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

OPEN HEARING

ODR File No. 19171-1617KE

Parties to the Hearing	Representative
Parent	*Pro se*
Parent[s]	

Local Educational Agency	LEA Attorney
School District of Philadelphia 440 N Broad Street Philadelphia, PA 19130	Andrea Cola, Esq. Office of General Counsel 440 N Broad Street, Suite 313 Philadelphia, PA 19130

Child's Name: J.A.

Date of Birth: [redacted]

Dates of Hearing: 06/30/2017, 07/17/2017, 07/18/2017, 07/19/2017

Date of Decision: 08/07/2017

Hearing Officer: Brian Jason Ford, JD, CHO

Introduction

This special education due process hearing concerns the education of a student (the Student), who is a student in the School District of Philadelphia (the District).[1] The District is the Student's Local Educational Agency (LEA). The Student's grandparent (the Grandparent) is the Student's legal guardian, and has all the same rights as a parent for purposes of this hearing.

The Grandparent claims that the District retaliated against her and the Student. The Grandparent also claims that the District failed to implement the Student's Individualized Education Plan (IEP) and Positive Behavior Support Plan (PBSP). As a result, the Grandparent alleges that the Student was denied a free appropriate public education (FAPE). The Grandparent demands compensatory education and an injunction prohibiting the District from engaging in the alleged retaliatory conduct.

The Grandparent filed this complaint shortly after the District requested a due process hearing to reevaluate the Student and change the Student's placement while the reevaluation is pending. The District complaint (ODR No. 19053-1617KE) was heard on a single record with this case. Although I must issue separate decisions for each complaint, there is overlap between the findings and analysis in each case.

As discussed below, this matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*. As explained to the parties at the outset of this hearing, I have jurisdiction to hear retaliation claims only as they relate to a denial of FAPE.

Issues

The Grandparent alleges ten specific claims against the District. The Grandparent does not delineate between which claims amount to retaliation, and which claims are failures to implement the Student's IEP or PBSP. The Grandparent alleges the following:

1. The District documented behaviors that did not occur.
2. The District conducted a Functional Behavioral Assessment (FBA) that was based on false information.
3. The Student's tests and grades were altered.
4. The Student's homework was not sent home.
5. The Grandparent's emails were ignored.
6. Teachers asked the Grandparent to administer tests at home.
7. The Student was either not given notes for tests, or notes were sent home only one or two days before a test.
8. The Student's sibling was questioned by District personnel.

[1] Identifying information is omitted to the extent practicable.

9. The Student was excluded from a class trip.
10. The District did not follow the Student's Positive Behavior Support Plan (PBSP).

Findings of Fact

All evidence presented in this case was carefully considered. I make findings of fact, however, only as necessary to resolve the issues before me. Consequently, not every piece of evidence is referenced in the findings below.

Documentation of Behaviors That Did Not Occur

It is worth noting that the District did not discipline the Student for any of the Student's behaviors, which are described in greater detail at ODR No. 19053-1617KE, as are the District's methods of deescalating the Student during behavioral incidents.

1. The District documented the Student's behaviors using behavioral charts that complement the Student's PBSP (P-11, S-18), disciplinary referral forms (S-16), bus incident reports (S-17), and bullying complaints (S-15).

2. These documents contain many sloppy errors. Some papers that purport to describe the Student's behaviors in school are dated on weekends. Some forms are completed in such a way that suggests the Student was in a class during days that class did not convene.[2]

3. Overall, the District's documentation of the Student's behaviors is accurate. Taken as a whole, the District's documentation paints an accurate picture of the escalating frequency and intensity of the Student's behaviors.

4. No evidence suggests that the bullying complaints, completed by parents of other children, were completed by District personnel, or concern events that did not happen. I reject the Grandparent's assertions to the contrary.

The FBA

5. On September 27, 2016; October 11, 2016; and October 18, 2016, District personnel observed the Student and used those observations, teacher input, and information from prior testing to draft an FBA. P-6. The FBA's date of creation is November 1, 2016. The FBA did not include parental input.

[2] I have no doubt that the District's careless errors significantly compound the Grandparent's distrust of the District. This is unfortunate, but I find that the District documented behaviors that happened.

6. Two additional, substantively identical FBAs are dated November 15, 2016, and November 21, 2016. P-7, P-8. These documents were generated because the District's IEP management software creates a new document with a new date if the document is altered. The FBA's form was edited on both November dates. No changes were made to the FBA's substance. *See also* NT 375.

7. No evidence suggests that the substantive information in the FBA is false, including the observation reports. The FBA includes results of some prior behavioral assessments. No evidence suggest that those results are false.

Altered Grades

8. The District did not alter the Student's grades.[3]

Homework

9. Emails submitted as evidence by the Grandparent, and the Grandparent's testimony establish that homework was sent home. *See, e.g.* NT 294, 302.

Emails

10. The District did not ignore the Grandparent's emails. *See* P-18, P-19, P-20, P-21, P-22, S-25.

11. The District did not respond immediately to every email that the Grandparent sent. *Id*.

12. On a few occasions, after multiple email exchanges on a topic, some District personnel would stop repeating the same information after the exchange became "unproductive." *See, e.g.* NT 92.

13. It was reasonable for the District to limit its replies to the Grandparent's emails after an email chain became unproductive.

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[3] The only evidence even hinting at altered grades is a "quizlet" that the Student was permitted to take twice. *See* P-17. A quizlet is a short quiz using questions selected from a question bank by a computer. *See, e.g.* NT 106. The Student earned a 53% on the quizlet, and then took the quizlet again in the principal's office. P-17. The questions on the second quizlet were similar but not identical. *Id.* The Student earned a 54% on the second quizlet. *Id*. The Grandparent argues that the handwriting on the quizlets looks different, suggesting that the Student did not take the first quizlet. Subjectively, the Grandparent is correct that the handwriting does not look the same on both quizlets. I will not, however, substitute my subjective impression for evidence. Moreover, the allegation is that the District changed the Student's grades. The evidence does not indicate that the District changed the Student's grades.

Tests at Home

14. The Grandparent points to P-18 and P- 22 to support her claim that the District forced the Student to take tests at home, administered by the Grandparent. Those exhibits demonstrate that a practice exam was sent home with the Student (P-18), and a test was sent home with instructions for the Student to correct errors on the test as homework (P-22).

Notes for Tests

15. Neither the Student's IEP, nor the Student PBSP, require the District to send home notes before tests. P-1, P-3, P-10, S-6.[4]

Questioning the Student's Sibling

16. No evidence was presented regarding this claim.[5]

The Field Trip

17. The Student's school uses a building-wide behavior management system. Under that system, students earn points for good behavior. Students who earned enough points were permitted to go on a field trip to the zoo. NT 92-93.

18. The Student did not earn enough points to go on the field trip. *Id*.

19. The school principal and the Grandmother discussed this, and decided that the Student should not go on the field trip. *Id*.

Implementation of the Student's PBSP

The Grandparent's complaint is fairly read to include a general allegation that the District did not implement the Student's PBSP. During the hearing, the Grandparent made a record of two ways in which the District allegedly failed to implement the PBSP: 1) the District did not detain the Student after school when the Student failed to complete school work, and 2) the District used an Autistic Support and sensory room as a mechanism to deescalate the Student. Regarding these allegations, I find:

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[4] It is possible that the Student requires this accommodation. That is one of many reasons why the District wishes to reevaluate the Student and modify the Student's IEP. *See* ODR No. 19053-1617KE.

[5] As discussed below, the Grandparent did not satisfy the legal test for retaliation claims. Assuming, *arguendo*, that the District did question the Student's sibling, that would not establish retaliation in this case.

20. The Student's school building houses an Autistic Support classroom and a sensory room used primarily by students who receive autistic support. It is not clear if the sensory room is directly connected to the Autistic Support room, but the sensory room contains equipment that helps students calm down. *See, e.g.* NT 427.

21. District personnel would bring the Student to the Autistic Support classroom or the sensory room to help the Student calm down. The Student received no academic instruction in the Autistic Support room, but using the sensory equipment helped deescalate the Student. The Student also have positive interactions with District personnel and other students in the Autistic Support classroom. *See, e.g.* NT 70-74.

22. The frequency with which the Student was brought to the sensory room or the Autistic Support classroom was not documented.

23. The PBSP included a provision under which the Student would be detained after the school day to complete any unfinished class work. *See, e.g.* S-3.

24. By agreement of the parties, the Student moved to a new school building at the start of the 2016-17 school year. NT *passim*.

25. The Student's new school does not give after school detention and had no way to hold the Student after school. *See* NT 148.

26. The Student was not penalized for class work that was not completed during the school day, and was permitted to complete classwork at home. NT *passim*.

27. The after-school detention clause was removed from the Student's PBSP in November 2016. S-6.

Legal Principles and Discussion

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005*); L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed. Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Grandparent is the party seeking relief and must bear the burden of persuasion.

Credibility

Hearing Officers are charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses*". Blount v. Lancaster-Lebanon Intermediate Unit,* 2003 LEXIS 21639 at *28 (2003); *see also* generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014).

I found no significant credibility issues with any of the witnesses. Although I disagree with the Grandparent's assessment of the evidence in this case, I perceive that the Grandparent believes everything that she said under oath. I give more weight to the testimony of the educational professionals who worked with the Student. Their testimony, particularly regarding their failed efforts to address the Student's behavior, was candid and un-embellished.

Retaliation

To prove a retaliation claim, the Grandparent must establish three things. First, the Grandparent must prove that she (or the Student) engaged in protected activities. Second, the Grandparent must prove that the District's actions were sufficient to deter a person of ordinary firmness from exercising his or her rights. Third, the Grandparent must prove a causal connection between the protected activity and the retaliation. *Lauren W. v. DeFlaminis*, 480 F. 3d 259, 297 (3rd Cir., 2007). If the Grandparent establishes all three elements, the District can still defeat the claim if it can prove that it would have taken the same actions even if the Grandparent did not engage in a protected activity. *Ambrose v. Twp. of Robinson*, 303 F. 3d 488, 493 (3rd Cir., 2002).

The District concedes that the Grandparent engaged in a protected activity. The Grandparent's advocacy on the Student's behalf, and on behalf of other children, including prior due process requests, is unquestionably protected. The first prong of the test is, therefore, satisfied.

No evidence was presented to establish the second part of the test. Nothing in the record suggests that the District's actions interfered with the Grandparent's advocacy. The Grandparent very likely has more than ordinary firmness – much to the Student's benefit. The District's actions in no way interfered with the Grandparent's advocacy. Even so, nothing on the record suggests, let alone proves by preponderant evidence, that a more ordinary person would have been deterred from advocacy.

IDEA Claims

Of the ten claims raised in the Grandparent's complaint, two were substantiated by evidence: First, the Student was excluded from a field trip. Second, the District did not implement the portion of the Student's PBSP that called for the Student to complete unfinished class work in school after the school day ended. The Grandparent claims that use of the Autistic Support classroom and sensory room also violated the PBSP, but the PBSP is silent as to that issue, and so their use does not violate the PBSP.[6]

The record in this case does not establish that the Student['s] either exclusion from a field trip, or not detaining the Student after school, resulted in a denial of FAPE for which compensatory education is owed.

The IDEA requires the states to provide a FAPE to a student who qualifies for special education services. 20 U.S.C. § 1412. Local education agencies meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

More specifically, in *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."

Historically in the Third Circuit, the benefits to the child must be 'meaningful'. Meaningful educational benefit must relate to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

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[6] The record, taken as a whole, indicates that bringing the Student to the Autistic Support classroom was used only after the interventions in the PBSP failed. The record also shows that use of the Autistic Support classroom was a very effective strategy. The Student did not receive Autistic support. Rather, the Student helped in that classroom. It appears that Student could self-regulate in that room so that the Student could continue a preferred activity – helping other students who receive Autistic support. Bluntly, that is speculative, which underscores the need for a new FBA, as discussed in ODR No. 19053-1617KE.

Under the historical "meaningful benefit" standard, a school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). The Third Circuit has adopted this standard for educational benefit, and has refined it to mean that more than "trivial" or "*de minimus*" benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts "need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a "basic floor of opportunity"). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Recently, the United States Supreme Court considered what quantum of benefit is required by the IDEA. In *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimus*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics — as is clear in this case.

In general, *Endrew F*. is consistent with the standard that had been applied in the Third Circuit previously. The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

In this case, the decision that the Student should not go on the field trip was a mutual agreement between the Grandparent and District personnel. The Student's IEP and PBSP do not speak to this issue. No evidence suggests that not going on the field trip resulted in the denial of any educational benefit to the Student. No evidence suggests that compensatory education is now needed to remediate some harm caused by not going on the field trip.

The same is true for the lack of after school detention. The District recognizes that the Student's behaviors make it difficult for the Student to complete class work during the school day. Before the Student transferred to a new school building, an accommodation was put into the PBSP to let the Student complete work in school, after the school day. The mutually agreed-to building transfer made this accommodation literally impossible, but the District continued to

recognize the Student's needs. The Student's inability to complete classwork in school did not result in penalties, and the Student could still complete classwork after school – just not in the school building. I recognize that this placed an additional burden on the Grandparent, but that does not amount to a denial of FAPE. No evidence suggests that compensatory education is now needed to remediate some harm caused by not detaining the Student after school.

Conclusion

The District did not retaliate against the Grandparent or the Student. None of the District's actions would deter a person of ordinary firmness from engaging in the protected activity that the Grandparent engaged in: advocating on behalf of the Student and other children.

Of the ten claims made by the Grandparent against the District, two are substantiated by evidence: the District did not detain the Student after school to complete class work, and the Student was excluded from a field trip. Neither of those support the Grandparent's claim that FAPE was denied, or that compensatory education is owed.

ORDER

And now, August 7, 2017, it is hereby **ORDERED** that the Grandparent's claims against the District and demands for relief are **DENIED.**

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER