

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: CC

Date of Birth: xx/xx/xxxx

Dates of Hearing:
June 23, June 26 & September 3, 2009
March 22, 2010

CLOSED HEARING

ODR Case # 9849-08-09-LS

Parties to the Hearing:

Sullivan County School District
101 East Main Street
Dushore, PA 18614

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Judith Gran, Esq.
Reisman Carolla Gran
19 Chestnut Street
Haddonfield, NJ 08033

Jennifer Donaldson, Esq.
Jane Williams, Esq.
Sweet, Stevens, et. al.
P.O. Box 5069
331 Butler Avenue
New Britain, PA 18901

April 19, 2010

May 4, 2010

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a 13-year old student residing in the Sullivan County 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 mental retardation. Parent claims the student has been denied a free appropriate public education (“FAPE”) since the student’s enrollment in the District in the fall of 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.

STIPULATION

The parties have stipulated that any compensatory education award will be limited to a period after March 21, 2009.

ISSUE

1. Has the student been denied a FAPE by the District?

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. If so, is compensatory education owed by the District and in what amount?

FINDINGS OF FACT

1. The student has Down Syndrome and, under the terms of IDEIA, has been identified as a student with mental retardation. His intellectual ability has been assessed in the extremely low range of cognitive functioning. (Parent's Exhibit ["P"]-4; School District Exhibit ["S"]-6).
2. The student moved with parent from [Redacted state] into the District in the summer of 2006. The student enrolled in the District in July 2006. (S-3; Notes of Testimony ["NT"] at 356-359).
3. Following a meeting in the summer 2006 with the District's director of special education that included a review of the student's individualized education plan ("IEP") from [Redacted state] , the District recommended a placement in a life skills classroom at an elementary school near the student's home. The District also requested, and received from parent, permission to evaluate the student. (P-1; S-2, S-4, S-6; NT at 808-809).
4. The student began to attend the District's elementary school placement. The student exhibited problematic behaviors during the first week of school. By August 30, 2006, the District had

- contacted a behavior specialist to observe the student and make recommendations. (P-2; NT at 362-363).
5. The student's teacher indicated that she would no longer teach the student. Thereafter, the student remained at home until the IEP team could meet. The District began to discuss with the parent an out-of-District placement, including a school visit to another school that was some distance away from the student's home. (NT at 365-369).
 6. On September 6, 2006, the behavior specialist issued her observation summary. It included nearly one page of recommendations for the student, all of which could have been implemented in the student's elementary school. The behavior specialist's included the offer to formulate a behavior management plan based on further data-gathering. No behavior plan was pursued by the District. (P-3).
 7. On September 11, 2006, the District issued its evaluation report. (P-4; S-6).
 8. On September 11, 2006, the District recommended a new educational placement, a full-time life skills placement run by the intermediate unit ("IU") at a classroom in another school district. The parent was told that the District needed to approve the recommended educational placement even though the IEP team

had not yet met and an IEP had not yet been developed. (P-6; NT at 370-372).

9. On September 15, 2006, the IEP team met. The parent was told that the District could not offer a program for the student at the District. The IEP team did not discuss how the student might be accommodated in the District. The parent approved the educational placement even though it was clear that she wanted the student to remain in the District. (NT at 370-372).
10. Even though the student was in elementary school, and issues with the student's behavior in the regular education environment at the elementary school underscored all of the complaints about the student, no regular education student attended the IEP meeting. (P-2, P-7; S-8).
11. The September 2006 IEP indicates that the student does not exhibit behaviors that impede the student's learning or the learning of others, yet the present levels of behavior in the IEP indicate that there were significant problematic behaviors in the school environment. (P-7; S-8).
12. The student's September 2006 IEP includes three goals—letter identification, number identification, and printing of the student's name. (P-7; S-8).
13. In the 2006-2007 school year, the student's behavior continued to be challenging in the IU classroom, including acts of

aggression toward the teacher. There was no functional behavior assessment or the drafting of a behavior support plan. (P-7, P-9, P-10; S-8; NT at 179-180, 263-264, 375-377, 921, 930-931).

14. The student was not assigned an individual aide during the 2006-2007 school year, either at the District elementary school or at the IU classroom. (NT at 375-376).

15. For the 2007-2008 school year, the student remained in the IU classroom. The IEP team met in September 2008 to design the student's IEP for the 2007-2008 school year. This IEP indicated that the student exhibited behaviors that impeded the student's learning and the learning of others. There was no functional behavior assessment and no behavior support plan. (P-14; S-12).

16. The September 2007 IEP had three academic goals—identifying and reading kindergarten sight words, number identification, and printing of the student's name. The IEP contains two speech and language goals. The IEP contains a behavior goal to “comply with adult requests”. (P-14; S-12).

17. In the spring of 2008, the parent was active in attempting to transition the student back to the District, or at least closer to home. Again, discussion of an aide came up. The District informed the parent that the parent needed to initiate a contact with the regional mental health/mental retardation agency for an aide. The

student was ineligible for support through the agency. The District did not discuss use of a District aide. (NT at 373-375).

18. In May 2008, the parent requested that the IEP team meet to discuss a transition of the student to the District from the IU classroom for the 2008-2009 school year. (P-26).

19. On May 28, 2008, the District issued a re-evaluation report which indicated that the student continued to exhibit problematic behaviors. (P-27; S-19).

20. The IEP team met in July 2008 to discuss the student's transition from the IU classroom to a middle school placement. The District recommended a placement in a middle school IU classroom in another school district approximately one hour away. Parent was told that this pattern held—from the IU elementary classroom to the IU middle school classroom—for many students. The District indicated to parent that it did not have a life skills classroom and so that it could not educate the student. (P-29, P-30; S-23, S-25; NT at 250-252, 341-343, 377-378).

21. The July 2008 IEP contains three academic goals—identifying kindergarten sight words, number identification, and printing three word sentences. The IEP contains two speech and language goals. The IEP contains a behavior goal to “comply with adult requests”. (P-29, S-23).

22. The student began to attend the IU middle school classroom for the 2008-2009 school year. (P-29; S-23; NT at 373).
23. In February 2009, a behavior support plan was finally produced. (P-33; S-30).
24. A functional behavior assessment was conducted in order to design a behavior support plan. Both are inadequate. The functional behavior assessment is flawed in that the specific behavioral antecedents involving social behavior and being asked if the student has done something wrong are not concrete and identifiable. The behaviors of concern involving social skills and truth-telling imply cognitive abilities that the student may not have. The behaviors of concern involving “working loudly” or “us(ing) physical aggression” are not specific, objective behaviors that an observer can uniformly recognize. The perceived function of behaviors “to avoid reflection of self improvement” again imply cognitive abilities that the student may not have. (P-33; S-30).
25. Behavioral goals include the student listing or stating coping/problem-solving skills, or social skills when presented with fictional social/academic situations. These goals are academic and not functional; the goals imply cognitive abilities that the student may not have, and, even if that were the case, there is no programming to generalize the instruction on the goal into a functional classroom environment. (P-33; S-30).

26. The student is instructed in these behavioral goals in an office outside of a classroom environment. The student's classroom teacher and the emotional support teacher providing the instruction on the goals do not coordinate their instruction on social skills. (S-27; NT at 459-461, 712, 755-759).
27. Although not specifically addressed on the record, there is no indication that the student has attended any other program than the IU middle school classroom in the 2009-2010 school year.

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”), considering the full range of supplemental aids and

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).

services that would allow a student to receive instruction in the 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 severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

Additionally, to comply with LRE mandates, the school district must ensure that “unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.”⁷

Pennsylvania special education regulations mirror this emphasis on LRE. Where a student “can, with the full range of supplementary aids and services, make meaningful education progress on the goals in...the IEP”, a school district cannot require separate schooling for a student.⁸ Similarly, “(a) student may not be removed from...(a) placement in a regular education classroom solely because of the nature or severity of the student’s disability, or solely because educating the student in the regular education classroom would necessitate additional cost or for administrative convenience.”⁹

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).

⁷ 34 C.F.R. §300.116(c).

⁸ 22 PA Code §14.145(3).

⁹ 22 PA Code §14.145(4).

In this case, the District has denied a student a FAPE because it has not educated, or even attempted to educate, the student in the LRE. Within one week of the student entering the District, the student's behavior was seen as problematic. (FF 2, 3, 4). Within two weeks of the student entering the District, the student was being excluded by request of District personnel, and the District had already prepared a recommendation that the student attend a much more highly restrictive program in an IU classroom in another school district. (FF 5, 7, 8). The District never considered any supplementary aid or service to address the student's behavior; within two weeks of enrollment, the District's goal was to exclude the student from District classrooms, and the District pursued actions to effect that. (FF 4, 5, 6, 7, 8, 9, 10, 11).

Thereafter, the student languished in a highly restrictive placement where the District continued its inaction on the student's behavior for almost 2.5 years. (FF 13, 14, 15, 16, 17, 18, 19, 20, 21). Not until February 2009 were the student's behaviors addressed through a functional behavior assessment and behavior support plan. (FF 23). Even these belated interventions were inadequate. (FF 4, 25, 26).

Whether or not the student can make progress on IEP goals in a District placement with supplemental aids and services is not knowable because the District never attempted it. The District relied on the assertion that because it did not have a labeled "life skills classroom", it could not educate the student. (FF 20). This is a fatal misunderstanding on two levels: One, a placement is not a location, it is a constellation of modifications,

adaptations, aids, services and supports for the student, and for school personnel. Two, the District is required by law to attempt to utilize these modifications, adaptations, aids, services and supports to educate the student in the LRE before recommending that the student be placed in a more highly restrictive setting.

Here, the District failed from the outset to attempt to educate the student within the District with supplementary aids and services. Based on the student's behavior needs, which are directly attributable to the student's disability, the District sought to exclude the student from the District and place the student in a more restrictive placement.

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.¹⁰ 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.¹¹ 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

¹⁰ 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).

¹¹ Ridgewood; M.C. .

deprivation, but excluding the time reasonably required for the school district to rectify the problem.”¹²

Here, I find that the District has denied the student a FAPE since the student’s enrollment in the District in September 2006. By stipulation, the parties agreed that any compensatory education award would be limited to a period after March 23, 2007.

Therefore, the student will be awarded 5.0 hours of compensatory education for every school day the student attended school from March 23, 2007 through the end of the 2006-2007 school year and the 2007-2008 school year.¹³ The student will be awarded 5.5 hours of compensatory education for every school day the student attended school in the 2008-2009 school year and for every school day the student has attended in the 2009-2010 school year.¹⁴

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.

¹² M.C. at 397.

¹³ The figure is based on the Commonwealth’s minimum school day requirements for 1st-6th graders. 22 PA Code §11.3.

¹⁴ The figure is based on the Commonwealth’s minimum school day requirements for 7th-12th graders. 22 PA Code §11.3.

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.

CONCLUSION

The District has denied the student a FAPE because it sought, almost immediately upon enrollment, to exclude the student from education within the District and subjected the student to education outside of the LRE. Compensatory education will be awarded.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, compensatory education is awarded, subject to the nature and limits set forth above, in an amount equal to 5.0 hours for every school day attended by the student from March 23, 2007 through the end of the 2007-2008 school year and 5.5 hours for every school day attended during the 2008-2009 and 2009-2010 school years.

Within 10 calendar days of the date of this order, the student's IEP team is ordered to convene to plan for the student's return to the District. Specifically, the IEP team, in drafting the student's IEP for the 2010-2011 school year, will consider all supplementary aids and services required by the student for the student to be educated in the school the student would attend if not identified as a child with a disability.

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

May 4, 2010