

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
DUE PROCESS HEARING

Name of Child: N.S.

ODR #01975/10-11-AS

Date of Birth: [redacted]

Dates of Hearing:

June 10, 2011

August 16, 2011

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Methacton School District
1001 Kriebel Mill Road
Norristown, PA 19403

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Michael Connolly, Esquire
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188 North Main Street
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September 21, 2011

September 26, 2011

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is an elementary-school-aged child enrolled in the Methacton School District (District). Student is eligible for special education under the classification of autism.

Student's parents (Parents) requested this hearing under the IDEA, alleging that the District failed to timely and appropriately evaluate all Student's educational needs and failed to provide Student a free, appropriate public education [FAPE] from January 20, 2009 to the end of the 2010-2011 school year. They are requesting compensatory education for that period of time. The District maintains that it appropriately evaluated Student and provided FAPE and that no compensatory education is warranted.

For the reasons presented below I find for the Parents with modifications.

Issues

1. Did the School District fail to timely and appropriately evaluate all Student's educational needs including behavioral and social needs?
2. Did the School District deny Student a free, appropriate public education [FAPE] from January 20, 2009 through the 2010-2011 school year?
3. If the School District failed to identify all Student's educational needs and/or denied Student FAPE during the period in question is Student entitled to compensatory education and if so in what kind and in what amount?

Findings of Fact

Introductory Information

1. Student is an elementary-school-aged pupil residing in and enrolled in the District. Student is eligible for special education under the

¹ The decision is written without further reference to the Student's name or gender to provide privacy, and other potentially identifying details are likewise omitted.

- classification of autism, with secondary disabilities of other health impairment and speech/language impairment. [NT 27; P-12]
2. Student has also been diagnosed with Oppositional Defiant Disorder. [P-11]
 3. Student has presented with elopement behaviors at home and at school. Student displays temper tantrums at home and at school, and exhibits defiance in both settings, as well as being frequently distracted, inattentive, and off-task. [NT 28-29, 55, 163-164, 187-188, 270-272]
 4. At various times Student has inappropriately removed clothing, has refused to engage in age-appropriate toileting hygiene, and has engaged in hitting, kicking, throwing chairs, and climbing under countertops and tables. [NT 270-271]
 5. At times Student resorts to selective mutism to avoid non-preferred activities, when frustrated in response to a given event, or when internally stimulated. [P-11]
 6. Student has difficulty with reading, written expression, and mathematics, and exhibits fine-motor weaknesses, expressive language delays, and poorly regulated executive functioning including deficits in inhibition, in planning, and in organizational skills. [P-11]
 7. After a successful year in kindergarten, Student experienced increasing behavioral difficulties in first and second grades. [P-23]
 8. Because the Parents, and apparently also the District, were dissatisfied with Student's autistic support program in a neighboring school district² for the 2008-2009 2nd grade school year, at a December 10, 2008 Individualized Educational Plan [IEP] meeting the team decided to seek a different placement. [NT 29-32, 39; S-1]
 9. The District explored various placements for Student, including at least four specialized private schools, but because of elopement

² The District was paying tuition for Student to attend this autistic support program.

- issues, Student was not accepted by those schools. [NT 50, 485-487; S-6]
10. The District also explored placement at the home school. The Parents were not in favor of either of two possible classrooms at the home school. [NT 36-38; P-35, P-39]
 11. In December 2008, an IU Board Certified Behavior Analyst (BCBA) conducted a Functional Behavior Assessment (FBA) utilizing multiple classroom observations, an interview with Student's teacher, and an interview with Student's 1:1 aide. [NT 221-225; S-29]
 12. The FBA resulted in the BCBA's concluding that Student's non-compliant and disruptive behaviors served the function of escape, avoidance and delay when Student was faced with a task demand, and that the behaviors also served to garner adult and peer attention. [S-29]
 13. The BCBA developed a positive Behavior Support Plan [BSP] with strategies to appropriately respond to Student's disruptive behaviors. [P-3]

Second Grade: January 20, 2009-June 2009

14. An IU-operated autistic support placement located in an elementary school building was secured and approved by the Parents, and Student began in that program on January 20, 2009. [NT 38, 488]
15. Prior to Student's January 20, 2009 entrance into the new autistic support program the teacher in that program reviewed the FBA and the BSP, as well as Student's previous Reevaluation Report and current IEP. [NT 158]
16. Including Student, there were eight pupils in the IU-operated autistic support classroom and the classroom was staffed with three to four adults. [NT 156, 216]
17. Student's program included a 1:1 aide, but until the position was filled with a permanent employee, the full time classroom assistant served as Student's 1:1 aide for purposes of consistency. [NT 176]

18. The IU behavior specialist provided training to Student's 1:1 aide on the implementation of Student's BSP. [NT 81, 163-164, 226, 240; P-8]
19. The IEP team decided to hold off on having an IEP meeting for one month after the change of placement so staff could get to know Student before engaging in educational planning. The IEP team developed a revised IEP on February 5, 2009. [NT 40; P-5]
20. The February 5, 2009 IEP, and a second IEP developed on May 18, 2009 were very similar to the May 13, 2008 IEP developed at the end of 1st grade, and despite continuing and increasing significant behavioral difficulties the District did not initiate a new FBA to gather objective data in the new setting, and instead throughout the school year continued to use the FBA and BSP developed at the previous school. [NT 41-43, 163-165, 170-177, 180; P-5, P-8]
21. The IEP team, including the IU behavior specialist, convened again in May 2009 to discuss parent concerns and to review the FBA, the BSP and behavioral progress. [P-8]
22. The autistic support teacher noted gradual progress in the length and quality of Student's academic participation. [NT 228, 240; S-16, P-8]
23. At the May 2009 IEP meeting the District did not propose a new FBA and BSP despite the Student's behaviors not having been extinguished even with 1:1 intervention. However, the District did suggest an independent neuropsychological evaluation to be conducted during summer 2009. The Parents chose the private evaluator from a list provided by the District. [NT 60, 496-497; P-10]

Third Grade: 2009-2010 School Year

24. For the 2009-2010 school year, Student's 3rd grade year, Student remained in the IU autistic support classroom but the IU moved the location of the classroom to another elementary school. The classroom held a total of eight or nine pupils, and the classroom was supported by six or seven adults. Student's 1:1 aide remained consistent. [NT 70, 184, 218]

25. At the Parents' request, Student attended specials with a regular education 4th grade class. Student received one-to-one instruction for reading and math and was instructed in a group with three other students for science and social studies. [NT 231]
26. In 3rd grade Student continued to display the same non-compliant and disruptive behaviors that were previously identified in the December 2008 FBA and BSP. Student's autistic support teacher and 1:1 aide continued to implement the old BSP. A new FBA and BSP were not prepared because the District deemed that the behaviors had not changed and the function of these behaviors was perceived to be the same. [NT 54-55, 187-189, 225, 240; P-29]
27. Student made some progress in reducing tantrum behaviors, but these behaviors were not reduced to extinction. [P-29]
28. The independent neuropsychological evaluation was completed in November 2009 and received by the District on December 16, 2009. [P-11]
29. Following receipt of the independent neuropsychological evaluation the District initiated a reevaluation to conduct new classroom observations, obtain parent input, and review the independent neuropsychological evaluation. [P-12]
30. The District's reevaluation was completed in March 2010 and in April 2010 the IEP team met to amend the IEP in consideration of the independent neuropsychological evaluation and its own reevaluation. [NT 67-68; P-13]
31. On May 7, 2010 the District sought to conduct a new FBA but the Parents withheld permission because they disagreed with the type of FBA they thought was being proposed. [NT 72-73; P-14]
32. Having ultimately secured parental permission the District conducted the new FBA. However because the school year had ended, in order to have the FBA completed by the beginning of the 2010-2011 school year, the FBA including the behavioral observations was conducted at Student's summer camp ESY program. The FBA was issued on

August 2, 2010. A BSP was developed following the FBA. [NT 80; P-18]

Fourth Grade 2010-2011 School Year

33. At the April 2010 IEP meeting the Parents had concerns about the age range in Student's special education classroom. Therefore the District began a search for a new placement for Student for 2010-2011. [NT 68-69, 230]
34. Although other placements were still being explored, by mutual agreement of the Parents and the District Student was returned to the District from the IU-operated autistic support classroom and placed in an autistic support classroom in a District elementary school. The autistic support classroom held a total of four pupils and was staffed by two or three adults. Student attended regular education classes for science, social studies, and specials. [NT 77-78; S-20]
35. Almost immediately Student began to exhibit the same behaviors as previously, [the Parent testified that it was the "worst behavior" she had seen from Student] and the frequency rose to daily occurrence of tantrums. [NT 83, 270-273]
36. On September 24, 2010 the IEP team met to craft a plan to address Student's behaviors. The District changed Student's 1:1 aide from a petite woman to a male to ensure that the individual was physically capable of managing Student if needed to prevent elopement. [NT 510-511; P-21]
37. The District decided to seek outside expertise, and with the Parents' permission on October 18, 2010 secured the consultation of a different BCBA who conducted an ABA evaluation and issued a report dated October 30, 2010. However the operational definitions, topography, functions and baseline data from the August 2, 2010 FBA performed at camp were used. [NT 89-90, 94; S-19, P-22]
38. The BCBA recommend a number of strategies to help address Student's behavioral outbursts. A new BSP was created dated November 4, 2010 and implemented after the Thanksgiving holiday. [NT 93-94; S-19, P-22]

39. The BCBA continued to advise Student's teachers, 1:1 aide, and the IEP team for the remainder of the 2010-2011 school year. On February 22, 2011, an IEP meeting was held to discuss Student's behaviors, which continued to persist. [NT 96, 423-424; P-24]
40. Following the February 22nd IEP meeting, Student's 1:1 aide was changed to an ABA-trained paraprofessional and Student was returned to the autistic support classroom for the majority of the school day. [NT 98-99, 424-425]
41. The frequency and duration of Student's inappropriate behaviors decreased. [S-19]
42. Beginning at the end of April 2011 when Student began a medication regimen for the first time, and a new token economy was put into place, Student's behavior at home and school improved significantly. Student made progress in behavioral goals and in academic goals. [NT 100-101, 439; S-19, S-24, S-26]
43. As Student's behavior improved, Student was transitioned back to more time in the regular education environment. [NT 349-350]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in " equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. The evidence

was not in equipoise, as the Parent's evidence was preponderant, and therefore the Schaffer test on burden of proof did not apply.

Credibility of Witnesses

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). None of the witnesses presented credibility issues; rather the evidence in this matter revolved around the specific chronology of events.

IDEA

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA" or "IDEA 2004"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). "Special education" is defined as specially designed instruction...to meet the unique needs of a child with a disability. "Specially designed instruction" means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."

Special education and related services must be designed to ensure meaningful academic, social, emotional, and behavioral progress. *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484, 2491 (2009); *Breanne C. v.*

Southern York Cty. Sch. Dist., 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (referencing *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 394 (3d Cir. 1996) (finding that to confer meaningful educational benefit, an IEP must be designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social, and emotional domains); *See also, Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Benefits to the child must be ‘meaningful’. Meaningful educational benefit must relate to the child’s potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit). However, the statute guarantees an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Compensatory Education

In-kind compensatory education is a remedy for a span of FAPE denial by district action or inaction, less a reasonable period when it could have been rectified, its form and timing to be a matter of parental discretion as long as costs are commensurate with what was denied and it does not replace otherwise currently entitled to programming.

Parents may select the form of the compensatory education so long as it addresses any appropriate developmental, remedial, or enriching instruction that furthers the goals of the student’s present or future IEPs. Such hours must be in addition to the student’s then current IEP and may not be used to supplant such services.

There are financial limits on parents’ discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student’s present or future IEPs. The costs to the District of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the actual costs for salaries, tuition and transportation for contracted services. This principle sets the maximum cost of all of the hours or days of the compensatory education awarded. The parents may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The

parents also may use fewer hours of expensive services so long as the maximum amount is not exceeded. Finally, the parents may not be required to make co-payments or use personal insurance to pay for these services.

Additionally, the time for utilizing compensatory education awarded may extend beyond age 21. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Such flexibility is particularly crucial in a case like this one where Student will not likely graduate until the goals on the IEP are completed, and the compensatory education is not to be used to supplant goals and related services that are, or should be, in Student's current and future IEPs.

Discussion

The two substantive issues in this hearing are intertwined. In presenting their case, the Parents did not in fact bring out any needs of Student that went unidentified, but rather shaped their case to address inappropriate and/or untimely creation of the means to address Student's already-identified needs. Consideration of this case was complicated by several factors, the most salient of which were this Student with autism's being required to adjust to three new placements in the two-year period under consideration, and this Student's being prescribed psychotropic medication relatively late given the severity and persistence of the behavioral presentation. Neither the District alone nor the Parents alone bear responsibility for these complicating factors, although they do serve to mitigate somewhat the missteps on the District's part leading to a failure to provide FAPE. Student is a child with significant behavioral issues, and the diagnosis of Oppositional Defiant Disorder lends a dimension of willfulness to the characteristics of autism Student displays.

Unfortunately, although it was not directly providing the programming for second or third grades, including the behavioral consultation, the District bears ultimate responsibility for the failure of that programming to address the needs of this child who is a District resident. It appears that the District was not well-served by the program with whom it contracted initially, and was likewise not well-served by the IU's program or its behavioral consultants. I find that the District was certainly well-meaning and desirous of cooperating with the Parents' wishes regarding placements. The District is to be commended for initiating an independent educational evaluation, and to its credit, the District brought Student back into one of its school programs, abandoned the IU behavioral personnel, and contracted with an outside agency to conduct an ABA-based FBA that was more appropriate

given Student's autism. When the outside behavior specialist began consulting with the District the District began to be on the right path toward appropriately serving Student, although it was not until it implemented an ABA-trained 1:1 aide for Student that its program became appropriate.

The Parents contend that even with the February 22, 2011 change to an ABA-trained aide Student continued to have some behavioral problems, and that the significant improvement in Student's behaviors was directly attributable to the initiation of a medication regimen. I do not accept their reasoning in this regard, since the revamped behavioral program that included an ABA-trained aide and a new token economy system provided a reasonably calculated framework within which Student could reap the positive benefits of medication.

Overall, this case is about the management of significant behavioral challenges presented by a child with autism and marked oppositionality. Until a behavior specialist with an ABA focus was brought into the picture and an ABA-trained aide was employed the offered programs were not appropriate. It took the District too long to zone in on appropriate evaluation of Student's behavioral profile, and the child lost educational benefit. As of February 22, 2011 however the District began offering Student the opportunity for meaningful educational benefit. Compensatory education will be awarded to assist the Student to recover lost educational opportunity.

I find that the standard for awarding compensatory education set out by the Commonwealth Court of Pennsylvania in *B.C. v. Penn Manor School District*, No. 1150 C.D. 2005, 2006 Pa. Commw. LEXIS 445 (8/15/06), is unworkable in this case. In *B.C.* the court held that "where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." In the instant matter there was no testimony directed toward what would be needed to bring Student to the position student would occupy but for the denial of FAPE and I cannot construe such a calculation. Accordingly I will award hours of compensatory education as set forth below.

I conclude that when Student entered the IU-operated classroom on January 20, 2009 the District was entitled to a reasonable 2-month period to monitor

Student's adjustment to the new setting and to revise the behavior plan. Therefore, an award of compensatory education will not begin until March 21, 2009. Student's behavioral program was inappropriate and continued to be inappropriate through the end of the 2008-2009 school year. During the entire 2009-2010 school year Student did not have the benefit of an appropriate behavioral plan and therefore is entitled to compensatory education for that school year. The District itself became directly involved in Student's programming for the 2010-2011 school year. Although positive and eventually fruitful steps were taken, Student's behavioral program was not reasonably calculated to provide meaningful educational benefit until the implementation of 1:1 ABA techniques as of February 22, 2011. An appropriate behavior management program is estimated to require implementation for about one-third of an elementary-school-aged child's school day, on average over time. Accordingly I am awarding Student compensatory education at the rate of two hours per day for every day Student was present in school from March 21, 2009 through February 21, 2011, excluding summer ESY programming.

Conclusion

The Parents produced preponderant evidence that the District denied Student FAPE by failing to timely assess and provide appropriate interventions for Student's significant behavioral needs and Student is therefore entitled to compensatory education.

Order

It is hereby ordered that:

1. The School District failed to timely and appropriately evaluate, and create a plan to address, Student's behavioral needs.
2. The School District denied Student a free, appropriate public education [FAPE] from March 21, 2009 through February 21, 2011.
3. As the School District failed to timely and appropriately evaluate, and create a plan to address, Student's behavioral needs and denied Student FAPE during the period delineated above, Student is entitled to compensatory education at the rate of two hours per day for every

day Student was present during the regular academic year [excluding ESY] from March 21, 2009 through February 21, 2011.

Any claims not specifically addressed by this decision and order are denied and dismissed.

September 26, 2011

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official