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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: CT
Date of Birth: May 9, 1997

Dates of Hearing: March 17, April 16, June 8, June 15, June 29, 2009

OPEN HEARING

ODR No. 9666/08-09 KE

Parties to the Hearing:

Parents:

School District:
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West Shore School District
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Representative:

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Date Record Closed: July 22, 2009

Date of Decision: August 1, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student (hereinafter “Student”)¹ is a resident of the West Shore School District (District) with various disabilities who complains that the District has failed to provide a free and appropriate public education (FAPE) between January 2007 and January 2009, and that the appropriate program and placement is a private school. As described below, the District did deny FAPE to Student, but the appropriate remedy is compensatory education rather than the private school placement requested by Student.

ISSUES

Whether or not the District provided FAPE to Student between January 2007 and January 2009?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xxxx, is a lovable, charming, creative 5th grade resident of the District who enjoys theatrical activities and has a good sense of humor and a zest for life. (NT 3/17/09, 164, 213)² Student also has Tourette’s Syndrome, OCD and ADHD. (NT 3/17/09, 56-57, 150) While it is rare to see all three disorders in one person, the result is that Student can be oppositional, easily distracted, impulsive, hyperactive, anxious, compulsive, and can experience uncontrollable motor behaviors (or tics). (NT 3/17/09, 57, 150-151) Tourette’s is a developmental disability involving

¹ All further references to Student will be impersonal and gender-neutral. This is intended not to be disrespectful, but rather to ensure Student’s confidentiality.

² References to “N.T.” are to the date and page of the transcripts of the hearing sessions. (The 5 volumes of transcript pages are not numbered in uninterrupted sequential order, thereby requiring references to the hearing date as well as page number.) References to “SD”, “P”, and “HO” are to the District, Parent and Hearing Officer exhibits, respectively.

multiple motor or vocal tics, or sudden, rapid movements or vocalizations that occur repeatedly in the same way. (NT 4/16/09, 566)

2. Student's behaviors at home and at school are quite different. At home, Student exhibits lengthy, violent and destructive rages, sometimes needing to be removed to a safe room at home. (NT 3/17/09, 80; NT 4/16/09, 280, 295, 309, 367) At school, Student has been noncompliant, but not aggressive or violent. (NT 4/16/09, 715-716, 826) Student's behaviors at school do not require a safe room. (NT 4/16/09, 296-297, 397) Student's parents attribute Student's behaviors at home to anxiety regarding school, noting that rages are more common on Sunday nights. (NT 3/17/09, 251) Student's parents believe that school is a stressor for Student, in part because the District is attempting to push Student to learn material that is above Student's developmental capability. (NT 3/17/09, 93-94; NT 6/8/09, 703) Student's parents are concerned that, if Student is stressed too much, Student's rages may become so extreme that Student will have to go to a residential institution. (NT 3/17/09, 216-217, 254) At an October 2008 meeting, Student's IEP team considered whether to eliminate homework altogether, but mutually decided to continue requiring homework to help Student develop organizational skills and a sense of responsibility. (NT 3/17/09, 176; 6/8/09, 601-602, 703, 817-818)
3. Student's independent neuropsychologist cannot attribute Student's behavior problems at home to educational programming and placement. (NT 6/15/09, 119) Student's teachers do not observe anxiety while Student is at school. (NT 6/18/09, 746)
4. Student has good communication skills and can reciprocate communication in conversations in an appropriate manner. (NT 6/29/09, 996-997) Student does not relate well to peers, however, and has few friends. (NT 3/17/09, 158; 4/16/09, 386) At school,

Student says and does inappropriate things to some female peers (“she’s hot”, “do you want to kiss me?”, blow kisses). (NT 4/16/09, 329, 342) Sometimes peers will encourage Student into saying and doing some of these inappropriate things. (NT 4/16/09, 348)

5. Student’s sleeping cycle is unusual, staying awake most of night, then sleeping much of the morning. (NT 3/17/09, 118, 133, 178-179; 4/16/09, 352) Student’s best times for focus are between 11:30 a.m. and 1:30 p.m. (NT 6/18/09, 641) After 1:30, Student appears tired, sometimes hyperactive. (NT 6/18/09, 756) The District’s reaction to this unusual sleep cycle has been inconsistent. In 2006-2007, Student was permitted to arrive at school at 12:30 p.m. For the last two school years (2007-2008 and 2008-2009) Student arrived at 11:30 a.m. (NT 3/17/09, 226; 4/16/09, 390; 6/8/09, 640, 821) At various times over the last three school years, the District has threatened to consider truancy charges, sometimes accepted a single physician’s note to justify Student’s late arrivals, sometimes required physicians’ notes for each late arrival, and most recently it has agreed to require monthly physician notes to justify Student’s late arrivals. (P12; SD16, pp.23-29; SD27; 4/16/09, 369, 371, 376; NT 6/29/09, 940-942, 948-950) Although in past years, the District offered extended school day services to compensate for Student’s late arrivals, the District no longer offers it. (4/16/09, 355)

6. Student’s afternoon fatigue can affect the quality of work and Student’s teacher tries to plan activities that are more motivating. (NT 4/16/09, 293; NT 6/8/09, 757, 794) Although Student is known to have an affinity for theater, the District’s teacher hasn’t tried using theatrical settings for much instruction. (NT 6/18/09, 795-796) Although the District is aware that Student may enjoy skating, dancing and swimming outside of

school, those are not activities available at school, particularly next year at middle school.
(NT 6/15/09, 782-783)

7. Student's school day is very structured. (NT 6/8/09, 337) Each school day is chunked into 20-30 minute segments, with breaks between. (NT 6/8/09, 654, 829) Instruction involves much repetition and chunking. (NT 6/8/09,735) Student does not do very many things independently. (NT 6/8/09, 752) Student has had a therapeutic support staff (TSS) since at least first grade who sits next to Student in school and prompts Student to refocus and keep away distractions. (P7; NT 3/17/09, 39, 41) Sometimes Student is the only child in the classroom. (NT 4/16/09, 273) Other times, Student is in the regular education classroom, sitting in the back with a therapeutic support staff (TSS) and special education teacher. (NT 4/16/09, 326) Because 5th grade specials are scheduled before 11:30 a.m., Student does not participate in them. (NT 6/8/09, 643) Student needs frequent sensory breaks during the school day. (NT 6/18/09, 731; SD-16, pp. 59-72) Until recently, the District's sensory breaks tended to elevate Student's hyperactivity rather than calm Student down. (NT 3/17/09, 243; NT 4/16/09, 278, 322; NT 6/15/09, 746-746)
8. In September 2007, Student's Developmental Reading Assessment (DRA) score was 18 which converts to the end of 1st grade level. (SD12; NT 6/8/09, 595, 874) In January 2008, Student's DRA score was 20 (Beginning 2nd grade level). (NT 6/8/09, 875) By June 2008, Student's DRA score was 24 (mid-2nd grade level). (NT 6/8/09, 889-890). In September 2008, Student's DRA level was 28 which is near the end of second grade level. (N.T, 6/8/09, 598, 671; SD13; SD22) In January 2009, Student's DRA level was 30, which is beginning 3rd grade level. (N.T. 6/8/09, 672-673)

9. A math applications probe in the October 2008 IEP shows Student at the 4th grade level for math applications (NT 6/8/09, 765)
10. The District monitors Student's academic progress on an AimsWeb computerized system. (NT 6/18/09, 615-618, 659-660, 689; SD21) Trend line reporting on AimsWeb reports was inconsistent. (NT 6/18/09, 659-660) Although teachers did make changes in instructional intervention based upon AimsWeb progress monitoring data, they cannot identify any specific intervention changes. (NT 6/8/09, 832, 884; 6/29/09, 1019-1021)
11. The District does not offer Student a social skills component during the school day, because Student participates privately in Therabilities, which is a friendship group outside of the school setting that focuses upon social skills. (NT 6/15/09, 787-788)
12. Student's IEP does not address Student's transition to middle school. District personnel expected that potential issues regarding scheduling and earlier start times at the middle school would simply be discussed at monthly parent-teacher meetings during the 2008-2009 school year. (SD13; NT 4/16/09, 542; 6/8/09, 819-821)
13. Student's Parents want the District to fund Student's placement at the NHS Autism School (Private School.) (SD-16, p. 13) Private School has four classrooms, an indoor/outdoor play area for breaks, and a room for sleeping if necessary. (NT 3/17/09, 211, 425-426) It offers a small, family atmosphere, with 3-6 students total. Classes are divided by age and ability, with some students who are verbal and others who are not. (NT 3/17/09, 421) Academics start at 2nd and 3rd grade levels. (NT 3/17/09, 212) Private School would offer Student a year round program to compensate for a shortened school day. (NT 3/17/09, 212) Teachers would design Student's lessons around Student's

interests, heavily incorporating Student's theatrical interests to maximize focus. (NT 3/17/09, 430)

14. Student's private neuropsychologist confirms that Student is functioning at the 2-3rd grade level in reading, written expression and math. (NT 3/17/09, 72) She believes Student needs a highly individualized, highly supervised, flexible academic program in a learning environment where Student is comfortable. (NT 3/17/09, 74, 94) She recommends a classroom for neurologically impaired students with staff trained for a full range of behaviors. (NT 3/17/09, 81) She is unsure about the wisdom of increasing Student's school hours, and recommends minimizing stress with access to a school counselor. (NT 3/17/09, 77, 80) She is concerned about Student's transition to a middle school program where Student is not monitored one-on-one. (NT 3/17/09, 95) She won't recommend the parental preference for Private School, believing that is a decision for others. (NT 3/17/09, 129)

15. On January 7, 2009, Student's parents requested due process. (P1) An unsuccessful resolution meeting was conducted on April 1, 2009. (NT 6/29/09, 1117) Due process hearing sessions were conducted on March 17, April 16, June 8, June 15, and June 29, 2009. Student's exhibits P1-P14 were admitted into the record. (NT 6/29/09, 1112) District Exhibits SD1-SD3, SD5-SD9, and SD11-SD29 were admitted into the record. (NT6/29/09, 1116) On July 22, 2009, the record was closed upon submission of written closing arguments.

DISCUSSION AND CONCLUSIONS OF LAW

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger

burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006) If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case the party with the more persuasive evidence wins. In this case, Student bears the burden of persuasion because Student alleges that the School District denied FAPE from January 7, 2007 through January 7, 2009.

FAPE

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. Part 300; 22 Pa. Code Chapter 14 A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP. FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533-534 (3d Cir. 1995), cert. denied, 517 U.S. 1135 (1996); Board of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982)

Student complains that academic progress has stalled at 2nd and 3rd grade levels, that Student's current IEP doesn't plan for middle school transition, and that the District is uninterested in collaborating among various private service providers. Student argues that Student must be educated in a very slow, step by step manner, focusing on the basic building blocks of reading, math and writing, not moving to the next step until Student has achieved mastery to generalization. Student argues that the District's approach leaves

Student more and more frustrated, helpless and dependent. Student argues that Student needs an educational placement responsive to very severe and complex neurobehavioral needs, informed by the principles of data collection and data driven decision making, with a very individualized curriculum that addresses on the one hand, Student's intelligence, curiosity and wealth of background knowledge, and on the other hand Student's very delayed academic skill level, compounded by severe Tourette's Syndrome, ADHD and OCD.

The District argues that Student functions at a higher, 4th grade, level in school, that Student's home behaviors are not occurring at school, and that it would like to address social skills but must concentrate on academics with Student's limited school day. The District further argues that there is no evidence that the school setting is causing the behaviors at home.

Student's IEPs for the period in question were neither reasonably calculated, nor implemented, in such a way as to result in meaningful educational progress. From September 2007 to January 2009, Student's DRA score increased from 18 (which converts to the end of 1st grade level) to 30, which is beginning 3rd grade level. (SD12; NT 6/8/09, 595, 874; N.T. 6/8/09, 672-673) This is barely more than 1 year's progress in 2.5 years. AIMSweb progress monitoring was not useful in identifying unacceptable rates of progress and should have been more explicit in identifying the teachers' data-driven interventions. Trend line reporting on AimsWeb reports was inconsistent. (NT 6/18/09, 659-660) Although teachers did make changes in instructional intervention based upon AimsWeb progress monitoring data, they cannot identify any specific intervention changes. (NT 6/8/09, 832, 884; 6/29/09, 1019-1021)

There is no evidence that the District's behaviors cause Student's behaviors at home. Student's independent neuropsychologist cannot attribute Student's behavior problems at home to educational programming and placement (NT 6/15/09, 119) and Student's teachers do not observe anxiety while Student is at school. (NT 6/18/09, 746)

In light of the complexity of Student's needs, however, the District inappropriately was not sufficiently proactive, creative and collaborative in designing Student's educational programming. At various times over the last three school years, the District has threatened to consider truancy charges and has been inconsistent in its requirements for accommodating Student's need to arrive after the time that school usually starts. (P12; SD16, pp.23-29; SD27; 4/16/09, 355, 369, 371, 376; NT 6/29/09, 940-942, 948-950) Although the District is aware of Student's interests in theater, skating, dancing and swimming, very little theatrical setting has been tried and the other activities haven't even been considered in designing instruction. (NT 6/15/09, 782-783; NT 6/18/09, 795-796) Because 5th grade specials are scheduled before 11:30 a.m., Student does not even participate in them. (NT 6/8/09, 643) Student's IEP does not address Student's transition to middle school. (SD13; NT 4/16/09, 542; 6/8/09, 819-821) This inflexibility does not demonstrate reasonable efforts calculated to result in meaningful educational progress.

Accordingly, the District denied FAPE to Student between January 2007 and January 2009.

Compensatory Education

Compensatory education may be awarded when a school district deprives an eligible student of FAPE. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d

238 (3d Cir. 1999) Compensatory education awards may be qualitative, designed to place the student in the same position she would have occupied but for the school district's denial of FAPE. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005) Compensatory education awards may be quantitative, based upon the period of time that a school district denies FAPE, with an offset for the time reasonably needed to discover and remedy FAPE deficiencies. M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)

Student's parents seek a special setting such as Private School. They acknowledge that Private School is a more restrictive placement than even a self-contained classroom at the District, and they suggest that the District might locate a comparable yet less restrictive setting that provides the same educational/behavioral model as Private School provides. This remedy does not appropriately address the District's FAPE denials.

The District failed to design educational programming that was reasonably calculated to improve Student's academic skills and that was consistently and coherently monitored for progress. The District's educational programming also was not sufficiently proactive, creative and collaborative in light of the complexity of Student's needs. Often, it appeared that Student's programming was being designed around the District's time schedules and activity options, rather than around Student's educational needs. (Admittedly, Student's parents' expectations appeared inconsistent and unclear at times as well.)

What is needed is compensatory education that will place Student in the same position s/he would have occupied but for the District's denials of FAPE in the areas of

programming, attendance, behavior and sensory integration. In this case, such appropriate compensatory education shall consist of: 1) an assistive technology evaluation; and 2) publicly funded monthly consultation between the IEP team and: a) an independent neuropsychologist of Parent's choosing with respect to program design; b) Student's psychiatrist with respect to Student's school attendance needs; c) Student's outside service providers for the purpose of comparing and coordinating home and school interventions; and d) an independent occupational therapist.

CONCLUSION

Student's IEPs for the period in question were neither reasonably calculated, nor implemented, in such a way as to result in meaningful educational progress. Often, it appeared that Student's programming was being designed around the District's time schedules and activity options, rather than around Student's educational needs. Accordingly, the District denied FAPE to Student between January 2007 and January 2009. Appropriate compensatory education shall be awarded.

ORDER

- The District denied FAPE to Student between January 2007 and January 2009.
- The District shall provide to Student an assistive technology evaluation.
- The District shall publicly fund monthly consultation between Student's IEP team and:
 - an independent neuropsychologist of Parent's choosing with respect to program design;
 - Student's psychiatrist with respect to Student's school attendance needs;
 - Student's outside service providers for the purpose of comparing and coordinating home and school interventions; and
 - an independent occupational therapist.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

August 1, 2009