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Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: Student

Date of Birth: xx/xx/xx

Date of Hearing: July 31, 2009

CLOSED HEARING

ODR Case # 9878-08-09-AS

Parties to the Hearing:

Central Greene School District
P.O. Box 472
Waynesburg, PA 15370

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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August 31, 2009

September 14, 2009

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (“student”) is a pre-teen aged student residing in the Central Greene 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 parents requested compensatory education and reimbursement of privately funded related services due to an alleged failure to provide a free appropriate public education (“FAPE”). Specifically, parents allege that the District inappropriately changed the student’s placement and exacerbated student’s classroom behavior by allowing the student to have milk and/or soy products to which the student is allergic. The District maintains that it provided a FAPE to student at all times and accommodated the milk and soy allergies as far as it had been provided accurate information by parents.

ISSUE

Are parents entitled to compensation and/or other remedies as the result of an alleged denial of 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.

FINDINGS OF FACT

1. The student has been diagnosed with autism. (Parents' Exhibit ["P"]-1; School District Exhibit ["S"]-1).
2. The parties met in May 2007 to discuss the student's individualized education plan ("IEP") for the 2007-2008 school year. (P-1; S-1).
3. The May 2007 IEP indicated that the student would receive full-time life skills support. The student would participate with non-disabled peers in regular education for science, social studies, specials, recess, lunch, library and computer class. The student would be pulled out of the regular education environment for language arts and mathematics. (P-1; S-1).
4. The May 2007 IEP indicated that the student had "many sensory needs", including use of a weighted blanket, a weighted lap pad, a wedge-seat cushion and a variety of fidget toys. (P-1; S-1).
5. The student was receiving occupational therapy services ("OT") twice a week in the 2006-2007 school year. This was reduced to 30 minutes of OT per week in the first quarter of the 2007-2008 school year with a further reduction to 30 minutes per month on a

- consultative basis for the remaining three quarters of the 2007-2008 school year. (P-1; S-1).
6. The student's May 2008 IEP indicates that the student was receiving OT twice per week over the course of the 2007-2008 school year. But this entry appears to be copied verbatim from the May 2007 IEP (which was reporting services from the 2006-2007 school year) and does not reflect the level of OT services provided in the 2007-2008 school year. The student's life skills teacher testified that the student received intermittent OT services in 2007-2008. (P-1, P-8; S-1; NT at 110-111).
 7. The May 2007 IEP included, as part of the student's specially designed instruction, the word "redirection", to be used daily in all settings. (S-1; P-1).
 8. In the 2007-2008 school year, the student participated in the regular education setting for all instruction outside of language arts and math, which were both delivered in the District's life skills classroom. (Notes of Testimony ["NT"] at 88).
 9. There was no indication on the IEP developed in May 2007 that behaviors impede the learning of the student or of others. The parties did not discuss problematic behaviors at the May 2007 IEP meeting. (P-1; S-1; NT at 73).
 10. Over the course of the 2007-2008 school year, the student had two teachers in regular education, the full-time teacher and a

long-term substitute teacher who took over the classroom when the full-time teacher went on maternity leave in approximately April 2008. (NT at 29-30).

11. The student's life skills teacher recorded nine instances of, in the words of the witness/District, "meltdown" behavior, behavior which amounted to the halt of instruction in the entire life skills classroom from September 2007 through March 2008. These nine instances each lasted from five minutes up to forty minutes. At times, these behavior incidents included self-stimulating behaviors such as screaming, yelling, or ear-flapping; at other times, the student would slam bathroom and locker doors and destroy classroom property. The witness testified that in April 2008 she went on maternity leave and was not present in the life skills classroom thereafter. (NT at 93-96).
12. The student was often removed from the regular education environment to the life skills classroom. The life skills teacher testified that the student would enter the life skills classroom in an agitated state, and, at times, that she could hear the student approaching the room from noise that the student was making. (NT at 97-98).
13. The student's paraprofessional, who accompanied the student throughout the entire day, recorded twenty-five instances from September 2007 through May 2008 where the student needed

- to be removed from either science or social studies instruction in the regular education setting. (P-3).
14. The parties met in May 2008 to discuss the student's IEP for the 2008-2009 school year. (P-8; NT at 28).
 15. The IEP indicated that the student would receive full-time life skills support. There was no explicit mention of the student's participation in regular education. The indication that the student would not receive language arts and math instruction in the regular education environment remained in the IEP. (P-8).
 16. There was no indication on the IEP developed in May 2008 that behaviors impede the learning of the student or of others. The parties did not discuss problematic behaviors at the May 2008 IEP meeting. (P-1; S-1; NT at 32-33, 60-61, 73, 111-112, 115).
 17. At the May 2008 IEP meeting, the regular education teacher in attendance indicated to the student's mother that the teacher had never seen or met the student. The District admitted that the long-term substitute teacher did not know about the student's schedule and did not deliver much instruction to the student in the regular education setting. (P-2; NT at 29-30, 124-125).
 18. The student did not have a behavior intervention plan in any IEP. The life skills teacher testified that the student could have benefited from such a plan. (NT at 111-112).

19. In February 2007, the parents indicated on a health history that the student had no allergies. In August 2007, however, the District was made aware of the student's milk and soy allergies. But the student, at least once, consumed milk product in pizza with the parents' permission. (P-9; S-2; NT at 64).
20. The student's mother testified that the student's behavior is moderately affected by consumption of milk or soy products over time. (NT at 38-39).
21. The parents removed the student from the District in mid-May 2008. In July 2008, the student enrolled in a Pennsylvania cyber charter school, a school the student was attending at the time of the hearing. (NT at 39, 69-71, 118).
22. The student has been receiving private sensory integration therapy. (NT at 76-77).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE. The substantive provision of a FAPE requires that a student eligible under the IDEIA have an IEP that includes measurable annual goals that meet the child's needs as a result of his/her disability (34 C.F.R. §300.320(a)(2)) and a statement of the program modifications, specially designed instruction, related services, supplementary aids and services that are required to allow the child to advance appropriately toward attaining the annual goals (34 C.F.R.

§300.320(a)(4)). These goals and instruction/related services/supports must be reasonably calculated to yield meaningful education benefit.

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

Additionally, where a student's behaviors impede that student's learning or the learning of others, the IEP team must consider, and the IEP must contain, "the use of positive behavioral interventions and supports, and other strategies, to address that behavior". (34 C.F.R. §300.324(a)(2)(i)).

Here, the District's IEP for the 2007-2008 school year was inadequate to address the OT and behavioral needs of the student. First, going into the 2007-2008 school year, the District knew that the student had significant sensory needs which were being addressed through the student's OT services. (FF 5). These services were not only reduced at the outset of the year but were practically phased out over the course of the 2007-2008 school year. (FF 5).

Second, over the course of the 2007-2008 school year, the student was experiencing multiple, prolonged "meltdown" behaviors that impeded the student's learning and/or the learning of others. (FF 10, 11, 12). The student's life skills teacher opined that a behavior intervention plan could have helped the student. (FF 17). By all appearances, the student was experiencing problematic classroom behavior in both the special education and regular education settings throughout the year, behaviors which intensified in April of 2008. (FF 10, 11, 12; *see also* P-3). At that

very moment, both of the student's regular education teacher and life skills teacher left for maternity leave and the student's instruction was taken over by substitute teachers. (FF 9, 10, 16). Yet there was no behavior intervention plan in effect to facilitate the student's behavior given an entirely new instructional team.

At no IEP meeting was the student's behavior discussed, nor was there any indication in any IEP that the student's behavior was a concern. (FF 8, 15). The only specially designed instruction that could be construed as addressing the student's behavior was "redirection"; but it is implausible to think that this generalized instruction could appropriately address the student's needs, especially in light of the absence of a behavior intervention plan. (FF 6, 17).

Finally, the parents presented a claim that the District did not know and/or ignored the student's milk and soy allergies, leading to or exacerbating the student's problematic behaviors. (FF 18, 19). The parents have not met their burden to establish that the District's treatment of the student's allergy conditions contributed to the student's problematic behaviors.

Still, in sum, the District has failed to provide FAPE to the student through inappropriate OT services where addressing sensory needs were clearly indicated. Additionally, the District has failed to provide FAPE through the lack of any behavior intervention plan or evaluation to

address the student's behavioral needs in both the regular education and special education settings.

Remedies. The parents requested reimbursement for out-of-pocket expenses for related services. The District argues in its closing that since the student is enrolled in a Pennsylvania cyber charter school and, as such, there is no valid claim for reimbursement as these services are available to the parents under 22 PA Code §§ 711.1, *et seq.* I agree with the District that any out-of-pocket expenses incurred by the parents after the date of enrollment in the cyber charter school (FF 21) are not recoverable in this matter.

Still, parents are entitled to reimbursement where they have had to provide for the student themselves what the District should have provided as part of an appropriate education program. *See generally* Florence County Dist. Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985). Therefore, the District will be ordered to provide reimbursement for parents' out-of-pocket expenses related to any OT, sensory, sensory integration services in the 2007-2008 school year, up to the date the student enrolled in the Pennsylvania cyber charter school.

The parents made an explicit claim for compensatory education. (See 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)).

The U.S. Court of Appeals for the Third Circuit has held that the right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied a FAPE. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). A student who is denied a 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.” M.C. at 397.

In this case, the student’s OT needs were recognized as significant yet the District provided little OT services during the 2007-2008 school year. Therefore, the compensatory education award for the denial of FAPE due to inappropriate OT programming will amount to 60 minutes per school week (reflecting two 30-minute sessions per week) over the course of the 2007-2008 school year. Because this award will also allow the parents’ to claim reimbursement for private OT, sensory, or sensory integration services over a similar time frame, the amount of any compensatory education awarded for OT will be reduced hour for hour for any reimbursed private services. This will avoid a situation where the parents are compensated twice for the same denial of District OT services.

The calculation of the denial of FAPE for the lack of any behavior intervention plan is more complex. First, pursuant to Ridgewood and

M.C., the District can only be held liable for a period when it knew or should have known that the student was in need of such a plan. The evidence in this case reveals that the District personnel knew of eleven behavioral incidents (“meltdowns” in their parlance) between September 21, 2007 and October 10, 2007. (See P-3). As of October 10, 2007, then, it seems that the District knew or should have known that the student was experiencing problematic behaviors in multiple settings that were interfering with the student’s education or that of others. Giving the District approximately twenty school days to perform a functional behavior assessment and develop a behavior intervention plan, with an additional ten school days for the IEP team to meet to discuss and approve the plan, it is the considered opinion of this hearing officer that the District should have had a behavior intervention plan in place for this student by November 21, 2007.²

The second complicating factor is the amount of compensatory education that results from the student not having a behavior intervention plan. In this case, the student’s behavior issues were pervasive and interfered with instruction in multiple settings across the school day. And after April 2007, it appears that the student’s entire regular education program was given over to the aide, if it was implemented at all after the full-time teacher left. And no behavioral data was collected in the life skills class after the full-time teacher left for her

² The hearing officer took judicial notice of the 2007 calendar and used it to calculate the dates.

maternity leave. By not having a behavior intervention plan in place after November 21, 2007, the student's instructional setting was severely compromised. Therefore, as a matter of equity, the student will be awarded three hours of compensatory education for every school day from November 21, 2007 through the end of the 2007-2008 school year.

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 related to the student's peer interaction/social skills needs. 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 student's parents.

There are financial limits on the compensatory education award. The costs to the District for compensatory education award 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 should have provided services to the student.

An award of compensatory education will be fashioned accordingly.

CONCLUSION

The District denied the student a free appropriate public education through inappropriate OT services and the lack of a behavior

intervention plan. Where appropriate, reimbursement of out-of-pocket expenses will be ordered. And compensatory education will also be awarded as a result of these denials.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the parents of the student are entitled to reimbursement for parents' out-of-pocket expenses, verified by receipts and/or other proofs of payment, related to any OT, sensory, and/or sensory integration expenses incurred during 2007-2008 school year through the date that the student enrolled in the cyber charter school.

Additionally, the student is entitled to an award of compensatory education, subject to the nature and limits set forth above, as follows:

- 36 hours for the denial of OT services (60 minutes per school week x 36 school weeks for the 2007-2008 school year); and
- 3 hours per school day for every school day from November 21, 2007 through the end of the 2007-2008 school year.

The award of compensatory education for the denial of OT services shall be reduced hour for hour for every hour of private OT/sensory/sensory integration services for which the parents are reimbursed.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

September 14, 2009