

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: T.S.

Date of Birth: [redacted]

Dates of Hearing:

August 10, 2012

August 29, 2012

CLOSED HEARING

ODR Case # 3005-1112KE

Parties to the Hearing:

Parents

Slippery Rock Area School District
201 Kiester Road
Slippery Rock, PA 16057

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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September 7, 2012

September 12, 2012

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (hereinafter “student”) is [a late teen-aged] student residing in the Slippery Rock 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 The parties disagree over the nature of the student’s exceptionality. The parents contend that the student has specific learning disabilities, the health impairment of attention deficit hyperactivity disorder (“ADHD”), and behavioral needs; the District agrees that the student has ADHD, and potentially other health impairments that impact the student’s learning, but contends that the student has an emotional disturbance and no identifiable learning disabilities.

Parents allege that the District denied the student a free appropriate public education (“FAPE”) in the 2011-2012 school year when the student returned to the District from a private school, violating the District’s obligation to provide the student’s education programming in the least restrictive environment (“LRE”). This allegation was compounded, in the parents’ eyes, by an inappropriate re-evaluation in the fall of 2011. As a result of those alleged denials of FAPE, parents claim a remedy of compensatory education. Additionally, parents

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.

challenge the appropriateness of the individualized education plan (“IEP”) proposed for the recently commenced 2012-2013 school year.

The District counters that the student was provided with FAPE in the 2011-2012 school year. The District also argues that its re-evaluation is appropriate and, as such, the IEP currently in place for the student for the 2012-2013 school year is appropriate.

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

ISSUES

Was the student provided with FAPE during the 2011-2012 school year?

If not,
is compensatory education owed to the student?

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

FINDINGS OF FACT

1. The student enrolled in the District in the 2002-2003 school year, the student’s 2nd grade year, and was identified as being eligible as a student with learning disabilities. (Parents’ Exhibit [“P”]-3; Notes of Testimony- August 10, 2012 [“NT-August 10”]² at 53-57).
2. From 2nd grade through 5th grade (the school years 2002-2003 through 2005-2006), the student received special education programming from the District. (P-3; NT at 53-59).

² Both volumes of transcript begin at “page 1”. Therefore, the date of the transcript will be noted for accurate citation.

3. In the 2006-2007 school year, the student's 6th grade year, the student was involved in a number of behavior incidents that affected [the student's] educational placement. (P-3).
4. In January 2007, the District completed a re-evaluation and issued a re-evaluation report ("RR"). The RR identified the student's primary identification as a student with emotional disturbance and, secondarily, as a student with learning disabilities. (P-3; School District Exhibit ["S"]-7).
5. Over the period May-September 2007, the parties engaged in a special education due process hearing and a special education appeals panel process which resulted in parents prevailing on the issues presented at the hearing and on appeal. (P-3; NT at 79-81).
6. In the 2007-2008 school year, the student left the District and attended a private school. The student started the school year as a 7th grade student, but a decision was made to have the student repeat 6th grade. (NT at 81).
7. Over the 2007-2008 through 2010-2011 school years, the student completed the repeated 6th grade year, as well as 7th – 9th grades at the private school. (S-8 at pages 2-3, 9-17, 3-37; NT at 81-82).
8. In the 2011-2012 school year, the student began 10th grade at the private school. In October 2011, however, the student left the private school and re-enrolled in the District. (Joint Exhibit ["J"]-2; P-4; S-3 at pages 26-36, S-8 at pages 1 and 4-8; Notes of Testimony – August 29, 2012 ["NT-August 29"] at 78).
9. Upon re-enrolling, the District used information from its January 2007 RR and the academic information it had from the private school to draft an October 2011 IEP. At that time the District sought, and parents provided, permission for a re-evaluation of the student. (J-2; S-3 at pages 30-35, S-4; NT-August 10 at 88-91, 101-102; NT-August 29 at 78-80, 90-92).
10. The October 2011 IEP contained goals in self-advocacy, English, mathematics, and social studies. The IEP also contained a goal for "access" to emotional support. (S-4 at pages 11-16).
11. The October 2011 IEP placed the student in the general education setting for 46% of the school day. The student participated in regular education classes for biology, sculpture, physical education, and health; all other instruction was delivered

- in an emotional support classroom. (S-4 at pages 21-22; S-10 at page 7).
12. On December 15, 2011, the District issued its RR to parents.³ (S-1).
 13. The December 2011 RR found, on the Woodcock-Johnson Test of Cognitive Ability (3rd edition), that the student's General Ability Index score, a variant of full-scale IQ, was 73. (S-1 at pages 14-16).
 14. The December 2011 IQ score is markedly lower than other IQ scores in the student's educational history. The District's initial evaluation report in November 2002 found that the student's full-scale IQ was 93. The District did not perform a cognitive assessment in its January 2007 RR and reiterated that the student's full-scale IQ was 93. In March 2008, parents obtained a private evaluation, which was not shared with the District, which found the student's full-scale IQ was 86; the evaluator opined that the student's General Ability Index, scored at 91, was a truer measure of the student's cognitive ability. (P-6; S-7).
 15. The December 2011 RR found, on the Kaufman Test of Educational Achievement (2nd edition), the following achievement scores: letter & word recognition – 87, nonsense word decoding – 91, reading comprehension – 80, spelling – 87, written expression – 71, math computation – 94, math concepts & applications – 86. (S-1 at 12-14).
 16. The December 2011 RR contained assessments of the student's social functioning. The raters (two teachers and the student's mother) did not rate any sub-scale on the Social Responsiveness Scale as clinically significant. (S-1 at pages 21-23).
 17. The December 2011 RR contained assessments of the student's behavioral functioning. The same raters (two teachers and the student's mother) utilized the Behavioral Assessment System for Children (2nd edition) ("BASC-2"). Both teachers rated the student as clinically significant on the following sub-scales: depression, anxiety, learning problems, and adaptability. The

³ The December 2011 RR has, at page 1, the "date of report" as November 16, 2011. The District school psychologist testified, however, that this was a date automatically populated into the report on the date he began to prepare it. (NT-August 10 at page 161). The December 2011 RR was delivered to parents on December 15, 2011. (S-1 at page 1).

student's mother did not rate the student as clinically significant on any sub-scale but rated the student as at-risk on the following sub-scales: depression, anxiety, and somatization. The student utilized a self-report for the BASC-2. The student did not self-report any clinically significant scores but self-reported at-risk scores on the following sub-scales: depression and locus of control. (S-1 at pages 23-26).

18. The December 2011 RR contained assessments in speech and language and, in that regard, contained a recommendation that the student receive speech and language support. (S-1 at pages 27-28).
19. The December 2011 RR concluded that the student was eligible as a student with an emotional disturbance with a secondary identification of health impairment. The report continually reiterated that the student would likely exhibit academic difficulties but, in applying a discrepancy analysis between the student's cognitive ability and achievement, did not find that the student had any specific learning disabilities. (S-1 at pages 28-39).
20. In mid-December 2011, the student's multidisciplinary team met to discuss the December 2011 RR. The parents were upset with the conclusions of the December 2011 RR, and parents did not participate in an IEP meeting until late February 2012.⁴ (S-3 at pages 1-24; NT-August 10 at 132-142; NT-August 29 at 81-83).
21. As part of the communications between the parties over the IEP process in January and February 2012, the parents requested an independent educational evaluation ("IEE") at public expense, a request which the District granted. (S-3 at page 19-20; NT-August 10 at 138).
22. On January 3, 2012, the student was involved in an incident on a school bus where the student used profanity. The incident resulted in school discipline [redacted]. Aside from this incident,

⁴ The District made a point at the hearing regarding the signature of the student's mother on the December 2011 RR that she "agreed" with the conclusions of the report. First, the District school psychologist testified in such a way to indicate that his understanding of what mother's signature represented, and consequently his explanation of what it meant to sign the evaluation, is contradicted by the plain language of the evaluation report itself. (S-1 at page 34; NT-August 10 at 207-209). Second, and more significantly, the entirety of the record leaves little doubt that parents never agreed with the December 2011 RR.

there were no overt behavioral issues involving the student in school in 2011-2012. (S-10; NT-August 10 at 129-131).

23. The consistent behavioral difficulty exhibited by the student in the educational environment is classroom disinterest, with the student “(putting) head down on desk”, refusing to complete work, refusing to participate in the lesson and, at times, defiance. (P-5; S-1 at pages 6-8, S-3 at page 29, S-5 at pages 7-8 and 19-21, see generally S-11⁵, S-12⁶, S-13⁷.)
24. On February 29, 2012, the student’s IEP team met to discuss the student’s IEP. (S-5).
25. The February 2012 IEP contained one goal each in English, reading comprehension, mathematics, organization skills, written expression, vocabulary, and understanding idioms. (S-5 at pages 15-16).
26. The February 2012 IEP provided weekly speech and language support. (S-5 at page 17).
27. The February 2012 IEP contains a positive behavior support plan to address the student’s classroom behaviors. (S-5 at pages 18-21).
28. The February 2012 IEP contains nearly identical information regarding the student’s placement as was contained in the October 2011 IEP. (S-5 at pages 25-28).
29. On March 8, 2012, parents rejected the February 2012 IEP and requested a special education due process hearing, a request which led to these proceedings. (S-6).
30. Sometime in March or April 2012, the private evaluator issued the IEE. (P-2).

⁵ S-11 is a compendium of academic and behavioral records from the emotional support classroom. There is a fair degree of duplication in the 109-page exhibit, and the documentation is presented only for April and May 2012.

⁶ S-12 is a compendium of academic and behavioral records from mathematics class. There is little duplication in the 279-page exhibit. The academic records, by far the more voluminous, are largely undated but seem to be broadly across the curriculum. The behavioral records are uniformly from April and May 2012.

⁷ S-13 is a compendium of academic and behavioral records from various classes, including social studies, biology, health, and art. There is no duplication in the 97-page exhibit. The academic records, by far the more voluminous, are largely undated but seem to be broadly across the curriculum. The behavioral records are mostly from April and May 2012.

31. The March/April 2012 IEE found the student's full-scale IQ was 88, with a General Ability Index at 92. (P-2 at pages 6-7).
32. The March/April 2012 IEE gauged the student's achievement using the Wechsler Individual Achievement Test (3rd edition). The student exhibited achievement scores in mathematics consistent with the student's cognitive ability. Significant discrepancies were noted, however, between the student's cognitive ability and achievement on the reading comprehension and fluency index (scored at 75), the reading comprehension subtest (76), and the essay composition subtest (77). (P-2 at pages 7-8).
33. The March/April 2012 IEE contained significant discrepancies in more in-depth assessment of the student's reading. On the Nelson-Denny Reading Test, significant discrepancies were noted between the student's cognitive ability and the total score (67) and the reading comprehension subtest (65). On the Test of Word Reading Efficiency, a significant discrepancy was noted on the phonemic decoding efficiency subtest (74). (P-2 at pages 8-9).
34. The March/April 2012 IEE determined that the student has specific learning disabilities in reading (basic reading, reading fluency/automaticity, and comprehension) and written expression. (P-2 at 10-13).
35. In an explicit credibility finding, the testimony of the District school psychologist was found to be unpersuasive as to his testimony on cognitive/achievement assessment and the determinations on specific learning disabilities. This testimony was accorded very little weight. (NT-August 10 at 161-171, 187-188, 196-198, 209).

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.

RR of December 2011. In this case, the December 2011 RR undertaken by the District is prejudicially flawed. Its findings on the student’s emotional needs are supported by the record. (FF 17, 19, 22, 23). It seems clear that the student should be identified as a student with emotional support and behavioral needs. (FF 3, 4, 10, 12, 17, 22, 23). But equally as clear is the fact that the student has consistently exhibited specific learning disabilities throughout the student’s academic career, both at the District and at the private school. (FF 1, 2, 4, 5, 6, 7, 8). This experiential window into the student’s learning disabilities has been reinforced through consistent standardized assessments which have revealed significantly discrepant scores between the student’s cognitive ability and achievement in reading and written expression. (FF 1, 2, 4, 5, 14, 15, 30, 31, 32, 33, 34). The only outlier is the District’s cognitive assessment contained in the December 2011 RR; the District’s findings as to the cognitive ability of the student is prejudicially flawed.

(FF 13, 14, 31, 35). As will be seen below, the District's reliance on flawed assessment data led to an inappropriate February 2012 IEP. As such, the inappropriate cognitive assessment contained in the December 2011 RR laid the groundwork for a denial of FAPE.

IEP of February 2012. When the student returned to the District in October 2011, it reacted appropriately in (a) providing special education to a student it knew to have marked educational programming needs and (b) immediately seeking to initiate a re-evaluation process. (FF 8, 9, 10, 11). But its February 2012 IEP, based on the flawed data of the December 2011 RR, is inappropriate.

First, even though the student has significant deficits in reading, the February 2012 IEP contains inappropriate reading goals and no specially designed instruction in, or modifications for, reading. (FF 25, 32, 33). The student exhibits difficulty in composition yet the written expression goal is geared to grammar and syntax; again, there is no specially designed instruction or modifications to address the student's needs in written expression. (FF 25, 32). In counterpoint, the student exhibits no discrepancies between cognitive ability and mathematics, yet the IEP contains a mathematics goal. (FF 25, 32). The entirety of the record supports the finding that the District, in failing to identify concretely the student's specific learning disabilities, failed to propose an appropriate IEP in February 2012 to meet the student's needs.

Second, there is no doubt that the student exhibits problematic behaviors that interfere with the student's learning (FF 23). The February 2012 IEP addresses those needs, although it does so in a way that, as indicated above, neglects the student's academic needs and unduly focuses on the student's need for behavioral support. (FF 23, 25, 27, 28). In doing so, after February 2012, the District violated the LRE requirement for designing the student's special education program.

Both federal and Pennsylvania law require that the placement of a student with a disability be in the LRE. 34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993). 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." Here, the District's decision to maintain the placement of the student in an emotional support setting after February 2012 without attempting to provide instruction in less restrictive settings (such as inclusion in regular education, or selective pullout for learning support) failed to meet the District's obligation to attempt to educate the student in the LRE. (FF 10, 11, 28).

Accordingly, an award of compensatory education will be ordered.

IEP for 2012-2013. The February 2012 IEP, rooted in the prejudicially flawed December 2011 RR, is inappropriate and amounts to a denial of FAPE. It may be that the student requires a more restrictive environment. But the District erred in not attempting a less restrictive environment. Therefore, the order will address the student's educational programming for the 2012-2013 school year, including provision for ongoing data-gathering and progress monitoring to ensure that the student is in an educational placement that is most appropriate.

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 denied the student FAPE, and compensatory education will be awarded. There are equitable considerations, however, that lead to a multi-faceted calculation of compensatory education. First, the District responded entirely appropriately when the student re-enrolled in the District in October 2011. (FF 8, 9, 10, 11). Therefore, there is no basis for any award of compensatory education from October 2011 through December 15, 2011 when the District issued the December 2011 RR.

From December 16, 2011 onward, however, the District’s flawed evaluation rightfully cast doubt on its findings, and parents’ reasonably resisted its conclusions. (FF 19, 20). The record supports a finding, however, that the District worked in good faith to arrange an IEP meeting with the parents, and parents’ resistance to such a meeting was the impediment to convening the meeting before February 29, 2012. (FF 20, 21). Accordingly, one hour of compensatory education will be awarded for every school day that the student attended from December 16, 2011 through February 29, 2012.

As outlined above, after the February 2012 IEP meeting, however, the student’s educational programming was overly restrictive and inappropriate. This denial of FAPE is tempered, though, by the fact that some elements of the student’s IEP were appropriate and that the

student made some degree of educational progress. (FF 23, 26, 27).

Therefore, as a matter of equity, the student is entitled to 2.75 hours of compensatory education for every school day the student attended between March 1, 2012 through the end of the 2012-2013 school year.⁸

As for the nature of the compensatory education award, the parents may decide in their 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.

There are financial limits on the parents' 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.

⁸ A full day of compensatory education amounts to 5.5 hours for a secondary level student. See 22 PA Code §11.3.

An award of compensatory education, as fashioned above, will be made part of the order.

CONCLUSION

The December 2011 RR was prejudicially flawed, leading to a February 2012 IEP that is not reasonably calculated to yield meaningful education benefit in the LRE. The student is entitled to compensatory education. Additionally, the student's IEP team must convene to craft an appropriate IEP for the 2012-2013 school year.

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ORDER

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

The student is entitled to compensatory education as follows:

- 1 hour for every school day the student attended between December 16, 2011 and February 29, 2012; and
- 2.75 hours for every school day the student attended between March 1, 2012 and the end of the 2012-2013 school year.

Furthermore, within 10 calendar days of the date of this order, the student's IEP team shall meet to revise the student's IEP. The IEP team may utilize the results of the December 2011 RR for the student's needs in social skills, ADHD, behavioral needs, and speech and language. The team shall not utilize the results of the December 2011 RR for academic planning in reading and written expression. The IEP team shall utilize the March/April 2012 IEE for academic planning in reading and written expression. The IEP team shall be mindful of LRE obligations, and the entire special education placement continuum, in planning for the student's educational programming.

Additionally, the IEP team shall make provisions for detailed data-gathering and progress monitoring on the behaviors that interfere with the student's classroom learning. This information shall be the basis for

ongoing functional behavior assessment and behavior intervention planning.

Finally, at least 30 days after the date of the IEP team meeting but no later than 45 days after the IEP team meeting, the IEP team shall reconvene to consider explicitly the results of the behavioral data and to gauge whether the student's educational placement is appropriate.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

September 12, 2012