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: A. H.
Date of Birth: [redacted]
Dates of Hearing:[1]

August 11, 2016
September 21, 2016
October 13, 2016
October 14, 2016
November 4, 2016

CLOSED HEARING

ODR Case #17885-1516KE

Parties to the Hearing:	Representative:
Parent[s]	Mark Voigt, Esquire Plymouth Meeting Executive Campus 600 W. Germantown Pike – Suite 400 Plymouth Meeting, PA 19462
Avon Grove School District 107 Schoolhouse Road West Grove, PA 19390	Kathleen Metcalfe, Esquire 331 E. Butler Avenue New Britain, PA 18901
Date of Decision:	November 30, 2016
Hearing Officer:	Michael J. McElligott, Esquire

[1] The August 11th session was dedicated to evidence on the student's educational placement, disputed between the parties, for the 2016-2017 school year and led to an interim ruling on that placement. The September 21st session was dedicated to evidence on the parties' disputed view of when parent knew or should have known (KOSHK) of the claims which form the basis of the complaint and led to a KOSHK ruling on the scope of the denial-of-FAPE evidentiary record. The October 13th and 14th sessions were dedicated to the denial-of-FAPE evidence. Evidence was concluded over these two sessions, and counsel presented oral closing statements at the November 4th session.

INTRODUCTION

Student ("student")[2] is a late-teen-aged student who formerly resided in the Avon Grove 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")[3], although they disagree over the specific identification status of the student.

Parent claims, in the complaint, that the student was denied a free appropriate public education ("FAPE") during the school years 2012-2013 through 2015-2016, inclusive, and seeks a compensatory education remedy for that alleged denial, including failure to identify the student with specific learning disabilities and a health impairment. When the complaint was filed in June 2016, the student's placement for the upcoming 2016-2017 school year was also in dispute, and parent sought a placement in a private tutoring center for GED preparation.

The District counters that at all times it provided FAPE to the student for the period of the student's enrollment, including the programming proposed for the 2016-2017 school year. As such, the District argues that the parent is not entitled to remedy.

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[2] The generic use of "student", rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

[3] 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").

The student's educational history over the school years considered at the hearing and in evidence, as set forth in the record below, was deeply impacted by issues of non-attendance.

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

PROCEDURAL HISTORY

A. The parent filed a complaint in June 2016, alleging past denial of FAPE by the District over multiple school years (2012-2013 through 2015-2016, inclusive). Parent also claimed that the student's placement in the upcoming 2016-2017 school year should be a GED preparation program at a private tutoring facility. (Hearing Officer Exhibit ["HO"]-1).

B. The District filed a response to the complaint, broadly denying the parent's claims, and asserting that certain claims in the complaint were untimely. Furthermore, the District provided its position on the upcoming 2016-2017 school year, asserting that its recommended placement at a January 2016 individualized education plan ("IEP") meeting was reasonably calculated to provide meaningful education benefit. (HO-2; Parent Exhibit ["P"]-41).

C. Because the student's placement for the upcoming 2016-2017 school year was in dispute, a hearing session on August 11, 2016 was focused exclusively on evidence related to the parties'

positions on their views of the student's 2016-2017 placement, resulting in an interim ruling addressing the placement. (Notes of Testimony ["NT"] at 1-246).

D. On August 22, 2016, an interim ruling issued by this hearing officer found that parent sought to substitute private GED tutoring in place of credit accumulation at the District. The student's placement for the 2016-2017 school year, at its outset at least, was ordered as the January 2016 IEP in the placement recommended by the District. (HO-3).[4]

E. The District, in its response to the complaint, asserted that parent knew or should have known of certain actions which formed the basis of the complaint and did not timely file a complaint on those matters. (HO-2).

F. To frame each party's view of the date(s) when parent knew, or should have known, of actions which formed the basis of certain claims in the complaint, this hearing officer required each party to submit offers of proof on this KOSHK issue. (HO-4, HO-5).[5]

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[4] In terms of the details of the interim ruling, absent an IEP team decision for a special needs student which might address graduation, which was not the case here, only a school district's school board has authority to determine how its curricula meet academic standards toward graduation requirements. *See generally* 22 PA Code §§4.1-4.82 As a matter of law, then, the interim ruling found that parent's requested placement for the 2016-2017 school year was not within the authority of the hearing officer. Because the interim ruling was decided as a matter of law, however, it was issued without prejudice to the parent arguing that the program/placement in the January 2016 IEP is substantively inappropriate. (HO-3).

[5] In light of *G.L. v. Ligonier Valley School Authority*, 801 F.3d 602 (3d Cir. 2015), parents must file a complaint within two years of when they know, or should have known, of the actions which form the basis of their complaint. *See also* 34 C.F.R. §§300.507(a)(2), 300.511(3). By definition, then, actions within two years of the filing of a complaint are

G. A hearing session on September 21, 2016 was focused exclusively on this KOSHK evidence—to determine the scope of the denial-of-FAPE evidence in follow-on hearing sessions. (NT at 248-410).

H. On October 10, 2016, a KOSHK ruling issued by this hearing officer found that parent knew or should have known prior to June 2014 of actions which form the basis of her complaint for the 2012-2013 and 2013-2014 school years. Accordingly, the evidentiary record in this matter was limited to the period of June 2014 and thereafter. (HO-6).

I. The hearing concluded over two sessions on October 13th and October 14th. (NT at 411-928).

J. After the conclusion of the October evidentiary sessions, parent's counsel sought to offer additional evidence related to a claim that the District did not hold a manifestation determination review, pursuant to 34 C.F.R. §§300.530-300.536, when the student was removed from school over the periods September 2014 - March 2015 and August - December 2015 (*see* Findings of Fact below). Because the removals were not at the instigation of school personnel related to violations of the student code of conduct (again, *see* Findings of Fact below), the request was denied. (HO-7).

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timely. In this case, actions after June 2014 are timely. The parties were instructed to provide offers of proof on their views for any actions which form the basis of the complaint prior to June 2014.

K. At a session on November 4, 2016, counsel for the parties presented oral closing statements. (NT at 929-982).

ISSUES

Did the District provide the student with FAPE for the school years 2014-2015 and 2015-2016?

If not, is the student entitled to compensatory education?

FINDINGS OF FACT

1. In the 2013-2014 school year, the student's 9th grade year, the student's non-attendance led the District to file a truancy summons (School District Exhibit ["S"]-2; NT at 346-371).
2. There was no immediate action taken on the summons, as the student underwent evaluations by both the District and the school refusal program at the local intermediate unit ("IU").
3. In November 2013, the IU issued its evaluation report, making school-based and family-based recommendations. (P-1).
4. In December 2013, the District issued its evaluation report, identifying the student as a student with an emotional disturbance. (P-2).
5. The student's IEP team met in January 2014. (P-3; S-5).

6. In March 2014, the student's IEP team met to revise the student's IEP, although parent did not attend the meeting. (P-6; S-7).
7. In April 2014, the District issued a notice of recommended educational placement ("NOREP"), recommending itinerant emotional support services at the District high school. (P-7).[6]
8. The student's primary need revolves around anxiety, stress, and social difficulties in the educational environment. When attending school, the student's academic engagement and performance has been meaningful. (P-1, P-2, P-6, P-13, P-14, P-40; S-5, S-7, S-8, S-11, S-16, S-22, S-32, S-55).
9. Non-attendance at school was a significant issue over the course of the 2013-2014 school year. (S-1, S-2).
10. As a result of the non-attendance issues over the 2013-2014 school year, the truancy proceedings, and family issues in the home, over the period May – August 2014, the student and parent received community-based mental health/family support services. The services were coordinated with the County Department of Children, Youth, and Families ("County CYF"). (S-57 at pages 104-121; NT at 728-790).

[6] The March 2014 IEP/April 2014 NOREP represent the program/placement which the District envisioned for the student for the relevant evidentiary period as of June 2014.

11. In August 2014, County CYF filed a dependency petition with the County Court of Common Pleas/Juvenile Division ("the Court") for non-attendance at school and habitual disobedience in the home and with providers. (S-57 at pages 2-7).

12. The District was coordinating with County CYF on the school non-attendance issue and was aware of the filing of the petition but had no role in bringing the petition, which was undertaken entirely by County CYF. The District's high school emotional support teacher was subpoenaed and testified at the hearing. (S-57 at pages 2-7; NT at 728-790, 806-808).

13. In early September 2014, the student's IEP team met to revise the student's IEP. Both parent and student attended the IEP team meeting. The District issued a NOREP for the itinerant emotional support services, and parent signed the NOREP. The District undertook these actions, not knowing if/how the dependency petition pending before the Court might be decided. (P-8, P-9; NT at 589-593).

14. In late September 2014, the Court, through a special master's recommendation, made a finding that the student was a dependent child and ordered the County CYF to assume legal custody of the student. (S-57 at pages 9-12).

15. In early October 2014, County CYF had arranged for a residential educational placement with a therapeutic

component ("the residential placement"). (P-10; S-57 at pages 9-12).

16. In December 2014, the Court reviewed the student's status and recommended County CYF continue to maintain legal custody of the student and that the residential placement continue. (P-11; S-12; NT at 594-596).

17. Under the terms of the Section 13-1306 of the Pennsylvania Public School Code,[7] the student was a 'non-resident inmate' of the residential placement, making the provision of FAPE under 22 PA Code §§14.101-14.162 the responsibility of the school district where the facility is located and not the school district of residence (in this case the District). Therefore, in January 2015, the school district where the residential placement is located undertook revision of the student's IEP at its annual review. (P-13).

18. In mid-March 2015, the Court returned to the parent legal and physical custody of the student, and the student returned from the residential placement. The student returned to the District immediately, but the District had no notice of the Court's decision or the student's return to the District until the student and parent appeared at the high school for class. The District did not have the January 2015 IEP or any academic

[7] 24 P.S. §13-1306.

information from the residential placement. (P-17; S-13; NT at 596-597, 809-810).

19. The record is silent as to what IEP, if any, the District implemented upon returning to the District. But the student's programming included two periods of emotional support per day, in addition to an academic program built around work the student completed at the residential placement. Slowly, the District worked the student into regular education classes with push-in support. Coming back from the residential placement, the emotional support teacher testified quite credibly that the student's affect, engagement in learning, and attendance all showed a remarkable improvement. (S-13, S-14; NT at 599-600, 810-815).

20. In the latter half of March 2015, after the student's return to the District, the District requested an IEP team meeting to discuss the student's IEP. The meeting was scheduled for mid-April 2015, but parent did not indicate that she would attend, and, given the schedules of multiple attendees, including individuals from outside the District, the meeting did not take place. (S-13, S-15; NT at 598, 815-816).

21. After returning from the private placement, from mid-March through mid-April 2015, the student missed no school days. After the District spring break in the latter half of April 2015,

the student missed three consecutive school days, and the student reported that the family/home situation was starting to interfere with school attendance, which escalated the student's emotionality and anxiety in the education setting. (S-1; NT at 817-819).

22. In May 2015, the student's IEP team met to discuss the student's IEP. The student and parent attended the IEP team meeting, which included County CYF attendees. The May 2015 contained two goals—one addressing anxiety/stressors in the educational setting and one addressing socialization/social skills. The District issued a NOREP, recommending itinerant emotional support. The parent never returned the NOREP. (P-14, P-15; S-16).

23. In the spring of 2015, a physical condition also emerged for the student that added a new component to the student's emotional support needs in school and complicated the home/family milieu. (NT at 820-826).

24. Over the course of May and June 2015, through the end of the school year, the student's March/April success in returning to the District diminished, and the student's attendance began to falter. The student's affect in school and engagement in learning also faltered. (S-1; NT at 824-826).

25. In August 2015, the Court, through a special master's recommendation, returned legal and physical custody of the student to the County CYF. The student was placed by County CYF in a county juvenile center ("youth center"). (P-20; S-57 at page 19-23, 60-70, 91-93).

26. Under the terms of the Section 13-1306 of the Pennsylvania Public School Code, the student was again a 'non-resident inmate' of the youth center, making the provision of FAPE under 22 PA Code §§14.101-14.162 the responsibility of the school district where the facility is located and not the school district of residence (in this case the District).[8] (S-22).

27. In October 2015, the Court, through a master's recommendation, ordered that County CYF would continue to retain legal and physical custody and that the student's placement at the youth center would be maintained. As part of the order, however, the student was to undergo a neuropsychological evaluation at the request and expense of parent. (P-26, P-27).

28. Shortly thereafter, parent secured an independent neuropsychoeducational evaluation report ("IEE"). (P-28).

[8] The school district where the residential placement was located (*see* FF 17) is a different school district from where the youth center is located.

29. The October 2015 IEE identified the student as a student with primarily academic/learning disorders, de-emphasizing the student's emotional/social/behavioral needs. When viewed in the context of the record as a whole, especially in light of the very persuasive testimony of the District school psychologist, the October 2015 IEE is not a reliable evaluation document. (P-1, P-2, P-28, P-57 at pages 60-70; S-4, S-35; NT at 29-75, 372-395, 648-717).

30. In November 2015, the student's IEP team, including representatives from the District, the school district where the youth center was located, the IU, attorneys for the school districts and parent met for an IEP meeting at the youth center. (S-22; NT at 170-171).

31. At that November 2015 IEP meeting, in light of the October 2015 IEE, the District requested permission to re-evaluate the student, which was granted by the parent. (S-24).

32. Based on the November 2015 IEP team discussions, in December 2015 the District felt the need to secure a space in a competitive IU program where the student might potentially attend, a program for students requiring mental health or behavioral support. Therefore, without the re-evaluation having been completed or the student's IEP having been agreed-to, the

District communicated with the IU about reserving a space at the program. (P-38; S-25; NT at 174-178).

33. Through mid-December 2015, the student was still placed by County CYF at the youth center located in a neighboring school district. In mid-December 2015, the Court returned to the parent legal and physical custody of the student. (P-39).

34. Because of the student's unavailability due to the placement at the youth center and later due to spotty communication with the family, into January 2016, the District was still waiting to complete its assessments and re-evaluation of the student. (S-24, S-25, S-28).

35. In January 2016, the student's IEP team met at the District. The District recommended that the student's IEP be delivered in the IU program which the District investigated in December. The parent rejected the recommendation but not within 10 days of the issuance of the NOREP. (P-38, P-40; S-25, S-29, S-32; NT at 174-175, 180-181, 193).

36. Over the course of January 2016, lack of communication with the family and then medical complications meant that further assessment of the student would be delayed into later January or even February 2016. Therefore, the District "determined not to pursue additional testing at the time due to (the student's) unavailability." (S-35).

37. In late January 2016, the District issued its re-evaluation report, finding that the student continued to qualify for IDEIA services as a student with an emotional disturbance. While incorporating the content of the October 2015 IEE, the District evaluator declined to identify the student with specific learning disabilities and/or a health impairment. (S-35).

38. The District considered the IU program to be pendent because the parent had not returned the January 2016 NOREP, but the student did not attend any District-offered educational programming after January 2016. The communications regarding potential medical issues led the District to discuss homebound services for the student, but the parent was not responsive. (P-40; S-32, S-36; NT at 192-194).

39. In April 2016, the District attempted to schedule an IEP team meeting in May, including representatives from the IU program which awaited the student. Parent was not responsive to the request, and the IEP meeting did not take place. (S-37, S-38, S-39; NT at 194-195).

40. The student did not attend any District-offered/District-recommended educational programming in the spring of 2016. (NT at 193).

41. In June 2016, parents filed the special education due process complaint which led to these proceedings. (HO-1).

42. At the October 13, 2016 hearing session, the student confirmed that as of that date and only recently before it, the student no longer resides in the District, having moved to a residence in a neighboring state. (NT at 553-554).

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)).

In this case, broad swathes of the parent's claims for denial of FAPE are mislaid at the foot of the District. Namely, as indicated above, under the terms of the Section 13-1306 of the Pennsylvania Public School Code ("Section 1306")[9], "(t)he board of school directors of any school district in which there is located any orphan asylum, home for the friendless, children's home, or other institution for the care or training or orphans or other children, shall permit any children who are inmates of

[9] 24 P.S. §13-1306.

such homes, but not legal residents in such district, to attend the public schools in said district."[10] Regarding students with special needs, Section 1306 requires that: "whenever a student described in this section is…(an) identified eligible student as defined in 22 PA Code Chapter 14…, the school district in which the institution is located is responsible for: providing the student with an appropriate program of special education and training consistent with this act and 22 PA Code Chapter 14…; and maintaining contact with the school district of residence of the student for the purpose of keeping the school district of residence informed of its plans for educating the student and seeking the advice of that district with respect to the student."[11]

For the period from September 2014 – mid-March 2015, when the student was placed by the Court in the residential placement, and again for the period from September – December 2015, when the student was placed by the Court in the youth center, pursuant to Section 1306 school districts other than the District bore the responsibility to provide FAPE to the student, as the student was a 'non-resident inmate' in facilities located within the geographical boundaries of those other school districts. Therefore, the periods where the District bore the responsibility to provide FAPE to the student were mid-March 2015 through June 2015, January – June 2016, and September – mid-October 2016.

[10] 24 P.S. §13-1306(a).
[11] 24 P.S. §13-1306(c).

For the period of mid-March 2015 through June 2015, the largest question is what IEP, if any, was guiding the student's instruction at the District. Here, there is no definitive finding that an IEP was not being utilized; but the record is silent as to whether the IEP was the District's last-proposed IEP of September 2014 or the residential placement IEP of January 2015. What is clear, however, is the (a) the District was not placed in any position to know that the student was returning, let alone that it needed to have programming in place.

The District was not, though, casting the student adrift. Indeed, the student was transitioned over the period of March/April 2015 with great success, and the testimony of the emotional support teacher is very credible and persuasive that working with the student within the framework and successes of the residential placement in terms of District programming resulted in the daily provision of FAPE over that golden month or so. As the school year unfolded through May and June 2015, however, the student's dis-engagement from learning and faltering school attendance were attributed largely, if not solely, to the family/home variable in the equation breaking down and to a significant change in the student's physical condition. Again, the emotional support teacher was highly credible when she described the student as engaged and successful in learning when family/home dynamics were in the background; the change in the student's physical condition was an external event that had implications for every aspect of the student's life,

both at home and at school. In short, the span of approximately six weeks from the time the student returned from the District spring break, and a noticeable decline in engagement/attendance set in, through the end of the school year in June 2015, the record does not weigh against the District that it denied the student FAPE.

For the period January – June 2016, the equities weigh against the student and family in terms of a claim that the District denied the student FAPE. First, not wanting to be caught unawares a second time should the Court return the student from the youth center placement, the District was active in communicating with the school district where that facility was located, with the IU (which was providing an array of services at the facility and for the District), and with County CYF. Second, the District was proactive in securing a space for the student in a competitive IU program (which it ultimately recommended), but over the November/December 2015 timeframe, it had no control of the student's IEP or programming. This was not pre-determination on the part of the District, it was simply prudent planning for a time when the student might, and likely would, return; the District will not be faulted for thinking and communicating proactively. Third, over January 2016, with the student having returned to District rolls, due to a lack of communication with the parent, it found itself stymied in comprehensively finalizing the re-evaluation report and holding IEP

meetings. Quite simply, it was working with a parent who had unplugged from the process.

At the end of the day, over the period January – June 2016, the record in its entirety shows that the District was reaching out to the parent in an attempt to engage the student in District-recommended/District-controlled programming; reciprocal communication or engagement was lacking on the part of the parent/family. Here, too, the record does not weigh against the District as it stood ready to provide the FAPE and proposed an appropriate IEP for the student's education.

Finally, over the period September – mid-October 2016, this hearing officer's interim ruling regarding the student's placement was the IU placement as outlined in the January 2016 IEP and NOREP. As set forth above, this was decided as a matter of law under the intersection of Pennsylvania academic standards and school district credit accumulation/graduation requirements. But parent's claims for denial of FAPE in the 2016-2017 school year (until the student relocated from the District in mid-October 2016) were a matter of substantive evidence. Here, the lack of engagement and attendance again weigh against the parent for a claim that the District denied the student FAPE.

Accordingly, the District did not deny the student FAPE in any of the periods where it held that obligation on this evidentiary record—mid-

March – June 2015, January – June 2016, and September – mid-October 2016. No compensatory education will be awarded.

Two other issues need to be addressed: One, the parent claims that the student should have been provided with extended school year ("ESY") services in the summers of 2014, 2015, and 2016. The student, though, did not exhibit recoupment or regression issues such that ESY programming was necessary.[12] Here, once again, the emotional support teacher was highly credible in explaining that the student's academic engagement was always appropriate when school attendance did not interfere and summer programming, as a bridge between academic school years was unnecessary.

Two, the parties disagree over the student's identification status. The record as a whole supports the identification, and programming, conclusions of the District, specifically that the student's overriding needs in the education setting are social/emotional/behavioral not academic. To the extent that parent claims that the District's evaluation processes, reports, or conclusions are inappropriate, such claims are denied. As with the emotional support teacher, the testimony of the District school psychologist was highly credible and persuasive, both in the testimony asserting the District's positions and in addressing the process/report/conclusion of the independent evaluator who issued the October 2015 IEE.

[12] 22 PA Code §14.132.

Accordingly, claims related to ESY programming and evaluation or identification issues are denied.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District did not deny the student a free appropriate public education in the periods mid-March – June 2015, January – June 2016, and September – mid-October 2016, nor did it deny the student a free appropriate public education with regard to claims to ESY programming over summers 2014/2015/2016 or with regard to claims related to the evaluation or identification of the student.

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

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

November 30, 2016