

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

Final Decision and Order

CLOSED HEARING

ODR File Number: 18979 16 17

Child's Name: N.S. **Date of Birth:** [redacted]

Dates of Hearing:

6/26/2017, 8/16/2017, 9/21/2017

Parent(s):

Parent(s)

Counsel for Parents

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Hearing Officer: Michael J. McElligott, Esquire

Date of Decision: 10/23/2017

INTRODUCTION

[The student] (“student”)¹ is [a primary elementary school-aged] student who resides in the Belle Vernon Area School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² as a student with a health impairment, specifically attention deficit hyperactivity disorder (“ADHD”). Parent also claims that the District both denied the student FAPE and discriminated against the student in violation of the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).³

Parent claims that the student was denied a free appropriate public education (“FAPE”) for a period during the 2016-2017 school year for allegedly failing to identify the student’s disability prior to March 2017 and in the student’s placement from March through April 2017. Parent seeks compensatory education as a remedy.

The District counters that it timely identified the student’s disability. Additionally, the District asserts that at all times its programming and placement were designed to provide FAPE to the student and, when implemented, provided FAPE for the period of parent’s allegations. As such, the

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

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

³ 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”).

District argues that the parent is not entitled to a compensatory education remedy.

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

ISSUES

Did the District meet its obligation to identify the student as a student with a disability?

Did the District provide a FAPE to the student through the student's program/placement in March and April 2017?

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

FINDINGS OF FACT

1. The student entered District schools in kindergarten in the 2016-2017 school year. (School District Exhibit ["S"]-1).
2. In March 2016, on the kindergarten enrollment form, the student's mother indicated that the student had not attended any preschool or other schooling and that there was no indication of any medical, academic, or adaptive needs. (S-1, S-2).
3. In July 2016, on the health information reporting form submitted prior to enrollment, the student's mother indicated that the student had difficulties with [a medical condition]. (S-15 at pages 1-2).
4. On the day before the parent completed the District health information reporting form— July 26th – on July 25, 2016, the student was admitted for individual mental health therapy sessions with a community-based mental health agency with symptoms of adjustment disorder. This information was not shared with the District. (S-14, S-15 at pages 1-2).
5. In September and October 2016, the student engaged in intermittent behaviors in the school environment which the teacher reported to the student's mother, including moving around the classroom, yelling,

defiance, disrespect, [and other behaviors]. On other days over the same span, the student's behavior was entirely appropriate. (Parent's Exhibit ["P"]-1, S-6; Notes of Testimony ["NT"] at 38-79, 81-95, 97-129, 189-259).

6. In September and October 2016, [redacted]. (S-15 at pages 11-12).
7. In late October 2016, the student began to participate in a regular education social skills group for waiting/turn-taking, appropriate hallway behavior, and "line" behavior (not always being the line leader, and not cutting in line). (S-12, S-33).
8. In late October, 2016, the District's school nurse discussed the student's [medical condition]. This conversation was the first notice to the District of the student's [treatment for the medical condition]. (NT at 337-383).
9. In November 2016, the student's mother, teacher, and building principal met during regularly-scheduled parent-teacher conferences to discuss the student's behaviors and transition to kindergarten. (NT at 38-79, 97-120, 189-259).
10. The parent-teacher conference report, in the Work Habits section, indicated that the student was unsatisfactory in following directions, performed excellent work "when (the student) completes it" but "sometimes throws work on the floor", and needed improvement in turning in work with the notation "often refuses to work". (P-3).
11. The parent-teacher conference report, in the Behavior section, indicated that the student was at times excellent and at times unsatisfactory in working well with others, with a notation "depends on mood", was unsatisfactory in respecting the property of others and respecting adults, was at times excellent and at times unsatisfactory in having a positive attitude with the notation "can be an absolute delight", and needed improvement in attempting tasks. (P-3).
12. In November 2016, [redacted]. (S-15 at page 13).
13. After [redacted], the District would respond appropriately by assisting the student [redacted]. At times, the student could not [redacted] return to class and the student's mother or grandmother was summoned to the school to have the student taken home. (NT at 38-79, 81-95, 97-120, 337-383).
14. In December 2016, the student's [medical condition was] discussed at the District's intervention team meeting. [Redacted.] (NT at 147-148).

15. In December 2016, the student again engaged in intermittent defiance and inappropriate peer interaction. (P-2).
16. Upon returning to school after the winter break, the student's problematic behaviors in the school environment escalated. (NT at 97-129, 189-259).
17. In early January 2017, the student's teacher was informed by the parent of another student of a behavior incident on the school bus. (S-31 at page 1).
18. In early January 2017, the parent provided a brief, one-page diagnosis note from a community mental health agency where the student had been receiving counseling services. The diagnosis said "ADHD" and indicated "Section 504 plan would be appropriate". (S-11).⁴
19. Following receipt of the one-page diagnosis note, the District requested that parent authorize a release of records for documentation for more detail on the diagnosis. (P-6, S-13).
20. Over the course of January 2017, the student was involved in classroom incidents involving verbal outbursts [and other behaviors]. (S-4 at pages 1-14, S-10a, S-32).
21. In January 2017, in data collected during the social skills group, the student was reported to be able to engage and to sustain successful peer interaction for 3 consecutive minutes (the first of three consecutive-minute benchmarks in the program). The student was reported to have difficulty with active listening, attention to task, and speaking out loud instead of hand-raising. (S-12).
22. On February 6, 2017, the District requested, and received, parental permission to evaluate the student. (S-17).
23. Over the course of February 2017, the student was involved in classroom incidents involving verbal outbursts, aggressive peer interactions, defiance, [and other behaviors]. (S-4 at pages 15-22, S-10b, S-10c, S-10d; NT at 189-259).
24. In late February 2017, the student was diagnosed by a physician at a local children's hospital with ADHD and oppositional defiant disorder. (S-16).

⁴ This community mental health agency is different from the mental health agency referenced in finding of fact #4.

25. Over the latter two weeks of February 2017, parents of other students [expressed concerns]. (S-31 at pages 2-13).
26. On March 3, 2017, the District issued its evaluation report ("ER"). (S-18).
27. The March 2017 ER included input from the student's parent and teacher, classroom observations, and nurse's information. (S-18 at pages 1-12).
28. The March 2017 ER included intelligence, achievement, behavior, executive functioning, and attention assessments. (S-18 at pages 12-23).
29. In the March 2017 ER, the student's intelligence indicated that the student's full-scale IQ was 110. Achievement testing did not support the identification of the student with a specific learning disability. (S-18 at page 27).
30. In the March 2017 ER, in behavior testing, the teacher's behavior scales indicated clinically significant scores in hyperactivity, aggression, anxiety, depression, atypicality sub-tests, and the externalizing problems composite score, and behavioral symptoms index. The parent's behavior scales did not indicate any clinically significant scores. (S-18 at page 27).
31. In the March 2017 ER, in executive functioning testing, both the teacher's and parent's executive functioning ratings were in the elevated range for the global executive composite and the behavioral regulation index. (S-18 at page 27).
32. In the March 2017 ER, in the attention testing, both the teacher's and parent's inattention and hyperactive-impulsivity sub-scales, and the global ADHD quotient, were all in the atypical range. (S-18 at page 27).
33. The March 2017 ER also included a functional behavior assessment conducted as part of the evaluation. (S-19).
34. The March 2017 ER determined that the student qualified for special education as a student with a health impairment and made multiple recommendations for classroom and behavioral support. (S-18 at pages 28-29).
35. On March 3, 2017, with the issuance of the March 2017 ER, the student's parent waived the 10-day period for consideration of the ER, and the student's individualized education program ("IEP") team met that same day. (S-20, S-21, S-22).

36. The March 2017 IEP indicated, in the special considerations section, that the student exhibited behaviors that interfered with the student's learning and the learning of others. (S-22 at page 5).
37. The March 2017 IEP noted the student's strengths in academics and noted needs with on-task behavior, needing to increase "positive behaviors" and to decrease "negative behaviors", and the need to increase appropriate peer interaction. (S-22 at page 13).
38. The March 2017 IEP contained two goals, including increasing on-task behavior and peer engagement. (S-22 at pages 20-22).
39. The March 2017 IEP recommended a supplemental emotional support classroom at a District elementary school which was not the student's neighborhood school. (S-22 at pages 6, 26).
40. The March 2017 IEP indicated that the student would be in the regular education setting for 23% of the school day, for homeroom, specials (art, gym, music, library) lunch, recess, special classroom activities, assemblies, and field trips. The remainder of the school day, the student would receive all academic instruction and social skills lessons in the emotional support classroom. (S-22 at page 25-27).
41. At the March 3, 2017 meeting, the parent approved the recommended educational placement. (S-24).
42. On March 6, 2017, based on the functional behavior assessment performed as part of the evaluation, and as indicated as a necessity in the special considerations section of the March 2017 IEP, the District implemented a positive behavior support plan. (S-23).
43. Following the early March 2017 IEP meeting, the student began to attend the emotional support classroom. The student continued to exhibit the same types of behaviors (yelling, difficult peer interactions, defiance, aggression toward peers and adults), although to a lesser degree. (S-25 at page 11, S-28; NT at 385-484).
44. Over the period of March 6 – April 28, 2017, while the March 2017 IEP was in place and the student attended the emotional support classroom, the District was in session for 37 school days. The student was absent eight of those school days. (District online calendar; S-34).
45. On April 26, 2017, the student's IEP team re-convened at parent's request. (S-25).

46. In the April 2017 IEP, the student's present levels of academic and functional performance were updated to include performance in the social skills group. The student was reported to sustain interaction for 5 minutes, with success in manners-with-peers scenarios. The student required multiple prompts for re-direction for attention to a worksheet. (S-25 at page 7).
47. In the April 2017 IEP, the student's parent did not register any additional concerns or input as an explicit part of the IEP. Updated information indicated that the student continued to exhibit frequent, but not daily, yelling in the classroom and task refusal. The IEP noted that twice in late March 2017 the student [was aggressive toward] school staff. (S-25 at page 11).
48. In the April 2017 IEP, the student's on-task behavior had increased in the six weeks from the March 2017 IEP from a 30% baseline to 76.5%; the attention goal was increased to 90% on-task behavior by the end of the April 2017 IEP's implementation period. Additionally, the peer-interaction data from the social skills group was made part of the peer-interaction goal. (S-25 at pages 21-24).
49. The April 2017 IEP recommended that the student's placement be changed from supplemental emotional support to itinerant emotional support. Specifically, the student would begin to receive all academic instruction in the regular education classroom; the only scheduled time outside of the regular education classroom would be a 30-minute transition period after recess, three days per week, and a daily 15-minute allotment for potential access to the emotional support classroom. (S-25 at pages 28-29).
50. The April 2017 IEP, then, called for the student to be in the regular education environment 88% of the school day. (S-25 at page 31).
51. In the April 2017 IEP, the following specially designed instruction/program modifications were added: additional time for tests, all tests to be administered in the emotional support classroom, and access to the emotional support classroom when needed. A personal care assistant was assigned to the student as a related service. (S-25 at pages 25-26).
52. The April 2017 IEP included an updated positive behavior support plan. (S-26).
53. As part of the student's placement, for continued access to the emotional support classroom as needed, the student remained in an elementary school that was not the student's neighborhood school.

Parent approved the recommended program and educational placement. (S-27).

54. The student began to attend the new placement on May 1, 2017. (S-25).

ENTIRETY OF RECORD

The evidentiary record in its entirety, including all exhibits and testimony, was considered in issuing this decision. Even where certain exhibits and/or passages of testimony are not explicitly mentioned, this does not mean that such evidence was not considered and weighed in reaching this decision.

WITNESS CREDIBILITY

All witnesses testified credibly. The testimony of all witnesses was accorded approximately the same weight. Where, however, a material issue testified to by the building principal and differed from other testimony, the testimony of the principal was accorded heavier weight.

DISCUSSION AND CONCLUSIONS OF LAW

Denial of FAPE - IDEIA

Child Find. School districts are under a “child-find” obligation to identify students who may potentially qualify under IDEIA as students with disabilities. (34 C.F.R. §300.111; 22 PA Code §§14.121, 14.123). Where a student may potentially qualify as a student with a disability, that student must undergo an appropriate evaluation process—once parental permission has been obtained—

to see if the student should be identified as an eligible student under IDEIA. (34 C.F.R. §§300.300, 304-306; 22 PA Code §§14.102(a)(2)(xxiv-xxv), 14.123).

Here, the District met its child-find obligations. Clearly, the student exhibited problematic behaviors in school. One can understand that the parent feels that the student's needs should have been formally identified sooner than March 2017. But there was no denial of FAPE in the evaluation processes employed by the District. First, the student had just entered the District as a kindergartner, and social/behavioral adjustment is to be expected. While a school district cannot delay or engage in dilatory practices in recognizing the need for an evaluation, the District's position that it was monitoring the student's first exposure to structured, school-based learning in kindergarten is defensible. Second, even as it continued to monitor the student's behavior, it did not simply ignore the student's behaviors—by October 2016, two school months had passed and the student's peer interactions, especially, were then addressed through a social skills group. Third, [redacted] rightly became a concern, both for the student's in-school needs and the health/safety concerns for the student and others presented by [redacted]. Finally, and importantly, even with the student's problematic behaviors, there was no consistency to those behaviors—at times, the student exhibited no problematic behaviors at all and was a typical kindergartner. For all of these reasons, as the first semester of kindergarten unfolded, the District's approach to monitor the student's behavior and manage it through regular education and classroom interventions was not inappropriate.

In January 2017, returning from the winter break, the student's behavior dramatically changed. The problematic behaviors of fall 2016, which had been intermittent, both intensified and became consistent. The caution exhibited by the District in evaluating such a young child was quickly becoming less warranted, and the District's focus on having parent provide some type of formal diagnosis was potentially problematic as, day by day through January 2017, the student's behavior began to overwhelm the classroom environment. Finally, in early February 2017, the District requested permission to evaluate the student. The request led to the issuance of the March 2017 ER on March 3rd formally identifying the student was necessary, as the events of February 2017 showed a further escalation of problematic behaviors, impacting peers and adults more explicitly through aggression in school.

Still, the entire pattern of District action here confirms that its actions did not amount to a denial of FAPE. As set forth above, the evidence does not support a finding of denial-of-FAPE by failing to evaluate the student in the fall of 2016. By mid-January 2017, with the escalation in student behavior and the provision of documentation by the parent of a formal ADHD diagnosis (albeit it nothing more than a jotted note), the District could, arguably, have been in a position to request permission to evaluate. That is not an explicit finding of this decision, but as argument, the earliest point that the District could have been expected to recognize its child-find duty is mid-January 2017. A school district has 60 calendar days (not including summer break, which is not material to this situation) to issue an ER from the date it receives parental permission to

conduct the evaluation. Thus, a request to evaluate the student even in mid-January 2017 would render timely the District's issuance of the March 3, 2017 ER. Indeed, by early February 2017, with parental permission in hand and recognizing the clear need to understand the student's needs on a deeper level, the District moved with alacrity to issue the ER.

On the entirety of the record, the District's issuance of the March 2017 ER was timely, and the District met its child-find obligation.

Program/Placement. Once identified as a student with a disability, to assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her needs (Endrew F. ex rel. Joseph F. v. Douglas County School District, U.S. , S. Ct. , 197 L. Ed. 2d 335, (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (Endrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).⁵ Furthermore, the student's program must be delivered in the least restrictive environment appropriate for the student. (34 C.F.R. §§300.114; 22 PA Code §14.145).

⁵ While in some parts of the United States the recent U.S. Supreme Court decision in Endrew F. presented a new and higher standard to gauge 'meaningful benefit' in a special education program, the standards laid out in Endrew F. have been the longstanding standard enunciated by the Third Circuit Court of Appeals and has been the applicable standard to judge the appropriateness of special education programming in Pennsylvania.

Here, the March 2017 IEP was reasonably calculated to yield meaningful education benefit. The positive behavior support plan, goals, specially designed instruction, and related services all were calculated to allow the student to benefit from significant learning in light of the student's behavior support needs. The dispute between the parties is whether the student's placement for implementation of the March 2017 IEP—supplemental emotional support for 77% of the student's school day—was overly restrictive. Based on the entirety of the record, the student was not denied FAPE for the 29 instructional days the student was in the emotional support classroom.

Critical to this finding is the state of the student's in-class behavior at the beginning of March 2017. For the two months since the student returned from winter break, the student's acting-out, defiance, and—especially—aggression had continually intensified, to the point that over February 2017, including multiple instances of classroom disruption ([redacted]). By early March 2017, no one, including the District, was under any illusions that the student should not be identified at that point as a student eligible for special education. And, again, the student was a new kindergartner who, seven months into the school year, would now attend, with parent's approval, a new school building. Erring on the side of more support, rather than less, was wholly appropriate. Given the seriousness of the behaviors, and the transitions involved, a supplemental level of emotional support was appropriate.

Importantly, the District made sure that the student had as much access to the regular education curriculum as possible. And, by the end of April 2017,

when the student's behaviors—still present, but less problematic—had moderated in the new placement, the District convened the IEP team at parent's request, considered the student's placement, and moved the student into a far less restrictive placement—itinerant emotional support. Decisions about the student's program/placement over the period of March and April 2017 did not deny the student FAPE.

Denial of FAPE – Section 504

In addition to IDEIA, Section 504 requires that a student be provided with FAPE. The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

Therefore, in finding above that the student was not denied FAPE under IDEIA, those findings and that reasoning are adopted here. The District did not fail in its Section 504 obligations to provide FAPE to the student.

Discrimination – Section 504

Additionally, the provisions of Section 504 bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against, has been discriminated against in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F.3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district. (S.H., *infra*).

Here, the District did not discriminate against the student. Throughout the 2016-2017 school year, it did not at any time act with deliberate indifference toward the student in addressing the student's needs in the educational environment.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District has not denied the student a free appropriate public education and has not discriminated against 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

October 23, 2017