

*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: J. P.

Date of Birth: [redacted]

Dates of Hearing:

March 26, 2012

May 15, 2012

May 24, 2012

### **OPEN HEARING**

ODR Case # 2787-1112KE

Parties to the Hearing:

Representative:

Parents

Pro Se

Big Beaver Falls Area School District  
150 8<sup>th</sup> Avenue  
Beaver Falls, PA 15010

Andrew Evankovich, Esquire  
Andrews & Price  
1500 Ardmore Boulevard  
Suite 506  
Pittsburgh, PA 15221

Date Record Closed:

June 11, 2012

Date of Decision:

July 12, 2012

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student<sup>1</sup> is a[n elementary school-aged] student who formerly resided in the Big Beaver Falls Area School District (“District”). The parties dispute whether, when the student attended at the District, the student should have been identified by the District as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania special education regulations (“Chapter 14”),<sup>2</sup> as well as whether the District had analogous obligations to the student under the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to “Section 504”) and Pennsylvania education regulations which implement Section 504 (“Chapter 15”).<sup>3</sup> Particularly, the dispute centers on whether the District should have identified the student as a student with Asperger’s syndrome.

Specifically, parents argue that the District denied the student a free appropriate public education (“FAPE”), failing to meet its obligations under IDEIA to identify the student as eligible under that statute and to provide special education and related services, known as the District’s

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<sup>1</sup> The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

<sup>2</sup> 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.

<sup>3</sup> 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 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for services to “protected handicapped students”.

“child find” obligation. As a result of the District’s alleged failure of its child find obligation, parents also argue that the student was exposed to bullying and harassment that amount to a denial of FAPE and discriminatory behavior in violation of the obligations of Section 504.

The District argues that, for a variety of reasons, it did not deny a FAPE to the student under either IDEIA or Section 504. As such, the District feels that no remedy is warranted.

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

### **ISSUES**

Did the District fail in its child find obligations under the terms of the IDEIA/Chapter 14?

If so, is compensatory education owed to the student?

Did the District provide the student with a FAPE, as required by Section 504?

Did the District discriminate against the student?

### **FINDINGS OF FACT**

1. In the 2007-2008 school year, the student began to attend the District for kindergarten. (School District Exhibit [“S”]-1).
2. In January 2008, due to progress during the first half of the kindergarten year, the student was promoted to 1<sup>st</sup> grade and was evaluated for gifted education. In May 2008, the District issued a gifted written report, finding that the student scored in the superior range of intellectual functioning thereby qualifying for gifted education. (S-1, S-6; Notes of Testimony [“NT”] at 40-41).
3. In the 2008-2009 school year, the student completed 2<sup>nd</sup> grade, including a gifted education component. (S-1, S-8, S-9, S-10).

4. In the 2009-2010 school year, the student began 3<sup>rd</sup> grade. (Hearing Officer Exhibit ["HO"]-7; S-1, S-12, S-13, S-14).
5. The student experienced success in the first half of the 3<sup>rd</sup> grade year. As the school year progressed, however, the student began to experience peer harassment across multiple settings in the District. The student's 3<sup>rd</sup> grade classroom presented intensive misbehaviors by multiple students throughout the school year. Many of these misbehaviors included derogatory, harassing comments and gestures (many of a sexual nature) and aggression directed at the student. (NT at 44-45, 291-293, 306-311, 314-322, 336, 338, 340-341, 443-446, 451, 453-454, 457-458, 463, 470-472, 486-487, 489-492, 497-498, 501).
6. By February 2010, the student's demeanor and engagement in the educational environment had markedly deteriorated. (NT at 46-47, 330-331, 455-457).
7. In late February/early March 2010, the notebook of a classmate in the student's 3<sup>rd</sup> grade classroom was discovered in school. The notebook contained [redacted]. (Parents' Exhibit ["P"]-9).
8. The notebook [redacted] deeply upset the student [and] caused disruptions among the students, including distress in some classmates. The notebook was delivered to the building principal, who returned it to the classroom teacher with instructions that the notebook should be returned to the student's classmate. The classroom teacher felt this course of action was not advisable and retained the notebook herself; ultimately, however, as instructed, the teacher returned the notebook to the student's classmate. Thereafter, the notebook was visible to the student and classmates in the classroom. (NT at 49, 65, 69-70, 291-295, 427-430, 443-450).
9. The student's parents communicated with the building principal about their concerns over the notebook [redacted]. The principal told the parents that she had removed the [notebook]. (P-7; NT at 67-68, 112-113, 118-124).
10. In early March 2010, the student received a reprimand from the classroom teacher. Thereafter, the student requested to go to the bathroom where the student engaged in self-injurious behavior. [Redacted]. (NT at 280-283, 330-331, 337-338, 463-466).

11. Following the March 2010 [redacted] incident, the student's teacher and school counselor both felt that the student's deteriorating behaviors indicated "red flags" that were concerning, to the point where both individuals felt follow-up by the District, if not an outright request for permission to evaluate the student, was in order. Both professionals testified credibly that the building principal, as a matter of building-level policy, did not support District-initiated requests to evaluate students with suspected disabilities. The student's teacher testified credibly that she feared outright reprimand by the principal if she voiced support for investigating/evaluating a student's need for special education services. (NT at 330-331, 337, 416-418, 499-504).
12. In mid-March 2010, parents wrote to the principal to share their cumulative concerns. (P-7).
13. Thereafter, parents requested of the principal that the principal, superintendent, teacher and school counselor gather for a meeting to discuss the issues swirling around the student. The teacher and school counselor were not informed of these requests. (NT at 303, 458).
14. In April 2010, the parents received information that a bookmark with a threatening message about the student had been placed in a school library book. No such bookmark was found after an exhaustive search by the District. (NT at 342-351).
15. In May 2010, the student was involved in an altercation on the afternoon school bus [redacted]. (S-24).
16. In May 2010, the parents undertook a private evaluation of the student. The report was finalized in the latter half of June 2010. (P-15a; NT at 676-678).
17. The parents' evaluator identified the student as having Asperger's syndrome. (P-15a).
18. Parents did not share the private evaluation with the District at the time the student was enrolled at the District. The District first learned of the private evaluation during document disclosure for the hearing. (P-15a; NT at 574-575).
19. In June 2010, the parents finally met with the principal, the superintendent, the classroom teacher, and the school counselor. Parents, who had secured the notebook [redacted] from the classmate's parents, produced the notebook. The production of the

notebook produced tremendous surprise at the meeting. The principal denied that it was the notebook in question; the teacher and counselor confirmed that it was. (P-9; NT at 67-68, 303-306, 333, 458-461).

20. Despite the behavioral and social issues impacting the student over the course of the 2009-2010 school year, the student maintained strong academic performance. (S-1; NT at 475, 486).
21. Observations of the student by the classroom teacher and school counselor that there was a special-needs issue involving the student fully comport with the formal findings of the independent evaluator that the student has Asperger's syndrome. The classroom teacher, dually certified in elementary education and special education, specifically suspected that the student exhibited signs of Asperger's syndrome. (P-15a; NT at 308-311, 316-332, 334-342, 372-376, 384-385, 387-389, 407, 411, 416-418, 446-447, 450-451, 453-458, 463-466, 468, 470-471, 479, 484-492, 498-502, 504, 665-671).
22. The student was withdrawn from the District in the summer of 2010 and, beginning with the 2010-2011 school year, the student has attended a nearby school district following the relocation of the student's family. (NT at 27, 580).
23. The building principal was not found to be a credible witness. All other witnesses were found to be credible, especially the student's mother, the school counselor and the classroom teacher.<sup>4</sup>

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Failure of Child Find Obligation under IDEIA/Chapter 14**

Pursuant to the requirements of IDEIA and Chapter 14,

Pennsylvania school districts have an obligation "to establish a system of

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<sup>4</sup> To the extent that a reader might come away from this decision with the notion that the challenging classroom environment experienced by the student in the 2009-2010 school year was somehow the result of the teacher's failings, such a notion must be completely rejected. The entirety of the record clearly supports the conclusion that the classroom teacher, and in the same vein the school counselor, both made concerted and professional efforts to respond to the problematic issues, both in general as well as specifically regarding the student. Any failure would seem to lie in the climate and culture fostered at the building level.

screening...to”, *inter alia*, “identify students who may need special education services and programs.”<sup>5</sup> School districts are explicitly granted the authority to seek permission from parents to evaluate a student who the school district feels might qualify as a student with a disability.<sup>6</sup>

In this case, the District clearly failed in its child find obligations. Although, due to being promoted to 1<sup>st</sup> grade during the kindergarten year, the student was younger than classmates, there is no indication in the record that the student’s educational performance was impeded as the student continued through 2<sup>nd</sup> grade and began 3<sup>rd</sup> grade. (FF 1, 2, 3, 4). At the outset of the 2009-2010 school year, the student was a well-adjusted, engaged 3<sup>rd</sup> grade learner with superior intellect. (FF 2, 5).

As the 2009-2010 school year unfolded, however, the student became the target of sustained bullying at the hands of classmates. (FF 5, 7, 8, 15). By late February/early March 2010, the student had exhibited marked declines in the engagement of the learning environment, had exhibited troubling behavior changes, and had engaged in self-injurious behavior. (FF 5, 6, 10). The District not only knew of parents’ growing concerns about these issues, but District employees, who knew the student best, saw an explicit need for the District to investigate and/or evaluate the student’s potential disability status. (FF 7, 8, 9, 10, 11, 12). Yet building-level practices interfered

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<sup>5</sup> 22 PA Code §14.122(3); *see also* 34 C.F.R. §300.111.

<sup>6</sup> 34 C.F.R. §§300.300(a), 300.301(b).

with, and effectively placed an injunction on, the District's fulfillment of its child find obligations. (FF 11).

Accordingly, the District failed in its child find obligations and, in doing so, denied the student an opportunity to receive a FAPE under IDEIA/Chapter 14.

### Compensatory Education

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 IDEIA.<sup>7</sup> 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.<sup>8</sup> 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."<sup>9</sup>

In this case, while the District failed in its child find obligation, the question of whether the student is entitled to compensatory education turns on different considerations. Here, the record sets forth rather clearly when the District knew or should have known that the student

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<sup>7</sup> 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).

<sup>8</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

<sup>9</sup> M.C. at 397.



was potentially a student with a disability. In late February/early March 2010, there was a confluence of the student's behavioral and emotional decline along with the eruption of the notebook [and other] incident[s]. (FF 6, 7, 8, 10, 11). The student's teacher and school counselor both testified that the [redacted] incident was a watershed moment which both witnesses described as a "red flag" that brought to a head their mounting concerns about the student. (FF 11).

Therefore, by mid-March 2010, the District should have initiated an evaluation process that would have ostensibly moved the District toward an identification as a student with a disability. This dovetails with the parents' pointed concern because at exactly this time, mid-March 2010, the parents notified the District in writing of their concerns, concerns that swept up the concerns that District employees also felt. (FF 12). So, by March 15, 2010, the District should have put itself in a position where it had obtained parental permission to undertake an evaluation of the student.

At that point, the District would have had an obligation to complete the evaluation and issue an evaluation report within 60 calendar days.<sup>10</sup> Therefore, the District would have had until May 14, 2010 to issue its evaluation report.

At that point, the District would have had an obligation to convene the individualized education plan ("IEP") team to craft the student's IEP

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<sup>10</sup> 34 C.F.R. §300.301(c)(1)(i); 22 PA Code §14.123(b).

within 30 calendar days.<sup>11</sup> Therefore, the District would have had until June 13, 2010 to put in place an IEP to address the student's needs in the educational environment.

In sum, then, had the District complied with its child-find, evaluation, and IEP obligations, the provision of FAPE to the student under the auspices of an IEP would not have legally accrued under the obligations of IDEIA until the 2010-2011 school year had ended. The student did not return to the District after the 2010-2011 school year. (FF 22).

Accordingly, even though the District failed in its child find obligations and, in doing so, denied the student an opportunity to receive a FAPE under IDEIA/Chapter 14, there can be no compensatory education award given the statutory timelines that would have allowed the District the time to rectify the problem.

#### Denial of FAPE under Section 504/Chapter 15

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with a FAPE.<sup>12</sup> While the provisions of IDEIA and Chapter 14, and subsequent case law, regarding

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<sup>11</sup> 34 C.F.R. §300.323(c)(1).

<sup>12</sup> 34 C.F.R. §104.33; 22 PA Code §15.1.

the provision of FAPE is more voluminous, the standards are analogous.<sup>13</sup>

Accordingly, the fact-finding and legal analysis outlined above in the *Failure of Child Find Obligation under IDEIA/Chapter 14* subsection are adopted here in support of the conclusion that the District denied the student a FAPE by failing in its obligation to identify the student as a protected handicapped student.<sup>14</sup>

#### 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 his disability.<sup>15</sup>

In the instant case, at the first prong, parents have met their burden to show that the student has a physical or mental impairment—Asperger’s syndrome—that interferes with the major life activities of

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<sup>13</sup> And while the obligations of IDEIA/Chapter 14 to identify and evaluate students with disabilities are much more intricate, Section 504/Chapter 15 impose similar obligations on school districts in Pennsylvania. 34 C.F.R. §104.35; 22 PA Code §15.5.

<sup>14</sup> 22 PA Code §15.2. Chapter 15 nomenclature speaks of “protected handicapped students”; Chapter 14, at 22 PA Code §14.101, uses the term “student with a disability”.

<sup>15</sup> Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

communicating and socializing in an educational environment. (FF 5, 10, 15, 16, 17, 21). At the second prong, parents have met their burden to show that the student was “otherwise qualified” to participate in the educational environment. (FF 1, 2, 3, 4, 5, 20). At the third prong, the District receives federal assistance for programming for students with disabilities. (NT at 596-597). Deferring for a moment the fourth prong, at the fifth prong, the District knew, or should have been reasonably expected to know, that the student was disabled. (See the *Denial of FAPE* subsections above).

At the fourth prong, parents have met their burden that the District acted with deliberate indifference in excluding the student from participation in an appropriate educational environment, denying the student the benefits of an appropriate educational environment, and subjecting the student to discrimination as a result of the District’s failure to identify the student’s disability. Most concerning are the following acts and omissions in this regard: (1) the principal’s handling of the notebook [redacted] involving the student (FF 7, 8, 9, 19), (2) the building-level practice that placed an implicit injunction on the identification and evaluation of students with disabilities within the building, to the point where staff feared retribution for advocating on behalf of the District’s statutory obligations (FF 10, 11, 21), and (3) the exclusion, until the very end of the 2009-2010 school year, of the teacher and school counselor from a collaborative process requested by parents

to discuss the issues that had surfaced in the spring of 2010 (FF 11, 13, 19, 21).

Accordingly, there will be an explicit finding that the District engaged with deliberate indifference in discriminatory acts and omissions against the student as a consequence of the District's failures as to its child find obligations and its obligations to provide FAPE to the student.

### **CONCLUSION**

The District failed in its child find obligations in the spring of 2010 by not evaluating the student and identifying the student as a "student with a disability" under IDEIA/Chapter 14 and a "protected handicapped student" under Section 504/Chapter 15. As a result of this failure, the student was denied a FAPE. Given the chronology of events as they unfolded in the spring of 2010 in light of the District's statutory obligations at that point, however, there can be no award of compensatory education. The District engaged with deliberate indifference in discriminatory acts and omissions against the student as a consequence of the District's failures as to its child find obligations and its obligations to provide FAPE to the student.

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## **ORDER**

For the reasons set forth above:

The Big Beaver Falls Area School District failed in its child find obligations by not evaluating the student in the spring of 2010 and identifying the student as a student with disability/protected handicapped student. As a consequence, the student was denied a FAPE under IDEIA/Chapter 14 and Section 504/Chapter 15.

The student is not entitled to an award of compensatory education.

The Big Beaver Falls Area School District engaged with deliberate indifference in discriminatory acts and omissions against the student as a consequence of the District's failures as to its child find obligations, its obligations to provide FAPE to the student, in excluding the student from participation in an appropriate educational environment, in denying the student the benefits of an appropriate educational environment, and subjecting the student to discrimination as a result of the District's failure to identify the student's disability.

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

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

July 12, 2012