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## Pennsylvania Special Education Hearing Officer

### DECISION

Child's Name: PW

Date of Birth:

Dates of Hearing: November 20 and 21, 2008

CLOSED HEARING

ODR No. 9041/08-09 AS

### Parties to the Hearing:

Parents:

Drew Christian, Esq.  
801 Monroe Avenue  
Scranton, PA 18510

School District:

Maria Farrell, Supervisor of Special  
Education  
Delaware Valley School District  
236 Route 6 and 209  
Milford, PA 18337-9454

School District Attorney:  
Andria L. Saia, Esq.  
Levin Legal Group  
1301 Masons Mill Business Park  
1800 Byberry Road  
Huntingdon Valley, PA 19006

Representative:

Date Record Closed:

December 15, 2008

Date of Decision: December 20, 2008

Hearing Officer: Daniel J. Myers

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student (Student)<sup>1</sup> is a teen-age autistic resident of the Delaware Valley School District (School District). In an earlier case, a hearing officer and appeals panel found that the School District had denied free appropriate public education (FAPE) to Student during the 2005-2006 and 2006-2007 school years. In this case, the parties contest the School District's provision of FAPE to Student during the 2007-2008 school year. For the reasons described below, I find that the School District did deny FAPE to Student for the first half of the school year in the areas of behavioral skills and social skills needs, and I award 132 hours of compensatory education.

### **ISSUE**

Whether the School District provided FAPE to Student for the 2007-2008 school year?

### **FINDINGS OF FACT**

1. Student, whose date of birth is XX/XX/XX, is a teen-age resident of the School District with a pervasive developmental disorder on the autistic spectrum.  
(N.T.328-330)<sup>2</sup> Student has a sense of humor and enjoys working with peers and adults. (N.T. 207) Student travels from class to class alone, and has an assigned

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<sup>1</sup> All future references to Student will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

<sup>2</sup> References to "HO," "SD" and "P" are to the Hearing Officer, School District, and Parent exhibits, respectively. References to "N.T." are to the transcript of the November 20 and 21, 2008 hearing sessions conducted in this matter.

- instructional assistant only in physical education and reading classes. (N.T. 284-285, 288)
2. In July 2007, Student's parents requested a due process hearing, alleging that the School District denied FAPE to Student for the 2005-2006 and 2006-2007 school years. (P1,p.1; P2,p.1)
  3. Meanwhile, Student's extant individualized education program (IEP), developed by the parties on May 18, 2007 for Student's 2007-2008 school year (P3; SD6), included the following:
    - a. The Behaviors Impeding Learning box was not checked (SD6,p.4);
    - b. Math operations and analytical math goals were on a 5<sup>th</sup> grade level (SD6,p.28);
    - c. Speech and language goals involved only vocabulary and idioms (SD6,p.27); and
    - d. There were no behavioral goals or specially designed instruction (SDI) to address either Student's increase in self-stimulatory behavior in math class (SD6,p.23) or Student's aversion to [opposite gender peers]. (SD6,p.23; N.T. 335)
  4. On August 29, 2007, the parties met to revise Student's 2007-2008 IEP in light of a March 2007 independent educational evaluation (IEE) that Student's parents had privately secured. (SD5; SD7; SD13; N.T. 29) Significant aspects of that revised IEP were:
    - a. The Behaviors Impeding Learning box was not checked (SD7,p.3);

- b. Student was moved from a regular education 7<sup>th</sup> grade inclusion class to a math resource room to work on 5<sup>th</sup> grade skills (SD7, p.40; N.T. 140-141, 256, 259);
  - c. A pragmatic language skills goal was added (SD7,p.30; N.T. 30-31);
  - d. A personal appearance check list goal was added (SD7,p.31);
  - e. There was no goal or SDI to address Student's aversion to [opposite gender peers]. (N.T. 60, 122-123, 180, 240-247, 265)
5. To implement Student's IEP, School District teachers met at monthly Educational Team (ET) meetings to discuss Student's progress and any concerns. (SD14; N.T. 64, 269, 271, 292, 364) At the ET, the School District's board certified behavior analyst (BCBA) reviewed methods for addressing Student's behaviors. (SD14, p. 2; N.T. 64, 119, 120, 267-268, 274, 275) In Student's first math resource class, Student's teacher developed baselines for 2007-2008, discovering that Student's actual instructional level was at the 2<sup>nd</sup> grade level rather than at the 5<sup>th</sup> grade level listed in the IEP goals. (N.T. 142-143, 152, 289) The School District's speech and language teacher prioritized parental and teacher lists of social skills concerns, and then focused on initiating conversations, social greetings, and asking questions. (N.T. 47, 69, 165-170, 204-205, 219, 291) The speech and language teacher also worked on generalization of skills in cafeteria and regular classroom settings, but did not take formal monitoring data because results were inconsistent. (N.T. 181-182, 192, 208-209) Teachers observed that Student's stereotypic behaviors and aversion to [opposite gender peers] were never frequent or intense enough to prompt data collection or goal writing in the IEP. (N.T. 269,

- 271) When obsessive-type behavior was observed, the teachers simply reminded Student to hold hands at side, keep head up, and just walk directly through the hallway. (N.T. 121) At Parents' suggestion, when Student was perseverating Student's teachers would ask Student what was on Student's mind and Student's answer was usually sufficient to get Student back on track. (N.T. 180, 280)
6. On October 23, 2007, the School District issued an Occupational Therapy (OT) evaluation. (P5; SD3; 297, 316) On November 13, 2007 the School District revised a previous Functional Behavior Assessment (FBA). (P6; SD4; N.T. 67, 294, 296)
  7. On January 7, 2008 Student's IEP was again revised. (SD8; SD13,p.8; N.T. 53, 56, 67-69, 294) Significant aspects of that IEP were:
    - a. The Behaviors Impeding Learning box was checked and a behavior plan was attached (SD8,p.3);
    - b. Four speech and language goals were added to address daily living problem solving, social skills attending, anger self-awareness, and odd mannerisms (SD8,pp.36-37; N.T. 172);
    - c. A "Visualizing and Verbalizing" speech and language program was added to SDI (SD8, p.40; NT 255);
    - d. A reading comprehension goal was added (SD8,p.37);
    - e. Time and money math goals were added (SD8,pp.37-38); and
    - f. Written expression goals were added (SD8,pp.38-39).
  8. After revision of the IEP, Student's speech and language teacher determined applicable baselines during the first speech and language class. (N.T. 172, 174)

9. On February 28, 2008, Student's IEP team determined that Student did not qualify for extended school year (ESY) services. (SD9; P3)
10. On March 6, 2008, a special education hearing officer issued a decision on Student's July 2007 due process hearing request concerning the 2005-2006 and 2006-2007 school years. (P1) The hearing officer found that the School District had denied FAPE to Student during those school years by failing to address Student's needs in mathematics, social skills and behavior. (P1,p.14) More specifically, the hearing officer concluded that Student's math program was in constant flux and, along with social skills training, lacked clear baselines, measurable goals and appropriately defined progress monitoring. (P1,p.16-19) The hearing officer also found that the School District had no systematic approach to Student's aversion to [opposite gender peers] and no goals addressing student's stereotypical autistic behaviors, OCD-like behaviors and avoidance behaviors. (P1,p.19) In reading, written expression, spelling, and adaptive skills, the hearing officer found no FAPE deprivation. (P1,p.16-17)
11. On April 28, 2008, an Appeals Panel affirmed the hearing officer's decision but modified the amount of compensatory education awarded. (P2)
12. On May 23, 2008, the parties developed an IEP for Student's upcoming 2008-2009 school year. (P7; SD10; N.T. 21) Significant aspects of that IEP were new goals related to Student's aversion to [opposite gender peers], and stereotypic and OCD-like behaviors (N.T. 87-88, 93, 225; P7, pp.25-26)
13. By the end of the 2007-2008 school year, Student had progressed from the 2<sup>nd</sup> grade to the 4th grade level in math. (N.T. 142-143, 152; SD10) School District

officials believe Student will rely on a calculator for the rest of Student’s life and therefore they believe it is appropriate for Student’s IEP to include a calculator accommodation and for Student’s math goals to include calculator use. (N.T. 45, 152)

14. On July 2, 2008, Student’s parents requested a due process hearing, alleging that the School District denied FAPE to Student for the 2007-2008 school year. (SD1) Until July 2, 2008, Student’s parents had not disagreed with any of Student’s 2007-2008 IEPs. (N.T. 205, 213, 261, 289, 299)

15. Student’s parents complain that the social skills goals added to Student’s IEP in January 2008 fail to address all of Student’s emotional, behavioral and social needs and lack appropriate baselines, exit criteria and quantifiable progress monitoring. (N.T. 178-179, 218, 222-223, 320-321; P4; SD7) Student’s parents argue that Student’s 2007-2008 behaviors continued to isolate Student, and Student’s continued need to tolerate [opposite gender peers] and young [opposite gender individuals] was not addressed. (N.T. 225, 333-337; P2) Student’s parents also complain that Student’s math goals continued to rely inappropriately upon a calculator. (N.T. 145, 150, 346; p1,p.14)

16. Due process hearing sessions were conducted on November 20 and 21, 2008. The following exhibits were either admitted, or not admitted, into the record. (N.T. 6, 373, 376)

Exh. #	Admitted	Withdrawn	Not Admitted	Exh. #	Admitted	Withdrawn	Not Admitted
HO 1	√			SD1	√		
P1	√			SD2	√		
P2	√			SD3	√		

Exh. #	Admitted	Withdrawn	Not Admitted	Exh. #	Admitted	Withdrawn	Not Admitted
P3	√			SD4	√		
P4	√			SD5	√		
P5	√			SD6	√		
P6	√			SD7	√		
P7	√			SD8	√		
P8		√		SD9	√		
				SD10	√		
				SD11			√
				SD12	√		
				SD13	√		
				SD14	√		

## **DISCUSSION AND CONCLUSIONS OF LAW**

The Individuals with Disabilities Education Improvement Act (IDEIA) requires that a FAPE be made available to all children with disabilities. 20 U.S.C. §1412(a)(1)(A); Board of Education v. Rowley, 458 U.S. 176 (1982) A student’s IEP is the main vehicle for the provision of a FAPE. Honig v. Doe, 484 U.S. 305 (1988); S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003); Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995) The IEP must point toward the child's actual educational needs by including summaries of the child's abilities and present levels of educational performance, outlines of measurable educational goals, specifications for educational services to be provided, and appropriate evaluation procedures and schedules for determining whether instructional objectives are being achieved. 20 U.S.C. § 1414(d)(1)(A); Pardini v. Allegheny Intermediate Unit, 420 F.3d 181 (3d Cir. 2005); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988) For an IEP to

be appropriate, it must offer a child progress in all relevant domains, including behavioral, social and emotional. M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996) A school district's failure to meet these requirements may constitute a denial of a FAPE.

The burden of proof in an administrative hearing alleging a FAPE denial is upon the party seeking relief. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Educ., 435 F.3d 384 (3d Cir. 2006); In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763 (2006) In this case, Student bears the burden of proof because Student alleges that the School District denied FAPE for the 2007-2008 school year.

Student argues that, because the School District revised Student's May 2008 IEP in response to the hearing officer and appeals panel decisions (N.T. 225; P1; P2), the School District has opened the door to offensive application of the doctrine of collateral estoppel. See Amader v. Johns-Manville Corp., 541 F.Supp. 1384 (E.D.Pa. 1982), reconsideration denied, 546 F.Supp. 1033 (E.D.Pa. 1982) Student contends that, under this doctrine, the previous hearing officer and appeals panel decisions regarding FAPE denials in 2005-2006 and 2006-2007 compel my conclusion that the School District similarly denied FAPE to Student in 2007-2008. Student argues that the issue and parties are the same as before and that the School District has already had a full and fair opportunity to litigate the issue in question. On the other hand, the School District argues that collateral estoppel does not apply because the issue is not the same as before, i.e., the previous decisions did not address the appropriateness of Student's 2007-2008 IEPs, and consequently the School District never had the previous opportunity to litigate the issue

in this case. The School District also argues that offensive application of the collateral estoppel doctrine in this manner frustrates the annual IEP process contemplated in the IDEIA.

I agree with the School District. The fact that a hearing officer and appeals panel found pre-2007-2008 IEPs to be inappropriate may be useful information when judging the appropriateness of subsequent IEPs, but it does not preclude either party from litigating the appropriateness of those subsequent IEPs. Further, IDEIA's regular IEP review process recognizes that children's educational needs are not static; rather they change fluidly and what may have been an appropriate (or inappropriate) IEP in one school year is not necessarily true for the next school year. Accordingly, I conclude that collateral estoppel does not apply in this case to issues regarding the 2007-2008 school year.

Student's parents complain that the social skills goals added to Student's 2007-2008 IEPs fail to address all of Student's needs and lack appropriate baselines, exit criteria and quantifiable progress monitoring. Student's parents also argue that the School District's eventual addition of goals addressing Student's aversion to [persons of the opposite gender], OCD behaviors and stereotypic behaviors, in response to the hearing officer and appeals panel decisions, only highlights the inappropriateness of their absence in earlier IEPs.

The School District counters that Student's behavioral issues were not impeding learning because Student always calmed down or could be reasoned with. (N.T. 85, 125, 211) The School District also argues that, except when disciplining behavior, the IEP team is only required to explore the need for strategies and support systems to address

any behavior that may impede the learning of the child with the disability or the learning of others. 20 U.S.C. §1414(d)(3)(B)(i)

I find that, for the first half of the 2007-2008 school year, the School District failed to address appropriately Student's behavioral and social skills needs. Similar to previous school years, the School District lacked a sufficiently systematic approach to Student's stereotypical autistic behaviors, OCD-like behaviors, avoidance behaviors and aversion to [opposite gender peers]. Student's August 29, 2007 IEP contained a single pragmatic language skills peer interaction goal (SD7,p.30), did not even acknowledge that Student's behaviors impeded learning (SD7,p.3), and behavioral interventions were informal and rather haphazard. No data were recorded of generalization of social skills in cafeteria and regular classroom settings (N.T. 181-182, 192, 208-209), and stereotypic behaviors and aversion to [opposite gender peers] were considered too infrequent or insufficiently intense to warrant data collection or IEP goals. (N.T. 269, 271) This was a denial of FAPE. Student clearly had behavioral and social skills needs that required a more systematic approach.

By January 7, 2008, however, the School District had changed its opinion and revised Student's IEP to include both an acknowledgement that Student's behaviors were affecting learning as well as a behavior plan. (SD8,p.3; N.T. 53, 56, 67-69, 294) In addition, four speech and language goals were added to address daily living problem solving, social skills attending, anger self-awareness, and odd mannerisms (SD8,pp.36-37; N.T. 172), and a "Visualizing and Verbalizing" speech and language program was added to SDI. (SD8, p.40; NT 255) On May 23, 2008, the social skills and behavioral components of Student's IEP were beefed up even more, with new goals related to

Student's stereotypic and OCD-like behaviors. (P7; SD10; N.T. 21, 87-88, 93, 225; P7, pp.25-26) Thus, I conclude that the School District had addressed Student's behavioral and social skills needs appropriately for the period from January 7, 2008 to July 2, 2008.

With respect to Student's math needs, Student's parents complain that Student's math goals lacked baselines, quantifiable present education levels, anchors based upon assessments, and inappropriately relied upon the use of a calculator. (N.T. 145, 150, 346; p1,p.14) I disagree. In contrast to earlier, apparently more chaotic math programs (P1,p.14-15; P2,p.5), Student's 2007-2008 math programming was more structured and tailored to Student's individual needs.

The August 29, 2007 IEP moved Student from a regular education 7<sup>th</sup> grade inclusion class to a math resource room, and it reflected a more realistic math instructional level than in previous years. (SD6,p.28) In Student's first math resource class, Student's teacher developed accurate 2<sup>nd</sup> grade level baselines. (N.T. 142-143, 152, 289) The January 2008 IEP added time and money math goals. (SD8,pp.37-38) By the end of the 2007-2008 school year, Student had progressed to the 4<sup>th</sup> grade level in math. (N.T. 142-143, 152; SD10) I conclude that the 2007-2008 IEPs were reasonably designed to produce, and in fact did produce, meaningful educational benefit for Student. Accordingly, I find that the School District did provide FAPE to Student in the area of math for the 2007-2008 school year.

With respect to goals that include the use of a calculator, the argument of Student's parents appears to be that Student should be required to memorize and learn to apply addition, subtraction, multiplication and division facts, rather than rely upon a calculator to perform those functions. School District officials, however, believe that

Student will rely on a calculator for the rest of Student's life and therefore it is appropriate for Student's IEP to include a calculator accommodation and for Student's math goals to include calculator use. (N.T. 45, 152) I agree with the School District. Calculators are as ubiquitous today as watches, phones, microwaves and remote controls, all of which, it could be argued, enable users to avoid learning and exercising whatever, more basic underlying skills those devices replace. Student is a teenager whose math needs are such that Student's instructional level at the end of the 2007-2008 school year was 4<sup>th</sup> grade. (N.T. 142-143, 152; SD10) At least in this particular case, I believe it is appropriate that Student's IEPs enable Student to learn math concepts through the use a calculator. Accordingly, I conclude that, for the 2007-2008 school year, the School District provided FAPE to Student with respect to Student's IEP math goals as well as with respect to implementation of Student's math program.

Compensatory education is an equitable remedy that may be awarded for the period of time that a school district deprives an eligible student of FAPE, with an offset for the period of time reasonably needed to discover and remedy the deficiencies in the school district's services to the student. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996); R.M. v. Pocono Mountain School District, Special Education Opinion 1714 (2006); F.M. v. North Penn School District, Special Education Opinion 1503A (2006); R.A. v. Interboro School District, Special Education Opinion 1431 (2004)

In this case, I have found that, for the first half of the 2007-2008 school year, the School District failed to address appropriately Student's behavioral and social skills needs. Student is entitled to compensatory education for that period of time, less a

reasonable rectification offset. A reasonable rectification period can be 30 days when a previous IEP is considered. B.C. v. Southern York County School District, Special Education Opinion 1911 (2008)

When weighing the equities, I note that, as they were developing the 2007-2008 IEPs, both parties were litigating the appropriateness of previous IEPs, and so both parties should have been sensitive to the appropriateness of the IEPs that they were developing. Yet, throughout that school year and until July 2, 2008, Student's parents had not disagreed with any of Student's 2007-2008 IEPs. (N.T. 205, 213, 261, 289, 299) Thus, I conclude that a 30 day rectification period deducted from a 90 day (1/2 year) compensatory education period is reasonable and equitable.

Thus, in this case, I will award compensatory education for 60 school days (12 weeks), which represents the first 90 days of a 180 day school year less 30 days for reasonable rectification. Using the same hourly formula employed by the appeals panel with respect to the number of hours of compensatory education (P2,p.7-8), I will award 12 hours (one hour per week) for social skills-related compensatory education and 120 hours (two hours per day) for behavior-related compensatory education. For the second half of the 2007-2008 school year, i.e., the period from January 7, 2008 to July 2, 2008, Student is not entitled to compensatory education because the School District provided FAPE to Student.

### **CONCLUSION**

Collateral estoppel does not apply in this case because the fact that pre-2007-2008 IEPs were found to be inappropriate does not preclude either party from litigating the appropriateness of subsequent IEPs. The School District should have provided a more

systematic approach to address Student's behavioral and social skills needs during the first half of the 2007-2008 school year. For the second half of the 2007-2008 school year, the School District appropriately addressed Student's behavioral and social skills. With respect to Student's math-related needs, the School District provided FAPE to Student for the entire 2007-2008 school year. Thus, I conclude that the School District denied FAPE to Student for the first half of the 2007-2008 school year in the areas of behavioral and social skills, and I award compensatory education accordingly.

### **ORDER**

- The School District denied FAPE to Student for the first half of the 2007-2008 school year in the areas of social skills and behavioral skills.
- The School District shall provide to Student 12 hours of social skills-related compensatory education.
- The School District shall provide to Student 120 hours of behavior skills-related compensatory education.
- For the period from January 7, 2008 to July 2, 2008, the School District provided FAPE to Student.

*Daniel J. Myers*

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HEARING OFFICER

December 20, 2008

