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## **Pennsylvania Special Education Hearing Officer**

### **Final Decision and Order**

#### **CLOSED HEARING**

ODR File Number 20659-17-18

**Child's Name:** M.C.      **Date of Birth:** [redacted]

#### **Parent:**

*Counsel for Parent*  
Grace Osa-Edoh, Esquire  
1230 County Line Road, Bryn Mawr, PA 19010

#### **School District:**

Philadelphia School District  
440 N. Broad Street, Philadelphia, PA 19130

*Counsel for the School District*

Anne Hendricks, Esquire  
1800 Byberry Road, Suite 1301, Huntingdon Valley, PA 19006

#### **Hearing Officer:**

Michael J. McElligott, Esquire

#### **Date of Decision:**

11/07/2018

## **INTRODUCTION**

Student<sup>1</sup> is a mid-teen aged student who resides in the Philadelphia 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”)<sup>2</sup> as a student with an emotional disturbance, specific learning disabilities, and autism.

The student’s mother claims that the District’s proposed programming for the 2017-2018 school year, and continuing into the current 2018-2019 school year, was not appropriate and, therefore, denied the student a free appropriate public education (“FAPE”). Parent seeks a make-whole compensatory education remedy, a remedy which would place the student in the same position where the student would have been barring the District’s alleged denial of FAPE.

Analogously, she asserts these claims and request for remedy under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”)<sup>3</sup>, including claims of disability discrimination. Parent also requested, as a

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

<sup>2</sup> 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 §§14.101-14.162 (“Chapter 14”).

<sup>3</sup> 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”). Parent also makes claims under the Americans with Disabilities Act (“ADA”, *see* 28 C.F.R. §§ 35.160-35.161). These proceedings were held pursuant to 22 PA Code §§14.162, 15.8, neither of which provide jurisdiction to hear claims, or engage in fact-finding, in Pennsylvania related to ADA claims. Accordingly, any ADA claims are denied under the terms of the order below, specifically on the basis of lack of jurisdiction.

remedy, reimbursement for an independent educational evaluation and report, issued in November 2017, and an independent functional behavior assessment.

The District counters that at all times it met its obligations to the student under IDEIA and Section 504 in its proposal of programming for the 2017-2018 and 2018-2019 school years. Accordingly, the District argues that the parent is not entitled to any remedy.

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

### **PROCEDURAL BACKGROUND/RULINGS**

- A. In August 2017, parent had filed a complaint at ODR file number 19571-1718. Parent's counsel in the case at 19571-1718 was different from counsel in the instant case. (Parent's Exhibit ["P"]-24; Hearing Officer Exhibit ["HO"]-3; Notes of Testimony ["NT"] at 49-50).
- B. The complaint at 19571-1718 included claims, among others, for reimbursement for services the student was receiving as part of a homeschooling program. (P-24; HO-3).
- C. The hearing at 19571-1718 was convened by a different hearing officer on December 20, 2017. Parent's burden of proof in that matter included proving by a preponderance of the evidence that programming proposed by the District in October 2017 was inappropriate. (HO-3 at pages 10-24).
- D. At the December 20, 2017 hearing, the parent testified. (HO-3 at pages 27-90).
- E. Following the December 20<sup>th</sup> session, there were no further hearing sessions for the complaint at 19571-1718. At some point after December 20, 2017 and prior to February 25, 2018, the parent dismissed her former counsel and retained counsel who represent her in the instant case. On February 25, 2018, parents' new counsel withdrew the complaint at 19571-1718. (NT at 46-58).
- F. In April 2018, the parent filed the complaint in the instant matter, and the first session in these proceedings was held in June 2018. (HO-1).

- G. The prior procedural history between the parties was not part of the complaint in the instant matter, nor part of the District's response to the complaint. In the midst of parent's testimony in June 2018, the undersigned hearing officer for the first time became aware of the prior procedural history, including the complaint at 19571-1718 and the parent's testimony at the December 2017 session as part of those proceedings. (HO-1, HO-2; NT at 46-58).
- H. Not having any context for the nature or scope of the evidence, and particularly the parent's testimony, at the December 20, 2017 session at 19571-1718, the undersigned hearing officer limited parent's testimony at the June 2018 session in these proceedings to the period after January 2018 (with the understanding that, given the chronologies, parent could not have testified at the December 2017 session to any event or exhibit as of January 2018 or thereafter), pending his ability to review the transcript from the December 2017 hearing session at 19571-1718 to see what, if any, impact it might have on evidence in the instant record. (NT at 46-58).
- I. Upon review of the December 20, 2017 transcript at 19571-1718, the undersigned hearing officer found that the parent testified to events between the parties generally from the fall of 2017, specifically including educational programming/documentation, communications, and interactions related to an October 2017 individualized education program ("IEP") and a November 2017 re-evaluation process. (HO-3 at pages 27-90, specifically at pages 67-80, 86-90).
- J. Prior to the second session in these proceedings, in August 2018, the undersigned hearing officer found that, given the parent's testimony and exhibits made part of the record at the December 20, 2017 hearing session, parent had been given an opportunity to develop an evidentiary record, as of December 20, 2017, related to the alleged inappropriateness of the District's October 2017 IEP and November 2017 re-evaluation. Therefore, with that evidence made part of the evidentiary record in the instant matter, evidence related to the fall of 2017 was not re-visited in the instant matter. (HO-3 at pages 27-90, HO-4, NT at 30-69, 229-246).
- K. Parent objected to this ruling and felt that she should be able to testify again as to events related to the fall of 2017. Parent wished to submit an affidavit supplementing her testimony from the fall of 2017. The undersigned hearing officer excluded the proffered affidavit. (NT at 229-246).

- L. Prior to convening the August 2018 session, the parties took a substantial amount of time to discuss the issuance by the District, and approval by the parent, of a notice of recommended educational placement (“NOREP”) for the 2018-2019 school year, in addition to a potential global resolution of all issues. It appeared that these efforts might bear fruit but ultimately did not. (NT at 229-230).
- M. Because the parties were unable to agree on the student’s educational placement for the 2018-2019 school year, the undersigned hearing officer issued an interim pendency ruling for the student for the 2018-2019 school year. (HO-5).

### **ISSUES**

Is the District’s proposed programming  
for the 2017-2018 and 2018-2019 school years  
appropriate?

### **FINDINGS OF FACT**

1. The student last attended school substantively in the District in the 2014-2015 school year, under the terms of an IEP developed in December 2014. (P-10, P-35 at page 3).<sup>4</sup>
2. In the 2015-2016 and 2016-2017 school years, the student was homeschooled and/or received instruction as part of a community-based educational program. (P-35 at 3).
3. In May 2017, as a prior settlement agreement between the parties that addressed the District’s obligations to the student was nearing its operative end, the parent, through her then-counsel, communicated

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<sup>4</sup> The student came back briefly to the District in June 2016, and an IEP was produced at that time, but the student did not return to the District under the terms of the June 2016 IEP. (P-15, P-35 at page 3).

with counsel for the District about an IEP meeting to discuss the student's educational programming. (P-18).<sup>5</sup>

4. In July 2017, the District communicated with parent because it had not received a homeschooling affidavit (indicating the parent's intent to homeschool the student) by the Commonwealth's annual June 30<sup>th</sup> deadline for such affidavits. (P-19).
5. In early August 2017, the student's parent submitted a homeschooling affidavit for the 2017-2018 school year. (P-21, P-35 at page 2).
6. In late August 2017, the parent filed the complaint at ODR file number 19571-1718, indicating that the parent was dissatisfied with the status of the student's educational program/placement. (P-24; see *Procedural Background* section above).
7. In late September 2017, in light of the parent's complaint, the District requested permission to re-evaluate the student and proposed an IEP meeting in October 2017 to discuss potential programming in the District. (P-25, P-27; School District Exhibit ["S"]-3, S-4).
8. In October 2017, the student's IEP team met to devise an IEP for the student, an IEP with a meeting date of October 19, 2017. (P-31, S-11).
9. The proposed October 2017 IEP indicated that the student had behaviors that impeded the student's learning or that of others, necessitating a positive behavior support plan based on a functional behavior assessment. (P-31; S-11).

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<sup>5</sup> The student's placement and programming was addressed through the settlement agreement through the end of the summer of 2017.

10. The October 2017 IEP contained present levels of academic and functional performance from a June 2016 re-evaluation when the student had briefly returned to the District in the midst of multiple years of homeschooling. (P-31; S-11).
  
11. The October 2017 IEP includes ten goals, including three goals in reading, two goals in mathematics, one goal in attention/task-completion, one goal in organization, and three goals in post-secondary transition/career exploration/independent living. (P-31; S-11).
  
12. The October 2017 IEP calls for counseling services 30 minutes per month. (P-31; S-11).
  
13. The October 2017 IEP recommends that the student is eligible for extended school year programming in the summer for reading, mathematics, and behavior support. (P-31; S-11).
  
14. The October 2017 IEP recommends that the student receive instruction for two hours per day in a learning support and one hour per day in an autism support. (P-31; S-11).
  
15. The October 2017 IEP recommends that the student attend the District high school the student would attend if Student did not have a disability and that the student spend 57% of the school day in the regular education setting. (P-31; S-11).
  
16. The October 2017 IEP was seen as interim programming, to be implemented for 30 days upon the student's return to the District, whereupon it would be revised as the District began to work with the student, as well as in light of the District's re-evaluation. (NT at 107-110, 320-322).

17. In November 2017, the parent disapproved a NOREP which accompanied the October 2017 IEP. (S-12).
18. In November 2017, a private evaluator issued a report. (P-35).
19. The November 2017 report contained an extensive educational history and record review. (P-35 at pages 2-15).
20. The November 2017 report contained assessment of academic skills, a reading assessment, an assessment by parent of student's social response, behavioral assessment, and transition assessment. (P-35 at pages 15-25).
21. The November 2017 report indicated concerns with vocational understanding, emotional regulation (including a recommendation for a return to outside therapeutic intervention), socialization in crowds, and the need for support in reading and mathematics. (P-35 at pages 25-27).
22. The November 2017 report was issued with recommendations geared toward remaining in a then-current, community-based homeschooling setting, or a private school placement. (P-35 at pages 27-28).
23. The November 2017 report included recommendations for a potential placement in a public school environment, including a gradual transition to such an environment, with particular attention paid to the student's engagement in crowded/noisy environments (hallways, cafeteria). The evaluator recommended any public school placement be in a "small, structured, supervised school environment". (P-35 at pages 26-28).



24. In December 2017, the District issued its re-evaluation report (“RR”). (P-33).
25. The December 2017 RR contained the results of multiple prior evaluations, mostly privately obtained or obtained as part of medical evaluations. (P-33 at pages 1-23).
26. The December 2017 RR contained updated assessments performed by the District evaluator, including cognitive assessment, achievement assessment, behavioral assessment, anxiety assessment, executive functioning assessment, and autism spectrum assessment. (P-33 at pages 17-23, 26-36).
27. The December 2017 RR identified the student as a student with an emotional disturbance, specific learning disabilities, and autism. (P-33 at page 23).
28. The District evaluator noted that: “Should the student return to a traditional school setting (from homeschooling), (the student’s) need for specially designed instruction appears clear....educational planning and progress should be closely monitored to ensure (the student) makes appropriate progress. (The student’s) recent accomplishments and recent courage (e.g., taking public transportation independently, talking to strangers),...desire for positive friendships and ‘to be normal’, and...current social and artistic endeavors speaks well for (the student’s) prognosis and...ability to function within a traditional school setting.” Yet the evaluator also found that “sudden abnormally high rates of fear or inhibition in particular situations such as loud, crowded hallways would impede functioning....” (P-33 at page 24).
29. The District evaluator recommended: re-engaging treatment by outside providers, a functional behavior assessment in the District along with school-based counseling and autism support, educational/social/community engagement both through and outside the District, a focus on academic skills and support in reading and

mathematics, and strategies to address executive functioning/attention/organization. (P-33 at pages 25-26).

30. The student continued in a homeschooling program through the 2017-2018 school year. In May 2018, the student's mother inquired about having the student enrolled in the District but did not formally enroll the student at that time. (NT at 63-66, 330-332).

31. The August 2018 interim pendency ruling included the following:

- the October 2017 IEP was to be implemented at the outset of the 2018-2019 school year
- an increase in the amount of individual school counseling to 30 minutes weekly
- a directive that the student's IEP team meet to design a transition plan, bringing the student into the District in stages of longer and longer school days over the course of September 2018, culminating in a full school day by the last week of September
- a directive that, once the student was attending the District for a full school day, the District was to undertake a functional behavior assessment, an occupational therapy evaluation, and a speech and language evaluation, all in the school environment. (HO-5).

## **DISCUSSION AND CONCLUSIONS OF LAW**

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). 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 individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); K.D. v. Downingtown Area School District, F.3d (3d Cir. at No. 17-3605, September 18, 2018)).

Furthermore, in Pennsylvania, there is very little statutory or regulatory instruction regarding students with special needs enrolled in homeschooling (formally referred to in the Commonwealth as a “home education program”). (24 P.S. §13-1327.1). In fact, the provision of the Pennsylvania School Code which provides the requirements, limits, and parameters of homeschooling addresses the education of students with special needs in only the following way: “Nothing in this section shall be construed to affect Federal or State law relating to special education for students with disabilities in home education programs.” (24 P.S. §13-1327.1(h)).

As an initial matter, then, it appears that in Pennsylvania a homeschooled student would have available to him or her all of the services available through Chapter 14— that is, the identification and evaluation of the student, and an offer of special education programming through an IEP. Indeed, school districts are obligated to “adopt and use a public outreach awareness system to locate and identify children thought to be eligible for special education within the school district’s jurisdiction.” (22 PA Code §14.121(a); *see also* 34 C.F.R. §300.111). The fact, then, that the student was

in a homeschooling program, and not formally enrolled in the District, in the 2017-2018 school year does not impact the ability of the parent in the instant case to engage with the District in the potential provision of special education programming.

So, here, the question turns on whether the District's educational programming, proposed through the October 2017 IEP, is reasonably calculated to provide significant learning to the student in light of the student's unique circumstances. The weight of the record supports a conclusion that the District has met its FAPE obligation to the student.

First, given the prior settlement agreement, the student's educational placement and programming was addressed through the end of the summer of 2017. In August 2017, the parent submitted her homeschooling affidavit for the 2017-2018 school year and also filed the complaint at ODR file number 19571-1718. In September 2017, the District communicated with the parent directly, providing a proposed interim IEP and requesting permission to re-evaluate the student since the student had not been in District programming since the 2014-2015 school year. Procedurally, then, the District responded to the student and parent in a timely way, moving to have programming in place should the student be exited from homeschooling and return to the District.

Second, the October 2017 IEP is reasonably calculated to provide significant learning to the student in light of the student's unique circumstances. The IEP included information on the student's present levels of academic and functional performance which the District possessed as of

October 2017. It included numerous goals in the areas of the student's needs, and specially-designed instruction/program modifications for the delivery of special education, including monthly counseling. The student's programming would not be overly restrictive (34 C.F.R. §§300.114-120 ; 22 PA Code §14.145). In sum, based on what was known about the student's needs at the time, the October 2017 IEP was an appropriate offer of FAPE.<sup>6</sup>

In November 2017, the independent evaluator issued her report, and in December 2017, the District issued its RR. What is striking about both reports is how much they have in common in terms of the student's needs—a structured transition to school-based programming, academic support in reading and mathematics, emotional support and autism support needs, with special attention paid to the student's involvement in noisy or crowded environments.<sup>7</sup> In terms of the December 2017 RR being part of the District's obligation to understand the student's needs in providing FAPE, the December 2017 RR is entirely appropriate. (34 C.F.R. §§300.302-311 ; 22 PA Code §14.102(a)(2)(xxv-xxvi)).

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<sup>6</sup> What is clear, too, is that in the fall and winter of 2017, into the spring of 2018, everyone's focus on the student's educational programming was not from a perspective of returning the student to the District. The student had returned to homeschooling, and the record at 19571-1718, and indeed even the November 2017 independent report, were both clearly geared to the student continuing in the community-based homeschooling program (including a claim at 19571-1718 for reimbursement therefor), not for transitioning the student expeditiously to District programming. (P-24, HO-3, P-35).

<sup>7</sup> Significantly, too, both evaluators opined that the family should give consideration to having the student re-engage with therapeutic/mental health providers outside of the school environment.

It is time for the October 2017 IEP to undergo its minimum annual review. That IEP may undergo revision, and perhaps significant revision, based on the evaluations (both the District's evaluation and the private evaluation) undertaken after its issuance, and most especially based on the student's performance in the first two months of the current 2018-2019 school year. Additionally, the results of the functional behavior assessment, and OT and S&L evaluations, will also be available, or will soon be available, for the IEP team's consideration. And, as part of the order below, the IEP team will be ordered to meet to revise the student's IEP as the team deems it necessary or advisable.

The record in its entirety, however, supports a finding that in the 2017-2018 and current 2018-2019 school year through the issuance of this decision and order, the District met its obligations to the student under IDEIA/Chapter 14.

#### Section 504/Chapter 15

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 §§15.1-15.8).<sup>8</sup> The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504

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<sup>8</sup> 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.

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 met its FAPE obligations to the student under Section 504/Chapter 15.

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 act, in any way, with deliberate indifference toward the student.

Accordingly, the District met its FAPE obligations to the student and did not discriminate against the student under the anti-discrimination provisions of Section 504.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the School District met its obligations to provide a free appropriate public education to the student under the terms of the IDEIA/Chapter 14 and Section 504/Chapter 15 in its proposed programming for the 2017-2018 and 2018-2019 school years, through the date of this decision.

Within 10 days of the date of this order, the student's IEP team shall meet to revise the student's IEP as the team deems it necessary and/or advisable. The student's IEP team is explicitly directed to consider the content of the November 2017 independent report, the December 2017 RR, and the results of the functional behavior assessment, OT evaluation, and/or S&L evaluation, as that assessment/those evaluations may be available to the IEP team. The IEP team is further explicitly directed to garner specific input as to the student's behavior and potential needs in hallways, the cafeteria, and other school-based situations involving crowds or noise.

Parent's claim in the complaint for remedy under the Americans with Disabilities Act is denied for lack of jurisdiction of these proceedings to adjudicate such claims.

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

With the issuance of this final decision and order, the undersigned hearing officer releases jurisdiction.



*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

November 7, 2018