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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: MS

Date of Birth: XX-XX-XXXX

Dates of Hearing:

May 26, 2009, June 4, 2009, October 15, 2009, October 16, 2009,
October 21, 2009, October 30, 2009, November 5, 2009, and
November 20, 2009

CLOSED HEARING

ODR Case #s
9743-08-09-LS
10106-08-09-LS
00283-09-10-LS
(consolidated cases)

Parties to the Hearing:

Mr.

Ms.

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Emmaus, PA 18049

Representative:

Pro Se

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Date Record Closed: December 23, 2009
Date of Decision: January 7, 2009
Hearing Officer: Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

“Student” (“student”) is an 8-year old student residing in the East Penn 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”)¹, specifically severe autism. The student’s mother filed a series of complaints alleging that the student’s educational program and placement for the 2007-2008, 2008-2009, and 2009-2010 school years (including extended school year programming [“ESY”] in summer 2008 and 2009) are inappropriate. The student’s father disagrees, and in doing so agrees with the District’s position, feeling that the District’s programs and placement have been, and are, appropriate for the student.²

The June 4th session of these hearings was devoted to the 2009 ESY issue, and on June 29, 2009, an interim decision was issued to dispose of the 2009 ESY issue only.

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 father’s major concern is an objection to the use of an augmentative communication device rather than sign language for the student’s communication needs. Outside of this issue, the student’s father is in general agreement with the position of the District.

As set forth below, the District has deprived the student of FAPE in portions of each of the three school years resulting in an award of compensatory education.

ISSUES

Was the District's program and placement for the 2007-2008 school year, including 2008 ESY, appropriately designed and implemented?

Was the District's program and placement for the 2008-2009 school year appropriately designed and implemented?

Is the District's program and placement for the 2009-2010 school year appropriately designed and being appropriately implemented?

FINDINGS OF FACT

1. The student is a student diagnosed with autism and seizure disorder. (Parent Exhibit³ ["P"]-5; School District Exhibit ["S"]-38; S-50).
2. The student has significant behavioral, communication, and sensory needs. (P-5, P-6, P-14, P-17, S-4, S-5, S-35, S-61).
3. The student exhibits numerous problematic behaviors including, at one time or another: hitting, biting, crying, climbing, kicking, licking, spitting, dropping, eloping, head butting, screaming,

³ The student's father did not present any exhibits so references to parent's exhibits are those offered by the student's mother.

- whining, property destruction, hair pulling, self-injurious behavior, throwing, and removing clothing. (S-29, S-30, S-34, S-45, S-46, S-47, S-48, S-49).
4. The student uses augmentative communication devices, such as a Go-Talk (a device that responds with spoken words when pictures are or symbols are pressed) and, at times, a picture exchange communication system. (P-19, P-32A, S-28).
 5. The student requires numerous sensory strategies and interventions. (S-10, S-27).
 6. The student receives academic instruction. (P-6, P-7, P-8, P-13, P-16, P-17, S-4, S-5, S-18, S-22, S-23, S-24, S-35, S-36, S-37, S-61).

2007-2008 School Year

7. In the fall of 2007, the student began attending a full-time autistic support classroom in a District elementary school with an individualized education plan (“IEP”) for the 2007-2008 school year. (P-5, P-6, S-4, S-5).
8. The student’s IEP for the 2007-2008 school year was comprehensive but did not include a behavior plan. (P-6, S-5).
9. Even though a functional behavior assessment (“FBA”) was to be undertaken in September 2007, a District school psychologist did not undertake formal FBA observations until December 2007. The FBA was not issued until January 2008. A behavior support plan

based on the FBA was not included in the student's IEP until April 2008. (P-7, P-8, P-11, S-17, S-18; Notes of Testimony ["NT"]/May 26th at 59-62; NT/November 20th at 1162, 1204-1221).

10. The student made generalized progress under the terms of the 2007-2008 IEP, but the District recognized that progress on the student's behaviors was "inconsistent". (S-22 at pages 7-13; S-23 at pages 5-8).
11. The student attended ESY programming in the summer of 2008. The student's 2008 ESY program was appropriate and was implemented appropriately. (P-7, P-8, S-18, S-22).

2008-2009 School Year

12. In May/June 2008, the student's IEP for the 2008-2009 school year was developed. The IEP included a behavior plan. The student was again placed in a full-time autism support classroom, but the classroom was located in a different District elementary school. (S-22).
13. The 2008-2009 school year was tumultuous from the beginning. Most pressing, the student exhibited elevated levels of problematic behaviors, to the point where the student's instruction was compromised, and the safety of the student, classmates and staff was a concern. (S-29, S-30, S-34, S-55).

14. The student was re-evaluated in October/November 2008. The student's IEP team agreed that the student should be placed in a private placement outside of the District. (P-13, P-14, S-35, S-56).
15. The student began attending the private placement in November 2008. (P-13, S-36; NT/May 26th at 125; NT/October 21st at 509-510).
16. The student's IEP at the private placement did not include the student's behavior plan from the District. The behavior analyst for the private placement testified that through November and December of 2008, and January and February 2009, the private placement collected data but did not produce a FBA or a behavior support plan. (NT/June 4th at 264-268, 287-288).
17. From November 2008 through February 2009, the director of the private placement testified that the private placement did not have an individualized behavior plan but was implementing its organizational behavior "protocol" with the student. (NT/June 4th at 220-223).
18. In February 2009, the IEP team met to design the student's educational program at the private placement. The team was unable to complete the IEP, so the November 2008 IEP (without any behavior support plan) remained the student's pendent program. The student finished out the 2008-2009 school year

without a behavior support plan. (P-13, P-14, S-35, S-56, S-65; NT/June 4th at 237; NT/November 20th at 225.)

19. The student did not make progress under the terms of the 2008-2009 IEP at the District in September and October 2008, but there was no denial of a free appropriate public education (“FAPE”). The student made inconsistent progress under the terms of the 2008-2009 IEP at the private placement from November 2008 – June 2009 that amounted to a denial of FAPE. (P-26, S-7, S-29, S-34, S-45, S-46, S-47, S-48, S-49, S-55, S-61, S-62, S-64).
20. The District’s 2009 ESY program at the private placement was appropriate, but, without a behavior support plan, the implementation of the ESY program resulted in a denial of FAPE. (See June 29, 2009 Interim Decision 10106-08-09-LS).

2009-2010 School Year

21. In the fall of 2009, the student returned to the private placement with the pendent IEP from November 2008. (P-13, S-36).
22. On September 23, 2009, the IEP team met to design the student’s program at the private placement for the 2009-2010 school year. The student’s mother did not attend the meeting, but the student’s father did. The student’s father approved the September 2009 IEP, which included a behavior support plan designed for implementation at the private placement. (S-61).

23. The parties stipulated that the individual providing speech and language services to the student in the 2009-2010 school year was not a certified speech and language therapist. Therefore, the parties stipulated that a compensatory education award would be fashioned as part of this decision for the speech and language services that the private placement was to provide under the terms of the IEPs governing the student's program in the 2009-2010 school year. (P-16, S-37, S-61; NT/November 20th at 1035-1039).

24. To the point where evidence was last presented on November 20, 2009, the student was making meaningful education progress in the 2009-2010 school year under the terms of an appropriate IEP in an appropriate placement. (S-61).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law.⁴ To assure that an eligible child receives a free appropriate public education,⁵ an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”⁶ ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for

⁴ 34 C.F.R. §§300.1-300.818; 22 PA CODE §§14.101-14.

⁵ 34 C.F.R. §300.17.

⁶ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

“significant learning.”⁷ More specifically, a student’s IEP must include specially designed instruction designed to meet the unique needs of the child and must be accompanied by any necessary related services to permit the child to benefit from the instruction.⁸ This specially designed instruction and related services must be delivered in the least restrictive environment (“LRE”) that is appropriate for the child, and a school district must make efforts to ensure that it is implementing an IEP in the LRE.⁹

In this case, it is easiest to consider the claims of the student’s mother year by year. In the 2007-2008 school year, the student was denied FAPE due to the tardiness of the District in preparing and implementing a behavior support plan. (FF 2,3,8,9,10). From the outset, the need to address the student’s behavior was recognized as the critical element in the student’s education program. (FF 2, 3). In the spring of 2007, as the IEP team designed the student’s initial program at the District, the need for a FBA was recognized and planned for. (FF 9). Yet it took four months for the District to complete the FBA (January 2008) and another three months for the FBA to be incorporated into a revised IEP (April 2008). (FF 9). In both of these instances, this is unacceptable. Indeed, the inconsistent behavioral progress of the student over the 2007-2008 school year bears out the fact that the lack of a behavior

⁷ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

⁸ Rowley; Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993).

⁹ Oberti.

support plan undermined the degree of progress that the student could make over that school year.

In the 2008-2009 school year, the student began the year in the District in a very problematic way. (FF 13). Still, the student's behavior support plan was in place and the factors at play at the outset of the school year (a change in classroom location and teaching personnel) account for many of the difficulties. (FF 12, 14). There was no denial of FAPE in September and October 2008. In November 2008, however, when the student began attending the private placement, the student again suffered from the lack of a behavior plan. (FF 15, 16, 17). The private placement was unaware that there was a behavior support plan in existence and, even though it attempted to justify its need to create a behavior support plan on its own terms, the end result was that the student was, once again, being educated without a behavior support plan as an explicit part of the IEP. (FF 16, 17, 18). Faced with an array of complex behavioral needs presented by this student, and the effect of those behavioral needs on the student's educational program, this is unacceptable. The student was denied FAPE as a result of this omission from November 2008 through the end of the 2008-2009 school year.¹⁰ (FF 19).

In the current 2009-2010 school year, the deprivation of FAPE continued until September 23, 2009 when the student's IEP (including a

¹⁰ The deprivation continued through the student's 2009 ESY program, but, as indicated, the interim decision of June 29th addressed that claim.

behavior support plan) was approved by the student's father. (FF 22). Since September 23, 2009, the student has been provided FAPE under the terms of the September 23rd IEP, excluding the stipulated denial of FAPE regarding the provision of speech and language services. (FF 23, 24).

In sum, then, for the reasons set forth above, the student was denied FAPE across various periods in the 2007-2008, 2008-2009, and 2009-2010 school years. These denials of FAPE are grounds for an award of compensatory education as discussed below.

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.¹¹ The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied a free appropriate public education.¹² The U.S Court of Appeals for the Third Circuit has held that a student who is denied a FAPE "is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem."¹³

In this case, the District knew explicitly as it began to design programming for the student that managing behaviors would be critical to the student's success. As the 2007-2008 school year began, the

¹¹ 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).

¹² Ridgewood; M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996).

¹³ M.C. at 397.

District knew it needed to conduct a FBA and develop a behavior support plan. Giving the District a month to complete classroom observations and another two weeks to prepare the FBA, design the behavior support plan, and convene the IEP team, the District should have had a behavior support plan in effect by October 15, 2007. Therefore, the compensatory education award for the 2007-2008 school year will cover a period from October 15, 2007 – April 16, 2008 (the date that a revised IEP with the behavior support plan was put into effect).

In the 2008-2009 school year, the student began attending the private placement on November 7, 2008. From that point on, the student was educated without an explicit, individualized behavior support plan. Here, there should be no exclusionary period for the private placement to design a behavior support plan. The District was under an obligation to make sure that the private placement had access to the behavior support plan that was part of the student's pendent IEP. Therefore, the compensatory education award for the 2008-2009 school year will cover a period from November 7, 2008 through the end of the 2008-2009 school year.

In the 2009-2010 school year, the student had no behavior support plan until September 23, 2009 when the student's father approved an IEP that included a behavior support plan.

Over all of these periods, however, the student will receive instruction that was/is reasonably calculated to yield meaningful

education benefit. In many cases the student showed progress over these periods, although the degree of that progress fluctuates. As such, not every hour of the instructional day will suffer, or be affected by, the inappropriate aspects of the IEPs regarding behavior. But behavior is such a major part of managing the student's educational environment that the flaws in the IEPs warrant a compensatory education award. Therefore, the compensatory education award will be calculated at a 50% rate.

As for the nature of the compensatory education award, the student's mother, and only his mother¹⁴, 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 student's mother.

There are financial limits on the mother's discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of 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, broken down on an

¹⁴ The award is limited to the discretion of the student's mother because of the father's implicit, and in some cases explicit, support for the District programming.

hourly basis, are the salary and benefits of the District employee who would have provided the services which were denied to the student.

Finally, the award of compensatory education will not be limited only to the school days that the student attended. The weight of the record clearly shows that the student's mother had concerns about the educational programming of the student, especially the omissions regarding behavioral programming. As such, the degree to which the student was not in attendance at school, even if the student's mother held the student out of school, will not be used to reduce the award.

An award of compensatory education will be fashioned accordingly.

CONCLUSION

The lack of a behavior support plan, as outlined above, in the District's IEPs for the 2007-2008, 2008-2009, and 2009-2010 school years amounted to a denial of a free appropriate public education for the student. These denials support an award of compensatory education for those flaws. The student's current program and placement, as outlined in the IEP of September 23, 2009, however, is appropriately designed and, as of November 20, 2009, was being appropriately implemented.

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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 a compensatory education award of hours equal to 50% of each school day for the following periods:

- October 15, 2007 through April 16, 2008;
- November 6, 2008 through the end of the 2008-2009 school year; and
- The start of the 2009-2010 school year through September 23, 2009.

Additionally, the student is entitled to a compensatory education award equal to every hour of speech and language programming in the student's applicable IEP from start of the 2009-2010 school year until the date on which a speech and language therapist, holding a certificate from the Pennsylvania Department of Education, begins to provide speech and language services to the student.

The nature, limits, and control of these hours are set forth above in this decision.

Finally, the student's current program and placement, as outlined in the IEP of September 23, 2009, is appropriately designed and, as of November 20, 2009, was being appropriately implemented.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

January 7, 2010