

*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: Z.B.

Date of Birth: [redacted]

Dates of Hearing:

October 1, 2012

October 8, 2012

October 29, 2012

### **CLOSED HEARING**

ODR Case # 3098-1112KE

Parties to the Hearing:

Parents

Penn Hills School District  
260 Aster Street  
Pittsburgh, PA 15235

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pamela Berger, Esq.  
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November 16, 2012

November 27, 2012

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

[The student] (hereinafter “student”)<sup>1</sup> is a [pre-teenaged] student who resides in the Penn Hills School District (“District”). The parties dispute whether 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 a disability given the student’s in-school behaviors in the 2011-2012 school year as well as instances of peer-bullying. As a result of these claims, parents claim the student was denied a free appropriate public education (“FAPE”) and seek remedies of compensatory education and reimbursement for an independent education evaluation (“IEE”).

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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”.

The District counters that, based on the information it had in the 2011-2012 school year, the student did not qualify as a student with a disability under the terms of the IDEIA. To the extent that the student qualified as a student with a disability under Section 504/Chapter 15, the District argues that those needs were met with an appropriate Section 504 plan. For those reasons, the District claims that at all times it provided the student with FAPE and, therefore, no remedy is owed.

For the reasons set forth below, I find in favor of parents on the issues of failure to identify the student and reimbursement for the IEE but in favor of the District on the issue of compensatory education.

### **ISSUES**

Should the student have been identified as a student with a disability under the IDEIA in the 2011-2012 school year?

If so, did the District deny FAPE to the student as a result?

Did the District fail to meet its obligations to the student under Section 504?

If the response to any of these questions is in the affirmative, is the student owed compensatory education?

Are parents entitled to reimbursement for the IEE?

## **FINDINGS OF FACT**

1. The student's father served in the military throughout the student's childhood. As a result, the student has been schooled in multiple school districts in various states. The student attended kindergarten in [one state], and thereafter two schools in [a second state], two schools in [a third state] from August 2009-April 2011, a private school in Pennsylvania from April-June 2011 and a public school district adjacent to the District from August-December 2011. (Joint Exhibit ["J"]-1 at page 12; Notes of Testimony ["NT"] at 80-81).
2. On January 13, 2012, the student moved from the neighboring school district and enrolled at the District. (School District ["S"]-1).
3. On the same date, parents completed the District registration form for secondary education and indicated that the student had never received special education. (S-1 at page 3).
4. On the same date, the student's mother signed a records request form provided by the District, directed to the elementary school where the student previously attended. The form requested that the elementary school forward educational records, birth/custody records, health records, discipline records, and special education records. The records request was faxed from the District's Office of Pupil Services. The fax, however, was not directed to the fax number of the student's prior school; the dialed number for the records request on the fax confirmation receipt was not the fax number of the student's prior elementary school. The records request was faxed to an unknown, apparently unrelated fax number. (S-1 at page 8).
5. On January 19, 2012, the District attempted again to obtain records from the prior school district by supplying the same records request dated and signed by the student's mother. It is unclear to whom, or by what means, the request was sent. (S-10).
6. The student's parents testified that the student had a Section 504 plan at the prior school district. When the student's father contacted the student's prior elementary

- school, he could not obtain the student's educational records. (NT at 82-83, 105-106, 125).
7. The District never came into possession of a Section 504 plan from the prior school district. (NT at 273-276, 339).
  8. On February 16, 2012, the student was involved in an incident [wherein the student was assaulted by peers]. The student's counselor spoke with the student about the incident, but the assistant principal, who was informed of the incident, did not document any investigation of the incident and could recall nothing specific about the incident. (NT at 85-87, 192, 195-197, 202-204, 219-221, 296-302, 306-310).
  9. The day after the February 16<sup>th</sup> incident, the assistant principal related to the student's mother that the student's idiosyncratic behaviors—[redacted]—made the student a target to other students. (NT at 88-89).
  10. A peer told the school counselor that the student [made a remark to peers]. The peer felt this led to the student being assaulted; the school counselor felt it was an awkward attempt by the student to socialize with peers. (NT at 284, 307-312).
  11. On March 16, 2012, the student was assaulted in the bathroom where a group of students beat on the student. (NT at 90-93).
  12. The incident did not come to light during the school day; the student's parents discovered the assault that evening and took the student to the emergency room. The student was diagnosed with a deep contusion [redacted]. (Parents' Exhibit ["P"]-3; NT at 92-94).
  13. On March 20, 2012, the student's father, private counselors, the assistant principal, and school counselor met to discuss the incident of March 16<sup>th</sup>. (NT at 122-124, 184-185).
  14. At the March 20<sup>th</sup> meeting, the student's school counselor repeated what had been shared with her after the February 16<sup>th</sup> incident, namely that the student's in-school behavior may have provoked the peers' behavior. (NT at 122-123).

15. At the March 20<sup>th</sup> meeting, the student's father made a request in writing that the student be evaluated for special education services. (NT at 123-124).
16. Following the March 20<sup>th</sup> meeting, the assistant principal communicated to the student's teachers regarding accommodations for the student. These accommodations included preferential seating, access to the restroom away from other students, and organizational approaches in the classroom. Given the student's in-class behaviors, however, the student's teachers had already been employing many of the accommodations. (S-3; NT at 185-186, 210-215, 247-248).
17. On April 18, 2012, a third incident involving the student occurred where parents allege that the student was again assaulted [at school]. The District contends that the contact was incidental hallway contact during the passage between classes. (NT at 95-99).
18. On April 24, 2012, the student's parents, private counselors, a parents' advocate, the building principal, and the assistant principal met to discuss the April 18<sup>th</sup> incident. Parents felt that the District representatives were dismissive of their concerns. The meeting ended abruptly. (NT at 97-99, 103-104, 125-127, 160-163).
19. Following the April 18<sup>th</sup> incident, the student did not return to the District and, under a medical doctor's prescription, began homebound instruction. (S-9; NT at 99, 164).
20. Each of the student's teachers consistently noted that the student [redacted], lacked organizational and task-approach skills, maintained awkward relationships with peers, and exhibited deeply problematic concerns with written work. (P-4; S-7; NT at 210-215, 247-253, 255, 262-267, 270-271).
21. On May 18, 2012, the District issued its evaluation report ("ER"). (J-1).
22. A comparison of the student's cognitive ability on the Wechsler Intelligence Scale for Children/4<sup>th</sup> Edition and achievement levels on the Kaufman Test of Educational

Achievement/2<sup>nd</sup> Edition do not exhibit a significant discrepancy. (J-1 at pages 5-8).

23. On the Behavior Assessment System for Children/2<sup>nd</sup> Edition (“BASC”), one of the student’s teachers rated the student as at-risk in hyperactivity and attention problems, and study skills. A second teacher rated the student as clinically significant for withdrawal. Both teachers rated the student as at-risk for atypicality, adaptability, social skills, leadership and functional communication. (J-1 at pages 8-9).
24. On the BASC, the student’s mother rated the student as at-risk in aggression, conduct problems, atypicality, withdrawal, and leadership. The student’s mother rated the student as clinically significant in hyperactivity, anxiety, depression, attention problems, adaptability, social skills, and activities of daily living. (J-1 at page 9-10).
25. On the BASC self-report, the student self-rated as at-risk in attitude to school, attitude to teachers, somatization, hyperactivity, and interpersonal relations. The student self-rated as clinically significant in atypicality, anxiety, sense of inadequacy, and attention problems. (J-1 at pages 10-11).
26. Parents had shared with the District’s evaluator a mental health treatment plan from early May. The treatment plan speaks to a number of school-based issues, including reported bullying, concerns over grades and socializing at school, openness/communication/frustration with school issues. Diagnoses in the plan included bipolar disorder (not otherwise specified) and attention deficit hyperactivity disorder (combined type) (“ADHD”). (J-1 at page 2).
27. The ER did not address any issues related to the student’s writing or written expression. (J-1).
28. The ER recognized that the student had a disability as a result of the bipolar and ADHD diagnoses but did not require special education. (J-1 at page 14).
29. On July 30, 2012, the student’s parents obtained an IEE. (P-2).
30. Based on cognitive and achievement assessments administered by the independent evaluator, he concluded that the student exhibited severe discrepancies that led to a

conclusion that the student should be identified as a student with specific learning disabilities in written expression and oral expression. (P-2 at page 13-14).

31. The private evaluator also concluded that the student should be identified as a student with the health impairment of ADHD. (P-2 at page 14).
32. As of the October 8<sup>th</sup> hearing session, the student was attending a charter school for the 2012-2013 school year and, using the IEE, was being evaluated for eligibility for special education under IDEIA. (NT at 109-110).

## **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 screening...to”, *inter alia*, “identify students who may need special education services and programs.”<sup>4</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>5</sup> This duty is known as a school district’s child-find obligation.

In this case, the District had signs early on that the student was experiencing difficulties in the educational environment. Teachers were accommodating the student in terms of seating away from other students, having the student work alone on classroom assignments where others were paired or working in groups, implementing strategies

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<sup>4</sup> 22 PA Code §14.122(3); *see also* 34 C.F.R. §300.111.

<sup>5</sup> 34 C.F.R. §§300.300(a), 300.301(b).



for organization skills and attention, and noting the student's struggles with written work. These issues all arose in the classroom outside of the peer assaults in February and March 2012.

Thereafter, the data provided in the ER, through the mental health diagnoses, teacher input, and the BASC results, provided the basis for an identification of the student as qualified under IDEIA as a student with a health impairment as the result of the behaviors exhibited in the school environment due to the student's ADHD and, although it was not explored thoroughly, potentially the student's bipolar diagnosis.

And while the student's identification under IDEIA/Chapter 14 as a student with a health impairment is established in the record, an identification as a student with a specific learning disability is not. That is not to say that the student does not have a specific learning disability—indeed, there are strong indications in the record that the student requires specially designed instruction to address needs in written expression and/or occupational therapy. But, based on this record, it is still an open question as to whether the student qualifies as a student with a specific learning disability.

Accordingly, the District failed in its child find obligations under IDEIA/Chapter 14 in failing to identify the student as having a health impairment that required specially designed instruction and related services.

### Denial of FAPE under IDEIA/Chapter 14

To assure that a student with a disability receives a FAPE (34 C.F.R. §300.17), the student's special education programming must be reasonably calculated to yield meaningful educational benefit to the student.<sup>6</sup> 'Meaningful benefit' means that a student's program affords the student the opportunity for "significant learning", not simply *de minimis* or minimal education progress.<sup>7</sup> Given the finding above regarding the District's failure to meet its child-find obligations, the District puts itself in a position where it may have denied the student FAPE. Here, however, the factual circumstances underlying the parents' claims [do not] lead to a finding that the student was denied FAPE as a result of the District's errors.

A denial of FAPE occurs, and the right to compensatory education as a remedy 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>

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<sup>6</sup> Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982).

<sup>7</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996).

<sup>8</sup> Id.

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

In this case, the student came to the District in January 2012. The District was unable to obtain educational records from the prior school district and, while the student required accommodations in the classroom, through January and February 2012, the record does not support a finding that the District's child-find obligations had been triggered. The February 2012 assault is troubling, especially in light of the assistant principal's comments regarding the student's unique in-school behaviors being a potential cause of the peers' aggression and the apparent lack of any formal investigation. Still, at that point, the student had been in the District only six weeks; the District cannot be faulted for taking a cautious approach.

In March 2012, with a second assault and, at that point, months of accommodations having been implemented by the student's teachers, the District knew or should have known it needed to perform an evaluation. When that issue arose at the meeting held on March 20, 2012, the District accepted the parents' request for an evaluation and moved to obtain the parent's permission to begin the evaluation. A timely ER was issued on May 18, 2012.

And even though the District erred in its conclusions in that ER, the District did not deny the student a FAPE. After the issuance of the ER, the IEP team must meet within 30 calendar days.<sup>10</sup> Thus, the window for the IEP team to meet and design the student's IEP lasted

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<sup>10</sup> 34 C.F.R. §300.323(c)(1).

until June 17, 2012. In sum, then, had the District appropriately 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/Chapter 14 until the 2011-2012 school year had ended. The student did not return to the District after the 2011-2012 school year.

Accordingly, even though the District failed in its child-find obligations, the underlying factual circumstances in this matter do not amount to a denial of FAPE by the District. Therefore, there will be no award of compensatory education.

#### Section 504/Chapter 15

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with a FAPE.<sup>11</sup> While the provisions of IDEIA and Chapter 14, and subsequent case law, regarding the provision of FAPE is more voluminous, the standards are analogous.<sup>12</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

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<sup>11</sup> 34 C.F.R. §104.33; 22 PA Code §15.1.

<sup>12</sup> *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009). 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.

District failed in its obligation to identify the student as a protected handicapped student.<sup>13</sup>

In this case, however, the District provided FAPE to the student under Section 504/Chapter 15. This finding hinges on two critical factors: (1) the District's provision of services and (2) the District's undertaking of a contemporaneous IDEIA evaluation process.

Even though it was outside the four corners of a Section 504 plan, the District provided multiple services and accommodations to the student. And, while not minimizing the difficulties that the student encountered at times in the spring of 2012, the record does not support a finding that the student failed to make meaningful educational progress. In sum, then, the record taken in its entirety supports the conclusion that the District provided the student with FAPE under its Section 504/Chapter 15 obligations.

Accordingly, while the District failed in its child-find obligations to student under the terms of the Section 504 and Chapter 15, the student was not denied a FAPE, as the District moved to address the student's needs albeit outside a formal Section 504 plan. Therefore, there will be no award of compensatory education.

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<sup>13</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".

### Reimbursement for the IEE

The fact-finding and legal analysis outlined above in the *Failure of Child Find Obligation under IDEIA/Chapter 14* subsection are reiterated here in finding that the District's ER is prejudicially flawed. In disagreeing with the ER, parents sought an IEE at their own expense, an IEE which, as far as the student's identification as a student with a health impairment is concerned, reaches the conclusion in July 2012 that the District's ER should have reached in May 2012. This expense was necessarily undertaken by parents as the direct result of the failure of the District's evaluation process.

Accordingly, the District must reimburse the student's parents for the out-of-pocket cost of the private evaluation.

### **CONCLUSION**

The District failed in its child-find duties under both the IDIEA/Chapter 14 and Section 504/Chapter 15. These failures, however, do not amount to a denial of a FAPE under the factual circumstances in this matter. Therefore, no compensatory education is owed. The District's ER, though, was flawed and led to parents' obtaining an IEE at their own expense. Therefore, parents will be reimbursed for the cost of the IEE.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, under the terms of the IDEIA/Chapter 14, the student qualifies as a student with a health impairment who, as a result, requires special education and related services. This finding does not foreclose the possibility that the student may qualify as a student with another exceptionality or with additional multiple exceptionalities.

The [Redacted] School District failed in its child-find obligations under IDEIA/Chapter 14 and Section 504/Chapter 15. These failures, though, did not result in a denial of a free appropriate public education.

These failures, however, did require parents to engage a private evaluator and obtain an independent educational evaluation report. Therefore, the school district must reimburse parents for the out-of-pocket cost of the independent evaluation, including any costs borne by the parents related to the evaluator's appearance at the hearing session on October 1, 2012. Upon parents' presentation of written evidence to the school district's office of special education of the out-of-pocket cost of the independent evaluation, the school district shall issue payment to parents within 60 calendar days.

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

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

November 27, 2012