

*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: N.M.

Date of Birth: xx/xx/xx

Dates of Hearing:

July 1, 2009

August 25, 2009

September 9, 2009

September 10, 2009

**CLOSED HEARING**

ODR Case # 9957-08-09-KE

Parties to the Hearing:

Mr. & Mrs.

Central Dauphin School District  
600 Rutherford Road  
Harrisburg, PA 17109

Date Record Closed:

Date of Decision:

Representative:

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October 19, 2009

November 3, 2009

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student (“student”) is an elementary school age student residing in the Central Dauphin School District (“District”) who, as student with autism, has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup>. The parents have requested compensatory education for a period from roughly November 2008 – March 2009 and tuition reimbursement of a privately funded education placement due to an alleged failure to provide a free appropriate public education (“FAPE”). Specifically, parents allege that the District has denied the student an appropriate education during the student’s time at the District. Furthermore, the parents claim that the District’s proposed program for the current 2009-2010 school year is inappropriate, necessitating a private placement. The District maintains that it has acted appropriately towards the student and, at all times, has provided the student with a FAPE.

## **ISSUES**

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<sup>1</sup> 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.

Did the District provide a free appropriate public education to the student in from October 2008-March 2009?

Are the parents entitled to tuition reimbursement for the private placement of the student in the 2009-2010 school year?

### **FINDINGS OF FACT**

1. The student, diagnosed with autism, has been a student in the District since entering the District in the 2005-2006 school year. The student was placed in a full-time autistic support classroom. (Joint Exhibit ["J"]-3, J-7, J-20).
2. The student continued to attend autistic support classes in the District in the 2006-2007, 2007-2008 and 2008-2009 school years. (J-8, J-9, J-10, J-11, J-12, J-13; Notes of Testimony ["NT"] at 573-574, 608).
3. Behavior issues have always been a concern of the student's programming. Throughout the student's years at the District, these behaviors have often interfered with the student's ability to learn. (NT at 575-578, 635-638).
4. None of the student's individualized education plans ("IEPs") in 2006-2007 or 2007-2008 included any District data-gathering on behavior, a functional behavior assessment, or a behavior plan. (J-8, J-9, J-10, J-11).
5. By the 2008-2009 school year, the student's individualized education plan ("IEP") included goals in fine motor skills, speech and language, mathematics, reading, and behavior. There was, however, no behavior management plan included in the IEP. (J-11).
6. The student's progress in the 2008-2009 school year was impeded by the student's behaviors.
7. The student's academic program at the District was the competent learner model ("CLM"), a curriculum designed for students on the autism spectrum. The CLM involves behavioral goals and instruction across "repertoires", which are sets of skills (such as participating, problem solving, listening, observing) necessary for

students to engage their environments and learn from/within those environments. (J-76; NT at 58-66).

8. The student takes prescribed medication. In November 2008, the student's medications changed and, within those various medications, underwent numerous dosage changes. The student's doctor and mother testified that over the period of November 2008 – March 2009, the student was switched among four different medications, with up to fifteen medication/dosage changes. (J-73; NT at 231, 543-544).
9. Over the period November 2008 – March 2009, the student's behaviors intensified. The District staff attributed these behavioral changes, some of which had not been present before, to the changes in medication. (NT at 699-714).
10. In March and June 2009, the IEP team met. The proposed IEP included a behavior management plan. (J-12, J-13).
11. After the March 2009 IEP meeting, the parents began to investigate a private placement at a school specializing in services to students with autism. (NT at 462-463).
12. The student enrolled at the private school for the 2009-2010 school year. (NT at 72-80).

## **DISCUSSION AND CONCLUSIONS OF LAW**

To assure that an eligible child receives a free appropriate public education, an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” (34 C.F.R. §300.17; Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (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 (3<sup>rd</sup> Cir. 1999)). 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. (Rowley; Oberti v. Board of Education, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993)).

The District has acted in good faith in attempting to provide IEPs that are reasonably calculated to yield meaningful education benefit. The parents do not resent the District or hold animosity toward it. Both parties have a genuine concern for the educational well-being of the student.

*2008-2009 School Year.* Having set for the goodwill between the parties regarding the student's programming, the student's program for the 2008-2009 school year is inappropriate. Clearly, the student's primary issue in educational settings is behavioral. (FF 3). The student's 2008-2009 IEP contains a behavioral goal but no behavior plan even though the IEP indicates that the student exhibits behaviors that impede the learning of the student and/or others. (FF 5). Given the student's needs, this serious defect in the student's education program is enough, in itself, to hold that the IEP for the 2008-2009 school year was not reasonably calculated to yield meaningful education benefit to the student. And, indeed, the student's progress in the 2008-2009 school year was impeded by the lack of any functional behavior assessment or behavior plan. (FF 6).

Over the period of November 2008 – March 2009, the behaviors intensified, and the record supports the notion that this change in behaviors was related to some degree to the student’s medications. (FF 8). The District argues that the medication issue underpins the student’s behavioral difficulties in this period. While the medication issues play some role in the student’s behavior over November 2008 – March 2009, the fact remains that the District had no plan in place, or any functional behavior assessment underway, to address the student’s behavior on any level.

Accordingly, an award for compensatory education will be fashioned for the deprivation of a FAPE in the 2008-2009 school year.

*2009-2010 School Year.* In March 2009, the student’s IEP team met and, for the first time, a behavior plan was included, as well as behavioral data/reporting as part of the student’s present levels of functional performance. (FF 10). The IEP team met again in June 2009, and behavior was part of those discussions. Here, the District has remedied the most profound deficit in its educational programming for the student. By the time these meetings took place and the proposed programming was being considered, however, the parents’ estimation of the District’s program had reached a point where they were considering a private placement. (FF 11, 12). Still, the District’s proposed IEPs of March/June 2009 were reasonably calculated to yield meaningful

education benefit. Accordingly, there will be no remedy for tuition reimbursement.

*Remedies.* Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student a FAPE. (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 a FAPE. (Ridgewood; M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996)).

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.” (M.C. at 397).

Parents have claimed compensatory education for a period between November 2008 and March 2009. The weight of the record indicates, however, that the District was not programming for the student’s primary need, the need to address behavior so that other meaningful learning could take place. In fact, from early on when the student joined the District, it knew or should have known that explicit data-gathering, a functional behavior assessment, and a behavior plan should be part of its programming.

Therefore, as part of the equitable nature of compensatory education, the award is calculated as follows:

Parents' complaint was filed on April 15, 2009. Therefore, parents' claim for compensatory education will be recognized as ranging back to April 15, 2007. (See 34 C.F.R. §300.507(a)(2)). A school day for this student would be, at a minimum, five hours. (22 PA Code §11.3(a)). The District's omissions in behavioral planning for the student did not entirely deprive the student of a FAPE; at times, there was educational progress. But such progress was often bogged down, if not submarined, by behavior issues. Thus, it is the considered opinion of this hearing officer that the daily compensatory education award that reflects the deprivation experience by the student amounts to two hours per school day.

The District offered an appropriate program through its notice of recommended educational placement of March 2, 2009. (J-25). So, a compensatory education award will be fashioned to reflect two hours per school day from April 15, 2007 through March 2, 2009.

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 any IEP. These hours may occur after school, on



weekends and/or during the summer months, when convenient for the student and parents.

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 should have provided services to the student.

There is, however, no remedy for 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. (34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi); Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985)).

A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated implicitly 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. Here, the District proposed an appropriate IEP in March 2009. Parents certainly would disagree. But

the IEPs of March/June 2009 are reasonably calculated to yield meaningful education benefit. As such, the analysis ends at that point, and there is no need to continue the analysis through its second and third steps.

### **CONCLUSION**

The student has been denied a free appropriate public education as the result of District educational programming that did not account for or address in a meaningful way the student's behavioral needs. Compensatory education will be awarded. As of March 2, 2009, however, the District had proposed an educational program reasonably calculated to yield meaningful education benefit to the student. Accordingly, tuition reimbursement will not be awarded.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student was denied a free appropriate public education. The student is awarded compensatory education in an amount as reflected below:

- 2 hours per day for every school day from April 15, 2007 through March 2, 2009.

There is no award of tuition reimbursement.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

November 3, 2009