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Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

25865-21-22

Child's Name

E.S.

Date of Birth

[redacted]

Parents

[redacted]

Counsel for Parents

Jacqueline Lembeck, Esquire
30 Cassatt Avenue
Berwyn, PA 19312

Local Educational Agency

Donegal School District
1051 Koser Road
Mount Joy, PA 17552

Counsel for LEA

Shawn Lochinger, Esquire
331 East Butler Avenue
New Britain, PA 18901

Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

07/28/2022

Introduction

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

The parties disagree over the educational programming of the student under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA") and the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504"), specifically as to whether the student was provided with a free, appropriate public education ("FAPE") under the terms of those statutes.²

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 student and parent are not entitled to any remedy.

For reasons set forth below, I find for the parents in part and the District in part.

Issues

1. Did the District provide appropriate educational programming for the student's needs in the 2018-2019 (as of February 2019), 2019-2020, 2020-2021, and 2021-2022 school years?

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"]), as well as the 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"]).

2. To the extent that the answer to this questions is “no” as to any school year, is the student entitled to remedy?

Stipulations of the Parties

The parties have stipulated as follows as to the student’s programming and when it was in effect:

Stipulation #1. School District Exhibit (“S”) 4 is an individualized education program (“IEP”) developed in April 2018 with revisions through March 2019 on various dates as noted on pages 1 and 2. The parties agree that the Hearing Officer may consider the document at S-4 to be the programming that was in place from the start of the statute of limitations period in February 2019 through the development of the IEP at S-8.

Stipulation #2. S-8 is an April 2019 IEP, which was in place from April 2019 through the end of the 2018-2019 school year.

Stipulation #3. S-11 is an IEP developed in April 2019 with revisions in May 2019 related to extended school year (“ESY”) programming and related services. The IEP at S-11 did not go into effect due to the student’s transition to a private placement.

Stipulation #4. S-12 is a transition IEP for the student’s transition from a placement at the District to an agreed-upon private placement. The IEP at S-12 was in place for ESY programming in the summer of 2019 and the beginning of the 2019-20 school year until a revision in September 2019 Parents Exhibit (“P”) 9.

Stipulation #5. P-9 is a September 2019 IEP developed by the private placement. The IEP at P-9 was in place from October 2019 until the end of the 2019-2020 school year.

Stipulation #6. S-29 is a June 2020 IEP developed by the private placement after a re-evaluation of the student.

Stipulation #7. S-32 is an August 2020 IEP for the student's transition from the private placement to a placement at the local intermediate unit ("IU"). The IEP at S-32 was in place until a revision in September 2020 revision. (S-36).

Stipulation #8. S-36 is the August 2020 IEP with September 2020 revisions for implementation at the IU. The IEP at S-36 was in place from September 2020 to December 2020.

Stipulation #9. S-37 is an August 2020 IEP with revisions through December 2020. In response to the notice of recommended educational placement ("NOREP") that accompanied the IEP, the parents requested an informal meeting. (S-38). The IEP at S-37 went was in effect from January 2020 through May 2021.

Stipulation #10. S-41 is an IEP proposed in February 2021 IEP, revised in May 2021 after the issuance of a functional behavior assessment ("FBA"). Parent rejected the February 2021 IEP and invoked pendency when they filed a special education due process complaint (which tolled the parents' claims and is not the complaint at the center of these proceedings). After the May 2021 IEP revision, however, parents approved the implementation of

the IEP but noted concerns with the reductions of occupational therapy (“OT”) and speech language therapy (“S&L”) minutes (S-40). The IEP at S-41 went into effect in May 2021 and was in place for ESY programming in the summer of 2021 until December 2021.

Stipulation #11. S-43 is February 2021 IEP with revisions from December 2021, which are marked throughout the document. The IEP at S-43 went into effect in December 2021 when parents returned the NOREP (S-44), agreeing to implementation of the IEP but noting parents’ concerns.

Stipulation #12. S-46 was approved for implementation in March 2022, but revisions were made shortly thereafter. S-49 is the current IEP (the February 2022 IEP with the March 2022 revision). Parents agreed to the implementation of the IEP but noted concerns.

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

General Background & Placement History

1. The student is diagnosed with autism, intellectual disability, attention deficit hyperactivity disorder (“ADHD”), and apraxia of speech. (Notes of Testimony[“NT”] at 43).
2. In the 2018-2019 school year, including February 2019 when parents’ claims accrue, the student attended a placement at a District elementary school. After that school year, that classroom was going to be phased out of the District’s continuum of special education placements, so the student’s IEP team investigated private placements for the student.
3. In the summer of 2019, the student attended a private placement for ESY programming. The student remained at the private placement for the 2019-2020 school year.
4. The 2019-2020 school year was interrupted by the statewide school closure in March 2020 as a result of the COVID-19 pandemic. The student completed the school year with online programming.
5. In the summer of 2020, the student attended the private placement for ESY programming.
6. In the 2020-2021 school year, the student attended a placement at the local IU. Due to health concerns, the student began the school year with online programming instead of in-person schooling.
7. The student was not attending the online sessions. In October 2020, having been informed of this, the District held a meeting to discuss a

school attendance improvement plan and the potential for a paraprofessional to assist the student at home during online programming. The family rejected the paraprofessional coming into the home, and the student's attendance with online sessions improved. The student continued with online programming until February 2021 when the student returned to the IU for in-person schooling. (S-49).

8. The student finished the 2020-2021 school year, in-person, in the IU placement. In February 2021, upon the return to in-person schooling, the IU unilaterally determined that the student was not eligible for COVID compensatory services ("CCS").³

9. In the summer of 2021, the student attended the IU for ESY programming.

10. Parents took advantage of the pandemic-related Act 66 repeated school-year provision which allowed students to repeat the same grade level in the 2021-2022 school year. The [Student] repeated the same grade level, in person, at the IU placement for the 2021-2022 school year.

11. As part of an interim, evidence-based ruling, the District's proposed ESY programming for the summer of 2022 was found to be

³ Near the end of the hearing, the parents made a motion to compel that documentation of the IU's determination of CCS be made available and, failing the disclosure of that documentation, that a negative inference be imputed to the District's position on the matter. The District asserted through counsel that its request for any and all documentation in this regard had gone unanswered by the IU. Evidence, through the testimony of the District's director of special education, was taken (Hearing Officer Exhibit – Parents Motion to Compel & District Response; Hearing Officer Exhibit – Order re Motion to Compel; NT at 788-810.)

appropriate, although the level of related services were increased to mirror the level of services during the school year. (Hearing Officer Exhibit – ESY-2022 Ruling).

12. As indicated in the stipulations above, the student’s IEP has been the basis of numerous revisions over time.
13. To wrangle such an intricate record, the hearing officer requested that the parties, in their closing statements, address the specific areas of dispute that had coalesced over the course of the hearing. These include the following areas: evaluations, academics, related services (S&L and OT), ESY, and CCS.⁴ This framework will be employed in structuring the fact-finding and discussion.

Evaluations

14. In June 2017, the District evaluated the student upon the student’s entry into the District’s [program] kindergarten from early intervention. It accepted the testing and conclusions of the early intervention evaluation report. (P-2).
15. In February 2020, an independent educational evaluation was performed, confirming the identifications of the student, including a new identification of the student as having an intellectual disability. (S-25).

⁴ This matter was filed contemporaneously with a complaint involving the student’s sibling I.S. at ODR file number 25864-2122KE, and decisions in both matters are also being issued contemporaneously. Because some witnesses would testify on both records, hearing days often had the participants moving between both records, with testimony first taken as to the student before switching to testimony for the student’s sibling. Interspersed between this “duplicate” testimony might be the testimony of a witness who was testifying as to only one of the records. It led to a very intricate evidentiary record session to session. (See NT at 816-818).

16. The District re-evaluated the student in June 2021. In this re-evaluation report, the District added intellectual disability to its identifications of the student. (S-28).

Academic

17. The student had made progress by the end of the 2018-2019 school year on the VB-MAPP goals in the IEP. (S-4, P-9).
18. The student had not made progress by the end of the 2018-2019 school year on behavior goals in the IEP, especially aggression. (S-4, P-9).
19. At the private placement, overall the student made progress on the VB-MAPP from the start of the 2019-2020 school year through March 2020 before Pennsylvania schools closed as a result of the COVID-19 pandemic. The student showed mixed progress in behavior, with self-injurious behaviors and screaming both increasing but aggression significantly decreasing along with a decrease in elopement from task (S-4 at pages 6-11, S-29 at pages 5-7, 9).
20. Due to the school closure and the need to move to online programming, the student continued to work on goal progress, although the online environment limited the instructional approaches. The student received a reduced amount of S&L and OT services due to the online programming. (P-11, P-26; NT at 74, 77, 143-144, 710, 728-731, 743-744).
21. At the IU placement from the outset of the 2020-2021 school year through the end of October 2020, the first quarter of the school year, the student did not attend enough online sessions to gauge progress over that quarter. (S-51).
22. Over the remainder of the 2020-2021 school year, the student made progress on all VB-MAPP goals. (S-34 at pages 3-4, 7-9).

23. In the first half of the 2021-2022 school year, the student continued to make progress on VB-MAPP goals. (S-34 at pages 10-12, 19-24).
24. The goals, specially-designed instruction/program modifications, and related services in the March 2022 IEP are appropriate for the student. (S-49 at pages 39-72).

S&L / OT

25. The student had made progress by the end of the 2018-2019 school year on S&L goals in the IEP. (S-4; P-9).
26. The student had made progress by the end of the 2018-2019 school year on OT goals in the IEP. (S-4; P-9).
27. At the private placement in the 2019-2020 school year, progress monitoring is vague and does not show evidence of progress in OT through March 2020 before Pennsylvania schools closed as a result of the COVID-19 pandemic. (S-29 at pages 8-19).
28. At the private placement in the 2019-2020 school year, progress monitoring indicates that the student made progress in S&L goals through March 2020 before Pennsylvania schools closed as a result of the COVID-19 pandemic. (S-29 at page 8).
29. At the IU placement from the outset of the 2020-2021 school year through the end of October 2020, the first quarter of the school year, the student did not attend enough online sessions to gauge progress in S&L or OT over that quarter. (S-51).
30. Over the remainder of the 2020-2021 school year, the student made only slight progress in both of the S&L goals. This progress does not reflect significant learning. (S-34 at pages 2-3, 6-7).

31. Over the remainder of the 2020-2021 school year, the student made only slight progress in all three OT goals. This progress does not reflect significant learning. (S-34 at pages 1-2, 5-6).
32. In the first half of the 2021-2022 school year, the student made progress on both S&L goals. (S-34 at pages 17-18).
33. In the first half of the 2021-2022 school year, the student showed progress in OT goals. In the 1st quarter of the school year, the student's progress in OT goals had dipped. By the 2nd quarter, progress in all goals had improved dramatically and was very strong. Overall the record supports a conclusion that, by January 2022, the student exhibited significant learning in OT. (S-34 at pages 12-17).

ESY

34. The student maintained most skills during the ESY programming in the summer of 2019, although there was an increase in aggressive behaviors. This was the first experience of the student in an entirely new setting (the private placement). Therefore, this is a mitigating factor as to any sense that the student did not maintain skills. (S-14).
35. Due to the March 2020 pandemic-related school closure, the student attended online ESY programming in the summer of 2020. The record does not contain any data or progress monitoring from the ESY-2020 program. (S-32 at page 5).
36. The student attended ESY programming in person in the summer of 2021, where the student maintained skills levels. Additionally, the record created for the ESY-2022 program contains a large degree of implicit evidence—both exhibits and testimony—that speaks to the student's academic, S&L, and OT performance upon returning directly from ESY-2021 programming for the 2021-2022 school year. This

evidence supports a conclusion that the student did not markedly regress, thereby indicating that the ESY-2021 programming was appropriate and allowed the student to maintain skills levels. (P-23, S-41, S-49; see generally NT May 20th ESY session at pages 8-233).

37. The ESY programming for the summer of 2022 was addressed in the interim ruling issued in June 2022. (Hearing Officer Exhibit – ESY-2022 Ruling – June 23, 2022).

CCS

38. The student’s IEP team discussed CCS. Yet in February 2021, the IU unilaterally decided that the student did not qualify for CCS as a result of the pandemic related school-closure and return-to-schooling issues in the spring of 2020 and the beginning of the 2020-2021 school year. (NT at 93, 243, 606-613).

Discussion

IDEIA/Denial-of-FAPE

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, or

'some' education progress. (Endrew 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 District by and large has provided FAPE to the student over the school years in question—2018-2019 (as of February 2019), 2019-2020, 2020-2021, and 2021-2022. (Findings of Fact ["FF"] 17, 19, 22, 23, 25, 26, 28, 32, 33, 34, 36). There were, however, aspects of programming over time where the student did not make progress and was denied FAPE, specifically: behavior (especially aggression) for the period February 2019 through end of the 2018-2019 school year, OT for the 2019 – 2020 school year (through March 2020 when schools closed), and S&L and OT in the IU placement in the 2020-2021 school year after the student began to attend regularly in November 2020. (FF 18, 27, 30, 31). For these latter instances, compensatory education will be awarded.

There are also three aspects of the student's programming where the student was denied FAPE where special explanation must be provided. First, the District failed to identify the student as a student with an intellectual disability (FF 14-17). There is a degree of merit in the District's position that nothing in the student's program would markedly change even had the District identified the student as a student with an intellectual disability. As to the District's argument, however, there is not only a flaw, but a fatal flaw.

To not identify a student with an intellectual disability is, on its face, almost always a denial of FAPE because it circumvents the heightened awareness, and added protections, in Pennsylvania special education regulations for students with intellectual disability. One example of this heightened awareness/added protection is found in IDEIA and adopted in Pennsylvania law—the necessity to include short-term objectives as part of any IEP goal where a student with an intellectual disability (more precisely, a

student who qualifies for alternative state-level assessment). (34 C.F.R. §300.320(a)(2)(ii); 22 PA Code §14.102(a)(2)(xxvii)).

But in Pennsylvania, a student with an intellectual disability must be evaluated at least every two years, rather than every three years. Ostensibly, this is to confirm that an understanding of the student has not changed or does not need to be addressed on a, by definition, more regular basis. (22 PA Code §14.124(c)). Likewise, any disciplinary removal from school— regardless of type or length and excluding only the weapons, drugs, and inflicting serious bodily injury provisions of 34 C.F.R. §300.530(g)(1-3)—of a student with an intellectual disability is considered to be a disciplinary change-in-placement, requiring that a manifestation determination process be undertaken. (22 PA Code §14.143(b)).

The latter of these two points does not apply in this case, although it is included to illustrate the heightened awareness/added protection in Pennsylvania for students with an intellectual disability. The former of these two points, however, was a downfall of the District due to the mis-identification. The District should have engaged in a biennial evaluation of the student by June 2019 (instead of waiting for the independent evaluation of February 2020. This mis-identification is a denial of FAPE.

Second, there is no data or evidence, at all, in the record regarding the student's ESY programming at the private placement in the summer of 2020. (FF 35). Granted, this was only shortly after the pandemic-related school closure and the student's ESY programming was entirely online. So there may well be valid reasons for the lack of any data. Still, even any statement to that effect in the August and September 2020 IEPs—S-32, S-36—is missing. Where progress-monitoring evidence as to ESY programming is available for every other summer, this must weigh against the District.

Third, in a similar way, the evidence is silent as to the District's position on the provision of CCS to the student. (FF 38). In February 2021,

the IU unilaterally decided that the student did not qualify for CCS. The parents or IEP team were not made part of the decision-making, the District has no documentation on the decision, and the IU could not, or chose not to, provide information to the District about decision. These are all reasons why the District may be viewed as blameless. This cannot be the ultimate conclusion, however: Where the IEP team had discussed CCS, the lack of evidence about the decision or decision-making process must weigh against the District.

Accordingly, in addition to the programming-related deficits, compensatory education will be awarded for these three instances of denial of FAPE.

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).⁵ 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)).

As outlined above, the District denied the student FAPE for certain deprivation in the provision of services, as well as the issues related

⁵ 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 the evaluation, ESY-2020, and CCS. The compensatory education award will remedy denial-of-FAPE under Section 504 as well as IDEIA.

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, which is not a point of contention in this matter, and the nature of compensatory education awards were addressed in G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015) 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, in their complaint, parents seek a quantitative/hour-for-hour (“full days of compensatory education”— Complaint at page 10).

In terms of compensatory education, there is an equitable component to the awards below. The District rightly points out that even where there have been denials of FAPE, those have not been blanket denials. The testimony of educators deepens one’s understanding of the student and provides context for nuanced understanding of elements of progress.

Bearing that in mind, compensatory education is awarded as follows:

- Behavior in spring 2019 – 60 hours (S-4, P-9)
- OT in 2019-2020 (to mid-March 2020) – 10 hours (P-9 at page 26)
- S&L in 2020-2021 (after October 2020) – 25 hours (S-36 at page 36, S-37 at page 39)
- OT in 2021-2022 – 10 hours (S-36 at page 36, S-37 at page 39)
- Non-identification of student – 100 hours (FF 14-17)
- Lack of documentation ESY-2020 – 25 hours (FF 35)
- Lack of documentation CCS – 25 hours (FF 38)

Thus, the entirety of the compensatory education award will be 255 hours.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Donegal School District denied the student a free appropriate public education as detailed in the decision above. The student is awarded 255 hours of compensatory education.

The student's educational program as outlined in the February 2022 IEP, with March 2022 revisions, is an appropriate program and placement for the student.

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

07/28/2022