

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: J.C.

Date of Birth: [redacted]

Dates of Hearing:

February 28, 2012

April 19, 2012

CLOSED HEARING

ODR Case # 2470-1112KE

Parties to the Hearing:

Parents

Carbondale Area School District
Administration Building
103 Brooklyn Street
Carbondale, PA 18407

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Drew Christian, Esquire
801 Monroe Avenue
Scranton, PA 18510

Lucas Repka, Esquire
King Spry
One West Broad Street
Suite 700
Bethlehem, PA 18018

May 14, 2012

June 5, 2012

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a [late teen-aged] student residing in the Carbondale Area School 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 (“Chapter 14”).¹ Specifically, the student has been identified as a student with an emotional disturbance and specific learning disabilities in reading, mathematics and written expression.

Parents assert that the student was denied a free appropriate public education (“FAPE”) due to alleged acts and omissions in the 2009-2010 school year and in the 2010-2011 school year through May 25, 2011. The District counters that, at all times, it has provided, or stood ready to provide, FAPE to the student.

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

STIPULATION

The parties stipulated that the period of alleged deprivation, and hence potential recovery period, includes only the 2009-2010 school year and the 2010-2011 school year through May 25, 2011. (Notes of Testimony [“NT”] at 24-27).

¹ 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 §§14.101-14.164.

ISSUES

Did the District provide a FAPE to the student
in the 2009-2010 school year
and the 2010-2011 school year through May 25, 2011?

If not, is the student entitled to compensatory education?

FINDINGS OF FACT

1. The student attended private school through 2nd grade. (NT at 433).
2. In the 2003-2004 school year, the student attended the District for 3rd grade. (NT at 433).
3. In September 2003, the District evaluated the student who was found eligible as a student with an emotional disturbance. (Parents' Exhibit ["P"]-1).
4. In November 2003, shortly into the student's 3rd grade year, due to behaviors exhibited in the District and school-avoidance behavior, the student left the District and began to attend a partial hospitalization program. The student attended the program through 6th grade. (NT at 434-438).
5. In the 2007-2008 school year, the student's 7th grade year, the student attended private school. (NT at 437-438).
6. In the 2008-2009 school year, the student's 8th grade year, the student began the school year in private school. On November 2, 2008, however, due to behavior concerns and school-avoidance behaviors at the private school, the student enrolled in the District. The student completed the 2008-2009 school year at the District. (NT at 438-439).
7. In April 2009, the District completed a re-evaluation report ("RR"), finding that the student was eligible as a student with specific learning disabilities in reading and mathematics. The student was also identified as having a health impairment, specifically attention deficit hyperactivity disorder ("ADHD"). (P-1; School District ["S"]-1).

8. Despite the student's previous evaluation by the District in September 2003, the April 2009 re-evaluation process did not include a school psychologist. The student's special education teacher prepared the April 2009 RR; it did not contain significant information from the District September 2003 evaluation report. The April 2009 RR did not continue to identify the student with an emotional disturbance. (P-1; S-1; NT at 28-36, 96-97).
9. In the April 2009 RR, the student's achievement levels in reading and mathematics fell far below the student's intellectual ability. Particularly, the student's grade-equivalent achievement levels were as follows: 4.6 in word reading, 3.2 in sentence comprehension, 2.2 in spelling, and 2.6 in math computation. There was no assessment of the student's decoding or reading fluency. (P-1; S-1).
10. In April 2009, the District prepared an individualized education plan ("IEP") based on the April 2009 RR. (P-2; S-2).
11. The April 2009 IEP did not contain any special consideration of whether the student's behaviors impeded the student's learning or that of others. The April 2009 IEP contained only one mathematics goal. There were no goals in reading and no provisions to accommodate the student's emotional disturbance. (P-2; S-2).
12. In the 2009-2010 school year, the student began to attend District schools. On September 25, 2009, however, the student began homebound instruction. Homebound instruction continued through January 29, 2010. (S-4, S-5).
13. The student's homebound instructor, who also happened to be the student's aunt, provided 1 hour of instruction per day to the student. In addition to this instruction, the homebound instructor provided an additional 1-2 hours of instruction per day to the student out of her own time. The student was not receiving grade-level instruction, even with modifications, and did not exhibit that ability to the homebound instructor. The student also exhibited significant task-avoidance behavior. (NT at 365-388, 428-430).
14. The student's homebound instruction prescription expired on January 29, 2010. The student did not return to the District. Through February 2010, the student's homebound instructor continued to provide instruction on her own time. On February 22, 2010, the District notified parents that, without a return to the

- District, the student would be treated as truant. (S-5, S-6, S-30; NT at 391-393, 396-400, 428-430, 510).
15. The student's homebound instruction resumed from March 3, 2010 through March 12, 2010. Thereafter, the student returned to District schools on March 15, 2010. (S-7; NT at 375, 391-393, 510).
 16. In anticipation of the student's return from homebound instruction, on March 12, 2012, the student's mother, the homebound instructor, and the student's special education teacher/case manager met to discuss revisions to the April 2009 IEP. The student's special education teacher/case manager took notes on an IEP document, but this document was not an IEP for consideration by the IEP team and was not circulated as an IEP. (P-2, P-3; S-2, S-8; NT at 62-95, 449-450).
 17. Following the March 12, 2010 meeting, a new special education teacher/case manager assumed responsibility for the student's IEP. (NT at 161-162).
 18. At the March 12, 2010 meeting, the District sought, and parents granted, permission to re-evaluate the student. (S-9).
 19. From March 15, 2010 through the end of the 2009-2010 school year, no new IEP document had been created, and the student continued to receive instruction under the April 2009 IEP. (P-2; S-2; NT at 161-165).
 20. On June 14, 2010, ninety-four days after the District received permission to evaluate the student, the District issued a RR. The student's composite achievement assessments in reading (2nd percentile), mathematics (0.1st percentile), and written language (1st percentile) each fell into the "extremely low" range. (P-4; S-11).
 21. The June 2010 RR also found that the student qualified as a student with an emotional disturbance; the Behavior Assessment System for Children (2nd edition), Scale for Assessing Emotional Disturbance and Conners (3rd edition) all revealed clinically significant results across multiple raters, including parents, teachers, and the student's own self-report. (P-4; S-11).
 22. The June 2010 RR identified the student as a student with an emotional disturbance and specific learning disabilities in reading, mathematics, and written expression. (P-4; S-11).

23. The June 2010 RR contained a section entitled “functional behavioral assessment”, but it is merely a compilation of standardized testing. There is no data collection on antecedent behaviors in the school environment. (P-4; S-11).
24. The student’s IEP team met on September 2010. (P-5).
25. The IEP contains goals in classroom expectations/classroom rules, written expression, and mathematics. Again, the IEP contained no goal in reading. (P-5).
26. Although enrolled at the District for the 2010-2011 school year, the student’s 10th grade year, the student did not attend school at the outset of the school year. (S-20; NT at 514-517).
27. On September 21, 2010, the student left the District and enrolled in a cyber charter school. The student was enrolled in the cyber charter school until February 18, 2011. (S-15, S-20; NT at 514-517).
28. Upon withdrawal from the charter cyber school, the District received information from the cyber charter school regarding the withdrawal. Parents considered various educational options but did not re-enroll the student in the District. While the District received information from the cyber charter school and conversations were held between the student’s mother and a District school counselor regarding a return to the District, parents did not pursue re-enrollment. (S-14, S-15, S-29; NT at 451-453, 519-520).
29. Over late February and March 2011, the District communicated with the parents regarding re-enrollment, but the parents did not re-enroll the student in the District. (S-29; NT at 520-524).
30. On March 30, 2011, the student re-enrolled in the District. (S-20).
31. On April 5, 2011, given communication lag and the student’s non-attendance since re-enrollment, the District indicated that the student would be considered truant. (S-29).
32. The student did not return to the District and so a truancy proceeding was held. Parents were ordered to return the student to

District schools or face magistrate-imposed incarceration. (S-26; NT at 520-527).

33. The student began to attend District schools on April 26, 2011. (S-20; NT at 526-527).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE

To assure that an eligible child receives a 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” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

In this case, the District has failed to provide FAPE to the student. Even though years had passed between the student’s initial evaluation in September 2003 and a return to the District in the fall of 2008, the District’s April 2009 RR neglected entirely the previous District evaluation. (FF 2, 3, 4, 8). When the April 2009 RR was issued, the student’s pervasive behavioral/emotional issues (issues which led to removal from the District to a partial hospitalization placement from 3rd-7th grades) were ignored and the student’s identification as having an emotional disturbance evaporated. (FF 2, 3, 4, 5, 7, 8). Additionally, as a

student with a District-identified emotional disturbance and specific learning disabilities, no school psychologist was involved in the re-evaluation process, in violation of 22 PA Code §14.124(a).

It comes as no surprise, then, that the April 2009 IEP developed as the result of this evaluation was inappropriate. First, it is inappropriate because it does not address any of the student's behavioral/emotional support needs. (FF 8, 10, 11). Second, and equally if not arguably more egregious, is the fact that the April 2009 IEP does not address the student's needs in reading; these needs are glaring and pervasive and yet the IEP does not address these deficits. (FF 8, 9, 10, 11). Therefore, the educational programming under the April 2009 IEP – at the outset of the 2009-2010 school year in the District, during the September 2009-January 2010 and March 2010 homebound instruction, and the remainder of the 2009-2010 school year back in the District – was all under the auspices of a wholly inappropriate IEP. (FF 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19).

The District's June 2010 RR was not timely, being issued over a month beyond the 60-day timeline imposed for the issuance of such a report. (FF 18, 20). 34 C.F.R. §§300.301(c)(1)(i-ii); PA Code §14.124(b). While more comprehensive than the April 2009 RR, and undertaken by a District school psychologist, the June 2010 RR is deficient in one critically important regard: even though a section reiterated the results of

standardized behavioral/emotional assessments, a functional behavioral assessment was not performed. (FF 21, 22, 23).

At the outset of the 2010-2011 school year, in violation of 34 C.F.R. §300.323, the District did not have an appropriate IEP in place, and it continued to guide the student's educational programming under the inappropriate April 2009 IEP. (FF 10, 11, 16, 19). Again, the District's September 2010 IEP egregiously failed to address the student's needs in reading. (FF 24, 25). When the student returned to the District on March 30, 2012, then, the District was not in a position to provide appropriate instruction to the student. (FF 24, 25, 28, 29, 30).

Accordingly, given prejudicial flaws in the District's evaluation processes, the District's RRs, and the student's IEPs, the District has denied the student a FAPE in the 2009-2010 school year and the 2010-2011 school year through May 25, 2011. An award of compensatory education will follow.

Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEIA, compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEIA. (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 right to

compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied FAPE “is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” (M.C. at 397). Here, the award of compensatory education is equitably impacted at certain times by a number of factors as segmented below.

September 2009. As outlined above, the District’s April 2009 IEP was not reasonably calculated to yield meaningful education benefit to the student. Therefore, the District was not prepared at the outset of the 2009-2010 school year to offer the student a FAPE. Again, the two overarching concerns with the student are (1) behavioral/emotional support issues and (2) severe and pervasive reading deficits; neither was addressed at all in the April 2009 IEP. As such, the student will be awarded full days of compensatory education for each school day from the outset of the 2009-2010 school year through September 24, 2009 when homebound instruction began.² (FF 11, 12).

Homebound Instruction. From September 25, 2009 through January 29, 2010, and again from March 3-12, 2010, the student was educated on homebound instruction. (FF 12, 13, 15). While the April

² A full day of compensatory education amounts to 5.5 hours for a secondary level student. See 22 PA Code §11.3.

2009 IEP that guided the instruction continued to be inappropriate, the student was not in school. And while the homebound instructor's herculean effort to instruct the child (and to extend to the student the sacrifice and concern of a family member) was guided by a wholly flawed IEP, awarding a full day of compensatory education seems inequitable. Therefore, an award of one-half day of compensatory education will be awarded for every school day for the period September 25, 2009 through January 29, 2010 and for every school day from March 3-March 12, 2010.³

February 2010. For the month of February 2010, the student was not on homebound instruction but had not returned to the District. (FF 14). While private instruction continued to be delivered by the homebound instructor of her own accord, the District was in no position to deliver any instruction to the student. (FF 14). Therefore, no compensatory education will be awarded for the period from January 30, 2010 through March 2, 2010.

March 15, 2010 through June 2010. The student returned to the District on March 15, 2010 and was enrolled in the District through the end of the 2009-2010 school year. (FF 19). Here, the equitable considerations again support an award of full days of compensatory education. First, the District clearly saw the need for a transition back

³ This amounts to 2.75 hours. See note 2. While the reduction from a whole day of compensatory education to a half-day is equitable in nature, it also accurately reflects nearly the average amount of time that the homebound instructor spent each day educating the student. (FF 13).

from homebound instruction yet neglected to engage in the process beyond one meeting, a meeting which was not an IEP meeting. (FF 16). Second, because the IEP team did not meet, the inappropriate April 2009 IEP continued to guide the student's educational programming. (FF 16, 19). Third, during this period, the District undertook an evaluation process that was overly extenuated and resulted in a June 2010 RR that could not be used to allow the IEP team to rectify the deficiencies in the April 2009 IEP for the end of the 2009-2010 school year. (FF 20, 21, 22, 23). For all of these reasons, a full day of compensatory education will be awarded for each school day from March 15, 2010 through the end of the 2009-2010 school year.

August 2010-September 2011. As the 2010-2011 school year began, the District was, again, not in a position to offer an appropriate IEP to the student, still using the wholly inappropriate April 2009 IEP even given the flaws in that document that should have been apparent after the June 2010 RR. (FF 10, 11, 20, 21, 22, 23). Therefore a full day of compensatory education will be awarded for every school day from the outset of the 2010-2011 school year through September 20, 2010, the last day the student was enrolled in the District before enrolling in cyber charter school. (FF 27).

February 2011-April 25, 2011. The student was enrolled in cyber charter school through February 18, 2011. (FF 27). Thereafter, the parents' actions did not allow the District to be in a position to educate

the student until April 26, 2011. (FF 28, 29, 30, 31, 32, 33). As such, and even though the District still had not put itself in a position to offer a FAPE to the student under the terms of the September 2010 IEP (FF 24, 25), equitable considerations do not support an award of compensatory education from February 19-April 25, 2011.

April 26-May 25, 2011. The student returned to the District on April 26, 2011. (FF 33). From that point to the end of the stipulated period under consideration in these proceedings, May 25, 2011, the District's September 2010 IEP was not reasonably calculated to yield meaningful education benefit, again, wholly neglecting the student's needs in reading. (FF 24, 25). Therefore, an award of a full school-day of compensatory education will be awarded.

Accordingly, there will an award of compensatory education for the periods, and in the amounts, outlined above.

CONCLUSION

The District denied the student FAPE through inappropriate evaluation procedures and IEPs in the 2009-2010 and 2010-2011 school years. The student is entitled to compensatory education.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student was denied a free appropriate public education

The student is entitled to compensatory education as follows:

- 5.5 hours of compensatory education for every school day from the outset of the 2009-2010 school year through September 24, 2009;
- 2.75 hours of compensatory education for every school day from September 25, 2009 through January 29, 2010;
- 2.75 hours of compensatory education for every school day from March 2 through March 12, 2010;
- 5.5 hours of compensatory education for every school day from March 15, 2010 through the end of the 2009-2010 school year;
- 5.5 hours of compensatory education for every school day from the outset of the 2010-2011 school year through September 20, 2010; and
- 5.5 hours of compensatory education for every school day from April 26 through May 25, 2011.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

June 5, 2012