

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

.....
Student T.G. Doe (II)

v.

Chariho Regional High School
.....

DECISION

HELD: We find that this student is eligible to have a 504 plan. The school district is requested and required to convene a meeting to develop an appropriate plan. The academic supports we have previously ordered are to be maintained until a new 504 plan is developed and any further appeals are completed unless we order otherwise.

DATE: July 15, 2009

Travel of the Case and Jurisdiction

From third grade the student in this case had a 504 plan. In November of 2007 his school district decided that he was no longer eligible for a 504 plan. This denial of eligibility was appealed to the Commissioner of Education. We ordered that the student's 504 accommodations were to stay in effect until we ruled in this matter. On April 7, 2008 we reversed the decision of the school district on procedural grounds. We instructed the school district to conduct a new 504 eligibility meeting. The school district again found the student not to be eligible for a 504 plan.

Once again the parents appealed to the Commissioner. In a decision issued on December 18, 2008 we ruled that this student's "present 504 plan is to remain in effect as an item of good teaching practice" rather than as a 504 plan.¹ Given this ruling, the question of whether or not the student's disability (Tourette's syndrome) rose, in his particular case, to the level where this disability "substantially limited" him in "a major life activity" became moot. There was, therefore, no need to determine whether or not this student was eligible for a 504 plan. In our prior decision we explicitly refrained from ruling on whether or not certain amendments to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 705), which were made in 2008 but which would come into effect in 2009, might have a bearing on this student's future eligibility for a 504 plan.²

In 2009 the petitioning parents requested the school district, once again, for a 504 plan for their child. The school district denied this request on the grounds that this student regularly attains high grades in his course work and that he often performs at an advanced academic level, especial in mathematics and foreigner languages. Since this student is succeeding in his academic program the school district contends that the student's Tourette's syndrome does not "substantially limit" the student in the major "life activity of "learning" and that as a result of this, the student is not eligible for a 504 plan.

From this decision of the school district the parents have appealed to the Commissioner of Education. Jurisdiction is present under R.I.G.L. 16-39-1, R.I.G.L. 16-39-2 and R.I.G.L 42-87-5 (c).

¹ Rhode Island's *Basic Education Program* at *Generic Standard C* requires: "That the school district's curriculum and instructional procedures shall...be designed to meet the varying needs of all children..."

The *Basic Education Program* is grounded on R.I.G.L. 16-7-23 which states in pertinent part that: "The board of regents for elementary and secondary education shall adopt regulations for determining the basic education program and the maintenance of local appropriations to support the basic education program."

² These amendments were contained in an Act entitled "ADA Amendments of 2008" (S.3406) At S.3406—Sec. 7 these amendments were made applicable to Section 504.

Positions of the Parties

The School District's Position

The school district contends that since this student is attaining high grades it is obvious that the student's Tourette's syndrome does not "substantially limit" him in the "major life activity of "learning." Since, in the school district's view, the student's disability does not "substantially limit" him in the "major life activity of "learning." It contends that the student is not eligible for a 504 plan.

The Parents' Position

The parents contend that the student's Tourette's syndrome causes their child to lose concentration and focus, especially when he tries to control the "tics" that are associated with Tourette's, and that this loss of concentration and focus causes him to miss instructions from his teacher and further that this loss of concentration and focus makes it difficult for him to get organized to carry out academic tasks. The student's difficulty in "attending" and organizing, in the parents view, if not compensated for, will put his academic progress at serious risk.

Findings of Fact

1. The parties agree that this student has Tourette's syndrome. A recent "Neuro developmental Assessment" of the student at Memorial Hospital of Rhode Island renewed this medical finding and included in its recommendations that: "Due to the impact of [the student's] tics, as well as associated difficulties, on his academic functioning, we strongly support the continued provision of academic accommodations provided under Section 504 of the Rehabilitation Act of 1973."³
2. An "Auditory Processing Evaluation" conducted by HealthCare of Rhode Island, Inc. concluded that: "Today's evaluation [of the student] suggests the presence of an Auditory Processing Disorder which would be characterized by the following behaviors: difficulty hearing in background noise, difficulty understanding distorted speech with reduced acoustic redundancy, which can occur in listening environments where excessive reverberations or echoing of sound is apparent or with speakers who talk rapidly or have an accent, problems coordinating auditory information to be decoded."⁴
3. The record before us shows that this student has difficulties with concentration that cause him to fail to turn in assignments, fully complete assignments, realize that the teacher has assigned homework, prepare homework, bring home, or take to school, the right books, and in general be prepared for the school day. His difficulty in hearing and processing speech means that he needs to be seated where noise is minimized and he needs to receive instructions from the teacher in a very understandable format.

³ Exhibit 9.

⁴ Exhibit 10

Conclusions of Law

1. The question of whether or not a petitioner has a disability for 504 purposes and whether or not this disability substantially limits a petitioner in a major life activity is a mixed question of fact and law which is to be decided by the trier of fact. *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141 (1st Cir. 1998)
2. The line of United States Supreme Court decisions interpreting the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 in a way that “narrowed the broad scope of protection intended to be afforded by the ADA” have now been undercut by the “ADA Amendments Act of 2008.” (S.3406). These amendments to ADA also apply to the Section 504 of Rehabilitation Act of 1973. (S.3406 at Sec. 7)
3. In particular Congress has rejected the Supreme Court holding in *Toyota Motor Manufacturing, Kentucky, Inc. V. Williams*, 534 U.S. 184 (2002) “that the terms ‘substantially’ and ‘major’ need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” ADA Amendments Act of 2008.
4. The ADA Amendments Act of 2008 is intended, *inter alia*, “to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis....” ADA Amendments Act of 2008.
5. Under the ADA Amendments Act of 2008: “Major Life Activities” are defined to include, *but are not limited to*, caring for oneself, performing manual tasks, seeing, *hearing*, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, *learning*, reading, *concentrating*, *thinking*, communicating, and working.” (Emphasis added).
6. Under the ADA Amendments Act of 2008: “The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”
7. Under the ADA Amendments Act of 2008: “An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”

Discussion

We will follow the mandate of the ADA Amendments Act of 2008, “that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” This student has Tourette’s syndrome. Whether or not Tourette’s syndrome produces the student’s disabilities in the areas of hearing, concentrating, and thinking documented in the record before us or whether these disabilities exist for this student as independent conditions is of no great moment. It is clear from the record that at a minimum that this student has a disability in concentrating and that this difficulty in concentrating causes him to fail to follow instructions, keep track of assignments, and organize his school work and school day.

The fact that this student is getting good grades does not disable him from being eligible for a 504 plan. The record shows that this student’s difficulties with concentration cause him to fail to turn in assignments, fully complete assignments, realize that the teacher has assigned homework, prepare homework, bring home or take to school the right books, and in general be prepared for the school day. His difficulty in hearing and processing speech means that he needs to be seated where noise is minimized and he needs to receive instructions from the teacher in a very understandable format. This means that assignments may often be best communicated to this student by writing them on the board. While he may be getting good grades, we find that these good grades would quickly slip away if appropriate academic supports were not to be kept in place to deal with this student’s disability in concentration.

Conclusion

We find that this student is eligible to have a 504 plan. The school district is requested and required to convene a meeting to develop an appropriate plan. The academic supports we have previously ordered are to be maintained until a new 504 plan is developed and any further appeals are completed unless we order otherwise.

Forrest L. Avila, Hearing Officer

APPROVED:

Deborah A. Gist, Commissioner

July 15, 2009
Date