

THERESA P.,

Appellant

v.

PRINCE GEORGE'S COUNTY BOARD  
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 11-30

OPINION

INTRODUCTION

In this appeal, Appellant challenges the local board's decision concerning her daughter's grades, home and hospital services, and §504 plan. The local board has filed a Motion for Summary Affirmance, or in the Alternative, to Dismiss. Appellant has opposed the motion, and the local board has responded.

FACTUAL BACKGROUND

Appellant's daughter attends Oxon Hill High School. The student suffers from allergies and asthma which has resulted in her frequent absences from school. The student's absences began to increase significantly in her 10<sup>th</sup> grade year when she missed a total of 37 days of school. (Appeal Attach., SchoolMax (TM) Attendance Totals). Indeed, the condition has had a serious impact on the student. As reported by her allergist, the student has "exacerbations of her asthma and allergies that can be debilitating to the point that she is unable to perform activities of daily living, much less attend school and complete her required school work" with episodes lasting "anywhere from a few days to one to two weeks." (Akin Letter, 9/23/10). Due to the student's increased absences, she began to have difficulties completing her coursework. As early as March 2009, the Appellant expressed her concern about not receiving all of her daughter's assignments. (Appellant E-Mail, 3/23/09).

In the 10<sup>th</sup> grade year, during the spring of 2009, Appellant requested that the local Superintendent change certain grades that her daughter had received for that year. She apparently also discussed her daughter's health conditions. By letter dated May 11, 2009, legal counsel for Prince George's County Public Schools (PGCPS) advised the Appellant that school system staff had reviewed the matter and determined that the student's 2<sup>nd</sup> quarter Chemistry grade would be changed from a "D" to a "C" but that no other grades would be changed. (Motion, Ex. 2).

Legal counsel also advised the Appellant that if her daughter had an ongoing medical problem causing her to be frequently absent from school, Appellant should submit medical documentation to the school so that PGCPS could provide appropriate educational services. He further advised that, based on the daughter's current condition, she would not be eligible for a §504 plan. (*Id.*).

Thereafter, at some point during the remainder of May 2009, it appears that the Appellant requested that the school evaluate her daughter for a §504 plan based on her medical condition. In May, the §504 Team found that Appellant's daughter was ineligible for §504 services based on the documentation before it. (Motion, Ex. 8). Appellant appealed that eligibility determination. (Motion, Ex. 5).

In June 2009, Appellant requested that the school provide her daughter with compensatory home and hospital teaching services based on an alleged delay in receiving those services, and requested that the school again evaluate her daughter for a §504 plan based on her medical condition.<sup>1</sup> With regard to the home and hospital teaching issue, on June 30, 2009, the Director of Student Services, Dr. Diane E. Powell, advised the Appellant that no compensatory or make-up services were warranted because home and hospital teaching services were provided promptly after the school system received verification of need for those services.<sup>2</sup> (Motion, Ex. 5).

On July 20, 2009, the Central 504 Appeal Review Committee reversed the §504 eligibility determination based on additional medical information provided. (Local Bd. Reply, Affidavit Attach. 3, Frasier Letter, 7/21/09). A §504 plan was ultimately approved during the week of August 17, 2009 for implementation at the start of the 11<sup>th</sup> grade school year on August 24, 2009 (11<sup>th</sup> grade). (*Id.*).

The §504 plan provided that Appellant would notify the school of her daughter's absences in writing; that teachers would provide tutoring when available either before or after school; that teachers would provide assignments 2 weeks in advance and that the assignments would be modified as needed; that the student would be provided extra time to complete make-up work as needed; that the student would have access to home and hospital instruction as needed; and that the student would have access to the school nurse as needed. (Motion, Ex. 7). When the student's absences increased in the fall of 2009, the school counselor established a process by which teachers would submit the work to the counselor for pick up by the Appellant. (Motion, Ex. 8).

During the 11<sup>th</sup> grade year, the Appellant notified the school often about the accommodations her daughter was receiving. For example, in January 2010, Appellant requested modification of her daughter's work because she was unable to complete all assignments within the established time frames. (Motion, Ex. 8). It appears from the record that some teachers

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<sup>1</sup>On June 1, 2009, Appellant also requested that the Superintendent reconsider the grade decision. (Motion, Ex. 4). On September 15, 2009, the Superintendent denied Appellant's reconsideration request. (Motion, Exs. 3 & 4).

<sup>2</sup>Although it is not clear from the record, we presume the home and hospital instruction referenced here was instruction that was provided to the student at some point during the 2008-2009 school year.

modified the student's assignments. Appellant met with school system staff on February 26, 2010 to discuss attendance and academic issues. (Local Bd's. Reply, Affidavit Attach. 3, Hite Letter, 5/10/11, Cadet Letter, 3/5/10). At this meeting, the Appellant requested that the school system provide a highly qualified home and hospital teachers to assist her daughter with her AP classes - AP English Language and World History Honors. The school system advised her that these services were not available for the high level classes due to a lack of available teachers in the subject matter. The school system states, however, that it offered the student the option to take online courses for these subjects, but Appellant declined that option. (*Id.*). There is some dispute about that fact.

Toward the end of 11<sup>th</sup> grade, there is some indication that the school system knew that the §504 plan was not working. In an e-mail dated May 8, 2010, William Barnes, Director of the High School Consortium, noted his support of the Appellant's "request referencing [her] daughter's 504 plan and lack of implementation of [the] plan." (Appeal, Attach., Barnes E-mail). A June 5, 2010 e-mail from A. Duane Arbogast, Chief Academic Officer, explained to staff that the purpose was to help the student achieve the goal of learning, not just completing make-up assignments. He stated that final grades could be given in mid-June if the work was of the caliber expected, or grades could be changed upon receipt of work in September 2010. (Appeal, Attach., Arbogast E-mail). The school counselor provided the Appellant a modified assignment list via e-mail in June 2010.<sup>3</sup> A September 30, 2010 deadline was established for submission of all assignments from the student's 11<sup>th</sup> grade school year. (*Id.*).

At the beginning of her 12<sup>th</sup> grade year, the §504 Team reviewed the student's §504 plan. The plan contained the same accommodations as the previous year. (Motion, Ex. 7). The school system states that the §504 Team offered home and hospital instruction and a half day schedule, but the Appellant declined these options. The record does not reflect her reasons. (Motion, Ex. 8). The student was placed in English 12 in lieu of AP Literature to help reduce the workload. (Local Bd. Reply, Affidavit Attach. 2). Although the school system states that the Appellant was reminded of the September 30 deadline for 11<sup>th</sup> grade assignments, the student failed to submit all assignments by that time. (Motion, Ex. 8).

On October 20, 2010, Appellant met with the principal of Oxon Hill to review the assignments to be completed and the deadlines for submission. He provided a revised assignment plan and gave the student an extension until December 1, 2010 to submit completed assignments for the 11<sup>th</sup> grade school year. In a letter dated October 21, 2010, the principal states that he also offered the Appellant the option of having her daughter participate in online classes, take a half day schedule, and receive home and hospital instruction. He states that the Appellant refused these alternatives, but there is some dispute about that. (Motion, Ex. 9). He further stated that the student's §504 plan would be revised to provide specifics regarding modification

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<sup>3</sup>Appellant claims she was unaware of the modified list.

of work and time allowed to complete assignments, and that an administrator would help ensure that the student was receiving assignments in accordance with the plan. He referred the Appellant to the Chief of Academic Affairs to address her concerns over grades from the 10<sup>th</sup> grade year. (*Id.*).

On November 10, 2010, Appellant had another §504 plan review meeting with teachers and administrators to address Appellant's concerns about her daughter's assignments. (Motion, Ex. 8). At this time, the §504 Team stated that it reminded Appellant of the December 1 deadline for 11<sup>th</sup> grade assignments. (*Id.*). The Appellant's daughter did not submit her work by the deadline and thereby failed to earn credits for World History and AP Language. Consequently, the school system downgraded her from Senior status to Junior status pending the completion of assignments from the previous school year. (*Id.*). The principal extended the deadline to January 21, 2011 to allow the student to submit her 11<sup>th</sup> grade assignments for World History and AP Language. (Local Bd. Reply, Affidavit Attach. 3, Cadet Letter, 12/6/10).

Appellant's daughter was also behind in submitting her assignments from the 1<sup>st</sup> quarter of her 12<sup>th</sup> grade year. The principal gave the student until January 12, 2011 to submit that work. On January 12, 2011, the principal sent Appellant a certified letter advising her of an extension of the January 12 deadline to January 21, 2011. He also provided extended deadlines in advance for the remainder of the school year in order to facilitate the possibility that the student would be able to graduate at the end of the school year. (Motion, Ex. 10). Those deadlines were: 2<sup>nd</sup> quarter work due February 25, 2011 (2<sup>nd</sup> quarter ends January 21); 3<sup>rd</sup> quarter work due May 3, 2011 (3<sup>rd</sup> quarter ends March 31); and 4<sup>th</sup> quarter work due June 1, 2011 (graduation June 9). (*Id.*).

The school system says it reminded Appellant of the January 21 deadline for the submission of 1<sup>st</sup> quarter grades, but Appellant says that she never received the letter. She states that she did not know of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> quarter deadlines that are mentioned in the January 12 letter until February 16, 2011. (Appeal Attach., Appellant's Handwritten Note).

Thereafter, Appellant requested a meeting to discuss her daughter's 1<sup>st</sup> quarter grades. She met with her daughter's school counselor, teachers, an administrator and the principal on January 20, 2011. Appellant disputed the grade given by the Information Systems I teacher, claiming that the assignments were never provided to her through the guidance department as she believed they were supposed to be. The teacher claimed that she and the Appellant had agreed that Appellant would instead go directly into the SchoolMAX system to get the assignments that her daughter needed to complete rather than go through the Guidance Department. After a lengthy meeting with the Appellant, the principal exempted from the student's grade any assignments that were not turned in by the teacher to the Guidance Department. (*Id.*).

The student failed to turn in any 1<sup>st</sup> quarter work by the January 21, 2011 deadline. (Local Bd. Reply, Affidavit Attach. 2, Hawkins Letter, 5/10/11). She did turn in some assignments for World History and AP Language from her 11<sup>th</sup> grade year. The teachers from the previous year reviewed the assignments and reassessed the student's grades. She received a D in both subjects. The student was then upgraded to a Senior status. (*Id.*).

By letter dated January 31, 2011, the Superintendent responded to complaints from the Appellant regarding implementation of the §504 plan and her daughter's grades. The Superintendent reiterated his determination that the student's grades from the 2008-2009 school year would remain unchanged, except for the Chemistry grade that was changed from a "D" to a "C". (Motion, Ex, 11). He also noted that the school had established and implemented a §504 plan for the student and had given repeated extensions of time for the completion of make-up work. He enclosed a copy of the principal's January 12, 2011 letter setting forth the deadlines for submission of assignments leading up to graduation, reminding the Appellant that the assignments must be completed and returned. Additionally, he found that the administration and staff at Oxon Hill had appropriately responded to the Appellant's concerns. (*Id.*).

The Superintendent ended his letter stating:

In the event you desire review by the Board on issues of grade changes for your daughter, you will be required to request an appeal directly to the Board specifying the basis for the appeal and relief sought. Please note that under §4-205(c)(3) of the Maryland Annotated Code, Education Article, "a decision by a county superintendent may be appealed to the county board if taken in writing within thirty days after the decision of the county superintendent." Thus, I trust that you will avail yourself of any appeal remedies that may be available to you.

(Motion, Ex. 11).

The Appellant appealed the Superintendent's decision to the local board. Meanwhile, Appellant also expressed her frustration to school system staff regarding the computation of deadlines and the impact on those deadlines of her inability to communicate with certain teachers with questions about assignments and of her daughter not receiving necessary tools to complete the assignments. (Appellant E-mail, 2/18/11).

By letter dated February 14, 2011, counsel for the local board advised Appellant that her appeal was denied. The local board stated as follows:

[T]he board determined that proper procedures have been followed to address your daughter's need for support in completing her assignments. You have been provided with adequate opportunity to participate in your daughter's educational program and have it reviewed on a continuous cycle. The requirements of Administrative Procedure 5146, "Procedural Guidelines for Students with Disabilities under Section 504 of the Rehabilitation Act of 1973" have been followed. Oxon Hill High School had provided your daughter with accommodations by giving her extra time to complete the work mandated to progress to a higher grade level. You were offered other forms of assistance for your daughter, which you have rejected.

The local board explained that the Appellant could appeal their decision to the State Board pursuant to Ed. Art. §4-205. Thereafter, the Appellant filed her appeal. Appellant's letter of appeal states as follows:

I am appealing my daughter's 10<sup>th</sup> grade transcript (particular subjects). Some of her 11<sup>th</sup> grade (grades). The lack of home school. The lack of implementation of the 504 Plan. I want to appeal the deadline dates that were given for the 11<sup>th</sup> grade work. The 504 is not being implemented in the 12<sup>th</sup> grade."

Appellant also alleges in her appeal to this Board that her "daughter is being harassed by some teachers," presumably at Oxon Hill High School. She submitted hundreds of documents in support of the appeal.

Meanwhile, after filing the appeal to the State Board, on March 23, 2011, the Appellant met with school staff, school administrators, and the Assistant Superintendent to discuss concerns regarding her daughter. The group determined that the student's schedule would be reduced from eight to four classes, the minimum necessary for graduation. She would complete assignments for English 12, Geology, International Cuisine, and Yearbook, which were the classes for which the teachers had already provided assignments for the remainder of the school year. The student would receive a passing grade in her other classes - Dance 2B; Information Systems; Social Issues; and Introduction to Law and Student Aide. Appellant disagreed with the school system's decision to reduce her daughter's courses because she felt her daughter was being penalized for the school's failure to properly implement the §504 plan. (Appellant's E-mail, 4/18/11).

The Principal granted a final extension of time, until May 10, 2011, for the student to turn in all missing assignments. (Local Bd. Reply, Affidavit Attach. 2, Goldson Letter w/Attachs., 4/6/11).

Appellant also met with the §504 Coordinator in April 2011. Because the student had only submitted a few 1<sup>st</sup> quarter assignments for English 12, a plan was established to provide the student with home and hospital instruction to assist with English 12 assignments through May 10.<sup>1</sup> Despite the arrangements, Appellant's daughter was unable to maintain the scheduled appointments with the home and hospital instructor due to the student's illness and hospitalization. (Local Bd. Reply, Affidavit Attach. 2, Timeline Doc.).

On May 10, 2011, Appellant advised the school that her daughter would be unable to turn in all of the assignments because she had been hospitalized. In response, the Deputy Superintendent offered Appellant the opportunity to turn in whatever assignments her daughter had completed at that time, expecting that some of the assignments would have been completed since the student had them for some time. No further assignments were submitted. The Superintendent sent the Appellant a letter chronicling everything the school system had done with regard to the student's case and explained that there would be no further extensions or modifications to her daughter's case.

On May 25, 2010, after considering the full record in this case, this Board issued an Order that reversed and remanded the case to the local board. The Order said:

After considering the full record in this case which, in our view, contains a flawed §504 Plan and a lack of timely accommodations to the student, on this 25<sup>th</sup> day of May, 2011, this Board reverses and remands this case to the local board with instructions to work with the Maryland State Department of Education (MSDE) to determine whether this student qualifies to graduate in this school year. The Superintendent or his designee will make the final determination on graduation for this school year. If he/she determines that the student is not qualified to graduate, the Superintendent or his designee shall work with MSDE to fashion a framework for this student to demonstrate that she qualifies for graduation in a reasonable time period.

MSBE Order No. OR11-07.

We stated that we would issue an opinion on a later date to support the Order.

On June 8, 2011, Dr. William Hite, the local Superintendent, issued a decision finding that the student needed an English 12 credit to graduate. Therefore, he denied the Appellant's request that her daughter participate in the June 9, 2011 graduation ceremony. Dr. Hite offered

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<sup>1</sup> The §504 Coordinator stated in an email that he offered to have the student take the English 12 course online, but Appellant declined because her daughter would have to take the course online from the beginning and Appellant felt her daughter was too sick to take the online course. (Appeal, Hamlin E-mail, 4/14/11).

to waive the fee for summer school to allow the student to complete English 12 and graduate. The Appellant sought an instant appeal to the local board of the Superintendent's decision. The local board declined to review the decision.

On June 6, 2011, the Appellant filed for a Temporary Restraining Order (TRO) and Request for Permanent Injunction in the Circuit Court for Prince George's County. A hearing was held on June 8, 2011 at which the Court denied the Appellant's request for an injunction and a TRO.

On June 7, 2011, the Appellant requested this Board to conduct an expedited review of Dr. Hite's decision. We did so and ruled by Order of June 8, 2010 to uphold Dr. Hite's decision.

What follows here is the Opinion to support the Order this Board issued on May 25, 2011.

### STANDARD OF REVIEW

The general standard of review in a State Board appeal is that local board decisions involving a local policy or a controversy and dispute regarding the rules and regulations of the local board must be considered prima facie correct and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A.

### ANALYSIS

In May, when this Board reviewed the facts and circumstances of this case, we found that the student generally had good grades, that she had passed all of the HSAs, and that she needed very few credits to graduate. Indeed, as Dr. Hite has determined, the student needed just the English 12 credit to complete all her requirements for graduation. We considered how far behind she was in completing her assignments. In fact, it looked like the student would never be able to complete the work that was on her plate. We recognized that, for the most part, this was a case about the appropriateness of the accommodations the school system provided to the student pursuant to §504 of the Rehabilitation Act. We decided that a decision was necessary to break the arbitrary cycle of extensions of time that the §504 accommodations engendered and the backlog of work that resulted.

#### *Is §4-205 of the Education Article a Proper Review Channel for §504 Cases?*

Section 504 of the Rehabilitation Act is a federal civil rights law that protects the rights of individuals with disabilities in programs and activities that receive federal financial assistance. 29 U.S.C. §794(a). In the educational context, §504 prohibits public schools from discriminating against students with disabilities<sup>4</sup> by denying them the benefits offered by public school

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<sup>4</sup>A person who has a mental or physical impairment that substantially limits one or more major



programs. Under §504, public schools must provide each qualified person with a disability a free appropriate public education (FAPE) through the provision of regular or special education and related aids and services. 34 C.F.R. §104.33. To this end, public schools offer qualifying disabled students modifications or adjustments of educational programs, frequently referred to as accommodations in a §504 plan, in order to afford students with disabilities equal opportunity to access public education.

Federal law requires a school system to establish a system of procedural safeguards for parents and guardians.<sup>5</sup> They must include notice, an opportunity to examine relevant records, an impartial hearing with an opportunity for participation by the person's parents or guardians and representation by counsel. The regulations call for a "review procedure". 34 CFR §104.36.

The regulations do not define the "review procedure" requirements. In general, there are two types of review procedures - - administrative review or direct judicial review.

PGCPS has established "Appeal/Complaint Procedures" for §504 cases. Under those procedures, a parent has four avenues of recourse. One option is that the parent may request an "impartial hearing" to review the identification, evaluation, or educational placement of the student. Although the PGCPS policy does not identify who conducts such hearings, we presume it would be an independent hearing examiner. The policy does not explain the appeal/review process thereafter. (Administrative Procedure 5146 -XII.A).

Second, the parent may request that a PGCPS §504 Review Panel resolve any complaint regarding the evaluation, identification, disciplinary action, or placement of the student. (Administrative Procedure 5146 - XII.B). In this option, a Regional §504 Review Panel makes the initial determination regarding the claim. The decision of the Regional §504 Review Panel is appealable to the Central §504 Review Panel. Under local board policy, that decision is considered final and not subject to further review by PGCPS or the local board. (*Id*). We assume it would be appealed directly to the courts.

Third, a parent may file a complaint/grievance with the PGCPS §504 Coordinator. The coordinator will forward the complaint to the Regional Review Panel for resolution. (Administrative Procedure 5146 - XII.C). The policy does not explain the appeal/review process thereafter.

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life activities is considered an individual with a disability. 34 C.F.R. 104.3(j)(1).

<sup>5</sup>To comply with this regulation, a school system can, but need not, adopt the procedural safeguards required under IDEA. 34 C.F.R. 104.36.

Finally, at any time a parent may file a complaint with the Office of Civil Rights. (*Id.*)

This appeal came to us as an appeal of a local board decision pursuant to §4-205 of the Education Article. The local board's decision derived from an appeal of the local superintendent's January 31, 2011 decision upholding, among other things, the school system's implementation of Appellant's daughter's §504 Plan. As a matter of State education policy, we believe that §4-205 can be an appropriate administrative review channel for §504 cases. We encourage local school systems to be clear in their policies and procedures about the proper review process for their §504 cases, however, as there is no State law that specifically requires these cases to proceed through §4-205 review. As stated previously, §504 cases may proceed directly from the local school system process to judicial review. Here, the PGCPS policy did not specify that §504 cases would be reviewed through the §4-205 process, yet the local superintendent and local board used that process in rendering decisions on the Appellant's §504 issues. Therefore, because the case has progressed through that process, it is appropriate for the State Board to consider the matter on appeal.

### *Section 504 General Principles*

#### Child Find and §504 Eligibility

Section 504 has a child find requirement that requires school districts annually to identify and locate every qualified disabled student residing in the jurisdiction. 34 C.F.R. §104.32. PGCPS's §504 procedure recognizes the school system's child find obligation in Administrative Procedure 5146 -IV. That provision states:

The Prince George's County public schools system is obligated to locate and identify every qualified disabled student residing in the County, to take appropriate steps to notify such persons and their parents/guardians of the school system's duty to do so, and to provide a free appropriate public education to each such student regardless of the nature of the severity of the disability. . . .

In order to identify a student as having a disability entitled to §504 protections, school systems conduct eligibility evaluations. To this end, the PGCPS procedure provides that students suspected of having a disability under §504 shall be referred to a §504 Team for an evaluation to determine whether the student is disabled under §504. (AP 5146-XII.A & E). Those who can refer a student for an eligibility evaluation are school staff, parents, guardians, or surrogate parents, physicians, or appropriate agency representatives. (5146-IV.A). Although the §504 federal regulation does not specify the time period within which the initial eligibility evaluation

must take place after identification, it must be completed within a reasonable time frame. *See Sachem (NY) Cent. Sch. Dist.*, EHLR 352:462 (OCR 1987). In PGCPs, the §504 Team is required to conduct the eligibility evaluation within 60 days after the request for evaluation has been made to the school.

A student's poor school attendance related to a medical condition can trigger the school system's obligation to conduct an evaluation to determine the child's eligibility. OCR has held that a school system's failure to initiate the evaluation in a timely manner is a violation of §504. *See Grafton (ND) Public School*, 20 IDELR 82 (OCR 1993)(school system should have evaluated based on student's extensive absences over a five year period and information making it aware that student might have medical problems); *Deer Valley (AZ) School District*, 20 IDELR 196 (OCR 1993)(school system had reason to believe student might be disabled given numerous absences over two year period and information from parents).

In the case at hand, the student's attendance record for the 2008-2009 school year (10<sup>th</sup> grade) shows that the student attended school for a total of 143 of 180 days, was absent for 37 days, and was tardy 35 days. (Appeal Attach., SchoolMAX (TM) Attendance Totals). There is no record evidence explaining all of the reasons for those absences and late arrivals but we suspect that most were due to illness and that some school staff were aware of this. Indeed, as early as November 3, 2008, the student's Basic Design teacher at Oxon Hill knew the absences were a result of her medical issues and believed the student required a §504 Plan due to the effect the absences were having on the student's ability to complete work. The teacher conveyed her view of this need by letter to the student's allergy specialist. (Appeal Attach., Richo Letter). We do not know whether the teacher conveyed her views to anyone in the school system.

The local school system should have been aware of the student's poor attendance pattern long before the end of her 10<sup>th</sup> grade year. As best we can tell, however, based on the May 11, 2009 letter from PGCPs legal counsel to the Appellant, it was not until sometime in the spring of 2009 that the school system recognized that the student had ongoing medical issues preventing school attendance and possibly impeding the completion of school work. Although the letter advised the Appellant that her daughter's current condition did not satisfy eligibility for a §504 Plan, it is not clear from the record whether a §504 Review Team had evaluated eligibility for the student at this point, as required by PGCPs Administrative Procedure for eligibility determination. Rather, it appears that the school system did not initiate the §504 evaluation process until the Appellant later requested it after receiving the May 11 letter.

As a result of the evaluation, the §504 Review Team determined sometime in May 2009, that the student was not eligible for services under §504 based on documentation before the Team. Again, it is unclear from the record in this case exactly what documentation the Team reviewed. What is clear is that the Appellant appealed that determination to the Central §504

Review Panel. Her daughter was found eligible on July 20, 2009 based on additional documentation presented to the Central 504 Review Appeal Panel.

One of the problems in this case is the lack of clear guidance from the school system to the parent of a child in need of §504 services as to processes and procedures. The evaluation and eligibility process was not clearly explained or delineated and, as we point out later in this opinion, the implementation process was fractured and oversight was intermittent and after-the-fact.

#### Provision of FAPE

Under §504, a school system is required to provide a FAPE that is designed to meet the educational needs of the student in order to give that student the same access to educational programs as non-disabled students. 34 C.F.R. 104.33; PGCPs AP 5146-V. Therefore, the necessary accommodations will depend on the nature of the student's disability. Once accommodations are established, the school system is responsible for funding them and carrying them out. *See Letter to Zirkel*, 16 EHLR 1177 (OCR 1990). The determination of or denial of services cannot be based on cost or staff availability. *See Modoc County (CA) Office of Educ.*, 24 IDELR 580 (OCR 1996).

In the case before us, the school system listed various accommodations on the student's §504 plan. One accommodation was tutoring. It was listed on the Plan as follows: "When available, teachers will provide before and/or after school tutoring." The record shows that tutoring was not consistently available because staff was not available. The accommodation should have been based on what was needed to provide the student FAPE, not staff availability. Appellant's daughter either needed tutoring to access the educational program or she did not.

The same reasoning holds true for the home and hospital instruction. The §504 Plan stated that the student "will have access to Home and Hospital Instruction after or in anticipation of 3-5 consecutive days of absence". Yet, when the Appellant requested home and hospital instruction for her daughter's advanced classes, PGCPs advised her that there were no home and hospital teachers available for those subjects. As stated above, the issue in providing FAPE is to address the needs of the student to access the educational program, not the availability of school system staff. If no school system teachers were available, the school system should have attempted to contract for the services elsewhere. *See also* COMAR 13A.03.05.03C (As a means of delivering home and hospital teaching a school system may provide instructional services directly to a student, contract with private providers to deliver instructional services, contract with other school systems to provide instructional services, or combine any of these delivery options.).

Many of the Appellant's complaints revolved around assignments made and whether they conformed to the §504 plan. It is abundantly clear from the record that the student failed to complete most of her assignments in grade 12. Here is an assignment total for class assignments from the student's Senior year:

Class	Quarter	Class Assignments	Assignments Modified for Student	Completed Assignments
English 12	1 <sup>st</sup>	29	13	7
	2 <sup>nd</sup>	33	12	0
	3 <sup>rd</sup>	38	9	0
	4 <sup>th</sup>	22	8	0
Yearbook	1 <sup>st</sup>	7	1	1
	2 <sup>nd</sup>	23	10	0
	3 <sup>rd</sup>	19	5	0
	4 <sup>th</sup>	9	8	0
Class	Quarter	Class Assignments	Assignments Modified for Student	Completed Assignments
Geology	1 <sup>st</sup>	26	23	23
	2 <sup>nd</sup>	25	22	10
	3 <sup>rd</sup>	26	16 total for 3rd	1
	4 <sup>th</sup>	12	and 4 <sup>th</sup> quarter combined	0
International Cuisine	1 <sup>st</sup>	23	10	8
	2 <sup>nd</sup>	16	13	6
	3 <sup>rd</sup>	19	10	5
	4 <sup>th</sup>	11	15	5

(Local Bd. Reply, Affidavit Attach.2).

The schools system's response to the assignment issue throughout the years was to give the student more time to submit the work. But the student failed to meet extended deadlines. This resulted in a situation in which the student was almost a year behind in completing some assignments. While the extension of deadlines may have been a proper accommodation initially, it is our view that at some point during the student's 11<sup>th</sup> or 12<sup>th</sup> grade years school staff or a §504 Team member should have recognized that simply extending the deadlines was not effective and a different approach was necessary. *See Arlington (TX) ISD*, 31 IDELR 87 (OCR 1999) (Disabled student's teacher extended deadlines, accepted late assignments, and gave special instructions, but failed to use all of the accommodations required in the accommodation plan. Student received a final grade of 68. OCR found a violation of §504).

While on the surface it looks like the school system made valiant efforts to provide accommodations to this student, the whole of those efforts should be greater than the sum of its

parts. In this case, the efforts did not add up to appropriate accommodations. Without question, the unpredictable and frequent absences caused by the student's chronic illness, challenged the school system's ability to fashion appropriate accommodations. The task required a combination of skills, chief among which were: empathy, patience, creativity, flexibility and nimbleness. On the plus side, the system was working with a capable and motivated student, an involved parent/advocate and medical experts who articulated the nature and limitations of the student's illness. There were also available a number of supportive teachers and administrators who encouraged and lent extraordinary aid to the student. However, not everyone on the school's team followed the plan. On paper, the §504 plan reflected a coordinated strategy for ensuring the student received access to an education and the support needed to succeed. In practice, individual classroom teachers, some of whom found the plan burdensome and questioned its legitimacy, were give discretion to interpret and implement the plan, without adequate compliance oversight. In our opinion, many of the documented conflicts between parent and school, and the resulting weariness on all sides, can be directly attributed to a lack of consistent implementation across classrooms and lack of accountability for compliance failures.

Based on our review of the record, and for the reasons stated above, we have concluded that the requirement of §504 that the school system provide FAPE was not met. In particular, we have concluded that two years of extended deadlines, among other things, did not necessarily provide an appropriate accommodation for this student. The local board's decision that the requirements of §504 were met is not supported by the facts in the record.

Our decision here does not mandate that this student be allowed to graduate without completing English 12. Diligence and perseverance is required now from all persons involved in this case, including the Appellant and the student, so that the student can complete that credit requirement. We paraphrase the words of the Chief Academic Officer - - everyone's purpose should be to help the student achieve the goal of learning. And as that academic understood, not every classroom assignment is critical for learning. Making accommodations for students who are chronically ill requires identifying those assignments that can be a measure to demonstrate learning and mastery.

#### *Grade Change Request*

In this appeal, the Appellant also requests changes to grades on her daughter's 10<sup>th</sup> and 11<sup>th</sup> grade transcript. We are unable to review this claim because the Appellant has failed to identify with any specificity the particular grades at issue.

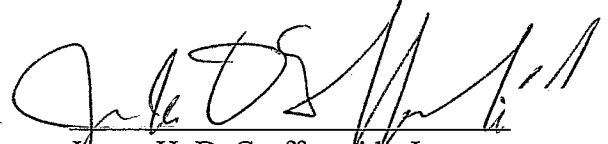
#### *Harassment*

Appellant has also alleged that her daughter was being harassed by some of her teachers. This issue was not a matter before the local board and was not considered as part of the February 14, 2011 decision. Accordingly, the matter is not ripe for review by the State Board.

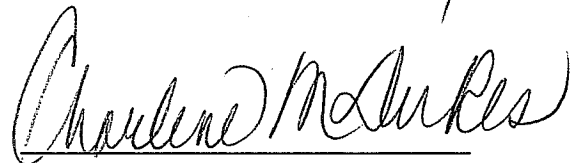
CONCLUSION

For all these reasons, we reverse and remand the decision of the local board on the §504 claim. We find that facts do not support the local board's decision that the requirements of §504 were followed. A decision not supported by the facts is an arbitrary decision.

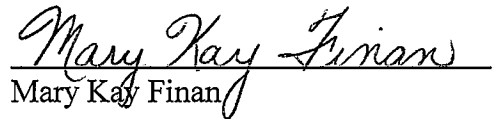
We dismiss the Appellant's request for a grade change and allegations of harassment.



James H. DeGraffenreid, Jr.  
President



Charlene M. Dukes  
Vice President



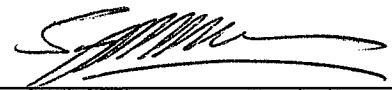
Mary Kay Finan



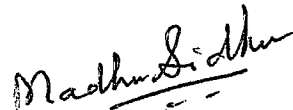
S. James Gates, Jr.



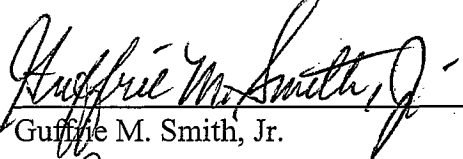
Luisa Montero-Diaz





Sayed M. Naved



Madhu Sidhu

  
Guffie M. Smith, Jr.

  
Donna Hill Staton

  
Ivan C.A. Walks

ABSTAINED  
Kate Walsh

June 21, 2011