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: A.B.

Date of Birth: [redacted]

Dates of Hearing:

June 29, 2012
August 16, 2012
August 21, 2012
August 24, 2012

CLOSED HEARING

ODR Case # 2612-1112AS

Parties to the Hearing:	Representative:
Ms. Amanda Shackelton, Esq. Court-Appointed Educational Decision-Maker KidsVoice Frick Building 437 Grant Street/Suite 700 Pittsburgh, PA 15219	Pro Se
Penn Hills School District 260 Aster Street Pittsburgh, PA 15235	Chelsea Dice, Esq. 787 Pine Valley Drive/ Suite E Pittsburgh, PA 15239
Date Record Closed:	August 24, 2012
Date of Decision:	September 10, 2012
Hearing Officer:	Jake McElligott, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

[Name redacted] (hereinafter "student") is a [late teen-aged] student residing in the Penn Hills 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 intellectual disability, as well as speech and language needs.

At the time of the drafting of this decision, the student's educational decision-making is under the authority of an educational and medical decision-maker ("guardian") appointed by the Court of Common Pleas of [redacted] County ("Court"). Guardian asserts that the student was denied a free appropriate public education ("FAPE") due to alleged acts and omissions which led to an allegedly inappropriate program and placement for the 2011-2012 school year. As a result of this alleged deprivation, the guardian seeks compensatory education as well as an order for the 2012-2013 school year that the student be placed in a private setting for students with autism. The District counters that, at all times, it has provided, and stands ready to provide, FAPE to the student in its programming.

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[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.

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

ISSUES

Did the District provide a FAPE to the student in the 2011-2012 school year?

If not, is the student entitled to compensatory education?

What should the student's educational programming be for the 2012-2013 school year?

FINDINGS OF FACT

1. The student entered District schools from another school district in September 2007, and attended through the 2007-2008 (7th grade), 2008-2009 (8th grade), and 2009-2010 (9th grade) school years. (School District Exhibit ["S"]-24, S-25, S-26, S-27, S-28, S-29, S-30, S-31, S-32, S-33; Notes of Testimony ["NT"] at 336-348).

2. In the 2007-2008 and 2008-2009 school years, respectively the student's 7th and 8th grade years, the student received pullout special education services at the District middle school where the student would attend if not exceptional. (S-27, S-28, S-30; NT at 339-343).

3. In October 2009, after briefly receiving special education services in 9th grade in an autism support classroom at the District's high school, the student began to receive special education services in a separate District emotional support setting, called by the District [Program B]. The student remained at [Program B] through the remainder of the 2009-2010 school year. (S-31, S-33; NT at 285, 344-345).

4. The student's mother was the educational decision-maker for the student in 7th, 8th, and 9th grades and approved/agreed-with the educational programming proposed for the student through those years. (S-25, S-27, S-28, S-30, S-31).

5. In September 2010, at the outset of the student's 10th grade year, the District transitioned the student from [Program B] to an autism support classroom with pullout services at the District high school. The student's mother was the student's educational decision-maker at that time, agreed with the change in placement, and requested a re-evaluation for updated data-gathering. (S-32, S-34, S-36; NT at 347-348, 506-507).

6. In October 2010, the District issued a re-evaluation report. (Parent's Exhibit ["P"][2]-21).

7. By October 2010, the student was not experiencing success in the high school setting, and the District reversed its previous recommendation; the District was recommending that the student return full-time to [Program B]. Contemporaneously, in October/November 2010, the Court appointed a *guardian ad litem* for the student to make educational decisions. The student's guardian at that time (a different guardian than the guardian of the student in these proceedings) approved the transition back to [Program B]. (P-78; S-40, S-41, S-42; NT at 345-352, 506-507, 558).

8. In November 2010, after attending [Program B] for approximately two weeks, the student withdrew from the District and, in December 2010, enrolled in a neighboring school district. (S-44; NT at 352).

9. In March 2011, the student re-enrolled in the District. The student's mother signed the forms at that time for the student's re-enrollment. (S-43, S-44).

10. In April 2011, the District intended to return the student to the last-operative District placement at [Program B]. Upon re-enrolling at the District, the student did not attend school through the remainder of the 2010-2011 school year. (S-42, S-45; NT at 352-354).

11. In September 2011, the student's individualized education plan ("IEP") team met to consider the student's educational programming for the 2011-2012 school year, the student's 11th grade year. (S-46).

[2] Although the student is represented in this matter by an educational guardian, the exhibits were all marked, as instructed by the hearing officer, as "parent" exhibits, as the guardian serves in place of the parent in this matter and in keeping with the custom of exhibit-marking in special education due process hearings.

12. The student's mother was the educational decision-maker for the student at the September 2011 IEP meeting. The IEP team agreed that the student's school day would amount to a half-day of instruction—the student would attend one period per day at [Program B] (approximately one hour per day) and would then be transported to a vocational education setting (approximately 2 hours per day) and then be returned home.[3] The District did not issue a notice of recommended educational placement ("NOREP") regarding the change in placement, and the record is not clear as to whether the student's mother was provided with a procedural safeguards notice. (P-37; S-45, S-46; NT at 281-282, 439).

13. The September 2011 IEP included a transition plan with generalized services and activities related to lifelong learning, employment, and independent living. The IEP contained three behavior/social skills goals, and two speech and language goals. The IEP included a behavior intervention plan. (P-27; S-46).

14. In September and October 2011, the student did not attend school. (S-3, S-4; NT at 438-439).

15. In late October and into November, the student began to attend school but would not enter the vocational education setting or would not fully engage the instructional environment. At times the student would not enter the [Program B] setting. The student's IEP or behavior intervention plan was not revised to contain provisions to address the student's inability to enter the District's educational settings. (P-27; S-46; NT at 267-269, 276-281, 299-300, 303-309, 427-428, 440-441).

16. On November 3, 2011, the student's IEP team met. The student's guardian attended the November 2011 IEP meeting and requested changes to the student's September 2011 IEP. The District disagreed but did not issue a NOREP at that time. (P-27, P-30; NT at 559-560, 569-570, 574-576, 580-581).

17. On November 8, 2011, in a telephone discussion with District administrators, the guardian repeated her disagreement with the IEP and reiterated the request for a NOREP. (P-30; NT at 580-581).

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[3] Even though it is a District program, the [Program B] program is not housed in a District building. The [Program B] program is housed in private, rented space located off District grounds. NT at 474-476.

18. By letter dated November 11, 2011, the guardian requested a NOREP from the District. (P-30).

19. By email dated November 16, 2011, the guardian requested assistance from the District's legal counsel in obtaining a NOREP. (P-31; NT at 582-585).

20. On December 2, 2011, the guardian filed the special education due process complaint that led to these proceedings. (P-32; NT at 585-586).

21. On December 14, 2011, the District finally issued a NOREP to the guardian. On December 16, 2011, the guardian returned the NOREP, indicating agreement to expand the student's instructional hours to a full school day but continuing to object to other aspects of the student's program. (P-37).

22. Beginning in mid-November 2011, the student was removed from the home environment and resided in a shelter. The student's attendance improved, and the student attended regularly from mid-November throughout January 2012. Again, the student exhibited difficulty entering the educational settings. (S-3, S-4; NT at 267-269, 273-274, 276-281, 299-300, 303-309, 427-428, 440-441).

23. In February 2012, the student's IEP team met to discuss potential changes to the student's placement, namely that the student would begin to receive instruction at the District's high school. Upon visiting the high school, however, the student's guardian did not feel adding this component to the student's program would be appropriate. (P-56).

24. In mid-January 2012, the student returned home. Shortly thereafter, in February and March 2012, the student again failed to attend school. The guardian met with the District regarding non-attendance, and an outside support agency became involved in working with the student at the student's residence. (P-72; S-3, S-8; NT at 578-579).

25. When the student was able to attend the vocational educational setting, the student would not access certain parts of the instructional environment [redacted]. The student would also engage in ritualistic and/or sensory-specific behaviors that impacted the student's learning and progress. No functional behavior assessment was ever undertaken in regard to these behaviors. In April 2012, the student stopped attending the

vocational education setting and began to attend [Program B] full-time. (P-66; NT at 270, 427-429, 483-492, 562-563, 565-566).

26. From April 2012 through the end of the 2011-2012 school year, with supports in place to assist the student in attending school while residing in the home environment, the student attended regularly but continued to experience difficulties accessing the [Program B] environment. (P-72; S-3, S-8; NT at 417-418, 579).

27. The District began to deliver academic instruction in the [Program B] program. Additionally, the student received speech and language services throughout the 2011-2012 school year. The student had no instruction in life skills/community-based skills or adaptive behaviors, even though multiple witnesses testified to the student's issues with hygiene and inability to work in many vocational assessments due to various behaviors. (S-9, S-10, S-11, S-12, S-13, S-14, S-15, S-16, S-17; *see generally* NT at 416-535).

28. In April and May 2012, the parties received an independent speech and language evaluation and an independent educational evaluation. The independent evaluations contained a number of recommendations for the student's educational program, including a recommendation in the independent educational evaluation that the student receive "full-time special education (support) to be provided in a specialized setting that is not (the student's) neighborhood school." (P-71).

29. The student's guardian posits that a full-time private placement for students with autism is an appropriate placement. (NT at 542-555).

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 denied the student FAPE. This finding is rooted in three prejudicial flaws in the District's programming. First, the student presents as a very complex mosaic of disabilities. But the District's programming in the 2011-2012 school year was not appropriate, especially at the [Program B] setting, to address the student's needs in life skills and adaptive areas. (FF 12, 13, 16, 27). The District's programming in the vocational education setting was appropriate. (FF 12). But that programming failed because of the second factor underlying the denial of FAPE, namely the behaviors that interfered with the student's ability to access educational environments and the student's ritualistic and/or sensory-specific behaviors. (FF 15, 22, 25, 26). The record is clear that both parties recognized that non-attendance was a significant issue for the student. (FF 10, 14, 22, 24). Yet when the student did attend, and the student's behaviors interfered with the student's ability to enter or engage the instructional environment, the District did nothing to gauge the student's behavior through a functional behavior assessment or to revise the student's behavior intervention plan. (FF 12, 13, 15, 16, 22, 25, 26).

Third, knowing in early November 2011 that the student's guardian had significant disagreements with the student's program, the District prejudicially neglected to issue a NOREP to the guardian until mid-December 2011, interfering with her opportunity to make concrete her concerns and provide notice to the District of the guardian's preferred course of action through the various options provided on the NOREP. (FF 16, 17, 18, 19, 21). Indeed, the guardian was forced to file a special education due process complaint without ever having received a NOREP from the District, even after multiple requests and the involvement of District counsel. (FF 20).

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, as detailed above, the District engaged in multiple acts and omissions that led to a denial of FAPE for the student. There are equitable considerations that weigh in favor of both parties, however, that lead to an intricate calculation of compensatory education. In the student's favor, the IEP is not appropriate for meeting the student's needs, and the [Program B] program is overly restrictive. (FF 13, 27). The District provided only a half-day schedule to the student until the guardian protested that the student should receive a full day of instruction. (FF 12, 21). Additionally, the overarching need of the student—behaviors that interfere with the student's learning—went entirely unaddressed. (FF 12, 13, 15, 16, 22, 25, 26). This would support a substantive award of compensatory education. In the District's favor, however, is the well-founded concern, shared by all, that the student's inability to attend school, fundamentally interfered with the student's ability to receive any educational programming. (FF 10, 14, 22, 24). Also in the District's favor is the fact that, even though the student's IEP was deficient, the District made good-faith efforts at instruction which did yield some degree of meaningful education benefit over the course of the 2011-2012 school year. (FF 27).

Therefore, the following compensatory education calculations are grounded in equity:

Because the District was educating the student for only half of a school day, the student will be awarded 2.5 hours of compensatory education for every school day[4] where the student attended either the [Program B] program, or the vocational educational setting, or both, from the outset of the 2011-2012 school year until November 10, 2011. By November 10, 2011, knowing that the guardian disagreed with the District's recommendations for educational programming and that the guardian had requested a NOREP, the District should have issued a NOREP coming out of the November 3, 2011 IEP meeting. Therefore, as a prejudicial procedural omission, the student is entitled to 5.5 hours of compensatory education for every school day, inclusive, between November 11, 2011 and December 16, 2011, when the guardian returned the NOREP; these hours are awarded regardless of whether the student attended school or not on any particular day within the designated period. The student will be awarded 2.5 hours for every school day attended either the [Program B] program, or the vocational educational setting, or both, between December 17, 2011 and the date when the District extended the student's school day to include an entire day of instruction. Finally, the student will be awarded 1 hour of compensatory education for every school day attended either the

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

[Program B] program, or the vocational educational setting, or both, between the date when the District extended the student's school day to include an entire day of instruction through the end of the 2011-2012 school year.

As for the nature of the compensatory education award, the guardian may decide in her sole discretion how the hours should be spent so long as they 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 the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family and/or the guardian, as appropriate.

There are financial limits on the guardian's discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education, either hourly or as the result of a lump sum settlement, must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

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

Placement for 2012-2013

Both federal and Pennsylvania law require that the placement of a student with a disability be in the least restrictive environment ("LRE"). Pursuant to the mandate of 34 C.F.R. §300.114(a)(2):

> "Each (school district) must ensure that to the maximum extent appropriate, children with disabilities…are educated with children who are nondisabled, and…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. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993).

In this case, the District violated the LRE requirement by delivering the student's programming at the [Program B] program; that program is overly restrictive and returning the student to that placement for the 2012-2013 school year would be inappropriate. (FF 12). On the other hand, the guardian's request for a placement at a non-public private placement for students with autism is also overly restrictive. (FF 23, 28, 29). The student's IEP team will be ordered to convene to design a wholly

new IEP for the student, including transition planning, goals, curriculum, and instruction, to be delivered entirely at the District high school in classrooms and settings that the IEP team shall decide are appropriate. (FF 5, 13, 27).

The record clearly supports a finding that the District should be given the opportunity to implement an appropriate program in a less restrictive environment than [Program B]. But the record also reveals that the student presents quite challenging behaviors in educational settings. To that extent, the IEP team ultimately may find that the student requires more restrictive programming than the District offers. But, at this stage, the student should be given an IEP to be delivered at the District's high school.

An order will be crafted accordingly.

CONCLUSION

The District denied the student FAPE in the 2011-2012 school year, and the student is entitled to compensatory education. The IEP team must convene to design a wholly new IEP for the student to be implemented at the District's high school.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Penn Hills School District denied the student a free appropriate public education in the 2011-2012 school year.

The student is entitled to an award of compensatory education as follows:

- 2.5 hours for every school day the student attended at any educational setting from the outset of the 2011-2012 school year through November 10, 2011;
- 5.5 hours for every school day from November 11, 2011 through December 16, 2011;
- 2.5 hours for every school day the student attended at any educational setting from December 17, 2011 through the date when the student's school day was extended to include a full day of instruction; and
- 1 hour for every school day the student attended at any educational setting from the date when the student's school day was extended to include a full day of instruction through the end of the 2011-2012 school year.

Additionally, within 10 calendar days of the date of this order, the student's individualized education plan (IEP) team shall meet to wholly

redesign the student’s IEP. The IEP team shall design, and the IEP shall explicitly include, the following:

- individualized and detailed post-secondary transition planning;
- social skills goals;
- specially designed instruction in social skills;
- speech and language goals;
- specially designed instruction in speech and language;
- academic goals;
- specially designed instruction in academics;
- life skills/community-based functional goals;
- specially designed instruction in life skills/community-based skills;
- planning for transition to the District’s high school, including being prepared to perform a functional behavior assessment, and to implement a behavior intervention plan, regarding any impediment(s) to the student accessing the building, or instructional settings within the building;
- performance of a functional behavior assessment, and implementation of a behavior intervention plan, for ritualistic and/or sensory-specific behaviors that impact the student’s learning; and

- any and all planning, assessments, curriculum, goals, specially designed instruction, program modifications, and/or related services that the IEP team may identify, or agree to, as necessary.

The IEP team shall explicitly consider, and where appropriate make part of the IEP, all recommendations contained in the independent speech and language evaluation of April 2012 and the independent educational evaluation of May 2012, where those recommendations can be implemented in the District's high school.

The student's IEP shall be designed for delivery entirely within settings at the District's high school.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

September 10, 2012