

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 19185 16 17

Child's Name: R. W. **Date of Birth:** [redacted]

Dates of Hearing:

9/14/2017, 9/22/2017, 10/5/2017, 11/20/2017, 12/20/2017

Parents:

[redacted]

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Counsel for Parent

School District:

North Hills School District, 135 Sixth Avenue
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Hearing Officer: Michael J. McElligott **Date of Decision:** 2/6/2018

INTRODUCTION

Student (“student”)¹ is an elementary-school age student who resides in the District (“District”) and formerly attended the 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 specific learning disability in reading.

Parents claim that the student was denied a free appropriate public education (“FAPE”) for a period from March 2016 through the end of the 2015-2016 school year and the entire following school year, the 2016-2017 school year, related to allegations of deficiencies in the student’s educational programming in reading and in emotional/behavioral support. Parent seeks a quantitative/hour-for-hour compensatory education as a remedy. Analogously, parent asserts these claims and request for remedy under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).³ The parents also claim that the District retaliated against the parents by calling community police regarding behavior of the student’s mother and by limiting the parents’ ability to communicate with the student’s teachers.

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”).

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. The District further asserts that it did not retaliate against the student's parents in any actions it took regarding the parents. Accordingly, the District argues that the parent is not entitled to any remedy, compensatory education or otherwise.

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

ISSUES

Did the District provide FAPE to the student
for a period from
March – June 2016 and/or
in the 2016-2017 school year?

Did the District discriminate against the student?

Did the District retaliate against the family?

FINDINGS OF FACT

1. The student began to attend the District in kindergarten, the 2014-2015 school year.
2. In October 2014, the student was provided with a Section 504 plan for occupational therapy support. (Parents Exhibit ["P"]-4, P-5).
3. By the spring of the student's 1st grade year, the 2015-2016 school year, the student had undergone a number of regular education screenings. (School District Exhibit ["S"]-1, S-4, S-7, S-9).
4. At times, the student exhibited frustration with some academic tasks, defiance, and work refusal. The student in a regular small group session with the school counselor, focusing on coping strategies for these episodes. (S-10; Notes of Testimony ["NT"] at 849-890).

5. In March 2016, the District requested permission to evaluate the student. (S-3, S-30 at pages 6-8).
6. In May 2016, the District issued its evaluation report (“ER”). (S-10).⁴
7. The May 2016 ER identified the student as having “significant weaknesses in basic reading abilities”, explicitly noting dyslexia as the basis for the student’s reading deficits. (S-10).
8. The May 2016 ER included input from the student’s 1st grade teacher who provided detail on the student’s occasional defiance and work refusal. The teacher indicated that the student’s behavior would not be addressed by her, and, later, she would re-engage the student, who would acknowledge the previous behaviors and complete the tasks/work at that time. The teacher also noted instances of inattention and difficulties in organization, which sometimes would be the foundation of the frustration and, ultimately, defiance/work refusal. (S-10).
9. The District did not convene a multi-disciplinary team meeting to discuss the May 2016 ER. Instead, on May 20, 2016, the District school psychologist spoke by telephone with the student’s mother about the conclusions of the ER. (S-10; Notes of Testimony [“NT”] at 270-417, 426-484, 645-707).
10. Contemporaneously with the issuance of the May 2016 ER, the student began to receive community-based counseling services after a formal diagnosis of generalized anxiety disorder. The referral to the community-based program came from the District, which partners with the community agency where students might require more intensive counseling in the school setting. (P-17; NT at 100-137).
11. Beginning in May 2016 and continuing through the 2016-2017 school year, the student continued to meet with the community based counselor, mostly in the school setting during the school year and in the counselor’s office outside of school during the summer months. The counseling focused on helping the student to gain coping skills when faced with situations where problematic behavior might surface. (P-17; NT at 100-137).⁵

⁴ The date on the ER is April 11, 2016. The ER indicates, however, that the assessments were administered on May 6th, 11th, 12th, and 17th. (S-10). The ER was re-dated for May 20, 2016 (the date of the phone call with parent). (P-21).

⁵ The counselor testified that services continued over this period, but documentary evidence in the record in the form of progress notes for sessions with the student only encompasses the period May – November 2016. (P-17; NT at 100-137).

12. In June 2016, the District drafted an IEP. An IEP meeting could not be scheduled given the schedules of the family and District employees. (S-23, S-24; NT at 139-214, 270-417, 426-484).
13. In August 2016, the student's IEP team met at the outset of 2nd grade, the 2016-2017 school year. (S-11, S-30 at pages 1-5).⁶
14. The August 2016 IEP identified the student's needs in basic reading skills, phonemic automaticity, and executive functioning. While "emotional control" is listed as an element of the student's executive functioning need, there is no formal recognition of emotional/behavioral needs. ((S-11 at page 14).
15. The August 2016 IEP explicitly proposed daily direct instruction, one hour per day, in the Wilson reading program. (S-11 at page 13).
16. The August 2016 IEP contained five goals: one in decoding, one in spelling, one in accuracy/fluency, and two in occupational therapy (letter formation and fine-motor skills). (S-11 at pages 21-25).
17. The August 2016 IEP did not contain any goal related to defiance/task-refusal or organization/executive functioning, but program modifications included limiting distractions, breaking down tasks, repeating directions, talking-through tasks, sequencing, movement and task breaks, pre-planning for transitions, and "timeout" from assignments/tasks to re-focus. (S-11 at pages 27-30).
18. The August 2016 IEP recommended a placement in regular education aside from the one hour daily in direct reading instruction, which took place in a learning support classroom. (S-11 at page 34-35).
19. The student's special education teacher undertook the first level of training in the Wilson training program. The teacher did not receive a level-I Wilson certification, but a witness from the Wilson organization testified that such certification is not necessary to engage in Wilson instruction. (S-15, S-16, S-17, S-18; NT at 29-75, 139-214).
20. The student's mother had deeply investigated the Wilson reading program and had received training in the Wilson program. The heart of the dispute on the student's academic needs centered on disagreements

⁶ The August 2016 IEP was re-visited and revised multiple times by the student's IEP team over the fall of 2016. The revisions were not chronologically or explicitly documented in the "August 2016" IEP document, so while these findings of fact note the content of the "August 2016" IEP, aspects of the "August 2016" IEP were developed thereafter. (NT at 100-137, 139-214, 270-417, 426-484, 645-707).

over the family's and District's views on instruction and progress in the Wilson reading program. The evidence presented at the hearing on the parties' views of training, instruction, and assessment in the Wilson reading program was voluminous. (P-6, P-8, P-10, P-11, P-13, P-14; S-15, S-16, S-17, S-18, S-19; NT at 29-75, 80-98, 139-214, 270-417, 426-484, 610-642).

21. In September 2016, the student began instruction in the Wilson reading program at the program's sub-step 1.1. The student showed consistent progress moving through the sub-steps of the program, ending in May 2017 at sub-step 3.4 (moving sequentially through sub-steps 1.1 – 1.6, 2.1 – 2.5, and 3.1 – 3.4). (S-19 at page 36, and, generally, at pages 28-181).
22. In September 2016, the student was at level G (in an alphabetized progression beginning with level A) on the District's curriculum-based reading assessment. The student showed consistent progress moving through the assessment levels, ending in May 2017 at level L (moving through levels G, H, I, J, K, and L). (S-19 at page 38).
23. On October 4, 2016, the student's parents provided the District with a copy of a complaint letter she intended to file with the Pennsylvania Department of Education Bureau of Special Education ("PDE-BSE"). (P-1 at page 5).
24. On October 6, 2016, the parents' complaint was received by PDE-BSE. (P-1).
25. On the morning of Friday, October 7, 2016, the student's mother was at the student's elementary school. The student's siblings attend the same elementary school as the student, and one of the siblings has a Section 504 plan that affords some opportunity for the student's mother to check on the student's sibling while that sibling eats in the cafeteria. (NT at 270-417, 426-484, 539-588).
26. [Redacted.]
27. The building principal and the student's mother continued their conversation regarding the ability of the student's mother to check on the student's sibling. Dissatisfied with the course and result of the conversation, the student's mother withdrew her children from the building that day and left the school. (NT at 270-417, 539-588).
28. [Redacted.]

29. The testimony of the building principal and the student’s mother regarding the events of the morning of October 7th is nearly in equipoise—neither witness’s testimony materially outweighs the other’s. [redacted](NT at 270-417, 539-588).
30. [Redacted.]
31. [Redacted.]
32. On the morning of Monday, October 10, 2016, the building principal emailed other administrators in the District as follows: “[redacted] I would like to request that we create a plan for the following situations related to (the student’s mother)”. The email listed parent’s “unannounced visits at school”, parent volunteering, meeting and school “protocols”, and both email and phone correspondence. (P-29).
33. In November 2016, the community-based counselor who had been providing services to the student in the school setting met with various District employees about employing strategies to address the student’s behavior. (P-18; S-20; NT at 100-137).
34. On November 1, 2016, the PDE-BSE adviser performed a site visit/interviews at the District in investigating the parents’ PDE-BSE complaint. (P-1).
35. On November 16, 2016, the District superintendent issued a letter to the student’s mother (specifically), directing her that all communication regarding the education of the student (and a sibling of the student), whether in person, by phone, or by email, must funnel through the elementary school principal. The principal would be the point-of-contact, relaying communication and information from the parents to the appropriate District employee; that person’s response would flow back to the parents through the building principal. (S-32).⁷
36. On November 29, 2016, PDE-BSE issued its complaint investigation report. (P-1).

⁷ One of the reasons for limiting communication to a point-of-contact was the volume of emails purportedly sent by the student’s mother to various District employees. It became a point of contention in the hearing. Ultimately, it is unknowable how many emails the student’s mother sent to the District. The testimony from an information systems contractor and the student’s mother was not entirely dispositive either way, and both parties attempted to quantify the number of emails. It is not a finding of fact because of the unreliability of the evidence to make a factual finding, but it is clear that the student’s mother sent hundreds of emails (whether in the low 100s, as the mother asserts, or in the high 100s, as the District asserts). (P-35; S-35; NT at 707-720, 840-842, 945-948).

37. From mid-November through mid-December 2016, the District gathered data on the student's classroom behavior for a functional behavior assessment ("FBA") based on parental concerns over anxiety exhibited by the student and District concerns related to "attitude, remaining in a seat during instruction, and utilizing fidget tools properly during classroom instruction". (P-30).
38. In December 2016, the student's IEP team (by this time including the attendance of counsel for the parties) met to review the FBA. The December 2016 FBA indicated that the student engaged in off-task behavior or refusal behavior when confronted with a non-preferred task or a task perceived by the student as being too difficult, or when asked to dis-engage from a preferred task, in order to gain attention and to continue to engage in/to avoid, respectively, preferred/non-preferred tasks. (P-30).
39. In the latter half of December 2016, following the IEP team's consideration of the FBA, the IEP team crafted a positive behavior support plan ("PBSP"). (S-25).
40. In January 2017, the student's IEP team met twice to revise the August 2016 IEP. (S-12, S-13).
41. The January 2017 IEP was revised to indicate that, as a special consideration in the student's programming, the student's behavior in school impeded the student's learning or that of others. Because of this, the December 2016 FBA and PBSP were incorporated in the IEP, as well as additional behavioral concerns shared by the student's mother. These parent-initiated updates resulted in the issuance of a revised PBSP at the early January IEP team meeting. (S-13 at pages 7-12, S-29).
42. The January 2017 IEP noted that the student was making progress on all reading goals and the spelling goal, was making limited progress on the letter formation goal, and had mastered the fine-motor skills goal. (S-13 at pages 27-34).
43. The January 2017 IEP revised the spelling goal (including use of punctuation and capitalization), added a reading comprehension goal (visualization and re-telling), and added a reading fluency goal. (S-13 at pages 35-37).
44. The student's placement and level of service remained the same in the January 2017 IEP. (S-13 at pages 49-51).

45. In late January 2017, the student was privately evaluated, with the private evaluation report being issued to parents in approximately March 2017. The private evaluation report was not shared with the District until evidence disclosure took place for these proceedings. (P-19; NT at 270-417, 426-484, 744-825, 895-945).
46. In April 2017, the student's IEP team met to revise the student's IEP. (S-14).
47. The April 2017 IEP included the original five goals from the August 2016 IEP and the three additional goals from the January 2017 IEP. A new occupational therapy goal (stabilizing paper when writing) was added. (S-14 at pages 27-37).
48. Contemporaneously with the April 2017 IEP meeting, the parent drafted a letter of concerns about the design and implementation of the student's programming. (P-9).
49. On May 9, 2017, through former counsel, the parents filed the special education due process complaint, which led to these proceedings.
50. On May 15, 2017, the parents independently filed a complaint with PDE-BSE. (P-2; NT at 270-417, 426-484).
51. On May 19, 2017, the PDE-BSE adviser interviewed the student's mother. On June 28, 2017, the adviser interviewed the District's director of pupil services. The PDE-BSE complaint investigation report was issued on June 30, 2017. (P-2).
52. The student made progress on each of the goals in the April 2017 IEP (S-21).
53. In early July 2017, the parents' current counsel entered an appearance in place of former counsel. A request by current counsel to file an amended complaint was granted, and an amended complaint was filed late July 2017.

DISCUSSION AND CONCLUSIONS OF LAW

Denial of FAPE

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)).⁸

Here, the denial-of-FAPE claims center on both of the student’s areas of need: reading and problematic behaviors in school. In terms of reading, the record clearly shows that the student made progress in reading under the terms of the IEPs in place, and through the programming delivered, in the 2016-2017 school year. The student’s needs were addressed in separate, appropriate goals, and the explicitly called-for instruction-- the Wilson reading program—was delivered on a daily basis to the student. The parents clearly feel that the Wilson program delivered by the District could have been different

⁸ While in some parts of the United States the U.S. Supreme Court decision in Endrew F. presented a new and higher standard to gauge the appropriateness of special education programming, the standard laid out in Endrew F. has 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.

and, in their view, should have been “better”. But the District implemented the Wilson program with fidelity over the course of the 2016-2017 school year, and the student made sizeable and consistent progress on the reading goals across all of the IEPs in that school year.

In terms of behavior, the record here is not as definitive, but on balance, the evidence clearly weighs in favor of the District providing the programming and supports to address the student’s behavioral needs and to allow the student to make academic progress. To be sure, there are elements of the behavioral programming that, while not problematic or deficient, are less than to be hoped for. The initial evaluation in May 2016 did not assess the student’s behavioral needs in a way one would expect given the input of the student’s 1st grade teacher. But form will not be valued over substance, and the August 2016 IEP contained multiple, specific modifications to address the student’s behavioral needs. Along with this, the student was receiving school-based community counseling services. Here, it could be argued that the community-based counseling was taking the place of services or supports that the District should have been offering. There may be some traction with such an argument, but it is not deep traction. Again, the student had needs, and those needs were being explicitly addressed through planning and collaboration. (Importantly, the notion of school-based counseling was recommended and pursued by the District in May 2016.)

In sum, in terms of the student’s behavioral needs, when faced with the question “did the District deny the student FAPE in how it understood and

programmed for the student’s needs?” the record taken as a whole weighs in the District’s favor. The programming may not have been perfected, but there was no denial of FAPE.

Accordingly, the District did not deny the student FAPE over the period March – June 2016 or in the 2016-2017 school year, and no remedy is owed.

Section 504/Chapter 15 – Denial of FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁹ The provisions of IDEA/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, the foregoing analysis is adopted here— the District did not deny the student FAPE under the provisions of Section 504/Chapter 15, and no remedy is owed.

⁹ Pennsylvania’s Chapter 14, at 22 PA Code §14.101, utilizes the term “student with a disability” for a student who qualifies under IDEA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term “protected handicapped student” for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term “student with a disability” will be used in the discussion of both statutory/regulatory frameworks.

Section 504/Chapter 15 – Discrimination

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 has not in any way discriminated against the student, or taken actions against the student with deliberate indifference in light of the student's disabilities.

Section 504/Chapter 15 – Retaliation

Where a family engages in the process for educating students with disabilities under Section 504, it should do so secure in the knowledge that engaging in those processes will not be held against them by the school district and that they will not be penalized for engaging in those processes. To establish that a school district has retaliated against a family for engaging the processes outlined in Section 504, a three-part test has been elucidated, namely: (1) Did the parents engage in protected activities? (2) Was the school district's retaliatory action sufficient to deter a person of ordinary firmness from exercising his or her rights? (3) Was there a causal connection between

the protected activity and the retaliation? Lauren W. v. DeFlaminis, 480 F.3d 259 (3d Cir. 2007).

Here, the matrix of factual events does not support a finding that the District retaliated against the family. Clearly, the District took some outsized actions in dealing with the family, [redacted] and the limits placed on parental communications with District personnel by employing a point-of-contact through the building principal.

But as the legal analysis dictates, there must be a nexus between the family pursuing protected activities/advocacy and the school district's alleged retaliatory acts. In this case, none of the protected activities/advocacy (the filing of the October 2016 complaint with PDE-BSE and engaging or communicating with District personnel) were causally connected with each other. The October 2016 complaint with PDE-BSE was filed only one day prior to the October 7th incident, so while the District knew a complaint letter had been drafted by the family, it had no idea of when, or even if, it would be filed. And the investigation report itself was not issued until late November 2016, nearly two months later.

Immediately after the October 7th incident, the building principal was communicating about what, if anything, the District might do, given (in its view) an inordinate amount of time/resources being devoted by numerous employees at all levels in working with the family. Again, the intra-District discussions which ultimately resulted in a point-of-contact communication decision by the District (reached in mid-November 2016, again before issuance

of the PDE-BSE complaint investigation report) were underway well before any knowledge of the complaint having been formally filed was known to the District. And even the point-of-contact communication decision itself is not exclusionary, in that parents were fully able to continue to communicate and to engage in the educational programming for their children. It is certainly something that most school districts, and this District one surmises, would rarely engage in. But, on these facts, it is not retaliatory.

Finally, [redacted].

Accordingly, the District did not retaliate against the family.

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 over the periods March – June 2016 or in the 2016-2017 school year. The School District did not discriminate against the student based on the student’s disability. The School District did not engage in retaliation against the family.

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

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

February 6, 2018