

*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

Child's Name: Student

Date of Birth: xx/xx/xx

Dates of Hearing:

March 9, April 9, April 20, May 7, May 13  
2010

**CLOSED HEARING**

ODR Case # 00628-09-10-AS

Parties to the Hearing:

Plum Borough School District  
900 Elicker Road  
Plum Borough, PA 15239

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Edward Feinstein, Esquire  
Stember Feinstein  
429 Forbes Avenue/17<sup>th</sup> Floor  
Pittsburgh, PA 15219

Andy Evankovich, Esquire  
Andrews & Price  
1500 Ardmore Boulevard  
Suite 506  
Pittsburgh, PA 15221

June 7, 2010

June 22, 2010

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student (“student”) is a 15-year old student residing in the Plum Borough 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”) and Pennsylvania special education regulations (“Chapter 14”).<sup>1</sup> The parties agree that the student qualifies under these provisions of law. The parties disagree over the student’s past and current special education programming. Specifically, the student’s parents allege that, through multiple acts and omissions, the District mis-identified the student and has denied the student a free appropriate public education (“FAPE”) as required under IDEIA and Chapter 14. Parents seek compensatory education and reimbursement for private tutoring as a result of these alleged deprivations. Parents also seek a unilateral private placement by hearing officer order. The District counters that at all times it has provided a FAPE to the student and met its obligations under IDEIA and Chapter 14.

Parents’ claimed compensatory education in excess of two years.

The first hearing session was devoted to evidence on the scope of the

---

<sup>1</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See also 22 PA Code §§14.101-14.164.

parents' claims pursuant to 34 C.F.R. §§300.507 and 300.511(f). As a result of the evidence presented, the District was found not to have misrepresented or withheld information regarding the student's special education program. Therefore, the scope of the hearing, and any potential recovery, were limited to a period after January 11, 2008 (two years prior to the date parents' complaint was filed).

For the reasons set forth below, I find in favor of the parents and student.

### **ISSUES**

Has the student been denied a FAPE by the District under the terms of IDEIA/Chapter 14?

If so, is compensatory education owed to the student?

If so, is reimbursement owed for private tutoring?

If so, is the student entitled to a due process order for a private placement at a specific private school?

### **FINDINGS OF FACT**

1. The student was initially identified by a District school psychologist in February 2003 as a student with mental retardation and speech and language impairment. (Parents' Exhibit ["P"]-2; Hearing Officer Exhibit ["HO"]-3).
2. From March 2003 through November 2006, the student had individualized education plans ("IEPs"). (P-3, P-4, P-5, P-6, P-7, P-9, P-10; HO-3).
3. In Student's November 2006 IEP, the student's identification of speech and language impairment, and all consequent services, was

- removed. The identification as a student with mental retardation continued to be present. (P-10; HO-3).
4. The student had an IEP in February 2007, the IEP in effect on January 11, 2008. (P-11; HO-3).
  5. By agreement, the District's re-evaluation in December 2005 was independent. (P-8; HO-3).
  6. The student was evaluated privately in February 2007 and August 2007. (P-13, P-43; HO-3).
  7. In December 2007, without knowledge of either of the independent school psychologists' reports, a re-evaluation was completed by a District school psychologist. The re-evaluation continued to find that the student qualified under the IDEIA as a student with mental retardation. (P-12).
  8. The two evaluation reports obtained by parents in February 2007 and August 2007 were shared with the District in January 2008. (P-13, P-43, both at page 1; HO-3).
  9. An IEP was developed in March 2008. (P-14; HO-3).
  10. In May 2008, the student was re-evaluated by a District school psychologist. The re-evaluation report contained results from both of the independent evaluation reports obtained by the parents. The District's re-evaluation report continued to identify the student as a student with mental retardation. Speech and language testing was part of the re-evaluation report, but the results did not lead to a recommendation in the report that the student be identified as a student with speech and language impairment. (P-15; HO-3).
  11. In September 2009, an independent evaluator issued a report identifying the student with a language-based learning disability and not mental retardation. (P-22).
  12. Contemporaneously, in September 2009, the District issued a re-evaluation report. The student's identification was changed from mental retardation to a specific learning disability. (P-23).
  13. The student's IEP team last met in October 2009. (P-24).
  14. In the District's initial evaluation, in February 2003, the student's full-scale IQ was measured at 69. In the following re-

- evaluation, in December 2005, the student's full-scale IQ was measured at 68. In neither evaluation was the student's adaptive behavior evaluated. (P-2, P-8).
15. In subsequent evaluations, the student's full-scale IQ was measured as follows: 74 in February 2007, 75 in September 2009, 84 in September 2004 (different assessment). (P-43, P-22, P-23).
  16. The parents' independent evaluator testified credibly that, in light of the student's language-based learning disability, the high "language load" of certain cognitive assessments have likely underestimated the student's IQ scores. (Notes of Testimony ["NT"] at 180).
  17. In the District's initial evaluation, in February 2003, the student's achievement testing revealed scores of 85 and 88, respectively, on the reading and mathematics composite scores. (P-2).
  18. In the re-evaluation of May 2008, the District did not perform adaptive behavior evaluation, even though the independent evaluation of August 2007 (which did contain adaptive behavior evaluations) indicated that the student's behavior was inconsistent with a student with mental retardation. (P-13, P-15).
  19. The District's mis-identification of the student as having mental retardation, and not a language-based learning disability, rendered inappropriate the expectations, goals, and instruction shaping the student's special education programming. (P-11, P-14, P-16, P-17, P-19, P-20, P-24; NT at 213, 483-484).
  20. The student's achievement testing in reading has shown a consistent decline from 2003 through 2009. (P-2, P-5, P-8, P-10, P-13, P-22, P-23).
  21. The student has scored below basic in reading on all administrations of the Pennsylvania Standard School Assessment ("PSSA") testing. (P-25; School District Exhibit ["S"]-65).
  22. The student's reading goals from January 11, 2008 through October 28, 2009 have been inappropriate. All of the reading goals that guided the student's instruction since January 11, 2008 were written for mastery at, progressively, the 6<sup>th</sup> grade level, or "middle level reading" level, or the 7<sup>th</sup> grade level, or the 8<sup>th</sup> grade level. (P-11, P-14, P-16, P-17, P-19, P-20).

23. In the October 28, 2009 IEP, however, the goal was rewritten to reflect mastery at the student's "instructional reading level" which throughout the 2009-2010 school year has been at the 2<sup>nd</sup>-3<sup>rd</sup> grade level. The student had been evaluated by the District as instructional at the 2<sup>nd</sup>-3<sup>rd</sup> grade level in its re-evaluation of December 2007. (P-12, P-24; NT at 298-300).
24. On the face of the IEPs up to October 28, 2009, then, the reading goals were inappropriate and the student failed to make meaningful education progress in reading. (P-11, P-12, P-14, P-16, P-17, P-19, P-20, P-24; NT at 298-300).
25. In the IEP of October 2009, there is only one reading goal: "When given a selection at (the student's) instructional reading level, (the student) will be able to identify orally and/or in writing, topic, main ideas, and supporting details with at least 85% accuracy on 9 out of 10 opportunities." (P-24 at page 26).
26. Given the student's profound learning disability, the lack of any other goal is inappropriate. (P-22; NT at 185-199).
27. In the District's initial evaluation, in February 2003, the student was identified with a disability in speech and language. In its December 2005 re-evaluation, the student's performance on the same speech and language assessment had declined. The student exhibited significant difficulties in language processing. (P-2, P-8).
28. In November 2006, the student was exited from speech and language services. The District did not perform any testing or assessment of the student's speech and language needs. The decision to exit the student was made solely on the recommendation of the student's speech and language therapist based on Student assessment that the student had met the lone speech and language goal in the IEP. (P-10; NT at 59-60, 178, 652-654).
29. The independent re-evaluation report in August 2007 included comprehensive language-based assessments which indicated that the student continued to have significant needs in language-based processes. In its re-evaluations of May 2008, the District did not use the results to re-incorporate speech and language services into the student's IEP. (P-13, P-15).
30. The independent re-evaluation report in September 2009 included comprehensive language-based assessments which

indicated that the student continued to have significant needs in language-based processes. (P-22).

31. In its re-evaluation of September 2009, the District evaluated the student for speech and language needs and found the student required speech and language services. (P-23; NT at 648-649).
32. The IEP of October 2009, however, did not contain any goal in speech and language. Speech and language services are being provided on a consultation basis, but there was no formal instruction or assessment of the student in the 2009-2010 school year. (P-24; NT at 650, 663-665).
33. The parent's independent evaluator testified credibly that, at the time of testing in September 2009, the student was approximately below grade level as follows:
  - five years below grade level in basic reading;
  - six years below grade level in reading comprehension;
  - six years below grade level in reading fluency;
  - seven years below grade level in oral expression;
  - seven years below grade level in listening comprehension;
  - and
  - five to six years below grade level in writing.(P-22; NT at 183-184).
34. The parent's independent evaluator testified credibly that the student has a severe language-based learning disorder of the dyslexic type that requires intensive, systematic, structured, synthetic-phonetic, code-emphasis to establish essential literacy skills in reading and writing. (P-22; NT at 177, 186-187).
35. Since February 2008, parents have engaged a private tutoring agency to provide reading instruction at their own expense. (P-27; NT at 254-262).
36. By hearing officer ruling dated March 12, 2010, the scope of the hearing, and consequently the scope of parents' claims, was limited to events after January 11, 2008. (HO-3).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Provision of FAPE Under IDEIA

To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

Here, the District has denied the student a FAPE on multiple levels. First, the District clearly and prejudicially denied the student a FAPE by mis-identifying the student as having mental retardation instead of a severe learning disability. (FF 1, 2, 7, 9, 10, 14, 15, 16, 17, 18, 19). Second, the District failed in its duty to evaluate and re-evaluate the student, even when independent evaluations and the student’s own performance should have alerted the District to the fact that the student’s evaluation history was driving inappropriate special education programming. (FF 1, 5, 6, 7, 8, 10, 11, 14, 15, 16, 17, 18, 33, 34). Third, the student has a severe learning disability and the District has failed to provide appropriate IEPs to address that disability. (FF 4, 9, 13, 20, 21,



22, 23, 24, 25, 26). Fourth and finally, the District failed the student in wrongfully discontinuing the student's speech and language services in November 2006 and, once re-instituting those services in October 2009, in inappropriately programming for the student's speech and language needs. (FF 3, 10, 27, 28, 29, 30, 31, 32).

Accordingly, the student has been denied a FAPE since January 11, 2008 through the date of this order. An award of compensatory education will be fashioned accordingly.

#### Compensatory Education

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEIA. (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 right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied 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).

Here, I find that the District's failures amounted to a failure of the student's educational programming from January 11, 2008 through the

date of this decision. Indeed, the student presents with a deep, complex reading disability and broad-ranging language disorder. (FF 16, 17, 19, 20, 21, 27, 28, 29, 30, 31, 33, 34). The student still does not have an IEP that is responsive to the student's needs in reading and language. (FF 22, 23, 24, 25, 26, 32).

The student will be awarded 5.5 hours of compensatory education for every school day from January 11, 2008 through the end of the 2009-2010 school year.<sup>2</sup>

Additionally, given the severity of the student's disability, and the District's failure to program appropriately, it is clear the student needs an educational component over the summers to maintain skills and knowledge in reading. Therefore, the student will be awarded 75 hours of compensatory education for the three summers from 2008 through 2010.<sup>3</sup>

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours

---

<sup>2</sup> The figure is based on the Commonwealth's minimum school day requirements for 7<sup>th</sup>-12<sup>th</sup> graders. 22 PA Code §11.3.

<sup>3</sup> The calculation is based on fairly standard types of ESY programming to serve a student such as this: 3 hours per day each day for a period of five weeks over the summer (e.g., from June 20 – August 1). So the calculation for ESY programming reduces to 3 hours per day x 5 days per week x 5 weeks = 75 hours.

may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that further the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education, either hourly or as the result of a lump sum settlement, 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 provided services to the student during the period of the denial of FAPE.

An award of compensatory education will be fashioned accordingly.

### Reimbursement

Parents have made a claim for reimbursement for their out-of-pocket expenses in providing private tutoring services to the student. 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)). The District failed in its duty to provide FAPE to the student regarding instruction in reading and language. (FF 20, 21, 22, 23, 24, 25, 26, 33, 34, 35). Therefore, the

District will be ordered to provide reimbursement for parents' out-of-pocket expenses for tutoring services.

#### Order for a Specific Placement

Parents request as a remedy a due process order placing the student at a specific private placement. This hearing officer is unaware of any authority to allow for an order of a specific private placement.

Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability. (34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi); Florence County; Burlington). Explicit in this remedy, however, is the requirement that the student be enrolled in the private placement: "(i)f the parents of a child with a disability, who previously received education and related services under the authority of a public agency, *enroll* the child in a private (school)...a court or hearing officer may require the agency to *reimburse* the parents for the cost of that *enrollment*..." (emphasis added)(34 C.F.R. §300.148(c). Even the recent U.S. Supreme Court decisions that found that a student need not ever receive services from a school district for parents to qualify for tuition reimbursement dealt with cases where a

student was enrolled in private schools, and parents were reimbursed for the cost of that enrollment.<sup>4</sup>

This is not to minimize, from the parents' perspective, the financial risk involved in a unilateral private placement should tuition reimbursement not be awarded. But that risk is part of the calculus established by statute.

Therefore, without the ability to order a prospective private placement and prospective tuition payment, and provided only the option to award reimbursement of tuition paid by parents after enrolling a student in a private placement in the face of an inappropriate program offered by a school district, this hearing officer finds that he does not have the authority to grant this remedy.

## **CONCLUSION**

The District has denied the student a FAPE through its mis-identification of the student's disability and inappropriate program. As a result of this denial of FAPE, the District owes the student compensatory education. In addition, the District owes the parents reimbursement for their out-of-pocket expenses in providing private tutoring services for the student.

•

---

<sup>4</sup> Forest Grove School District v. T.A., U.S. , 129 S.Ct. 2484, 174 L.Ed. 2d 168 (2009); Bd. of Educ. of City of New York v. Tom F., 193 Fed. Appx. 26, 2006 WL 2335239 (2d Cir.) *aff'd without op.* 552 U.S. 1 (2007).

## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to an award of compensatory education, subject to the nature and limits set forth above, calculated as follows:

- The student will be awarded 5.5 hours of compensatory education for every school day from January 11, 2008 through the end of the 2009-2010 school year.
- The student will be awarded an additional 225 hours of compensatory education, representing 75 hours of compensatory education for the three summers from 2008 through 2010.

Additionally, upon presentation by the parents of a bill for charges/account statement for all tutoring charges since January 11, 2008 through the date of this order, the District is ordered to pay 100% of the costs of these services. This payment shall be made within 45 calendar days of the date the parents present the bill to the District.

Finally, the IEP team shall meet within two weeks of the date of this order to design the student's IEP team for the 2010-2011 school year. In its deliberations, the IEP team shall consider all evaluation reports and shall particularly and explicitly consider the results and

recommendations of the private evaluation report of September/October 2009 (and entered into the record at P-22). The IEP team shall also particularly and explicitly consider the recommendations for a private placement contained in that same report.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

June 22, 2010