

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 Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR File Number 21813 18 19

Child's Name: S. M. **Date of Birth:** [redacted]

Parents:

[redacted]

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Hearing Officer:

Michael J. McElligott, Esquire

Date of Decision:

08/11/2019

INTRODUCTION

Student (“student”)¹ is an elementary-aged student who resides in the School District (“District”). Although early on in the student’s educational history, the parties disputed the student’s eligibility status, the parties now agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² as a student with autism and speech and language (“S&L”) impairment.

The student’s parents claim that the student’s needs require a placement outside of the District. The parents also claim that the District has denied the student a free appropriate public education (“FAPE”) as the result of the District’s evaluation/identification process and inappropriate programming in the 2018-2019 school year. Parents seek an order that addresses the student’s placement and a compensatory education remedy.

The District counters that at all times it met its obligations to the student under IDEIA in its evaluation process and proposal of programming for 2018-2019 school year. The District also asserts that a District-based placement is appropriate.

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

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is 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”).

ISSUES

Did the District provide FAPE to the student in the 2018-2019 school year?

If the answer to this question is “no”, are parents entitled to compensatory education?

What is the appropriate placement for the student?

FINDINGS OF FACT

1. In May 2018, in anticipation of the student’s transition to District-based programming, the student’s parents requested that the student be evaluated for special education. (Parents’ Exhibit [“P”]-1).
2. Parents had had the student evaluated previously by the student’s treating psychiatrist and a private school psychologist. (School District Exhibit (“S”)-21, S-23).
3. In January 2018, the treating psychiatrist diagnosed the student with trauma/stress-related disorder related to the death of a family member, separation anxiety, and attention deficit hyperactivity disorder (“ADHD”). The report noted acting-out behaviors (including defiance and aggression) with family members, adults, and peers. (S-21).
4. In March 2018, a private school psychology evaluator administered an assortment of assessments, including intellectual-ability testing, achievement testing, visual-motor integration testing, attentional assessment, and an autism spectrum instrument. (S-23).
5. The private evaluator found that the student had high average intellectual ability (full-scale IQ of 118). The evaluator found that the student exhibited severe discrepancies in achievement in reading and writing. The evaluator identified the student as having “high functioning autism”. Additionally, the evaluator confirmed that the student exhibited a profile consistent with ADHD. (S-23).
6. The private evaluator recommended that the student be identified as a student with autism, specific learning disabilities in reading and writing, and a health impairment (ADHD). (S-23).

7. The parents provided these two evaluations to the District when they requested the evaluation. (Notes of Testimony [“NT”] at 51-186).
8. Based on parents’ request, in July 2018, the District formally requested from parent permission to evaluate the student. The parent granted permission to evaluate the student in August 2018. (S-4).
9. In July 2018, the parents provided input for the District evaluation process, including details of the student’s acting-out behaviors. (S-42).
10. Also in July 2018, the student enrolled in a District-based reading support program. (NT at 604-677).
11. The student exhibited acting-out behaviors in the reading support program and received support from a community-based mental health behavioral support. (P-5, P-6; S17; NT at 51-186, 604-677).
12. In September 2018, in order for the student to receive mental-health behavioral support in school, the student’s teacher provided input to the provider. The student’s teacher noted exhibited defiance and task-refusal, engaged in property destruction and class disruption, and engaged in non-cooperative behavior with peers, including aggression. The teacher noted, however, that the student also, at times, appropriately engaged with peers. (P-3).
13. The District observed the student both prior to, and after the commencement of, the school year. The observer witnessed some problematic behavior and the teacher reported behaviors consistent with the behaviors she reported to the community agency, including difficulty with turn-taking, peer interactions, and defiance. (S-12).³
14. The student began to attend the District for the 2018-2019 school year. (S-31).
15. In the first two weeks of school, prior to the issuance of the District’s evaluation report (“ER”), the student frequently exhibited problematic behavior. (S-11, S-27 at pages 11-27).
16. In mid-September 2018, the District issued its ER. (S-11).
17. The September 2018 ER contained brief synopses of the prior evaluation reports and adopted the full-scale IQ score but did not include the achievement testing. (S-11).

³ The exhibit at S-12 is, at points, illegible.

18. The September 2018 ER contained a behavior assessment. The mother rated the student as clinically significant in several areas, including the aggression, depression, withdrawal, and adaptive skills sub-scales, as well as the external and behavioral symptoms index. The evaluator opined that the validity measure on the instrument signaled that the mother's scores should be viewed with caution. The student's teacher rated the student as clinically significant on the aggression sub-scale. (S-11).
19. The September 2018 ER contained an autism screening assessment. The scores of the student's mother indicated that autism was likely. The scores of the student's teacher indicated that autism was not likely "and reported minimal issues". Both the mother and teacher reported, as had been seen by the evaluator during evaluation, that the student reacted strongly and negatively—at times aggressively—when a request for a non-preferred task was given. (S-11).
20. The September 2018 ER concluded that the student was a student with an unspecified disability who did not, however, require special education. The conclusion definitively ruled out an identification of autism. The evaluator did not recommend a Section 504 plan and recommended only regular education behavior intervention. (S-11).
21. The parent submitted a written dissent to the September 2018 ER but agreed to allow regular education interventions. (S-11).
22. The District issued a notice of recommended educational placement ("NOREP") confirming its view that the student "will continue regular education with general education supports". (S-7).
23. In September 2018, the District performed a functional behavior assessment ("FBA"), noting the acting-out/defiant behaviors that had been previously reported. The District created a behavior support plan. (S-15, S-16).
24. The student's parents felt that the behavior support plan was inadequate without an individualized education program ("IEP") in place. (NT at 51-186).
25. The District agreed to allow the community-based mental health behavior support to be provided to the student in school. (P-9; S-18; NT at 51-186, 195-309).
26. Over late September – November 2018, the student received multiple, formal disciplinary referrals, including the consequence of copy work that included the statements "I will not hit", "I will not push", and "I

will not hurt others”. The student’s daily behavior charts and data collection show problematic behavior due to peer interaction and/or defiance on most days. (P-4, P-7, P-9 at pages 1-39; S-15, S-24, S-27 at pages 29-133, S-52; NT at 195-309, 604-677).

27. In mid-November 2018, the District agreed to fund an independent educational evaluation (“IEE”). (S-5, S-8).
28. In December 2018, the student continued to exhibit problematic behaviors on an almost daily basis. (P-9 at pages 40-72; S-24, S-27 at pages 134-149; NT at 195-309, 604-677).
29. In January 2019, the student continued to exhibit problematic behaviors. (P-9 at 73-104; S-28 at pages 1-8; S-51).
30. In mid-January 2019, the student was involved in a behavioral incident that included hitting, attempted biting, and throwing objects at staff members. After being removed to a location without other students, the student engaged in a 35-minute episode that included defiance, throwing objects, dis-arranging the room, and hitting staff members. (P-8).
31. In mid-January 2019, only a few days after the 35-minute episode, the IEE was issued by the evaluator. (S-19).
32. The January 2019 IEE was comprehensive. The evaluator assessed the student in a number of areas of suspected disability and determined that the student was a student with high functioning autism and S&L articulation needs. (S-19).
33. The January 2019 IEE explicitly ruled out eligibility as a student with a specific learning disability and, although noting “ADHD tendencies”, the evaluator associated these with the student’s autism and did not support eligibility as a student with the health impairment ADHD. (S-19).
34. The evaluator identified the student as eligible under IDEIA as a student with autism and S&L needs. The evaluator made a number of recommendations for programming in the IEE and, at the hearing, testified extensively about those recommendations. (S-19; NT at 347-443).
35. The evaluator, the student’s parents, and the student’s teacher all recognize—and assessment data concurs—that, academically, the student is very strong and is appropriately proceeding through the curriculum. (S-19, S-29, S-31, S-32; NT at 51-186, 347-443, 604-677).

36. In January 2019, the student's IEP team met to consider the IEE. (S-20).
37. The District accepted the eligibility determinations of the independent evaluator and recognized that the student required special education and related services as a student with autism and S&L articulation needs. (S-20; NT at 678-743).
38. The January 2019 IEP identified the student's needs as self-regulation when being denied a preferred activity and during transitions, and social skills with peers. (S-20).
39. The January 2019 IEP contains a summary of a FBA and a positive behavior support plan ("PBSP"). (S-20).
40. The January 2019 IEP contained a social skills goal, two behavior goals (self-regulation/appropriate-response and self-advocacy), and a S&L articulation goal. (S-9).
41. The January 2019 IEP adopted some, but not all, of the independent evaluator's recommended strategies. Most of those recommendations involve instructional strategies to address the student's behavior or components of a behavior plan, but these are not made explicit as part of the PBSP. (S-19, S-20).
42. The January 2019 IEP indicates the student will receive twenty-five sessions of 30 minutes each "per IEP duration" (i.e., for an entire chronological year through January 2020). (S-20).
43. The January 2019 IEP indicates the student will receive a full-time 1:1 District aide. (S-20).
44. The January 2019 IEP indicates that the student's placement would be entirely in regular education for 100% of the school day. (S-20).
45. The District issued a NOREP for the implementation of the January 2019 IEP, and parents agreed. (S-9).
46. In the days after the January 2019 IEP meeting, the student hit staff and a fellow student and needed to be escorted from the educational environment, an event which required a restraint report. (S-25).
47. In February 2019, the student continued to exhibit problematic behaviors almost daily. (P-9 at pages 105-135; S-28 at pages 9-20; S-51).

48. In early February 2019, the student hit staff and a fellow student and needed to be escorted from the educational environment, an event which required a restraint report. After being removed to a location without other students, the student engaged in a 60-minute episode that included defiance, ongoing outburst and throwing food at staff members. (S-26).
49. In mid-February 2019, the parents filed a *pro se* special education due process complaint. (Hearing Officer Exhibit ["HO"]-1).
50. In the latter half of February and early March 2019, the parents provided medical documentation for homebound instruction. The District denied the request for homebound instruction, and the student was absent from school for an extended period. (S-10, S-45).
51. In early March 2019, parents, through counsel, filed an amended complaint, the complaint that led to these proceedings. (HO-2).
52. In mid-March 2019, the District issued a re-evaluation report which formally adopted the findings of the IEE from January 2019. (S-13).
53. In April 2019, the District proposed that the student complete the school year in its online virtual schooling environment. (S-10).

DISCUSSION AND CONCLUSIONS OF LAW

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); K.D. v. Downingtown Area School District, F.3d (3d Cir. at No. 17-3605, September 18, 2018)).

Appropriate Placement

Although the last of the three issues identified above is the appropriateness of the student’s placement, it will be addressed first because it is easily disposed of. Parents request a placement outside of the District, at a specialized school or classroom for autism support. Regardless of what one might call the school/classroom, parents seek a placement which would remove the student from the regular education environment wholly or to a large degree. Such a placement would be overly restrictive—the student can and does behave appropriately, at times, in regular education environments.⁴ More importantly, the student performs well academically and there is no reason that the student’s learning through the District’s curriculum cannot take place in regular education with supports, services, and when necessary, targeted instruction and related services outside of regular education.

But, as set forth below, the District’s proposed placement—100% regular education without specialized instruction geared to the student’s needs and

⁴ The provision of FAPE requires that the placement of a student with a disability be in the least restrictive environment (“LRE”). Educating a student in the LRE requires that placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting which affords 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)).

without a highly-structured PBSP—is inappropriate. Amendments to the student’s IEP, whether for consideration by the student’s IEP team or by directive of this decision, will be detailed below. But even though the January 2019 IEP is inappropriate, an appropriate IEP can be implemented in a District placement.

Denial of FAPE

The student has been denied FAPE. There are two facets to this finding: the failure to identify the student’s eligibility under IDEIA and needs therefrom, and the inappropriateness of the January 2019 IEP. Each of these will be addressed in turn.

Eligibility/Evaluation. The District denied the student FAPE in its handling of the evaluation process and its failure to identify the student as eligible under IDEIA. Reading the evaluations by multiple professionals prior to the District’s initial ER—evaluations that the District had in hand—one sees a very consistent picture of a student with autism and significant behavioral needs. Yet the District’s evaluation, based on only a handful of observations and few assessments, seems almost dismissive of the notion that the student had autism. Repeatedly in the ER, the evaluator notes data from the student’s teacher that, in the evaluator’s view, ran counter to the views of the student’s mother and the other professionals, even though daily behavior charting shows that the student was engaging in problematic behavior from the outset of the school year.

Even if one plays devil's advocate, that the District was simply being cautious in its view of the student, the evaluation is in no way measured in its tone or content and, more pointedly, the District did not recommend a Section 504 plan to provide even a modicum of services. From the very beginning, then, the District failed in its obligations to the student. Not surprisingly, without services in place, the student immediately began to exhibit, almost daily, acting-out behaviors (especially defiance, difficulty with transitions, and aggression toward both adults and peers).

Accordingly, the record supports a finding that the District denied the student FAPE from the outset of the 2018-2019 school year.

January 2019 IEP. Unfortunately, the denial of FAPE continued even after the creation and implementation of the January 2019 IEP. The student's behavior continued to deteriorate after the implementation of the IEP which is not, by itself, necessarily a denial of FAPE. But it is not surprising given the inappropriate programming in the IEP. Here, the detailed and concrete recommendations of the IEE show how one might approach the provision of FAPE. But the January 2019 IEP lacks the instruction and structured behavioral approaches/interventions that the IEE—and the evaluator herself in her testimony—makes clear is necessary for the student. In the order below, the student's IEP team will be directed to consider changes to the IEP, or will be ordered to revise the IEP in specific regards, in light of the recommendations of the IEE.

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 has denied the student FAPE as the result of its faulty handling of the evaluation process and eligibility determination. Further, the District has denied the student FAPE as the result of an in appropriate IEP. The student has been denied FAPE for the entire 2018-2019 school year.

Granted, the student made academic progress due to the student's high-average cognitive ability. But as the independent evaluator testified, as curriculum becomes more complex, the student's cognitive ability may not allow the student to compensate for the impact of problematic behaviors (including lack of focus on academic material and removal from the classroom). The District failed to identify the student's needs, failed to program for those needs, and, ultimately, inappropriately programmed for those needs when it finally took action. The District's abject failure to address the student's behavioral needs throughout this school year did not impact the student's academics, but there is no equitable argument that the student should not be awarded compensatory education, or that the award should be minimized as a result.

Therefore, as a matter of equitable consideration, the student is awarded 300 hours of compensatory education for the District's failures in

identification, evaluation, and programming for the student in the 2018-2019 school year.

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 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.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the District has denied the student a free appropriate public education for the entirety of the 2018-2019 school year.

The student is awarded 300 hours of compensatory education.

The student's placement shall be at the District elementary school which the student attended in the 2018-2019 school year.

Within 10 days of the date of this order, the student's IEP team shall meet to discuss the student's IEP, including the crafting of these revisions:

- One hour of daily instruction, in two sessions of 30 minutes each, outside of the general education setting, utilizing applied behavior analysis techniques, with eventual integration across settings for self-regulation and social skills. This instruction shall be goal-based for manding and appropriate social interaction (in line with recommendations 1, 2, and 6 at page 18 of S-20).
- Data on the progress monitoring for these manding and social skills goals shall be collected daily and graphed weekly (in line with recommendation 13 at page 19 of S-20).
- A positive behavior support plan to include an explicit description of pre-escalation behavior, appropriate adult response, “time away” strategies in class, a revised token economy system, and immediate reinforcement for preferred behaviors (in line with recommendations 3, 4, 9, 10, and 11 at pages 18-19 of S-20).
- One weekly 30-minute session of social skills instruction, outside of the general education setting (in line with recommendation 5 at page 18 of S-20).
- One weekly 30-minute session of S&L articulation therapy. This related services schedule shall replace the “25 sessions...per IEP duration” therapy.⁵

⁵ The consistent provision of this therapy is critical to its efficacy. As written, the services might be provided unevenly—certain weeks might include multiple sessions of therapy and others might include no sessions at all. So long as 25 sessions were delivered over the course of a year, the IEP would be implemented as directed. But the

Nothing in this decision and order, regarding the student's placement or programming, or the compensatory education award, should be read to limit the parties' ability to agree otherwise in writing as to any aspect of that placement, programming, or award.

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

With the issuance of this final decision and order, the undersigned hearing officer releases jurisdiction.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

August 11, 2019

consistent provision of this therapy is critical to its efficacy. Therefore, the frequency of the delivery of this therapy must be explicitly weekly.