

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: Student

Date of Birth: xx/xx/xx

Date of Hearing: July 31, 2009

CLOSED HEARING

ODR Case # 9877-08-09-AS

Parties to the Hearing:

Central Greene School District
P.O. Box 472
Waynesburg, PA 15370

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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August 24, 2009

September 8, 2009

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (“student”) is a teen-aged student residing in the Central Greene 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. The parents requested reimbursement of privately funded related services due to alleged failure to provide a free appropriate public education (“FAPE”). The District maintains that it provided a FAPE to student at all times.

ISSUE

Are parents entitled to compensation and/or other remedies as the result of an alleged denial of a FAPE to the student?

FINDINGS OF FACT

1. The student has a primary diagnosis of Asperger’s Syndrome.
(Parents’ Exhibit [“P”]1, P-3).

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. From the time the student was referred for a multi-disciplinary evaluation (“MDE”) in 2nd grade in May 2003, issues related to peer interaction were a concern. (P-5).
3. The 2nd grade teacher reported: “[The student]² has some problems interacting properly with [the student’s] peers” and “Problems interacting with peers. Keeping...hands to [the student’s self]. Much better with adults.” (P-5 at pages 2, 3, 7).
4. The elementary guidance counselor noted in the 2nd grade MDE: “[The student’s] greatest difficulty (other than math) is relating to [the student’s] peers. [The student] does very well with adults, but does not even feel comfortable with [the student’s] peers— [the student] just doesn’t relate.” (P-5 at page 5, emphasis in the original).
5. The student’s elementary principal assessed as poor in “behavior is suitable for peer level” and “interacts positively with peers” in Student’s observation of the student for the 2nd grade MDE. (P-5 at page 6).
6. The parents’ input form included the following: in terms of skills the parents sought to have the school develop, they answered “social skills and dealing with bullying”; in terms of what the parents sought for the student’s educational experience, they answered, in relevant part, “to not feel so isolated”; in terms of

² The use of “student” rather than the student’s name or gender-identifying pronoun has been substituted by the hearing officer.

- other comments or concerns, they answered, in relevant part, “social skills”. (P-5 at page 10).
7. In November 2003, in 3rd grade, the student was diagnosed with Asperger’s Syndrome. (P-3).
 8. Parents still had concerns about bullying in the 2006-2007 school year, the student’s 6th grade year, indicating those concerns in a re-evaluation process in December 2006/January 2007. The parents often had conversations with District personnel and sent emails to an assigned informal mentor teacher and the student’s guidance counselor regarding peer interactions and bullying in [special interest] class and in the cafeteria during lunch. (P-3, P-6; Notes of Testimony [“NT”] at 32-33, 38).
 9. Parents testified that the student had behavior issues at home, including crying and isolation in the student’s bedroom. (NT at 37).
 10. The student’s father testified that similar patterns of behavior continued in the 2007-2008 school year, the student’s 7th grade year. The student’s father also testified that Student communicated often with the student’s guidance counselor in 7th grade. (NT at 39-41).
 11. District witnesses testified that they never saw the student being bullied. (NT at 74, 79-80, 82-83, 144).

12. In 7th grade, the student discontinued with [special interest] class but continued to pursue [special interest] through private lessons. (NT at 47-48, 65-66).
13. In January 2008, the student's individualized education plan ("IEP") recognized, in relevant part, the student's need for "social skills and interaction with [the student's] peers during non-structured time". (P-1 at page 6).
14. The student's IEP contained one goal, to "provide appropriate verbal and nonverbal responses to social situations". (P-1 at page 9).
15. Program modifications and specially designed instruction in the student's IEP include, in total, an agenda book, the ability to take necessary classroom breaks, extra time to complete assignments, and extra time for tests. (P-1 at page 10).
16. The student receives as a related service 30 minutes of speech and language therapy monthly. (P-1 at page 10).
17. The student received inclusion services in regular education provided by District special education staff. The student received resource room support in mathematics. The emotional support teacher also provided services to the student for social skills, including weekly lunch with the teacher in the teacher's office room. This teacher did not observe the student for peer interaction

issues in the educational environment. (NT at 71-72, 90-94, 131-132, 141, 144-149).

18. In the spring of 2008, the student wrote a private note about difficulties in school and mentioned [redacted] thoughts. The note was discovered in the student's backpack by parents. (P-7; NT at 43-44).

19. The parents did not share this note or its contents with the District. (NT at 44).

20. On May 5, 2008, the student was designated for homebound instruction for the remainder of the 2007-2008 school year as a result of "severe anxiety and depressive symptoms in the context of [the student's] diagnosis of Asperger's Syndrome". (School District Exhibit ["S"]-2).

21. The student withdrew from the District in July 2008 and attended a Pennsylvania cyber charter school in the 2008-2009 school year. The student continues to attend the cyber charter school in the 2009-2010 school year (S-3; NT at 55-56).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE. The substantive provision of a FAPE requires that a student eligible under the IDEIA have an IEP that includes measurable annual goals that meet the child's needs as a result of

Student's/her disability (34 C.F.R. §300.320(a)(2)) and a statement of the program modifications, specially designed instruction, related services, supplementary aids and services that are required to allow the child to advance appropriately toward attaining the annual goals (34 C.F.R. §300.320(a)(4)). These goals and instruction/related services/supports must be reasonably calculated to allow to yield meaningful education benefit. Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

Here, the District's IEP of January 2008 is inadequate as to the goal and instruction/related services/supports. In fact the IEP is not reasonably calculated to yield meaningful education benefit to this student.

The IEP's only goal—"(The student) will provide appropriate verbal and nonverbal responses to social situations." (FF 14)—is marginally inappropriate. But taken in conjunction with other deficits in the IEP and the student's programming, the goal is a denial of a FAPE. First, there is no indication that this is a peer-oriented goal, when that is clearly the socialization need of the student. (FF 2, 3, 4, 5, 6, 8, 13, 17). Second, even though the special education teacher assigned to monitor these needs testified as to her monitoring of the goal, none of her interactions with the student were observations of peer interaction; all of her progress monitoring would have involved her own weekly adult/child interaction during the lunch period. (P-17). Third, the student received intensive

support in pullout mathematics—a full period for two out of every three school days (FF 17, NT at 146-147), yet there is no goal for mathematics.

Deficiencies in the specially designed instruction and related services also amount to a denial of a FAPE. The student has four instructional modifications. (FF 15). One, the agenda book, is an assignment-tracking planner that is provided to every student in the school (NT at 101); by definition, it is not specially designed instruction individualized to this student's needs. The three remaining instructional modifications—the ability to take classroom breaks to focus on classwork, extra time for assignments, and extra time for tests—are not related in any way to the goal in the IEP, or to the student's socialization needs in general. (FF 15). There was no testimony from the District that the monthly, 30-minute related service of speech and language therapy was related to the IEP goal. Indeed, the student's special education teacher testified that she did not coordinate or confer with the speech and language therapist on any of the student's social skills training. (NT at 95).

In sum, the student had an inappropriate goal related to long-standing, and District-recognized, needs in peer interaction and socialization. There was no specially-designed instruction related to this goal (whereas there was intensive pullout time devoted to an area where the student apparently had no identified need and no goal). The student was given 30 minutes of speech and language therapy once a month and

a weekly lunch with a special education teacher to address the student's needs. This is wholly inadequate and denial of a FAPE.

Remedies. The parents requested reimbursement for out-of-pocket expenses for related services. The District argues in its closing that this remedy is unavailable for the 2008-2009 and 2009-2010 school years since the student is enrolled in a Pennsylvania cyber charter school and, as such, there is no valid claim for reimbursement as these services are available to the parents under 22 PA Code §§ 711.1, *et seq.* I agree with the District that any out-of-pocket expenses incurred by the parents after July 18, 2008, the date of enrollment in the cyber charter school (FF 21), are not recoverable in this matter.

Still, parents are entitled to reimbursement where they have had to provide for the student themselves what the District should have provided as part of an appropriate education program. *See generally* Florence County Dist. Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985). Therefore, the District will be ordered to provide reimbursement for parents' out-of-pocket expenses related to any speech and language, psychological, anxiety, and/or social skills related expenses incurred during the 2006-2007 and 2007-2008 school years. Additionally, given the student's need to drop out of [special interest] class in the 2007-2008 school year due to bullying and inappropriate peer interaction (FF 12),

the District will be ordered to provide reimbursement for parents' out-of-pocket expenses related to the student's private [special interest] instruction from the date the student left the [special interest] class through the end of the 2007-2008 school year.

The parents did not make an explicit claim for compensatory education. This hearing officer noted at the outset of the proceedings that compensatory education is an equitable remedy that remained awardable even without an explicit claim by the parents. (NT at 18-19; see 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 U.S Court of Appeals for the Third Circuit has held that 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 FAPE. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). 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." M.C. at 397.

In this case, the District has known from the student's pre-identification experiences with the student, and from its initial provision of special education to the student, that the student has had prominent peer interaction/socialization needs. (FF 2, 3, 4, 5, 6, 7, 8). While no

prior IEPs were made part of the record in these proceedings, the District has had long-standing knowledge of the student's needs in these areas. Therefore, the District knew or should have known at the outset of the 2006-2007 school year that the student required a measurable goal or goals in these areas. Furthermore, it should have known that its programming was not yielding meaningful education benefit to the student given the consistent concerns voiced by parents to multiple District personnel. (FF 8, 9, 10, 12, 13).

Periods in the District's middle school are approximately 45 minutes. (NT at 146-147). Therefore, the District will be ordered to provide 90 minutes of compensatory education per school week for the 2006-2007 and 2007-2008 school years to reflect two periods per week of individualized instruction in peer socialization/social skills. Furthermore, the District will be ordered to provide 22.5 minutes of compensatory education for every [special interest] class the student attended in the 2006-2007 and 2007-2008 school years to reflect the denial of FAPE in that class due to bullying/inappropriate peer interactions in that specific class.

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 related to the student's peer interaction/social skills needs. 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 parents.

There are financial limits on the compensatory education award. The costs to the District for compensatory education award 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 should have provided services to the student.

An award of compensatory education will be fashioned accordingly.

CONCLUSION

The District denied the student a free appropriate public education in the provision of services relating to needs in peer interaction/social skills. Where appropriate, reimbursement of out-of-pocket expenses will be ordered. And compensatory education will also be awarded as a result of these denials.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the parents of the student are entitled to reimbursement for parents' out-of-pocket expenses, verified by receipts and/or other proofs of payment, related to any speech and language, psychological, anxiety, and/or social skills related expenses incurred during the 2006-2007 and 2007-2008 school years. Additionally, parents are entitled to reimbursement for parents' out-of-pocket expenses, verified by receipts and/or other proofs of payment, for expenses related to the student's private [special interest] instruction from the date the student left the [special interest] class through the end of the 2007-2008 school year.

Furthermore, the student is entitled to an award of compensatory education, subject to the nature and limits set forth above, as follows:

- 108 hours (90 minutes per school week x 36 school weeks for the 2006-2007 and 2007-2008 school years); and

- 22.5 minutes for every [special interest] class the student attended in the 2006-2007 and 2007-2008 school years.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

September 8, 2009