

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: W.S.

Date of Birth: [redacted]

Dates of Hearing:

September 2, 2014
September 3, 2014
September 15, 2014
October 27, 2014
October 28, 2014

CLOSED HEARING

ODR Case #15090-1314KE

Parties to the Hearing:

Representative:

Parent[s]

Charles Steele, Esquire
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Suite 700
Pittsburgh, PA 15219

Wilmington Area School District
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New Wilmington, PA 16142

Patricia Andrews, Esquire
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Date Record Closed:

December 9, 2014

Date of Decision:

December 24, 2014

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION

Student¹ is an early elementary school age student residing, at least at times, in the Wilmington Area School District (“District”). By order of a court with competent jurisdiction regarding custody issues between the student’s parents (and set forth more fully below in the *Procedural History* section below), the student is educated in the District. The student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² and Pennsylvania special education regulations (“Chapter 14”)³ for specially designed instruction and related services as a student with autism.

The student’s mother asserts a number of claims related to the student’s educational programming in the District that, in her view, denied the student a free appropriate public education (“FAPE”). Specifically, the student’s mother claims that the student was denied a FAPE in the 2013-2014 school year and the 2014-2015 school year (through the date the record closed) for various alleged acts and omissions by District employees (or intermediate unit [“IU”] employees providing services to the student by arrangement with the District) in the educational programming for the student.

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.

³ 22 PA Code §§14.101-14.163

As a result of this alleged denial of a FAPE, the student's mother claims that the student is owed compensatory education for a period beginning with the commencement of the 2013-2014 school year and continuing through the date the record in this matter closed. The student's mother also seeks, as a remedy, an independent educational evaluation ("IEE") of the student at District expense.

The District counters that, at all times, it met its obligations under the IDEIA and Chapter 14, providing the student with a FAPE at all times. The student's father was not a party to the dispute but was included in communications related to scheduling/participation and attended most hearing sessions. The student's father's position aligns with the District's; father feels the District has provided appropriate educational services to the student throughout the student's attendance at the District.

For the reasons set forth below, I find in favor of the District. The District will not be ordered to provide an IEE. The order will, however, provide instruction to the student's individualized education plan ("IEP") team.

ISSUES

Was the student provided with a FAPE
in the 2013-2014 school year,
and the 2014-2015 school year through the date the record closed?

If not,
is the student entitled to compensatory education?

Must the District fund an IEE for the student?

PROCEDURAL HISTORY

- i. In approximately November 2013, the Domestic Relations Division of the Court of Common Pleas of [redacted] County, [redacted State] issued a 22-page Judgment Entry (“Judgment Entry”) regarding various aspects of the domestic relations between the student’s mother and father. Included in this Judgment Entry were numerous determinations related to custody arrangements regarding the student and a sibling. (Hearing Officer [“HO”] Exhibit 1).
- ii. The November 2013 Judgment Entry awarded to the student’s father decision-making authority for “school enrollment”. Each parent was given joint authority, as each parent chose during his/her parenting time, to engage private tutors, private providers for students with autism, and speech/language services. The student’s mother was given decision-making authority over private physical and occupational therapies, to be implemented during her parenting time. (HO-1 at page 13).
- iii. In August 2013, as set forth more fully below, the student began to attend school in the District for the entirety of the 2013-2014 school year.
- iv. In early June 2014, the Court of Common Pleas of [redacted] County, Pennsylvania (“Pennsylvania Court”) issued an order declining to disturb the Judgment Entry. By order of the Pennsylvania Court, the Judgment Entry remained “in full force and effect”. (HO-2; NT at 15-22).
- v. In early June 2014, the student’s mother filed the special education due process complaint which led to these proceedings.

- vi. In late June 2014, after ascertaining the mother’s represented status and father’s intent to participate in the proceedings but not as a party, the hearing officer engaged in a lengthy pre-hearing conference call with mother’s counsel and District counsel. The parties were informed that, in the hearing officer’s reading of the Judgment Entry, while “school enrollment” was addressed explicitly between the parents, authority for decision-making under the IDEIA was not apportioned explicitly to either parent. Therefore, the parents were viewed to share joint educational custody as to the student’s special education programming, with each qualifying as a statutorily-defined “parent” under IDEIA. (Notes of Testimony [“NT”] at 15-20).⁴
- vii. The hearing commenced in September 2014 and was held over five sessions September-October 2014. The scheduling of hearing sessions was complicated by the needs of both parents’ [redacted] schedules.
- viii. At the close of the final hearing session, counsel for the parties asked for a span of time to collaborate on a stipulation for the submission of additional documents to supplement an already-admitted exhibit (Joint Exhibit 8).⁵ To accommodate that request, and the requests of counsel given the Thanksgiving holiday, the record was closed on December 9, 2014 with the submission of closing statements. (NT at 931-934).

FINDINGS OF FACT

1. The student had been long-identified as a student with autism.
(Joint Exhibit [“J”]-1a, J-1b, J-1c; NT at 319-391, 867-930).
2. In the 2012-2013 school year, the student attended a [State redacted] private placement for children with disabilities. (J-1a, J1c; Parent Exhibit [“P”]-3).

⁴ See 34 C.F.R. §300.30; 22 PA Code §14.102(b)(2)(vi).

⁵ Ultimately, Joint Exhibit 8 was not supplemented by the parties.

3. In February 2013, anticipating the student's enrollment in the District, the District undertook an evaluation based on document review and parental input. (J-1c, J-4a).
4. As part of that evaluation process, the District distributed questionnaires to the student's mother and father. Father returned the questionnaire; mother did not. Father also returned the parental input form for the Adaptive Behavior Assessment System-2nd Edition ("ABAS-II"); mother did not. (J-7; J-2b, J-2c).
5. In late February 2013, the District issued its evaluation report ("ER"). The February 2013 ER contained data from prior evaluations and assessments, father's questionnaire and ABAS-II results, verbal input from both parents, and November 2012 progress reports from the private placement. (J-1c).⁶
6. In the February 2013 ER, the student was identified as a student with autism who is non-verbal, requiring significant academic, functional, and social/emotional/behavioral support. (J-1c).
7. The February 2013 ER identified programming needs for autism support, speech/language therapy, occupational therapy, physical therapy, and assistive technology. (J-1c).

⁶ The multi-disciplinary team met on February 26, 2013 to discuss the ER. The second quarter of progress reporting from the private placement was documented in January 2013. Whether this progress reporting was unavailable to the parents when the multi-disciplinary team met in February, or whether it was in the parents' possession but not shared with the team, was not made part of the record.

8. In March 2013, an IEP was drafted based on the February 2013 ER. The student's father approved the program and placement in the March 2013 IEP; the student's mother did not respond to the proposed program/placement. (J-2b, J-4b).
9. The March 2013 IEP indicated that the student has communication needs and requires assistive technology, but that the student does not exhibit behaviors that impede the student's learning or the learning of others. (J-2b).
10. The March 2013 IEP, in the present levels of performance, contained data from the various assessments and evaluations as outlined in the February 2013 ER. (J-2b).
11. The March 2013 IEP reiterated that the student is non-verbal, relying on a total communication approach including an iPad with a communication program— Proloquo2go ("PLQ")— for expressive and receptive communication. PLQ is an augmentative communication program that provides a wide range of pictures/titles, in folders and sub-folders accessed through the iPad's touchscreen, to allow non-verbal communicators access to pictorial/written language. (J-2b).
12. In the school setting, problematic behaviors included difficulty sustaining attention/focus, sensory-seeking behaviors, and difficulty with transitions. (J-2b).

13. The March 2013 IEP contained data related to the student's gross motor and fine motor skills. (J-2b).
14. The March 2013 IEP contained seven goals: one in toileting/self-care, one in occupational therapy for gross motor skills in physical education, three in communication (one for object identification/use, one for sharing/turn-taking with peers, and one for indicating needs/wants utilizing total communication), and one in mathematics (number identification and counting to 10). (J-2b).
15. The March 2013 IEP contained a variety of specially designed instruction and related services. (J-2b).
16. The March 2013 IEP indicated that the student's placement would be a full-time autism support classroom where the student would receive specially designed instruction for approximately 80% of the school day. (J-2b).
17. In April 2013, the District issued a re-evaluation report ("RR"). The April 2013 RR contained updated textual changes (based on parental revisions to the February 2013 ER) and assessment data from assistive technology, dysphagia, occupational therapy, and physical therapy evaluations conducted by the IU in March 2013. (J-1b).
18. In April 2013, the student's mother responded to the proposed program/placement outlined in the March 2013 IEP, disapproving the proposed program/placement and indicating on

the notice of recommended educational placement: “(The student) is resident of [State redacted] currently, and please see letter sent to you by/from my counsel....” (J-4c).⁷

19. In May 2014, the student was still attending the [State redacted] private placement. The [State redacted] school district of residence, however, performed its mandated evaluation of the student and issued an IEP. (J-1c, J-2c).
20. In June 2013, the [State redacted] private placement issued its final quarterly progress reporting and 2012-2013 school year summary report. This information was not requested by the District, and the last information provided by the [State redacted] private placement was quarterly progress reporting from November 2012. (J-1a, J-1b; P-3, P-7; NT at 517-522).
21. In August 2013, the student was evaluated for community-based behavioral health services, including a functional behavior assessment (“FBA”) for behaviors in the home. (P-8).
22. In August 2013, the student began to attend District schools under the terms of the March 2013 IEP. (J-2b).
23. In September 2013, a behavior treatment plan was developed by the community-based behavioral health service. Ultimately, the community-based agency was unable to find staff to implement the

⁷ The letter was not made part of the exhibit and the counsel referenced in the mother’s response is different from mother’s counsel in these proceedings.

plan and a second agency took over behavior health services in the home. (P-1; NT at 550-678).

24. In mid-September 2013, having had the opportunity to educate the student for a few weeks, the District convened the student's IEP team to revise the student's IEP. For the first time, the District had also been provided the May 2013 ER and IEP prepared by the [State redacted] school district; information from the [State redacted] ER/IEP included in the September 2013 IEP. (J-1c, J-2d).
25. The September 2013 IEP continued to indicate that the student has communication needs and requires assistive technology, but that the student does not exhibit behaviors that impede the student's learning or the learning of others. (J-2d).
26. The September 2013 IEP contained detailed information regarding mother's concerns provided by her earlier in the month. (J-2d).
27. The goals for self-care, sharing/turn-taking, number identification/counting, and communicating needs/wants from the March 2013 IEP were revised in the September 2013 IEP. (J-2b, J-2d).

28. The September 2013 IEP contained six new goals: three in occupational therapy for fine motor skills (one for manipulating pencil/crayon/marker, one for cutting, and one for buttoning), one in language arts (letter identification), one in occupational therapy for gross motor skills (mobility/physical activity across environments), and one for task completion. (J-2d).
29. The September 2013 IEP contained extensive revisions to the specially designed instruction, including the explicit addition of an iPad with PLQ loaded onto it. (J-2d).
30. The iPad used by the student was supplied by the parents. (NT at 81-83, 338-341).
31. The District did not have an individualized behavior support plan for the student. Instead, the District employed a universal design IU behavior support document for use in autism support classrooms. (School District Exhibit ["S"]-1).
32. In October 2013, at school, the student's mother was involved in a confrontation with the student's special education teacher. The confrontation resulted in the removal of the student's mother by police. Following the confrontation, the District issued a no-trespass instruction to the student's mother, informing her that

she was not permitted on District property. Ultimately, the matter was resolved. (P-16; Father's Exhibit ["F"]-6).

33. In February 2014, to meet the student's assistive technology need, the District sought to replace the parent-supplied iPad with an iPad of its own. The District iPad had PLQ loaded onto the device. The number of images on the District iPad was more expansive than on the parent-supplied iPad. (S-3).
34. The District felt that an expanded menu of choices would allow the student to communicate in a more supple way, enlarging the student's vocabulary and ability to engage new concepts. The student's father embraced the use of the District iPad; the student's mother was resistant to it. The student's use of the District iPad was a successful educational intervention. (S-6; NT at 41-157, 165-259, 319-391, 399-484, 486-539, 767-844, 867-930).
35. In June 2014, the student's IEP was revised to indicate that the student qualified for extended school year services for summer programming. (J-2f).
36. Over the course of the 2013-2014 school year, the student made progress on IEP goals. (J-2f, J-3, J-5, J-6; P-2; S-7, S-8; F-1, F-2).

CREDIBILITY OF WITNESSES

- A. All witnesses testified credibly.
- B. Due to her knowledge of her child, a degree of weight was accorded to the mother's testimony.
- C. Due to his knowledge of his child and his demeanor/affect, heavy weight was accorded to the father's testimony.
- D. Due to her experience with the child and her demeanor/affect, heavy weight was accorded to the testimony of the speech and language therapist.
- E. Due to her experience with the child in educational settings and demeanor/affect, the heaviest weight was accorded to the testimony of the student's teacher.
- F. All other witnesses were accorded some degree of weight, as all witnesses' testimony was found to be probative.

DISCUSSION AND CONCLUSIONS OF LAW

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)).

Here, the record in its entirety supports the finding that the student was provided with a FAPE. The goals, specially designed instruction, supports and modifications in the student's IEPs were appropriate. Most importantly, the student made steady and marked progress under the terms of each District IEP.

There are, however, two aspects of the District's programming that are problematic. First, in February 2013, when the District evaluated the student, it was aware that the student was attending the [State redacted] private placement. Indeed, the District utilized data from the student's progress reporting as part of the February 2013 ER. Even with this knowledge, the District did not, as part of its April 2013 RR or IEP planning through the spring and summer of 2013, follow up with the private placement or the parents to seek updated data related to the student's programming and progress at the private placement. While this oversight may have jeopardized an understanding of the student or led to inappropriate programming in the student's initial programming in the District, ultimately the District's proactive approach to the student's programming prevented any denial of a FAPE. As the District had planned even from its initial evaluation in February 2013, once the student enrolled and the District had an opportunity to gauge the student in a District setting, it heavily revised the student's IEP in

September 2013 (where, as it should, it incorporated newly-acquired information from the [State redacted] school district ER/IEP processes). This matter, then, is presented more as a matter of dicta than a finding.

The second problematic aspect of the District's programming, however, comes closer to denial of a FAPE. Again, ultimately, it does not rise to that level, but it is of greater concern, namely the lack of an FBA and individualized behavior support plan for the student. The student's behaviors clearly impede the student's learning. The record is replete with consistent assessment, observation, and documentation of classroom behaviors (inattention, distractibility, escape from task, sensory needs, at times even pinching and grabbing) that prevent the student from being available for instruction. It is clear that an FBA should have been performed and an individualized behavior plan should have been in place. This is a serious substantive flaw in the student's programming.

But it does not rise to the level of a denial of FAPE. Two elements of the record save the District from such a finding. One, the District implemented the universal design IU behavior support document in the autism support classroom; in this, the student received behavioral support and interventions, albeit not individualized. And evidence in the record is strong that the student's classroom behaviors improved to a large degree. Two, the student's special education teacher testified credibly and reliably that she and other District personnel implemented

consistent behavioral approaches with the student. She was a very strong witness whose efforts, by and large, provided an implicit individualized behavior plan which was highly effective.

In sum, then, the District's lack of an FBA and individualized behavior support plan is problematic. Under a different factual constellation, such a flaw could easily support a finding of a denial of a FAPE. Under the facts in this matter, however, it does not. Still, it is a flaw which must be remedied in the IEP, a matter which will be addressed in the order.

Accordingly, there will be no award of compensatory education, but the District will be instructed to undertake an FBA and devise an individualized behavior support plan.

Evaluation

The record supports the conclusion that the District's evaluation processes, and February 2013 ER and May 2013 RR, were comprehensive and appropriate. Notwithstanding the dicta above related to the lack of updated data from the [State redacted] private placement, the District's evaluations have placed the IEP team in a position to have reliable data to make decisions about the student's program and placement. Accordingly, the District is under no obligation to provide an IEE as the result of this decision.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student has been provided a free appropriate public education by the School District in the 2013-2014 school year, and in the 2014-2015 school year through the date the record closed in this matter. The School District is not required to provide an independent education evaluation for the student.

Forthwith, but no later than 10 school days after the date of this decision, the student's IEP shall be re-issued with an indication, in the special considerations section, that the student's behavior impedes the student's learning.

Within 10 days of the date of this order, the District shall, on its own or by arrangement with the IU or other provider of its choosing, initiate an FBA process for the student and, based on the FBA, craft an individualized behavior support plan.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

December 24, 2014