

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

Closed Hearing

ODR No. 28228-22-23

Child's Name

X.M.

Date of Birth

[redacted]

Parent

[redacted]

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

01/23/2024

Introduction

This special education due process hearing concerns X.M. ("student"), a student who attends the Avon Grove Charter School ("Charter School").¹

The student's parent claims that the student should be identified as a student who is eligible for special education under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEA")² as a student with a social/emotional/behavioral needs.

By allegedly failing to identify the student as eligible under IDEA, and consequently failing to provide special education programming, the parent claims that the Charter School denied the student a free appropriate public education ("FAPE"). Parent seeks appropriate programming and compensatory education as a result of the alleged failure to identify the student.

The Charter School counters that the student does not qualify as a student with a disability and does not require special education programming for social/emotional/behavioral. At all times, the Charter School asserts that it has appropriately educated the student. Accordingly, the Charter School argues that the parent is not entitled to any remedy.

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 IDEA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§711.1-711.62 ("Chapter 711").

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

Issues

1. Is the student eligible for special education as a student with a disability under the IDEA?
2. If so, is the student entitled to compensatory education?

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.

[2021-2022 School Year]

1. The student began to attend the Charter School in [redacted], the 2021-2022 school year. (School District Exhibits ["S"]-2, S-21; Notes of Testimony ["NT"] at 307-427).
2. In September and October 2021, the student had a handful of classroom behaviors resulting from frustration with peers or academic work. (Parent Exhibit ["P"]-14 at pages 1-4).

3. In November 2021, the student had an inappropriate interaction with a peer, including hitting the peer, and engaged in avoidance behavior with a staff member who reacted to the situation. (S-15; NT at 1074-1116).
4. After this November 2021 incident, the student's parent emailed the Charter School with concerns about the student's behavior in school. The parent requested a functional behavior assessment ("FBA"). (P-3 at pages 1-2).
5. Various classroom incidents, including problematic peer interactions, non-compliance, and one incident of elopement, took place in November 2021. (P-14 at pages 5-12).
6. In December 2021, a student services coordinator responded to the parent. The student services coordinator indicated that the Charter School would begin an "initial line of inquiry" to document the student's behaviors and gauge whether or not deepened regular education interventions would address any problematic behaviors that the student exhibited. (P-3 at pages 3-4).
7. The Charter School, however, did not feel that the student's in-school behavior warranted the initial-line-of-inquiry process and did not initiate the data collection. (P-3 at pages 5-6).

8. In February 2022, the student services coordinator emailed to say that the student's behavior continued to be non-problematic. While the coordinator mentioned some "bus write-ups" which the coordinator wished to chart, she felt the initial-line-of-inquiry process was still not necessary. These bus behaviors were not documented on the student's disciplinary log. (P-3 at pages 5-6; S-15).
9. This view quickly changed, however, for only two days later in February 2022, the student was involved in an incident of inappropriate bus behavior. The student was persistently tapping a peer on the head and would not accept re-direction, an incident which was documented in the student's disciplinary log. (S-2).
10. The next day, the student services coordinator emailed the student's parent, indicating that the student had exhibited problematic classroom behavior for approximately one week, including disrespect directed at staff and non-compliance with directives. The coordinator recommended that the initial-line-of-inquiry process take place. (P-3 at pages 7-8).
11. Approximately a week later, the student used an inappropriate non-verbal gesture, was standing on the bus, and would not accept re-direction. (S-2).

12. In early March, the Charter School implemented regular education interventions to address the student's behavior and began to gather data as part of its initial line of inquiry. (P-14 at pages 19-23; S-5, S-6).
13. In March 2022, the student exhibited inappropriate bus behavior. The student would not listen to the bus driver's instruction and exposed underwear to other students. (S-2).
14. In early May 2022, the student exhibited inappropriate bus behavior by asking a seatmate to engage in inappropriate touching. (S-2).
15. In mid-May 2022, the student used profanity in reference to a peer. (S-2).
16. In late May 2022, the student underwent a private psychological evaluation to see if the student qualified for behavioral support from a community-based agency. (P-1).
17. The May 2022 private evaluation was a one-hour, videoconference-based interview with the student and parent, and included an overview of a psychological evaluation from 2018. (P-1).
18. The May 2022 private evaluation included parent relating information about problematic behavior in school. Much of the school-

based behavior reported in the May 2022 private evaluation is not documented in school records, but the record supports that these behaviors were discussed between the student's [redacted] teacher and the parent. All of the bus behaviors were made part of that evaluation. (P-1, P-14).

19. Based on the parent's information, the evaluator for the May 2022 private evaluation diagnosed the student with oppositional defiant disorder ("ODD") and found that the student required behavior support in the home and at school. The private evaluation recommended 100 hours of support monthly in the educational environment. (P-1).

20. The May 2022 private evaluation was not shared by the parent with the Charter School when it was issued. (P-1; NT at 88-210, 307-427).

21. Over the period March – May 2022, the daily data collected as part of the initial line of inquiry showed that the student's behavior in school markedly improved. (S-6).

[2022-2023 School Year]

22. The student attended [redacted] grade in the 2022-2023 school year. (S-2, S-21; NT at 307-427, 632-736, 743-815).

23. In September 2022, the Charter School reported to parent that the student had a good start to the school year without any behavioral concerns. (P-3 at pages 14-15).
24. In September 2022, the student began to attend an accelerated mathematics class. (S-16 at pages 1-4; NT at 743-815).
25. In late September 2022, the student was involved in two incidents of non-compliance with teacher directives. (S-15).
26. In early October 2022, the student was involved in two incidents on the same day involving inappropriate peer interactions, including physical aggression. (S-15).
27. In mid-October 2022, the student was involved in an incident involving classroom disruption and non-compliance. (S-15).
28. In late October 2022, the student was involved in a misbehavior incident on the school bus. (S-15).
29. In late October 2022, the student's parent initiated home-based behavioral support. (P-8).
30. Based on the October 2022 incidents, the Charter School initiated a regular education behavior support in the form of a check-in/check-out system. The student would earn points, and consequent

rewards, for appropriate behavior across the ten settings in the student's day—morning meeting, lunch, recess, and seven academic settings. (S-7, S-8; NT at 632-736).

31. In early November 2022, the community-based behavior support agency communicated with the parent about finalizing a FBA. (P-9; NT at 431-514).
32. In mid-November 2022, the student was involved in an incident where trading cards were stolen from a peer and later returned. (S-15).
33. In late November 2022, the student was involved in a "pushing struggle" with another student. (S-15).
34. In late November 2022, the community-based behavior support program issued its FBA. (P-10; NT at 431-514).
35. The November 2022 FBA included input from the student's teacher, who reported that at times the student exhibited off-task behavior, and had difficulties with turn-taking and peer interactions. The student often required prompting and exhibited non-compliance. The teacher reported that the student showed remorse when problematic behavior is addressed. (P-10).

36. In the November 2022 FBA, the teacher reported that the student's peer interactions had improved with the implementation of the check-in/check-out system. (P-10; S-7).
37. The November 2022 FBA included one observation of the student in the school environment. (P-10).
38. The November 2022 FBA included two goals— decreasing non-compliance, and decreasing outbursts/eliminating physical aggression (one combined goal). (P-10).
39. The November 2022 FBA mirrored the recommendation in the May 2022 private evaluation for school-based behavior support of 100 hours per month. (P-10).
40. In early December 2022, a treatment plan was developed by the community-based behavior support agency, based on the FBA. (P-11).
41. In January 2023, the student was moved from the accelerated mathematics class to the regular education class. The student was becoming frustrated, and occasionally acted out, when not able to maintain the pace of other students in the class. (S-16 at pages 7-9; NT at 743-815).

42. In January 2023, an aide from the community-based agency began to provide support for the student in the school for approximately 25 hours per week. (NT at 1025-1068).
43. The student's classroom teacher did not see the need for an aide accompanying the student, as she felt that problematic behaviors in school were isolated and were effectively addressed through the regular education interventions, re-direction, and peer-to-peer support being provided to the student. The teacher felt that the aide's presence may have exacerbated the student's behavior and/or response to correction. (S-11; NT at 632-736).
44. In February 2023, parent shared with the Charter School for the first time the student's diagnosis of opposition defiant disorder. (S-12).
45. In February 2023, the student began to see the school counselor approximately every other week, for a total of 2-3 times per month. (821-903).
46. While somewhat present in the [2021-2022 school] year, academic perfectionism in the student's work became more prominent and became a more frequent antecedent to acting-out and non-compliance behaviors in academic settings. (S-14; NT at 632-736, 821-903).

47. In early March 2023, the student was involved in a significant misbehavior incident on the bus involving public urination. (S-15).
48. In March 2023, parent, an advocate, and a team of Charter School educators met to discuss the student's needs, and the Charter School considered additional interventions, including requested breaks in a quiet sensory room. (NT at 88-210, 307-427, 632-736, 821-903, 924-1021, 1025-1068).
49. In mid-March 2023, the parent, through her advocate, requested a special education evaluation. The Charter School denied the parent's request and declined to evaluate the student, citing the fact that the student was "accessing grade level curriculum" with the regular education interventions provided by the Charter School. (S-17, S-18).
50. The team considered the May 2022 private evaluation report. (P-1).
51. In mid-April 2023, the student was involved in a physical altercation with a peer, resulting from a taunt by the other student. (S-15).
52. In late April 2023, the student was involved in an incident involving non-compliance with teachers' requests. (S-15).

53. Over the period October 2022 – May 2023, the daily and weekly data collected as part of the check-in/check-out system being employed by the Charter School showed that the student’s behavior in school consistently improved. (S-9).

54. The student had never exhibited academic concerns. (S-2; NT at 307-427, 632-736, 743-815).

55. In June 2023, the parent filed the complaint which led to these proceedings.

56. Thereafter, the Charter School sought permission to evaluate the student. Parent did not provide permission for the evaluation. (S-19).

[2023-2024 school year]

57. In mid-August 2023, the hearing officer denied the Charter School’s motion to dismiss for lack of ripeness but provided authority for the Charter School to undertake an evaluation of the student.

58. In mid-October 2023, on the same day the student was involved in mutually aggressive behavior with a fellow student during recess and engaged in defiance and work-refusal with a teacher. (S-20).

59. In October 2023, approximately one week after the behavior incidents, the Charter School issued its evaluation report ("ER"). (S-20; NT at 519-602).
60. Parental input forms were not returned for the evaluation, but the Charter School incorporated the relevant aspects of the May 2022 private evaluation report. (S-20).
61. The October 2023 ER included teacher input. The student's [redacted] teacher reported that the student often engaged appropriately with peers but sometimes struggled with peer interactions during unstructured activities such as recess. The student exhibited struggles with some of the perfectionist attitudes toward school work and, as of the date of the ER, had engaged in work refusal one time. (S-20).
62. Cognitive testing in the October 2023 ER indicated that student's full-scale IQ was 94. Achievement testing in the ER was in the average or high-average range across all subtests and the reading and mathematics composites. (S-20).
63. The October 2023 ER contained a behavioral assessment. The teacher's ratings indicated average scores in all areas except for an at-risk rating on the adaptability sub-test. The parent's ratings indicated average scores in all areas except for at-risk ratings in aggression,

conduct problems, and attention problems. Neither rater indicated any clinically significant scores. (S-20).

64. The October 2023 ER contained an attention assessment. The teacher's ratings did not indicate any at-risk or clinically-significant scores. The parent's ratings indicated average scores in all areas except for an at-risk rating for emotional dysregulation. (S-20).

65. The October 2023 ER contained an assessment for potential emotional disturbance needs. The student's parent did not return the instrument. The student's teacher indicated at-risk scores in three of four sub-tests (inability to build/maintain relationships, inappropriate behavior/feelings, pervasive mood/depression), and the composite total. (S-20).

66. The October 2023 ER recognized that the student has a disability but does not require special education. The ER indicated that the student might benefit from a Section 504 plan (see below). (S-20).

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 below.

Discussion

IDEA/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 §§711.1-711.62). To assure that an eligible child receives FAPE (34 C.F.R. §300.17; 22 PA Code §§711.3(b)(3)), charter schools are under a “child find” obligation, requiring charter schools have policies “to ensure that all children with disabilities who are enrolled in the charter school or cyber charter school, and who are in need of special education and related services, are identified, located and evaluated.” (22 PA Code §711.21). This provision places upon local education agencies, such as charter schools, the “continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under these statutes.” *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009). The evaluation of children who are suspected to have a disability must take place within a reasonable period of time after the school is on notice of behavior or results that may reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999).

Where a charter school conducts an evaluation under its child-find obligation, that evaluation must “use a variety of assessment tools and

strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the student is a child with a disability and, if so, what must be provided through the student’s special education programming in order for that student to receive FAPE. (34 C.F.R. §300.304(b); 22 PA Code §711.3(b)(22)). The evaluation must assess “all areas related to the suspected disability”, must “use technically sound instruments that may assess the relative contribution of (various) factors, in addition to physical or developmental factors”, and must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child”. (34 C.F.R. §300.304, generally, and specifically at §§300.304(b)(2-3),(c)(4); 22 PA Code §711.3(b)(22)).

At the outset, one must be mindful of the instruction of the IDEA set forth above that no single measure or assessment as the sole criterion for determining whether a child is a child with a disability. Where the question is eligibility for social/emotional/behavioral programming, formalized assessments in those areas would be appropriate. But other data—like the evidence presented here such as the parent’s and teacher’s views of the student, along with those of individuals close to the family and the parent’s advocate, the student’s general behavior at school, and the student’s formal

disciplinary records— must be examined to provide a complete picture of the student's affect and behavior in educational settings.

Here, the answer to the question of the student's potential social/emotional/behavioral needs in the education setting is complicated. On one hand, there is evidence that special education programming might be required for the student:

- the consistent and well-informed observations and opinions of the student's parent;
- generalized concern by Charter School educators of problematic behaviors involving non-compliance, acting out, and aggression toward peers;
- multiple disciplinary referrals;
- a mosaic of services in place for the student, including an aide and breaks away from the classroom in a quiet area; and
- slightly elevated ratings on behavioral, attention, and emotional-state assessments.

On the other hand, there is evidence that special education programming is not required for the student:

- the opinion of Charter School educators that even given their generalized concerns over the student's behaviors,

their opinions that those behaviors were not overly problematic and did not interfere with instruction;

- the intermittent nature of the disciplinary referrals;
- the student's clear response to regular education behavior supports and interventions; and
- singular and overall mild at-risk scores, rather than wide-ranging or clinically-significant scores, on the behavioral, attention, and emotional-state assessments.

One can see how the parties view the evidence as supporting their particular contentions about the student's eligibility. On balance, the evidence weighs in favor of the finding that the student is not eligible for special education services. Most significant in this finding is the testimony of the Charter School educators—and especially the student's [2022-2023 school year] teacher—that the student was an engaged, successful, and responsive learner who, even with behavioral challenges, did not require extensive interventions. This testimony, from individuals who spent the most time with the student in educational settings, was accorded heavy weight.

Also persuasive is the documentary evidence showing the success of the regular education interventions employed by the Charter School. If one considers what behavioral goals, with intensive programming including a positive behavior support plan, would look like in an individualized education program, it is the considered opinion of this hearing officer that such

programming is over-programming. The student requires programming to address certain needs, but it need not be with the intensity of special education.

Accordingly, the student is not eligible as a student under the IDEA as a student who requires special education.

Before turning to consideration of potential Section 504 supports, it must be noted that the Charter School erred in failing to evaluate the student in March 2023 when the parent made an explicit request for an evaluation. Ultimately, the student is not eligible for special education and so the Charter School's procedural failure does not lead to a denial of FAPE. Thus, there is no basis for remedy based on this procedural error. (34 C.F.R. §300.513; 22 PA Code §711.3(b)(27)). But make no mistake, it is a signal procedural failure of the Charter School's child-find obligation and, under a separate mosaic of facts, would support different findings and conclusions.

Section 504

Section 504 of the Rehabilitation Act of 1973 ("Section 504"), a statute separate from but analogous to IDEA, requires that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §711.2).³ Where a student has a recognized disability but does not

³ As with the IDEA, 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") and 22 PA Code §711.2.

require special education programming and, instead, requires general education supports to accommodate that disability, a Section 504 plan may be appropriate. In Pennsylvania, this process has jurisdiction over Section 504/Chapter 15 programming in charter schools. (22 PA Code §§15.1, 15.8, 711.2, 711.3(c)).

Parent did not make an explicit claim under Section 504. But especially in light of those factors which support parent's view of the student's needs (albeit do not rise to the level of requiring special education), the record supports a finding that a Section 504 process should be undertaken to develop a Section 504 plan for the student. Moreover, to make sure that the student's parent and the Charter School educators are continually monitoring the student's needs and response behavioral interventions, monthly meetings of the Section 504 team will be ordered as part of the Section 504 plan's provisions

Therefore, as a matter of equity and to ensure that the student has formalized programming, albeit not special education programming, the order will address convening a Section 504 meeting for the development of a Section 504 plan for the student.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is not eligible for special education. Within 20 days of the

date of this order, the Avon Grove Charter School shall convene a Section 504 meeting to consider how the student should be supported in the regular education environment with a section 504 plan. The Section 504 plan resulting from this process shall include a provision for monthly meetings for the team to consult and consider the student's ongoing needs for support in the school setting.

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

01/23/2024