

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: C.G.

Date of Birth: [redacted]

Dates of Hearing:

January 17, 2012

January 25, 2012

February 6, 2012

February 14, 2012

March 9, 2012

March 13, 2012

CLOSED HEARING

ODR Case # 2557-1112AS

Parties to the Hearing:

Representative:

Parents

Pro Se

Pro Se

Greater Johnstown School District
1091 Broad Street
Johnstown, PA 15906-2437

John J. Kuzmiak, Esquire
442 Main Street
Johnstown, PA 15901

Date Record Closed:

March 13, 2012

Date of Decision:

April 13, 2012

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] is an [elementary school-aged] student residing in the Greater Johnstown 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 specific learning disabilities in reading and mathematics and an other health impairment, namely attention deficit hyperactivity disorder (“ADHD”). The parties disagree over the student’s past and current special education programming.

Parents assert that the student should be identified as a student with autism. They assert that the District inappropriately programmed for the student since the District began educating the student in kindergarten, the 2009-2010 school year, continuing through the current 2011-2012 school year. Parents seek compensatory education as a result of the alleged deprivations of a free appropriate public education (“FAPE”). The parents also request a private placement for the student. To the extent that a private placement would be declined, the parents seek certain accommodations and program changes. The District

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.

counters that at all times it has provided a FAPE to the student and met its obligations under IDEIA and Chapter 14.

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

ISSUES

Has the student been appropriately identified?

Has the District provided a FAPE in the 2009-2010, 2010-2011, and/or 2011-2012 school years?

If not, is compensatory education owed to the student?

Should the student be removed from the District to a private placement?

FINDINGS OF FACT

1. The student has been evaluated multiple times for servicing in public mental health and government disability systems. (Parents' Exhibit ["P"]-1 at pages 2-6, 18-21, 172-180, 203-210, 270-275, 283-289; School District Exhibit ["S"]-3 at pages 3-4).
2. Through those evaluations, the student has garnered a number of diagnoses: adjustment disorder, pervasive developmental disorder/not otherwise specified ("PDD-NOS"), expressive language disorder, ADHD, oppositional defiance disorder, potential intellectual disability, and autism disorder. One report related that an evaluator had found, in June 2011, that the student exhibited borderline intellectual functioning. The record, however, is devoid of the finding in any original evaluation. (P-1 at pages 270-275, P-5; S-3 at pages 3-4).
3. In the 2007-2008 school year, the student attended Head Start programming and, in February 2008, an evaluation was conducted by the local intermediate unit ("IU"). The student was identified with developmental delays and received an early intervention individualized education

- program (“IEP”). (P-1 at pages 301-314; S-37, S-38; Notes of Testimony [“NT”] at 249-251).
4. In the 2008-2009 school year, the student attended a District preschool program, with early intervention services provided by the IU. (NT at 249-251).
 5. In February through May 2009, transition meetings were held to consider issues related to the student’s transition from early intervention services to school-age services for kindergarten at the District. Parents did not attend the transition meetings. (S-1 at page 3, S-33, S-34, S-35).
 6. In the 2009-2010 school year, the student began to attend District kindergarten as a regular education student. (S-1; NT at 249-251).
 7. By letter dated February 2, 2010, parent requested that the student be evaluated by the District. On February 15, 2010, the District requested permission to evaluate (“PTE”) the student. Parent did not provide permission by signing and returning the PTE. (S-1 at pages 3-4; S-39).
 8. The student completed the 2009-2010 school year. The student was retained for a second year of kindergarten for the 2010-2011 school year. (NT at 249-250).
 9. In August 2010, the District contacted the parents, indicating that the District had still not received the PTE from the parents. On October 5, 2010, parent returned the PTE with signature. The evaluation was undertaken by an independent evaluator. (S-1 at pages 3-4, S-3, S-40, S-41).
 10. In November 2010, the District issued its evaluation report (“ER”). (S-3).
 11. The November 2010 ER found that the student’s full-scale IQ of 78 placed the student in the borderline range of intellectual functioning, although the report noted that this might not be “an appropriate index to use to describe (the student’s) overall level of abilities, since it is comprised of discrepant scores.” (S-3 at pages 6-7).
 12. The November 2010 ER found that the student exhibited extremely low (1st percentile or less) achievement scores in early reading, math problem solving, alphabet

- writing fluency, and numerical operations. (S-3 at pages 7-8).
13. The November 2010 ER concluded that the student was eligible for special education and related services as a student with specific learning disabilities in reading and mathematics, and the qualifying health impairment of ADHD. (S-3 at pages 10-15).
 14. On December 8, 2010, the student's IEP team met, and the District issued a notice of recommended educational placement ("NOREP") recommending that the student receive itinerant learning support services. (S-4, S-5).
 15. The student's December 2010 IEP indicates present levels of educational performance in reading as follows: "(The student) has difficulty identifying and making the letters of the alphabet....needs to develop the proper sounds for consonants and vowels....needs to break down CVC² words....needs to improve and develop sight words." (S-4 at page 5).
 16. The student's December 2010 IEP indicates present levels of educational performance in math as follows: "(The student) has difficulty counting from 1 to 100....has problems identifying and writing numbers 1-20....is able to identify most of the basic shapes...." but "...has trouble with identifying the rectangle." (S-4 at page 5).
 17. The student's December 2010 IEP contained seven goals, four in reading and three in mathematics. The reading goals included: accurate alphabet reproduction, letter-sound correspondence, phonics in consonant-vowel-consonant words, and sight-word recognition. The math goals included: counting to 100, identification and reproduction of numbers to 20, and shape recognition. (S-4 at pages 11-12).
 18. The student received one-on-one and small group instruction from a special education teacher for 40 minutes each day. (NT at 323).
 19. By June 2011, the student could identify all but one letter of the alphabet, could produce all but four letter sounds, could (on average) phonically break down CVC

² "CVC" stands for consonant-vowel-consonant.

- words 89% of the time, and could (on average) identify 8 out of ten 10 sight words. (S-8, S-32; NT at 316-350).
20. By June 2011, the student could count consistently to 50 , could identify numbers 0-12 and 14 and could select numbers 13 and 15, could write numbers 0-20 with a model, and could identify eight basic shapes. (S-8, S-32; NT at 316-350).
21. In November 9, 2011, the student’s progress report on the four IEP goals in reading contained one number—“80%”. The same indication—“80%”—was reported for the three IEP goals in mathematics. Progress across each of the goals was not measured individually; evaluation of progress across the four reading goals was ‘blended’, as was evaluation of progress across the three math goals. (S-10; NT at 423-426).
22. Over October and November 2011, the District attempted to convene the IEP team to review the student’s IEP. To accommodate the parents, the meeting was not held until November 17, 2011. The student’s mother participated by telephone. (S-13; NT at 119-122, 598-601).
23. In the proposed November 2011 IEP, the present levels of educational performance for reading do not mirror the data, measurement or evaluation that had been used to monitor progress on the student’s goals in the December 2010 IEP. (S-12 at page 5).
24. The present levels of educational performance are related in terms of scores on curriculum-specific assessments. The only present level related to the student’s IEP goals indicates “(the student) is beginning to build a sight vocabulary of the words that have been taught.” There is no indication of the student’s levels in accurate alphabet reproduction, letter-sound correspondence, or phonics in consonant-vowel-consonant words. (S-12 at page 5).
25. In the proposed November 2011 IEP, the present levels of educational performance for mathematics indicate that “(the student) is able to count by 1’s to 29, count by 5’s to 65, and count by 10’s to 100.” There is no indication of the student’s levels in identification and reproduction of numbers to 20, and shape recognition. (S-12 at page 5).

26. The proposed November 2011 IEP contains three goals in reading (oral reading accuracy, reading comprehension, and letter-sound decoding), one goal in language arts (4-5 word sentence writing), and one goal in mathematics (improvement of basic math skills—numerical concepts, addition/subtraction, time, money, measurement—from baseline). (S-12 at pages 11-13).
27. On the same day as the IEP meeting, on November 17, 2011, the student's mother filed the special education due process complaint that led to these proceedings.
28. Approximately ten days after the November 17, 2011 IEP meeting, the District began implementing the November 2011 IEP to guide its delivery of special education to the student. (NT at 120-123).
29. Under the November 2011 IEP, the student continued to receive itinerant special education for 40 minutes per day in small group instruction as in the December 2010 IEP. The student also received one-on-one special education instruction for an additional 30 minutes per day. Also, the student also received an additional 90 minutes per day in reading/language arts instruction outside of the regular education classroom. (NT at 123-126, 429-430, 473, 488).
30. On December 16, 2011, the parents returned the NOREP, indicating that the parents did not approve of the recommendations for programming in the proposed November 2011 IEP. (S-14).
31. At the hearing, while certain examples of curricular assessments—mostly informal, some more formal—were entered into the record, there was no evidence of explicit progress monitoring for the November 2011 IEP entered into the record. (S-17, S-18, S-19, S-20, S-21, S-22, S-23, S-24, S-25, S-26, S-27).
32. The student exhibits no behaviors in the school environment which necessitate behavioral interventions or a one-on-one District aide. The student has appropriate social interactions across school settings. (P-5 at page 9; *see generally* NT at 256-308, 316-340, 353-397, 423-473, 487-524, 543-566, 596-597).

33. Four behavioral incidents were reported to have involved the student in the fall of the 2011-2012 school year. Upon District investigation: one incident was unsubstantiated; one incident involved mutual verbal exchanges between the student and a second student; and the remaining two incidents, one in October 2011 and one in December 2011, were confirmed, and the other students involved were disciplined. (NT at 592-596).
34. On March 5, 2012, parents filed a special education due process complaint at 2923-1112AS, alleging that the District wrongfully changed the student's educational placement in November 2011. (NT at 419, 620-622).

DISCUSSION AND CONCLUSIONS OF LAW

Evaluation & Identification

To qualify for services under IDEIA and Chapter 14, a student must be identified as a child with a qualifying disability who, as a result of that disability, requires special education. (34 C.F.R. §300.8). The identification of a child with a disability takes place through a comprehensive evaluation process. (34 C.F.R. §§300.301, 304-311).

In this case, the District performed a comprehensive evaluation that met all statutory criteria. (FF 6, 7, 8, 9, 10). The student was identified as a student with specific learning disabilities and the health impairment of ADHD. (FF 10, 11, 12, 13). While there have been indications that the student had developmental delays, the evidence in the record taken as a whole, both in terms of the evaluation history and the student's experience in the educational environment, does not support parents' contention that the student has autism, or that the

District has mis-identified the student. (FF 1, 2, 3, 10, 11, 12, 13, 32, 33).

Accordingly, the District has met its obligations under IDEIA and Chapter 14 in terms of its evaluation and identification of the student.

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)).

2009-2010 School Year. Going into the 2009-2010 school year, the District was aware that the student had been receiving early intervention services. (FF 4, 5). Yet when the District undertook its obligation to facilitate a transfer from early intervention services to school-age special education (22 PA Code §14.157(a)(1)), the parents did not participate in the process. (FF 5). Therefore, the student’s status as a regular education student was appropriate. (FF 6; 22 PA Code §14.162(c)).

When, in February 2010, the parents requested an evaluation process for an initial evaluation for identification and eligibility, the

District responded appropriately by requesting permission to evaluate. (FF 7) Parents, however, did not grant permission for the initial evaluation at that time or throughout the remainder of the 2009-2010 school year. (FF 7, 8). Therefore, any claim that the District did not meet its obligation to identify the student in the 2009-2010 school year must fail. (FF 5, 6, 7, 8).

2010-2011 School Year. At the outset of the 2010-2011 school year, the District contacted the parents to see if the parents would be returning the PTE, thereby allowing the District to move forward with the evaluation process. (FF 9). The evaluation process was comprehensive, and the student was appropriately identified as a student with specific learning disabilities and the health impairment of ADHD. (FF 10, 11, 12, 13).

The December 2010 IEP was appropriate. The present levels of educational performance and IEP goals allowed for the District to deliver educational programming reasonably calculated to yield meaningful education benefit. (FF 14, 15, 16, 17, 18). The student's progress report in June 2011 exhibited that the student indeed had made meaningful education progress on those goals over the course of the 2010-2011 school year. (FF 19, 20). The evidence taken as a whole supports the finding that the District met its obligations to offer, and to provide, a FAPE to the student in the 2010-2011 school year.

2011-2012 School Year. The question of the provision of FAPE in the current 2011-2012 school year is problematic on a number of levels. First, in the first reporting of progress monitoring in November 2011, it is impossible to determine where the student stood vis a vis progress on goals from the December 2010 IEP. The progress monitoring itself, using a ‘blended’ assessment across four goals in reading and three goals in mathematics, is flawed. (FF 21). More specifically, the student was reported to have mastered “80%” on the reading goals (FF 21); yet, as reported, two of the four goals might have been mastered at 100% and the remaining two at 60%. This is especially problematic after the detailed progress monitoring for each individual goal at the end of the 2010-2011 school year. (FF 15, 16, 17, 19, 20). Additionally, the present levels of educational performance in the November 2011 IEP do not reflect the student’s goal-achievement as that IEP was proposed to guide the student’s educational program. (FF 23, 24, 25). Still, all of these flaws notwithstanding, there is not enough evidence to support a conclusion that the student was denied a FAPE from the outset of the 2011-2012 school year through the end of November 2011, when the District moved forward to implement the November 2011 IEP.

Secondly, the math goal in the November 2011 IEP is inappropriate. In its entirety, the goal reads as follows: “Given math curriculum at [the student’s] instructional level, (the student) will improve...basic math skills from baseline, such as numerical concepts,

addition, subtraction, time, money and measurement, to complete task with 70% accuracy on 4 out of 5 trials during a 9-week period”. (S-12 at page 11). The goal is inappropriate because (1) nowhere in the IEP, or the record, is the student’s baseline(s) established, (2) in that vein, there is no way to gauge whether “70%” is an “improvement”, and (3) the listing of “math skills” is illustrative (“such as”) rather than explicitly governed by measures of progress. While the math goal is clearly inappropriate, no evidence came into the record regarding formal progress monitoring on this goal. (FF 31). Therefore, this hearing officer explicitly declines to hold whether the student was denied a FAPE as a result of the inappropriate mathematics goal. The order resulting from this decision, however, will address the issue of denial of FAPE in the 2011-2012 school year.

Third, it appears that the District may have violated the stay-put provisions of IDEIA. Whenever a student is involved in a special education due process hearing, “during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing,...unless the (school district) and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.” (34 C.F.R. §300.518(a)). This provision is commonly referred as to the “stay-put” provision. A student’s “current educational placement” refers to “the operative placement actually functioning at the time the dispute first arises; if an IEP has been implemented, then that program’s placement

will be the one subject to the stay-put provision.” *Drinker v. Colonial School District*, 78 F.3d 859 (3d Cir. 1996), 867, quoting *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 625-626 (6th Cir. 1990).³

In this case, the parents filed for special education due process on November 17, 2011, the date of the November 2011 IEP meeting. (FF 27). Thereafter, however, the District moved forward with the implementation of the November 2011 IEP even though the stay-put safeguard was triggered with the filing of the parents’ special education due process complaint. (FF 27, 28). The determination of whether or not the student was denied a FAPE in the 2011-2012 school year beyond November 2011 is governed by another special education due process complaint.⁴

As indicated above, the mathematics goal in the November 2011 IEP was inappropriate. Additionally, after November 2011, the student moved to a more restrictive educational program, with specially designed instruction toward IEP goals in a setting outside of regular education increasing from 40 minutes per day to 160 minutes per day. (FF 18, 29). Here too, however, the record is devoid of any evidence that would allow a determination of whether the student was denied FAPE as the result of these substantive violations and serious procedural violations. The order

³ The holding in *Drinker* regarding a student’s current educational placement for stay-put purposes was recently reiterated by the Third Circuit in a non-precedential slip opinion in *L.Y. v. Bayonne Bd. of Educ.*, 384 Fed. Appx. 58, (3d Cir. 2010). And, see generally, *Honig v. Doe*, 484 U.S. 305 (1988).

⁴ On March 5, 2012, the parents filed a complaint regarding this alleged wrongful change in placement. (FF 34). This hearing officer has jurisdiction over that complaint. While it appears that the District may have violated the stay-put safeguard, that assertion is explicitly not declarative and not a finding of fact as strict fact-finding on that issue was not part of these proceedings.

resulting from this decision, however, will address the issue of denial of FAPE in the 2011-2012 school year.

In sum, then, the student was not denied a FAPE in the 2009-2010 and 2010-2011 school years. In the 2011-2012 school year, the student was not denied a FAPE through the end of November 2011. An alleged denial of FAPE after November 2011 is governed by the special education due process complaint at 2923-1112AS.

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 student is not entitled to compensatory education for the 2009-2010 and 2010-2011 school years. In each of those school years, the District met its obligations under the IDEIA and Chapter 14. (FF 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20). There is also no support in the record for an award of compensatory education for from the outset of the 2011-2012 school year through the end of November 2011 when instruction was delivered under the terms of the December 2010 IEP. (FF 21).

Accordingly, there will be no award of compensatory education for any alleged denials of a FAPE for the 2009-2010 and 2010-2011 school years and the 2011-2012 school year through the end of November 2011.

Private Placement

There is no indication whatsoever in the record that the student requires a private placement outside the District. (FF 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 29, 31, 32, 33). On this record, there is no error in the District failing to recommend or pursue a private placement for the student.

CONCLUSION

The student is appropriately identified as a student with specific learning disabilities and the health impairment ADHD. The District has met its obligations to provide FAPE to the student from the time the

student entered the District through November 2011. On this record, the student does not require a private placement.

-

ORDER

In accord with the findings of fact and conclusions of law as set forth above:

- the student has been appropriately identified as a student with specific learning disabilities and ADHD;
- the District has met its obligations in providing FAPE to the student from the 2009-2010 school year through November 2011;
- the question of the provision of FAPE for the 2011-2012 school year beyond November 2011 is governed by the complaint filed at 2923-1112AS; and
- on this record, the student does not require a private placement.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

April 13, 2012