

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:

26287-21-22

Child's Name:

N.C

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Moon Area School District
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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

08/15/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, N.C. (Student),¹ is a late teenaged student who resides in the Moon Area School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) on the bases of Intellectual Disability and Autism.²

The family moved into the District from another state in late 2021. The parties agreed at that time to Student's placement in a private school (Private School) located in an adjacent county. However, transportation by the District to Private School was significantly delayed. In the spring of 2022, the Parents filed a Due Process Complaint under the IDEA and Section 504 of the Rehabilitation Act of 1973³ asserting that Student was denied a free, appropriate public education (FAPE). Following a ruling on the District's Motion to Limit the scope of the remedies, the case proceeded to a very efficient due process hearing.⁴

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

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 29 U.S.C. § 794.

⁴ The District's Motion was granted to exclude evidence of monetary damages as beyond this hearing officer's jurisdiction, and that claim was dismissed. Hearing Officer Exhibit (HO-) 1B. Other 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-) followed by the exhibit number. The parties through counsel also provided a set of joint stipulations of fact (HO-2), thereby streamlining the hearing and yielding a concise record. References to duplication in the exhibits may not be to all.

ISSUES

1. Whether the District deprived Student of a free, appropriate public education under the IDEA and Section 504; and
2. Whether the District acted with deliberate indifference toward Student under Section 504; and
3. If either of the first two issues is answered in the affirmative, whether Student and/or the Parents are entitled to any remedy?

FINDINGS OF FACT

1. Student is a late teenaged student residing in the District. Student has been identified as eligible for special education as a child with Intellectual Disability and Autism. Student also has a mental health diagnosis that impacts Student's ability to participate in activities safely across settings. (HO-2 at 1, ¶¶ 1, 2;⁵ S-2A at 11.)
2. Student presents with various relative strengths and weaknesses, is able to follow one- and two-step directions, and exhibits skills with social interactions. [redacted] (S-4A at 13; S-5A at 2.)
3. Student and the family moved into the District from another state in late November and early December 2021, and the Parents were in communication with the District in October. Student was formally enrolled on November 2, 2021. (N.T. 37; HO-2 at 1-2, ¶¶ 4, 5, 6, 12.)

⁵ A majority of the joint stipulations are paraphrased, combined, and/or contain minor revisions for simplicity and clarity, to correct typographical errors, and to remove potentially personally-identifiable information.

4. The Parents provided Student's special education records to the District and contact information for the principal at school in the other state at the time of enrollment. (N.T. 30-31; HO-2 at 1-2, ¶¶ 3, 10.)
5. Student was evaluated by the other state in November 2021. Cognitive assessment revealed overall significantly below average functioning, but a relative strength with fluid reasoning (average range). Assessment of academic achievement reflected similar scores in the significantly below average range. Student's adaptive behavior skills were also judged to be deficient across domains (Communication, Daily Living Skills and Socialization), with the Parents' ratings somewhat higher than those of the teacher. (S-2A.)
6. The November 2021 evaluation determined that Student remained eligible for special education based on Intellectual Disability and Autism. Programming recommendations addressed full time support including during transportation, safety of Student and peers, strategies to promote academic skill development, and preparation for changes to routine. (S-2A.)
7. Student's Individualized Education Program (IEP) from the other state, last updated in November 2021, provided for full-time one-on-one paraprofessional support. Annual goals addressed functional reading and mathematics skills; daily living (social skills, personal information); behavior (task completion, following directions, emotional regulation, safety). Post-secondary transition was also addressed, with a goal for Student to identify public transportation options. (P-2.)
8. During early conversations with the District, the Parents advised the District that they must provide the transportation for Student. (HO-2 at 2, ¶ 8.)

9. Prior to the family's move, the District contacted a number of approved private schools for the purpose of providing comparable services, in order to consider appropriate placement for Student; however, the only placement that would accept Student was Private School. A Private School administrator was at first hesitant to provide full-time one-on-one support but that was the District's decision to make. (N.T. 30, 133, 137; HO-2 at 2, ¶ 14.)
10. On November 19, 2021, the Parents contacted the District requesting a meeting of the IEP team to discuss educational placements and the need for one-to-one support. The team meeting convened on December 8, 2021. (HO-2 at 2, ¶¶ 15, 16.)
11. The District proposed Private School for Student with a one-to-one Registered Behavioral Technician (RBT). The Parents shared their reluctance to accept that placement with specific concerns regarding its distance from the home and transportation, and Student requiring an aide for transportation without other students. Both the District and Private School representatives agreed that transportation must be consistent with the IEP from the other state⁶ for safety reasons. (HO-2 at 2, ¶¶ 17, 18, 19.)
12. On December 8, 2021, the District issued a Notice of Recommended Educational Placement (NOREP). The Parents reluctantly agreed to Private School, asking again as they had in the meeting that Student be transported by the District with an aide and without other students. (N.T. 30-31, 108; HO-2 at 2-3, ¶¶ 21, 23, 25; P-20 at 3.)
13. The Parents agreed to transport Student to Private School at the District's standard reimbursement rate until transportation could be secured. After February 1, 2022, they requested an additional \$200

⁶ The IEP from the other state does not contain specifics on transportation. (P-2.)

per day since one of the Parents was unable to work normal hours in the applicable field because of the time involved with transporting Student, a trip of approximately 45 miles lasting at least one hour each way. (N.T. 33-34, HO-2 at 3, 5, ¶¶ 26, 27, 28, 29, 55.)

14. Private School could not make arrangements for Student to begin school on December 13, 2021 as planned, the day after the move into the District. In response, the District offered compensatory education for the five day period before the winter break. (HO-2 at 4, ¶¶ 33, 34, 35.)
15. The District began attempts to secure transportation services for Student in December 2021, although the District advertisements for driver positions remain ongoing and constant throughout the year. This effort was challenging due to a shortage of bus and other drivers in the geographic area, particularly after the COVID-19 pandemic and school closures. No specific advertisements or postings for a driver and aide for Student were created, but inquiries were made to identify other agencies providing transportation services. (N.T. 80-81, 83-84, 91-92, 119-20, 144-45.)
16. The District's search for a van driver and aide for Student did not result in rejection of any applicant on the basis of gender or other irrelevant attribute of a candidate. (N.T. 87.)

Entry Into Private School

17. Student began attending Private School on January 4, 2022, with the Parents providing transportation. The District provided its standard reimbursement rate, that for the Internal Revenue Service. (HO-2 at 3, ¶¶ 36, 37, 38.)

18. The parties communicated about the progress on securing transportation in February, March, April, and May 2022. (HO-2 at 4-5, ¶¶ 39, 40, 41, 42 43, 44, 45, 47, 48, 49.)
19. The local Intermediate Unit conducted an evaluation of Student and issued an Evaluation Report on April 1, 2022. Parent input into the ER described Student's strengths, as well as their concerns with Student's behavior including aggression and social/emotional regulation. (S-5A at 1-2.)
20. The April 2022 ER provided a summary of Student's functioning and academic performance. (S-5A.)
21. Additional assessments for the April 2022 ER yielded results similar to those by the other state, reflecting deficits with cognitive and adaptive functioning. Behaviorally, both the Parents and teacher endorsed elevated to very elevated concerns with defiance/aggression, peer relations, inattention, hyperactivity/impulsivity, with some variability between those raters. (S-5A at 11.)
22. A Functional Behavior Assessment (FBA) was conducted as part of the April 2022 ER. A number of behaviors of concern were identified: disruption, verbal aggression, elopement, and self-injurious behaviors. The hypothesized functions of these behaviors were determined to be escape from aversive stimuli or to gain automatic reinforcement. (S-5A at 2-10.)
23. The April 2022 ER maintained Student's eligibility categories as Autism and Intellectual Disability. (S-5A.)
24. The District developed an IEP for Student in late April 2022. This IEP identified needs in the areas of reading and mathematics skills, speech/language, behavior, and daily living skills (safety awareness, personal information). Student's limited safety awareness and mental

health were noted to be major factors in planning for future employment and living. Special transportation was a related service in the IEP along with a PBSP. (P-15; S-4A.)

25. Transportation was secured by the District on May 4, 2022, and those services began on May 9, 2022 with a driver and aide. (N.T. 44-45, 123-24; HO-2 at 5, ¶¶ 53, 54, 56.)
26. The District reimbursed the Parents for transportation of Student between January and May 2022. (S-8.)
27. The District offered compensatory education for a single school day when the Parents were unable to provide transportation. (N.T. 53-54, 122; HO-2 at 5, ¶ 51; S-7A.)
28. The programming provided at Private School is appropriate for Student. (HO-2 at 5, ¶ 57.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion 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 Parents 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, who assume 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 each of the witnesses who testified to be credible as to the facts. The testimony was essentially quite consistent where it overlapped, with the differences among witnesses largely based on his or her interpretation of the facts.

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

The IDEA requires each of the states to 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. Some years ago, 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 comply with the procedural obligations in the Act.

The various states, through local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student 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).

Transition to post-secondary education, employment, and adult living skills may be a necessary component to the provision of FAPE. 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43. Similarly, transportation may be a necessary related service. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34.

General IDEA Principles: LEA Obligation for Students

Transferring from Out of State

The interstate transfer provision of the IDEA is found at 20 U.S.C. § 1414(d)(2)(C)(i)(II):

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

20 U.S.C. § 1414(d)(2)(C)(i)(II).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). Consistent with these principles, a denial of FAPE

may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

General Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995).

Intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.” *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). However, “deliberate choice, rather than negligence or bureaucratic inaction” is necessary to support such a claim. *Id.* at 263.

The Parents’ Claims

There is no dispute that Student was entitled to comparable services following the move to Pennsylvania. The Parents also do not challenge the appropriateness of the program developed by the District. On the contrary, this case presents two very narrow issues relating to the delay in the District’s implementation of transportation services.

Denial of FAPE

The first issue is whether the length of time during which Student was not provided District transportation denied Student FAPE in any respect. The Parents contend that the District did not act promptly or reasonably in its efforts to secure transportation, while the District counters that the various challenges unique to this case as well as systemic transportation personnel shortages effectively prevented it from doing so any earlier.

The Parents clearly were afforded the opportunity for meaningful participation in programming decisions. However, the District had no reason to suspect that it would be responsible for transporting Student to Private School based on early conversations until the IEP team met and the Parents advised of that need, ultimately agreeing to the placement on December 9, 2021. The District was thereafter required to act reasonably, understanding that the Parents accepted that obligation at the District's standard mileage rate through February 1, 2022. With the exception of one school day in 2022, the Parents provided the transportation for Student so that Student could attend Private School.

The February 1, 2022 date marks a deadline of sorts, but must be viewed in context. The District provided testimony that explained various reasons for the delay through May 9, 2022. While the Parents were and are understandably frustrated by the time that elapsed, particularly since their offer was not unlimited, they continued to transport Student albeit reluctantly under the circumstances.

On the other hand, the District was well aware at the time that the April 2022 ER was underway and the resulting IEP was in development that Student exhibited limited safety awareness and needed to develop daily living skills. Although Student was undoubtedly safe with the Parents' transportation, Student was not learning safety awareness or developing the

foundational and functional skill of using transportation other than the family vehicle. Certainly as the April 2022 ER was in process, the District should have been taking additional steps to secure transportation for Student beyond those that had been unsuccessful. This hearing officer is compelled to find that the District had an obligation at least by March 1, 2022 to refocus and plan to revise its efforts, with the upcoming approach of the fourth quarter, to ensure that Student had the opportunity to develop transportation skills including safety awareness. In doing so, this hearing officer finds persuasive the reasoning in *B.N. v. Abington Heights School District*, ODR File No. 2341-1112 (Culleton, February 8, 2012), cited by the Parents, and finds a denial of FAPE warranting a remedy. The FAPE denial is construed as beginning within a reasonable time of when alternative efforts should have been pursued, or as of March 15, 2022. See *Dallas Independent School District v. Woody*, 865 F.3d 303, 321 (5th Cir. 2017); *Questions and Answers on Individualized Education Programs, Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 2011) at Question A-4.

Deliberate Indifference

The next issue is whether the District acted with deliberate indifference under Section 504. The record evidence falls far short of establishing that the District engaged in any action such that it was deliberately indifferent in this case. There is simply no showing that the District's failure to secure transportation earlier than May 9, 2022 was a product of any deliberate choice.

The Parents contend that they were given only one choice for placement and that Private School initially did not support the need for full-time one-on-one support, and the District offered that program without the means to also provide transportation. There is no evidence that the District ever wavered from the provision for full-time one-on-one support. With respect to transportation, the Parents cite to the absence of documentary

evidence to support the District's assertions that it made reasonable efforts to secure those services. However, the testimony of the two District witnesses was credible in this regard, as were their explanations of various challenges that were encountered. This persuasive testimony easily defeats the claim of deliberate choice by the District. Furthermore, even accepting the assertion that the Parents never received detailed records about the transportation personnel search efforts that were undertaken (assuming such even exist in an understandable format that could be shared, and that the Parents were entitled to such information), this hearing officer cannot conclude that they have met their burden of establishing deliberate indifference.

Remedies

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 has also endorsed an alternative qualitative 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).

Having concluded that Student was denied FAPE with respect to transportation beginning on March 15, 2022, an equitable remedy of one hour of compensatory education per day from that date through May 9, 2022 is the appropriate remedy. This award reflects consideration of all of Student's unique circumstances including the limited ability to attend and behavioral presentation (P-2; S-4A), as well as a focus on the equitable nature of the remedy, and is consistent with *B.N., supra*.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents 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 in the areas of daily living and post-secondary transition. 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 or other provider 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 Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty two (22). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. 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.

Finally, the Parents argue that the standard mileage reimbursement is inadequate, particularly since the IRS increased its rate effective July 1, 2022. They therefore seek additional reimbursement for expenses incurred in providing transportation for Student. The Parents do not, however, proffer an alternative method of calculating the amount to which they should be reimbursed, nor have they provided any evidence of actual expenditures for this hearing officer to consider. Thus, no further remedy shall be awarded.

CONCLUSIONS OF LAW

The District did deprive Student of FAPE regarding transportation as a related service between March 15, 2022 and May 9, 2022.

Student is entitled to compensatory education.

The District did not act with deliberate indifference under Section 504.

ORDER

AND NOW, this 15th day of August, 2022 in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student was denied FAPE regarding transportation between March 15 and May 9, 2022.
2. Student is entitled to one (1) hour of compensatory education for each day that school was in session beginning on March 15, 2022 and through implementation of transportation services on May 9, 2022. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
3. The District did not act with deliberate indifference under Section 504.
4. Nothing in this 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. 26287-21-22