

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: A.S.

Date of Birth: [redacted]

Dates of Hearing:

August 10, September 21 & September 29, 2011

CLOSED HEARING

ODR Case # 1782-10-11-AS

Parties to the Hearing:

Parents

Bangor Area School District
123 Five Points Richmond Road
Bangor, PA 18013

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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October 25, 2011

November 8, 2011

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an elementary school age student residing in the Bangor Area School District (“District”) who has been identified 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”).¹ Specifically, the student has been identified as a student with speech and language needs and an other health impairment. The parties agree that the student qualifies under these provisions of law, but there is disagreement over the student’s past and current special education programming.

Parents assert that the District inappropriately programmed for the student since the District began educating the student in the 2009-2010 school year, continuing through the current 2011-2012 school year. Parents seek specific programmatic changes/accommodations and compensatory education as a result of the alleged deprivations of FAPE. The District counters that at all times it has provided a FAPE to the student and met its obligations under IDEIA and Chapter 14.

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

¹ 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.

ISSUES

Has the District programmed appropriately for the student
In the 2009-2010, 2010-2011, and 2011-2012 school years?

If not, are parents entitled to compensatory education?

Are there specific programmatic changes for the IEP team to consider
and/or implement?

FINDINGS OF FACT

1. The student's primary disability is childhood apraxia of speech, a speech and language impairment which severely limits the student's ability to communicate. The student is also identified with attention deficit hyperactivity disorder. (Parents' Exhibit ["P"]-2, P-11; School District Exhibit ["S"]-5, S-13, S-24; Notes of Testimony ["NT"] at 165).
2. The student's speech is unintelligible to those who have not lived with, or diligently worked with, the student. (P-11).
3. The severity of the student's inability to communicate has interfered with an assessment of the student's cognitive ability. (P-2; S-24).
4. In April 2009, the student was receiving early intervention services and began a transition process to kindergarten at the District. (S-1).
5. In May 2009, the student underwent a SETT (student-environment-task-tools) assessment to gauge the student's need for assistive technology. (S-2).
6. In summer 2009, the District had not yet completed the student's evaluation. The student, however, began in a District summer program under the auspices of a section 504 plan. The student's difficulty with communication led to problematic behaviors in the summer program. (S-3; NT at 165).
7. In July 2009, the District completed its evaluation. The student was identified as a student with a speech and language impairment. (S-5).

8. In August 2009, parents obtained a private augmentative/alternative communication evaluation report. (P-1).
9. In August 2009, the student's individualized education plan ("IEP") team met to design the student's program. The IEP provided speech and language services for the student, including the private augmentative communication report for selecting an assistive communication device. The student also received the support of a one-on-one aide. (S-7).
10. Early on in the 2009-2010 school year, the student's kindergarten year, the student exhibited communication difficulties and attendant problematic behaviors, including sensory issues. Over the course of September and October 2009, the student underwent a psychiatric evaluation and an occupational therapy evaluation. The student's IEP was revised multiple times, including a functional behavior assessment and positive behavior support plan. (S-7, S-10, S-11, S-15).
11. In December 2009, the parents obtained a private evaluation from a speech and language specialist in apraxia of speech. The specialist opined: "It is a concern that (the student) has not spent more time in learning to use an augmentative communication device given how impaired (the student's) speech is at this time. It will be critical for (the student) to have some other means of communicating while...working on oral speech as clear and complex verbal speech is likely not going to occur for an extended period of time." (P-2).
12. Beginning in the fall of 2009, the District utilized multiple augmentative communication devices. Parents also explored options for various devices. The degree of training, use, and monitoring of the devices by the District was inconsistent. (S-53; NT at 167-169, 194-196, 469-471).
13. The private report of December 2009 was provided to the District. It undertook a re-evaluation process and issued a re-evaluation report in February 2010. (S-24).
14. In March 2010, the student's IEP goals were revised to add academic goals in addition to the speech and language programming which was the focus of the previous iterations of the kindergarten IEP. (S-26).

15. Throughout kindergarten, the teacher and parents shared back and forth a communication notebook. (P-8; NT at 174).
16. The student's communication and academic needs were not addressed appropriately in the 2009-2010 school year and the student did not make adequate progress. (P-8; S-7, S-26, S-28, S-30, S-33 at pages 7-24; NT at 200-202).
17. In the summer of 2010, the parents sought out private speech and language services and a private evaluation. (NT at 201-203).
18. In September 2010, the private evaluator issued a report, including her observations of the student in the educational environment. The evaluator stressed the importance of the need for an augmentative communication device to allow the student to communicate. (P-4).
19. The student began the 2010-2011 school year in 1st grade. The student's IEP was revised in November 2010. (S-33).
20. The student continued to exhibit academic concerns. By November-December 2010, the student began to exhibit a singularly problematic behavior—even given the difficulties with verbalizations, the student clearly and repeatedly voiced an expletive. (NT at 209-210).
21. Other problematic behaviors included walking in the halls, work avoidance, screaming, disruptions, spitting, and pinching. (NT at 214, 356-357).
22. Over December 2010 and January 2011, the District took data on the problematic behaviors. Data collection stopped in January 2011 and was not continued. (S-36).
23. In February 2011, the IEP team met and revised the student's IEP. (S-39, S-40).
24. Throughout 1st grade, the parents and student's aides shared back and forth a communication notebook. In March 2011, parents became aware of a second notebook communication system, a notebook unknown to the parents

and shared back and forth between the student's two aides.² The intra-aide notebook shared a picture of the student—experiencing highly problematic behaviors—at deep variance with the notebook shared by the aides with the family, which portrayed a student having much more appropriate behavioral and academic success. (P-7, P-9; NT at 206, 219-230).

25. At the conclusion of the 2010-2011 school year, the student's word/phrase list included 70 words; the student showed independent mastery of two words. The student showed mastery of only one phrase of 2-3 words from the list. (S-41; NT at 491-492).
26. The student's communication and academic needs were not addressed appropriately in the 2010-2011 school year and the student did not make adequate progress. (P-6, P-7, P-9; S-33, S-35, S-36, S-39, S-41, S-44, S-47).
27. The student's lack of progress continued through the outset of the 2011-2012 school year. (S-62; NT at 364).
28. In kindergarten and 1st grade, the student worked with a single District speech and language pathologist. Just as with the ability of the student's family to understand the student's vocalizations, the extent to which the speech and language pathologist could understand the student's vocalizations was a matter of experience over years. An independent listener with no experience with the student would have no means to understand the student. (P-11; see generally NT at 411-515).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE

To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful

² The student's assignment of a one-to-one aide was shared between two aides, one with duties in the morning and one in the afternoon.

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)).

In this case, the student’s disability makes communication an arduous and, in the short-term, nearly impossible task; and in the words of the specialist in apraxia, “oral speech as clear and complex verbal speech is (unlikely) to occur for an extended period of time.” (FF 1, 2, 3, 11, 18, 28). This inability to communicate has led to a consistent and extensive pattern of problematic behaviors. (FF 6, 10, 20, 21, 22, 24).

More broadly, however, the student has been with the District for over two academic years and lacks any means to communicate effectively. The student has not been provided by the District with an augmentative communication device for consistent deployment which, given the severe effects of apraxia, has left the student without any means to communicate. (FF 1, 2, 5, 8, 9, 11, 12, 18, 25, 26, 28). In effect, this has led to wholesale deprivation of FAPE; without the means to communicate, the student has not made meaningful education progress. (FF 16, 26, 27). This is of especial concern because, without the means to communicate on even a fundamental level, the student’s

cognitive abilities cannot be ascertained such that higher-level academic goals can be appropriately crafted. (FF 3).

Accordingly, an award of compensatory education, in addition to specific programmatic changes, will be ordered.

Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEIA, compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEIA. (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 right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied 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).

Here, the District knew from early intervention services that the student would require intensive programming; this was made explicit to the District in the summer of 2009 when the student participated in District programming and was largely unsuccessful as a result of the

student's apraxia. (FF 1, 4, 5, 6). While the District continued to refine its approach to the student over the fall of 2009, it had multiple evaluations, experience, and data on the student such that its February 2010 re-evaluation should have put the District in a position to have in place, and to be delivering, an appropriate program.³ (FF 7, 8, 9, 10, 11, 12, 13, 15). Critically, by February 2010, the District should also have known that its attempts to implement the use of an augmentative communication device was unsuccessful. (FF 11, 12). As indicated above, the denial of FAPE has been ongoing since February 16, 2010. (FF 16, 26, 27).

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education, either hourly or

³ The February 2010 re-evaluation report was issued on February 16, 2010.

as the result of a lump sum settlement, must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

An award of compensatory education will be fashioned accordingly.

CONCLUSION

The District denied the student a FAPE for its failure to appropriately program for the student's needs in speech and language.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to compensatory education in an amount equal to 5 hours for every school day attended⁴ from February 16, 2010 through the date when the District has proposed an appropriate program in accord with this order.

Additionally, within 20 days of the date of this order, the student's IEP shall meet to:

Select for implementation an augmentative communication device; where the IEP team feels it is helpful and/or necessary, it is ordered to consider retaining the services of a private consultant to assist in the selection and implementation process;

make part of the student's IEP a full-time one-on-one aide and to consider what skills and training the aide should possess;

select a behavior specialist to assist in the design and implementation of a positive behavior support plan (including the functional behavior assessment that precedes such a plan);

select an appropriately qualified individual to help the team address the student's sensory issues and to assist in the design and implementation of a sensory diet; and

⁴ 22 PA Code §11.3. While the minimum standard for kindergarten hours is 2.5 hours per day, the student received extra time each day as part of the kindergarten year.

consider the advisability of retaining an expert in apraxia of speech for ongoing consultation with the IEP team.

Parents are not entitled, however, to reimbursement for evaluation fees associated with a university augmentative-communication study in which the student is participating.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

November 8, 2011