02-0205182

THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	)	
	)	
Petitioner,	)	
	)	
v.	)	**Docket No.:**
	)	OSAH-DOE-SE-02-05182-56-MPW
FAYETTE COUNTY SCHOOL SYSTEM,	)	
	)	
Respondent.	)	
	)	

FINAL DECISION

Appearances: For Petitioner- Mark D. Oldenburg, Esq., Peachtree City, Georgia.
For Respondent, Fayette County School System- Christopher J. Ramig, Esq., Fayetteville, Georgia.

I. INTRODUCTION

This matter came before the Office of State Administrative Hearings ("OSAH") pursuant to a request for a due process hearing filed with the Georgia Department of Education ("DOE") by [redacted] ("Petitioner") pursuant to Section 504 of the Vocational Rehabilitation Act of 1973, as codified at 29 U.S.Code § 794 (hereafter referred to generally as "Section 504"). OSAH has jurisdiction to hear this matter pursuant to Article 2 of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act;" *Ga. Comp. R.. & Regs.* at Chapter 616-1-2 *et seq.* (OSAH Rules); and *Ga. Comp. R. & Regs.* at Chapter 160-4-7 *et seq.* (DOE Rules).

This case was heard on October 4, 2001 in Fayetteville, GA. The issue was whether or not the Respondent has violated Section 504 by not allowing the Petitioner to move from 8TH Grade Team B to Team A at [redacted] Middle School. The Petitioner argues that this action has effectively excluded her from participation in, or has denied the benefits of, a public education program that receives federal financial assistance, as her safety and academic performance have been compromised. The Respondent counters that the Petitioner has not been excluded from or denied benefit of any program it offers, and that the 504 Alternate Strategies Plan agreed upon by both the Petitioner's parents and the school system has been fully implemented.

For the reasons set forth in this Decision, I AFFIRM the Respondent's denial of a transfer from Team B to Team A as such action is not required under Section 504. However, I also recommend that immediate action be taken to provide the Petitioner with more effective measures to prevent any potentially unsafe situations, and to improve her academic benefits.

II. FINDINGS OF FACT

The following Findings of Fact are based on a preponderance of the credible evidence, which is the standard of proof under OSAH Published Rule 616-1-2-.21(4). All oral and documentary evidence produced at the hearing was considered by the Administrative Law Judge, although not all evidence is discussed herein.

1. [redacted] is a [redacted] year-old girl who was first diagnosed with Type I Diabetes in 1992. She learned how to monitor her own blood sugar by age 4, and has self-administered insulin since age 5. Presently, her blood sugar ranges from about 42 to over 300 every week. She was recently trained in the use of an insulin pump, which she uses quite successfully.

2. For the past three years, [redacted] has been a student at [redacted] Middle School in Fayette County. She is currently an 8th grader. Despite her disability, [redacted] is active as a basketball cheerleader and a recreational volleyball player. She also maintains a solid "A" average overall (Tr. 81-84, 107).

3. [redacted] is not presently served by the school system as a Special Education student. However, the school has addressed [redacted]'s disability under a Section 504 Alternate Strategies Plan ("504 Plan") first adopted in 1999 while she was in sixth grade (Petitioner's Exhibit 1). The 504 Plan states that [redacted]'s diabetes requires her to leave the classroom to monitor and adjust her blood sugar levels, and go to the bathroom. Occasionally, her disability causes her to miss school.

4. The school system has accommodated [redacted]'s missed classes under the 504 Plan by assigning a peer tutor and note-taker, usually called a "peer buddy." [redacted] chose 4 girls to act as her peer buddies in 7th grade. Each girl was a good friend who [redacted] trusted, and who could be relied on to

take notes and relay assignments if [redacted] had to miss class due to her diabetes (Tr.100-104).

5. The school system further accommodated her disability under the 504 Plan by allowing her to tape record lessons, to have extra time to complete work and exams, and to complete assignments at home. (None of these accommodations are at issue in this hearing). [redacted] has not used any of the accommodations in the 504 Plan to shirk her responsibilities or avoid classes (Tr. 57-58).

6. The 8th grade class at [redacted] is divided into three "teams" of approximately equal numbers of students. The teams are designated as "A," "B," and "C." Each team shares the same teachers and classrooms. Each team is allowed some latitude in how the curriculum is presented, and thus students can In this way, each team is almost akin to a separate school within a school (Tr. 185).

7. [redacted] has been assigned to Team B for 8th grade. The school began working on placement of students on one of the three teams during the spring of her 7th grade year. Among the factors weighed by the school in making its decision were the Team B teachers' flexibility and their ability to accommodate an individual student's needs. Team B teachers are also regarded as excellent educators (Tr. 184-187).

8. None of the four girls who served as [redacted]'s peer buddies in 7th grade are on 8th grade Team B. [redacted]'s parents questioned the school about her placement on Team B as early as July 11, 2001, and repeated their concerns just prior to the beginning of classes in August, 2001. Her parents were concerned that not having the same peer buddies would cause [redacted] to suffer undue stress (Tr. 60-62).

9. The school administration refused to change [redacted]'s placement to Team A. The rationale for this decision appears to be based on two primary concerns. First, one of the girls who served as a 7th grade peer buddy did not want to do the job again in the 8th grade. This student's parents were under the impression that a peer buddy was responsible for keeping watch on [redacted] to monitor her physical condition, in the event that she had either low or high blood sugar levels. Second, the decision to not place her in Team A was due partly to a concern about breaking-up a quasi-family

relationship that the school tried to foster in the individual teams (Tr. 163, 206).

10. [redacted]'s parents then requested a hearing on her behalf. They sought to compel the school system to place Brittany in Team A as an accommodation under Section 504. There is no issue under the Individuals with Disabilities Education Act (IDEA) raised in this appeal (Tr. 11).

11. The first general area of concern raised by [redacted] in this appeal is that her safety is compromised if she remains in Team B. In support of this position, she cited two specific safety concerns. First, she argued that Team B's classrooms are farther from the clinic and bathrooms than are Team A's. This could present a real safety issue in that she must frequently go to the bathroom, and as she is required under school policy to monitor her blood sugar levels and administer insulin at the clinic rather than in class. The classrooms assigned to students in Team B include Reading and Georgia History courses taught in trailers outside the main school building. Team A has only one class in a trailer, and that class is somewhat closer to the school clinic and the nearest bathrooms than is Team B's trailer. All other classes for both teams are held in the 8th grade "pod" in the main school building or in the gym, and there is no appreciable difference in the distance to either the clinic or bathroom for either team (Exhibits R-4, R-5).

12. The second specific safety issue is the location of the trailers used by Team B. These classrooms are near an open area used for a "Project Adventure" course.[1] [redacted] contends that if her blood sugar levels became too high or too low, she could become confused and disoriented and lose her bearings. Although this could certainly lead to a serious and potentially life-threatening situation, it appears that [redacted] had two classes taught in trailers in the 7th grade and there is no evidence that she was ever in danger (Exhibit R-3).

13. The second general area of concern is that [redacted]'s peer buddies in Team B have failed to adequately assist her. She testified that during the first two weeks of the 8th grade school year, she was told by teachers at the beginning of class that she had to choose a peer buddy by the end of class. She was not familiar with the children in her class, and did not consider any of them to be her friends. She followed her teachers' instructions and chose peer buddies for each class. She presently

has six peer buddies for the first grading period of the school year (Tr. 121-124).

14. [redacted]'s experience with her peer buddies' performance in 8th grade has been poor. Apparently, her new peer buddies do not take their responsibilities seriously. She testified that although she tells her peer buddy whenever she has to leave class, none has kept notes for her or let her know about missed assignments. Her parents have called the parents of at least one of her 8th grade peer buddies about this problem, but apparently the peer buddies still have not been helpful (Tr. 128-130).

15. The school system countered that [redacted] has not told her teachers or anyone else at the school that she is having any problems with her 8th grade peer buddies (the school counselor admitted that it would be unlikely that a 13 year-old student would approach her teacher with such a delicate problem). The school has several programs in place to help students build relationships with their peers, none of which has been utilized by [redacted] to this point (Tr. 156-157; 172-173).

16. The school also asserted that [redacted] has, in fact, had meaningful input into the selection of her peer buddies for 8th grade, as she selected the students herself. The school's position is that [redacted] does not have "veto power" over who is chosen as her peer buddy, but only input into the selection.

17. According to [redacted]'s principal, there would be no financial cost to the school if she was transferred to Team A. The school would simply make an administrative change. There might be a small logistical problem with her school work, as the teachers in Team B might cover subjects differently than teachers in Team A. Because [redacted] is a bright child and a hard worker, there is little doubt that she could easily make up any missed work if she transferred to Team A (Tr. 132-133, 198-199).

III. CONCLUSIONS OF LAW

1. The burdens of persuasion and going forward with the evidence in this case rest on the Petitioner. OSAH Published Rule 616-1-2-.07.

2. As stated in the Introduction, this appeal is brought under Section 504 of the Vocational Rehabilitation Act of 1973, which is codified at 29 U.S.Code § 794. That statute states in pertinent part as follows:

> (a)… No otherwise qualified individual with a disability in the United States….shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance….

A local school system is included as a covered "program or activity." 29 U.S.C. § 794(b)(2)(B).

3. To prevail against the school system, the Petitioner must show "that a school district has refused to provide reasonable accommodations for the handicapped [person] to receive the full benefits of the school program." *Marvin H. v Austin Ind. Sch. Dist.,* 714 F. 2d 1348, 1356 (5th Cir. 1983)(Emphasis in original). *Quoted* in *Pace v. Bougalousa City School Board,* 35 IDELR 124 (E.D.La, Aug.23, 2001). The question in this case is, therefore, whether or not the denial of the transfer from Team B to Team A constitutes a refusal to provide a reasonable accommodation for [redacted]s diabetes.

4. [redacted] does not argue that the terms of the 504 Plan fail to provide a reasonable accommodation. She instead argues that the Respondent has failed to act reasonably by not placing her in Team A, where she will presumably be safer and have access to her friends who she can trust and rely on to be peer buddies (the argument that one of the peer buddies does not want to serve in that capacity this year is not a reasonable justification for denying the transfer to Team A, as there are at least three other students who may be willing to be her peer buddy).

5. In regard to the safety concerns [redacted] has raised, it would stretch rationality to believe that she would be in danger simply because several of Team B's classes are held in trailers outside the main building and near open areas where she could get lost. [redacted] had several classes in trailers during her 7th grade year, with no evidence of any danger. Further, the difference in distance between classes and the clinic or bathroom by students in Team A and Team B is not significant. Thus, the

Petitioner has not proved that the Respondent refused to provide a reasonable accommodation to ensure [redacted]'s safety by placing her on Team B.

6. In regard to [redacted]'s concerns about her peer buddies, the 504 Plan only states that she is to have "input" into the selection process. The school has not denied her this right, although [redacted] and her parents may believe that her input was not meaningful since she did not know the students in Team B very well. Further, the fact that she had to pick her buddies within the first two weeks of school did not deny her the right to have input in the selection process. The school clearly had a justifiable educational interest in having her pick a peer buddy as early in the school year as possible.

7. Because the school did not act unreasonably when it initially assigned [redacted] to Team B or when it denied her request to transfer to Team A, the Administrative Law Judge must conclude that the school has not violated Section 504. However, there is a nagging question raised by this case. Why did the school system refuse to transfer [redacted] to Team A when was clear from the evidence that this action would cost no money and only a little amount of administrative labor, and would not seriously affect [redacted]'s education? This question is not answered directly in the hearing record. Perhaps the school system did not want this case to establish some kind of adverse precedent. Whatever its rationale, the Administrative Law Judge hopes that the school system will make an effort to assist [redacted] in reaching her potential, which certainly is a stated goal under both IDEA and the Vocational Rehabilitation Act of 1973.

8. Although this Decision does not find the Respondent in violation of Section 504, it is clear that steps can be easily taken to enhance the Petitioner's educational benefits and to further accommodate her disability. The Administrative Law Judge has five suggestions for the school system. First, it can allow [redacted] to transfer to Team A. Second, if the school system does not allow such a transfer, it can allow her to choose new peer buddies with whom she may feel more comfortable now that the school year is several months old. Third, her peer buddies should be trained in how to effectively help [redacted] with her courses without feeling they have to identify her low or high-blood sugar reactions. That is a job for trained medical personnel, not a fourth-grader.

Fourth, the Petitioner should be encouraged to use options other than peer buddies to keep up with her coursework. The 504 Plan allows her to tape-record classes, and she can learn to effectively use the "Homework Hotline." Fifth, the teachers in Team B should provide more assistance to Brittany than the hearing record shows they have. Team B teachers have a reputation for flexibility and accommodating student's needs, and it is possible they did not know the gravity of [redacted]'s diabetes, perhaps because she is not a "traditional" special education student operating under an IEP.

III. DECISION

It is the Decision of the Administrative Law Judge that the Respondent has not violated Section 504 of the Vocational Rehabilitation Services Act of 1973, either by initially placing [redacted] on Team B at Booth Middle School, or by denying her request to transfer to Team A.

Entered this 7th day of November, 2001.

M. Patrick Woodard, Jr.
Administrative Law Judge
Office of State Administrative Hearings

[1] "Project Adventure" is a relatively new program offered in many Georgia schools for special education and regular education students. It is often used as a method for including special education students in the main student body. This information has been gleaned by the court from other special education hearings.