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: NG

Date of Birth: XX-XX-XXXX

Date of Hearing: September 28, 2009

CLOSED HEARING

ODR Case # 00082-09-10-KE

Parties to the Hearing:	Representative:
Mr. & Mrs.	Pro Se
Mr. Mark Draskovich Director of Pupil Services East Allegheny School District 1150 Jacks Run Road North Versailles, PA 15137	Andrew Evankovich, Esq. Andrews & Price 1500 Ardmore Boulevard Suite 500 Pittsburgh, PA 15221

Date Record Closed: October 12, 2009

Date of Decision: October 27, 2009

Hearing Officer: Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

"Student" ("student") is a 14-year old student residing in the East Allegheny School District ("District") who, parents claim, should have been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")[1]. The parents have requested a specific placement order and compensatory education due to an alleged failure to provide a free appropriate public education ("FAPE"). Specifically, parents allege that the out-of-district placement for the student is inappropriate and that the District has committed procedural and substantive violations of IDEIA. The District maintains that the student's placement has been appropriate and that it has acted appropriately at all times towards the student in the design and implementation of the student's special education programming.

ISSUES

Has the District met its procedural obligations under IDEIA?

Has the District met its substantive obligations under IDEIA?

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[1] It is this hearing officer's preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

Is the student's placement appropriate?

FINDINGS OF FACT

1. In August 2000, the student was identified as a student with mental retardation as part of the student's transition process from early intervention to school-based services. (School District Exhibit ["S"]-4).

2. In October 2008, the student was re-evaluated. The student continued to be identified as a student with mental retardation. The student also required speech and language services. (S-5; Notes of Testimony ["NT"] at 231-232).

3. The student was homeschooled in the 2004-2005 school year. In the 2005-2006, 2006-2007, and 2007-2008 school year, the student was educated at a private school run the by the local intermediate unit ("IU"). (S-20, S-21; NT at 49, 151-152).

4. The student had the same teacher at the IU placement over the three school years. Based on credible testimony by this individual, the student made meaningful education progress under the terms of the student's individualized education plan ("IEP"). (S-20, S-21; NT at 152-162).

5. In November 2008, the IEP team met and, given a strong preference by the student's mother for a District-based placement, the IEP team designed a transition plan to allow the student to split the school day between a District placement and the IU placement. The student spent the first part of the morning of each school day at a District school (from 8:15 to 10 AM) and transitioned at mid-morning to the IU placement for the remainder of the school day. (S-9; NT at 122-126, 175-177, 234-235).

6. The IEP team agreed to proceed with the new split-day arrangement but did not issue a notice of recommended educational placement ("NOREP"). (S-8; NT at 246-248).

7. In December 2008, shortly after the split-day arrangement had begun, the student's behavior deteriorated in both the District placement and the IU classroom. (NT at 127-129).

8. In an attempt to address the student's behavior, a positive behavior support plan was developed to allow the student to attend a dance at a District middle school. The student earned points for appropriate behavior and, in earning those points, earned the opportunity to attend the dance. (NT at 129-131).

9. The student did not earn enough points to attend the dance. Thereafter, there was a significant deterioration in the student's behavior in both the District placement and the IU classroom. (NT at 130-131, 177-178).

10. In February 2009, while in the IU classroom, the student made a suicidal threat. The IU administration contacted the parents who removed the student to a local psychiatric hospital. After an absence of a few weeks, the student returned full-time to the IU classroom in March 2009 for the remainder of the 2008-2009 school year. The student did not return to the District placement. (NT 132-134).

11. The student's behavior in the remainder of the 2008-2009 school year was problematic. The administrator of the IU program testified that he felt the IU classroom might no longer be an appropriate program for the student. (NT at 134-136).

12. The student exhibited problematic behaviors to the extent that meaningful education progress was difficult to achieve after returning to the IU classroom for the remainder of the 2008-2009 school year. (S-23; NT at 204-206).

13. Multiple witnesses testified credibly that, without parental support, the student is unlikely to make progress outside of a highly structured educational placement outside of a public school. (NT at 136, 163, 205-206, 249).

14. As of the date of the hearing, the student was not attending the IU classroom. (NT at 80-81, 245).

DISCUSSION AND CONCLUSIONS OF LAW

Procedural Issues. The IDEIA requires that parents be given notice whenever a school district "proposes to initiate or change the…educational placement of the child." 34 C.F.R. §300.503(a)(1). In Pennsylvania, this notice is commonly referred to as a notice of recommended educational placement ("NOREP"). Here, the District did not issue a NOREP in November 2009 when the split-day arrangement between the District placement and the IU classroom was implemented. (FF 5,6). The District reasoned that it felt the need to yield to mother's wishes even though she indicated to them that she would sign no document presented by them, that it considered the prior NOREPs to have given notice of its intentions, and that it considered the split-day arrangement a "trial" placement. (NT at 246-248).

This is problematic on a number of levels. First, if the District felt it was an appropriate placement then it should have indicated so by issuing the NOREP. If not, then it had the right to file a due process complaint to validate its judgment that the proposed change was not appropriate. (22 PA CODE §14.162(c)). The fact that mother wanted the placement and would not agree to the NOREP is no excuse to say "well, then, let's not issue it". This leads to the second concern, namely the nature of the student's pendent placement. The NOREP is the document which frames the stance between the District and the parent—agreement with the NOREP means the IEP will be implemented as indicated;

disagreement with the NOREP means that the parties must seek mediation, due process, or some other dispute resolution mechanism; ignoring the NOREP (here, mother's explicit threat) means that the school district must seek to validate the educational placement it is offering. All of this is critical to ascertaining where the child is to be placed.

Here, the District proceeded as if the split-day arrangement was a "dry run". If it was satisfactory, it could continue indefinitely. If not, it could be dropped at a moment's notice, as was the case here when the student returned from the hospitalization/school absence episode in March 2009. (FF 10).

The educational placement of a student is not something to be "tried out", to be adopted, manipulated, and/or dropped when it suits a school district. If a school district "proposes to initiate or change the…educational placement of the child", it must issue a NOREP. (34 C.F.R. §300.503(a)(1)). If that will not meet with the agreement of parent, it must seek to validate its proposed change through due process. ((22 PA CODE §14.162(c); see also 34 C.F.R. §300.58(a)).

In the instant case, however, the student was not denied a free appropriate public education "(FAPE") from November 2008 through March 2009. Indeed, the split-day arrangement provided the student the opportunity to make educational progress in a less restrictive environment. (FF 5,7). This less restrictive environment, though, was

made more restrictive by returning the student solely to the IU classroom beginning April 1, 2009 at the whim of the District; the "trial" had ended. (22 PA CODE §14.145). Without a NOREP in place for the split-day arrangement, the IU classroom was perceived by the District to be the student's pendent placement and so there was no need to convene the IEP team to consider ending the split-day arrangement. (NT at 246-248). This is exactly the kind of flip-flopping that pendent placements and the requirements of a NOREP to change a placement are designed to avoid. ((34 C.F.R. §300.503(a)(1); see also 34 C.F.R. §300.58(a)).

Accordingly, as set forth below, a compensatory education award will be fashioned for the denial of a FAPE from April 1, 2009.

Substantive Issues. The substantive provision of a FAPE requires that a student eligible under the IDEIA have an IEP that includes measurable annual goals that meet the child's needs as a result of his/her disability (34 C.F.R. §300.320(a)(2)) and a statement of the program modifications, specially designed instruction, related services, supplementary aids and services that are required to allow the child to advance appropriately toward attaining the annual goals (34 C.F.R. §300.320(a)(4)). These goals and instruction/related services/supports must be reasonably calculated to allow to yield meaningful education benefit. Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

There is no denying the fact that the student is presents a complex challenge in terms of regulating behavior to allow for instruction. The record fully supports the contention that the District provided IEPs that were reasonably calculated to yield meaningful education benefit and that those IEPs were implemented effectively, notwithstanding the interference with instruction that the student's behavior presented. (FF 3,4,7,8,11,12,13).

Accordingly, the District has met its obligation to provide a FAPE to the student under the substantive terms of its IEPs.

Placement. As indicated above, upon returning from the hospitalization/school absence episode in March 2009, the student was returned to a more restrictive setting (the IU classroom) without the IEP team meeting to consider this change in placement and without the opportunity for the parent to respond to the District's change in placement through agreement/disagreement with its NOREP. (FF 6,10,14).

Accordingly, the order will set forth that the student's pendent placement in the least restrictive environment is the split-day arrangement that was in effect from November 2008-March 2009. Additionally, the order will contain a provision for the IEP team to meet to consider the educational placement for the student.

Remedies. The parents did not make an explicit claim for compensatory education. This hearing officer noted at the outset of the proceedings that compensatory education is an equitable remedy that remained awardable even without an explicit claim by the parents. (NT at 18-19; see 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 U.S Court of Appeals for the Third Circuit has held that the right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied a FAPE. 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 (3d Cir. 1996). 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." M.C. at 397.

In this case, the District knew or should have known that a NOREP needed to be issued in November 2008 before the split-day arrangement was put into effect. (FF 6). Luckily for the student, this procedural violation did not result in the denial of a FAPE. Beginning April 1, 2009, however, the District unilaterally kept the student in a more restrictive placement by denying the student the opportunity to return to the split-day arrangement where the student received approximately one hour and forty-five minutes of instruction in a District

placement. (FF 5). This denial of FAPE will be compensated through a compensatory education award.

CONCLUSION

The student has been denied a free appropriate public education as the result of the District's unilateral placement in a more restrictive environment without consulting the IEP team and without the issuance of a NOREP. The substance and implementation of the student's IEPs have, at all times, provided the student with a FAPE. The student's pendent placement is the split-day arrangement between the District placement and the IU classroom.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student's pendent placement is the split-day arrangement between the District placement and IU classroom that was in effect from November 2008 through March 2009.

Additionally, the student is entitled to a compensatory education award equivalent to 105 minutes per school day that the student attended from April 1, 2009 through the end of the 2008-2009 school year, and

every school day attended from the start of the 2009-2010 school year through the date of this order.

Within ten school days of the date of this order, the District shall make arrangements to have the student participate in the split-day arrangement as outlined in this order.

Within 20 school days of the date of this order, the IEP team shall meet to design review the program and placement of the student and to consider the full range of educational placements the team feels might be appropriate for the student.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

October 27, 2009