

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: D.B.

Date of Birth: [redacted]

Dates of Hearing:

September 8, 2014

November 10, 2014

November 13, 2014

CLOSED HEARING

ODR Case # 14868-1314KE

Parties to the Hearing:

Parent[s]

Fairview School District
7460 McCray Road
Fairview, PA 16413

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Charles Steele, Esquire
428 Forbes Avenue / Suite 700
Pittsburgh, PA 15219

Thomas Lent, Esquire
717 State Street / Suite 701
Erie, PA 16501

December 8, 2014

December 19, 2014

Jake McElligott, Esquire

INTRODUCTION

[Student] (hereinafter “student”)¹ is an [elementary school-aged] student who resides in the Fairview School District (“District”). The parties do not dispute that the student qualifies as a student with a disability under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania special education regulations (“Chapter 14”) as a student with a health impairment and speech/language needs.² However, the parties dispute the appropriateness of the District’s programming for the student over the 2012-2013 and 2013-2014 school years. Parents claim that the student was denied a free appropriate public education (“FAPE”) and seek compensatory education as a remedy, as well an independent educational evaluation of the student.

The District counters that, at all times, it met its obligations to the student under IDEIA/Chapter 14. Consequently, the District claims that no remedy is owed.

For the reasons set forth below, I find that the District provided a FAPE to the student in the 2012-2013 school year. In the 2013-2014, I find that the District failed in its obligations to the student for a brief period of time. Even though the District failed in its obligations, however,

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 implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162.

the intersection of the chronologies of the District's knowledge/imputed knowledge and its actions as those chronologies surface in the mandates of IDEIA, Chapter 14, and precedential case law does not support an award of compensatory education. Finally, I find that the District's evaluation processes and reports were appropriate and, as such, the District will not be ordered to provide an independent educational evaluation.

ISSUES

Did the District provide FAPE to the student under its IDEIA obligations for the 2012-2013 and/or 2013-2014 school year(s)?

If so,
is compensatory education owed to the student?

Should the District be ordered to provide
an independent educational evaluation?

FINDINGS OF FACT

1. In January 2012, the student's family sought early intervention services for the student, who was at that time enrolled in a preschool program. In February 2012, the student underwent an initial evaluation for early intervention services. The student was rated by the preschool teacher in the clinically significant range for attention problems and aggressive behavior, and in the borderline range for

emotional reactivity and withdrawal. Observation of the student in the preschool setting revealed certain acting-out behaviors. The February 2012 ER indicated that the student had already been seen by a private psychologist to investigate the potential for an autism diagnosis, but no formal diagnosis was made. The February 2012 ER indicated that the student would be evaluated by a private psychologist in the coming weeks. (S-1).

2. Based on the February 2012 ER, an early intervention individualized education plan (IEP) was developed for the student. The early intervention IEP indicated that the student did not exhibit behaviors that impeded the student's learning, or the learning of others. (S-2).
3. The February 2012 early intervention IEP contained two goals, one for maintaining attention and one for peer interaction. (S-2).
4. In February 2012, when the student was first presented for early intervention services from the preschool, the District's transition process for incoming kindergarten students was already underway, and so the District was unaware that the student was in the midst of the early intervention evaluation/IEP process. Once the District was made aware of the student's impending enrollment in kindergarten, a

- District school psychologist observed the student in the preschool setting in the summer of 2012. (S-3; Notes of Testimony [“NT”] at 625).
5. In August 2012, at the outset of the student’s kindergarten year, the District’s director of special education, the District school psychologist, a District special education teacher, and the student’s mother met to consider a District ER prepared by the school psychologist. The District did not identify the student as having a disability, preferring to gauge the student’s transition to the kindergarten setting. (S-3; NT at 470-472).
 6. As the 2012-2013 school year began, the District’s student support team monitored the student’s adjustment to kindergarten. (NT at 510-511, 629-630).
 7. By October 2012, the student had exhibited frustration and crying episodes in school (described as “meltdowns”), and the student’s kindergarten teacher, in conjunction with the student support team, recommended consultation with a behavior specialist. (NT at 475-479, 629-630).
 8. In November 2012, the behavior specialist performed a functional behavior assessment (FBA) and drafted a positive behavior support plan. The FBA identified potential behavioral antecedents as difficulty with social cues, low

- frustration tolerance, disappointment, assignment of independent work or new routines, and, at times, fear of the bathroom. The behavior support plan recommended numerous interventions. (S-4, S-5, S-6, S-24).
9. In December 2012, the District issued a re-evaluation report (RR). The RR identified the student as a student in need of speech and language support. (S-9).
 10. The December 2012 IEP indicated that the student did not have behaviors that impeded the student's learning or the learning of others. (S-7)
 11. The December 2012 IEP contained two speech and language goals, one for social skills/social interaction and one for emotional regulation. The behavior support plan developed by the behavior specialist was implemented by the District. (S-7).
 12. The District's interventions were effective, and the student's behaviors moderated over the remainder of the 2012-2013 school year. The student's "meltdown" behavior subsided and social interactions improved. (S-19; NT at 477, 497-498, 502-503, 514).
 13. In the 2013-2014 school year, the student began 1st grade at the District. The school year began without

- problematic behaviors by the student. (NT at 88-89, 261-262, 277).
14. In October 2013, the student was evaluated by the child development unit at Children's Hospital of Pittsburgh. The evaluator opined that the student met criteria for generalized anxiety and obsessive compulsive disorder. When the report was received sometime in November 2013, it was provided to the student's 1st grade teacher and the building principal, but the student's mother did not request an evaluation given the student's success at that point in the school year. (Parents' Exhibit ["P"]-5; S-10; NT at 88-89).
 15. In December 2013, the student's annual IEP meeting took place for revision of the December 2012 IEP. (P-1; S-11).
 16. In the December 2013 IEP, the student's present levels of academic performance indicated that the student was making satisfactory/proficient progress in most academic areas, with advanced progress in certain areas. On measures of social skills and work habits, the student's progress was evaluated as satisfactory or excellent. (P-1; S-11).
 17. The December 2013 IEP updated the student's FBA, indicating that the student experience intermittent emotional episodes but that intervention strategies were successful. The December 2013 IEP continued to indicate that the

student did not exhibit behaviors that impeded the student's learning or the learning of others. (P-1; S-11).

18. The December 2013 IEP reflected the progress the student had made on speech/language goals in the prior school year, progress which continued through the fall of 2013. Progress monitoring data on the student's goals in both the December 2012 and December 2013 IEPs was collected by the speech/language therapist. (P-1; S-11, S-19; NT at 263, 406-420).
19. Based on the student's progress, the December 2013 IEP contained one speech/language goal, focusing on social skills and following directions. (P-1; S-11).
20. Through January 2014, after the student returned from the winter break, the student's classroom behavior deteriorated markedly, including increased acting-out behavior, emotionality and crying, and regression on speech/language goals. (S-19, S-20; NT at 65, 107, 209, 277-278).
21. Over January and February 2014, the student's parents communicated with the 1st grade teacher and the principal. The District's director of special education was not included in these communications. (NT at 65-66, 168, 278, 656-657, 649).

22. In early March 2014, the student's parents requested that the student be evaluated for [redacted]. The District issued permission to evaluate the student and began an evaluation process for [redacted]. (S-21, S-22).
23. In late March 2014, the student returned to the child development unit at Children's Hospital of Pittsburgh for a follow-up visit. The student was diagnosed with attention deficit hyperactivity disorder (ADHD). (S-10).
24. In April 2014, the parents filed the special education due process complaint which led to these proceedings.
25. The filing of the special education due process complaint in April 2014 brought to light for the District's special education director, for the first time, that the student's classroom behavior had been deteriorating since January 2014. (NT at 646-647, 649).
26. In April 2014, following receipt of the parents' complaint, the District revised the student's FBA and behavior support plan, and requested permission to re-evaluate the student. (S-13, S-14).
27. In May 2014, the District issued a RR with updated behavioral observations/data, as well as the diagnoses from the Children's Hospital of Pittsburgh assessments. The May

- 2014 RR also included cognitive and achievement testing. (P-2; S-16).
28. The May 2014 RR identified the student as having health impairments related to the anxiety, obsessive-compulsive disorder, and ADHD diagnoses, in addition to a continuing identification for needs in speech and language. (P-2; S-16).
29. An IEP dated May 9, 2014 was proposed by the District, incorporating the data from the May 2014 RR. (P-3; S-15).
30. The May 2014 IEP indicated that the student exhibited behaviors that impeded the student's learning and the learning of others. The IEP contained updated present levels in academics. (P-3; S-15).
31. The May 2014 IEP contained two goals, one for appropriate classroom/peer interaction and one for behavior. (P-3; S-15).

CREDIBILITY OF WITNESSES

- A. All witnesses testified credibly.
- B. Due to their knowledge of their child and demeanor/affect, heavy weight was accorded to the parents' testimony.

- C. Due to her experience with the child and her demeanor/affect, heavy weight was accorded to the testimony of the speech and language therapist.
- D. Due to her experience with the adult participants in the process and her demeanor/affect, heavy weight was accorded to the testimony of the director of special education.
- E. Due to their experience with the child in educational settings and demeanor/affect, the heaviest weight was accorded to the testimony of the kindergarten teacher and behavior specialist.
- F. All other witnesses were accorded some degree of weight, but less weight than those explicitly noted above.

DISCUSSION AND CONCLUSIONS OF LAW

FAPE

To assure that an eligible child receives FAPE,³ an IEP must be “reasonably calculated to yield meaningful educational...benefit and student or child progress.”⁴ “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning”,⁵ not simply *de minimis* or minimal education progress.⁶

³ 34 C.F.R. §300.17.

⁴ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

⁵ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

⁶ M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

In this case, there are various phases of when and how the District provided, or failed to provide, the student with a FAPE. In the kindergarten year, given the student's late transition into early intervention services, the District was not placed in a position to have perfected information about the student. Still, by the outset of the 2012-2013 school year, the District knew that the student presented potential needs; the decision not to identify the student, and to monitor the student through the student support team, however, is entirely understandable given the student's age, developmental stage, and the differences between the preschool and kindergarten environments.

That process eventually resulted in the October 2012 FBA, November 2012 behavior support plan, and December 2012 ER and IEP. The District reacted in a timely and effective way throughout the student's kindergarten year. While parents' counsel addressed certain granular elements in the District's actions in the kindergarten year (such as whether or not behavior was indicated as a special consideration in the December 2012 IEP, or the exact role of the kindergarten teacher in data-gathering), the record as a whole (both in terms of the exhibits and the testimony) firmly support a finding that the District provided a FAPE to the student in the 2012-2013 school year.

Likewise, in 1st grade, the school year began with the provision of a FAPE to the student. The record as a whole supports a finding that the student's behavior interventions continued to be effective. The student

also exhibited progress academically and on the goals in the December 2012 IEP, goals which were revised in the December 2013 IEP.

Shortly thereafter, however, through January 2014, the student's educational needs changed dramatically. The student's classroom behavior deteriorated suddenly and markedly. Progress on the speech and language goal in the December 2013 IEP stalled and began to regress, again quite dramatically. It is the considered opinion of this hearing officer that, by Monday February 3, 2014 (the first school day of that month after four full weeks of instruction in January 2014), the District knew or should have known that the student's behavioral and speech/language needs were no longer being met by the student's IEP and that permission to re-evaluate the student should have been requested. As a result of the complaint in this matter and a subsequent re-evaluation, as of May 9, 2014, the District had marshaled comprehensive, updated data on the student's needs and proposed an appropriate IEP.

The effect of these finding ultimately requires construction of a compensatory education timeline. As set forth below, however, the legal mandates involved in constructing this timeline does not support a compensatory education award.

In sum, then, the student was provided with a FAPE by the District in the 2012-2013 school year. In the 2013-2014 school year, the District provided a FAPE through February 3, 2014, when the District knew or

should have known it needed to request permission to re-evaluate. As of May 9, 2014, the District had taken the steps it needed to, resulting in an appropriate RR and IEP. An explanation of the compensatory education timeline is outlined below.

Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEIA, 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 IDEIA⁷. Compensatory education accrues from a point where a school district knew or should have known that it was failing in its obligation to provide a FAPE.⁸ The U.S Court of Appeals for the Third Circuit has held that a student who is denied a 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.”⁹

In this case, the District knew or should have known it needed to request permission to re-evaluate the student on February 3, 2014. Under Pennsylvania special education regulations, however, in issuing a re-evaluation report, a school district has 60 calendar days from the date

⁷ Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area School District v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992).

⁸ Ridgewood; M.C..

⁹ M.C. at 397.

it receives permission to re-evaluate to issue the report.¹⁰ Therefore, the timeline involved must be adjusted to account for time that the District could (and should) reasonably take to re-evaluate the student and revise the student's IEP.

As of February 3, 2014, it is the considered opinion of this hearing officer that the District knew or should have known that it needed to request permission to re-evaluate the student. Giving the District/parents a week to issue/return the request-for-permission, the District should have been in a position by February 10, 2014 to undertake the evaluation. The RR, then, should have been issued no later than April 11, 2014. At that point, the District has an obligation to convene the individualized education plan ("IEP") team to craft the student's IEP within 30 calendar days.¹¹ In effect, then, the District was required to have an appropriate IEP proposed by May 11, 2014. The District proposed its IEP on May 9, 2014. The legal result is that, under the applicable terms of IDEIA and Chapter 14 and precedential case law, even finding that the District failed in its obligations to the student for a span of weeks, there is no award of compensatory education.

¹⁰ 22 PA Code §14.124(b).

¹¹ 34 C.F.R. §300.323(c)(1).

Evaluation

The record supports the conclusion that each time the District evaluated the student and issued an ER or a RR— in August 2012, December 2012, and May 2014— those processes and reports were comprehensive and appropriate, given the District’s information about/experience with the student at the time of each report. Accordingly, the District is under no obligation to provide an IEE as the result of this decision.

CONCLUSION

The District provided a FAPE to the student in the 2012-2013 school year. In the 2013-2014 school year, while the District was in the position of not meeting its obligations to the student as of February 3, 2014, by re-evaluating the student and proposing an appropriate IEP by May 11, 2014, there is no compensatory education award. Under the terms of this decision, the District does not need to provide an IEE 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 was provided a FAPE in the 2012-2013 school year.
- The District failed in its obligations to the student as of February 3, 2014, a failure the District remedied on May 9, 2014.
- There is no award of compensatory education.
- The District is under no obligation, as a result of this decision, to provide an independent education evaluation of the student.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

December 19, 2014