

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: G.L.

Date of Birth: [redacted]

Dates of Hearing:

February 22, 2012

May 14, 2012

May 25, 2012

June 27, 2012

July 18, 2012

July 20, 2012

July 23, 2012

July 25, 2012

CLOSED HEARING

ODR Case # 2724-1112KE

Parties to the Hearing:

Parents

Ligonier Valley School District
339 West Main Street
Ligonier, PA 15658

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Charles Jelley, Esquire
229 South Maple Street
Greensburg, PA 15601

Christina Lane, Esquire
1500 Ardmore Boulevard
Suite 506
Pittsburgh, PA 15221

September 10, 2012

October 9, 2012

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (hereinafter “student”) is [a late teen-aged] student who resides in the Ligonier Valley School District (“District”) and 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 as having specific learning disabilities. Parents allege that the student was denied a free appropriate public education (“FAPE”) as the result of allegedly inappropriate individualized education plans (“IEPs”).

Additionally, parents make claims that the student was denied FAPE under the provisions of Section 504 of the Rehabilitation Act of 1973 (“Section 504”),² as well as claims that the student suffered discrimination, prohibited by Section 504, as a result of bullying in the school environment. Included in these claims of discrimination are explicit claims that the District discriminated/retaliated against the family for pursuit of the protections afforded under IDEIA and Section 504 for students with disabilities.

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.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1, 15.10 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of “protected handicapped students”.

The District counters that that it met its obligations to the student under IDEIA and Section 504, that allegations of bullying did not arise out of the student's disability status and, regardless, were handled appropriately, and that the family did not suffer retaliation by the District.

As a final matter for background, at the outset of the hearing process, the parties disagreed over the recovery period should there be an award of compensatory education. Following the submission of briefs, this hearing officer ruled that even though parents sought to recover compensatory education for alleged deprivations of FAPE beginning in the 2008-2009 school year, the recovery period would be limited to a period within 2 years of the date the family filed its special education due process complaint, January 10, 2012. Therefore, any recovery was limited to a period beginning January 10, 2010. (Hearing Officer Exhibit ["HO"]-1, HO-2, HO-3, HO-4, HO-5).

For the reasons set forth below, I find in favor of the family on the claim of discrimination and retaliation for the pursuit of the protections of IDEIA and Section 504, and in favor of the District on claims related to FAPE.

ISSUES

Was the student provided with FAPE during the 2009-2010 school year?

If the answer to question is “yes”, is compensatory education owed to the student?

Did the District discriminate and/or retaliate against the student and family in violation of Section 504?

FINDINGS OF FACT

1. The student attended a parochial school in the 2007-2008 school year, the student’s 8th grade year. (Notes of Testimony [“NT”] at 40).
2. In the 2008-2009 school year, the student enrolled in the District high school for 9th grade. (NT at 40).
3. In November 2008, the student’s family suffered a tragedy [redacted]. At that time, based on information [received], the District investigated the family’s residency status in the District. After investigation by the District’s home and school visitor, the District employee responsible for investigating issues related to residency, the District determined that the family resided in the District. (Parents’ Exhibit [“P”]-3; School District Exhibit [“SD”]-BB; NT at 87-88, 638-639, 644, 810-815, 1287-1289).
4. In June 2009, the student’s parents and the District mutually discovered that the student had doctored grade reports to show a passing grade in [a class] when, in fact, the student had failed [that] class. (NT at 58, 424-425).
5. On June 11, 2009, at a meeting with the high school principal, the parents discussed the forgery of the student’s report card. At the meeting, parents requested that the student be evaluated for special education. The conversation also included specific allegations of bullying by certain two high school students in the prior school year. The meeting was contentious, and the high school principal exhibited anger and aggression toward the parents when the student’s mother referred to a female employee of the District as a “chick”. (P-3, P-4; SD-P at page 6).

6. The high school principal recommended that the student's father speak with the fathers of the two bullies. (P-4).
7. On June 16, 2009, parents requested in writing that the student be evaluated for special education. (SD-B).
8. On June 17, 2009, in the evening, the student's mother emailed the high school principal regarding receipt of the request for an evaluation, issues related to the completion of a summer [redacted] class to substitute for the failed [redacted] class, and issues of bullying. At approximately 6:45 AM the morning of June 18th, the high school principal called each parent's cell phone, leaving a message for the student's mother. The call to the cell phone of the student's father was answered, and the high school principal aggressively confronted parents about the email of the previous evening. (P-3, P-4; NT at 481-483).
9. On June 18th, the high school principal contacted the District's home and school visitor regarding residency. Beginning on June 18th, the District's home and school visitor began to check on the family's home during the day, later relating to the family that the question of residency was allegedly the result of an anonymous phone call to the District. (P-3; NT at 463-467, 483-484).
10. The high school principal testified that the events involving the student's ability to intercept mail and the alleged lack of parents' knowledge regarding the District triggered his suspicions regarding residency. In an August 2009 memorandum to the District's superintendent, the high school principal did not relate any information about an anonymous phone call. Evidence regarding any alleged anonymous phone call was unpersuasive. (SD-P at pages 4-5; NT at 484, 810-813).
11. Some time between June 18, 2009 and August 2009, the high school principal independently undertook a search out of his office using an internet search engine to ascertain voting records for the student's parents. This activity, led by the high school principal, did not involve the District's home and school visitor. (NT at 810-813).
12. Over July and August 2009, the District continued to challenge the family's residency status, asking for the submission of multiple documents to prove residency. The family retained legal counsel regarding the residency dispute and complied with each District request. On August 18, 2009, the District's superintendent

- confirmed that the family resided in the District. (P-3; SD-BB; NT at 483-487, 638-646, 1191).
13. The District eventually sought formal permission to evaluate on July 17, 2009, and parents provided consent on July 24, 2009. (SD-B).
 14. In September 2009, at the outset of the school year, the high school principal met with two students who had been identified by parents at the June meeting regarding the allegations of bullying of the student. The two students denied involvement. (P-4; NT at 429-432, 827-828).
 15. In September 2009, the student began to have weekly “check-in” meetings with a school counselor to monitor concerns the student might have regarding academics or bullying behavior by other students. This system was referred to by the District as a bullying prevention program. The student met approximately 4-5 times with the school counselor in September and October 2009. Missed sessions were due to student absences. The student did not report any incidents of bullying in September and October 2009. These weekly meetings were made part of the student’s subsequent IEPs and became more formal at that point. (SD-N, SD-Y; NT at 950-954, 962-963).
 16. A timely evaluation report (“ER”) was issued on October 14, 2009. The ER found that the student had specific learning disabilities in mathematics, reading, and written expression. (SD-C).
 17. On a measure of the student’s behavioral and emotional functioning, the evaluator utilized the Behavior Assessment System for Children – 2nd edition (“BASC”), having the student’s father and two teachers rate the student. The student’s father rated the student to have clinically significant ratings in the areas of anxiety and depression, in maintaining attention, and withdrawal. Two teachers rated the student. None of the teacher ratings indicated clinically significant ratings. One teacher rated the student at-risk in the area of withdrawal. Teacher ratings included school-based areas such as learning problems, school problems, and study skills; none of these areas showed elevated ratings by the teachers. (SD-C).
 18. On November 3, 2009, a draft IEP was developed, and the student’s IEP team met. (SD-D).

19. The November 2009 IEP included goals in mathematics, reading, and self-advocacy and specially designed instruction across settings. The November IEP included transition goals for the student's post-secondary planning. The student was to be included in regular education with supports for 93% of the school day through the remainder of the first semester and was to be included in regular education with supports for 83% of the school day in the second semester. (SD-D).
20. The District issued a notice of recommended educational placement ("NOREP") on November 3rd. (SD-E).
21. On November 24, 2009, the parents filed a complaint with the Pennsylvania Department of Education's Bureau of Special Education ("PDE"), alleging that the District had failed in its child-find obligation. (SD-AA).
22. On December 3, 2009, parents sent an email to the District superintendent, copied to the high school principal, indicating that the student complained of continuing bullying in the school environment. The high school principal responded that the District had received no complaints of bullying from the student or anyone else. (P-4; SD-P; NT at 829-833).
23. After December 2009, given the strained relationship between the parents and the high school principal, parents were not comfortable with the student being interviewed by the high school principal. Mis-communication ensued. The District believed that the parents did not want the student to be interviewed by the high school principal at all. The parents believed that the District was welcome to interview the student so long as a parent was present in the interview. Therefore, the student was never interviewed by the District regarding alleged bullying incidents. The District, however, did not offer to allow, and did not instruct, another administrator to interview the student or to lead an investigation of the bullying allegations. The investigation was left in the hands of the high school principal and was never completed. (NT at 160, 175-176, 435-436, 443-446, 454-455, 469-470, 861).
24. Following the parents' email regarding continuing bullying, the high school principal interviewed the student's teachers. There were no reports of bullying and no teacher had witnessed any bullying. (SD-P, SD-LL; NT at 445-446, 858-860).
25. On December 8, 2009, the NOREP was returned by parents, indicating agreement as to the identification of the student and

- recommendation for special education services but disagreement with the IEP. (SD-E).
26. On December 11, 2009, the IEP team met again. The student's goals remained the same. The student's program modifications and specially designed instruction were revised. The weekly meetings with the school counselor were made part of the December 2009 IEP. (SD-F, SD-Y; NT at 950-954).
 27. On January 12, 2010, the IEP team met again. One of the student's self-advocacy goals was revised into a time management/organization goal. The student's mathematics goal was slightly altered. The student's program modifications and specially designed instruction were revised. (SD-H).
 28. On January 15, 2010, [a] high school [employee] made a remark to a friend of the student in the presence of other students. The student's friend declined to attend an after-school [event], instead going to the student's home to visit the student. The [high school employee made a remark to the student's friend]. (NT at 449-452, 747-752).
 29. The District viewed the comment as directed at the student's friend and not the student. (NT at 450, 747-753).
 30. After January 15, 2010, the student stopped attending the District high school. (NT at 524).
 31. On January 19, 2010, PDE issued its investigation report on the parents' complaint lodged in November 2009. PDE determined that the District was unable to demonstrate compliance with the child-find obligations of IDEIA and ordered that the District implement staff training on the child-find requirements. (SD-AA).
 32. In a meeting on January 19, 2010 and a phone call on January 22, 2010, the parents spoke with the District superintendent and director of special education to discuss a number of issues, including the student's IEP, ongoing bullying and its effects, the behavior of the high school principal, procedures on making a complaint to the school board, and a request to review the student's records. (SD-II; NT at 83).
 33. On January 20, 2010, as a result of parents' concern over the student's emotional well-being, the District sought permission for an independent psychiatric evaluation through the local intermediate unit ("IU"). (SD-I).

34. By letter dated February 11, 2010, parents' counsel contacted the District's solicitor, informing him of his appearance on behalf of the family regarding dispute over the District's provision of FAPE to the student. (P-33; SD-P).
35. On February 19, 2010, the student's father, as had been part of a daily routine since January 15th, stopped by the high school to pick up school work for the student and to drop off completed school work from the day before. When doing so on February 19th, the student's father shared that the comments of the [high school employee] were particularly distressing and that those comments led to the student no longer attending the District. (SD-P; NT at 450-452).
36. By letter dated February 25, 2010, parents' counsel informed the District's solicitor of the names of students who the District could talk to in its bullying investigation who could corroborate allegations of bullying. (SD-P).
37. On March 2, 2010, the high school principal and assistant principal interviewed the named students. The first of the interviewed students alleged various incidents of bullying against the student; the second interviewed student did not allege witnessing any incident. Follow-up interviews were conducted with the alleged bullies named by the first interviewed students. These interviews were conducted with the two students in the presence of their fathers. (SD-P; NT at 711-738, 902-909).
38. On March 2, 2010, the IEP team met again. (SD-L).
39. On March 5, 2010, the IU issued its private psychiatric report. (P-32A).
40. On March 8, 2010, the student withdrew from the District and began to attend a cyber charter school. (NT at 187).
41. Over the course of the 2009-2010 school year and beyond, parents made requests of the District for the student's school records. Initially, the District did not provide records to the parents. Eventually, over the course of months and into 2011, records were produced although disputes over record-sharing by the District persisted. (NT at 470-472, 487-491).

42. On March 10, 2010, parents' counsel made a comprehensive request for all of student's school records and included parents' signed release to allow for the sharing of those records. (SD-MM).
43. On March 31, 2010, parents' counsel reiterated a request for the student's school records. (SD-MM).
44. On April 22, 2010, parents' counsel requested the written findings of the District's bullying investigation report. (SD-MM).
45. The District's solicitor testified that over the period of February and March 2010, he was under the impression that the District had been sharing records with the parents. (NT at 1026-1027).
46. The District's solicitor testified that he did not consider the high school principal's previously prepared chronology to be a student record. The high school principal also indicated that the bullying investigation was ongoing. (NT at 1041-1042).
47. The District's solicitor testified that his client had not made him aware of the email exchanges in December 2009 between and amongst parents and District personnel regarding bullying. Had he been aware, he would have disclosed those emails to parents' counsel. The District solicitor was unaware the extent to which emails were reviewed by the District in its compilation of chronologies of events. (NT at 1047-1049, 1057-1058).
48. On September 20, 2010, parents' counsel informed the District's solicitor of the parents' ongoing frustration at not receiving complete school records for the student. (SD-MM).
49. On February 2, 2011, parents filed a complaint with the U.S. Department of Education ("DOE") regarding the parents' inability to obtain certain school records. (SD-MM).
50. Information regarding the high school principal's previously-prepared chronology of events were not shared with the parents until March 2011. (SD-MM; NT at 1040-1041).
51. The District's solicitor relied upon his client's review of documents in the compilation of the student's school records. (NT at 1058-1060).
52. On March 30, 2011, the DOE found that counseling records being withheld by the District needed to be provided. DOE required

the District to provide explicit assurances that District employees understand the “broad definition of ‘education records’ ”. (SD-MM).

53. The high school principal and assistant principal produced notes from their bullying investigations at, respectively, the July 20th and July 18th hearing sessions, notes which parents and parents’ counsel had not seen previously. (NT at, generally, 711-739 and at 836-849).

54. The parents’ testimony was found to be highly credible regarding aggressive and unprofessional behavior by the high school principal in his dealings with them and fellow District employees. (NT at 456-462, 473, 476-483,

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 proposed IEPs that were reasonably calculated to provide FAPE to the student. The District timely evaluated the student, and the evaluation was appropriate. (FF 2, 13, 16). This evaluation led to appropriate IEPs that, while not perfect, were

reasonably calculated to provide meaningful education benefit to the student. (FF 18, 19, 25, 26, 27, 38). Even as events unfolded quickly in early March 2010, and the IU evaluation was issued, the student had not attended the District for approximately two months and was contemporaneously withdrawn from the District and enrolled in a cyber charter school. (FF 30, 33, 39, 40).

For the family, much of the alleged deprivations of FAPE occurred as a result of the District's handling of bullying allegations. Here, parents did not meet their burden to show that the District denied the student FAPE as a result of bullying. First, the District was always responsive to the parents' complaints. (FF 5, 14, 15, 22, 24, 26, 29, 32, 35, 36, 37). Second, the District was stymied in its attempts to have the student involved in the bullying investigation. This arose from a good-faith misunderstanding regarding the high school principal's interviewing of the student, but, in the end, it blunted the District's attempts to investigate fully the allegations of bullying. (FF 23). Third, the weight of the record supports the finding that the District did not witness or perceive the bullying being reported by the student nor the effects on the student's engagement of the educational environment. (FF 15, 17, 24, 36, 37). This is not to say that bullying did not occur; the record equally supports the finding that the student was bullied by consistent behaviors perpetrated by specifically identified students. But, in its entirety, the

record does not support a finding that the District's handling of the bullying allegations amounts to a denial of FAPE.

Accordingly, the District met its obligations under both IDEIA and Section 504 to provide an educational program designed to provide FAPE to the student.

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)). Because the District did not deprive the student of FAPE, no compensatory education is owed to the student.

Accordingly, there will be no award of compensatory education.

Discrimination under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he was excluded from

participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability. Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

In the instant case, there is no dispute that the student is disabled and is otherwise qualified to participate in school activities; the District knows and acknowledges that the student is disabled. While not made an explicit matter of proof in this case, it is a near certainty that federal funding flows to the District.

Thus, the legal determination to be made is whether the student “was excluded from participation in, denied the benefits of, or subject to discrimination at the school”. Here, I find that the student was subjected to discrimination as the result of the student’s disabilities. Specifically, the District (a) retaliated against the student in the summer of 2009 in its rigorous examination of the student’s residency within the District following the parents’ request for an evaluation and (b) discriminated against the student in its handling of records-requests by the parents and, subsequently, parents’ counsel in the pursuit of information regarding the student’s educational programming at the District.

Retaliation. Where a family engages in the process of seeking educational services for students with disabilities, it should do so secure in the knowledge that engaging in those processes will not be held

against them by the school district and that they will not be penalized for engaging in those processes. To establish whether a school district has retaliated against a family for engaging the processes under IDEIA/Section 504, a three-part test has been elucidated, namely: (1) did the parents engage in protected activities, (2) was the school district's retaliatory action sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) was there a causal connection between the protected activity and the retaliation. Lauren W. v. DeFlaminis, 480 F.3d 259 (3d Cir. 2007).

Here, the District retaliated against the family in the summer of 2009 after the family had requested that the student be evaluated for special education. The chronology of events in the weeks following the parents' request for an evaluation is highly problematic. First, following a contentious meeting with the high school principal, parents requested an evaluation for special education services on June 16, 2009. (FF 5, 7). Second, after parents emailed the high school principal on June 17th regarding that request (among other issues), the high school principal aggressively voiced his displeasure with the parents' email in a phone call made well before business hours on June 18th. (FF 7, 8). Third, on that very day—June 18th – the District began an investigation of the family's residency status, even though the District had previously accepted the family's explanation of residency questions in December 2008. (FF 3, 9). Fourth, the record reveals a manifest contradiction

regarding what supposedly engendered suspicions that the family did not reside in the District. (FF 9, 10). Fifth, the high school principal undertook his own independent internet searches, outside of District procedures for verifying residency, to ascertain information about the parents' voting records. (FF 11). Sixth, the District made multiple requests for different documents to establish residency and, ultimately, had to retain legal counsel, before accepting that the family resided in the District. (FF 12). This chronology of events supports a finding that, having requested an evaluation under IDEIA to see if the student had a disability and required special education, the parents were subjected to retaliatory treatment by the District regarding their residency in the District.

Here, it is important to note that while the District certainly has a duty to provide an education only to students who reside in the District (24 P.S. §13-1302), it had already investigated the question as to the family's residency and found the family's answers to be satisfactory. (FF 3). The chronology in the summer of 2009, then, is seen by this hearing officer as a direct result of the parents' request for a special education evaluation. (FF 7, 8, 9, 10, 11, 12). The inconsistencies and out-of-the-ordinary procedure add additional weight to the finding. (FF 9, 10, 11). And, ultimately, the District pressed parents multiple times for various sorts of documentation to the point where they retained legal counsel. (FF 12).

Therefore, the weight of the record supports a finding that in the summer of 2009, in challenging the family's residency, the District retaliated against the family for the protected activity of seeking an evaluation for the student under the provisions of IDEIA to the extent that a person of ordinary firmness would have been deterred from seeking that evaluation. There is a clear causal connection between the protected activity of parents (a request for an evaluation under IDEIA) and the retaliation (the acts and omissions of the District's residency investigation).

Accordingly, a finding will be made as part of the order.

Discrimination. The District discriminated against the student in declining to provide to parents and parents' counsel comprehensive school records for the student. (FF 32, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53). Clearly, the parties shared a contentious relationship, a relationship that grew more contentious over time. At all times, however, parents remained engaged in the student's educational programming and worked collaboratively with the District. (FF 5, 7, 8, 12, 13, 18, 25, 26, 27, 32, 33, 35, 36, 38). Throughout their interactions with the District, parents repeatedly requested comprehensive school records related to the student, a request which the District did not honor. (FF 41). Even with the involvement of parents' counsel, the District did not fully share records, despite repeated requests and the cooperation of the District's

solicitor and parents' counsel. (FF 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52). At the hearing, detailed notes of the high school principal's and assistant principal's notes from bullying investigations were produced for the first time. (FF 53).

The weight of the record fully supports a finding that the District discriminated against the student by not sharing forthrightly and comprehensively the student's school records when those records were requested by parents and/or parents' counsel.

Accordingly, a finding will be made as part of the order.

CONCLUSION

The District provided FAPE to the student through an appropriate evaluation process and appropriate IEPs. The District discriminated against the student, however, by retaliating against the parents when they requested an evaluation for special education in June 2009 and in not sharing with parents the comprehensive school records of the student.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the District provided a free appropriate public education to the student in the 2009-2010 school year.

Additionally, as set forth above, it is an explicit finding that the District retaliated against the family in its residency investigation over the summer of 2009 and subjected the student to discrimination by not sharing comprehensive school records when requested by the parents and/or parents' counsel. These findings of retaliatory and discriminatory behavior were in violation of Section 504 of the Rehabilitation Act of 1973.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

October 9, 2012