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Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: J.L.

Date of Birth: [redacted]

Dates of Hearing:

May 5, 2014
May 28, 2014
June 18, 2014

CLOSED HEARING

ODR Case # 14488-1314KE

Parties to the Hearing:

Parent[s]

Canon-McMillan School District
1 North Jefferson Avenue
Canonsburg, PA 15317

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Christopher Elnicki, Esquire
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August 8, 2014

August 26, 2014

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student (“student”) is a [teenaged] student residing in the Canon-McMillan School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)¹. The student has been identified under the terms of IDEA as a student with autism. Parent claims that the student has been denied a free appropriate public education (“FAPE”) as required under IDEA and Pennsylvania special education regulations. Specifically, parent alleges various failures in programming for the student’s educational needs, most notably social/emotional issues that interfered with the provision of FAPE to the student, issues which parent alleges were not appropriately addressed by the District.²

¹ It is this hearing officer’s preference to cite to the implementing regulations of the IDEA at 34 C.F.R. §§300.1-300.818. See also 22 PA Code §§14.101-14.162.

² The scope of the claim is limited to a very narrow period, from November 22, 2011 (a point two years prior to the filing of the parent’s complaint) through the end of the 2011-2012 school year in June 2012. Both parties recognize and agree that the student began to attend a partial hospitalization program in August 2012. (Notes of Testimony at 14-38). Also, by way of explanation of the chronology of the hearing process, the parent’s complaint was originally filed on November 22, 2013 and scheduled for hearing on January 27, 2014. On January 17, 2014, the parties informed this hearing officer that they had seemingly reached a settlement of all claims and requested a 60-day conditional-dismissal order, pending finalization of the settlement. The terms of the order allowed for reinstatement of the complaint within 60 calendar days if the parties were unable to consummate fully a settlement agreement, with the signature of parent and the approval of the District’s school board. On March 7, 2014, with the parties unable to finalize the settlement, parent made a timely request to reinstate the complaint. The collaborative scheduling of hearing dates followed.

The District counters that, at all times, it met its obligations to the student in providing FAPE. More specifically, its position is that, to the extent the student exhibited social/emotional needs, those needs did not manifest themselves in the educational environment.

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

ISSUES

Did the District deny the student FAPE over the period from November 2011 through June 2012?

If so, is parent entitled to remedy?

FINDINGS OF FACT

1. In April 2007, in the spring of the student's 2nd grade year, the student was identified by the District as a student with autism and speech and language impairment. (Joint Exhibit ["J"]-2; Parent's Exhibit ["P"]-21; School District Exhibit ["S"]-1, S-18; Notes of Testimony ["NT"] at 501-503).
2. In April 2010, the parties mutually waived, in writing, the student's triennial special education evaluation. (J-3).
3. In March 2011, at the end of the student's 6th grade year, the student's individualized education plan ("IEP") team met for its annual meeting to discuss the student's progress and needs, and to craft the student's IEP for the upcoming year. (J-5).

4. The March 2011 IEP noted that the student did not exhibit behaviors that impeded the student's learning or that of others. (J-5 at page 5).
5. The March 2011 IEP noted that, at the time of the drafting of the IEP, the student's attendance (9 absences and 3 tardies) was laudable. The IEP noted: "this is a great improvement for (the student) due to (the student's) history of missing many days of school." (J-5 at page 8).
6. The March 2011 IEP contained two goals, one in written expression and one in mathematics. (J-8 at pages 15-16).
7. The March 2011 IEP did not contain any goals, specially-designed instruction, related services, or supports for social/emotional functioning. (J-5).
8. Following the March 2011 IEP meeting, from mid-March 2011 through the end of the 2010-2011 school year, the student was absent 10 additional days, and tardy 3 additional days. (J-8).
9. The March 2011 IEP was the IEP in place for the 2011-2012 school year. (J-5).
10. In August 2011, the student entered 7th grade at the District's middle school, a new school building for the student, in August 2011. (J-5, J-8).
11. In September and October 2011, the student's teachers indicated in regular communications to the special education

teacher that the student was not exhibiting academic, behavioral, or social concerns in their classes. (S-15 at pages 1-28).

12. In September 2011, the student was absent one day and tardy once. In October 2011, the student was absent one day and tardy three times. (J-8).
13. Throughout September and October 2011, the student was exhibiting problematic behaviors at home and complaining to the parent about social/emotional/anxiety difficulties in the school environment. The student's parent contacted the District regarding the student, relating the student's complaints and seeking input from District staff. (NT at 507-511).
14. In early November 2011, the parent contacted the District to arrange an IEP team meeting. (J-7; NT at 115-117, 347-348, 507-511).
15. In November 2011, the student's attendance took a dramatic turn. The student was absent 10 days and tardy 3 days. In November 2011, the student was available for an entire school day of instruction on only four days, including 10 consecutive days of absence in the middle of the month. (J-8; S-17).
16. The student's parent dis-enrolled the student at the end of November 2011 and enrolled the student in a cyber charter school. (J-6; NT at 510-512).

17. In December 2011, the cyber charter school issued an IEP for the student. (J-6).
18. The December 2011 cyber charter school IEP noted that the student did not exhibit behaviors that impeded the student's learning or that of others. (J-6 at page 8).
19. The December 2011 cyber charter school IEP contained two goals, one in written expression and one in mathematics. (J-6 at pages 30-31).
20. The December 2011 cyber charter school IEP did not contain any goals, specially-designed instruction, related services, or supports for social/emotional functioning. (J-6).
21. The December 2011 cyber charter school IEP is largely the same as the March 2011 District IEP. (J-5, J-6).
22. In early January 2012, dissatisfied with the cyber charter school, the student's parent initiated contact regarding the student's return to the District. (P-25 at pages 29-35).
23. In January 2012, the student transitioned back to the District, under the terms of the December 2011 cyber school IEP. The student formally re-enrolled on Friday, January 6, 2012, with a return to school on Monday, January 9, 2012. (J-6; P-22 at pages 4-8; S-15 at page 37; NT at 273, 460-461, 527, 588).
24. The District took no steps to address the concerns shared by the student's mother in the fall of 2011, or the absences/tardiness

prior to the student's dis-enrollment. (NT at 223-229, 275-277, 353, 400-404, 528-529, 540-544).

25. In January 2012, the student was not absent from school and tardy two days. In February 2012, the student was absent once and tardy three days. In March 2012, the student was not absent from school and tardy three times. (J-8).
26. In March 2012, even though the attendance records in the record do not record any absences in that month, the student's special education teacher emailed the parent: "I just wanted to check on (the student) since (the student) has not been in school the past couple days. Please let me know if you want me to have (the student's) teachers put together work (the student has) missed for you to pick up at school." (P-22 at page 7).
27. In April 2012, the student was absent one day and tardy three days. (J-8).
28. On May 2, 2012, the student's special education teacher emailed the student's parent: "I wanted to make you are aware of what happened this morning in homebase. (The student) came to me very upset about having a bad last few days." The email went on to share that the student was upset over a missed science project and a request for the student to clean the student's locker. The email continued: "I...explained to (the student) that we all have

bad days sometimes and (the student) just needs to remember that it will pass and get better.” (P-22 at page 8).

29. In May 2012, the student was absent two days, and was tardy 11 days. (J-8).
30. In June 2012, with five instructional days, the student attended the first instructional day in June. The student was tardy the next day, the student was absent the final three days of school. (J-8).
31. The student earned As and Bs at the District in the first three quarters of the 2011-2012 school year.³ In the fourth quarter, the student’s grades declined in all year-long subject areas (from A to C, or B to C) except in mathematics, where the student’s grade remained the same (B), although the percentage declined from 88 to 82. (P-21 at page 18).
32. In July and August 2012, anticipating a return to the District, the student’s parent met with the District regarding concerns over the student’s programming, again voicing concern over the student’s social/emotional/anxiety response in school and as a result of school. (NT at 370-376, 452-460).
33. In August 2012, the student briefly returned to the District for the student’s 8th grade year. Shortly thereafter, the student stopped attending the District and, by agreement of the parties,

³ The student’s second quarter grade was a partial grade given the student disenrollment in November and December 2011.

was enrolled in a private school with a therapeutic component. (P-5, P-6; NT at 14-15, 23).

34. All witnesses testified credibly. As an explicit finding, however, the testimony of witnesses from the District is less reliable, and therefore accorded less weight, because of the degree of difficulty each had in recalling, with any specificity or reliability, events related to events surrounding the student's education in the District in the fall of 2011 and the period January-June 2012. Witnesses' responses to a host of questions were repeatedly along these lines: 'I don't recall', or 'I don't remember', or 'I'm not sure', or unsure, or 'I don't know'. This was especially the case as it related to communications with the parent, or with each other regarding the student's needs, or discussions about the student's needs. Therefore, even though the student's parent was no more or less credible than District witnesses, her testimony was accorded more weight because of a uniform lack of reliability in the testimony of the District witnesses. (NT at 44-261, 270-492, 499-630).

DISCUSSION AND CONCLUSION OF LAW

FAPE

To assure that an eligible child receives FAPE,⁴ an IEP must be “reasonably calculated to yield meaningful educational...benefit and student or child progress.”⁵ “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning”,⁶ not simply *de minimis* or minimal education progress.⁷

In this case, the District denied the student FAPE in its handling of the student’s social/emotional/anxiety needs. Clearly, the student has a long-recognized pattern of excessive absences and tardies. Excessive absences/tardiness are not by definition a behavior that interferes with the student’s learning to the extent that it needs to be addressed by an IEP team. Indeed, totally unrelated to a student’s disability or IEP, some students and/or families may simply not regard punctual school attendance as important, or are unable to govern their lives in accordance with a school schedule; that is a an issue of truancy.

But where a student is unable to attend punctually, if at all, and parent shares with the school district that social/emotional/anxiety stressors in the school environment are the reason, that is a different

⁴ 34 C.F.R. §300.17.

⁵ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

⁶ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

⁷ M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

matter and, at the very least, should be taken up by the student's IEP team to see if the school-based facet of the concern can, or should, be addressed.

That is the case in this instance. The student's mother repeatedly voiced to the District that the student was exhibiting problematic behaviors and voicing concerns to her about school-based social/emotional/anxiety issues. When she relayed this to the District, nothing happened. The student began the 7th grade year functionally, but, as the year progressed, eventually found school attendance to be problematic. This resulted in mother's unanswered request to have the IEP team meet, followed by 10 consecutive days of absence in November and eventual dis-enrollment.

Upon the student's return in January 2012, the same pattern repeated itself: the student acclimated well enough, and found success over a few months. By late April and into May 2012, however, events in the student's schooling reached a crescendo resulting in absences and tardies and academic decline.

On one hand, the District's arguments have a degree of merit, namely that the student did not exhibit academic problems, until the very end of the 2011-2012 school year. But this sole focus on academics is ultimately the foundation of the denial of FAPE. While the student's grades and academic performance were being maintained, the student's school-based social/emotional/anxiety needs were not being addressed,

with consequences that led to academic decline and, ultimately, the student being unavailable for any instruction.

The record in its entirety supports a conclusion that the District knew about the parent's concerns over school-based social/emotional/anxiety issues and had evidence through the student's attendance difficulties that these issues were potentially manifesting themselves in school avoidance. The District did not respond in any substantive way to parent's concerns. Accordingly, the student was denied FAPE. An award of compensatory education will follow.

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 IDEA⁸. Compensatory education is available from a point where a school district knew or should have known that it was failing in its obligation to provide FAPE, accounting for time it reasonably would have taken for the student's program to be remedied.⁹

In this case, the District knew or should have known, as of late November 2011, that the student's IEP team needed to convene to

⁸ 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).

⁹ Ridgewood.

reconsider whether the student's programming was appropriate and whether the student's IEP was meeting the student's needs. Against the backdrop of problematic school attendance, the student transitioned in 7th grade to a middle school environment. School transitions such as these for adolescents can be complicated for multiple social, academic, and developmental reasons. Notwithstanding the fact that the student's parent voiced concerns in the early weeks of the 7th grade year, the District's lack of action early in the fall of 2011 can be understood. Added to this is the fact that, undeniably, the student was progressing academically, and school attendance was not manifesting itself as a potential issue in September and October 2011.

By November 2011, however, the trajectory of events changed. The student's mother made an explicit request to convene the IEP team, a request which the District never responded to. Thereafter, the student's attendance issues became acute, and the student, in effect, was absent for the entire month of November 2011. Thus, by the latter half of November 2011, the District knew or should have known that the student's attendance issues were a potential manifestation of social/emotional/anxiety issues that the student's parent had been voicing.

At this point, though, in late November 2011, the student was disenrolled from the District. At the very time the District knew or should have known that it needed to reconvene the student's IEP team, or

needed to seek permission to re-evaluate the student, or both, the student was no longer enrolled in the District and began to receive special education services from the cyber charter school in December 2011.

Thereafter, in January 2012, the student returned to the District. Given the paragraphs above, however, the District was in a position to know, or should have known, that the student's educational programming needed to be assessed by the IEP team, or through a re-evaluation, or both. The student's special education teacher/case manager from the fall of 2011 went on medical leave in early January 2012 and was replaced by a new special education teacher/case manager.¹⁰ Given this fact, and the fact that there would be necessary communications/internal paperwork to share regarding scheduling an IEP team meeting, or seeking permission to re-evaluate, or both, it is the considered decision of this hearing officer that by January 19, 2012—ten days after the student returned to the District—the District would have been in a position to have held an IEP team meeting and to have received permission to re-evaluate the student.

Under Pennsylvania special education regulations, a school district has 60 calendar days from the date it receives permission to re-evaluate to issue the re-evaluation report.¹¹ Therefore, no later than March 20, 2012 (60 calendar days after January 19th), the District should have had

¹⁰ NT at 273-274.

¹¹ 22 PA Code §14.124(b).

a re-evaluation report upon which to understand the student's social/emotional/anxiety needs. With an IEP in place no later than 10 school days later, the date to begin calculating the compensatory education award is April 3, 2012 (10 school days after March 20, 2012).¹²

In Pennsylvania, an elementary school student must be provided with a minimum of five-and-a-half (5.5) hours of education per school day.¹³ This figure will be used as the basis for calculating the compensatory education award. The record supports the conclusion that the District denied the student FAPE as of April 3, 2012. Here, the student's academic achievement plays a role in the equitable nature of compensatory education. For even though the District failed to address the student's school-based social/emotional/anxiety issues, the student made progress in all subjects and the entirety of the record supports a finding that there was not a wholesale denial of FAPE.

Therefore, the student will be awarded 2.75 hours of compensatory for every school day from April 3, 2012 through the end of the school year on June 7, 2012, a total of 43 school days.¹⁴

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 they take the form of appropriate developmental, remedial or

¹² 22 PA Code §14.131(a)(6); S-17.

¹³ 22 PA Code §11.3(a).

¹⁴ S-17.

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.

There are financial limits on the parent's 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 would have provided services to the student during the period of the denial of FAPE.

An order of compensatory education will be fashioned accordingly.

CONCLUSION

As of April 3, 2012, the District knew or should have known that it was not providing FAPE to the student. Therefore, the student is entitled to compensatory education from that point through the end of the 2011-2012 school year.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is awarded 118.25 hours of compensatory education for the denial of a free appropriate public education to the student from the period April 3, 2012 through June 7, 2012.

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

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

August 26, 2014