

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

Student: Student
Date of Birth: xx/xx/xx
Hearing Dates: November 5, 2009; November 24, 2009
ODR File No.: 00250/09-10 LS

OPEN HEARING

School District: North Penn School District

Parties:

Representatives:

Parent Attorney: Frederick M. Stanczak, Esq.
179 North Broad Street, 2nd floor
Doylestown, PA 18901

North Penn School District School District Attorney: Brian Ford, Esq.
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Lansdale, PA 19446

Date Record Closed: December 27, 2009

Decision Date: January 11, 2010

Hearing Officer: Gloria M. Satriale, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the educational program for Student (hereinafter referred to as “student”), a teen aged student, who resides with Student’s parents in the North Penn School District. The Student has been identified as a child with a disability and eligible for special education services. The Student has received as part of Student’s Individualized Educational Plan (hereinafter referred to as “IEP”) and provision of a Free and Appropriate Public Education (hereinafter referred to as (“FAPE”) by the school district, educational services in the home (hereinafter referred to as “Home Program). A dispute between the Student and the School District arose when the District proposed to reduce/eliminate components of the Home Program. The within Due Process Hearing ensued following the Student’s rejection of the District’s proposal alleging a denial of FAPE, seeking reinstatement of all components of the Home Program and compensatory education for the period of time the Home Program was not fully provided by the District in compliance with the pendent IEP. For the reasons more fully described below, I find for the **STUDENT, IN PART** and **IN PART** for the **DISTRICT**.

ISSUES

1. Whether the District’s proposed titration of the Student’s Home Program constitutes a denial of FAPE? *The Student seeks a continuation of the Student’s home program at current levels as a remedy.*¹
2. Whether the District’s alleged failure to timely fund the Student’s Home Program constitutes a denial of FAPE? *The Student seeks timely funding of the same as a remedy.*²
3. Whether the absence of supervisory services from 6/16/08 – 10/20 /08 constituted a denial of FAPE? *The Student seeks compensatory education as a remedy.*
4. Whether the District’s proposed elimination of funding for the Parents to attend conferences constitutes a denial of FAPE? *The Student seeks a continuation of funding as a remedy.*

¹ During the Hearing, following a recess, the parties reached an agreement regarding this issue and requested that agreement be treated as Hearing Officer Direct ORDER. The Hearing Officer declined to treat the agreement of the parties as an ORDER. The parties then reached a Stipulation of Facts upon which a decision may be based. Further the District committed on the record to reissue a revised IEP and NOREP which would remove any mention of mandatory titration of hours, rendering the issue moot for purposes of this proceeding.

² Id. The parties reached a stipulation of facts upon which a decision may be based by the hearing officer on this issue as well.

5. Whether the District's proposed elimination of funding to reimburse the Parents for alleged out-of-pocket expenses related to the Student's Home Program constitutes a denial of FAPE? *The Student seeks a continuation of funding as a remedy.*³

STIPULATIONS OF FACT

1. The Student is a teen aged student (d/o/b/ xx/xx/xx) who resides with parents and is a resident of the North Penn School District. The Student has been identified with a disability and is eligible for special education services. The student, who has a diagnosis of autism, is placed by the District at a private placement, the Private School and also receives a complement of services in the home. (N.T. 11/5/09 pp. 19-21)
2. The North Penn School District is a recipient of Federal Funds. (N.T. 11/5/09 p.21)
3. The District is obligated to maintain the Student's home program at current levels unless or until such time as data indicates that such home program may be or should be modified so that the Student will receive FAPE in the least restrictive environment. (N.T. 11/5/09 pp. 45-48)
4. The District may not alter the Student's home program except through the procedures authorized by the IDEA at 20 U.S.C. § 1415 and corresponding provisions of Title 22, Chapter 14 of the Pennsylvania Code. (N.T. 11/5/09 tt.45-48)
5. In the event that the District ever uses such procedures to recommend a change in the Student's home program and the Parents disagree with the District's proposal, the Parents shall have the right to exercise any form of dispute resolution provided for by the IDEA. (N.T. pp. 45-48)
6. The District acknowledges its obligation under existing contracts and/or existing IEP obligations to fund the Student's current home program providers until such time as said home program may be modified by and through the procedures described herein. All such payments shall be issued in accordance with the District's practices for accounts payable. Specifically:
 - a. Invoices will be paid in accordance with the District's billing cycle, but not more than 30 days from the date of the District's receipt of the same.
 - b. Whenever possible, service providers will submit invoices directly to the District's accounts receivable department and the District will provide payment directly to service providers.
 - c. If, and only if, direct submission and payment is not possible, the District will reimburse the Parents upon submission of:
 - i. The invoice that the Parents received from the service provider or a photocopy thereof.
 - ii. Proof of payment in the form of a canceled check or credit card statement.

³ The filed Complaint included a sixth (6th) issue for determination regarding the provision of ESY services. The issue was withdrawn at the Hearing. (N.T. 11/5/09 p.23 5-9)

- d. Within five (5) business days from the District's receipt of any request for payment or reimbursement, the District shall inform the service provider or Parents if the request is deficient in any way. (N.T. 11/5/09 pp35 – 38)
- e. The District shall notify the Parents in writing if its procedure for payments or reimbursements changes.⁴

FINDINGS OF FACT

1. The student has not developed essential basic skills for communication, behavior management and social interaction. The student has a long history of problematic behaviors including injury to self and others. The student has difficulty responding to demands/stressors in a socially acceptable fashion resulting in social prejudices and stigma. (N. T. 11/5/09 pp.59-63; 11/24/09 ; N.T. 11/27/09 pp. 173-174; 244-251; Exhibits P-1; P-3; P-11; P-12)
2. Student needs highly structured, systematic instruction, broken down into manageable components specifically keyed to Student's developmental levels and rate of learning, with an emphasis on educational instruction, social and communication skills and behavior management. Communication and skill repertoires have been successfully expanded through intensive intervention and concentration on manding, tacting and intra-verbal instruction through Applied Behavior Analysis (hereinafter referred to as ("ABA")) and Verbal Behavior ("VB") technologies. (N.T. 11/5/09 pp. 64-65; 74-75; 86; 97; 212; 11/24/09 pp. 179; 180; 214-219; Exhibits P-1; P-3; P-11; P-12)
3. Since 2006, the Student has received the type of education Student requires: intensive services pursuant to the principles of Applied Behavior Analysis (hereinafter referred to as ("ABA")) and Verbal Behavior ("VB") in order to address the needs. Initially all services were provided in the home. A subsequent IEP added attendance at the Private School, a center-based ABA program. (N. T. 11/5/09 pp. 22; 63-64; stipulations of counsel; Exhibits 12, 1 respectively)⁵
4. The pendent IEP provided, as a related service, a "Home Program" which consists of the provision of "up to 20 hours" of direct instruction; per week "up to 10 hours" provision of supervisory services per month; reimbursement of expenses; and funding of attendance at conferences for training purposes for the parents. (N.T. 11/5/09 pp. 64; 109-115; Exhibit P-1)
5. On February 26, 2008, the parents were contacted regarding reducing the number of hours of related services provided in the Home Program and subsequently were issued a IEP and NOREP which eliminated 2 services related to the Home

⁴ With these stipulations entered and accepted as facts, the parties enable the hearing officer to address the first two (2) issues presented by the Student. The remaining issues concern whether the Student is owed compensatory education for an alleged lack of supervision in the Home Program and the District's obligation to continue funding the Parents' participation in conferences and out-of-pocket expenses.

⁵ The exhibits entered into evidence were jointly presented. (N.T. 11/05/09 p.13-15)

- Program i.e. funding of training for the parent and reimbursement of expenses related to the Home Program; and proposed an arbitrary titration of the provision of hours of direct service in the Home Program. (N.T. 11/5/09 pp.22; 24; 27-29; 30-34;37-38; 45-49; 74-76; Exhibit 6; 9)
6. On or about June 1, 2008, the Parents were notified that the current provider of supervisory services for the Home Program would no longer continue to provide those services. (N.T. 11/5/09 p.78-29)
 7. In the ensuing five (5) months, Parents and the District sought to replace the supervisor and communicated regarding the lack of supervisory services in the Home Program and the critical need for a Supervisor to be found as immediately as possible. (N.T. 11/5/09 pp. 127-131; P-15)
 8. The District was unable to secure a supervisor to take the case notwithstanding the fact that the District had staff qualified to do so. (N.T. 11/24/09 p. 218)
 9. In the ensuing five months the student was unable to derive any meaningful benefit from the Home Program and, in fact, regressed behaviorally. An increase in maladaptive behaviors was noted as well as a loss of instructional control. (N.T. 11/5/09 pp. 99-103).
 10. The Parent unilaterally sought and secured a Supervisor through entering into a contract. The District agreed to fund this supervisor and requested that the supervisor contract directly with the District. The Parent has refused to allow the District to directly contract with the supervisor and, in fact, initially obstructed the District's requests to directly communicate with the Supervisor.⁶ Parent finally signed consent for the District and supervisor to communicate directly. (N.T. 11/24/09 p.309)
 11. The District has other contracts with third party providers of ABA supervisory services in Home Programs. All current contracts are with the understanding that the providers are fully responsible to design, implement and supervise the Home Program including provision of materials incidental to the Home Program. (N.T. 11/24/09 pp. 292; 297-304; 310)
 12. Since the inception of the inclusion of the Home Program component in the student's IEP, there have been provisions in the IEP to allow for District reimbursement of out of pocket expenses paid by the Parent on account of attendance at conferences and for incidental expenses related to the Home Program. (Exhibit P-1).
 13. Parent has submitted receipts and received reimbursement for expenses related to the Home Program. No expenses are currently outstanding nor have any requests for reimbursement been made since October when the new supervisor was hired. (N.T. 11/5/09 pp. 11-12)
 14. Parent has not attended a conference in the past 3 years. (N.T. 11/5/09 p. 114)

⁶ The difficulties between the parent and the district regarding parent's unilateral communication with the service provider did not in any way delay the reinstatement of the provision of FAPE.

15. The parent is not responsible for the implementation or supervision of instruction in the Home Program. (N.T. 11/5/09 p.118)
16. A Hearing was initially convened regarding this issue before another hearing officer. At the hearing, the parties reached a settlement of all issues, however the settlement was subsequently rejected by the School District Board of Directors resulting in the parents re-filing the instant complaint on September 4, 2009, with the Office of Dispute Resolution (N.T.11/5/09 pp. 21-23; 24-3; P-19).
 - a. The parties waived a Resolution Meeting. A due process hearing was conducted in this matter on November 5, 2009 and November 24, 2009.
 - b. Exhibits were submitted jointly and the following were admitted into evidence: P-1; P-2; P-3; P-4; P-7; P-8; P-9; P-19; P-11; P-12; P-15; P-17; and P-19.
 - c. Exhibits P-5; P-6; P-13; P-14; P-18; and P-20 were not offered into evidence.

DISCUSSION AND CONCLUSION OF LAW

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. [20 U.S.C. § 1412\(a\)\(1\)](#). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of FAPE to its local school districts. School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). [20 U.S.C. § 1414\(d\)](#). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” [Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 \(3d Cir.2004\)](#) (quoting [Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 \(3d Cir.1988\)](#)). In assessing whether an individualized program of instruction is “reasonably calculated” to enable the student to receive meaningful benefit, the progress noted must be more than a trivial or *de minimis*. [Board of Education v. Rowley, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 \(182\); Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 \(3d Cir.1999\)](#)

A parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a due process hearing, to seek relief from the school district for its failure to provide a FAPE. [34 C.F.R. § 300.507](#). In Pennsylvania, the hearing is conducted by a Hearing Officer. [Carlisle Area Sch. v. Scott P., 62 F.3d 520, 527 \(3d Cir.1995\)](#).

Compensatory education is an appropriate remedy where a school district knows or should know that a child’s educational program is not appropriate or that the student is receiving only trivial educational benefit, and the district fails to remedy the problem. The period of compensatory education granted should be equal to the period of

deprivation, excluding the period of time reasonably required for the district to act accordingly. Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999); M.C. v. Central Regional School District, 81 F. 3d 389 (3rd Cir. 1996).

As the moving party, the Student bears the burden of proof in this proceeding. The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of FAPE is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast U.S. , 126 S. Ct.528, 163L. Ed.2d 387 (2005). The student has provided persuasive evidence entitling Student to compensatory education, but not to entitle Student to reimbursement for expenses for materials or training.

Student is entitled to 14 weeks, or 310 hours, of compensatory education

The parties do not dispute appropriateness of the Students program.⁷ It is also established that the District admits being out of compliance with the requirements of the IEP in failing to provide the enumerated hours of supervision (N. T. 11/24/09 pp. 267-268, 277, 292). However a technical violation alone does not entitle a student to compensatory education. A mere procedural glitch or technical violation of the IEP is insufficient. A violation must amount to a substantive effect on the child's ability to receive FAPE in order to hold the district responsible for any procedural glitches--such as the instant issue of difficulty with delivering related services.

20 U.S.C. 1415(f)(3)(E)(ii), 34 C.F.R. 300.513(2) provides:

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies —

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

It is easy to determine that this student should have received supervision and guidance in the implementation of the Home program and that the lack thereof caused a deprivation of educational benefit entitling the Student to compensatory education. 34 C.F.R. 300.513 (2) (iii); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996). Ms. M, MA, BCBA⁸ (hereinafter referred to as the "Behavior Analyst"), provided uncontested evidence of a regression of skill (N.T. 11/24/09 pp. 165; 175-176; 212 P-3) and regarding the inappropriateness of the current program (N.T.11/24/09 p. 170-172). Additionally, the Behavior Analyst testified extensively regarding the essential components of an ABA intervention program, most of which were missing during the gap in supervision. (11/24/09 pp 161—162; 189)

⁷ The District does not dispute that a Home Program component, in addition to the placement in a private school, is necessary for the provision of FAPE; and, as such, an analysis of whether meaningful educational benefit is derived from the provision of a full time ABA center-based private placement alone is not at issue. (N.T. 11/5/09 p. P-1; P-3; P-7)

⁸ Ms. M received her board certification in behavior analysis in March 2008 and has been actively employed as a behavior therapist with experience in ABA and VB programs since 1998. Additionally she holds a Masters degree in Behavior Analysis as well as Occupational Therapy.

Further, it appears that some form of interim supervision during the time that more permanent supervision was being sought could have been put in place by the District. In fact, the District testified that, during this gap period, the District had on staff individuals who would have been qualified to deliver the service. (N. T. 11/24/09 p. 278-279).

The Student was denied FAPE from June 17, 2008 through October 20, 2008 by reason of the District's failure to provide a Home Program supervisor. This denial of FAPE goes beyond the mere deprivation of up to ten hours a month of supervisory services as it is clear from the uncontested testimony of the Behavior Analyst that the Student did not derive any meaningful benefit from any aspect of the home program during that period. Thus, the student is entitled to compensatory education for both components of the Home program (i.e. direct service hours and supervision hours) for the period from June 16, 2008 through October 20, 2008. (P-3, p. 1 establishing October 20th as the initial re-instatement consultation date and P-15, p. 9 establishing June 17th as the first day on which no supervisory services were provided).

Accordingly, I will follow M. C.*supra.* to calculate an award of compensatory education based upon the amount of service that should have been provided, less a deduction for the time it reasonably should have taken the school district to provide FAPE. Here the maximum potential compensatory period would be from the first day there was no supervision (June 16, 2008) through the first day supervision resumed (October 20, 2008). Thus the Student was denied FAPE for a period of 18 weeks. Under the circumstances of the case, and the difficulty in securing qualified behavior analysts, a six week period seems an equitable period of time for the District to have retained a replacement supervisor. For two (2) of the six (6) weeks the district should have reasonably been able to retain a replacement, FAPE continued to be delivered. Thus the net reduction would be four (4) weeks. The Student was denied FAPE for 14 weeks during which Student should have received 20 hours per week of ABA instruction and 30 hours of supervision. Thus, I will award 310 hours of compensatory education.

Reimbursement of Parental Training

Under IDEA, schools must provide not only special education, but also related services in order to furnish students with a FAPE. [20 U.S.C. §§ 1401\(9\), 1412\(a\)](#). However, not all services that can be broadly construed as educational are cognizable under IDEA. This is because "ultimately any life support system...can be construed as related to a child's ability to learn." [Mary T.v. School District of Philadelphia, 575 F.3d 235 \(3rd Cir. 2009\)](#). The term "related services" is defined to include:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child,

Although continuing education and/or training is not specifically listed as a related service, it would seem that such services could be cognizable under IDEA as required to provide a FAPE where a nexus can be clearly established between the

student's ability to learn and receive meaningful benefit from the educational program as outlined in the IEP. See *Kruelle V. New Castle County School District*, 642 F.2d 687 694 (3rd Cir 1981) (stating that IDEA requires "courts to assess the link between the supportive service or educational placement and the child's learning needs").

The Parents claim that their participation in Autism conventions and training seminars has enabled them to communicate better with their daughter and participate in Student's educational program. (N.T. 11/5/09 p. 115)

However, the Parent also clearly testifies that she is *not* responsible for the implementation or supervision of the educational aspects of the Home Program or the student's education and does not participate in the Home Program "as a therapist or teacher". (N.T. 11/5/09 p. 73-76, 115)⁹ While I am certain that the Student's quality of life is dramatically increased by the dedication and interest of Student's parents in Student's progress, the required nexus between the Parents educating themselves regarding their child's disability and the best practices for interventions to improve Student's condition and the mandates of the provision of FAPE by the district is not supported by the evidence. Further, the training accommodation was drafted into the Student's IEP during a period in which the entirety of the Student's educational program was provided in Student's home. This training was provided and, as a result, they are clearly conversant in the language of special education in general and services for students with autism in particular. (N.T. 11/5/09 pp. 63; 65;).

Currently, the Student receives a very high level of support both in Student's home program and in Student's district-funded private school program. The Parents have already been trained and, importantly, do not directly provide any of the educational programming called for under the Student's IEP.

Ongoing training may be useful to the Parents, but there is no evidence or testimony suggesting how such training is necessary for the Student as a related service. No evidence was presented to suggest that the Student cannot make meaningful educational progress unless the Parents are continually trained. As such, the District's proposal to remove the provision of the IEP at this time does not constitute a substantive denial of FAPE.¹⁰

Reimbursement of Out of Pocket Expense

Initially it is noted that the relief requested seems to be prospective and speculative in nature. Parents have not been obligated to purchase anything to supplement that program since the 2007-2008 school year. (N.T.11/5/09 pp. 111-112) Instead, the Parents argue that this IEP provision must be maintained, "Because these are

⁹ The Behavior Analyst testified that the Parent had a sufficient understanding of ABA to meaningfully participate in her child's education. Suggestions for further training involved sophisticated principles necessary for individuals actively responsible for implementing the IEP. (N.T 11/24/09 pp.208 and 222)

¹⁰ See also 34 C.F. R. Section 300.31. Additionally, it is important to note the tremendous value to students with disabilities the continued education and training of all individuals, family members included, who touch upon their lives. Unlike the recent past, particularly in the area of autism, many resources for continued training and education now exist which are free and are readily available through a variety of social service agencies, advocacy groups or simple internet searches.

things that may be necessary to implement or that would be necessary to implement Student's IEP. And I might not be able to utilize my own cash at that time". (N.T. 11/5/09 p.112)

Secondly, it is the District's position that they are already paying for expenses incidental to the implementation of the Home Program through its payment to the Behavior Analyst. All of the other contracts by the District with third parties to provide a home program include incidental items necessary to effectuate the home program (N.T. 11/24/09 pp. 297-304). The District contracts with qualified consultants to be fully responsible for the design, implementation and supervision of the Home Program. It is universally accepted that items such as data collection sheets are the stock in trade of certified behavior analysts and the cornerstone of any ABA program. The production and maintenance of these data sheets whether concerning the intellectual capacity of the consultant to design the sheet or the actual paper and ink necessary to print them are the costs of doing business for the analyst.

The District testified that they would be interested to contract directly with the Student's ABA provider under the same terms and conditions that it contracts with many other ABA providers who administer other Home Programs within the District. The Parent prefers to have the direct contractual relationship with the provider – a desire to which the District acquiesced in accommodation to the Parents wishes. (N.T. 11/24/09 pp. 293; 300). The District should not be penalized by paying "extra". Either this provider is providing all of the services necessary to fully "run" the Home Program or it is not.

CONCLUSION

Notwithstanding the District's attempts to secure a replacement, the District failed to take immediate action upon its first notice regarding the resignation of the current supervisor. Failure to timely secure a properly qualified supervisor for the Home Program resulted in a regression of skills and loss of valuable instructional time for the student and a consequent denial of a FAPE for which the District is responsible to rectify.

The district is not responsible, however to support payment for expenses related to the responsibility of supervision and implementation. Supervision and implementation are the responsibility of the supervisor retained, as is the common practice of contracts with all providers for the District. Nor can the district be responsible to fund training of the parent where the parent is not providing the interventions addressing the goals for which the provision of FAPE is mandated.

ORDER

- The Student was denied a free and appropriate public education from 7/16/08 to 10/20/08.
- The School District shall provide to Student 310 hours of compensatory education. The grant of compensatory education is calculated to include appropriate supervision of the direct service hours.

- The District shall timely pay properly substantiated and submitted invoices in accordance with the procedures outlined in the stipulation of the parties.
- The District shall not be responsible for the reimbursement of expenses related to the Home Program.
- The District shall not be responsible for the reimbursement of expenses related to attendance at conferences or other trainings by the family.
- The district shall be responsible to maintain the current levels of the Home Program as outlined in the stipulation of the parties.
- The District shall convene an IEP Team meeting within ten (10) days of receipt of this ORDER to incorporate the findings and ORDER herein and issue a revised IEP and NOREP accordingly.

Dated: January 11, 2010

Gloria M. Satriale

Gloria M. Satriale, Esq., Hearing Officer