IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MALINDA and RITCH B., individually
and as parents of their minor child, L.B.,

Plaintiffs,

v.

BIRCHWOOD SCHOOL DISTRICT,

Defendant.

OPINION AND ORDER

10-cv-233-slc

On April 28, 2011, I denied plaintiff Malinda and Ritch B.'s motion for summary judgment and affirmed the decision of the ALJ in all parts but one—the provision of compensatory services. Dkt. 25. Before ruling on an award of compensatory education, I provided the parties an opportunity to submit additional proposed findings of fact and argument on points left open by the ALJ. The parties have responded to the order by filing stipulated findings of fact to all but two of the questions posed by the court. Dkt. 26. Each side then filed separate supplemental proposed findings of fact in response to the remaining 2 questions. Dkts. 27-29.

Having reviewed the record and the parties' submissions, I conclude that plaintiffs' request is too vaguely-defined and too open-ended to allow the court to enter an award of compensatory education for L.B. Therefore, I am denying plaintiffs' motion for summary judgment to the extent that it seeks compensatory education for the physical, vocational and behavioral education services that BSD failed to provide.

From the parties' proposed findings of fact, I find the following additional facts:

UNDISPUTED FACTS

Following the administrative hearing, BSD complied with the ALJ's order to provide L.B. with physical, behavioral, and vocational services. On March 25, 2010, an individualized education plan (IEP) meeting was held and attended by Malinda B., L.B., Jeff Stanley (principal), Dan Reif (counselor from Impact Day Treatment), Todd Herricks (physical education teacher), Elizabeth Meyers (special education teacher), Kristi Hoff (assistant director of special education), and Eugenia Hedlund (from Disability Rights Wisconsin). The IEP team modified L.B.'s IEP to include physical education and behavior modification services.

Malinda B. asked that the team give L.B. physical education credit for the time he engaged in physical education activities at Impact Day Treatment.[1] Reif indicated that Impact has regularly scheduled physical education on Mondays in a gym. Further, Impact provides team-building physical education activities averaging 2-3 hours a week to promote social skills. The IEP team discussed and agreed that the team building activities could be counted as L.B.'s physical education because they provide him an opportunity to participate in team sports, which is in line with BSD's 8th grade physical education class. Impact was asked to keep a log of the time L.B. spent doing physical activities. The IEP team also determined that because the team building activities at Impact addressed his social skills, they could be added to the IEP as a behavioral goal. The team agreed that this was a good use of that time and would benefit L.B.

[1] I presume that L.B. began attending Impact after the administrative hearing, but the parties do not indicate when he entered the program.

The team added "behavior and social skills instruction through role plays or journaling" as part of L.B.'s curriculum at the neutral site. This service was provided by the special education teacher.

From March 25, 2010 through the end of the school year, L.B. participated in team-building activities for an average of 2-3 hours a week at Impact and used a pedometer to record his walking activity. During the summer of 2010, L.B. transferred to Spooner School District and currently receives his educational services there. L.B. also received vocational education services. From the beginning of April of 2010 to the end of the 2010-2011 school year, L.B. was given a career interest survey, used a web-based program called "Career Cruising" to investigate careers, and met with the guidance counselor.

OPINION

In the preceding summary judgment order, I asked the parties to provide additional information about the physical, behavioral and vocational education services that L.B. needed and received following the ALJ's decision, and what compensatory services, if any, now are appropriate for L.B. The parties agree that BSD complied with the ALJ's order by reconvening the IEP team and modifying L.B.'s IEP to include physical education and behavior modification services. They also agree that L.B. has received FAPE since March 25, 2010. The parties disagree over whether all of this obviates plaintiffs' request for compensatory education to remedy BSD's past failures to provide L.B. with physical education and behavioral modification.

Compensatory education is "a legal term used to describe future educational services" which courts award to a disabled student under the IDEA "for the school district's failure to

provide a [FAPE] in the past." *Brett v. Goshen Com. Sch. Corp.*, 161 F. Supp. 2d 930, 942 (N.D. Ind. 2001). The IDEA "gives courts broad authority to grant 'appropriate' relief, including reimbursement for the cost of private special education when a school district fails to provide a FAPE." *Forest Grove School Dist. v. T.A.*, __ U.S. __, 129 S. Ct. 2484, 2492 (2009). However, not every denial of FAPE warrants compensatory relief. *Evanston Community Consolidated School Dist. Number 65 v. Michael M.*, 356 F.3d 798, 803 (7th Cir. 2004); *Jamie S. v. Milwaukee Public Schools*, 2009 WL 1615520, *31 (E.D. Wis. Jun. 9, 2009). For example, procedural or minor violations may not warrant compensatory services. *Id.*

Although BSD has provided L.B. with physical education and behavioral modification services since March 2010, they failed to offer these services between October 27, 2008 and March 25, 2010, a period of 17 months. BSD contends that as a practical matter, a student cannot be provided with compensatory services for the time in which he did not receive adequate physical and behavioral education because both are a form of conditioning and are not skills like math or reading that can be "made up later." Plaintiffs disagree and point out that BSD has not provided any support for its assertion. Given what plaintiffs term "the unusual post-hearing procedure," which they assert prevented the parties from presenting additional evidence that could be subject to cross examination, they ask the court to take judicial notice of the fact that it is common knowledge and practice that people can compensate for a failure to exercise by increasing their exercise regimen at a later date. Although there are myriad variables that could qualify plaintiffs' observation, at this stage, I am willing to assume, *arguendo*, that a student deprived of adequate physical education and conditioning could benefit from compensatory physical education over a year later.

To make up for the specific loss in services that L.B. suffered, plaintiffs propose that BSD provide L.B. with 17 months of physical education and behavioral modification services in the amount that the IEP team determined appropriate on March 25, 2010 (i.e., 2-3 hours of team-building physical activities).[2] They contend that a ruling denying compensatory education would send a message to school districts that there are no consequences for choosing not to implement aspects of a child's IEP.

BSD contends that providing such services is impractical because L.B. no longer is a student at BSD. In addition, BSD argues that for 11 of the 17 months cited by plaintiffs, L.B. attended the Siren Day Treatment Program, the purpose of which was to provide L.B. with behavioral modification. According to BSD, any additional behavioral education from BSD during that time would have served no purpose and in any event, would have been impossible to provide because L.B.'s days were completely filled. With respect to physical education, BSD argues that it did not receive a request and there was no opportunity for L.B. to participate in BSD's physical education program while he was at Siren. Therefore, BSD contends that L.B. should not be awarded any compensatory physical or behavioral education for at least the 11 months that he attended Siren.

The Seventh Circuit has yet to offer guidelines for how much compensatory education a student is entitled to under the IDEA. *Petrina W. v. City of Chicago Public School Dist. 299*, 2009 WL 5066651, *3 (N.D. Ill. Dec. 10, 2009). However, of those circuits addressing the issue, the majority have held that awards for compensatory education should be "reasonably calculated to

[2] Notably, plaintiffs have not requested any financial reimbursement for the services that Siren provided. It is not clear from the record whether such an award would be appropriate under § 1412(10)(C), which sets forth the situations in which a local educational agency may be required to pay for the education of a child enrolled in private school without consent of or referral by the public agency. Because neither party has raised the issue, I will not consider it.

provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005); *see also Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1290 (11th Cir. 2008); *Parents of Student W. v. Puyallup School Dist. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994) ("Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA."). *Cf. Mary T. v. School Dist. Of Philadelphia*, 575 F.3d 235, 248 (3d Cir. 2009) (adopting mechanical formula by which length of compensatory education period is equal to the period of deprivation minus the time reasonably required for school district to rectify problem). These circuits emphasize that purpose of IDEA is "to guarantee disabled students 'specialized education and related services designed to meet their unique needs.'" *Reid*, 401 F.3d at 524 (quoting 20. U.S.C. § 1400(d)(1)(A)); *see also Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 201 (1982) ("the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide education benefit to the handicapped child") (emphasis added). As the D.C. Circuit observed, "it would be highly incongruous if this qualitative focus on individual needs gave way to mechanical hour-counting when past . . . violations of the FAPE standard were at issue." *Id.*; *see also Parents of Student W.*, 31 F.3d at 1497 ("There is no obligation to provide a day-for-day compensation for time missed.").

Like Northern District of Illinois, I find the flexible, individualized approach to be consistent with the aim of IDEA and preferable to the formulaic approach taken by the Third Circuit. *Petrina*, 2009 WL 5066651, *4. Therefore, if BSD's denial of FAPE resulted in a

deficiency for L.B., then compensatory services must be aimed at advancing L.B. to the position in which he would have been had he not been denied FAPE. *Reid*, 401 F.3d at 518; *Jamie S.*, 2009 WL 1615520 at 32.

All this being so, the evidence in the record and provided by the parties on appeal does not establish that L.B. is entitled to compensatory services. For 11 of the 17 months, L.B. received what appears to be significant behavioral modification services at Siren. Given the intensive treatment and therapy that Siren offered, it is unlikely that L.B. would have been in a better position had BSD provided behavioral modification services for those 11 months or for the six months following L.B.'s completion of the Siren program.

L.B.'s physical education is a closer call because he received only minimal instruction upon his release from Siren. With due respect for plaintiffs' concern regarding general deterrence to other school districts, plaintiffs do not suggest how or when BSD could provide compensatory services now that L.B. is not its student. Here, it would exalt form over substance to require L.B. to return to Birchwood from Spooner two or three times a week for 60 to 90 minutes of *extra*[3] conditioning and team-building with students with whom he did not attend school. If it is genuinely important to L.B. and his parents that he engage in two or three extra hours of physical education every week for the next 17 months to make up for what he did not get a year ago, then it would seem more efficient and pragmatic for L.B. to start (or to continue) a conditioning program in Spooner. As the ALJ noted in her decision, plaintiffs' request is simply too ill-defined and open-ended to allow entry of an order awarding compensatory education for L.B. Therefore, I am declining to do so.

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[3] Since this is compensatory conditioning, it would be in addition to the physical education that the Spooner School District now is providing to L.B.

As a final matter, plaintiffs seek reimbursement for attorney's fees and costs under 42 U.S.C. § 1415(i)(3)(B) as the partially prevailing party in the due process hearing. Plaintiffs may renew their request in a timely filed motion under Rule 54(d).

ORDER

IT IS ORDERED that:

1. The motion for summary judgment filed by plaintiffs Melinda and Ritch B., dkt. 16, is DENIED to the extent that it seeks compensatory education for the physical, vocational and behavioral education services that defendant Birchwood School District failed to provide.

2. The clerk of court is directed to enter judgment in favor of the defendant and close this case.

Entered this 27th day of June, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge