

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: A P

Date of Birth: xx/xx/xxxx

Date of Hearing: September 16, 2009

CLOSED HEARING

ODR Case # 00193-09-10-KE

Parties to the Hearing:

Ms. Janet McCauslin
Central Dauphin School District
600 Rutherford Road
Harrisburg, PA 17109

Representative:

Phillip Drumheiser, Esquire
P.O. Box 890
Carlisle, PA 17013

Sean Lochinger, Esquire
1 South Market Square
P.O. Box 1146
Harrisburg, PA 17108-1146

Date Record Closed:

March 15, 2010

Date of Decision:

March 30, 2010

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

("student") is a 13-year old student residing in the Central Dauphin 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 student has been identified as a student with an emotional disturbance. Parent claims the student has been denied a free appropriate public education ("FAPE") since the student's enrollment in the District in December 2006. The District counters that it has provided FAPE to the student at all times.

For the reasons set forth below, I find in favor of the parent and student.

ISSUE

1. Has the student been denied a FAPE by the District?
2. If so, is compensatory education owed by the District and in what amount?
3. Is the parent entitled to an independent educational evaluation of the student?

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. 175-176.

FINDINGS OF FACT

1. In September 2004, the student was identified by another school district as a student with an emotional disturbance. (School District Exhibit ["S"]-1).
2. The student continued to attend another school district until December 2006, when the student enrolled in the District. (Parent Exhibit ["P"]-5; S-1A, S-45; Notes of Testimony ["NT"] at 283).
3. In December 2006, when the student came to the District, the student had an individualized education plan ("IEP") from the other school district which had been revised in February 2006. This February 2006 IEP contained goals in behavior, math, spelling, and reading. (S-2).
4. The District created an intake IEP in January 2007 with goals in written expression, math, reading, and behavior. (S-44).
5. The student was placed in a full-time emotional support classroom at a District elementary school, spending no time in the regular education environment. (S-44 at page 21).
6. The student was placed in an aspect of the District's emotional support services called 'special therapeutic educational programming for success', or STEPS. The STEPS program is a self-contained program that offers therapeutic services and support to

students with emotional support needs. Whenever a student comes to the District with a full-time emotional support placement, that student is automatically assigned to the STEPS program at a certain elementary school, or a certain middle school, or a certain high school where the STEPS classrooms are located in the District. (P-19; NT at 795-796).

7. The therapeutic services and support are provided to students in individual and group counseling sessions by counselors from a local community mental health services provider. (P-16, P-17, P-19).
8. In May 2007, the student's IEP team met to revise the student's IEP in anticipation of the student's transition to the middle school in the upcoming 2007-2008 school year. There was no functional behavior assessment ("FBA") as part of the process. (S-4).
9. In May 2007, the District issued a notice of recommended educational placement ("NOREP") recommending a full-time emotional support placement. (S-5).
10. For the 2007-2008 school year, the student was placed in the STEPS program at a District middle school, receiving the same therapeutic services and support. (S-5; NT at 39, 44).
11. A major component of the STEPS program is a points-based behavior system where students can earn up to 2 points per period in five different domains (tasks, area [physical location], language,

interactions, and directions). There are ten periods per day, so the maximum total points are 100 per day. By earning certain numbers of points each day over consecutive days, students can move in the STEPS system from Level I in (no privileges) to Level V (a variety of rewards). At Level V, the student may be considered for transition to regular education. (P-20).

12. In September 2007, the District re-evaluated the student and issued a re-evaluation report (“RR”). The RR was based on a records review and included no testing or assessments. The student was still identified as having an emotional disturbance. (S-7).
13. The student had a difficult time adjusting to the middle school setting, exhibiting behaviors that twice necessitated that the classroom be cleared. (S-7 at page 2, S-42 at page 2).
14. In January 2008, based on the RR, the student’s IEP was revised. The student had goals in behavior, communication, and socialization. The academic goals in written expression, mathematics, and reading were removed. The student spent no time outside of the emotional support classroom. The NOREP issued with the IEP indicated that no options other than full-time emotional support with a therapeutic component were considered. There was no FBA as part of the process or IEP. (S-11, S-12).

15. In September and October 2008, the crisis plan in the student's IEP was revised. (S-16, S-20).
16. The student's IEP was revised in January 2009. The student had goals in behavior, communication, and socialization. There were no academic goals in the IEP. For the first time, the student's IEP contained a behavior support plan which was supported by the type of structure and data found in a FBA. The student was included in the regular education setting for physical education/health and creative arts. (S-25).
17. In May 2009, the student was involved in a behavior incident involving another student that resulted in an expulsion from the District. (S-34).
18. In September 2009, the parent obtained an independent psychological evaluation. (P-3).
19. The District offers itinerant and supplemental emotional support services that lie outside of the STEPS structure. (NT at 248-254, 793).
20. The student's teacher and the District's director of special education testified that they did not think the student was "earning" the student's way into regular education. (NT at 73, 708).
21. There is no way for the student to transition from full-time emotional support in the STEPS program without rising to Level V within the STEPS points system. (P-19, P-20; NT at 72-73).

22. Nothing in the record indicates that the student has had behavioral difficulties in the regular education settings of health and physical education.

DISCUSSION AND CONCLUSION OF LAW

Denial of FAPE

To assure that an eligible child receives FAPE,² an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”³ “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning”,⁴ not simply *de minimis* or minimal education progress.⁵

Moreover, both federal and Pennsylvania law, at require that the placement of a student with a disability be in the least restrictive environment (“LRE”).⁶

Pursuant to the mandate of 34 C.F.R. §300.114(a)(2):

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or

² 34 C.F.R. §300.17.

³ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

⁴ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

⁵ M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

⁶ 34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993).

severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

In this case, the District has denied a student a FAPE because it has not educated the student in the LRE. From the moment the student came into the District, the student was assigned to the STEPS classroom. (FF 6). Once placed in the STEPS classroom, there is no way to transition out of the STEPS classroom unless a student earns his or her way out using the points system. (FF 11, 21). The points system is not individualized in any way—the assignment of points, the overall daily points totals for progress, and the privileges earned are the same for every student in the class. (FF 11). As an indication of how highly restrictive the STEPS classroom is, at level V, some of the privileges include stepping out into the hall during bell breaks, time in the gym (if earned), and lunch outside of the STEPS classroom once every two weeks. (FF 11). The STEPS classroom is highly restrictive, the most restrictive setting one can imagine that is still school-based.

That is not to say that it might not be appropriate for the student. But where the District has failed, and where it has denied the student a FAPE, is that, by and large, it has delivered instruction to the student in no other setting and has not attempted to employ supplementary aids and services outside of the STEPS program that might make the student’s placement less restrictive. First, this is problematic because placement in the STEPS

classroom is a matter of policy. (FF 6). Second, students then find themselves in a highly restrictive placement where they must earn their way out. (FF 19, 20, 21). The District's position can be reduced to 'if the student earns his way out then the student's placement becomes less restrictive'. This has the mandates of the law exactly backwards: a student should be placed in the LRE and only if the student's program cannot be appropriately implemented (or, in this case, if the student's behavior interferes with the learning of others) should a more restrictive placement be considered.

Can the student in this case be educated outside of the STEPS program with supplementary aids and services? It is an unanswerable question because the District has never attempted it, even though it provides a spectrum of supports to students with emotional support needs. (FF 19). Where the District has attempted limited inclusion in physical education and health classes, however, there is nothing in the record to indicate that the student's behavior have interfered with the student's learning or the learning of others. (FF 22).

In sum, then, the District's approach to the student's placement has been overly restrictive from the time the student entered the District. There are, however, other flaws in the District's programming for the student.

First, the record is clear that the student requires some degree of behavior support. (FF 1, 3, 4, 8, 12, 14, 15, 16, 17). Yet the student's IEP did not contain the types of interventions and planning one expects from a FBA until January 2009, over two years since the student came to the District. (FF

16). It is still not clear that the District has performed a comprehensive FBA. Still, even the concept of functional behavior assessment was not present in the District's process for years.

Second, the student came to the District with academic goals in math, spelling, and reading. (FF 3). The District initially programmed for academic goals in written expression, reading and math. (FF 4). By January 2008, however, academic goals evaporated from the student's programming and have not returned. (FF 14, 16). There was no progress monitoring on the academic goals at any time.

Third, the student has been with the District for nearly three and a half years. (FF 2). The District has never formally evaluated the student using any testing or assessment. Indeed the student has been serviced by the District and by the student's previous district without any formalized assessment since September 2004. (FF 1). The District has never formally assessed the student and performed only a paper review of the student's file in its sole evaluation. (FF 12). While none of that is *per se* violative of Pennsylvania or federal special education law, it comports with the record that the District felt it understood the child and was content to let the child stay in the STEPS classroom until the student earned a way out.

Accordingly, there will be an award of compensatory education.

Compensatory Education

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.⁷ 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.⁸ 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.”⁹

Here, I find that the District was not prepared to provide a FAPE to the student in the LRE from the outset of the student’s enrollment at the District in December 2006. (FF 2). Claims on behalf of students, however, are limited to two years from the date the complaint is filed, unless a family can show that the school district misrepresented or withheld information related to the education of the student that prevented the family from pursuing a claim through due process.¹⁰ Here, the District did not engage in any misrepresentation or withholding of information that would support extending the two-year window beyond July 1, 2007, which is two years before the parent filed a complaint.

Therefore, the student will be awarded 5.5 hours of compensatory education for every school day the student attended school from July 1, 2007 until the

⁷ 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).

⁸ Ridgewood; M.C..

⁹ M.C. at 397.

¹⁰ 34 C.F.R. §300.511(f).

student was excluded from the school environment as the result of the disciplinary incident in May 2009.¹¹ (FF 17).

As for the nature of the compensatory education award, the parent 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 parent's discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs, or to any lump-sum the parties might decide upon to settle the compensatory education claim. The costs to the District of providing the awarded hours of compensatory education, or the lump-sum, 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.

An award of compensatory education will be fashioned accordingly.

¹¹ The figure is based on the Commonwealth's minimum school day requirements for 7th-12th graders. 22 PA Code §11.3.

Independent Evaluation

The parent has solicited an independent psychological report. Therefore, the parent has an independent evaluation and expert voice in the process. The order below will require the District to pay for the independent report already obtained by the parent and will not require that the District fund another independent evaluation.

CONCLUSION

The District has denied the student a FAPE because it has never attempted to educate the student in the LRE with supplementary aids and services. Additionally, the District has denied the student FAPE due to prejudicial flaws in the student's IEPs. The student is entitled to compensatory education and to payment for the independent evaluation obtained by the parent.

•

ORDER

In accord with the findings of fact and conclusions of law as set forth above, parent is awarded compensatory education, subject to the nature and limits set forth above, in an amount equal to 5.5 hours for every school day attended by the student from July 1, 2007 through the date that the student was excluded from the school environment due to the behavior incident of May 2009.

Additionally, parent is also entitled to reimbursement for the cost of the evaluation submitted by her psychologist and marked for admission to the record at P-3.

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

March 30, 2010