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Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

23791-1920AS

Child's Name

W.W.

Date of Birth

[redacted]

Parents

[redacted]

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

11/24/2020

Introduction

This special education due process hearing concerns the educational rights of W.W. ("student"), a student who resides in the Sharpsville Area School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student who requires special education to address the student's needs. The parties disagree over the programming provided to the student in the 2019-2020 school year.

The student's parents claim that the District did not provide appropriate programming, thereby denying 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 at all times it met its FAPE obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the student is not entitled to any remedy.

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 ("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").

Issues⁴

1. Did the District deny the student FAPE in the 2019-2020 school year?
2. If so, is the student entitled to a compensatory education 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 necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The student had been identified in prior school years as a student requiring special education for specific learning disabilities in reading, written expression, and mathematics. (Parents Exhibit ["P"]-14, P-19; School District Exhibit ["S"]-14).
2. In October 2018, in the fall of the student's 7th grade year, the student's IEP was revised. (P-2; S-7; Notes of Testimony ["NT"] at 56-177, 281-375).

⁴ As set forth in the findings of fact below, after opening statements, presented in July 2020, it became clear that the parties did not agree on the status of the student's individualized education program ("IEP") for the 2020-2021 school year. Parents held that the student's program was the last-agreed-upon IEP in October 2018. The District held that deliberations of the IEP team in the spring of 2020, and a draft May 2020 IEP, led to understandings for changes in the student's programming. Due to this lack of clarity, this hearing officer directed that the District make explicit any change in the student's IEP by issuing a notice of recommended educational placement ("NOREP"). The District issued a NOREP in September 2020. Based on evidence developed at a hearing session held on September 29, 2020, an interim ruling was issued on the student's pendent program for clarity on the student's IEP for the 2020-2021 school year. This final decision will address the status of that interim ruling.

3. The October 2018 IEP contained an individual goal in each of the following areas: reading, occupational therapy, written expression, spelling, and five mathematics goals. (P-2; S-7).
4. At certain points in the October 2018 IEP, the IEP indicated that the student would receive 100 minutes of specialized reading instruction daily. At other points, the IEP indicated that the student would receive this instruction for 60 minutes daily. (P-2 at pages 2, 27, 47; S-7 at pages 2, 28, 48).
5. The October 2018 IEP was in place at the outset of the 2019-2020 school year, the student's 8th grade year. (P-2; S-7; NT at 56-177, 281-375).
6. In August and September 2019, the family communicated with the District about various issues related to the student's education. (P-3, P-4, P-6).
7. In October 2019, the student's IEP team met to revise the student's IEP. (P-7).
8. The IEP team could not agree on the student's programming, particularly the amount of specialized reading instruction. The parents requested mediation. (P-8; NT at 56-177).
9. With the request for mediation, the student's programming in effect at that point—the October 2018 IEP— became pendent.
10. Mediation was not successful and, in December 2019, parents filed a *pro se* special education due process complaint. In January 2020, this complaint was amended by parents' counsel and was withdrawn in May 2020. (S-23; NT at 56-177).

11. As a result of these dispute processes and consequent pendency, throughout the 2019-2020 school year the student's programming and placement were governed by the October 2018 IEP. (P-2, S-7).
12. In April 2020, the District re-evaluated the student. (P-19; S-14).
13. The April 2020 re-evaluation report ("RR") found that the student's full-scale IQ was 87, with significantly discrepant achievement scores in multiple areas of assessment. (P-19; S-14).
14. The April 2020 RR recommended that the student continue to be identified as a student with specific learning disabilities in reading, written expression, and mathematics. (P-19; S-14).
15. In May 2020, the student's IEP team met to revise the IEP. (P-20).
16. Over the 2019-2020 school year, the student made progress on the occupational therapy, three math goals, and a reading goal based on the specialized reading curriculum. (P-16).
17. Over the 2019-2020 school year, the student failed to make progress on two math goals, a reading comprehension goal, and the written expression goals. (P-16).
18. One math goal was removed. This was by agreement of the IEP team, as requested by the student's mother, so that the student's mathematics instruction could take place in a co-taught regular education classroom. This change in mathematics placement also impacted the student's lack of progress on mathematics goals. (P-16; NT at 56-177, 410-438, 618-645).

19. In June 2020, the parents filed the complaint which led to these proceedings.
20. The hearing convened in July 2020 with opening statements of the parties. In attempting to frame the issues, and to understand the nature of the dispute for the 2020-2021 school year, it became clear that the parties held differing views about the status of the student's reading instruction. Parents relied on pendency in the programming outlined in the October 2018 IEP. The District felt the spring 2020 deliberations between the parents, and the draft May 2020 IEP revision, had created new aspects for the student's reading instruction. (NT at 2-37).
21. With the parties' clear disagreement about which IEP was pendent, and given the fact that the student would begin high school with an IEP last agreed-upon in the fall of 7th grade (October 2018), the hearing officer directed that the District to make explicit its understanding of the proposed programming for the student in the upcoming school year by issuing a notice of recommended educational placement ("NOREP") setting forth a formal recommendation for a change in programming. (NT at 2-37).
22. In September 2020, on the cusp of the 2020-2021 school year, the District proposed a revised IEP and issued an accompanying NOREP. The student moved onto the District's high school in 9th grade for the 2020-2021 school year. (P-24; S-17; NT at 56-269).
23. The September 2020 IEP contained the following major revisions for the student's programming: 60 minutes daily of specialized reading instruction, removal of a 1:1 aide in certain academic classes, and delivery of a modified language arts and mathematics curricula in a learning support setting. (P-24; S-17; NT at 185-269).

24. Despite parents' request for information about the programming and placement as it would be implemented in the District high school in the 2020-2021 school year (the student's 9th grade year), the District could not definitively answer parents' questions about the programming and placement. Although it was not cast in these terms, the District was proposing that the student be instructed in a life skills classroom utilizing a modified, adaptive curriculum which was not aligned with Pennsylvania academic standards. (NT at 56-177, 185-269, 281-375, 410-438, 618-645).
25. The September 2020 IEP contained two occupational therapy goals (writing process, keyboarding), two mathematics goals (calculation, problem-solving), three reading goals (basic reading, fluency, comprehension), a written expression goal, and a behavior goal. (P-24; S-17).
26. In September 2020, this hearing officer issued an interim pendency ruling, ordering that the September 2020 IEP be implemented with certain modifications to the specialized reading instruction, accounting for the District's high school schedule based on its COVID-19 reopening plan and school-day schedule. The ruling also addressed the student's need for standards-based curriculum (not an alternative or functional curriculum) and the fact that the student does not require a one-to-one aide in instructional settings. (Hearing Officer Exhibit – Interim Pendency Ruling, October 14, 2020).

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

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)).

IDEIA/Denial-of-FAPE

2019-2020. Here, the area of the parties' most deep disagreement is the student's reading instruction. Overall, in the 2019-2020 school year, the student made progress in reading, especially in the basic reading, decoding, and fluency skills the student gained through the specialized reading instruction. The student also made progress in other goal areas, including occupational therapy and certain mathematics goals. In other goal areas, however, namely reading comprehension, written expression, and certain other mathematics goals, the student did not make progress.

One starts from a position, then, that the student failed to gain meaningful education benefit in certain areas of the student's programming.

An award of compensatory education is in order. But there are mitigating factors in terms of this denial-of-FAPE. First, the District was proactive in addressing the parents' concerns and proposing programming which was reasonably calculated to yield significant learning in light of the student's unique learning needs. Ultimately, the proposed level of reading instruction—clearly, the student's most significant learning deficit—was inappropriate, but taken altogether, the October 2019 IEP largely met the student's needs with appropriate goals and instruction. So while it cannot be viewed as a defensible proposal of FAPE, it is not a wholesale failure to propose FAPE. Second, in continuing to implement the October 2018 IEP, the student made progress in multiple areas, including the area of deepest need—basic reading. Third, the implementation of the October 2018 IEP continued because of the necessity to impose pendency on the student's programming at the time that parents filed for mediation in October 2019. (34 C.F.R. §300.518(a); 22 PA Code §14.102(a)(2)(xxxii)). Thus, the District's hands were tied in terms of updating the October 2018 IEP. And this was largely due to the fact that the parents pursued multiple avenues (mediation, a *pro se* complaint, and an amended complaint through counsel) which procedurally prolonged matters. Pendency always has an element of equitable consideration and, here, the fact that the student's programming could not be updated because of pendency will not be weighed against the District in determining a remedy.

Other specific areas of parents' complaint in the 2019-2020 school year, namely the use of assistive technology (a laptop/tablet computer), missed sessions of programming in the specialized reading program, and certain days/classes where the student's one-on-one aide was not present, on this record do not amount to a denial of FAPE.

Accordingly, the District's proposed October 2019 IEP, as proposed, was not reasonably calculated to provide the student with an appropriate

level of reading instruction. Additionally, the student exhibited a lack of IEP goal progress in multiple areas. Therefore, an award of compensatory education, accounting for the equities inherent such a remedy.

2020-2021. The District's proposed placement and programming, in the form of a life skills classroom utilizing a modified, adaptive curriculum which is not aligned with Pennsylvania academic standards, is wholly inappropriate. As a student with average intelligence and no functional or adaptive needs, there is no reason for the student to receive anything other than the District's standards-based, regular-education curriculum. Given the student's needs in reading and mathematics, this curriculum can and should be delivered in a learning support environment with students who are also progressing through the regular-education curriculum. This is the deepest flaw in the proposed September 2021 IEP.

Through the issuance of the interim pendency ruling, however, this aspect of the proposed programming was avoided, and the provisions of the interim ruling are adopted here in their entirety, namely:

The student's programming shall be reflected in the September 2020 IEP except for the following revisions and clarifications:

- The student shall receive 90 minutes daily of specialized reading instruction to align that instruction with the hybrid high school schedule in place as a result of the District's COVID-19 reopening plan. At least 60 minutes of this 90-minutes daily instruction shall be delivered as live instruction.
- To the extent that specialized reading instruction requires that any class be shed from the student's schedule, that class shall not include core academic classes in English/language arts, mathematics, science, or social studies.

- The student’s English/language arts and mathematics instruction shall be based on the provisions of the District’s high school curricula in those areas, as aligned with Pennsylvania academic standards (22 PA Code §4), and shall be provided in a learning support environment with other students who are also progressing through the regular education curriculum with academic support needs.
- There is no need for the student to have a 1:1 instructional aide, although any live instruction of the student in the core academic classes of English/language arts, mathematics, science, and social studies shall be in a classroom setting with a classroom aide for support.

All other aspects of the September 2020 IEP shall be implemented as written. This interim holding is adopted here—the September 2020 IEP shall be implemented, with the substantive changes outlined above or as made necessary by the District’s high school schedule as the result of the District’s COVID-19 reopening plan.

Furthermore, should the IEP team need to reconsider any element of the student’s IEP, either at the request of team members or as the result of changes in the District’s schedule, the IEP team shall make changes which preserve the necessity that the student make progress toward high school graduation requirements in the core academic classes of English/language arts, mathematics, science, and social studies.

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

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

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 denials of FAPE outlined above will be remedied as set forth below.

Compensatory Education

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, the District denied FAPE to the student in certain flaws in the October 2019 IEP as proposed and in a lack of progress in certain areas as outlined in the October 2018 IEP and as implemented in the 2019-2020 school year. But, as indicated above, there are equitable considerations which, in the view of this hearing officer, mitigate against a large award of compensatory education for these instances of denial of FAPE. And the student's programming, as outlined in the September 2020 IEP with the hearing-officer-ordered revisions above, is reasonably calculated in its design to yield meaningful education benefit. The September 2020 proposed IEP, as written, is not the basis for any remedy.

Therefore, as a matter of equitable consideration and taking into account these cross-currents of remedy, the student is awarded 100 hours of compensatory education.

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.

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs, or identified educational needs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, as the result of implementation flaws in the October 2018 IEP (as implemented in the 2019-2020 school year) and design flaws in the October 2019 IEP, the student is awarded 100 hours of compensatory education.

The student's programming and placement for the 2020-2021 school year shall be the September 2020 IEP as set forth above.

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

11/24/2020