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Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

26363-21-22

Child's Name

D.T.

Date of Birth

[redacted]

Parent

[redacted]

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

07/08/2022

Introduction

This special education due process hearing concerns the educational rights of D.T. ("student"), a student who resides in the West York Area School District ("District").¹ The parties disagree over the student's special education programming under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")².

As a result of behavioral incidents in the spring of 2022, the District has proposed a program and placement for the student in a center-based setting with a therapeutic component. The student's parent feels that the student's current program and placement at the District are appropriate.

For the reasons set forth below, the student's individualized education program ("IEP") team will be ordered to meet to craft a concrete IEP for a specific center-based program and placement.

Issue

Are the District's proposed program and placement for the student appropriate?

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").

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.

1. In the 2021-2022 school year, the student attended the District high school [redacted]. (School District Exhibit ["S"]-1).
2. In January 2022, the student's IEP team met to discuss the student's IEP. (S-1).
3. In January 2022, the present levels of academic performance indicated that the student had mastered goals in reading and mathematics. (S-1 at pages 6-7).
4. The January 2022 IEP indicated that the student's functional needs included oppositional behavior ("refusal to interact with peers/adults"), work refusal, and off-task behavior. The IEP contained a functional behavior assessment ("FBA") with strategies to address these behaviors. As of January 2022, the IEP indicated that "(The student) has not demonstrated these behaviors of concern during the 2021-2022 school year. The FBA will remain in place for safeguarding." (S-1 at pages 9-11).

5. In January 2022, the present levels of functional performance indicated that the student had mastered behavior goals in task-completion and interaction with peers/adults. (S-1 at pages 11-12).
6. The student's discipline records, however, indicate that the student engaged in incidents of non-compliance with, and disrespect towards, teachers/staff over the period September 2021 – January 2022. These incidents resulted in in-school suspensions. (S-2 at pages 1, 4-5).
7. In general, and in comparison to events later in the school year, the student's special education teacher testified that the student's behavior was not a major concern in the 2021-2022 school year, prior to the spring of 2022. (Notes of Testimony ["NT"] at 92-114).
8. The January 2022 IEP contained one goal to utilize coping strategies to remain on task and follow directions. (S-1 at page 24).
9. The student endured a life trauma [redacted]. (NT at 12-31).³
10. On February 10, 2022, the student was involved in two behavior incidents. The student was involved in an altercation with another student. Later in the day, after departing the school at the end of the school day, the student attempted to return, ostensibly to engage in

³ The record is silent as to when, exactly, the student[endured a life trauma.]In March and April 2022, however, the [life trauma] [was] discussed by members of the IEP team in relation to the student's behavior in school. (NT at 59-89).

another altercation. The student shoved a staff member attempting to engage the student. (S-2 at pages 2, 4; NT at 35-54).

11. The student served an out-of-school suspension as a result of the February incident. (S-2 at page 1).

12. On March 11, 2022, the student was involved in a behavior incident which involved defiance, profanity, disrespect, non-compliance and physical contact with staff. (S-2 at page 3-4; NT at 35-54).

13. The student served one day of in-school suspension and then an out-of-school suspension as a result of the March incident. (S-2 at page 1).

14. On March 14, 2022, the student was involved in a behavior incident which involved a confrontation and altercation with another student. (S-2 at page 3; NT at 35-54).

15. In March 2022, as a result of the February and March behavior incidents, the student's IEP team met to discuss the student's placement. The District recommended placement in a full-time emotional support classroom, run by the local intermediate unit, in a nearby school district. (S-1 at pages 35-37; NT at 59-89).

16. Parent disagreed with this placement and filed a special education due process complaint, at a separate ODR file number, related to allegations of denial of a free appropriate public education (“FAPE”) related to the District’s handling of the February and March behavior incidents. As part of prehearing planning for that matter, the District, seeking to change the student’s placement, filed a complaint that led to this proceeding. (S-3).⁴

17. In April 2022, the student’s IEP underwent revisions, including an updated FBA and positive behavior support plan, an increase in the student’s emotional support services, and early dismissal from school. Although not made part of the IEP, the student’s special education teacher—with whom the student had good rapport—accompanied the student whenever the student was in unstructured hallway settings. (S-1; NT at 92-114).

⁴ To paint a more complete picture of the procedural background, parent filed her complaint at ODR file number 26301-21-22, including allegations related to the handling of the February and March behavior incidents. Planning for that hearing revealed that the District sought to change the student’s placement not as a matter of discipline but as its view of the appropriateness of the student’s programming. Therefore, so that the District could bear the burden of proof as to the appropriateness of the proposed placement, the hearing officer instructed the District to file a complaint, the instant complaint, which proceeded at this file number, 26363-21-22.

As set forth below, by the time of the hearing, the District had changed its view of the appropriate placement for the student but still sought to change the student’s placement to an out-of-district location. This decision follows. On the cusp of the hearing for the parent’s complaint at 26301-21-22, the parent withdrew that complaint.

18. In May 2022, the student was allegedly involved in an out-of-school [weapons] incident involving another student. In June 2022, the student was allegedly involved in an out-of-school incident involving arson. (NT at 35-54).
19. In June 2022, prior to the hearing, the District proposed a full-time center-based placement with a therapeutic component. (S-4; NT at 59-89).
20. The June 2022 IEP is written for implementation at a District-based setting, with indications at certain pages that the District is recommending a center-based placement. The IEP does not contain specific programming elements for such a placement.
21. The student's acting-out behavior, whether with peers or staff, was always in an unstructured setting, during hallway time, free time, or at dismissal. The student did not exhibit acting-out behavior in classroom settings. (S-2; NT at 35-54, 92-114).
22. The student's special education teacher testified credibly that the student requires a much more structured setting, regular therapeutic support as part of programming, and social skills support. (NT at 92-114).

23. At the hearing, given consternation in the family related to the [student's life trauma], the student's mother testified that the family intended to withdraw that student from the District and enroll the student in a charter school, or potentially relocate to a nearby state. (NT at 12-31).

Witness Credibility

All witnesses testified credibly. A similar degree of weight was accorded to each witness's testimony, except for the student's special education teacher whose testimony was accorded a higher degree of weight.

Discussion

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 a free appropriate public education (34 C.F.R. §300.17; 22 PA Code §14.102(b)(iv)) ["FAPE"], 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)).

The provision of FAPE also requires that the placement of a student with a disability take into account the least restrictive environment (“LRE”) for a student. Educating a student in the LRE requires that the placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting as close as possible to regular education, especially affording exposure to non-disabled peers. (34 C.F.R. §300.114(a)(2); 22 PA Code §711(b)(11); Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

Here, the escalation of the student’s behaviors in the spring of 2022, moving from occasional defiance and task-avoidance to physical altercations with fellow students and physical contact with multiple staff members (in addition to serious allegations involving violence in out-of-school settings) provides an educational backdrop where an educational setting with a therapeutic component is necessary. The trauma in the student’s life [redacted] provides the tragic personal backdrop for the increase of these acting-out behaviors. While the acting-out cannot be excused, the context of those behaviors is easy to understand.

Those acting-out behaviors must be addressed in a way that requires therapeutic intervention. Most persuasive in this regard is the testimony of the student's special education teacher. It is clear, through her testimony, that she deeply cares for the student and, as indicated above, there is a level of trust and rapport between the teacher and student that provides the foundation for her to work with the student in effective ways. No one is in a better position to judge whether the District can provide the structure and services that the student requires.⁵ The teacher's testimony that it cannot provide the level of structure and services required by the student is accorded heavy weight.

Clearly, the District's proposed placement will be more restrictive, as the student will move into an environment where the student will not be exposed to regular education peers. This is an important issue and cannot be embraced lightly. It is a deep dis-service, if not a denial of FAPE, to a student to have him or her placed in an overly restrictive educational environment. But it is equally problematic, if not a denial of FAPE, for a student to be in an educational placement which is less restrictive but does not allow the student to engage in significant learning.

On balance, even though a center-based placement is more restrictive for the student, it is also an appropriate level of programming, at least given

⁵ Aside from the teacher's direct experience with the student, the teacher has a rich and varied professional history working with students who require emotional support and other specialized needs related to behavior. (NT at 92-114).

the student's current needs. One indication that a District-based placement is not appropriate is the fact that the student's teacher—a full-time staff member with classroom teaching duties—is summoned to accompany the student in hallways, or in unstructured settings, and is summoned when the student's behavior in unstructured settings is escalated. These *ad hoc* instances of the teacher's intervention stand alongside the regular practice of the teacher accompanying the student around the school each day. And it is not simply a matter of providing support; the teacher is the only staff member serving in that capacity. As she herself testified, as effective as it can be in the moment, the student is not generalizing coping strategies and she feels she is acting as a "crutch" for the student rather than a support. (NT at 101). Quite simply, the structure and support which the student currently requires cannot be provided in an emotional support placement at the District.

Having said that, the record is lacking any sense of the exact nature of the program and placement the District is proposing. The June 2022 IEP is written for implementation in a District-based placement with only a handful of references to a full-time, center-based placement. But reading the document, there is no sense at all of how instruction and support will be provided through such a placement. The only testimony as to such a placement was provided by a District special education administrator who described in general terms what such a placement would offer, and testified

to a specific center as an example. But a representative from that center, or any other center, did not participate in the June IEP meeting and did not testify at the hearing. This hearing officer is concerned that the District is asking for an order that changes the student's placement but is, in effect, a 'blank check' as to specific programming. Therefore, the IEP team will be ordered to meet, with a representative of the center where the District seeks to place the student in attendance, to consider the specific programming which the center-based placement will provide.

Accordingly, the District's proposed placement for a full-time, center-based program will be generally supported, but the IEP team will be ordered to meet to craft an IEP with concrete programming for a specific placement.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the District's proposed change of programming and placement for the student's education at a full-time, emotional-support, center-based setting, with therapeutic support available as part of that programming, is appropriate.

On or before August 1, 2022, the District shall arrange for the placement and convene an IEP meeting, to include an attendee (or multiple attendees if appropriate) from the center-based program which the District has identified, to craft an IEP with concrete programming for the student in that specific placement.

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

07/08/2022