

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: L. T.

Date of Birth: [Redacted]

Dates of Hearing:

May 21, 2013
August 5, 2013
August 8, 2013
August 13, 2013
September 9, 2013

CLOSED HEARING

ODR Case #13518-1213AS

Parties to the Hearing:

Parent[s]

Bentworth School District
150 Bearcat Drive
Bentleyville, PA 15314

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Jonathan Steele, Esquire
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October 14, 2013

October 29, 2013

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an elementary school age student residing in the Bentworth School District (“District”). The parties do not dispute the fact that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)¹ for emotional disturbance and other health impairment.

Parents assert the student was denied a free appropriate public education (“FAPE”) under the terms of IDEA due to the District’s alleged failures to evaluate and identify the student’s needs and in failing to propose individualized education programs (“IEPs”) to be delivered in the least restrictive environment (“LRE”). Additionally, parents claim that the District has violated its obligations to the student under Section 504 of the Rehabilitation Act of 1973 (“Section 504”).²

As a result of these claims, parents claim that compensatory education should be awarded for a period from February 13, 2011 through the end of the 2011-2012 school year when the student disenrolled from the District.

The District counters that, at all times, it met its obligations under the IDEA and Section 504, and provided the student with FAPE.

¹ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 wherein Pennsylvania education regulations explicitly adopt most provisions of 34 C.F.R. §§300.1-300.818.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61.

For the reasons set forth below, I find in favor of the parents on the denial of FAPE issue and in favor of the District as to allegations that the student was discriminated-against in violation of Section 504.

ISSUES

Was the student provided with FAPE
from February 13, 2011
through the end of the 2010-2011 school year?

Was the student provided with FAPE
for the 2011-2012 school year?

Did the District discriminate against the student
based on the student's disability?

If the answer to any
of the foregoing question(s) is/are in the affirmative,
what remedy is available to the student?

FINDINGS OF FACT

1. The student began attending District schools in kindergarten, the 2008-2009 school year.
2. By December 2009, in the midst of the student's 1st grade year, the student was referred to the District's student assistance team for continuing difficulties with distraction and focus, jabbing self with pencil, singing/talking to self, falling out of the seat, and sitting awkwardly in the seat. These behaviors interfered with the student's ability to learn and distracted other students. (School District Exhibit ["S"]-1).
3. In January 2010, the student was referred for special education services. (S-2).
4. Reports from parents and teachers indicate that the student exhibited problematic behaviors in school and at home. The student's music teacher reported that the student had difficulty with attention and task and did not participate in class activities,

- “always moving around and off in (the student’s) own world”. The student’s 1st grade teacher rated 10 of 13 classroom behaviors as poor. The student’s mother reported aggression and tantrums, as well as other problematic behaviors in the home environment. (S-2).
5. In March 2010, the District issued an evaluation report (“ER”). The student’s cognitive/achievement testing revealed no learning disabilities, and this comported with teacher observations that the student’s abilities and achievement were not a concern when attention, focus, and task issues did not interfere with learning. (Joint Exhibit [“J”]-1).
 6. The March 2010 RR included a functional behavior interview with the student’s teacher. The report noted the teacher’s concern with “problems focusing, not starting work, not completing work, playing with objects during instructional time, walking in circles, falling out of...chair, and sliding on the floor looking for things”. Reported skill deficits related to behavior included deficits in participation skills, communication skills, organizational skills, self-regulation skills, motor skills, and study skills. (J-1).
 7. The March 2010 RR included results from the Behavior Assessment System for Children – 2nd Edition (“BASC”), administered to three teachers, the student’s parents, and the student. (J-1).
 8. On the BASC, of the three teachers, all rated the student with clinically significant scores in attention problems. All three rated the student with clinically significant or at-risk scores in atypicality and withdrawal. At least two of the three teachers rated the student with clinically significant scores in hyperactivity, aggression, and externalizing problems. The student’s classroom teacher, who spent the most time with the student, additionally rated the student with clinically significant scores in somatization, internalizing problems, and school problems. All three teachers rated the student as at-risk on every measure of adaptive skills (adaptability, social skills, leadership, study skills, and functional communication). (J-1).
 9. The student’s parents both rated the student with clinically significant scores in hyperactivity, conduct problems, attention problems, and activities of daily living. (J-1).
 10. The student’s self-report rated a clinically significant score in interpersonal relationships. (J-1).

11. The March 2010 RR included results from the Conners' Rating Scales for attention difficulties. The student was rated by three teachers and both parents with elevated or very elevated scores for attention deficit hyperactivity disorder – inattentive type (“ADHD”). (J-1).
12. The March 2010 RR included various occupational therapy (“OT”) assessments. The OT assessment recommended strategies to address deficits in visual perceptual skills, motor skills, and self-care skills. (J-1).
13. The March 2010 RR identified the student's weaknesses in attention and focus, and impulsivity, noting “(the student) appears to have significant difficult [sic] maintaining...attention and focus in class. (The student) also seems to be very impulsive and not always able to process what is going on before (the student) acts or speaks. (The student) seems to also have some oppositional behaviors that also affect (the student's) ability to complete work in the classroom.” (J-1).
14. The March 2010 RR found that the student had a disability but did not require specially designed instruction and, therefore, was not eligible for special education. (J-1; S-3).
15. In March 2010, following the evaluation process and RR, the District developed a Section 504 plan. The March 2010 Section 504 plan addressed only OT needs. The student's school behaviors were not addressed in the plan. (J-2).
16. The student completed 1st grade in the 2009-2010 school year. The student began 2nd grade in the 2010-2011 school year.
17. The student continued to exhibit problematic behaviors in the school environment. (Notes of Testimony [“NT”] at 608-614, 616-621, 808-814, 819-821).
18. In December 2010, the student underwent a private psychological evaluation. (Parents' Exhibit [“P”]-13).
19. The December 2010 private evaluation diagnosed the student with oppositional defiant disorder and anxiety disorder/not otherwise specified. (P-13).
20. In late January 2011, the student was suspended for [injuring] another student. (J-8).

21. In February 2011, the student was again referred for special education services. The student's 2nd grade teacher reported similar problematic behaviors as the teachers in 1st grade had reported, noting that the student "spends most...time engaged in inappropriate behavior" and "is very distracted during instructional time." All teachers reported that the student's behavior was interfering with the student's learning. (S-4).
22. In February 2011, as a result of the special education referral, the District sought permission to evaluate the student. The student's parents granted permission to evaluate. (S-5).
23. In late February and early March 2011, the student was involved in a series of disruptive classroom behaviors, including running/flopping to the floor/crawling, hitting other students, eloping and hiding in the bathroom, and non-compliance with teacher-directives and instructional requests. As a result, the student was suspended for two days. (J-8).
24. In March 2011, the annual review of the student's section 504 plan took place. The Section 504 plan was not updated to include any elements addressing the student's behavior. (J-3).
25. In early April 2011, the District issued its ER. The April 2011 ER revealed reports, observations, and scores broadly in line with similar data (including multiple clinically significant BASC ratings by multiple raters) gathered in the March 2010 ER. The results of the December 2010 private evaluation were shared with the District evaluator. (J-4).
26. The April 2011 ER identified the student as a student with an emotional disturbance in need of specially designed instruction. The ER also recommended that the student continue to receive OT. (J-4).
27. In late April 2011, the student tripped another student. (J-8).
28. In early May 2011, the student repeatedly disregarded teacher directives [redacted]. Eventually, the student complied [but assaulted another student]. The student was suspended for two days. (J-8).
29. In late May 2011, the District proposed an IEP. (J-7).

30. The May 2011 IEP included three OT goals. The IEP included seven goals to address behavior, including appropriate responses, following directions, and peer interaction. (J-7).
31. The May 2011 IEP included a positive behavior support plan. (J-7).
32. The District issued a notice of recommended educational placement ("NOREP"), recommending that the student's IEP be implemented in a full-time emotional support placement outside of the District. (J-6).
33. In mid-June 2011, the parents rejected the District's recommendation, explicitly indicating that the out-of-district placement was unacceptable to them. As a result of parents' rejection of the recommendation, however, they did not seek mediation or request a due process hearing. (J-6).
34. The student began 3rd grade in the 2011-2012 school year.
35. Because the parents had rejected the initial provision of special education services and no IEP was in place, the District continued to implement the Section 504 plan from March 2011. (J-3, J-6).
36. The student continued to exhibit problematic behaviors in the school environment. (NT at 462-473, 476, 493-494, 522-526, 533-535, 546-556).
37. In early October 2011, the student's Section 504 plan maintained OT services. The Section 504 plan was amended to include various approaches, adaptations and modifications to address the student's behaviors. The amendments also included a crisis response plan if the student engaged in hitting, screaming, or throwing objects. (J-11).
38. In mid-October 2011, the student was verbally aggressive to teachers and fellow students, pushed a student, and grabbed the arm of another student to cut in line. (J-18; P-7).
39. In November 2011, after parents' indications that they wished to discuss the Section 504 plan, the student's 504 team met and revised the student's Section 504 plan to include various elements geared to the student's problematic behaviors. Parents approved the Section 504 plan. (J-12).

40. In mid-December 2011, the student disrupted the classroom by kicking and moving desks, lying on the floor and slithering, and exclaiming nonsense sounds to interrupt instruction. (J-18; P-7).
41. In January 2012, the student was defiant and removed from class. (J-18; P-7).
42. In late February 2012, [student was suspended for making threats]. (J-18; P-7).
43. In February 2012, the student was again referred for special education services. The student was sent to the office “multiple times for infractions regarding...peer interactions, being disrespectful, and making [terrorist] threats...” One of the student’s teachers continued to report difficulties with focus, attention, and task-avoidance. Another reported the need for “constant redirection” and “anger and frustration issues”. Teachers continued to report that the student’s behavior impeded the student’s learning and that of others. (S-13).
44. In February 2012, as a result of the special education referral, the District sought permission to evaluate the student. The student’s parents granted permission to evaluate. (S-14).
45. In March 2012, the annual review of the student’s section 504 plan took place. The Section 504 plan contained OT services and the behavior revisions added in November 2011. Parents approved the Section 504 plan. (J-14).
46. Over the course of the spring 2012, the student began to have bowel movements in class. (J-18; NT at 270-273, 667).
47. In April 2012, the District issued a third ER. The results of the ER were largely consistent with the March 2010 and April 2011 ERs. The April 2012 ER concluded succinctly: “The behaviors and issues in the 2010 and 2011 evaluations and functional behavior assessments remain concerns.” (J-15).
48. The April 2012 ER continued to identify the student as a student with an emotional disturbance in need of specially designed instruction. Additionally, the ER added a secondary disability category of other health impairment. The ER also recommended that the student continue to receive OT. (J-15).

49. In late April 2012, the student was non-compliant, moved the desk to distract others, and threw an object at the teacher. (J-18; P-7)
50. In mid-May 2012, the student was disruptive in class and defiant when reprimanded for cutting in line. (J-18; P-7).
51. In late May 2012, the student was disruptive in class. When removed, the student shouted a vulgarity at other students. (J-18; P-7).
52. In late May 2012, the student was aggressive with fellow students and staff. The student was suspended for two days. (J-18; P-7).
53. In early June 2012, the student punched another student. The student was suspended for two days. (J-18; P-7).
54. In June 2012, the student's IEP team met. (J-16).
55. The May 2012 IEP included three OT goals. The IEP again included multiple goals to address behavior, including appropriate responses, following directions, and peer interaction. (J-16).
56. The District again recommended that the student's IEP be implemented in a full-time emotional support placement outside of the District. (J-17).
57. Parents never returned the NOREP. In August 2012, the student was dis-enrolled from the District and began to attend a private school. (J-21).

DISCUSSION AND CONCLUSIONS OF LAW

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” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)). Parents have made a number of claims related to deficiencies in the student’s educational programming. These claims will be segmented and taken up in turn.

Child-Find

Both federal and Pennsylvania law obligate school districts “to establish a system of screening...to”, *inter alia*, “identify students who may need special education services and programs.” (22 PA Code §14.122(3); *see also* 34 C.F.R. §300.111.) School districts are explicitly granted the authority to seek permission from parents to evaluate a student who the school district feels might qualify as a student with a disability. 34 C.F.R. §§300.300(a), 300.301(b). This duty is known as a school district’s child-find obligation.

Here, it is clear that in March 2010, the District failed to identify the student as a student with an emotional disturbance. Indeed, in the years that follow, subsequent evaluations directly mirror the results that first surfaced in March 2010. Across multiple school environments, and as identified in detail by the student’s teachers and parents, the student clearly exhibited behaviors in the school environment that support the finding that the District ultimately reached a year later: the student

qualifies as a child with a disability under IDEA as a student with an emotional disturbance.

Due to this failure of its child-find obligations, the student went without an IEP or specially designed instruction to address significant behaviors for the remainder of the 2009-2010 school year (1st grade) and, likewise, started the 2010-2011 school year (2nd grade) in the same way. Therefore, on February 13, 2011 and thereafter, the student was being denied a FAPE.

An award of compensatory education will be fashioned accordingly, although the award will account for subsequent events as outlined below.

IEPs

An essential element of whether an IEP is reasonably calculated to yield meaningful education benefit is that a student's program must be delivered in the LRE. Both federal and Pennsylvania law require that the placement of a student with a disability be in the LRE, considering the full range of supplementary aids and services that would allow a student to receive instruction and make progress in the LRE. (34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

In this case, the IEPs were not reasonably calculated to yield meaningful education benefit in the LRE. In the spring of 2011, the

District's position on the student went from one extreme of the services spectrum to the other: through February 2011, the student did not require an IEP or specially designed instruction and, then as of June 2011, the appropriate placement for the student was a full-time emotional support classroom located outside the District.

Clearly, the student presented difficult behaviors in the educational setting. But, on their faces, nothing in the proposed IEPs—whether the specially designed instruction, or the related services, or the IEP goals, or the positive behavior support plan—would prevent the IEPs from being implemented in a District placement. Whether the student can make progress on those IEP goals at a District placement is unknown; but especially for the initial provision of services, the LRE would be implementation of the student's IEPs in a District placement. Therefore, the student was denied FAPE when the District proposed that the student's IEPs be implemented in a full-time emotional support placement outside of the District.

An award of compensatory education will be fashioned accordingly, although the calculation of that award will account for subsequent events as outlined below.

Section 504

Claims for a denial of FAPE under the obligations set forth in Section 504 are construed under the same standard utilized in considering denial-of-FAPE claims under IDEA. (34 C.F.R. §104.33; 22 PA Code §15.1). Therefore, in accordance with the discussion above, the student has been denied a FAPE under Section 504. The compensatory education award outlined below, however, remedies the denial-of-FAPE under both statutory frameworks.

Requests for a finding of discrimination in violation of Section 504, however, require that a school district act with deliberate indifference toward a student on the basis of that student's disability. S.H. ex rel Durrell v. Lower Merion School District, F.3d , 2013 U.S. App. LEXIS 18458, *17 (Sept. 5, 2013); Chambers ex rel. Chambers v. School District of Philadelphia Board of Education, 587 F.3d 176, 189 (3d Cir. 2009); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995). Here, the record fully supports the conclusion that the District did not act intentionally or deliberately in failing to address the student's needs. Therefore, there will be no finding of discrimination in violation of Section 504.

Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEA, compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEA. (Lester H. v.

Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area School District v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). In this case, the District has denied the student a FAPE from April 2011 onward.

In Pennsylvania, an elementary school student must be provided with a minimum of five hours of education per school day. (22 PA Code Section 11.3). This figure will be used as the basis for calculating the compensatory education award. But the record supports the need for a significant adjustment in the calculation of the award.

First, the student will be awarded five hours of compensatory education for every school day from February 13, 2011 through the end of that school year (2010-2011). This reflects the fact that the District failed in its child-find obligation. And even though the District proposed an IEP, the chronology of the parties' attempts to hold an IEP meeting and the issuance of the NOREP reflecting the District's recommended placement did not take place until the end of/after the conclusion of the 2010-2011 school year.

Second, as of June 2011, the District had proposed an IEP, but it was recommending that the IEP be implemented in an overly restrictive placement. By indicating their rejection of the NOREP, however, parents placed the District in an untenable situation. For in rejecting the NOREP, but in not requesting an informal meeting, or mediation, or a due process hearing, the parents placed the District in a position where it could not legally implement the IEP or file a due process complaint to

defend its position. (22 PA Code §14.162(c))³. In weighing the equities between the parties, there are elements that weigh against each: The parents did not engage in any “next step” processes provided in the NOREP, either requesting a meeting with the District, or asking for an outside mediator to intervene, or requesting a due process hearing to have an outside decision-maker to intervene. The District, however, having proposed an overly restrictive placement, thereafter stood by it, without reconvening the IEP team or consulting with parents after they indicated that the out-of-district placement was explicitly what they disagreed with. Therefore, it is the considered opinion of this hearing officer that the equities entitle the parents to an award of compensatory education for the District’s acts and omissions, but that the award will be significantly reduced.

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as they 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 the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

³ A school district may not use special education due process for a decision on the initial provision of special education services. (emphasis added) 22 PA Code §14.162(c).

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

In sum, then, an award of compensatory education will be made for a denial of FAPE for the period from February 13, 2011 through the end of the 2010-2011 school year and the 2011-2012 school year. The equities between the parties, however, bear significantly on the calculation of that award.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, parents are entitled to an award of compensatory education as follows:

- five (5) hours for every school day from February 13, 2011 through the end of the 2010-2011 school year; and
- one (1) hour for every school day for the 2011-2012 school year.

The District did not discriminate against the student.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

October 29, 2013