03-0302651

THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted]., Petitioner,	:	
	:	OSAH-DOE-SE-0302651-67-JBG
vs.	:	
GWINNETT COUNTY SCHOOL DISTRICT, Respondent.	:	

FINAL ORDER

Appearances: For Petitioner, [redacted].: Jonathan A. Zimring, Esq.

For Respondent, Gwinnett County School District: Victoria Sweeny, Esq. Elizabeth F. Kinsinger, Esq.

I. INTRODUCTION

This administrative action comes before the Tribunal pursuant to a complaint filed by the mother of [redacted]., alleging that [redacted]. was not offered a Free and Appropriate Public Education ("FAPE") from the Gwinnett County School District ("GCSD") as required under the Individuals with Disabilities Education Act ("IDEA"). As a remedy for the alleged violations, [redacted].'s mother seeks payment of [redacted].'s private placement at the Friends School including the provision of an aide and the related services of occupational therapy, physical therapy, and speech and language therapy, as well as transportation costs at public expense. [redacted]. also seeks payment for Extended School Year ("ESY") services for the summer of 2002 at public expense.

The Tribunal has jurisdiction to hear this matter pursuant to Article 2 of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act" and the Official Compilation of Rules and Regulations of the State of Georgia at Chapter 616-1-2 ("OSAH Rules").

The parties were provided the opportunity to present sworn testimony and documentary evidence on November 4, 6 and 7, 2002. At the conclusion of GCSD's presentation of its evidence, [redacted]. moved for dismissal on the basis that GCSD had failed to show that it offered [redacted]. a FAPE. [redacted].'s motion was granted and an Interim Order issued on November 13, 2002.[1] The hearing reconvened on November 19 and 25, 2002 to address the issue of an appropriate remedy.

GCSD and [redacted]. stipulated to the appropriateness of [redacted].'s placement at the [redacted] School as meeting the Carter/Burlington standard[2] and agreed to payment of the [redacted] School tuition inclusive of an aide and transportation for fifty miles per day at twenty-eight (28) cents per mile by GCSD. The hearing proceeded with the burden shifting to [redacted]. on the remaining issues of reimbursement for related services and ESY.

For the reasons indicated below, it is the decision of this Tribunal that [redacted]. has not met her burden of establishing that the services she received were necessary for her to receive a FAPE. Furthermore, J.B. is not entitled to reimbursement for ESY services as she was not eligible for those services for which she now requests reimbursement. It is further decided by this Tribunal that [redacted]. is not entitled to reimbursement for the occupational therapy, physical therapy, and speech and language therapy she has received during this school year as those services are based on a medical model and are not educationally related to her program.

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[1] The November 13, 2002 Interim Order is incorporated herein in its entirety.

[2] Under School Comm. of the Town of Burlington MA v. Dept. of Educ., 471 U.S. 359 (1985), the Supreme Court decided that parents should be reimbursed for private placement of their child during pending litigation where the public school had offered an inappropriate IEP. In Florence County Sch. Dist. v. Carter, 510 U.S. 7 (1993), the Supreme Court readdressed this issue holding that reimbursement for a private school is not barred by a private school's failure to meet state education standards. As a result, the standard of proving whether a private placement is appropriate is admittedly low. In light of this Court's interim order, Respondent GCSD agreed to stipulate to the Friends School as meeting this low standard, although GCSD does not concede that the IEP it offered was inappropriate.

II. FINDINGS OF FACT

1. [redacted]. is a [redacted] year old girl with athetoid cerebral palsy. She is eligible for services under the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*.
2. [redacted]. is currently attending the [redacted] School located in Decatur, Georgia, and has been placed there by her parents for the 2002-03 school year. Stipulation of the parties; T. 11/25/02, p. 164.
3. [redacted]. requires the assistance of an aide to access the educational program at the [redacted] School. Stipulation of the parties; T. 11/25/02, p. 164.
4. Transportation to and from the [redacted] School equates to approximately fifty miles per school day which will be reimbursed at twenty-eight (28) cents per mile. Stipulation of the parties; T. 11/25/02, p. 164.
5. [redacted] uses dictation to produce written work. T. 11/19/02, p. 93.
6. [redacted]'s parent has consistently rejected all services offered by Respondent including the services offered in the spring 2002 IEP. T. 11/19/02, p. 32; Joint pp. 5-10, 19, 21.
7. [redacted]'s injury is to the central nervous system and is not reversible. T. 11/19/02, p. 48. It cannot be cured. T. 11/19/02, p. 100.

Related Services

8. [redacted] presented no testimony from an occupational or speech-language therapist regarding her need for therapy.
9. Dr. Logan, an expert in programming and the provision of educational services for disabled children in inclusive environments and in designing and

implementing services for such children, testified on behalf of [redacted]. that she would require occupational therapy and physical therapy on an ongoing basis. T. 11/19/02, pp. 38-39; 43-44. However, Dr. Logan based his opinion on children *like* [redacted]., rather than relating it to [redacted].'s specific needs. T. 11/19/02, pp. 49-50.

10. Dr. Logan has observed [redacted]. only twice in her life: once at [redacted] School when she was a small girl and once in September 2002 at the [redacted] School. T. 11/19/02, p. 55.

11. Dr. Logan did not observe [redacted]. using any assistive technology during his three hour observation at the [redacted] School in September 2002. T. 11/19/02, p. 56. He did not testify that he had ever observed her receiving any related services. Moreover, Dr. Logan did not testify as to what those services would properly entail.

12. [redacted] does not currently use her motorized wheelchair at school. T. 11/19/02, p. 74.

13. [redacted].'s physical therapist does not come to her school this year to provide services. T. 11/19/02, p. 76.

14. [redacted].'s former physical therapist, Christine Sanchez, stopped providing services to [redacted]. in May or June of 2002. T. 11/19/02, p. 104.

15. [redacted].'s occupational therapist does not come to her school this year to provide services. T. 11/19/02, p. 77.

16. [redacted].'s speech therapist does not come to her school to provide services. T. 11/19/02, p. 79.

17. [redacted]'s aide has not been trained by her former occupational therapist or former physical therapist since May 2002. T. 11/19/02, p. 82.

18. [redacted]'s aide has never been trained by her current occupational therapist or current physical therapist. T. 11/19/02, p. 81. In fact, they have never met or even talked on the phone. T. 11/19/02, pp. 77, 87.

19. [redacted]'s aide has never called any of [redacted]'s therapists to ask questions. T. 11/19/02, pp. 86-87.

20. For educational purposes, it would not be proper for a therapist to train [redacted]'s parent and for the parent to train [redacted]'s aide. T. 11/19/02, pp. 99-100.

21. [redacted]'s former physical therapist Christine Sanchez distinguished between services provided in a medical model versus those provided in an educational model by stating that in the educational model the physical therapist would match [redacted]'s mobility skills to the school environment and work on maximizing postural control in order to develop academic function. T. 11/19/02, p. 124.

22. Ms. Sanchez recommended physical therapy services one hour per week regardless of whether or not [redacted] was in school. T. 11/19/02, p. 132. She further testified that the services [redacted] is currently provided would not change in any way if [redacted] were not in school. T. 11/19/02, p. 132.

23. An individual cannot determine if [redacted] is stronger by touching her muscles because in a child with athetoid cerebral palsy, "the spasticity that's present in muscle can make it look very developed." T. 11/25/02, p. 33.

24. Dr. Elizabeth Garrett, an expert in designing and implementing educational programs for children with orthopedic impairments testified that occupational

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therapy delivered in a clinical setting, one-on-one, in the presence of a parent, but with no educator present, no parapro, no teacher present is not a related service for educational purposes. T. 11/25/02, p. 102.

25. Dr. Garrett further testified that without collaboration between the therapists and the educational providers at the school regarding the child, the therapeutic service is not reasonably calculated to provide educational benefit. T. 11/25/02, p. 108.

ESY Services

26. When the parent raised the issue of ESY services during the spring IEP meetings, it was only in relationship to technology. The parent never requested educational services, physical therapy, occupational therapy or speech-language therapy for the summer of 2002. T. 11/25/02, p. 69; Pet. Ex. 2, 3, 29, 37-39.

27. A child may require medical therapy over the summer, which does not mean that the therapy is related to education. T. 11/25/02, p. 86.

28. [redacted].'s aide did not work with her in a classroom setting during the summer of 2002. T. 11/19/02, p. 79.

29. During the summer of 2002, [redacted] received the following private services: tutoring from her aide in an undisclosed amount, seven one-hour sessions of occupational therapy, seven one-hour sessions of speech-language therapy, and eight one-hours sessions of physical therapy. T. 11/19/02, pp. 156-157.

30. [redacted].'s new computer uses the same software programs that she used during the 2001-02 school year. T. 11/19/02, p. 80.

31. During the summer of 2002, [redacted].'s aide worked with her on reading books. She testified these were activities that any adult could have done with [redacted].. T. 11/19/02, p. 85.

32. [redacted]. passed all of her courses at the end of third grade and was ready to enter fourth grade; she did not need additional training or additional skill development to access and begin the fourth grade curriculum in the fall. T. 11/25/02, pp. 110-111.

33. [redacted]. presented no evidence that the services provided over the summer were essential for [redacted]. to benefit from education, nor did [redacted]. present any credible evidence that the services provided were related to her education.

III. CONCLUSIONS OF LAW

[redacted]. has the burden of proof to demonstrate that the remedy she seeks is appropriate. See School Comm. of the Town of Burlington, MA v. Dept. of Educ., 471 U.S. 359 (1985). [redacted] has shown no integration, collaboration, or communication with her educational program and the various therapies she has received over the summer and during the 2002-03 school year; consequently, she has presented no evidence of a connection between her education and the remedy requested. Since [redacted] has failed to meet her burden of proof, GCSD cannot be held responsible for payment of, or reimbursement for, [redacted].'s non-educational therapies.

The purpose of the IDEA and its implementing regulations is to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE"). See 34 C.F.R. § 300.1. The IDEA is designed to open the door of public education to children with disabilities, but it does not guarantee any particular level of

education once inside those doors. See Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982); see also J.S.K. v. Hendry Co. Sch. Bd., 941 F.2d 1563 (11th Cir. 1991). The Eleventh Circuit has determined that "when measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity." J.S.K. at 1572-3. There is no requirement that the educational outcome maximize the child's education. See id. at 1573, citing Todd D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991); Doe v. Alabama Dept. of Educ., 915 F.2d 651 (11th Cir 1990).

The IDEA deals specifically and only with a disabled child's education. It does not require a school district to provide medical treatment. See Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S.66, 119 S.Ct. 992 (1999.) It also does not require a school district to provide therapy to maintain a child's medical diagnosis. See Houston Indep. Sch. Dist., 4 ECLPR ¶ 190 (SEA, Texas 1999). Here, [redacted]. seeks a remedy which is outside the scope of the IDEA in that she requests reimbursement for medical therapies provided outside the educational environment and absent the involvement of her educational providers with no direct correlation to her educational program. Consequently, her requests for reimbursement of payment for the therapy she is currently receiving and that which she received over the summer of 2002 should be denied.

A. [redacted]. is not entitled to payment of or reimbursement for the occupational, physical and speech and language therapy she has received during the 2002-03 school year as it is not related to her educational program.

Under the IDEA, the term "related services" means: "transportation and such developmental, corrective, and other supportive services as are **required** to assist a child

with a disability **to benefit from special education**, and includes speech-language pathology . . . physical and occupational therapy, . . . medical services for diagnostic or evaluation purposes." 34 C.F.R. § 300.24(a) (emphasis added.) The Georgia Department of Education Rule is based on and identical to the federal regulation. See GA DOE Rule 160-4-7-.01. By the very definition, related services must be related to a child's special education.

[redacted]. currently receives one hour of occupational therapy and one hour of physical therapy per week in a clinical setting. T. 11/19/02, p. 149. [redacted].'s aide does not attend the therapy sessions and none of her teachers attend the therapy sessions. T. 11/19/02, pp. 77-81. The therapists have not been in the school and there is no evidence of any communication, written or oral, between the school and the therapists. T. 11/19/02, p. 77. [redacted]. presented no credible evidence that the therapy she receives is required for her to benefit from the specialized instruction she receives during the school year. Given that there is no relationship to [redacted].'s educational programming, these therapies are not related to her education and do not constitute "related services" as contemplated by IDEA.

Notably, [redacted]. presented no testimony whatsoever from her current providers.[3] Furthermore, [redacted]. presented no evidence regarding what her current therapies entail and no reports from her current private providers were introduced as evidence. There was absolutely no testimony regarding the current objectives of [redacted].'s therapy or [redacted].'s progress in therapy. Essentially, [redacted]. is requesting reimbursement for and payment of services from providers who have not been identified, credentialed, or presented to the Tribunal for questioning on the services they provide. In fact, the only evidence

[3] In fact, Petitioner has presented no bills indicating the cost of her current therapy and no evidence establishing the reasonableness of the cost as she is required to do under Florence County Sch. Dist. v. Carter, 510 U.S. 7 (1993).

presented at the hearing regarding [redacted].'s current therapies is that they are provided pursuant to a medical model and are not educationally related.[4] T. 11/19/02, pp. 123-124. Moreover, GCSD physical therapist, Kathleen Smith testified that working with a therapist one time per week, as [redacted] does, without any carryover[5] provides no measurable benefit to the child, educational or otherwise. T. 11/25/02, p. 17.[6] This testimony was not contradicted at trial.

The IDEA expressly excludes the provision of medical services except within the narrow provision for "diagnostic and evaluation purposes." See 20 U.S.C.A. § 1401(22). "Respondent is not held to the clinical model for providing educational services to [J.B.]." Houston Indep. Sch. Dist., 4 ECLPR ¶ 190 (SEA, Texas 1999); see also Cedar Rapids Community Sch. Dist. v. Garret F., 526 U.S.66, 119 S.Ct. 992 (1999.)[7] Respondent's duty is to provide services that enable J.B. to make educational progress. Here, [redacted] bears the burden of proving that the services she is provided are designed for her to make educational progress. As [redacted] has presented no evidence that the services she currently receives are in any way related to her education, she has failed to meet her burden of proof and her request that public funding be used to pay for these services should be denied.

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[4] Interestingly, when Christine Sanchez, the only therapist to testify on Petitioner's behalf was asked, "If you indicate to the insurance company that it is for educational purposes, is it reimbursable?" she responded, "Frequently not. It depends on the insurance company, but frequently not." T. 11/19/02, p. 122.

[5] Petitioner's aide has not met her current therapists. There is no evidence they have ever communicated. Therefore, the aide cannot be carrying over Petitioner's therapy regime at school.

[6] "If it was one hour of physical therapy in a clinical setting with no follow-through, no practice every day, frequently through the days, one hour a week with nothing else would not do anybody any good. I would liken that to if you go to the gym one hour a week, and you don't work on your program the rest of the week, you're not going to build endurance. The same would be true for [Petitioner]." T. 11/25/02, p. 17.

[7] Unlike Cedar Rapids, Petitioner has failed to demonstrate that the services requested are *necessary* for her to remain in school.

B. [redacted]. is not entitled to reimbursement for the therapy services she received over the summer of 2002 because she was not eligible for ESY services; moreover, the services she received were not related to her education.

Evidence was presented that during the summer of 2002 [redacted]. received seven one-hour sessions of speech and language therapy, eight one-hour sessions of physical therapy and seven one-hour sessions of occupational therapy. T. 11/19/02, p. 156-157. No evidence was presented about what services either the occupational therapist or the speech-language pathologist provided to [redacted].. Testimony further indicated [redacted]. received an undisclosed amount of tutoring from her aide on reading and practicing on her assistive technology. T. 11/19/02, pp. 85-86. However, no evidence was presented regarding [redacted].'s individualized need for therapy during the summer for educational purposes.

The standard for determining whether a child qualifies for extended school year services is whether such "services are **needed** as part of the student's FAPE." GA DOE Rule 160-4-7-.09(3)(i)2. [redacted]. must show that she would **not** benefit from special education absent the additional summer services. See Rettig v. Kent City Sch. Dist., 720 F.2d 463 (6th Cir. 1983); Bales v. Clarke 523 F.Supp. 1366 (E.D. Va. 1981). [redacted]. has failed to meet her burden of showing that she was eligible for ESY services in the form of occupational, physical, and speech-language therapy for the summer of 2002.[8] She has presented no evidence of need for speech services and no substantive evidence of need for occupational or physical therapy. Neither a speech language pathologist nor an

[8] Petitioner's counsel made reference at the hearing to requesting funding for ESY for the summer of 2003. However that issue is not properly before this Tribunal as the IEP at issue deals with the summer of 2002 and the 2002-03 school year. Respondent GCSD will initiate an IEP meeting in the spring of 2003 to consider ESY for that summer and to develop the following school year's IEP.

occupational therapist testified that [redacted]. needed summer services as part of her FAPE.[9] Furthermore, [redacted].'s former physical therapist testified that [redacted].'s physical therapy needs were medical in nature and the services she provided were pursuant to a medical model and were not educationally related.[10] [redacted] has failed to present any competent or credible evidence that extended school year services were necessary for her to benefit from special education; consequently she has failed to meet her burden of proof and her request for reimbursement should be denied.

1. **[redacted]. was not eligible for speech-language pathology, occupational therapy or physical therapy services for the summer of 2002 pursuant to GA DOE Rule 160-4-7-.09.**

When determining whether a child is eligible for ESY, the Georgia Department of Education Rule provides that the team:

> shall consider the individual needs of the student, and a multiplicity of variables, including such factors as: (i) the age of the student; (ii) the severity of the student's disability; (iii) progress on skills identified in the IEP goals and objectives which address, as appropriate, the student's needs in the areas of academics, communication, social, behavior, motor, vocational, and mobility; (iv) the contents of any applicable transition plan; (v) the rate of progress for the student or the rate of regression which may limit the student's ability to achieve IEP goals and objectives; (vi) the relative importance of the IEP goals at issue; (vii) whether related services are needed to enable the student to progress toward IEP goals; (viii) whether there were any delays or interruptions in services during the school year; and (ix) other pertinent information such as emerging skills.

GA DOE Rule 160-4-7-.09(3)(i)(2). Considering the variables established by the Georgia Rule, [redacted]. was not eligible for ESY services in the form of occupational, physical or speech-language therapy. In order to be eligible for these related services during the

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[9] Although Dr. Logan testified that Petitioner should have services over the summer, his testimony was based on children "like [Petitioner]" and was not specific to Petitioner's individual needs. T. 11/19/02, pp. 49-50.

[10] Ms. Sanchez responded "Yes" when asked, " So does [Petitioner] require physical therapy for medical reasons?" She further testified that "all" of the services she provided to Petitioner were medical in nature. T. 11/19/02, p. 123.

summer, [redacted]. must first establish that she needed to work on some educational objective over the summer which was required to be supported by the related services of speech, occupational therapy, or physical therapy. No such evidence was presented. Related services are defined as services that are required to assist a child to benefit from special education. See 34 C.F.R. § 300.24(a); GA DOE Rule 160-4-7-.01. J.B. has failed to prove that she was eligible for special education during the summer of 2002; as a result, she has failed to prove that she was eligible for related services during the summer of 2002.

[redacted]. presented no evidence of educational need. In fact, all evidence presented indicated that [redacted] was on grade level and making good progress and there was no indication she was in danger of regression. Pet. Ex. 2, pp. 5-8. All evidence at the hearing with respect to [redacted].'s progress indicated that she had done well in the third grade and was ready to start the fourth grade. [redacted] did not need additional training or additional skill development to access and begin the fourth grade curriculum in the fall. T. 11/25/02, pp. 110-111. Therefore, [redacted]. has failed to demonstrate that she was eligible to receive related services during the summer months of 2002 and her request for related services during the summer months of 2002 should be denied.

2. The services [redacted]. received over the summer were not educational in nature and do not constitute specialized instruction related to [redacted].'s unique needs.

Special education is "specially designed instruction provided at no cost to the parents that meets the unique needs of a student with a disability." GA DOE Rule 160-4-7-.01. As discussed more fully above, the only testimony regarding the therapy services J.B. received during the summer of 2002 demonstrated that they were medical in nature

and not for educational purposes. Furthermore, [redacted].'s aide testified that any adult could have engaged in the activities she did with [redacted]., like practicing reading.[11] T. 11/19/02, p. 85. In fact, all of the testimony regarding [redacted].'s summer services indicated that the services merely involved practice and repetition; this does not rise to the level of specially designed instruction related to J.B.'s unique needs.

[redacted]. has presented no evidence of an educational need for summer therapy services. She has presented no testimony that she needed to work on educational objectives during the summer or that she in fact did work on educational objectives. The only testimony presented demonstrated that [redacted] received medical therapy and practice with her aide. There was no evidence presented that [redacted]. took part in an educational program that was specially designed to meet her unique needs. Therefore, [redacted]. has failed to meet her burden of proof to establish that she was eligible for ESY services in the form of occupational, physical, or speech therapy, or that she required the tutoring services of an aide to make educational progress during the school year. Moreover, [redacted] has failed to demonstrate any integration, collaboration, or communication between those services and her education. As a result, [redacted].'s claims for reimbursement should be denied.

In conclusion, with the absence of any evidence proving that the services [redacted] requests reimbursement for are educationally related or calculated to provide her with educational benefit, [redacted].'s claims for reimbursement should be denied.

[11] Petitioner's mother also testified that she practiced with the Petitioner during the summer. T. 11/19/02, p. 161.

IV. ORDER

IT IS HEREBY ORDERD THAT [redacted]'s claims for payment of or reimbursement for the occupational, physical and speech and language therapy she has received during the 2002-03 school year are **DENIED.**

IT IS FURTHER ORDERED THAT Respondent shall pay the [redacted] School tuition inclusive of an aide and reimburse [redacted]'s parent for the costs of transportation for fifty miles per day at twenty-eight (28) cents per mile.

IT IS FURTHER ORDERED THAT [redacted] is not entitled to reimbursement for ESY services or any further remedy under IDEA.

SO ORDERED THIS 23rd day of December, 2002.

John B. Gatto

JOHN B. GATTO
Administrative Law Judge

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