

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: T.G.

Date of Birth: [redacted]

Dates of Hearing:

September 13, 2013

September 19, 2013

October 23, 2013

CLOSED HEARING

ODR Case #13950-1213KE

Parties to the Hearing:

Parents

Lakeland School District
1355 Lakeland Drive
Scott Township, PA 18433-9801

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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November 11, 2013

November 25, 2013

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (“student”) is a [teenaged] student residing in the Lakeland School District (“District”). The parties dispute the student’s eligibility as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)¹, specifically as a student with an emotional disturbance.

Parents assert that the District’s evaluation process was flawed and failed to identify the student as a student with an emotional disturbance. Consequently, parents argue, the District failed to provide special education and related services to the student. As a result of these alleged failures, the parents assert that the student was inappropriately disciplined and removed from the regular education environment without the procedural protections of IDEA.

Parents claim that these acts and omissions denied the student a free appropriate public education (“FAPE”) in violation of its obligations to the student under IDEA, as well as its obligations to the student under Section 504 of the Rehabilitation Act of 1973 (“Section 504”)². Parents seek compensatory education as remedy for these alleged failures.

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 (“Chapter 14”) wherein Pennsylvania education regulations explicitly adopt most provisions of 34 C.F.R. §§300.1-300.818.

² 34 C.F.R. §104.3(j). 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 (“Chapter 15”) wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61.

The District counters that its evaluation process was appropriate. It asserts that the conclusion of its evaluation report—that the student does not have a disability—is appropriate and that the student does not qualify under the terms of IDEA or Section 504 as, respectively, a “child with a disability”³ or a “handicapped person”⁴. Therefore, the District asserts, any disciplinary action it undertook was defensible in light of the student being in regular education, and parents are not entitled to remedy through special education due process.

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

ISSUES

Did the District err in concluding that the student does not have a disability?

If so, did the District deny the student FAPE, and is the student entitled to compensatory education?

FINDINGS OF FACT

1. The student has attended District schools since kindergarten.
(School District Exhibit [“S”]-15).
2. Beginning in the 2011-2012 school year, the student’s 7th grade year, with the transition from elementary school to the District’s junior/ high school, the student began to experience academic

³ 34 C.F.R. §300.8(a).

⁴ 34 C.F.R. §104.3(j).

- difficulty (low grades) and behavior issues. (S-15; Notes of Testimony ["NT"] at 115-117).
3. Over the course of September 2011 – January 2012, the student was disciplined for various incidents, including pushing another student, suspected bullying, disturbing the educational environment (classroom, cafeteria, library), inappropriate language, and inappropriate behavior. (S-5).
 4. In February 2012, the student was referred to the District's student assistance program ("SAP") due to concerns over the decline in academics and behavior. (Parents' Exhibit ["P"]-2; S-1).
 5. Teachers' comments in the SAP process yielded a complex portrait. The student was seen as talented and, at times, engaged in learning. Teachers reported that the student was not consistently disruptive, and was often polite and helpful. At other times, the student was disruptive and defiant, engaging in bullying behavior with peers and inappropriate interactions with teachers. One teacher's anecdotal comment, noting both positive and negative interactions with the student, summarizes the nature of the global teacher input into the SAP report: "The behavior goes from end to end of the spectrum, and I can't really predict what it will be like from day to day." (P-2; S-1).
 6. Ratings on the SAP data form for academic performance showed the most frequently rated problematic behaviors as lack of

- motivation, failure to complete homework, and poor test scores.
- SAP data for behavior concerns showed the most frequently rated problematic behaviors as disruptive in class, inappropriate responses, attention-seeking, and excessive talking. Student strengths were most frequently rated as cooperative, good communication skills, and class participation. (P-2; S-1).
7. The SAP data form reported that the student's parents have levied consequences for the student's in-school behavior. The report notes that "(the student) is not happy with...mom for making (the student) do work for class. (The student) shows indifference if mentioned about having to contact [sic] a parent about (the student's) behavior". (P-2; S-1).
 8. The February 2012 SAP referral noted that the student's peer group had changed in 7th grade and that drug/alcohol issues might be playing a role in the academic and behavioral changes. A drug/alcohol assessment by a county-based drug/alcohol program indicated the student did not meet diagnostic criteria for drug/alcohol treatment. (P-2; S-1, S-2).
 9. Over the course of the 2011-2012 school year, the student met eight times with the school counselor. (S-4).
 10. The SAP process resulted in a recommendation that the student participate in community-based counseling which would take place in school. (NT at 96-98, 276-278, 284).

11. Over the period February – May 2012, the student was involved in further disciplinary incidents, including disturbances in class, suspected bullying, harassment, disobedience, insubordination, defiance, misuse of technology. (S-5).
12. On May 16, 2012, as the result of communications with the parents, the District provided parents with a document so that parents could make a written request for a consent form to allow the District to conduct an evaluation of the student. The document is to be completed by a parent over parent's signature so that the District can "send me a (permission-to-evaluate form) as soon as possible so that I can provide written consent for the proposed evaluation to begin." (S-3; NT at 279).
13. On June 10, 2012, parent signed the document requesting a consent form which would give the District permission to evaluate ("PTE"). The document was not given to the District at that time. (S-3).
14. On July 9, 2012, the document was returned by parents to the District. That same day, with the written request for a PTE consent form in hand, the District requested PTE. (S-3, S-6).
15. On August 2, 2012, parents returned the PTE, granting consent for the District to evaluate the student. (S-6).
16. On October 26, 2012, the District issued the evaluation report ("ER"). (P-3; S-9).

17. Parental input in the October 2012 ER indicated the student did not have problematic behaviors at home. (P-3 at pages 1-2; S-9 at pages 3-4).
18. The October 2012 ER contained teacher input from both 7th grade and 8th grade teachers. Female teachers uniformly reported consistently disruptive or defiant behaviors and/or work refusal in their classes. One male teacher noted inappropriate hallway behavior, one male teacher noted antagonistic behavior with peers in gym class, and one male teacher noted the student can engage in attention-seeking behavior. Largely, however, male teachers reported no problematic classroom behaviors. (P-3 at pages 2-3; S-9 at pages 4-5).
19. Cognitive testing in the October 2012 ER on the Wechsler Intelligence Scale for Children (4th Edition) revealed that the student has an average IQ (98). Achievement testing scores on the Woodcock-Johnson Tests of Achievement (3rd Edition) all fell within the expected ranges, except for one subtest—understanding directions—on oral language testing. (P-3 at pages 4-7; S-9 at pages 6-10).
20. The student's self-report in the October 2012 ER indicated that the student generally dislikes school. The student reported lack of interests, inability to concentrate, and racing thoughts. The student reported experiencing sadness and guilt for inappropriate

behaviors. In the student's own words, the student reported: "I feel sad because I let down my parents. I feel guilty because I am always in trouble. I don't find much things fun (lack of interest). I find it very hard to concentrate. I feel like I need help with homework and quizzes. I can't stop thinking about useless things (racing thoughts)." (P-3 at page 8; S-9 at page 10).

21. The October 2012 ER utilized the Behavior Assessment System for Children -2 ("BASC") with teachers and the student's mother to rate the student's behaviors. (P-3 at pages 9-10; S-9 at pages 11-12).
22. The student's mother yielded no clinically significant ratings in any area on the BASC. She rated the student as at-risk in anxiety, depression, and attention problems. (P-3 at pages 9; S-9 at page 11).
23. Four of the student's teachers completed the BASC. All four teachers rated the student as with clinically significant or at-risk ratings in conduct problems (anti-social/rule-breaking behavior), adaptability, social skills, and study skills. Three of the four teachers rated the student with clinically significant or at-risk ratings in hyperactivity, aggression, attention problems, and leadership. (P-3 at pages 9; S-9 at page 11).
24. Two of the teachers were female and two were male. The female teachers reported more problematic behaviors and, of the

- eleven clinically significant scores yielded by any rater, nine were recorded by the female teachers. (P-3 at pages 9; S-9 at page 11).
25. The October 2012 ER utilized the Attention Deficit Disorders Evaluation Scale with two teachers (two of the four teachers who completed BASC ratings, one female and one male). The student scored in the average range on measures for both inattentive and hyperactive-impulsive types. (P-3 at pages 10; S-9 at page 12).
26. The October 2012 ER utilized the Behavior Rating Inventory of Executive Function to assess the student's executive functioning (the processes related to managing and directing cognitive, emotional, and behavioral functions) ("BRIEF"). (P-3 at pages 10-11; S-9 at page 13).
27. The student's mother yielded only one score of "strong concern" on the BRIEF—inhibition (the ability to stop one's behavior at appropriate times). (P-3 at pages 10-11; S-9 at page 13).
28. The same four teachers who completed the BASC completed the BRIEF. One of the teachers yielded no score of "strong concern" in area. Three of the teachers yielded scores of "strong concern" in inhibition and self-monitoring. (P-3 at page 10; S-9 at page 13).
29. The teacher who reported no score indicating "strong concern" was male. Of the three remaining teachers, the two female teachers reported more scores of "strong concern" and, of

- the thirteen scores indicating “strong concern” yielded by any rater, ten were recorded by the female teachers. (P-3 at page 10; S-9 at page 13).
30. The October 2012 ER contained results from the Integrated Visual and Auditory Continuous Performance Test (“IVA”). The IVA tests response-control (with both visual and auditory components) and attention (again with both visual and auditory components). The student showed moderate impairment in response-control, especially in the consistency sub-scale for both visual response-control and auditory response-control. The student showed extreme impairment in attention, with a strong divergence between visual and auditory attention; the student’s visual attention was generally non-problematic but auditory attention showed “significant problems”. (P-3 at pages 11-12; S-9 at pages 13-14).
31. The October 2012 ER utilized the Scale for Assessing Emotional Disturbance (2nd Edition) (“SAED”) to evaluate emotional and behavioral problems for students in educational settings. (P-3 at pages 12-13; S-9 at page 14-15).
32. The SAED was completed by the same four teachers who completed the BASC and the BRIEF. Two of the teachers’ scores rated all five sub-scales as “not indicative of emotional disturbance”. One teacher’s scores rated the inappropriate behavior sub-scale as “indicative of emotional disturbance”. One

- teacher's scores rated the inappropriate behavior sub-scale as "highly indicative of emotional disturbance" and the relationship problems sub-scale as "indicative of emotional disturbance". (P-3 at pages 12-13; S-9 at pages 14-15).
33. Of the two teachers who rated all sub-scales as "not indicative of emotional disturbance", one was female and one was male. Of the two remaining teachers, each rated one sub-scale as "indicative of emotional disturbance". The only teacher to rate a sub-scale as "highly indicative of emotional disturbance" was female. (P-3 at pages 12-13; S-9 at page 14-15).
34. The October 2012 ER included a functional behavior assessment ("FBA"). (P-3 at pages 13-14; S-9 at pages 15-16).
35. The FBA found the primary behaviors of concern were talking-out, or otherwise disrupting, class and name-calling/teasing of peers. Secondary behaviors of concern were work-refusal and defiance of authority figures. All behaviors were seen throughout the school day so time-of-day did not appear to be a factor. The FBA noted that the behaviors appeared to be "situational and selective, occurring more often with female teachers" with frequency and degree varying across all school environments. (P-3 at page 13; S-9 at page 16).
36. The October 2012 ER was the work product of the District's school psychologist. In the report, she noted that "while working in

a one-on-one situation...(the student) was cooperative, polite, and respectful. No concerns with attention to task, hyperactivity, or impulsivity were observed. When asked about the difference in (the student's) behavior, (the student) noted it was because I was nice to (the student), which would suggest that (the student) chooses when to engage in maladaptive behaviors.” (P-3 at page 14; S-9 at page 16).

37. The October 2012 ER concluded that, based on cognitive and achievement testing, the student did not have a specific learning disability. (P-3 at page 16; S-9 at page 18).
38. The October 2012 ER concluded that, while there were “some indicators of inattentive, hyperactive, and impulsive behaviors”, the inconsistency in the data and the absence of clinically significant scores in two or more settings (school and home), did not support an identification of the student with the health impairment of attention deficit hyperactivity disorder. (P-3 at page 16; S-9 at page 18).
39. The October 2012 ER concluded that the student elects, volitionally, to maintain satisfactory interpersonal relationships; does not consistently demonstrate inappropriate behaviors under normal circumstances; does not exhibit a general mood of depression or unhappiness; does not display physical symptoms or fears related to school. Therefore, the ER concluded, the student

- did not meet the eligibility criteria of a student with an emotional disturbance. (P-3 at page 16; S-9 at page 18).
40. The October 2012 ER found that the student did not have a disability and, consequently, is not eligible for special education. (P-3 at page 16; S-9 at page 18).
41. The District issued a notice of recommended educational placement (“NOREP”), indicating that it did not consider the student to be a student with a disability, and that it recommended the student continue in regular education. The NOREP was not returned by parents. (P-4; S-9 at pages 24-26).
42. Over the course of August – October 2012, while the evaluation process was taking place, the student was disciplined twenty-three times for disturbing class, improper use of technology, disrespect/insubordination, inappropriate physical contact, suspected bullying, and vandalism. (P-1 at pages 58-85, 92-95; S-12 at pages 1-27).
43. Of the twenty-three incidents, twenty-two involved interactions with teachers and one involved a suspected bullying interaction with a peer. Of the twenty-two incidents involving teachers, three involved male teachers and eighteen involved female teachers. (P-1 at 58-85, 92-95; S-12 at pages 1-27).
44. In November 2012, the student met twice with the school counselor. In a summary of the student’s interactions with the

school counselor over the 2011-2012 school year and the two November meetings, the school counselor noted: “The results of my conversations with (the student) have not been positive. (The student) said to me on November 28, 2012 that (the student) doesn’t want to change.” (S-4).

45. Over the period November – December 2012, after the ER had been issued, the student was disciplined twenty-eight times for tardiness, disturbing class, verbal abuse of staff, disrespect/insubordination, leaving class without permission, harassment of staff, and improper use of technology. (P-1 at pages 86-91; S-12 at pages 28-77).

46. Of the twenty-eight incidents, twenty-five involved interactions with teachers, two involved interactions with peers, and one involved tardiness to class. Of the twenty-five incidents involving teachers, six involved male teachers and nineteen involved female teachers. (P-1 at pages 86-91; S-12 at pages 28-77).

47. In December 2012, given the nature of the behaviors, the disruption of the educational environment, and the number of reprimands, the District sought to remove the student to an alternative education facility for disruptive youth. The formal offense was “disregard for school authority, including persistent violation of school policy and rules”. (P-5; S-11; NT at 137-139).

48. In January 2013, the student began to attend the alternative school. (P-6; S-13, S-17).
49. The alternative school developed and implemented an individual service plan for the student with three objectives: (1) ceasing negative attention-seeking behaviors and seek staff/peer assistance when encountering upsetting situations, (2) ceasing disruptive classroom behaviors, respecting others, and actively attending to academics, and (3) attending school regularly. (S-18).
50. At the alternative school, at the outset of the placement, the student engaged in similar disrespectful and work-avoidant behaviors. (P-6; S-19 at page 1, S-21).
51. Over the ensuing weeks, the student's behaviors improved. (S-21).
52. In April 2013, however, "(the student) reverted back to seeking the negative attention of peers and has refused to follow the directions of staff." (S-21).
53. On April 10, 2013, the student and a female peer became involved in a verbal altercation. The confrontation escalated, and the student was assaulted by the peer. Thereafter, the student withdrew from the alternative school. (S-19 at pages 2-4, S-22).
54. The student enrolled in a cyber school program administered by the local intermediate unit and completed the 2012-2013 school year in that program. (S-21; NT at 154-158).

55. The student's attendance at the alternative school and cyber school were to facilitate the student's education while the student did not attend District schools. At all times in the 2012-2013 school year, however, the student remained on the rolls of the District. (NT at 156-158).

56. All witnesses were all found to be credible and to have provided testimony that was probative. The testimony of the District school psychologist was especially persuasive and was accorded heavy weight in considering the evidence.

DISCUSSION AND CONCLUSIONS OF LAW

Evaluation Process & Report

Pursuant to the requirements of IDEA and Chapter 14, Pennsylvania school districts have an obligation "to establish a system of screening...to", *inter alia*, "identify students who may need special education services and programs."⁵ 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.⁶ This duty is known as a school district's child-find obligation.

⁵ 22 PA Code §14.122(3); *see also* 34 C.F.R. §300.111.

⁶ 34 C.F.R. §§300.300(a), 300.301(b).

Once a school district thinks a student may have a disability and/or require special education, it must seek permission from parents to evaluate the student and cannot proceed with an evaluation until it receives such permission.⁷ Once a school district has received permission to evaluate, the ER must be issued within 60 calendar days from the date the school district received permission from parents.⁸ The calculation of the evaluation timeline includes only calendar days when the school district is in session for the school year and does not include any day over the summer.⁹

The evaluation process “must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent” and must ensure “the child is assessed in all areas related to the suspected disability, including, if appropriate...social and emotional status, general intelligence, (and) academic performance.”¹⁰

Once the ER has been issued, “a group of qualified professionals and the parent(s)” meets to determine whether the child qualifies for special education.¹¹ In Pennsylvania, when the evaluation process involves a student who may have an emotional disturbance, the group of qualified professionals must include a school psychologist.¹²

⁷ 34 C.F.R. §300.300(a)(1).

⁸ 34 C.F.R. §300.301(c).

⁹ 34 C.F.R. §300.301(c)(1)(ii); 22 PA Code §14.123(b).

¹⁰ 34 C.F.R. §300.304(b)(1), (c)(4).

¹¹ 34 C.F.R. §300.306(a).

¹² 22 PA Code §14.123(a).

In making the determination of whether a student is a child with a disability, a school district must “draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior”; and “ensure that information obtained from all of these sources is documented and carefully considered.”¹³

Emotional Disturbance

To qualify under the provisions of IDEA as a student with an emotional disturbance, a student must exhibit:

“one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (a) an inability to learn that cannot be explained by intellectual, sensory, or health factors, (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, (c) inappropriate types of behavior or feelings under normal circumstances, (d) a general pervasive mood of unhappiness or depression, and/or (e) a tendency to develop physical symptoms or fears associated with personal or school problems.”¹⁴

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In this case, the record as a whole supports a finding that the District’s evaluation process and ER were appropriate. When the student’s behavior and grades began to deteriorate with a transition to 7th grade for the 2011-2012 school year, the District engaged in its SAP

¹³ 34 C.F.R. §300.306(c)(1).

¹⁴ 34 C.F.R. §300.8(c)(4)(i).

referral process in February 2012.¹⁵ The student entered counseling thereafter and, by May 2012, the District had responded to parents' request for information about formally evaluating the student. As soon as the District had parents' request to issue a PTE form, the District did so. The District undertook the evaluation and issued the ER in a timely way. Procedurally, then, the District did all that it needed to do, and in a timely way when it had actionable instructions from the parents.

Substantively, as well, the District met its obligations through the ER. The ER included input from parents and teachers. It included standardized assessments and records-review. It included a functional behavior assessment. Each element of the ER provided an explanation of the nature of the data, or assessment tool, and the results of the data-gathering or assessment. The conclusions of the ER were rooted in the results of the data-gathering and assessments, and were explained in detail. In sum, the District's evaluation process and resulting ER were both appropriate.

Consequently, the conclusion of the ER that the student did not have an emotional disturbance is supported by the weight of the evidence. The ER explicitly considered each characteristic that might lead to an identification of a student as having an emotional disturbance, and the evidence is preponderant that the student does not qualify under IDEA in that regard.

¹⁵ 22 PA Code §14.122.

Here, what was most compelling was the seeming ability of the student to control behaviors when the student chose to. Problematic behaviors reported at school were entirely absent at home. In the school, interactions with female teachers was markedly more problematic than with male teachers; in fact, the entirety of the record reveals that the student's documented disciplinary incidents with teachers were almost uniformly with female teachers.¹⁶ When the student attended the alternative school, the student's behavior notably improved after the student's adjustment to the school. Thereafter, behaviors deteriorated until the student left the school following a negative peer interaction.

The student was sad and felt guilty about the problematic behaviors, and often sought to mitigate potential consequences, or intervene and shape events before decision-makers became aware of the behaviors. Yet the student made explicit that the behaviors were not something the student was interested in changing.

Taken all together, then, the record weighs in favor of the District that the student does not qualify as a student with an emotional disturbance.

¹⁶ More in-depth consideration of the student's disciplinary history reveals that while the student had defiant and disruptive behavior with multiple female teachers, the student seemed to have brashly defiant behavior with one female teacher in particular. Therefore, the notion that the student can control behaviors is further reinforced: not only did the defiance and disruption occur much more with female teachers, but it occurred in a pointed way with one female teacher in particular. See P-1 at pages 58-95; S-12 at pages 1-77.

Section 504

While the obligations of IDEA to identify and evaluate students with disabilities are much more intricate, Section 504 imposes similar obligations on school districts in Pennsylvania.¹⁷ Claims for denial of FAPE under Section 504 are analyzed analogously to claims made under IDEA.¹⁸ Having found, above, that the District met its child-find and evaluation obligations under IDEA, parents fail to meet their burden for similar claims made under Section 504.

CONCLUSION

The District did not fail in its obligations to the student through its evaluation process, ER, and ultimate conclusion that the student is not a student with a disability.

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¹⁷ 34 C.F.R. §104.35; 22 PA Code §15.5.

¹⁸ S.H. ex rel Durrell v. Lower Merion School District, 729 F.3d 248 (3d Cir. 2013); Chambers ex rel. Chambers v. School District of Philadelphia Board of Education, 587 F.3d 176 (3d Cir. 2009).

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District's evaluation process and evaluation report of October 26, 2013 were appropriate. Through the date that this record closed, there is no error in the School District's conclusion that the student is not a student with a disability.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

November 25, 2013