

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 Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

23920-20-21

Child's Name

L.B.

Date of Birth

[redacted]

Parent

[redacted]

Counsel for Parent

Henry Young, Esquire
30 Cassatt Avenue
Berwyn, PA 19312

Local Educational Agency

Central Dauphin School District
600 Rutherford Road
Harrisburg, PA 17109

Counsel for LEA

Christopher Conrad, Esquire
100 Corporate Center Drive – Suite 201
Camp Hill, PA 17011

Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

03/17/2021

Introduction

This special education due process hearing concerns L.B. (“student”), a student who formerly resided in the Central Dauphin School District (“District”) during most of the student’s K-12 education.¹ The student took a diploma from the District in June 2019.

The student’s parent claims that, while at the District, the student should have been identified as a student who qualified under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² as a student with a specific learning disability in mathematics.

By allegedly failing to identify the student as an eligible student, the parent claims in her complaint that the District denied the student a free appropriate public education (“FAPE”). Analogously, the parent asserts these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).³

The District counters that the student did not qualify as a student with a disability, and at all times it appropriately educated the student.

¹ The generic use of “student”, and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² 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 §§14.101-14.162 (“Chapter 14”).

³ 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 §§15.1-15.11 (“Chapter 15”).

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the parent is not entitled to any remedy.

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

Issues⁴

1. Is the student a student with a disability?
2. If so, should the District have identified the student while the student attended the District?
3. If so, is the student entitled to remedy?

Findings of Fact

All evidence in the record, both exhibits and testimony, were considered.

Specific evidentiary artifacts in findings of fact, however, are cited only as

⁴ The first evidentiary hearing on November 20, 2020 was related to fact-finding regarding whether parent “knew or should have known” (KOSHK) of the actions which formed the basis of her complaint at a point prior to April 2018, which was two years prior to a tolling agreement of the parties in April 2020. Thereafter, on December 7, 2020, the undersigned hearing officer issued a KOSHK ruling, finding that the parent knew or should have known, no later than September 2016. Therefore, claims based on acts or omissions prior to April 2018 were untimely, and a denial-of-FAPE evidentiary record was developed as of April 2018, the spring of the student’s 11th grade year.

necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

Educational Background / K – 8th Grade

1. The student entered the District in 2nd grade, the 2008-2009 school year, having attended private schooling in the kindergarten and 1st grade. (Notes of Testimony ["NT"] at 51-117).
2. After attending a charter school for 8th grade, the student returned to the District for 9th grade. (School District Exhibit ["S"]-8).

9th Grade

3. In 9th grade, the student's final grades in core academic areas were: English – 84%, mathematics – 69%, science – 86%, and social studies – 93%. (S-9).
4. In 9th grade, the student achieved a proficient score on statewide Keystone Testing in algebra. (S-6).

10th Grade

5. In July 2016, prior to the student's 10th grade year, the parents communicated with the school counselor, emailing her previous requests for evaluation and special education services communicated

to the District in February 2009 and August 2012. (S-3; NT at 51-117, 138-162).

6. The July 2016 email detailed, in the parents' view, long-standing struggles with mathematics and requested specific accommodations in math classes. (S-3 at page 2).
7. In September 2016, the school counselor arranged a Section 504 meeting. (S-3 at pages 1-2, S-4 at page 7; NT at 138-162).
8. The team, including the student's mother, went through the Section 504 eligibility worksheet. (S-4 at pages 2-6; NT at 138-162).
9. The Section 504 team reviewed a psychological report which the parent had from private schooling in 1st grade, input from parent, observations of the student in the school setting, and a records review (including transcripts and grade reports). (S-4 at page 2).
10. The Section 504 team noted that the student exhibited anxiety related to mathematics. (S-4 at page 3).
11. At one point in the Section 504 worksheet, but not as a part of any substantive section, "dyscalculia" is written at the top of the page. Dyscalculia was discussed by the team. (S-4 at page 4; NT at 248-312).
12. The Section 504 team noted that weekly private tutoring is a "mitigating measure" to address impairment. (S-4 at page 4).

13. The Section 504 worksheet indicates that the conclusion was that the student did not qualify for a Section 504 plan. (S-4 at page 5).
14. Both the student and parent voiced that they did not wish to pursue special education. (NT at 248-312, 322-389).
15. In January 2017, midway through 10th grade, the parent emailed the District over concerns regarding the student's progress in mathematics. (P-1 at pages 11-19; NT at 248-312).
16. The District did not request permission to evaluate the student.
17. In 10th grade, the student's PSAT math score was in the 36th percentile and indicated that the student needed to "strengthen your skills to be ready for college". (Parent Exhibit ["P"]-8 at pages 1-2).
18. In 10th grade, the student's final grades in core academic areas were: English – 86%, mathematics – 75%, science – 92%, and social studies – 89%. (S-9).

11th Grade

19. In March 2018, in the spring of 11th grade, the student took the SAT exam for college admissions. In mathematics, the student scored in the 32nd percentile in a national sample and in the 29th percentile in a sample of SAT test-takers. The score was flagged by the College Board as "below benchmark". (P-8 at pages 5-6).

20. In June 2018, at the end of 11th grade, the student again took the SAT exam. No percentile scores or quality indicators were included in the record for this administration of the exam. The student's mathematics score was higher than the March score. (P-8 at pages 7-8).
21. After the results of the March and June 2018 SAT exams, the parent registered the student for private SAT tutoring. (P-14; NT at 172-243).
22. The student's 11th grade mathematics teacher testified that the student was offered additional regular education support. The student did not engage in that regular education support. (NT at 437-460).
23. In 11th grade, the student's final grades in core academic areas were: English – 79%, mathematics – 79%, science – 74%, and social studies – 88%. (S-9).

12th Grade

24. In October 2018, in the fall of 12th grade, the student again took the SAT exam. In mathematics, the student scored in the 47th percentile in a national sample and in the 40th percentile in a sample of SAT test-takers. The score was flagged by the College Board as "below benchmark". (P-8 at pages 9-10).

25. Over February – May 2019, in the spring of 12th grade, the parent provided the student with private tutoring in mathematics. (P-15).
26. The student’s 12th grade mathematics teacher testified that the student was offered additional regular education support. The student did not engage in that regular education support. (NT at 465-479).
27. In 12th grade, the student’s final grades in core academic areas were: English – 70%, mathematics – 74%, science – 83%, and social studies – 76%. (S-10).
28. Throughout high school, the student frequently met with the school counselor, to the point that the school counselor and support staff in the counseling office exchanged snarky emails about the amount of time the student spent in the office. These discussions were wide-ranging and included discussions related to work-completion and difficulties in math. (P-1 at pages 20-21; NT at 138-162, 322-389).
29. The student graduated from the District in June 2019. (S-10).
30. The District did not request permission to evaluate the student at any time.

Post-Secondary

31. The student had been accepted at a nearby state university. Anticipating enrollment at the university in the fall of 2019, the

student was required to take certain university placement tests, including mathematics. Knowing that the student struggled in mathematics, the parent inquired about accommodations for the testing. The university required a diagnosis or evaluation to support the requested accommodations. (NT at 172-243).

32. Parent undertook a private evaluation. In July 2019, the private evaluator issued a report. (P-2).

33. The July 2019 report included cognitive and achievement testing. (P-2).

34. The student's full-scale IQ was 106, in the average range. (P-2 at pages 3-7).

35. On academic achievement testing, the student showed statistically discrepant scores (at 1.5 standard deviations from the student's full-scale IQ) in the mathematics fluency composite (88), as well as the math problem-solving (87), math fluency/addition (81), and math fluency/subtraction (79) sub-tests. (P-2 at pages 7-12).

36. The evaluator diagnosed the student with a specific learning disorder with impairment in mathematics. (P-2 at pages 16-18; NT at 493-557).

37. The student did not receive accommodations in mathematics class at the outset of the freshman year at the university. In November 2019, the student's struggles in mathematics led to

communications with the university about potential accommodations. Ultimately, the student withdrew from the mathematics class without earning credit for the class. (P-4, P-7).

38. In July 2020, parent filed the complaint which led to these proceedings.

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

Discussion

IDEIA/Denial-of-FAPE

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives 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

in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Here, the parent has met her burden of proof that the District failed to request permission for an evaluation which would have led to the identification of the student with a specific learning disability in mathematics calculation and mathematics problem-solving. The record is clear that over the student's years at the District, the student's mother had communicated often about her concerns for the student's performance in mathematics.⁵

Once the student returned to the District for high school, the evidence is preponderant that the District had consistent information that the student's academic performance in mathematics was problematic. In 9th grade, the student's grade in mathematics was a clear outlier among the core academic subjects of English, mathematics, science, and social studies. It must be noted, however, that the statewide Keystone Testing yielded a proficient score in mathematics.

Prior to 10th grade, the parent asked for accommodations, which led to a Section 504 meeting. At that meeting, the team discussed difficulties in mathematics, including dyscalculia specifically, and anxieties related to these

⁵ Both in the findings of fact and in the legal conclusions, evidence prior to April 2018 is cited. This evidence lies outside the scope of the parent's claim but is necessary to understand the District's knowledge as of April 2018, when parent's claim for remedy is viable.

difficulties. The parent and student shared that they were not interested in special education.

This highlights a central tenet of the District's position, namely that it did not request permission to evaluate the student because the family did not embrace the idea of special education. That may be the case, but it entirely misses the mark. At the point where it suspects a potential disability, or in the face of parental concerns even where it does not harbor that suspicion, a school district's obligation is to request permission to evaluate. Parents may decline to grant permission. If the evaluation process yields an identification and recommendation for special education, parents may decline to pursue those services. But it does not suffice, and on facts such as these rises to a denial-of-FAPE, to acquiesce to some notion of parental preference when there is a clear need, at the outset, to request permission to evaluate.

Midway through 10th grade, only four months after the September 2017 Section 504 meeting, parent again contacted the District with deep concern about the student's performance in mathematics. On the PSAT, taken that year, the student's score in mathematics was flagged as below benchmark for college preparation. And the student's mathematics grade again was an outlier among the core academic subjects.

Once the student returned for 11th grade, the course of events—the parent's concerns and communications and the information shared at the

Section 504 meeting—as well as the achievement data that had accumulated (grades and testing) all should have put the District on notice that it needed request permission to evaluate the student.

The District did not request permission to evaluate, recommending only regular education support in mathematics over 11th and 12th grade. The parent absorbed out-of-pocket expenses for mathematics tutoring, including specialized tutoring for the SAT, where the student continued to exhibit markedly lower scores in mathematics compared to general test-taking populations.⁶

The private evaluation confirmed through testing (testing which the District should have performed, or at least put itself in a position to perform by requesting permission to evaluate), and post-secondary mathematics performance continued to make concrete, the student's learning disability in mathematics.

In sum, then, the District knew or should have known in the fall of 11th grade (somewhere over September – December 2017) that it needed to request permission to evaluate the student. It did not. Therefore, as of April 2018 when the parent's claims are timely, those claims will serve as the basis for remedy.

⁶ Parent made a request for reimbursement of charges for private counseling for the student. The evidentiary record does not support remedy for such claims. (See P-3, NT at 172-243).

Section 504/Denial-of-FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁷ The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See *generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

Therefore, the foregoing analysis is adopted here— the District failed to request permission to evaluate the student when it should have, thereby failing to put itself and the family in a position to see whether a necessary evaluation process could unfold.

Section 504/Discrimination

Additionally, the provisions of Section 504 bar a school district from discriminating against a student on the basis of disability, or thought-to-be-eligible status. (34 C.F.R. §104.4). A student with a disability, or a thought-

⁷ Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

to-be-eligible student, who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against on the basis of disability, has been subject to disability discrimination in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F. 3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in its purported acts/omissions. (S.H., *id.*).

Here, it was not made explicit in the complaint whether parent is claiming disability-based discrimination under Section 504. To the extent that such claims are part of parent's Section 504 allegations, those claims are not supported by the evidence. The District failed to request permission to evaluate when it should have. But this does not amount to deliberate indifference; while the critical first component on a potential journey toward an individualized education program (requesting permission to evaluate) was missing here, the District did not ignore or obfuscate, seeking to provide regular education support to the student in mathematics.

Accordingly, the District has not discriminated against the student on the basis of the student's thought-to-be-disabled status.

Remedy

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (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)).

In this case, compensatory education does not appear to be the most appropriate or workable remedy. The student was not identified, so there is no firm basis for understanding what necessary special education in mathematics might have been put in place. And while it does not excuse the District's failure to request permission to evaluate, there is an equitable facet to the family's resistance to conversations about special education. Too, the student went on to post-secondary education and, at this point, one must question how compensatory education might operate in the life of the student. Therefore, it is the considered opinion of this hearing officer that compensatory education is not an appropriate remedy.

More appropriate is the remedy of reimbursement for the out-of-pocket expense absorbed by the parent for tutoring to address the explicit needs of the student in mathematics. There was a clear need to investigate further, by requesting permission to evaluate, and so the necessary first step toward the District's opportunity to provide special education was bypassed. The District had a clear obligation to request permission to evaluate the student, and it did not. Out-of-pocket expenses by the parents were then necessary and must be remedied.

Accordingly, the order below will outline the appropriate reimbursement, which will include reimbursement for the July 2019 private report, the first time testing, analysis, and recommendations to understand the student's learning disability was made manifest.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Central Dauphin School District did not meet its obligations to the student by failing to request permission to evaluate the student at some point in or after the fall of 2017.

The District shall reimburse the parent for any out-of-pocket payments made by the parent for mathematics tutoring, including tutoring for SAT tutoring, in or after April 2018 through June 2019 when the student graduated from the District. The District shall also reimburse the parent for the cost of the private evaluation process and report undertaken in the summer of 2019.

Within 30 days of the date of this order, parent, through counsel, shall provide to counsel for the District documentation for the out-of-pocket tutoring services related to mathematics for the period April 2018 through June 2019, including proof of payment therefor, as well as proof of payment for any out-of-pocket evaluation process and report from the summer 2019. Within 60 days after furnishing the documentation and proof of payment, the District shall reimburse the parent.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

03/17/2021