

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

DECISION

Child's Name: A.F.

Date of Birth: [redacted]

Dates of Hearing:

June 24, 2011

June 27, 2011

August 15, 2011

August 29, 2011

August 30, 2011

CLOSED HEARING

ODR Case # 1756-10-11-KE

Parties to the Hearing:

Parent[s]

Brookville Area School District
104 Jenks Street
Brookville, PA 15825

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Charles Jelley, Esq.
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September 19, 2011

October 4, 2011

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a late-teen-aged student residing in the Brookville Area School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”) and Pennsylvania special education regulations (“Chapter 14”).¹ The parties agree that the student qualifies under these provisions of law, but there is disagreement over the identification of specific disabilities. Both parties agree that the student has an emotional disturbance. Parents assert that the District, after identifying the student with a specific learning disability, inappropriately found that the student no longer had a specific learning disability.

The student’s parents also allege that, through multiple acts and omissions, the District has denied the student a free appropriate public education (“FAPE”) as required under IDEA and Chapter 14. Additionally, parents assert that the student has been denied a FAPE and has been the subject of disability discrimination under the applicable provisions of Section 504 of the Rehabilitation Act of 1973 (“Section 504”).² Parents seek compensatory education as a result of the alleged deprivations of FAPE. The District counters that at all times it has provided a FAPE to

¹ 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 §§14.101-14.164.

² 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., 15.10 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of “protected handicapped students”.

the student and met its obligations under IDEA, Chapter 14, and Section 504.

ISSUES

Was the student denied a FAPE in the 2008-2009, 2009-2010 and/or 2010-2011 school years?

Does the District owe the parents reimbursement for private programming in the summer of 2010?

Did the District engage in discrimination in its treatment of the student?

FINDINGS OF FACT

1. In January 2001, the student was initially identified by the District as a student with needs in speech and language and auditory processing difficulties. While the District's report found the student's full-scale IQ as 89 and did not identify the student with a learning disability, the report indicated that "(the student's) profile would indicate a potential learning disability". (Parents' Exhibit ["P"]-10).
2. By May 2003, the student was receiving significant learning support. (P-19 at page 6).
3. In October 2004, the District re-evaluated the student at mother's request because the student was "experiencing difficulty and making slow progress". The student's full-scaled IQ was measured as 74. In addition to continuing needs in speech and language, the District identified the student with learning disabilities in reading, mathematics, and written expression. (P-19).
4. In June 2007, the District re-evaluated the student and again found the student eligible for special education as a student with specific learning disabilities and needs in speech and language. (P-18, School District Exhibit ["S"]-30).
5. In November-December 2007, the student underwent an independent educational evaluation at District expense. At

- approximately the same time, parents were undertaking a private evaluation. Both processes employed the Wechsler Intelligence Scale for Children- 4th edition (“WISC-4”), so the independent evaluator’s IQ score of 80 was potentially suspect due to practice effect. The independent evaluator opined that, applying the instrument’s scoring protocol in such circumstances, the student’s IQ score was more likely in mid-70s. (S-24 at page 2; S-29).
6. The independent evaluator also administered the Universal Nonverbal Intelligence Test which yielded a full-scale IQ score of 90, in the low average range. (S-29).
 7. Taking all of the cognitive testing together, the independent evaluator concluded that the student’s cognitive skills were in the “upper portion of the borderline range”. (S-29)
 8. In February 2008, the private evaluator, who administered the WISC-IV at the same time, found that the student’s full-scale IQ was 91. The private evaluator recommended that the student receive services in reading and written expression. (S-27).
 9. In October 2008, the student’s individualized education plan (“IEP”) was revised. (S-6b).
 10. The October 2008 IEP contained two goals in reading, two goals in vocabulary, one goal in written expression, three goals in mathematics, one goal in independent living skills, one goal in memory/recall goal, two goals in speech/language, and one goal in transition. (S-6b at pages 21-34).
 11. Neither the October 2008 IEP, nor any of the evaluations to this point, indicated that the student exhibited behavior, attention, or anxiety issues in the school environment. Under a section entitled “parental concerns”, the October 2008 IEP mentions that the student’s mother related that “(the student) has seen a counselor periodically and (the student) has seen (the private evaluator from FF 5, 8) for anxiety issues”. Still, the concerns of all parties were focused on academics and skills-acquisition for independence after K-12 schooling. (P-18, P-19; S-6b, S-24, S-27, S-29, S-30).
 12. In January 2009, the District provided an independent evaluation at the request of parents due to concerns about continuing difficulties in school and to seek specific educational recommendations. (S-26).

13. The January 2009 evaluation relied on the full-scale IQ scores of 91 in the independent and private evaluations obtained roughly a year earlier. (S-26).
14. For the first time, an evaluation included assessment of the student's emotional functioning. The Behavior Assessment System for Children – 2nd edition was administered to both of the student's parents, to the student, and two of the student's teachers. The parents' ratings were clinically significant in many areas, the student's ratings were clinically significant in some areas, and the teachers' ratings were consistently in the average range. All raters, however, had elevated ratings for anxiety, depression, and somatization. (S-26 at pages 11-13).
15. The evaluation explicitly identified the student with specific learning disabilities in reading, mathematics, and written expression. Additionally, while not identifying the student as a student with emotional disturbance, the evaluation report recommended that school-based teams give consideration to the potential for emotional support needs. (S-26 at pages 10-19).
16. The results of the January 2009 evaluation were provided to the District (P-5 at page 12; S-5 at page 13; Notes of Testimony ["NT"] at 434-435).
17. In March 2009, the student's IEP was revised. The student's goals were significantly revised from the October 2008 IEP, both in number and substance. The March 2009 IEP contained two goals in reading, goal in written expression, three goals in mathematics, and one goal in speech/language. (P-5 at pages 19-23; S-5 at 22-69, S-6b at pages 21-34; P-).
18. In March 2010, the student's IEP was revised. A re-evaluation was underway, so the March 2010 IEP did not vary substantively from the March 2009 IEP in anticipation of the results of the re-evaluation. (S-4).
19. In May 2010, the District issued a re-evaluation report. The report included results of a functional behavior assessment performed in the spring of 2010. The report continued to find that the student had specific learning disabilities and needs in speech/language. The re-evaluation report also, for the first time, identified the student as a student with an emotional disturbance. (P-4).

20. In June 2010, based on the May 2010 re-evaluation report, the student's IEP was revised. The June 2010 IEP contained two goals in reading, one goal in vocabulary, one goal in written expression, and one goal in organization, and one goal in transition. There were no goals in mathematics. (S-3).
21. In the summer of 2010, the District did not provide extended school year services ("ESY") to the student. The family arranged for the student to attend an intensive summer program at an out-of-state private school. (P-6, P-7, P-8, P-9).
22. In August 2010, as part of a process to qualify for services from the Office for Vocational Rehabilitation ("OVR"), the student underwent a private evaluation. The re-evaluation found that the student's full-scale IQ was 82. Compared with achievement testing in the same evaluation, the OVR evaluator found the student did not qualify as a student with specific learning disabilities. (S-25).
23. Over the fall of 2010, the parents retained an expert in special education services to become involved in the review of the student's evaluation history, IEPs, and other educational records as well as to participate in future IEP design. (P-3 at page 8).
24. In November 2010, the student's IEP was revised. The IEP meeting included review of the August 2010 OVR report as well as the participation of the parents' special education expert. The goals remained the same as in the June 2010 IEP except for the addition of a goal addressing anxiety and sadness. (P-3; S-2).
25. The November 2010 IEP meeting led to a request for a re-evaluation. (P-3 at page 8; S-24).
26. In December 2010, the District issued its re-evaluation report. Based on the results and conclusions from the August 2010 OVR report, the District found that the student was no longer eligible as a student with specific learning disabilities. The student's identified disabilities were emotional disturbance and speech/language. (S-24; NT at 426-473).
27. In January 2011, the student's IEP was revised. The January 2011 IEP contained three goals in reading, one goal in vocabulary, one goal in organization, one goal in dealing with anxiety/sadness, and one goal in problem solving. (S-1).

28. In January 2011, the family's expert in special education services issued a report, identifying multiple alleged procedural and substantive violations that denied the student a FAPE. (P-3).
29. Throughout the student's receipt of special education services at the District, it provided procedural safeguards notices. Various versions of these notices were provided, not always technically accurate at the time those were sent. The inaccuracies, however, were not materially adverse to the family and were not misrepresentations such that those inaccuracies denied the parents the opportunity to pursue their rights. (P-1, P-2).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE

To assure that an eligible child receives a 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" (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

In this case, the District appropriately evaluated and identified the student through the re-evaluation of December 2010. The student's IQ scores showed some degree of variability, but a consistent finding across the student's educational history shows that the student exhibits significant discrepancies between those IQ scores and the student's

achievement scores in reading, mathematics, and written expression. (FF 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 16, 19). Indeed, the notion that the student was not eligible as a student with a learning disability did not surface in anyone's thinking until the OVR report of August 2010. (FF 22, 26). The District's programming, however, belies its position after December 2010 that the student does not have specific learning disabilities, at least in reading, as it retained three goals in reading in the January 2011 IEP. (FF 26, 27). Regardless, the District has inappropriately eliminated goals to address the student's specific learning disabilities in mathematics and written expression.

The District, however, appropriately handled its evaluation of the student's needs in emotional support until January 2009. For many years, the only concerns in the educational environment were academic. (FF 10, 11). As each school year passed, however, the student's issues with anxiety and depression continued to mount and, as of January 2009, the District had independent, objective data that should have led the District to program for the student's needs for emotional support. (FF 14, 15, 16). The District failed in its obligations to provide programming for this need until May 2010. (FF 19).

Accordingly, compensatory education will be awarded.

ESY – Summer 2010

The record taken in its entirety does not support a finding that the student was denied a FAPE by not receiving ESY services in the summer

of 2010. (FF 21). Accordingly, parents are not entitled to reimbursement for the private school program provided to the student in the summer of 2010.

Discrimination under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability. Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

In the instant case, the student was denied the benefits of appropriate programming by the District not appropriately identifying the student as needing emotional support services after January 2009. (FF 12, 14, 15, 16, 19). In the same way, the student was denied the benefits of appropriate programming by the District inappropriately mis-identifying the student in December 2010 by removing the student’s services to address learning disabilities in mathematics and written expression. (FF 22, 2,5, 26, 27).

Accordingly, this finding will be part of the order.

Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEA, compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEA. (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 right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied FAPE “is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” (M.C. at 397).

Here, I find that the District denied the student a FAPE from February 2009, when the District knew or should have known that it should have been providing services to address the student’s needs in emotional support, through June 2010.³ (FF 14, 15, 16, 19, 20).

Additionally, the District denied the student a FAPE from January 2011

³ Although the record is not clear on exactly when the District came into possession of the independent evaluation of January 2009, the District had the results available when it prepared the re-evaluation report of March 2009. (FF 12, 14, 15, 16). Therefore, the District knew or should have known that the student had emotional support needs, in February 2009.

when it prepared an IEP based on the flawed re-evaluation of December 2010 where it found the student was no longer eligible as a student with learning disabilities. (FF 22, 26, 27). On this record, that deprivation continued through the end of the 2010-2011 school year and continues through the current 2011-2012 school year. Accordingly, compensatory education will be awarded.

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 they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education, either hourly or as the result of a lump sum settlement, must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

An award of compensatory education will be fashioned accordingly.

CONCLUSION

The District denied the student a FAPE for its failure to appropriately program for the student's needs in emotional support from February 2009 through June 2010. The District denied the student a FAPE for its mis-identification of the student in December 2010 and, in January 2011, removing programming to address specific learning disabilities in mathematics and written expression. The parents are not entitled to reimbursement for the summer 2010 program.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to compensatory education as follows:

- 1.5 hours of compensatory education for each school week between February 15, 2009 through June 15, 2010 for deprivations related to the student's emotional support needs; and
- 1.5 hours of compensatory education for each school day the student attended between January 25, 2011 through the date that the District proposes an IEP that appropriately addresses,

in addition to the student's other needs, the student's needs in mathematics and written expression.

The District has violate the student's rights under the Rehabilitation Act of 1973 by denying the student the benefits of special education programming the student was entitled to as set forth in the decision above.

Parents are not entitled to reimbursement for the private summer programming undertaken in the summer of 2010.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

October 4, 2011