

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: DC

Date of Birth: XX-XX-XXXX

Dates of Hearing:

December 7, December 8, December 9, 2009
February 5, February 9, February 18, 2010

CLOSED HEARING

ODR Case # 00211-09-10-KE

Parties to the Hearing:

Mr. & Mrs.

Ms. Joanne Wells
Montour School District
223 Clever Road
McKees Rocks, PA 15136

Date Record Closed:

Representative:

Arthur Feldman, Esq.
1010 LaClair Avenue
Pittsburgh, PA 15218

Jocelyn Kramer, Esq.
Law Offices of Ira Weiss
445 Fort Pitt Commons
Suite 503
Pittsburgh, PA 15219

March 8, 2010

Date of Decision:

March 23, 2010

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

“Student” (“student”) is a 6-year old student residing in the Montour 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, specifically as a child on the autism spectrum. Parents filed a complaint in August 2009, alleging that the individualized education plan (“IEP”) proposed for the student failed to offer a free appropriate public education (“FAPE”) to the student for the 2009-2010 school year. Parents requested compensatory education for those school years in addition to an order for the IEP team to consider a private placement. For the reasons set forth below, the student will be awarded compensatory education, and the IEP team will be ordered to consider specific options in its deliberations.

ISSUES

Is the student’s IEP proposed for the 2009-2010 school year reasonably calculated to provide a FAPE to 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.

If not, is compensatory education owed to the parents?

Is the student entitled to an IEP design process that considers private placement?

FINDINGS OF FACT

1. The student has been identified as a student with autism in the moderate to severe range. (Parents' Exhibit ["P"]-2, P-11, P-13; School District Exhibit ["S"]-2, S-5).
2. The student's specific deficits and diagnoses include significant receptive and expressive language deficits, sensory processing disorder, apraxia of speech, echolalia, auditory hypersensitivity, significant social skills deficits, gravitational insecurity, and hyperlexia. The student is not toilet-trained. (P-1, P-2, P-3; Notes of Testimony ["NT"] at 485-487, 495-498).
3. For approximately four years, the student has attended a preschool program which provides educational services designed for the student's needs. (NT at 41, 248-251, 274-275).
4. One of the features of the student's autism behaviors is the stimulation of loud, extended vocalization of the "e" sound ("eeeeee"). (P-27; NT at 212-213).

5. In February 2009, the parents attended a meeting at the District concerning students that might transition to the District from other settings. (NT at 45-46).
6. In April 2009, anticipating that the student might transition to the District, the District requested permission to evaluate, which the parents granted. (S-1).
7. The District issued its initial evaluation report ("ER") on May 21, 2009. The ER identified the student as having autism. There was no cognitive assessment administered as part of the evaluation. (P-11; S-2).
8. In June 2009, the IEP team met twice to consider the evaluation and placement options for the student. IEP drafts were brought to the meetings but were not substantively considered by the team. (P-16, P-28).
9. In a document dated June 7, 2009, the parents provided written input regarding the student's behaviors. (P-12).
10. Given the disagreement between the parties about the student's programming options, the District agreed to fund an independent educational evaluation ("IEE"). The IEE was issued on July 21, 2009, and echoed many of the findings of the District's ER. Cognitive testing using the Test of Nonverbal Intelligence – 3rd Edition indicated that the student had an IQ score of 89, the low average range. (P-2).

11. The student has demonstrated the ability to read, at least in terms of letter recognition and decoding. The degree of the student's comprehension from reading has not been ascertained. (P-27; NT at 376).
12. On July 27, 2009, the District issued a revised ER that incorporated the parental input from June 7th and the IEE. (P-13; S-5).
13. On August 6, 2009, the IEP team met to consider a draft IEP prepared as the result of the revised ER. (P-15).
14. The August 6th IEP contained very little information from the IEE. The scribe of the IEP did not indicate that the IEE was considered when preparing the draft IEP. There was no reference to the student's cognitive functioning in the present levels of educational performance. (P-2, P-15; S-7; NT at 376, 615-616, 766).
15. The reading goal for the student in the August IEP, given the student's abilities in reading as demonstrated and as indicated in the various evaluations, is inappropriate. The scribe of the IEP testified that the goal was prepared more as a result of the District's curriculum rather than as a result of the evaluation data presented to the District. (P-15 at page 29; S-7 at page 29; NT at 376-377).

16. The social skills goal for the student in the August IEP, given the student's severe difficulty in engaging as demonstrated by the record and the various evaluations, is inappropriate. (P-15 at page 27; S-7 at page 27; NT at 621-622).
17. There are three occupational therapy goals in the IEP, and the requirement of 150 minutes of occupational therapy per month as a related service, but an occupational therapist was never part of the IEP team. (P-15 at pages 32, 34, 35, 39; S-7 at pages 32, 34, 35, 39; NT at 1011-1012).
18. There is no specially designed instruction geared to the use of applied behavior analysis or discrete trial teaching which is highly effective for children with autism not only as evidenced in the educational history of the student but as a best practice for teaching students who require highly structured, concrete learning environments. (P-15 at pages 36-38; S-7 at page 36-38; NT 679-681).
19. The August IEP indicates that the student would spend approximately 35% of the school day in regular education. The notice of recommended educational placement ("NOREP") that accompanied the August IEP recommended a placement in a life skills support classroom on a supplemental basis. (P-15 at page 43; P-18; S-7 at page 43).

20. There are currently five students in the life skills support classroom, with a 5-year old, an 8-year old, two 9-year olds, and an 11-year old. The parents were informed that the age-ranges in the classroom exceeded classroom age-range limits outlined in Pennsylvania special education regulations, but they did not agree to waive the age-range limits. (S-6; NT at 337-345).
21. As with most students with autism, the student has difficulty with transitions between tasks and between environments. The District's proposed placement would have the student engaged in eleven different transitions throughout the school day. (NT at 783-790, 841-843).
22. The parents filed their complaint on August 27, 2009. (P-25; School District Procedural Exhibit A).
23. The last-offered IEP was the IEP offered at the August 6, 2009 IEP meeting, accompanied by a NOREP of the same date. (P-15, P-18).

DISCUSSION AND CONCLUSIONS 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

² 34 C.F.R. §300.17.

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

Parents claim that the District has denied the student FAPE in the 2009-2010 school year. The record in this case supports the conclusion that the District has failed to offer a program and placement that are reasonably calculated to yield meaningful education benefit.

Particularly, the District’s omissions are due to not accounting for the student’s cognitive abilities and the ability to read. (FF 10, 14, 15). Even if the District feels that the student is not “reading” (that is, for comprehension/meaning), the student clearly exhibits the ability to decode text, and the sole reading goal in the IEP is inappropriate for this student. (FF 11, 15).

The student has three occupational therapy goals (more than any other instructional or support area) and 150 minutes of occupational therapy per month (more than any other related service). Yet there was no participation by an occupational therapist in the IEP process. (FF 17). This prejudicial procedural flaw amounts to a denial of FAPE.

Also prejudicially inappropriate is the lack of direct, structured instruction. (FF 18). The entirety of the record clearly indicates that the

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).

student, as with most students with moderate to severe autism, requires direct, structured, concrete instruction. There is specially designed instruction in the IEP in this regard.

The parties also disputed the “labeling” of the environment—whether it was life skills or autism support. Clearly, the “label” placed on a classroom is not determinative; a student’s placement is the constellation of specially designed instruction, related services and supports for school personnel that surround and enable a student’s educational programming.

Here, the District has proposed a program that is not reasonably calculated to yield meaningful education benefit. First, the student would be placed for a significant amount of time in regular education. (FF 19). While the student’s placement must always be in the least restrictive environment,⁶ this student exhibits behaviors and needs that interfere markedly with the student’s instruction and the instruction of others. (FF 4, 7, 10, 12). Second, the range of student-ages in the District’s proposed placement do not comply with Pennsylvania special education regulations (absent parental waiver of the age-range limits through the IEP team process).⁷ (FF 20). Third, the District has proposed a placement that would require the student to transition eleven times from approximately 8:30 AM to 3 PM. (FF 21). Taken all together, the “placement”, both in the sense of the physical space that the student will

⁶ 34 C.F.R. §300.116(b)(2-3).

⁷ 22 PA Code §14.146.

occupy through out the school day and the constellation of services and supports the student will receive, as proposed by the District is inappropriate.

Accordingly, the District's last-proposed IEP and placement were not reasonably calculated to yield meaningful education benefit. As such, the District has denied that student a FAPE.

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 a FAPE.⁸ In this case, the District denied the student a FAPE in the 2009-2010 school year by not having an appropriate program available for the student at the outset of that school year.⁹

The student will be awarded 5.0 hours of compensatory education for every school day from the first day of school in the 2009-2010 school year through the date of this order.¹⁰

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.

⁸ 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).

⁹ 34 C.F.R. §300.323(a).

¹⁰ The figure is based on the Commonwealth's minimum school day requirements for 1st -6th graders. 22 PA Code §11.3. This is supported by the number of hours (in fact 6.5 hours) that the District purports is necessary for to provide a FAPE to the student. P-15 at page 43; S-7 at page 43.

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 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 provided services to the student during the period of the denial of FAPE.

An award of compensatory education will be fashioned accordingly.

IEP Team's Deliberations

At this point, the last-proposed IEP is inappropriate. Therefore, the order below will address the IEP team's need to develop an appropriate program/placement for the student.

CONCLUSION

The IEP and placement proposed by the District on August 6, 2010 is not reasonably calculated to yield meaningful education benefit. This

results in a denial of FAPE and a consequent award of compensatory education

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the IEP proposed for the 2009-2010 school year is not reasonably calculated to yield meaningful education benefit.

Parents are awarded compensatory education, subject to the nature and limits set forth above, in an amount equal to 5.0 hours for every school day in the 2009-2010 school year through the date of this order.

Additionally, the IEP team shall convene within 10 school days of the date of this order to design an appropriate program and placement for the student. The IEP team shall address the goals, specially designed instruction, related services, supports for personnel, and any other matter the team feels need to be addressed to design an educational program for the student. Furthermore, the IEP team shall explicitly consider the full spectrum of educational settings available for the education of the student, including District-based placement(s) and private setting(s).

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

March 23, 2010