

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

ODR No. 00743-0910AS

Child's Name: BC

Date of Birth: xx/xx/xxxx

Date of Hearing: 4/12/10

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney
Pro Se

School District
Pocono Mountain
P.O. Box 200
Swiftwater, PA 18370

School District Attorney
Rebecca A. Young, Esq.
King, Spry, LLC
1 West Broad Street, Suite 700,
Bethlehem PA 18018

Date Record Closed:

April 16, 2010

Date of Decision:

May 1, 2010

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The hearing in this matter concerned (Student), an IDEA eligible Pocono Mountain School District (hereinafter District) resident who reenrolled in the District for his senior year in August 2009 after several years in other educational placements.

In a due process complaint submitted in February 2010, Parent asserted denial of FAPE claims based upon the lack of a behavior plan from the beginning of the current school year and the adequacy of the transition services provided by the District. Parent's complaint also raised issues concerning the District's past conduct toward Student and Parent, and concerning past, present and future expenditures of funds for equipment and services requested as compensatory education pursuant to due process hearing decisions issued in 2003 and 2004. In accordance with the 2004 order requiring the District to initiate a due process hearing if it refuses Parents' request for payment/reimbursement for equipment and/or services selected by Parents as part of the compensatory education to which Student is entitled, the District submitted a counterclaim seeking an order that it need not provide the computer. In a preliminary ruling outlining the issues for the hearing, this procedure was deemed sufficient to fulfill the provision of the 2004 order requiring the District to seek a due process hearing if it denies a parental request for compensatory services. At the hearing, Parent also requested an order that the District pay for a fitness center membership for Student.

The hearing was conducted in a single session on April 12. For the reasons that follow, Parents' FAPE claims are denied; the District will be directed to purchase a computer before

Student enters college, but need take no further action concerning the fitness center membership.

A time limit is also placed on the use of the compensatory education award.

ISSUES

1. Did the Pocono Mountain School District deny Student a free, appropriate public education during the 2009/2010 school year by failing to provide him with
 - a. an appropriate behavior support plan and/or
 - b. appropriate transition services?

2. Is the District required to provide Student with compensatory education services pursuant to prior due process hearing orders by paying for
 - a. a computer system
 - b. a one year membership at fitness center identified by Student Mother in April 2009?

FINDINGS OF FACT

1. Student (Student) is a 17 year old child, [Redacted]. He is a resident of the District and is eligible for special education services. (N.T. p. S-6, p. 12)

2. Student has a current diagnosis of emotional disturbance (ED) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(4); 22 Pa. Code §14.102 (2)(ii); (S-6, p.12)

3. Student transferred to the District for the 2009/2010 school year as a senior after attending a charter school and a court-ordered placement during the preceding two school years. (N.T. p. 35, S-6, p. 2)

4. In accordance with a permission to reevaluate (PTRE) dated July 22, 2009 the District conducted a review of records reevaluation of Student prior to the beginning of the current school year. (N.T. pp. 36, 46, 47; S-2, p. 3, S-6)

5. A full reevaluation, including updated cognitive and achievement testing, had been conducted by the charter school in the spring of 2009, leading to the charter school's conclusion that Student was no longer IDEA eligible. (S-3, pp. 10-23, S-6)

6. Although Parent provided no written input for either the charter school's or the District's RR, she supplied information verbally at an August 18, 2009 meeting to discuss planning for Student's re-entry into the District. (N.T. p. 47, 48; S-6, pp. 6, 7)

7. The District school psychologist, who found little or no basis for the non-eligibility determination, and further considered that conclusion unreliable based on the absence of signatures on the charter school reevaluation report (RR), recommended continued special education eligibility. The IEP team concurred and the District offered a NOREP that provided supplemental emotional support, including special education or co-taught classes for math, social studies and science and regular education classes for electives. (N.T. pp. 47—50, 91; S-3, S-6, S-7, S-8, S-12, S-13)

8. Based upon the charter school's RR, no IEP was developed for Student prior to dis-enrollment from the charter school and re-enrollment in the District. Student's most recent IEP was developed at the court ordered facility and was dated October 17, 2007 (N.T. pp. 49, 50; S-3, p. 22)
9. Student's initial IEP for the current school year was developed in August 2009, but was expected to be updated after the school year began in order to give the District members of the IEP team the opportunity to observe Student's functioning in the school setting and determine his current academic and behavior needs. (N.T. pp. 50, 51, 56, 62, 63, 65, 66, 91; S-7, S-12)
10. Both the transfer and revised IEPs provided opportunities for Student to speak with his case manager as necessary and time to cool down should he appear angry or frustrated, but based upon Student's successful functioning in classes during the early weeks of the school year, an immediate Functional Behavioral Assessment and behavior plan were unnecessary. (N.T. pp. 54, 56, 62—65, 127; S-7, p. 6, S-12, p. 5)
11. In late September 2009, Student left the District for a court-ordered placement arising from circumstances unrelated to school. Student reenrolled in the District in December 2009, attending school for the half day just prior to winter break. (N.T. pp. 54, 95, 97; S-14)
12. When Student returned to the District in January 2010, his demeanor and functioning in the school setting declined. After collecting data beginning in January and early February 2010, and completing an FBA, the District invited Parent to attend an IEP team meeting to consider revisions to Student's IEP. (N.T. pp. 100, 112, 113, 115—117, 119, 149—151, 156; S-19, S-22, S-28, p. 42)
13. Student began accumulating unexcused absences and discipline reports for unexcused tardiness at the beginning of the school day. He eventually received an out of school suspension for the late arrivals at school. In accordance with the policy at the high school, the suspension ended after two days, when Parent brought Student to school and met with the assistant principal. (N.T. pp. 80, 81, 104—106, 112; S-30, S-31)
14. Between mid-February and March 2010, the District was unsuccessful in contacting Parent to schedule an IEP meeting. At an IEP team meeting held on March 12, 2010 without Parent, the District IEP team members recommended modifying Student's IEP to add the behavior support plan and provide more time in special education supported classes. The District immediately began implementing the revised IEP. (N.T. pp. 73—75, 83, 84, 102, 104, 112, 118, 119, 121, 145—148, 152, 156; S-19, S-21, S-23, S-24 S-25, S-28, pp. 2, 45, 46)
15. The behavior plan primarily addresses Student's late arrivals to classes when transitioning from unstructured time during the school day, avoidance of non-preferred tasks, poor response to re-direction, failure to complete assignments and to be properly prepared for class. Student received no disciplinary referrals between the date the

behavior plan was implemented and the date of the hearing. (N.T. pp.119—121, 152; S-28, pp. 45, 46, S-31)

16. The District transition coordinator has worked with Student since September 2009 to develop a transition plan to identify career interests and post-secondary goals. Transition planning and services generally span 10th, 11th and 12th grades, but Student did not attend school in the District during 10th grade, 11th grade and from October through December of 12th grade. Student's IEPs from August and September 2009 do not specify transition services because the coordinator needed to meet with Student to identify his immediate post-secondary goals. A transition plan is included in the March 12, 2010 IEP(N.T. pp. 208—211, 220; S-6, p. 2, S-26, S-28, p. 27)
17. Based upon Student's expressed interest in attending a four year college, the transition coordinator gathered college information, assisted Student in registering for the SAT, applying to college and researching costs. (N.T. pp. 211—218, 222; S-26)
18. Student is scheduled to graduate in June 2010, but has not yet scored in the proficient range on the 11th grade PSSA test. The District has an after school tutoring program, Pathways, to assist students in meeting that requirement. Student has been offered the opportunity to participate in Pathways. The special education supervisor and Student's case manager have been encouraging his attendance, but as of the date of the hearing, Student has been unwilling to participate. (N.T. pp. 77—79, 82, 83, 102, 109, 110, 126, 153—155, 246—251)
19. Student has been the subject of previous due process hearings, leading to two hearing officer orders awarding compensatory education in the form of services and/or equipment to be selected by Parents, but not to exceed a specific monetary amount derived from the value of the services that Student was denied. (N.T. p. 234; HO-1, Exh. B, pp. 1, 3; P-2)
20. Because the District questioned the need for or efficacy of some of the compensatory services requests Parents made pursuant to the 2003 order, the order issued in 2004 requires the District to pay for all compensatory services requested by Parents provided that Parents provide the District with the following information: a) name and address of the service provider; b) exact services provided; c) duration of the services; d) dates of the services; e) cost of the services; f) a request that the service provider be paid directly or a request for reimbursement accompanied by sufficient proof of any expenditures for which they sought reimbursement. (HO-1, Exh. B, pp. 19, 20)
21. The March 2004 order also requires the District to request a due process hearing to challenge any parental request it declines to fulfill. (N.T. p. 260; HO-1, Exh. B, p. 19)
22. Student's Mother or Father requested that the District purchase a computer and/or related equipment for Student in June 2004, November 2005, June 2007 (monitor, printer, accessories only) November 2008 and January 2010. (N.T. pp. 235—237; P-2, p. 1, S-20)

23. The District initially declined Father's 2008 request, but was subsequently ordered by a Pennsylvania Department of Education/Bureau of Special Education/Division of Compliance Monitoring and Planning Complaint Specialist to reimburse Father for the computer he purchased for Student during the time Father had physical custody pursuant to a court order and Student was living with him. (N.T. pp. 238, P-2, p. 7, S-16, S-33)
24. The District declined Mother's January 2010 request because it would be the fourth computer purchased from the remaining amount available to provide compensatory education pursuant to the 2003 and 2004 due process hearing decisions. (N.T. pp. 243, 244, 259; S-20)
25. In April 2009, Mother requested that the District pay for a fitness center membership as a compensatory education service beneficial to Student. (N.T. p. 198; P-3)
26. The fitness center selected by Parent will accept payment only via a monthly charge to a debit card. The facility will not provide a monthly or annual invoice for the District to pay the facility directly, and District has not received a reimbursement request from Parent that fulfills the terms of the compensatory education orders. (N.T. pp. 260, 261; P-3, pp. 7, 8, 9)
27. Parent also sought reimbursement for a YMCA membership from 2008, for which the District issued checks to Parent under her current and former names. The checks were not cashed. (N.T. p. 257; P-2, p. 8P-3, p. 8)

DISCUSSION AND CONCLUSIONS OF LAW

Appropriateness of the 2009/2010 IEP

The only claims Parent asserted in the complaint alleging a current denial of FAPE by the District are based upon a purported delay in developing a behavior plan for Student and the alleged lack of adequate transition services. Neither claim is supported by the evidence.

FBA/Behavior Plan

Student's case manager and the special education supervisor testified credibly that during the fall of 2009, there were no problems with Student's school behaviors. F.F. 10 Disciplinary records from the current school year, showing no violations in September 2009, supported that testimony. S-31 Since Student had not been enrolled in the District for the past two school years, and had no current IEP from the charter school where he was enrolled for the 2008/2009

school year, it was reasonable and entirely appropriate for the District to conduct observations of Student during the first weeks of this school year before determining the behavior issues, if any that needed to be addressed in a behavior support plan. F.F. 8, 9

At the end of September 2009, Student left the District high school for a court-ordered placement, where he remained until December 2009. F.F. 11, 12 The District, therefore, had no realistic opportunity to collect sufficient data to fully determine Student's behavioral needs until he returned to school in January 2010.

Parent presented no convincing evidence that the District inappropriately delayed developing a behavior plan for Student. Parent relied primarily upon an increase in discipline reports between the end of January and mid-March 2010. S-31 By then, however, the District had noted negative change in Student's attitude and behavior, and had resumed collecting the data needed to develop a behavior support plan. F.F. 12, 13

In addition, the uncontradicted evidence at the hearing established that any delay in developing and implementing a behavior plan between mid-February and mid-March 2010 is due entirely to the District's efforts to assure that Parent had the opportunity to participate in that process as a member of Student's IEP team, and Parent's lack of response to the District's efforts to schedule an IEP team meeting to revise Student's IEP. F.F. 14

The District members of Student' IEP team adopted and began implementing the behavior plan on March 12, 2010 after appropriately documenting several unsuccessful written attempts to schedule an IEP meeting that Parent could and would attend. F.F. 14 Parent asserted no claim, and presented no evidence at the hearing, including her own testimony, suggesting that the behavior plan is deficient in any respect, or that it is not being appropriately implemented.

The District, however presented uncontradicted evidence that the behavior plan has been effective in reducing the behaviors of concern, F.F. 15

Parent's denial of FAPE claim based upon the lack of a behavior plan is, therefore, moot at this point. Since the District also acted appropriately at the beginning of the 2009/2010 school year in collecting information from observations and other data concerning Student's behavior needs before developing a behavior plan, Parent's claim with respect to an inappropriate delay in developing a behavior support plan for Student is denied.

Transition Services

Although a claim for inadequate transition services was asserted in the due process complaint, Parent did not pursue it at the hearing. The District, not Parent called the transition coordinator to testify, and Parent had only a few questions concerning Student's scheduling of the SAT. N.T. pp. 222, 223. Because Student did not attend school in the District for most of high school, transition services were necessarily limited by the lack of time to coordinate services over several school years. Nevertheless, the transition coordinator has been appropriately assisting Student to reach the only post-secondary goal Student has identified, attending a two or four year college. There is no basis in the due process hearing record to conclude that the District's transition services, limited by circumstances over which the District had no control, are inappropriate or inadequate.

It is possible, however, that Parent's concern with transition relates to whether Student will be able to graduate in June 2010, since Parent questioned District witnesses extensively about the Pathways program and the effect of not passing or testing out of the PSSA requirement. F.F. 18 On the other hand, although Parent requested an order that will ensure Student's graduation, it appeared that she did not become aware of the Pathways program in the

course of the due process hearing. In any event, the District indicated its willingness to work with Student to meet the PSSA graduation requirement, and there was no real evidence on which to base an order concerning timely high school graduation, whether as a transition service or otherwise.

District's Denial of Compensatory Education Expenditures

January 2010 Request to Purchase a Computer

The District is understandably concerned that a significant portion of the monetary value of the compensatory education awarded to this Student has already been spent on computer equipment. Moreover, it is not objectively unreasonable for the District to suggest that Parent and Student should consider preserving the remaining value of the compensatory education award for other potential uses that may arise as Student adjusts to attending college. The reasonableness of the District's concerns, however, provides no legitimate basis for denying approval of Parent's recent request for another computer. By their terms, the compensatory education orders provide that Parents have sole discretion to select the specific services or items the District is required to provide to Student as compensatory education. There is no doubt, and the District does not deny, that computer equipment falls into the category of services and equipment contemplated by both orders. Neither of the previous orders gives the District authority to determine whether parental requests for compensatory education services are improvident or duplicative and deny a parental request based on any such reasons. As long as the services/equipment Parents identify are within the substantive parameters of the orders, and the requesting Parent fulfills the documentation requirements for payment or reimbursement, the District must grant the request.

Moreover, although it is certainly possible to imagine circumstances under which the breadth of the discretion granted to Parents by the compensatory education orders should be restricted, the computer request does not present an outrageously improvident request. As Parent pointed out, the original request to purchase a computer was nearly six years ago. N.T. pp. 282—284 Not only has technology advanced considerably since that time, but it is not uncommon for a heavily used computer and peripheral equipment to simply wear out in that amount of time. The first computer request was for a laptop, and the second for a desktop. S-20 It is also not uncommon for a computer user to have both a desktop computer for primary use and a laptop for portability. The third computer request originated with Student's Father for Student's use in his residence in New York. At the time that request was made, Father presented a court order releasing Student to his custody to reside in New York. S-33 The District's resistance to granting Father's request to purchase a computer was overruled by an order from the compliance division of the Pennsylvania Department of Education, Bureau of Special Education Services. Now, however, Student has resumed residing primarily with Mother. .

Finally, there is a relatively short time left before Student needs a computer specifically for college. By the time the computer purchase is completed, Student will be much closer to beginning college, and he certainly needs time to become comfortable using the new computer before beginning higher level classes. The District, therefore, will be ordered to purchase a computer for Student upon submission by Parent of the proper documentation as required by the March 2004 compensatory education order. The documents submitted with Parent's letter, found at S-16, which appear to be pages printed from a website, do not meet the standard for payment.

Before finalizing the computer request, Parent and Student are urged to consider consulting with a special needs counselor or technology advisor at the college Student will

attend, if such consultation is available, to assure that the computer selected will best meet Student's needs.

Health Club Membership

Although Parent's complaint did not explicitly raise the District's alleged denial of payment for Student's membership in a health club as an additional improper denial of compensatory education services, Parent was permitted to present evidence and argument on that issue at the due process hearing. Notwithstanding the District's objection to the expansion of the hearing issues beyond those explicitly raised in Parent's complaint, the District was not prejudiced, since the documents Parent presented at P-3 actually supported the District's position. Moreover, it was reasonable to consider Parent's argument that the District violated the prior compensatory education orders by failing to either pay for the health club membership in April 2009 or request a due process hearing as another, albeit previously unspecified, aspect of Parent's claim that the District violated the 2004 hearing officer order. Since the alleged denial of payment occurred in 2009, Parent could arguably have initiated another due process complaint to raise that issue, necessitating a full hearing on a very narrow issue. That would have been a particularly unnecessary and unwarranted waste of time and resources for the District, Parent and due process hearing system.

The evidence at the due process hearing established that the District did not refuse to pay for the fitness center membership. FF 26 The problem with the payment actually arose from the fitness center's limitation on the method of payment it will accept. The 2004 compensatory education order explicitly provides for direct payment to a provider upon presentation of a proper documentation or reimbursement to Parent upon proof of payment for a service. The fitness center will not accept direct payment from the District on either an annual or monthly basis, but

requires a debit card. F.F. 26 The District provided Parent with information regarding this issue several times. P-3, pp, 7, 8, 9 The District is not required to deviate from the explicit terms of the March 2004 compensatory education order, or to work out acceptable payment terms with the fitness center. If, as Parent testified, she cannot afford monthly direct payments to the fitness center before seeking reimbursement from the District, it is up to her to work out a payment arrangement permits direct payments from the District to the fitness center in accordance with the terms of the compensatory education order. If that is not possible, Parent will need to seek similar services from another facility that may be more amenable to working with Parent to develop a payment arrangement that provides for direct payment from the District, along with documentation that complies with the order.

Miscellaneous Issues

Improvident Expenditure of Compensatory Education Funds by the District

Soon after the due process complaint was filed, the District moved to dismiss certain issues, including claims that the District improperly managed Student's compensatory education fund. Although that motion was granted in a ruling dated February 26, 2010 (HO-2), Parent's argument nevertheless strayed into that claim in connection with the computer purchase issue.

At the hearing, it developed that Mother's claim concerning improper use of the special education fund is based upon the computer purchase requested by Student's Father in 2008. Evidence concerning that purchase was, therefore, relevant to the District's counterclaim and was admitted for that purpose.

Nevertheless, the pre-hearing ruling that Mother's claim for improper use of the compensatory education award is not a matter within the jurisdiction of the hearing officer stands.

The IDEA statute and regulations provide that,

A parent or a public agency may file a due process complaint...[when a public educational agency]... [p]roposes to initiate or change the identification, evaluation, or educational placement of..a child with a disability...or the provision of FAPE to the child; or [r]efuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

34 C.F.R. §§300.507(a)(1), 503(a)(1), based upon 20 U.S.C. §1415(b)(6).

All IDEA due process complaints, therefore, must “relat[e] to the identification, evaluation or educational placement of, or the provision of FAPE to the child.”

20 U.S.C. §1415(b)(6); 34 C.F.R. §507(a)(1).

Mother’s dissatisfaction with the District’s expenditure of funds at Father’s request, which she contends was improper and unlawfully reduced the monetary value of Student’s compensatory education award, does not relate to the identification, evaluation, educational placement, or the provision of a free, appropriate public education to Student.

Whether a compensatory education award consists of specific services or a fund against which Parents may draw to provide various additional services to Student, it is, by definition, a remedy awarded for a past denial of FAPE, and may not be used for services that the District must provide in order to fulfill its current FAPE obligation to Student. *See, e.g., Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009).

The provision of the 2004 order that requires the District to initiate a due process hearing if it refuses a parental request for payment or reimbursement for compensatory education services/equipment does not encompass disputes between the Parents concerning whether both of them, or which of them, may request payment for compensatory services or equipment. That portion of Mother’s claim, therefore, may not be considered in a special education due process hearing.

Time Limit on Use of the Compensatory Education Award

Neither the 2003 nor 2004 hearing officer orders includes a time limit by which the compensatory education award must be used. Parent requested an order permitting Student to use the compensatory education award until he graduates from college. N.T. p. 288 Because IDEA eligibility extends only to age 21, compensatory education generally terminates at that age as well, absent extraordinary circumstances. In this case, compensatory education has been available to Student since 2003, with another three years before he reaches age 21-- a total of ten years within which Parents could select compensatory services. Mother has presented no extraordinary circumstances suggesting that the time in which to use the award should be extended beyond the date Student turns 21 in July 2013.

Moreover, although it is certainly understandable that Parent would prefer to have compensatory services available throughout Student's college education, such an order would have no certain end date. It may well be Student's intention to complete all requirements for a college degree within a few years of high school graduation, and it is everyone's hope that he can meet that goal, but no one can predict when Student will graduate from college. Many students now take considerably longer than the four years that used to be customary, and sometimes interrupt their education for several years. In the absence of any equitable reason to extend the time within which the compensatory education award may be used, and in the absence of a date certain beyond age 21 for use of the award, the order in this case will explicitly set Student's 21st birthday as the end date by which all properly documented requests for payment/services pursuant to the 2003 and 2004 compensatory education awards must be received by the District.

Proper Use of the Compensatory Education Award

There was a suggestion in the due process complaint that Mother may have believed that she could request payment for ordinary college expenses as compensatory services. That matter was decided in the February 26, 2010 letter ruling on the District's partial motion to dismiss the complaint, which is part of the record in this case as both an interim, pre-hearing ruling and as Exhibit HO-2, and is intended to be part of the final decision in this matter.

At the due process hearing, Parent suggested that she might request payment from the compensatory education award for expenses incident to obtaining medical care for Student after high school graduation. *See* N.T. p. 282 It was unclear, however, whether Parent was referring to counseling or treatment related to Student's disability that may not be covered by medical insurance, or whether Parent was suggesting that the compensatory education award could be used to obtain medical insurance. Although the former may fall within the parameters of the order, depending upon the specific services for which payment is requested, purchasing medical insurance is clearly not compensatory education.

It is impossible, of course, to anticipate all of the potential requests Parents may make for compensatory services, and as noted, it is sometimes unclear whether Mother is referring to services fairly encompassed within the compensatory education order or not when she mentions possible uses for the compensatory education award. Consequently, no attempt will be made to further describe limits on Parents' requests for compensatory services. Except as provided in this decision, and in the interim ruling dated February 26, 2010, the parties will continue to be guided by the terms of the compensatory education orders issued in 2003 and 2004, including the provision in the 2004 order specifying how the District may challenge a parental request for payment/reimbursement of compensatory services.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the District is hereby **ORDERED** to provide Student with a computer upon receiving a written request from Parent for either direct payment to a provider or reimbursement to Parent, along with documentation in strict compliance with the March 24, 2009 Hearing Officer Order, also set forth in this decision in FF 20.

It is **FURTHER ORDERED** that in all other respects, Parent's claims are **DENIED**.

It is **FURTHER ORDERED** that all requests for payment/reimbursement for compensatory education services/equipment addressed to the District pursuant to the compensatory education awarded to Student by hearing officer orders entered in 2003 and 2004, must be properly documented as provided in the March 2004 hearing officer decision, and repeated in this decision at FF 20, and must be received by the District no later than 5:00 p.m. on July 20, 2013, Student's 21st birthday.

May 1, 2010

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER