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: 22103-18-19

Date of Hearing: June 4, 2019

Child's Name: T.S. **Birthdate**: [redacted]

Parent:
[redacted]

Counsel for Parent
Pro Se

Local Education Agency:

School District of Philadelphia
Office of General Counsel
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Hearing Officer: Linda M. Valentini, Psy.D, CHO
Certified Hearing Official

Date of Decision: June 17, 2019

Background

Student[1] is a pre-teen aged District resident who is eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and its Pennsylvania implementing regulations, 22 Pa. Code § 14 *et seq*. (Chapter 14) with the current classifications of autism, speech or language impairment, and specific learning disability. As such, Student is also regarded as an "individual with a disability" as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*., and as a "protected handicapped student" under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15).

The parties had previously entered into a settlement agreement and requested a 60-Day Conditional Dismissal Order; at that time the Parent was represented by counsel. The Parent subsequently dismissed his attorney, and as permitted under a 60-Day Order, timely requested reinstatement of the matter acting *pro se*.[2]

The Parent alleges that the District did not provide Student with a free appropriate public education (FAPE) in the areas of evaluation and placement and among other forms of relief is requesting an independent evaluation and compensatory education for the past two years. The District maintains that its evaluation was appropriate, that it has provided Student with FAPE and that no relief is warranted.

In reaching my decision I carefully considered the witnesses' sworn testimony, documents admitted into the record, and the parties' oral closing arguments. Not all testimony or all documents are referenced below, only those relevant to the issues before me. Based on the record before me I find in favor of the Parent on some but not all his issues.

Issues[3]

1. Did the district evaluate Student in all areas of suspected disability as put forth in the November 21, 2018 reevaluation report?

[1] In the interest of confidentiality and privacy Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

[2] Both parties were informed by email before the hearing and in person at the hearing that the hearing officer would not review the previous settlement agreement, would permit no testimony about it, and that in the decision pursuant to the hearing either party could gain more or lose more than provided for in the previous agreement. The hearing officer also told the parties that if they reconsidered their positions and wanted to revert to the terms of the previous agreement they had to notify the hearing officer on or before June 14, 2019. As of the date of this decision neither party has contacted the hearing officer in this regard.

[3] The Parent requested a prospective private school placement but a specific school was not identified. The hearing officer declined to add this issue to the case. The Parent also sought an order that the District pay his former attorney's fees. Hearing officers have no authority to award attorney fees.

2. If the District's reevaluation was inappropriate in any respect, what independent evaluations should it be required to fund?[4]

3. Did the District fail to offer Student appropriate transition services when moving from elementary to middle school?

4. Does Student's placement provide Student with FAPE?

5. If the District has not provided FAPE to Student, what remedy is due?

Findings of Fact[5]

1. Student's Full Scale IQ was miscalculated by a District psychologist in 2015 and the miscalculation erroneously placed Student in the Average to High Average Range of Intelligence. When another District psychologist reviewed the 2015 scores he questioned whether they were correct, but allowed them to remain part of the November 2018 reevaluation. [NT 151-161; S-1]

2. The Parent has been under the impression that Student's cognitive functioning was in the Average to Above Average Range. Based on the Index scores this cannot be accurate. [NT 162]

3. Prior to entering the middle school Student was placed in general education classes for most of the school day, with pull-out instruction for autistic support, learning support and speech/language services.[6] [NT 23, 79-80]

4. The 2015-2016 3rd grade IEP indicates that Student was in general education for 88% of the school day. [J-8]

5. The 2016-2017 4th grade IEP provides for 69% of the day in general education. [S-2]

6. The 2017-2018 5th grade IEP provides for 69% of the day in general education. [J-10]

7. The 2018-2019 6th grade IEP provided for 37% of the day in general education. [S-4]

8. The Parent believes that even though the 2018-2019 IEP calls for 37% of the day in general education Student in fact was not in general education at all. [NT 78]

[4] Following the discovery of information discussed below, in the middle of the hearing the District agreed to fund an independent educational evaluation. [NT 161]

[5] For the reader's reference, Notes of Testimony refer to the witnesses' testimony as follows: Parent - NT 23 through 87; Autistic Support Teacher – NT 89 through 148; Psychologist NT 148 through 165; Speech/Language Pathologist NT 165 through 191; Special Education Liaison and International Baccalaureate Coordinator – NT 192 through 212.

[6] Student's IEPs run from November to November such that an IEP spans parts of two school years.

9. As Student's IEPs run from November to November, when Student entered middle school in 6th grade in November 2018, the first third of the school year was still governed by the 5th grade IEP which called for 67% of Student's day in general education. [NT 81; J-10]

10. Student's educational environment did not change from the 2017-2018 IEP that ended in November 2018 to the 2018-2019 IEP that began in November 2018 even though the two IEPs have different provisions for general education versus special education. [NT 133]

11. The Parent believes that Student excelled in the 2017-2018 school year with the proportion of general education classes versus special education classes and cited Student's receiving various awards and honors.[7] [NT 197-198]

12. At an IEP meeting in November 2018 attended by the Parent and the middle school principal with other District staff present the Parent questioned why the amount of time Student was in special education as opposed to general education was different from previous years. The Parent alleges that the principal said that the type of programming Student had received in past years was not available at that middle school. Some District witnesses remembered the conversation but did not remember the details.[8] [NT 25-26, 32, 39-40, 44, 77, 84-85, 189-190, 194-195]

13. The amount of time a student spends in general education versus special education classes is an IEP team decision and parents are part of the IEP team. [NT 194-195]

14. When planning for Student's entrance into middle school the special education liaison reviewed the previous year's IEP. [NT 197-200]

15. Changing the amount of time Student was in general versus special education classes was not done at a team meeting, and the Parent was not included in the decision. With a "quick view" to placing Student in a classroom the special education liaison (possibly) consulted with a teacher but made the placement decision herself based on Student's requiring autistic support services. [NT 201-204]

16. At the time the special education liaison made the placement decision, she did not issue a NOREP or in any other way inform the Parent of the change of inclusion ratio from the previous year or afford the Parent the opportunity to discuss Student's placement. [NT 205-209]

[7] Although the Parent cites the proportion as 80% general education and 20% special education, the IEP for 2017-2018 calls for 67% general education and 32% special education. [J-10]

[8] The Parent had the opportunity to have the principal testify, which would have necessitated another hearing session and a possible Decision Due Date extension since the hearing was held on the last day of school and the principal was unavailable. The Parent decided that he would not have the principal testify. Regardless of whether or not the principal made such a statement, the testimony of the special education liaison shows that there was no consideration of the least restrictive environment appropriate for Student when Student transitioned to middle school. [NT 87-88]

17. Aside from specials classes (music, physical education, etc.) Student has a math class taught by a special education teacher; that class may or may not have a mix of general education and special education students. The special education liaison is not sure whether she would consider that a general education class or not. [NT 211-212]

18. The Parent believes that Student thrived in the 2017-2018 school year. [NT 78]

19. The Parent maintains that assistive technology provided for Student in 2015 was not provided at least for the past two school years with no explanation having been given for the omission. He believes that this has contributed to what he perceives as regression/lack of progress. [NT 29-30, 47-48]

20. The speech language pathologist who works with Student conducted testing for purposes of the November 2018 reevaluation and for purposes of formulating speech/language goals for the November 2018 IEP. Based on her testing, her therapy work with Student, and her knowledge of Student's autistic support classroom, and of Student's functioning in that classroom, she wrote speech/language goals. [NT 168-174]

21. The speech/language pathologist partially based the number of minutes of direct speech/language services provided to Student on the manner of service delivery in the autistic support classroom. [NT 183-184]

22. For about six weeks at the beginning of the 2018-2019 school year the Parent had to transport Student to and from school because transportation services were not put into the IEP. After transportation was restored the Parent voluntarily chose to continue to transport Student. [NT 42-43]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case although the Parent asked for the hearing the District was assigned the burden of proof on the issue of the appropriateness of its evaluation. The Parent was assigned the burden of proof on the remaining issues.

Credibility: During a due process hearing the hearing officer is 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); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014);.*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); *Rylan M. v Dover Area Sch. Dist*., No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). All witnesses appeared to be testifying truthfully to the best of their recollections.

Independent Educational Evaluations: If a parent disagrees with an evaluation because a specific area of the child's needs was not assessed, the parent has a right to request an IEE at public expense to fill the gap in the district's evaluation. In *Letter to Baus*, 65 IDELR 81 (OSEP 2015) OSEP Director Melody Musgrove wrote "When an evaluation is conducted in accordance with 34 CFR 300.304 through 34 CFR 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs." Subsequently, in *Letter to Carroll*, 68 IDELR 279 (OSEP 2016), OSEP reinforced the earlier position in *Letter to Baus,* that the right to seek an IEE to make up for a missing assessment is not extinguished even if the district responds by conducting the missing assessments.

OSEP Acting Director Ruth E. Ryder commented "Therefore, it would be inconsistent with the provisions of 34 CFR 300.502 to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents' request for an IEE at public expense or filing a due process complaint to show that its evaluation was appropriate," Accordingly, as it stands now, there is no third option that allows the district to simply conduct the missing assessments. *See*, *Letter to Baus*, 65 IDELR 81 (OSEP 2015) *Letter to Carroll*, 68 IDELR 279 (OSEP 2016). In the end, the label assigned to a particular assessment is less important than the skill areas the assessment evaluates. Therefore, the focus of the inquiry in an IEE dispute is whether the district appropriately assessed the student in all areas of suspected disability. *See, e.g., Avila v. Spokane Sch. Dist. 81*, 69 IDELR 204 (9th Cir. 2017, *unpublished*)

Least Restrictive Environment: There is a strong and specific preference in the IDEA that, (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment 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). The IDEA regulations also recognize, however, that there are circumstances where “the nature and severity” of an eligible student’s disability makes education in a regular school setting unsatisfactory. For those situations, the IDEA regulations require an LEA to provide “a continuum of alternative placements,” such as “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals. 34 C.F.R. §300.115(a), (b).

The Commonwealth of Pennsylvania has adopted and further articulated the IDEA requirements in its regulations implementing the IDEA. 22 Pa. Code §14.145. In addition to incorporating the language of the statute, the regulation adds the requirement that a district may not remove a child from the regular education classroom, or determine a child to be ineligible for such placement, solely because of the nature and severity of the child's disability, or because of considerations of cost or administrative convenience. 22 Pa. Code §14.145(4).

The Third Circuit set forth a two-part test in *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993) to determine whether an LEA is complying with the mainstreaming requirement. First, a "court must determine whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily." Second, if placement outside the regular classroom is necessary, then a "court must decide whether the school has mainstreamed the child to the maximum extent appropriate."

Parental Participation: A placement decision is a determination of where a student's IEP will be implemented. Placement decisions for children with disabilities must be made consistently with 34 CFR 300.116. The IEP team, including parents, makes placement decisions. Like the formulation of an IEP, a placement decision is not a unilateral matter for LEA determination 34 CFR 300.116(a)(1) however, is also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA merely mandates parental participation in the placement decision 34 CFR 300.116(a)(1), but does not suggest the degree of weight parental preference should be given.

Compensatory Education: Compensatory education is an equitable remedy. *Lester H. v. Gilhool,* 916 F.2d 865 (3d Cir. 1990). To compensate for past violations, "[a]ppropriate remedies under IDEA are determined on a case-by case basis." *D.F. v. Collingswood Bd. of Educ., 694 F.3d 488, 498 (3d Cir. 2012).* Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method ("hour for hour"), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional.* An alternate, relatively recent method ("same position"), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014);.*Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA."). The "same position" method has been most recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015). "Compensatory education is crucial . . . and the courts, in the exercise of their broad discretion, may award it to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." *G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015).*

Discussion

Did the district evaluate Student in all areas of suspected disability as put forth in the November 21, 2018 reevaluation report? If the District's reevaluation was inappropriate in any respect, what independent evaluations should it be required to fund?

Due to the discovery during the hearing of an unfortunate and serious mistake in calculating Student's Full Scale IQ made by a District psychologist in 2015, misleading the Parent (and school staff) into thinking that Student's cognitive functioning is higher than it actually is, the District has voluntarily agreed to fund an independent psychoeducational evaluation of Student. An order specifying what that evaluation must include will be issued.

The speech/language assessment was sufficient to form the basis of goals in Student's areas of need and an independent speech/language evaluation will not be ordered.

The Parent's assertions that Student previously was provided with assistive technology, and that this technology was removed without giving him a reason or the opportunity for input, raises the question of what if any assistive technology is needed to enable Student to access the curriculum. Accordingly an independent assistive technology evaluation will be ordered.

Did the District fail to offer Student appropriate transition services when moving from elementary to middle school?

The Parent's argument about transition from elementary to middle school revolves around the District's placing Student in fewer general education classes than in previous years. Although the Parent did not present his issue as a failure to provide Student with the least restrictive environment (LRE), this is the essence of his case. The Parent presented hearsay testimony about a statement attributed to the middle school principal, but chose not to call the principal as a witness when offered the opportunity to do so. District staff members present at the meeting where the alleged statement was made could not recall details about what was said. However, whatever the principal may or may not have said, the testimony of the special education liaison made it very clear that deciding Student's placement in middle school did not involve any consideration of the mandate for this individual student's placement in the least restrictive environment. This failure to consider Student's LRE constituted a denial of FAPE and will form the basis for an award of compensatory education.

Does Student's placement provide Student with FAPE?

2017-2018: The Parent has not met his burden of proof that the Student was denied FAPE in the 5th grade school year. In fact Parent several times brought up his belief that Student had done well in 5th grade in elementary school.

2018-2019: As discussed above, the District's failure to consider the LRE mandate when programming for Student's 6th grade year, and its failure to implement the placement provisions of the previous IEP from September to November 2018, constitutes a denial of FAPE in and of itself.

LRE: With a lack of robust evidence in the record, and pending the results of the independent psychoeducational evaluation, it is currently unclear what the least restrictive environment

appropriate for Student actually was in 6th grade, or what it will be going forward. However, the record does strongly support the finding that in choosing Student's 6th grade placement the District gave no consideration whatsoever to the Student's right to be educated in the least restrictive environment. As is relevant here, in examining an LRE issue, "[i]f the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." *Oberti, supra*, at 1216. The lack of this consideration is in itself a denial of FAPE and compensatory education is due.

If the District has not provided FAPE to Student, what remedy is due?

I have determined that 200 hours of compensatory education is an equitable remedy for the District's failure to consider the requirement for placement in the least restrictive environment in the 2018-2019 school year and its failure to include the Parent in deciding what level of restrictiveness was appropriate at the time of transition to middle school. This award will provide a just remedy to compensate Student and, it is hoped, will make it clear to the District that individualized consideration of a student's right to the least restrictive environment appropriate for that student must be made part of its programming deliberations in compliance with the mandates of the IDEA.

The hours of compensatory education may be utilized at the Parent's discretion according to the following limitations: The compensatory education hours are to be used exclusively for educational, developmental and therapeutic services, products or devices that further the Student's IEP goals. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county where the District is located and geographically adjacent Pennsylvania counties. The compensatory services may be used after school, on weekends and in the summers until Student's 21st birthday. The services are meant to supplement, and not be used in place of, services that are in Student's IEPs.

ORDER

It is hereby ordered that:

1. The independent educational evaluation that the District has voluntarily agreed to fund shall be conducted by a certified school psychologist and must include cognitive testing, achievement testing, visual-perceptual-motor testing, executive functioning assessment, and behavioral/social/emotional assessment. The Parent shall choose the evaluator from a list provided by the District. If the Parent does not choose from the list he may propose an evaluator, as long as that evaluator holds the same credentials required of a District school psychologist.

2. The District must fund an independent assistive technology evaluation. The same process for selecting the evaluator shall be followed as presented above.

3. The independent evaluations may be conducted in the summer, and shall be completed, with a written report given to the Parent and the District, within 30 calendar days of the first day of the District's school year.

4. Within 10 calendar days of the receipt of the evaluations the District must convene an IEP team meeting to discuss the evaluation results. The independent evaluators must be invited to attend and participate, and the District shall reimburse them for the time spent at the meeting. The District is not required to reimburse the evaluators for possible attendance at any future meetings about Student.

5. Within 10 calendar days of the meeting to discuss the evaluation the IEP team shall convene to develop Student's program and placement going forward. The speech/language pathologist working with Student must attend this meeting and if necessary revise the number of minutes of speech/language direct services to be provided depending on Student's proposed placement.

6. Since the District failed to consider the least restrictive environment for Student when making its assignment for Student's middle school placement, as an equitable remedy Student is entitled to 200 hours of compensatory education. The Parent may choose the form of compensatory education in accord with the guidelines in the Discussion above.

7. The District shall reimburse the Parent for mileage at the approved government rate for transporting Student to and from school for the first six weeks of the 2018-2019 school year.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D., CHO

June 17, 2019

Linda M. Valentini, Psy.D. CHO
Special Education Hearing Officer
NAHO Certified Hearing Official