

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: C.E.

Date of Birth: [redacted]

Dates of Hearing:

August 24, 2011

August 25, 2011

August 26, 2011

CLOSED HEARING

ODR Case # 1835-10-11-AS

Parties to the Hearing:

Parent[s]

Pennsbury School District
134 Yardley Avenue
Fallsington, PA 19052

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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September 12, 2011

September 27, 2011

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is [an elementary school-age] student residing in the Pennsbury School District (“District”) who is a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)¹. Specifically, the student is identified with specific learning disabilities and a speech/language impairment. The parents have requested compensatory education and tuition reimbursement of a privately funded education placement due to an alleged failure by the District to provide a free appropriate public education (“FAPE”). Particularly, parents claim compensatory education from May 18, 2009 through the commencement of the 2009-2010 school year and tuition reimbursement for the 2009-2010, 2010-2011 and 2011-2012 school years.² The District maintains that, when the student attended the District, it provided the student with FAPE and that the last-offered programming was reasonably calculated to yield meaningful education benefit and, as such, was designed to provide FAPE to the student.

For the reasons set forth below, I find in favor of the parents although the award will be in an amount less than 100%.

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.

² The parties agreed to the stated recovery period beginning on May 18, 2009.

ISSUES

Was the student denied a FAPE from May 19, 2009 through the commencement of the 2009-2010 school year?

If so, is compensatory education owed as a result?

Was the last-offered educational program proposed by the District in June 2009 appropriate?

If not, are parents entitled to tuition reimbursement for the unilateral private placement undertaken for the 2009-2010, 2010-2011, and 2011-2012 school years?

FINDINGS OF FACT

1. The student entered District schools in kindergarten in the 2006-2007 school year. (Notes of Testimony ["NT"] at 42-43).
2. Following parental request for an evaluation, the student received an individualized education plan "(IEP)" in January 2007 to address issues in speech/language. (Parents' Exhibit ["P"]-2, P-9; NT at 42-43).
3. The student continued to receive speech/language programming through IEPs in 1st grade (2007-2008) and 2nd grade (2008-2009). (P-3, P-4).

4. The student received various screenings and instructional support services in 1st and 2nd grade. (School District Exhibit ["S"]-1, S-2, S-3, S-4, S-7, S-8, S-11).
5. In spring 2009, parents received the student's results from the Iowa Tests of Basic Skills, administered by the District in January 2009. Disappointed with the student's results in reading and language, parents requested a re-evaluation of the student. (P-42; S-19; NT at 53-54).
6. In early March 2009, parents consented to the re-evaluation. (P-10).
7. The re-evaluation report was issued on May 14, 2009. (P-11; S-42).
8. The May 2009 re-evaluation report recommended that the student be identified as a student with specific learning disabilities in reading and written expression and as a student with a speech/language impairment. (P-11 at page 16; S-42 at page 16).
9. The May 2009 re-evaluation report noted that the student was on-task only 55% of the time and needed to be redirected three times in a 20-minute observation; that the student's physical and verbal activity during achievement testing was, in one session, marked and "may have effected

[sic] (the student's) performance on this assessment.” (P-11 at pages 3-7; S-42 at 3-7).

10. In the re-evaluation report, the music teacher's input included the following: “socially, (the student) does not seem to function on a 2nd grade level. (The student) often talks as if (the student) were in a kindergarten classroom. (The student) will sometimes bring small toys to class, which quickly become a distraction to (the student's) learning and have to be put away. (The student's) conversational skills haven't seemed to mature throughout this year.... (The student) often needs one or two reminders to stay on task....(The student) sometimes struggles during independent work. (The student) struggles to stay on task when working (alone) or in partners [sic]....Sometimes (the student's) imagination can cause a distraction from (the student's) learning. (The student) often 'zones out' and will not remember what has been discussed in class.... (The student) usually listens when...asked to stop talking. (The student) struggles to focus many times, and often finds distractions in class by talking with other students. (The student) can also become very silly during music class. (The student) will lose...focus and forget to pay attention.” (P-11 at pages 11-12; S-42 at pages 11-12).

11. In the re-evaluation report, the art teacher's input included the following: "(The student's) behavior has seemed to improve throughout the year; however, (the student) still can exhibit some immature behaviors. At times, (the student) can be silly and rush through...work." (P-11 at page 12; S-42 at page 12).
12. In the re-evaluation report, the general teacher's input included the following: "(The student) puts forth limited effort to pay attention and complete...work during class time. (The student) is often distracted by things in his desk and the actions (the student's) peers....(The student) tends to get distracted easily and needs to be redirected back to the task. As academics get more difficult, (the student's) level of off-task behavior increases." (p-11 at pages 12-13; S-42 at pages 12-13).
13. On the Behavior Assessment Scale for Children-2nd Edition, parents rated the student as at-risk for Attention Problems and Leadership. Teachers rated the student as at-risk for Attention Problems, Leadership, Hyperactivity, Anxiety, Withdrawal, Study Skills, and Functional Communication; teachers rated the student as clinically significant for Learning Problems and Atypicality. (P-11 at pages 15-16; S-42 at pages 15-16).

14. Addressing issues of behavior, the May 2009 re-evaluation report concluded: “Despite evidence of a specific learning disability, (the student’s) inattention appears to be the primary impediment to...overall academic success. Whether participating in core academic areas or special areas, (the student) is a student who displays a significant amount of motor overflow and distractibility. It appears as though the quality and completion of (the student’s) work is directly related to (the student’s) off-task behaviors....Regardless of the academic instruction that is presented, (the student) will likely experience difficulty due to (the student’s) level of distractibility.” (P-11 at page 16; S-42 at page 16).
15. An IEP was developed in June 2009. (P-5).
16. The IEP reported, in its present levels of functional performance, that “the student is often distracted and not focused on...speech during conversation time....” (P-5 at page 4).
17. At the outset of the June 2009 IEP, in a section for special considerations for the IEP team to address, where the IEP team was asked ‘does the student exhibit behaviors that impede his/her learning or that of others?’, the answer was checked “no”. (P-5 at page 3).

18. The June 2009 IEP contained one goal in attention/on-task behavior, two goals in reading, two goals in written expression, one goal in speech articulation, and one goal in visual-perceptual skills (an occupational therapy goal). (P-5 at pages 8-9).
19. In June 2009, the parents approved the recommended educational placement for the student's instruction under the June 2009 IEP. (S-28).
20. Over the course of the summer of 2009, parents became concerned that the IEP would not address the student's needs. In August 2009, parents sent a letter to the District indicating that they were dissatisfied with the IEP, removing the student from the District, and enrolling the student in a private placement which they in anticipation that the District would reimburse them for the private placement. (P-7; NT at 60-62, 117).
21. The IEP team met again in September 2009. The September 2009 IEP changed certain aspects of the June 2009 IEP, namely adding elements of specially designed instruction. (P-6).
22. The September 2009 IEP did not revise any of the goals, did not change the special consideration regarding behaviors that impede student learning or that of others, or

address any of the students' classroom attention, off-task, or maturity issues. (P-6).

23. In September 2009, parents rejected the recommended educational placement and began to attend the private placement. (S-28; NT at 65).

24. In the spring of 2011, parents obtained a private evaluation of the student. (P-56).

25. In May 2011, parents filed a due process complaint, seeking compensatory education and tuition reimbursement, the complaint that led to the instant action. (P-1).

26. In June 2011, the District requested permission to re-evaluate the student. (P-37).

27. The re-evaluation process, including updated data in behavior, cognition, reading, and achievement, was in process during the course of these proceedings. (S-38).

28. While there was a degree of variability in the achievement testing for the student between April 2009 and March 2011, overall the student showed progress. (P-56; S-38).

29. The program at the private placement is appropriate, and the student has made progress at the private placement. (P-52, P-53, P-54, P-56 at pages 21-23; NT at 74-79, 124-129).

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)).

May 18, 2009 to Commencement of 2009-2010 School Year

In this case, the record is not deep regarding the interaction of the parties prior to spring 2009. While parents shared general concerns with the District, and there was a level of District activity regarding the student (FF 1, 2, 3, 4), the entirety of the record does not clearly support a sense of when the District knew or should have known that the student required special education and/or related services delivered through an IEP. Still, as will be seen below, the record strongly supports the finding that the District should have been addressing issues of attention, off-task-behavior and immaturity in the school environment. (FF 10, 11, 13). Indeed, the input of the art and music teachers, gathered in the spring of

2009, both indicate that their concerns with the student's behavior were gauged over the course of the 2008-2009 school year. (FF 10, 11).

The record clearly supports the fact that the student exhibited consistent inattentive/off-task/immature behaviors across school environments, to the extent that those issues were identified by the District as "the primary impediment to...overall academic success." (FF 9, 10, 11, 12, 13, 14). The District inappropriately addressed these needs by not recognizing in the IEP that behavior was an impediment to learning (and, consequently, not performing a functional behavior assessment) and by offering a goal and specially designed instruction that was inadequate to address the student's needs. (FF 15, 16, 17, 18). Accordingly, compensatory education will be awarded.

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.).

Here, again, it is difficult to determine when exactly the District knew or should have known that its lack of behavioral programming was

denying the student a FAPE. But the District should have known to the extent that it should have had such programming in effect on May 18, 2009.

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, it seems that an award of one hour per day is equitable. The record is not persuasive, however, that the student would or should qualify for extended school year programming. As such, compensatory education will not be awarded for the summer of 2009.

An award of compensatory education will be fashioned accordingly. As for the nature of the compensatory education award, the parents may decide 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 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.

Tuition Reimbursement

Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also*, 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated in IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3)).

In this three-step analysis, the first step is an examination of the school district's proposed program and whether it is appropriate—as above, whether it was reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Ridgewood; M.C.). In this case, the June 2009 IEP—the last-offered IEP before the parents notified the District of their intention to place the student privately—was inappropriate, specifically for its lack of behavioral programming. The

record clearly supports the fact that the student exhibited consistent inattentive/off-task/immature behaviors across school environments, to the extent that those issues were identified by the District as “the primary impediment to...overall academic success.” (FF 9, 10, 11, 12, 13, 14). Both anecdotally (FF 9, 10, 11, 12, 16) and objectively (FF 13), the District recognized and reported the student’s behavioral needs. Yet, the June 2009 IEP found that there were no behaviors that impeded the student’s learning. (FF 17). This decision led to the lack of a functional behavior assessment to better understand these behaviors and a behavior support plan to manage them. Therefore, the June 2009 IEP is inappropriate.

When the school district’s program is found to be inappropriate, as here, the second step is an examination of the appropriateness of the private placement which the parents have selected. Here, the record is not as robust as it could be. Still, the testimony and exhibits in the record reflect a program that is geared intently to address the reading needs of the student and a program where the student is finding overall academic success. (28, 29). The private placement is appropriate.

When the school district’s proposed program is found to be inappropriate, as here, and the private placement is found to be appropriate, as here, the third step of the analysis is to determine if tuition reimbursement is a fair remedy and, if so, in what amount. This is the so-called “balancing of the equities” step. Here, there are equities

to support both parties. The parents clearly have been proactive in pursuing, in good faith, appropriate programming on behalf of the student. (FF 1, 2, 5, 20). While the District has failed in its obligation to propose a program where the student could receive FAPE where the student's behavioral needs are concerned, the record supports a finding that the District's June 2009 and September 2009 IEPs were reasonably calculated to yield meaningful education benefit in reading and written expression. (FF 15, 17, 18, 27, 28). For this reason, as much as it would be inequitable to deny tuition reimbursement to the parents, it would be inequitable to award 100% of tuition reimbursement.

Accordingly, the student's parents will be awarded tuition reimbursement in a slightly diminished amount.

CONCLUSION

The record taken as a whole supports a finding that the student should be awarded compensatory education for the period from May 18, 2009 through the end of the 2008-2009 school year. Additionally, the student's parents will be awarded 80% of their tuition reimbursement claims.

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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 1 hour of compensatory education for every school day the student attended at the District between May 18, 2009 and the end of the 2008-2009 school year.

Additionally, the student's parents are entitled to reimbursement for the private school placement for the 2009-2010, 2010-2011, and 2011-2012 school years. Upon presentation by the parents of (a) bills for charges/account statements supplied by the private placement for all tuition, fees, and charges over these three school years, and (b) parents' proof of payment and/or remaining balances over these three school years, the District is ordered to pay 80% of the costs. This payment shall be made within 45 calendar days of the date the parents present the documentation.

Furthermore, parents are also entitled to reimbursement for mileage for transportation to the private placement, using mileage reimbursement as allowable under Internal Revenue Service mileage reimbursement rates for the period(s) in question. The mileage

reimbursement is limited to one round trip, for every school day the student attended in the 2009-2010, and 2010-2011 school years, from the parents' address to the address of the private school as calculated using an online mapping or directions service. This payment shall be made within 45 calendar days of the date the parents present the documentation. The parties shall arrange between themselves how reimbursement shall be made for the ongoing 2011-2012 school year, both mileage charges already incurred and mileage charges to be incurred.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

September 27, 2011