

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

Child's Name:

N. R.

Date of Birth:

[redacted]

CLOSED HEARING

ODR Case Number 19725-1718AS

Dates of Hearing:

December 14, 2017 – January 25, 2018 – February 5, 2018 –
February 23, 2018

Parent:

[redacted]

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School District:

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Counsel for the School District

Date of Decision:

March 20, 2018

Hearing Officer:

Michael J. McElligott, Esquire

INTRODUCTION

Student (“student”)¹ is a pre-teen aged student who resides in the Penn Hills School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² as a student with a specific reading disability in mathematics problem-solving. While not formally identified with a health impairment, the student exhibited significant problematic behaviors in the school environment.

Parent claims that the student was denied a free appropriate public education (“FAPE”) for the 2015-2016 and a portion of the 2016-2017 school years primarily related to allegations of deficiencies in programming for the student’s behavioral needs in the school environment. Parent seeks compensatory education as a remedy “commensurate with the extent of” the alleged denial-of-FAPE.³

The District counters that it responded to the student’s needs in the educational environment and at all times provided FAPE to the student. As such, the District argues that the parent is not entitled to a compensatory education remedy.

¹ The generic use of “student”, rather than a name or gender-specific pronouns, is employed to protect the confidentiality of the student.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

³ Notes of Testimony (“NT”) at 28, 383-384. Parent seeks compensatory education for the District’s alleged acts/omissions in the denial of FAPE related to the student’s behavior through November 2016.

For the reasons set forth below, I find in favor of the parent in part and the District in part.

ISSUES

Did the District meet its obligations to provide FAPE to the student over the 2015-2016 and 2016-2017 school years (through November 2016)?

If this question is answered in the negative, is the student entitled to compensatory education?

FINDINGS OF FACT⁴

1. The student came to the District in the 2014-2015 school year, the student's 2nd grade year. (Joint Exhibit ["J"]-2; NT at 318).
2. In May 2015, in the spring of the student's 2nd grade year and based on a request of the parent, the District requested and received permission to evaluate the student. (J-1).
3. In early September 2015, at the beginning of the student's 3rd grade year, the District issued its evaluation report ("ER"). (J-2).

⁴ Here, at the outset of a factual consideration of the record, it must be noted that at the first hearing session on December 14th, the District's director of special education, who attended all of the hearing sessions, evidently voiced a handful of intermittent comments or vocalizations which reached the ear of the court reporter and came into the record (*see generally* NT at 44-330). At that session, neither the hearing officer, nor counsel, nor any attendee, heard the comments/vocalizations as those matters were not pointed out or addressed on the record at that time. Upon review of the transcript prior to the second session on January 25th, however, it was apparent that those comments/vocalizations were in the record. The matter was addressed and instructions given at that point and there were no further comments/vocalizations in the hearing or on the record thereafter. (NT at 461-464).

4. The September 2015 ER indicated, through parent input, that the student had difficulty with peers. During the observation conducted as part of the evaluation, the student was observed to be off-task and did not comply with teacher directives. The student's teacher also reported that the student sometimes exhibited anger in the classroom and disrupted class. (J-2).
5. Formal cognitive and achievement assessment in the September 2015 ER indicated a significant discrepancy between the student's cognitive ability and achievement in the area of math problem-solving. (J-2).
6. Formal behavioral assessment by the student's 2nd grade teacher as reported in the September 2015 ER indicated clinically significant ratings in hyperactivity, aggression, conduct problems, and adaptability. (J-2).
7. The September 2015 ER reported six behavioral infractions in 1st grade, and twenty-two behavioral infractions in 2nd grade. (J-2).
8. The September 2015 ER identified the student as a student with a specific learning disability in mathematics problem-solving. Although the student was not formally identified with a health impairment or emotional disturbance, the evaluator noted that the student's disruptive, defiant, and angry behaviors were problematic in the school environment. (J-2).⁵
9. After the issuance of the September 2015 ER, the District conducted a functional behavior assessment ("FBA") and devised a positive behavior support plan ("PBSP"). (J-3, J-7).
10. The September 2015 FBA identified the student's behaviors of concern as inappropriate interactions with teachers (defiance, ignoring, talking back) and off-task/disruptive behaviors (playing with objects, talking out of turn). (J-3).
11. The September 2015 PBSP recommended certain modifications and programming in the student's individualized education program ("IEP") to address the student's school-based behaviors, including a behavior chart, daily and weekly rewards, and tiered interventions for continued problematic behavior. (J-7).

⁵ Shortly after the issuance of the September 2015 ER, and contemporaneously with the meeting of the student's individualized education program team, the student was diagnosed with attention deficit hyperactivity disorder.

12. In late September 2015, the student's IEP team met to devise the student's IEP. (J-5).
13. The September 2015 IEP indicated that the student exhibited behaviors in the school environment which impeded the student's learning and/or the learning of others. (J-5).
14. The September 2015 IEP contained two math problem-solving goals. (J-5).
15. The September 2015 IEP contained modifications to address the student's behavior, including a behavior chart, preferential seating, the support of a classroom paraprofessional, and the reward system outlined in the September 2015 PBSP. (J-5).
16. The student spent nearly the entire day in a regular education setting except for small group re-teaching and testing in mathematics approximately 30 minutes per day. (J-5).
17. In late September 2015, the parent approved the implementation of the September 2015 IEP. (J-6).
18. In September 2015, prior to the implementation of the September 2015 IEP, the student was involved in three disciplinary infractions. (J-20).
19. Shortly after the implementation of the September 2015 IEP, due to concerns with the student's behavior in leaving the classroom or refusing to enter the classroom, the student's IEP was revised to allow the student to go to a "safe zone"—a designated work space outside of the classroom—where the student would complete academic work for a 5-10 minute period, depending on need. Thereafter, the student would return to the classroom. (J-8).
20. In the first half of October 2015, the student was involved in a bus incident, a verbal altercation with another student in the cafeteria, and an act of defiance with the teacher/leaving the classroom. (J-20).
21. In mid-October 2015, the student's IEP team met to consider revisions to the student's IEP, including whether school-based therapy might become part of the student's programming (a consideration which the student's mother took under advisement) and making the school counselor available to the student when the student experienced feelings of anger. (J-9).

22. The student began school-based counseling but was later withdrawn from the counseling by the parent. (NT at 234-235, 266-267, 269-271).
23. Over the latter half of October 2015, the student was involved in an episode of classroom defiance/acting-out, a bus incident (including aggression toward a teacher), and an instance of inappropriate classroom behavior. For the classroom defiance/acting-out incident, the student was suspended from school for one day. (J-20).
24. In early November 2015, the student's classroom placement was changed to a co-taught classroom, with both a regular education teacher and a special education teacher, to provide more academic and behavioral support. (J-10).
25. In November 2015, the student was involved in two instances of classroom defiance/taunting other students, and an incident where the student left the classroom. The second of the disruptive instances and the incident where the student left class resulted each in suspensions from school for two days. (J-20).
26. In December 2015, the student was involved in three disciplinary episodes, two for classroom defiance/disruption and one for failure to report to class. The incident involving failure to report to class resulted in a one-day suspension from school. (J-20).
27. In December 2015, the student was medically diagnosed with oppositional defiance disorder. (J-15, J-25).
28. In January 2016, the student was involved in one incident of classroom defiance/disruption. (J-20).
29. In early February 2016, the student slammed a classroom door very hard, resulting in damage to the door frame. (J-20).
30. In late February 2016, the student's IEP was revised to add additional modifications for academic and behavioral support, focused on the student's transition from one activity, or setting, to another. (J-12).
31. In the latter half of March 2016, the student was involved in two incidents of defiance/classroom disruption, one of which involved a physical altercation with another student. (J-20).

32. In April 2016, the student was involved in two incidents involving defiance/classroom disruption and another incident where the student [was in a physical altercation with a peer]. The physical altercation resulted in a one-day suspension from school. (J-20).
33. In May 2016, the student was involved in two incidents involving defiance/classroom disruption and another incident where the student [was in a physical altercation with a peer]. The physical altercation resulted in a one-day suspension from school. (J-20).
34. In early June 2016, the student was involved in [verbal aggression toward] a classmate. (J-20).
35. In early June 2016, the student's IEP was revised. (J-13, J-26).
36. The June 2016 IEP included the student's academic performance over the 2015-2016 school year. (J-26).
37. The teacher's input in the June 2016 IEP indicated that the student made progress over the course of the 2015-2016 school year in controlling anger and outbursts, reduced the amount of instances where the student left an area without permission, and improved the use of appropriate language in school. The input noted, however, the student's continued problematic behaviors and consistent need for interventions and programming. (J-26).⁶
38. The student's mathematics goals were revised in the June 2016 IEP. (J-26).
39. In June 2016, the District revised the student's PBSP. (Parent's Exhibit ["P"]-8).
40. Over the course of the 2015-2016 school year, the student made progress on one of the math goals in the September 2015 IEP. On the other goal, the student's progress is inconclusive. (J-25).⁷

⁶ The 3rd grade teacher for this school year was no longer an employee of the District, and neither party sought a subpoena for her testimony. The teacher did not testify.

⁷ Progress monitoring for the September 2015 IEP goals included only data from November 2015 and January 2016. This data showed significant progress on one goal and little progress on the second goal. The record, however, is largely

41. Many of the disciplinary incidents over the course of the 2015-2016 school year involved teachers calling school security to have the student removed from the classroom. (J-20).
42. In August 2016, as the student began 4th grade, the student's IEP team met to revise the student's IEP. Instead of using a behavior chart, the IEP team agreed that data on the student's behavior would be monitored using the classroom teacher's behavior program. (J-14).
43. In late September 2016, the student was involved in a physical altercation with another student on the bus, resulting in physical injury to the other student. The student was suspended from school for three days. (J-20).
44. As a result of the bus incident, the student's IEP team met to revise the student's IEP to assign the student seating on the bus to/from school. (J-15).
45. After returning from the three-day suspension in late September 2016, the student was involved in a fight with another student [redacted]. The student was suspended for two days. (J-20).
46. In early November 2016, the student was involved in an incident of hallway defiance and aggression with school staff. There were no more behavioral incidents through the end of November 2016. (J-20).
47. In mid-November 2016, the student's IEP was revised to include use of an aide for the student in the resource room setting and at recess, as well as at school dismissal. The IEP team agreed that in-depth behavioral data should be gathered, including instances of verbal or physical aggression with peers or adults and refusing directives from adults. The IEP also indicated that the student was beginning to receive private counseling services. (J-17).
48. Through October 2016, the student was making progress on both mathematics goals in the June 2016 IEP. The student's grade

devoid of evidence as to academics, as the crux of the dispute—and the focus of the evidentiary record—was the student's behavior. The student's quarterly mathematics grades over the course of 3rd grade were 78%, 68%, 71%, and 83%, for a final grade of 74%. (J-21; School District Exhibit ["S"]-8).

in mathematics through the first quarter of 4th grade was 69%. (J-23, S-8).⁸

49. Beginning in the 2017-2018 school year, the student withdrew from the District and enrolled in a public charter school. (NT at 318).

WITNESS CREDIBILITY

All witnesses testified credibly, and no one witness's testimony was accorded materially more or less weight than any other witness.

DISCUSSION AND CONCLUSIONS OF LAW

Denial of FAPE

To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982).

'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her needs (Endrew F. ex rel. Joseph F. v. Douglas County School District, U.S. , S. Ct. , 197 L. Ed. 2d 335, (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir.

⁸ The denial-of-FAPE evidentiary record was developed over the period beyond November 2016. Given the position voiced by the student's mother in her testimony at the hearing, events beyond November 2016 are not made part of fact-finding here. (NT at 383-384).

1999)), not simply *de minimis* or minimal education progress. (Andrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).⁹

Here, the District provided FAPE to the student through its programming to address the student's behavioral needs through March 2016. The District timely and comprehensively evaluated the student, including identifying the student's need for programming for behavioral support. The initial September 2015 IEP recognized the student's needs for behavioral support and included a PBSP based on a FBA. There is no doubt that the student presented consistent behavioral challenges in the educational environment throughout the period on this record. But from the outset of special education programming, the District addressed the student's needs and throughout the fall of 2015 and winter of 2015/2016, the District continued to revise the student's IEP to modify its programming. And the student progressed academically, both in general and on at least one of the mathematics IEP goals.

The nature of the student's problematic behaviors dramatically changed with the behavior incident of mid-March 2016 when the student [engaged in a physical altercation with] a fellow student. To that point, while the student had, at times, difficult peer relations which might involve [verbal aggression] and/or verbal altercations, starting with the March 2016 incident, almost every disciplinary incident involved physical aggression, or a physical altercation,

⁹ While in some parts of the United States the U.S. Supreme Court decision in Andrew F. presented a new and higher standard to gauge the appropriateness of special education programming, the standard laid out in Andrew F. has been, largely, the longstanding standard enunciated by the Third Circuit Court of Appeals and has been the applicable standard to judge the appropriateness of special education programming in Pennsylvania.

with peers—mostly—or with adults. (See Findings of Fact 31, 32, 33, 43, 45, 46). Until the student’s IEP team addressed these issues of aggression/physical altercations in November 2016 (through data-gathering with a view to revising the student’s IEP), the District did not reconvene the IEP team or revise the student’s IEP, as it had consistently done throughout the school year—with revisions in September, October, November, and February. This lack of intervention or revision at the very moment when the student’s behavior took a decidedly more problematic turn amounted to a denial of FAPE at the end of 3rd grade and the beginning of 4th grade. Therefore, compensatory education will be awarded.

The District’s position, as is often the case, centers on the fact that the student made academic progress over the entire period of this record. This is clearly supported by the record. While the evidence as to progress is sparse, and was not made a focus of the hearing, it is clear that the District addressed the student’s needs in mathematics and that the academic support/special education allowed the student to make progress in the curriculum and on IEP goals. But academic and IEP-goal progress cannot provide cover when significant behavioral needs are not being addressed and, indeed, result in regular physical aggression and altercations in the school environment, as evidenced on this record over the end of the student’s 3rd grade year and the beginning of the 4th grade year. Accordingly, compensatory education will be awarded.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The award of compensatory education accrues from a point where a school district knows, or should have known, that a student was being denied FAPE, accounting for a reasonable rectification period to remedy the proven denial-of-FAPE. (Ridgewood; M.C.).

In this case, the student was involved in an incident of physical aggression in mid-March 2016 [redacted]. On this record, at that point, the District could not have known that this was the first incident in what would become a pattern of behavior with peers. Approximately one month later, however, in mid-April 2016, the student was involved in a second incident [of physical aggression]. At this point, the District knew or should have known that the student was starting to engage in aggressive behavior toward peers which ended in physical altercations. And, as pointed out in the findings of fact, similar behavior occurred in May 2016, and the following school year twice in September 2016 and once (with an adult) in November 2016. As of mid-April 2016, the District should have convened the student's IEP team—as it had done consistently in the earlier part of the school year—to consider the data-gathering, programming and/or revisions that might be undertaken in

light of the aggression/altercations the student was then engaging in. By the end of April 2016, then, the student's IEP team should have had in place programming in response to the student's aggressive behaviors. This programming was not in place until mid-November 2016, in the fall of 4th grade.

Having found that as of mid-April 2016 the District knew or should have known that the student's in-school behaviors had changed significantly, and did not address those needs until mid-November 2016, a precise calculation of compensatory education in light of the District's denial-of-FAPE is difficult. Parent's claim for compensatory education is couched generally as a request 'commensurate with the denial of FAPE'. Yet there is no evidence on this record as to what or how the student was denied FAPE as an explicit basis for either a qualitative or quantitative calculation of compensatory education. And while the District's failure to address the student's significant behavioral needs over the period April – November 2016 cannot find cover in the student's academic and IEP-goal progress, that is indeed the clear foundation of this record—the student made marked academic and IEP-goal progress throughout 3rd grade and the first quarter of 4th grade.

Compensatory education, however, is always an equitable remedy. Therefore, as a matter of equity, the student will be awarded 100 hours of compensatory education.

As for the nature of the compensatory education award, the parent may decide in her sole discretion how the hours should be spent so long as those

hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District denied the student a free appropriate public education for the educational period April 2016 through November 2016. The student is awarded 100 hours of compensatory education.

Any claim not specifically addressed in this decision and order is denied.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

March 20, 2018