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Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

Closed Hearing

ODR No. 27484-22-23

Child's Name

N.R.

Date of Birth

[redacted]

Guardian

[redacted]

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

07/12/2023

Introduction

This special education due process hearing concerns the educational rights of N.R. ("student"), a student who resides in the Philadelphia School District ("District").¹

The student has been identified as a student with an intellectual disability, autism, and speech/language ("S&L") impairment.

The parties do not disagree over the student's eligibility under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA"). The guardian alleges that the student has been denied a free appropriate public education ("FAPE") in the 2022-2023 school year since the outset of the school year and continuing through the end of the year in June 2023.² The family requests a compensatory education remedy. The District counters that it met its obligations to the student and no remedy is owed.

For reasons set forth below, I find in favor of 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). The family also brings claims of denial of FAPE under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504"), 34 C.F.R. §104.33 (*see also* 22 PA Code §§15.1-15.8).

Issues

- Was the student denied FAPE over the course of the 2022-2023 school year?
- If so, what compensatory education remedy is owed?

Findings of Fact

Exhibits of record and testimony were considered in their entirety in writing this decision. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue presented.

1. Prior to the 2022-2023 school year, the parties agreed that the student would be educated at a private placement outside of the District. (Guardian's Exhibit³ ["P"]-2, P-5; School District Exhibit ["S"]-6; Notes of Testimony ["NT"] at 40-96).
2. In December 2021, the District sought permission to re-evaluate the student. The guardian provided consent in March 2022. (P-6, S-2).
3. In mid-June 2022, the District issued a re-evaluation report ("RR"). (P-8 at page 19; S-4).

³ Even though the guardian represents the interests of the family, "parent" is used as a default term to describe those party exhibits.

4. The June 2022 RR contained observation of the student in the private placement, guardian and educator input, and updated assessment of adaptive skills, and certain cognitive testing. (P-8 at page 19, S-4).
5. The educator input in the June 2022 RR indicated that the student exhibited below-average social skills. The educators indicated behavioral concerns including elopement and "physical resistance and intrusive behaviors...(and) forceful contact". (P-8 at pages 31-32; S-4 at pages 13-14).
6. The educator input in the June 2022 RR indicated consistent success in, and need for, community-based instruction and natural environments. (P-8 at pages 31-32; S-4 at pages 13-14).
7. The June 2022 RR did not contain any vocational or transition testing. (P-8 at page 19, S-4).
8. The June 2022 RR identified the student as a student with an intellectual disability, autism, and S&L impairment. (P-8 at page 19, S-4).
9. The June 2022 RR identified the student with needs in "compulsive and stereotyped maladaptive behaviors and severe deficits in communication and social functioning". (P-8 at page 40, S-4 at page 22).
10. As of late July 2022, the student's individualized education program ("IEP") team had not met. Counsel for the family began to

communicate with counsel for the District regarding the arrangement of an IEP meeting. (P-9).

11. Communication between counsel regarding an IEP meeting continued through August and September 2022. (P-9).
12. In late September 2022, the District proposed an IEP. (P-12 at pages 16-18; S-6 at pages 15-17, S-7).
13. The September 2022 IEP included transition goals in the transition programming section. (P-12 at pages 16-18; S-6 at pages 15-17).
14. The September 2022 IEP included six goals, including two in expressive language (using an augmentative-alternative communication device), one in behavior (task persistence), two in transition/employment skills (school-based activity and job skills), and one in transition/independent living (following multi-step directions). (P-12 at pages 22-30; S-6 at pages 21-29).
15. One goal in the September 2022 IEP is listed as "interpersonal communication". The goal is not a social communication, social skills, or interpersonal relations goal. Instead, it is a goal related to seeking assistance with want/needs or problem-solving. (P-12 at page 26; S-6 at page 25).

16. The District did not provide a notice of recommended educational placement (“NOREP”) with the IEP. The NOREP was issued in mid-October 2022. (P-13).
17. The guardian disapproved the NOREP, not agreeing with the programming and placement offered by the District. The guardian did, however, consent to the provision of the IEP so that the student could receive services at the District. (P-13, P-14; NT at 40-96).
18. District transportation was not in place until mid-November 2022. Over the period of the student’s attendance at the District from mid-November 2022 through the end of the school year in June 2023, transportation was not wholly reliable, with the student missing whole school days or tardy transportation leading to missed instruction. (NT at 40-96).
19. Job-skill transition instruction (farm-based activity) through the vocational instructor did not take place until April and May 2023. (S-19, S-27; NT at 275-306).
20. Community-based instruction (navigating streets and locations) took place only on the school campus/school grounds. (NT at 162-263).
21. Baseline data for the student’s IEP goals was developed in September 2022. (P-18, S-18).

22. There was no progress-monitoring data collected for the second quarter reporting period. (P-18, S-18).⁴
23. On this record, progress-monitoring data was provided in March 2023 for the third quarter reporting period. (P-18, S-18).
24. On the behavior goal, in March 2023 the student was making progress as of the third quarter. (S-18 at pages 1-2).⁵
25. On the 'interpersonal communication' goal, in March 2023 the student was consistently exhibiting scores at or above the goal level. (S-18 at page 3).
26. On the expressive language goal, in March 2023 the student was consistently exhibiting scores at or above the goal level. (S-18 at page 4).
27. On the employment skills/job-skills goal, in March 2023 the student was consistently scoring at or above the goal level. (S-18 at page 5).
28. On the independent living goal, in March 2023 the student was consistently scoring at or above goal level. (S-18 at page 6).

⁴ The student's special education teacher left the District approximately at the winter break. The special education teacher who instructed the student beginning in January 2023, and who testified at the hearing, did not begin to work with the student until the third quarter. (NT at 162-263).

⁵ IEP goal progress monitoring is provided at P-18 and S-18. The District exhibit at S-18, however, provides a cumulative picture of progress in one document. Therefore, citation to the progress-monitoring is at S-18 only.

29. On the employment goal/school-base activity, in March 2023 the student was making progress as of the third quarter. (S-18 at page 7).

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—including appropriately ambitious goals— affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis*, or minimal, or ‘some’ 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, there were multiple aspects of the student’s programming which contain deficits that amount to a denial of FAPE.

First, the District did not have an IEP crafted and in place for the outset of the 2022-2023 school year. A school district must have programming in place by the first day of a school year. (34 C.F.R.

§300.324(a); 22 PA Code 14.131(a)). The District did not have an IEP in place, offered through a NOREP, until mid-October 2022.

Second, there was no progress monitoring for the second quarter. Whether this is because the data was not collected or because the data was simply not reported and lost thereafter, the result is that the IEP team had no ability to gauge the student's progress. This procedural violation amounts to a denial of FAPE.

Third, the student's programming did not include any goal addressing outsized behaviors, such as elopement or assertiveness or appropriate behavior in physical proximities. These behavior needs were identified by both the educators at the private placement and the District evaluator, but there is no goal to address these significant behavior needs.

Fourth, certain IEP goals, in light of the progress-monitoring, were not appropriately ambitious. When gauged against the baseline levels, the progress-monitoring shows that the student's achievement in the 'interpersonal communication', expressive language, employment skills/job-skills, and independent living goals were all at or above where the student's IEP team hoped the student would achieve by September 2023. At the very least, the data should have indicated that an IEP team was required to consider the goal-achievement levels for these areas in the student's IEP.⁶

⁶ While not an aspect of the denial-of-FAPE, necessarily, the District decided to craft its own goals rather than continue with the goals in the student's IEP from the private placement where more accurate baseline data was available. (See P-2, P-3).

Fifth, the record taken in its entirety supports the conclusion that the student's community-based and vocational instruction were prejudicially lacking. There was, in effect, no community-based instruction. While the student, along with classmates would cross a street to access a District athletic track, the student did not navigate community streets or engage traffic signals, or interact with non-school personnel, or work in natural environments (retail, restaurant, public facilities). Similarly, there was only minimal direct vocational instruction. Instruction by the vocational teacher took place only in April and May 2023 and then only in isolated instances.

All of these factors combine to provide the basis that the District denied the student FAPE in the 2022-2023 school year.

Section 504/Denial-of-FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504/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

This decision was exacerbated by the prejudicial delays in the design of the student's programming.

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— for a myriad of procedural and substantive deficits in the student’s programming, the District denied the student FAPE.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, and by analogy under the terms of Section 504, 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)).

The evidentiary scope of claims and the nature of compensatory education awards were addressed in G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015).

In terms of the nature of the compensatory education, the G.L. court recognized two methods by which a compensatory education remedy may be calculated. One method, the more prevalent method to devise compensatory education, is the quantitative/hour-for-hour calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a quantitative calculation given the period of deprivation. In most cases, it is equitable in nature, but the award is a numeric award of hours as

remedy. The second method, a rarer method to devise compensatory education, is the qualitative/make-whole calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a qualitative determination where the compensatory education remedy is gauged to place the student in the place where he/she would have been absent the denial of FAPE. It, too, is equitable in nature, but the award is based on services, or some future accomplishment or goal-mastery by the student, rather than being numeric in nature.

Both calculations are a matter of proof. The quantitative/hour-for-hour approach is normally a matter of evidence based on IEPs or other documentary evidence that provides insight into the quantitative nature of the proven deprivation. The qualitative/make-whole approach normally requires testimony from someone with expertise to provide evidence as to where the student might have been, or should have been, educationally but for the proven deprivation, often with a sense of what the make-whole services, or future student accomplishment/goal-mastery, might look like from a remedial perspective.

In this case, the guardian was uncertain as to whether she would seek a quantitative/hour-for-hour remedy, or a qualitative/make-whole remedy. (NT at 21-22; see *also* Guardian's Closing Statement at pages 15-16). Qualitative/make-whole compensatory education requires an evidentiary component—evidence that sheds light on where a student's achievement

might be, or should be, absent the denial of FAPE. There is no such evidence on this record. Therefore, by default, compensatory education will be awarded as a quantitative/hour-for-hour award.

A secondary student, such as the student here, is entitled to a minimum of 990 hours of schooling each year. (22 PA Code §11.3(a)). Over the course of a 36-week school year, this amounts to 27.5 hours per week (or 5.5 hours per day over 180 school days).

As an initial matter, the District did not have an IEP proposed via NOREP until mid-October 2022, and lack of transportation delayed the student's attendance at the District until mid-November 2022. These delays account for a total denial of FAPE over this approximate 10-week period. Thus, 275 hours of compensatory education will be awarded for this aspect of denial of FAPE.

While it is uncertain how many days of school, or hours of instruction, the student missed due to unavailable or tardy District transportation, as indicated above the guardian's testimony is credited that there were such denials/delays over the period mid-November 2022 through the end of the school year in mid-June 2023. Working from an approximation of 30 cumulative school days (through whole days or accumulated hours) over these seven school months, 82.5 hours of compensatory education will be awarded for this aspect of denial of FAPE.

Additionally, over the period mid-November 2022 through the end of the school year in mid-June 2023, the procedural and substantive deficits in the student's programming, as outlined above, serve as the basis of a compensatory education award. Having said that, there is evidence in the record that the student made progress on certain IEP goals. And while the S&L goal was not appropriately ambitious (see above), the student's S&L programming was sufficient. (S-16; NT at 335-357). Thus, as a matter of equity, the student will be awarded 330 hours of compensatory education.

Finally, given the student's disability profile, the nature of the denial-of-FAPE (including over two months without any instruction whatsoever), and the fact that the denial-of-FAPE impacted the student in the very final year of IDEIA eligibility, the compensatory education shall be available to the student at market rates for services in the Philadelphia metropolitan area and shall be available through the student's 25th birthday.

Accordingly, 687.5 hours of compensatory education will be awarded.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Philadelphia School District denied the student a free appropriate public education.

The student is awarded 687.5 hours of compensatory education, available to the student as set forth above.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

07/12/2023