

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 Final Decision and Order

Closed Hearing

ODR File Number:

25848-21-22

Child's Name:

E.P.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Leigh Loman, Esquire
Ellen Connally, Esquire
301 Grant Street, Suite 270
Pittsburgh, PA 15219

Local Education Agency:

South Allegheny School District
2743 Washington Boulevard
McKeesport, PA 15133

Counsel for LEA:

Christina L. Lane, Esquire
424 South 27th Street, Suite 210
Pittsburgh, PA 15203

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

03/24/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, E.P. (Student),¹ is an early elementary school-aged student who resides in and attends school in the South Allegheny School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the basis of Emotional Disturbance.

In late November, 2021, the Parent filed a Due Process Complaint against the District³ under the IDEA and Section 504 of the Rehabilitation Act of 1973.⁴ More specifically, she contended that the District should have identified Student as eligible in the fall of 2019 (commonly referred to as a child find claim); and that programming for Student has not been appropriate. As remedies, the Parent demanded compensatory education, a referral to a private school placement, and other relief beyond the authority of this hearing officer. The District denied the Parent's contentions and maintained that its special education program was appropriate for Student under the applicable law and that no remedy was due. The expedited issues were bifurcated and previously decided, and this case proceeded to a very efficient due process hearing.⁵

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ The Parent also challenged a disciplinary action by the District that was decided in January 2022 and bifurcated. CITE

⁴ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-)

Following review of the record and for all of the reasons set forth below, the claims of the Parent must be granted in part and denied in part.

ISSUES

1. Whether the District failed in its child find obligations to Student prior to its May 2021 evaluation;
2. Whether the District's program provided over the 2019-20, 2020-21, and 2021-22 school years have been appropriate for Student;
3. If the District's program has not been appropriate for Student, should Student be awarded compensatory education; and
4. Whether the District should be ordered to place Student in an appropriate educational placement?

FINDINGS OF FACT

1. Student is a primary elementary school-aged child residing in the District. Student has been evaluated and determined to be eligible for special education based on Emotional Disturbance. (P-1; P-13 at N.T. 9-10.⁶)

followed by the exhibit number. The transcripts of the sibling's non-expedited hearing have been marked as Hearing Officer Exhibits (HO-) 1 (session of January 31, 2022) and HO-2 (session of February 22, 2022).

⁶ P-12 and P-13 are transcripts from the expedited hearing that were admitted without objection. *E.P. v. South Allegheny School District*, 25772-2122AS (Skidmore, January 13, 2022, at 3-6).

2. Student was previously evaluated by the District in the fall of 2019. At that time, Student was experiencing difficulty with English/Language Arts (including reading) and Mathematics, and was repeating [the grade]; there were also behavioral concerns with task refusal. (P-5.)
3. Student's cognitive ability was assessed for the fall 2019 Evaluation Report (ER) with the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V). Student's attention and motivation interfered with completion of that instrument, and the Kaufman Brief Intelligence Test – Second Edition was also administered, yielding an average range overall score. (P-5 at 3-6.)
4. Assessment of academic achievement for the fall 2019 ER revealed below average to average range performance on all Composites and subtests. There was not a significant discrepancy between aptitude and achievement. (P-5 at 7-8.)
5. Social/emotional functioning was also assessed for the fall 2019 ER. The rating scales for the Behavior Assessment System for Children – Third Edition (BASC-3) were completed by the Parent and teacher. The Parent's ratings endorsed a clinically significant concern with attention only; the teacher's ratings indicated at-risk concerns with hyperactivity, aggression, depression, attention problems, atypicality, withdrawal, adaptability, and social skills, but no clinically significant concerns. On the School Version of the Hawthorne Behavior Evaluation Scale (HBES) – Third Edition, the teacher reported significant concerns with learning problems, inappropriate behavior, and unhappiness/depression, with overall a moderate level of difficulty with emotional functioning. (P-5 at 8-11.)
6. The fall 2019 ER determined that Student did not meet criteria, and was not eligible, for special education in any category. (P-5.)

7. Student had seven disciplinary referrals during the 2019-20 school year for noncompliance with directives. One incident resulted in a one-day suspension, and two others in detention; the remainder involved telephone calls to one of the Parents. Other behaviors were addressed at the classroom or building levels. The Parent did not agree to a referral to the Student Assistance Program that school year. (P-9 at 15-17; S-3.)
8. Student's final grades for the 2019-20 school year reflected satisfactory or better performance across subjects with minor exceptions (reading decoding and comprehension) with Student working toward meeting expectations. (S-3 at 11-12.)

2020-21 School Year

9. During the 2020-21 school year, Student was able to go to the emotional support teacher's classroom for a break as needed. Student received two disciplinary referrals in November 2020, but the next was not until March 2021. Between March and May 2021, Student's behavior increased significantly with multiple disciplinary referrals leading to several out of school suspensions, ongoing phone calls to one of the Parents, and conferences with Student. (N.T. 18-19; P-9 at 6-15; S-3.)
10. Student was evaluated in the spring of 2021 and an Evaluation Report (ER) issued in May due to the significant behavioral concerns. (P-1.)
11. The District requested input from the Parent for the ER on multiple occasions through various means. No response was provided before the May 2021 ER was issued. (P-1.)
12. Teacher input into the May 2021 ER reflected significant concerns, including elopement, non-completion of tasks and assignments, aggression, and attention-seeking (disruptive) behavior. They also

noted academic difficulty, inattention, and concerns with emotional functioning. Student was reportedly referred for Title I services but refused to attend. (P-1 at 2, 3, 11.)

13. Assessments by the District school psychologist for the May 2021 ER were attempted or completed over four different dates. Student's behaviors interfered with administration on each of those sessions. (P-1 at 2-3.)
14. On a measure of cognitive functioning, the WISC-V, Student earned a Full Scale IQ score in the extremely low range, with all Composite scores very low to extremely low. Student did attain an average range score on a vocabulary subtest. The District school psychologist noted that Student's refusal behaviors impacted the scores and that the results were likely not an accurate representation of Student's ability. (P-1 at 5-7.)
15. Assessment of academic achievement for the May 2021 ER (Kaufman Tests of Achievement – Third Edition, Brief Form) yielded below average to average range scores on the subtests completed and on the Mathematics Composite; no other Composite scores were reported because of Student's refusal to complete tasks. (P-1 at 7-8.)
16. On the BASC-3 rating scales for the May 2021 ER, the teacher reported clinically significant concerns in most areas: hyperactivity, aggression, conduct problems, anxiety, depression, attention problems, learning problems, atypicality, withdrawal, adaptability, study skills, and functional communication. She also reported at risk concerns with social skills and leadership. The Parent's rating scales were not returned. (P-1 at 2, 9-10.)

17. Student's teacher also completed the School Version of the Fourth Edition of the HBES for the May 2021 ER. She reported significant concerns across subscales and overall. (P-1 at 10-11.)
18. A Functional Behavioral Assessment conducted for the May 2021 ER identified elopement and refusal as the target behaviors, and the hypothesized functions were to gain access to a preferred activity and escape a non-preferred activity. (P-1 at 11; P-2.)
19. The District school psychologist did not report a significant discrepancy between Student's ability and achievement in the May 2021 ER, attributing Student's academic weaknesses to behavior rather than a learning disability. (P-1 at 8.)
20. The May 2021 ER determined that Student was eligible for special education based on Emotional Disturbance. (P-1.)
21. Student's final grades for the 2020-21 school year were quite variable, ranging from 50 to 90 percent, with poorer performance in Language Arts and Mathematics compared to Social Studies and Science. (S-3 at 7-10.)

2021-22 School Year

22. An Individualized Education Program (IEP) was developed in August 2021. Parent input into that IEP included Student's need for a multi-sensory approach to instruction. (P-3 at 14.)
23. Needs identified in the August 2021 IEP were for reading comprehension, phonics, mathematics computation, and self-regulation. Annual goals addressed each of these areas, with self-regulation addressed through a Positive Behavior Support Plan (PBSP) goal to use coping strategies when experiencing frustration. A number of program modifications/items of specially designed instruction were also included. (P-3.)

24. The August 2021 IEP provided for a program of learning support at a supplemental level, with Student participating in general education except for English/Language Arts and Mathematics instruction, with emotional support as needed. (P-3 at 36-37.)
25. The District issued a Notice of Recommended Educational Placement (NOREP) for initiation of special education services through a program of supplemental emotional support as set forth in the August 2021 IEP. The Parent signed but did not approve or disapprove the NOREP at that time, citing inaccurate information in the ER. (P-4.)
26. The District followed up with its administrators contacting the Parent and meeting with her several times to explain the NOREP and the necessity for her express approval of services, in order to obtain her consent to implement the IEP. The Parent did not approve the NOREP until December 21, 2021. (N.T. 95-96, 143-45, 170; P-4; P-13 at N.T. at 79.)⁷
27. Beginning on the first day of the 2021-22 school year, the District noted Student's problematic behaviors, which included noncompliance with directives, work refusal, disrupting the classroom, physical aggression toward property, verbal and physical aggression toward staff, running around the classroom and other areas, and elopement from the classroom and the school building. Incidents were reported on a majority of school days through September 13, 2021. A number of staff were needed to intervene with Student's behaviors. (N.T. 39; P-9; P-14.)
28. Student was suspended from school on September 13, 2021 for three school days beginning on September 14, 2021. The suspension was

⁷ See also HO-2, N.T. at 143-44.

extended pending an informal hearing, and Student did not return to school thereafter. (P-9.)⁸

29. The District proposed an alternative placement for Student in lieu of expulsion. The Parent visited that placement and spoke with its staff, who advised that they could not meet Student's needs there. (N.T. 87-90.)
30. Student began attending the District cyber-school program in mid- to late October 2021. That program is self-paced by the individual student. Student did not consistently log on to the program and experienced difficulty at home maintaining focus and understanding the concepts and materials presented. (N.T. 20-22, 26, 83-84, 114, 121-23, 127, 129-30; HO-1 at N.T. 28-30, 36, 40, 57-60, 62-63, 65-66.)
31. The District's cyber school program does not provide behavioral support to its students but can provide academic supports. (N.T. 22-25.)
32. Another IEP meeting convened in January 2022 and some revisions were made to the IEP to reflect Student's attendance at the cyber school program. Student's IEP has not been implemented in the cyber school program. (N.T. 20, 24, 29, 32-33.)
33. The Parent has contacted several private schools for possible placement for Student and visited those that agreed to a tour. The District agreed to provide records to placements that request them

⁸ Although not an exhibit for this hearing, as set forth in the January 22, 2022 expedited decision, Student was expelled from school in early October 2021. See *E.P.*, *supra* n. 6 at 6 ¶ 17.

and has investigated potential placements for Student in other settings. (N.T. 61-64, 68, 92-93, 106; S-4; S-9.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof is generally viewed as consisting of two elements: the burden of production and the burden of persuasion. The latter burden lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parent who filed for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found the witnesses who testified to be generally credible as to the facts as they recalled them. The one exception to that determination is the Parent's testimony that she understood the IEP would be implemented without her approval on the NOREP; that account was contradicted by the more logical testimony of District witnesses that they asked her several times to indicate approval of the NOREP before services could begin and that she declined to do so. The documentary evidence, which further supported the District's testimony about

explanations to the Parent on the requirement of consent to services, was accorded significant weight.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires that states provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program, and also complying with the procedural obligations in the Act.

States, through local educational agencies (LEAs), meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." " *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). A proper assessment of whether a proposed IEP meets the above standard must be based on

information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

Substantive FAPE: Child Find and Evaluation Requirements

The IDEA and state and federal regulations further obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

The obligation to identify students suspected as having a disability is commonly referred to as “child find.” LEAs are required to fulfill the child find mandate within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to “conduct a formal evaluation of every struggling student” or identify a disability “at the earliest possible moment.” *Id.* (citations omitted).

After a child has been identified, special education services can be provided only with consent of the parents. 20 U.S.C. § 1414(a)(1)(D)(i); 34 C.F.R. §§ 300.300(a), (b). An LEA is required to make “reasonable efforts” to obtain that permission. 34 C.F.R. § 300.300(b)(2). Absent such consent, an LEA is not permitted to provide services. 20 U.S.C. § 1414(a)(1)(D)(ii); 34 C.F.R. § 300.300(b)(3). When a parent does approve special education programming, the LEA is obligated to provide those services even if the child’s placement has been changed due to discipline. 20 U.S.C. §

1415(k)(1)(D); 34 C.F.R. § 300.530(d)(4). This mandate does not mean that “exactly the same services” are required, 71 Fed. Reg. No. 156, 46716 (August 14, 2006), but the child must be provided the educational services that, “enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP” including behavioral supports. 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. § 300.530(d)(4).

General IDEA Principles: Compensatory Education

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit and other jurisdictions have also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

The Parent's Claims

The first issue is whether the District failed to timely identify Student as eligible for special education before its May 2021 ER. Student was

evaluated in the fall of 2019 due to academic and behavioral concerns. There is scant evidence in the record about the 2019-20 school year, and even with several disciplinary referrals, Student ended that school year overall having met or exceeded expectations. The 2020-21 school year began with few concerns and no evidence to establish a child find claim. It was not until March of 2021 that Student's behavior deteriorated significantly and exploration of the reasons was warranted. The District responded promptly by evaluating Student again, issuing a new ER in May 2021 that did find Student eligible for special education. This hearing officer cannot conclude on the basis of this record that the District erred in failing to identify Student prior to the spring of 2021.

The next issue is whether the District's program was appropriate for Student during the 2021-22 school year. An IEP was developed for the start of the 2021-[22] school year that addressed the needs identified by the May 2021 ER. Had the Parent approved the NOREP accompanying that IEP, Student would have been provided with special education to address academic and behavioral deficits. The Parent did not do so, however. This hearing officer concludes that the District made reasonable efforts to obtain the Parent's consent in this case, and that was not provided until December 2021.

Once that consent was obtained, however, Student was entitled to the special education services in the IEP. Here, the record is clear that Student has not been provided with the special education services in the IEP in the cyber program. Student was thus denied FAPE and is accordingly entitled to compensatory education. There is nothing in the record to support a make whole remedy. However, the IEP that the Parent approved via NOREP in December 2021 specified that Student would be provided learning support with instruction in English/Language Arts and Mathematics outside of general education, in addition to behavioral support. Assuming 45 minute periods

daily for each of those subjects, and an additional 30 minutes of emotional/behavioral services, Student shall be awarded two hours of compensatory education for each day that school was in session beginning with the first day of school in January 2022⁹ until such time as services are provided by the District or through some other agreed placement.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age fourteen (14). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

The final issue is the Parent's request for an appropriate placement, which based on the parties' exploration of other settings is understood to mean a private school. This remedy requires consideration of a number of

⁹ There was only one half day of school in December 2021 after the NOREP was signed by the Parent. (P-15.)

factors. Although the standard tuition reimbursement test may not be directly applicable, its prongs do provide concrete guidance for evaluating this type of claim. Those are that the LEA program did not provide FAPE and the private placement is appropriate; equitable considerations are also a factor. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009). Additionally, however, the record must, in this hearing view, support a conclusion that the LEA is not in a position to provide FAPE. See, e.g., *Burlington, supra*, at 369 (explaining that private placement at public expense is warranted where an appropriate public school program is not possible); *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285 (11th Cir. 2008)(citation omitted). The equitable nature of the requested remedy logically demands something more than a past denial of FAPE.

The Parent has not preponderantly established, on this record, that the District is unable to provide FAPE to Student. The Parent's approval of the NOREP in December 2021 was given long after Student was no longer attending the District school where the IEP was to be implemented. The District has not yet had an opportunity to do so, and there simply is an inadequate basis to conclude that it cannot.

This hearing officer could, and may even be tempted to, opine on the decision to expel Student. She declines to do so, however, since that is a matter for another forum. It is nonetheless noteworthy that the parties have been exploring potential alternative placements for Student, and it may well be that such would be appropriate for Student rather than a return to the District's schools. The parties are encouraged to continue their collaborative decision-making as the IDEA demands.

CONCLUSIONS OF LAW

1. The District did not violate its child find obligation to Student.
2. The District did deprive Student of FAPE after the Parent signed the NOREP in December 2021.
3. Student is entitled to compensatory education.
4. The District is not ordered to provide a private placement for Student prospectively.

ORDER

AND NOW, this 24th day of March, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not violate its child find obligation to Student.
2. The District denied Student FAPE after the Parent signed the NOREP in December 2021.
3. Student is entitled to two hours of compensatory education for each day that school was in session beginning in January 2021 and continuing until the District or another agreed placement provides Student with special education services set forth in the August 2021 IEP. All of the conditions and limitations on that

award set forth above are expressly made a part hereof as though set forth at length.

4. The District is not ordered to provide a prospective private school placement for Student.
5. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 25848-21-22