This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: AC
Date of Birth: xx/xx/xxxx

Date of Hearing: Not Applicable

CLOSED HEARING

ODR No. 9965/08-09 KE

Parties to the Hearing:

Parents

Dr. Karen Jackson, Supervisor of Special Education
Bermudian Springs School District
7335 Carlisle Road
York Springs, PA 17372

Stephen Russell, Esq.
Stock & Leader
Susquehanna Commerce Center East
221 W. Philadelphia Street, 6th Floor
York, PA 17404

Date Record Closed: May 7, 2009

Date of Decision: May 7, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student's Parent has requested a due process hearing alleging discriminatory treatment of her non-disabled child (Student) on the basis of Student's having been "regarded as" disabled by the School District. This Decision is based upon the facts alleged in the April 2, 2009, due process complaint notice filed by Student's mother with the Office for Dispute Resolution (ODR). As described below, I agree with Student's parent that there is legal basis for such claim[1], but I conclude that a special education due process hearing is not the appropriate forum for such claim.

ISSUE

Whether or not Student's complaint states a claim upon which relief may be granted?

FINDINGS OF FACT

1. Student is a [high school student] who does not have an IEP, has not received special education services or been considered a child with a disability for over two years, and has been identified as a regular education student for the last 2 ½ years.
2. On February 25, 2009 Student and two friends were accused of [a disciplinary infraction].
3. All three students were questioned, the police became involved, and all three students were given 3-day out-of-school suspensions as well as 7-day in-school suspensions.

[1] Having a "legal" basis does not also mean that there is a "factual" basis for the claim. Not having conducted an evidentiary hearing, I have no idea whether Student actually was discriminated against on the basis of having been regarded as disabled. I simply agree with Parent that there is legal authority for filing such a claim -- in the appropriate forum.

4. In addition, the School District conducted a manifestation determination for Student alone, which was not required of Student's two friends.
5. The School District also required Student to undertake a risk assessment, which was not required of Student's two friends.
6. While waiting for the risk assessment, Student was excluded from regular education classes for almost one month and 8 days longer than the two friends.
7. The School District still believes Student is disabled.
8. On April 2, 2009, Student's parent filed a due process complaint notice with ODR. ODR automatically expedited Student's due process hearing complaint because it concerned a manifestation determination. A hearing was scheduled for May 9, 2009.
9. On April 23, 2009, the School District filed a Motion to Dismiss.
10. Also on April 23, 2009, I conducted a telephone conference call with Student's parent, the School District's lawyer, and the School District's Director of Special Education. During that conference call, I determined that this case does not require expedited treatment, and I rescheduled the May 9 hearing to June 1, 2009. I also gave the Parents time within which to file a response to the School District's motion to dismiss.
11. On April 28, Student's parent filed her response to the School District's motion to dismiss.

DISCUSSION AND CONCLUSIONS OF LAW

The School District argues that the Individuals with Disabilities Education Act (IDEA) applies only to a child with a disability, and that IDEA due process procedures

are not available to children without disabilities. The School District further argues that this is not a case in which a child who has not been determined to be eligible for special education and related services is entitled to assert the manifestation determination protections accorded under 34 CFR §300.534. The School District notes that, by Parent's own admission, Student is a regular education student and not a child with a disability.

Student's parent responds that Student's rights were violated and Student was subjected to unfair punishment through the School District's perception of Student as a child with a disability. In the complaint, Parent asserts that she does not want the School District's opinion (that Student is disabled) "to be the only opinion." During the April 23 conference call, Student's parent stated that the relief sought is an Order prohibiting the School District from future treatment of Student as a child with a disability, and an apology from the School District for having recently treated Student as a child with a disability.

IDEA

I agree with the School District that IDEA protections are limited to children with disabilities and to children who have not been determined to be eligible but who assert that the school district had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action. 20 U.S.C.A. §1415 (k)(5)(A); 34 CFR 300.534(a) In this case, IDEA protections do not apply because Student is not alleged to be a child with a disability, Parent does not assert that the School District had knowledge of Student's disability before the disciplinary incident, and the fact that Parents have refused classification and services under the IDEA bars them from invoking

20 U.S.C.A. §1415(k) as a basis for School District liability under the IDEA. 20 U.S.C.A. §1415(k)(5)(C)

Section 504

ODR also receives complaints filed under Section 504 of the Rehabilitation Act of 1973. 29 USC §794(a); 34 CFR Part 104; 22 Pa. Code §15.8(d) Importantly for this case, Section 504 defines an "individual with a disability" as including "any person who ... is **regarded as** having ... an impairment." 29 U.S.C.A. §705(20)(B)(iii) (emphasis added); 34 CFR §104.3(j)(2)(iv); M.G. v. Crisfield, 547 F. Supp. 2d 399, 49 IDELR 21720 (D.C.N.J. 2008), citing Marshall v. Sisters of Holy Family of Nazareth, 399 F.Supp. 2d 597, 603 (E.D. Pa. 2005) A Section 504 "regarded as" claim can be brought by any general educational student who, like Student, claims to have been discriminated against because of a perceived disability. M.G., supra.

In School Board of Nassau County v. Arline, 480 US 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987), the Supreme Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reactions of others may prove just as disabling. Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.

The U.S. Department of Education's Office for Civil Rights (OCR) explains the reasoning behind the "regarded as" language in this way.

> The reason for the inclusion of the second and third prongs of the definition is explained in the regulation at Section 104.3(j)(2)(iii) and (iv), and is further clarified in Appendix A at ¶ 3. Those two prongs of the definition are legal fictions. **They are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were.** For instance, a person with severe

> facial scarring may be denied a job because she is "regarded as" handicapped. A person with a history of mental illness may be denied admission to college because of that "record" of a handicap. The persons are not, in fact, handicapped, but have been treated by others as if they were. It is the negative action taken based on the perception or the record that entitles a person to protection against discrimination on the basis of the assumptions of others. (emphasis added)
>
> The use of these prongs of the definition of handicapped person arises most often in the area of employment, and sometimes in the area of postsecondary education. It is rare for these prongs to be used in elementary and secondary student cases. They ***cannot*** be the basis upon which the requirement for FAPE is triggered. Logically, since the student is not, in fact, mentally or physically handicapped, there can be no need for special education or related aids and services. (emphasis in original)

OCR Senior Staff Memorandum, 19 IDELR 894, 19 LRP 2210 (August 3, 1992)

Another example of a “regarded as” claim is where a child suffered from a heart defect in infancy, surgery corrected the problem with no subsequent relapses, but a football coach later prevented the child from trying out for the team simply because of the child's record of a heart ailment. That would constitute discrimination based on the child's record of a past disability. The child has a right to equal participation in extracurricular activities under Section 504, past disability or not. If the coach “regarded” the student as being disabled, then the student likewise is protected from discriminatory treatment on the basis of the coach's misperceptions.

Forum

Simply because Student has rights based upon Section 504’s “regarded as” definition, however, does not mean that a special education administrative due process hearing is the proper forum for enforcing those rights. Student’s Section 504 "regarded as" claim does not seek relief that is available through the special education administrative process, which involves classification and/or receipt of special services.

Because the discrimination at issue in this Section 504 "regarded as" claim has nothing to do with the School District's failure to provide special services or accommodations, it does not fall within the subject matter of an administrative special education due process hearing. Because Parents refuse disability classification, and do not seek any special education services under either the IDEA, or accommodations under Section 504, Parents cannot get the relief they seek through this special education due process administrative hearing. See M.G., supra. The proper forum for the relief sought by Parents may be through a local agency hearing, through OCR, or through federal court, but it is not through a special education due process hearing.

Accordingly, this matter will be dismissed for failure to state a claim upon which relief may be granted in this forum.

CONCLUSION

Student alleges illegal discrimination the basis of having been "regarded as" a child with a disability by the School District. I agree with the School District's argument that, as a regular education student who does not seek the special education services and protections afforded to children with disabilities, Student does not have a right to a due process hearing under IDEA. I agree with Student, however, that Section 504 protects regular education students from discrimination on the basis of having been "regarded as" a child with a disability by the School District. Finally, I conclude that a special education due process hearing is not the proper forum for Student's regular education "regarded as" complaint. Parents must go elsewhere to enforce Student's "regarded as" claim. Thus, I will dismiss Student's complaint for failure to state a claim upon which relief may be granted in this forum.

ORDER

- Student's complaint fails to state a claim upon which relief may be granted in this forum.
- Student's complaint is DISMISSED.

Daniel J. Myers

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Daniel J. Myers
HEARING OFFICER

May 7, 2009