

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

Child's Name:

A. B.

CLOSED HEARING

ODR Case #20828-1718KE

Date of Hearing:

July 26, 2018, August 8, 2018

Parents:

[REDACTED]

Phillip A. Drumheiser, Esquire – 2202 Circle Road
Carlisle, PA – 17013
Counsel for Parents

School District:

Wyoming Area School District – 20 Memorial Street – Exeter, PA – 18643

Sharon Montanye, Esquire – 331 Butler Avenue – P.O. Box 5069
New Britain, PA – 18901
Counsel for the School District

Date of Decision:

August 15, 2018

Hearing Officer:

Michael J. McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (“student”)¹ is a late-teen aged student residing in the District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania special education regulations as a student with a health impairment.²

Parent’s complaint at this file number arises out of procedural matters following the decision of the District school board to expel the student from the District. Parent filed a complaint on April 3, 2018 with a variety of claims. The April 3rd complaint followed on the heels of a manifestation determination process undertaken when the student was allegedly involved in a behavior incident in school in mid-March 2018. (Hearing Officer Exhibit [“HO”]-1 – *April 3rd Complaint*).

The claims in the April 3rd complaint included:

1. Substantive allegations that the manifestation determination process was flawed and denied the student a free appropriate public education [“FAPE”] when school-based members of the team, in the absence of the student and

¹ To protect the confidentiality of the student, the generic use of “student”, rather than a name or gender-specific pronouns, will be employed and will be substituted in direct quotes throughout the decision.

² It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 24 PA Code §§14.101-14.163.

parent, found that the alleged behavior was not a manifestation of the student's disability.

2. Procedural allegations that the manifestation determination process was prejudicially flawed in denying the student and parent an opportunity to participate in the manifestation determination meeting.
3. Substantive denial-of-FAPE allegations for the brief period when the student attended the District, from November 2017, when the student enrolled in the District, through mid-March 2018, when the student was excluded from the District for the alleged behavior incident.

What followed after the filing of the April 3rd complaint was an intricate procedural history across a series of decisions— two already issued, and one yet to be convened— involving the student as the claims brought forward in the April 3rd (and a subsequent June 14th complaint, see below) required different approaches, and involved different resolution timelines, as parent's claims encompassed retrospective, contemporaneous, and forward-looking issues regarding the provision of FAPE across various educational placements.

The allegations related to the substantive denial-of-FAPE allegations for the period November 2017 – March 2018 (#3 in the above list) were heard and resulted in the decision at ODR file number 20601-1718. (*See HO-2 – Decision at ODR file number 20601-1718*).

The allegations related to the substantive result of the manifestation determination process (#1 in the list above) have two aspects. One aspect, the hearing at ODR file number 20467-1718, involved the finding by school-based members of the manifestation determination team, in the absence of the student and parent, that the alleged behavior was not a manifestation of the student's disability. The hearing at 20467-1718 was convened in May 2018, but no result was reached on the merits. Neither party was prepared to present evidence in that hearing process as to the disciplinary incident underlying the student's alleged involvement. (For details as to the parties' positions in that hearing, and their mutual view that the evidence as to the underlying alleged behavior would not be produced, see HO-3 – *Decision at ODR file number 20467-1718*).

The second aspect of the substantive denial-of-FAPE claims—the student's special education placement in light of the student being expelled from the District— is the focus of the instant decision. Specifically, the District's school board, following the manifestation determination process, moved forward in June 2018 with a formal hearing under 22 PA Code §12.8(b) and voted to expel the student. This necessitated a change in the student's special education placement as a result of the expulsion. Prior to the formal hearing before the school board, the parent filed a complaint on June 14, 2018 seeking to halt the school board's action. (HO-4 – *June 14th Complaint*). The District filed a

motion to dismiss the June 14th complaint for lack of jurisdiction. (HO-5 – *Motion to Dismiss June 14th Complaint*). The formal hearing before the school board went forward, and the school board voted to expel the student. (HO-6 – *Transcript & Exhibits from June 18, 2018 Formal Hearing*).

On the record at the July 26th hearing session, the undersigned hearing officer issued an oral order, agreeing in substance with the District that he did not have the authority or jurisdiction to countermand the decision of the school board. But the District’s motion was denied and parent’s complaint was not dismissed because the program/placement proposed by the District as the result of the student’s expulsion from the District was in dispute between the parties, and special education due process clearly had jurisdiction to decide the appropriateness of the District’s proposed placement. (Notes of Testimony [“NT”] at 12-15; 22 PA Code §§12.6(e)(2), 14.162(b); see Fry v. Napoleon Community Schools, 580 U.S. , 137 S.Ct. 743, 197 L.Ed. 2d 46 (2017)). Therefore, the appropriateness of the District’s proposed special education placement for the 2018-2019 school year, in light of its expulsion of the student, is the focus of this decision.³

³ The procedural denial-of-FAPE allegations related to the manifestation determination process (#2 in the list of issues on pages 2-3) have not yet been placed at issue in the context of a hearing—those claims will be heard in a separate evidentiary process which has yet to convene under a separate ODR file number.

For the reasons set forth below, I find that the District's proposed placement is overly restrictive and, in part, inappropriate.

ISSUE

Is the District's proposed program/placement for the 2018-2019 school year, in light of its expulsion of the student, appropriate?

FINDINGS OF FACT

1. The student enrolled in the District's high school in November 2017. (HO-2).
2. In mid-March 2018, the student was allegedly involved in a behavior incident at the school which led to the student's exclusion from the District. (HO-3; HO-6).
3. In June 2018, as a result of the behavioral incident, the District's school board voted to expel the student from District schools. (HO-6).
4. The District's proposed placement of the student is an alternative education placement for disruptive youth ("alternative education placement"). (School District Exhibit ["S"]-5 at pages 30-33; NT at 30-32).
5. While attending the District, the student's tardiness, attendance, and lack of work completion were the needs identified by both parent and school staff. (HO-2; S-5 at pages 10-13).
6. In May 2018, the District drafted an individualized education program ("IEP") for implementation at the alternative education placement. (S-5 at page 12, 30-32).

7. The May 2018 IEP was largely the IEP in place for the student during the November 2017 – March 2018 period when the student attended the District. (HO-2; S-5).
8. The May 2018 IEP indicated that the student did not exhibit behaviors that impeded the student’s learning or that of others. (S-5 at page 9).
9. The May 2018 IEP contained two goals, one for increased attendance allowing for late-arrival and one for mathematics. (S-5 at pages 22-23).
10. The May 2018 IEP contains program modifications and specially designed instruction which can be implemented at the alternative education placement. (S-5 at page 24; NT at 69-70).
11. The May 2018 IEP indicates that an assistive technology assessment will be undertaken at the alternative education placement. (S-5 at page 25).
12. The May 2018 IEP indicates that a behavior specialist will consult with the alternative education placement. (S-5 at page 25).
13. The May 2018 IEP calls for the student to receive instruction almost exclusively in regular education for all academic classes, lunch, and physical education. The student may access special education resource room support. The student would spend 96% of the school day in regular education. (S-5 at page 27, 29).⁴
14. The alternative education placement has approximately 40-50 students. (NT at 93).
15. The alternative education placement has a schoolwide behavior plan, and every student is required to have an individualized behavior support plan. Individuals at the alternative education placement are trained in crisis response. (NT at 61).

⁴ Based on fact-finding in the hearing process at 20601-1718, this was the student’s placement from November 2017 – February 2018. In February 2018, the student was moved into a more restrictive special education setting—receiving two periods per day of special education instruction, one in English and one in mathematics. This change in placement was found to be inappropriate and undocumented. Which of the two placements—almost entirely in regular education every day as documented, or two periods per day in a special education classroom as previously implemented but not documented—is unclear. (HO-2).

16. Every student with an IEP at the alternative education placement has a paraprofessional supporting the student. (NT at 62).
17. The alternative education placement provides four 50-minute periods of instruction in language arts, mathematics, social studies, and science. Every day, there is a mandatory 50-minute period of group counseling or life-skills programming. (NT at 63, 80, 112-113, 115-116).
18. The students at the alternative placement have a 30-minute lunch period and a 30-minute daily physical education class. (NT at 112).
19. The administrator from the alternative education placement who testified indicated that the placement had the means to implement instruction toward the IEP goals, including the specially designed instruction in the IEP. (S-5 at pages 22-24; NT at 68-70).
20. The alternative education placement serves some students who have dangerous or violent histories/tendencies. (NT at 72-75, 90-92, 105-106).
21. The students are “wanded” each day for weapons/contraband before entering the alternative education placement. (NT at 111).
22. In May 2018, a large-scale fight, described by local media as a riot, occurred at the alternative education placement. (P-5; NT at 72-75).
23. In the prehearing planning, up to and including the first session of the hearing on July 26th, the parties were attempting to see if a private placement might be arranged by the family. If that had been the case, the August 8th session would have included evidence about the parent’s proposed placement at private school. The student was not accepted at the private school, so that evidence could not be, and was not, provided as part of the hearing. (HO-7 – *Email from Parent’s Counsel re: Potential Private Placement*; NT at 23-27, 40-41, 119-121).

DISCUSSION AND CONCLUSION 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 §§14.101-14.163)). 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, 580 U.S. , 137 S. Ct. 988, 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)).

Moreover, both federal and Pennsylvania law require that the placement of a student with a disability be in the least restrictive requirement (“LRE”). Educating a student in the LRE requires that placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting which affords exposure to non-disabled peers and regular education and that “separate schooling...occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (34 C.F.R. §300.114(a)(2) and,

generally, 34 C.F.R. §§300.114-120 ; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

Here, the District’s proposed placement for the 2018-2019 school year is overly restrictive. The alternative education placement itself, by its very nature, is a restrictive placement—it is highly structured and designed, from arrival through the course of the school day, to take into account safety and potential crisis behavior on the part of students at the placement. At times, violence has entered the constellation of concerns at the alternative education placement.

But by itself, this general school environment does not render the alternative education placement inappropriate for the student. What renders the alternative education placement inappropriate—namely prejudicially restrictive—is the daily mandatory counseling/life-skills class, counseling and life-skills support which is not part of the May 2018 IEP and has not ever been part of the student’s school programming. (HO-2). A mandatory 50-minute group counseling and life-skills class—required as part of any student’s participation in programming at the alternative education placement—is, for the student, not part of the May 2018 IEP (or any IEP for the student; *see* HO-2). Indeed, the May 2018 IEP indicates that the student’s behavior does not impede the student’s learning or that of others, does not contain any related services related to counseling or life-skills, and contains no

behavior plan.⁵ In sum, the student would go from (at least as documented) an almost entirely regular education program to a program with mandatory daily counseling or life-skills instruction. It is inappropriate for the student.

Accordingly, the student will be awarded prospective compensatory education as the result of an overly restrictive placement.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The award of compensatory education accrues from a point where a school district knows, or should have known, that a student was being denied FAPE, accounting for a reasonable rectification period to remedy the proven denial-of-FAPE. (Ridgewood; M.C.).

In this case, the award of compensatory education must be entirely prospective because the District's proposed program/placement has not yet been implemented. Yet as the result of the expulsion, the District has directed that the alternative education placement be the student's

⁵ The May 2018 IEP indicates that the involvement of the behavior specialist was at the behest of parent and not the District, and the witness from the alternative education placement was unfamiliar with what the behavior specialist would be tasked with. (S-5 at page 25; NT at 104).

placement. Therefore, the student will be awarded 50 minutes of compensatory education for each school day the student attends the alternative education placement. Because the award of compensatory education is explicitly tied to the restrictive nature of forcing the student into mandatory programming, the District's obligation to provide compensatory education is triggered only when the student is in attendance at the alternative education placement. The order for compensatory education will be written accordingly.

As for the nature of the compensatory education award, the parent may decide in her sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

•

ORDER

In accord with the foregoing, the alternative education placement selected and recommend by the School District as the result of its expulsion of the student denies the student a free appropriate public education because it is overly restrictive. The alternative education placement forces the student into mandatory programming which is not reflective of the student's needs, has not ever been part of the student's educational programming, and is not part of the District's proposed IEP. Accordingly, the student is awarded 50 minutes of compensatory education for every school day of documented attendance by the student at the alternative education placement.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

August 15, 2018