

*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: RT

Date of Birth: xx/xx/xxxx

**CLOSED HEARING**

ODR Case # 10171-08-09-LS

Parties to the Hearing:

Michael J. Healey  
Superintendent  
Tunkhannock Area School District  
41 Philadelphia Avenue  
Tunkhannock, PA 18657

Representative:

Drew Christian, Esq.  
801 Monroe Avenue  
Scranton, PA 18510

Anthony F. Andrisano, Jr.  
Marshall, Dennehy, et. al.  
4200 Crums Mill Road/Suite B  
Harrisburg, PA 17112

Date Record Closed:

April 12, 2010

Date of Decision:

April 27, 2010

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is a 17-year old student who from October 2008 – June 2009, under the terms of the Pennsylvania Public School Code<sup>1</sup>, was a non-resident inmate at a facility within the geographical boundaries of the Tunkhannock Area School District (“District”). The student’s parents reside in another school district. The student has been identified as a student with a disability under federal and Pennsylvania special education laws<sup>2</sup>, namely as a student with mental retardation, an emotional disturbance, and attention deficit hyperactivity disorder (“ADHD”).

There is a complicated procedural history, which will be set forth in the findings of fact below. Based on the evidence presented at the hearing, the District has denied the student a FAPE and compensatory education will be awarded.

## **ISSUES**

Was the student denied a FAPE by the District?

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<sup>1</sup> 24 P.S. §13-1306.

<sup>2</sup> Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) at 20 U.S.C. §§1415, *et. seq.* It is this hearing officer’s preference to cite to the IDEIA’s implementing regulations at 34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-162.

Is compensatory education owed and, if so, in what amount?

### **FINDINGS OF FACT**

1. The student has been identified as a student with mental retardation, an emotional disturbance, and ADHD. (Parents' Exhibit ("P")-1, P-6, P-8; School District Exhibit ("S")-10).
2. The student resided with parents in the geographical boundaries of another school district until September 30, 2008. (Notes of Testimony ["NT"] at 38-39; Hearing Officer Exhibit ["HO"]-11).
3. By order dated September 30, 2009, while a student in the another school district, the student was adjudicated delinquent by the Juvenile Division of the Court of Common Pleas of Lackawanna County ("Court"). The Court ordered that the student be placed at a facility called [Redacted School]. (HO-11; NT at 92-94, 96-97).
4. On October 3, 2008, the student entered the facility at [Redacted School] . (NT at 40; HO -11).
5. By order dated November 13, 2008, the Court ordered that the student be placed at the [Redacted School] School until he could be transferred to the [Redacted School] Residential Treatment Facility (hereinafter both referred to collectively as "[Redacted School] "). (HO-11).
6. The parents were not permitted to dis-enroll or remove the student from [Redacted School] . The parents facilitated the student's enrollment at [Redacted School] through the juvenile probation office of the Court. The student remained at [Redacted School] until June 9, 2009. (NT at 40, 58, 142-144).
7. [Redacted School] is located within the geographical boundaries of the District. (NT at 41).
8. Due to a lack of clarity over the responsibility for which school district was responsible for providing special education and related services to the student, the school district of residence prepared individualized education plans ("IEPs") in September 2008 while the student was attending that school district, and in April 2009

- and May 2009 while the student was at [Redacted School] . (P-1, P-6, P-8; S-3, S-6, S-9, S-10).
9. Academically and functionally, the student's program at [Redacted School] was a failure. (P-7; S-11, S-5, S-12; NT at 43-49, 90-92, 117-126).
  10. The parent was dissatisfied with the program at [Redacted School] and voiced this dissatisfaction to [Redacted School] staff and administration. (NT at 51-53, 59-67, 90-92, 97-98, 117-126, 128-129).
  11. The District did not play a role in the design, implementation, or monitoring of the provision of FAPE to the student while the student was at [Redacted School] . (P-1, P-6, P-8; S-3, S-10; NT at 50-51, 82-83).
  12. As of June 9, 2009, the Court transferred the student, and the student became a non-resident inmate at another facility located outside the geographical boundaries of the District. (NT at 97-98).
  13. In June 2009, parents filed two due process complaints, one against the District—at this file number 10171-08-09—and one against the student's school district of residence at a separate file number. (HO-11; S-1).
  14. Over the course of July through October 2009, the parties filed multiple motions and responses. (HO-1, HO-2, HO-3, HO-4, HO-5, HO-6, HO-7, HO-8, HO-9, HO-10).
  15. In early July 2009, the District filed a motion to dismiss the complaint filed against it, claiming that the complaint was wrongfully filed against the District. (HO-1).
  16. In mid-July 2009, parents withdrew their complaint filed against the district of residence. Given the District's motion to dismiss, however, parents filed a second complaint against the district of residence to protect their interest pending the outcome of the disposition of the motion to dismiss. (HO-11).
  17. The district of residence filed a response to the District's motion to dismiss. (HO-3).

18. Parents filed a response to the District's motion to dismiss. Thereafter, the District and the parents filed continuous response and reply briefs. (HO-2, HO-4, HO-5, HO-6).
19. The District filed a second motion to dismiss for lack of jurisdiction. Parents and the district of residence filed response motions. (HO-7, HO-8, HO-9, HO-11).
20. In October 2009, this hearing officer assumed jurisdiction after the complaints against both school districts were transferred to him. (HO-11).
21. On January 18, 2010, this hearing officer issued a ruling finding that, under the provisions of the Pennsylvania Public School Code, at 24 P.S. §13-1306, (1) the complaint against the school district of residence was dismissed<sup>3</sup>, and (2) the complaint filed by the parents against the District would go forward. (HO-11).
22. On March 18, 2010, the hearing took place in one session. The parties stipulated to the admission of all exhibits, including hearing officer exhibits. The student's mother testified on behalf of the student's case. The District called no witnesses. (NT at 9, 17-24, 37, 144-145, 147).

## **DISCUSSION AND CONCLUSIONS OF LAW**

From the outset of the filing of the complaint in this matter, the District has steadfastly maintained that it should not be held liable, both as matters of law and equity, for any denial of FAPE. (FF 13, 14, 15, 16, 17, 18, 19, 20, 21). This hearing officer's ruling of January 18, 2010 disposed of those issues, finding that the Pennsylvania Public School

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<sup>3</sup> At the time the ruling was issued, parent was ordered to provide an assertion regarding the dates of the student's enrollment at [Redacted School] under the Court's order so that a determination as to whether the school district of residence had any obligations outside of 24 P.S. §13-1306 to provide FAPE to the student over the periods in question. Thereafter, the parent indicated that the student was enrolled at [Redacted School] as indicated in the findings of fact in this complaint. Therefore, the second complaint filed against the school district of residence was ultimately dismissed.

Code set forth that the District is responsible for the provision of FAPE to the student under Pennsylvania special education laws.<sup>4</sup>

### Denial of FAPE

Parents claim that the student was denied FAPE while at [Redacted School] from October 2008 – June 2009. To assure that an eligible child receives FAPE,<sup>5</sup> an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”<sup>6</sup> “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning”,<sup>7</sup> not simply *de minimis* or minimal education progress.<sup>8</sup>

In this case, the student was mis-served at [Redacted School] since the Court-ordered enrollment in October 2008. The record is non-existent in terms of testimony from educational professionals; it is sparse in terms of testimony as to the details of the student’s program at [Redacted School] . (FF 8, 10). Still, a review of the documentary evidence regarding the IEPs for the student and the results of the student’s program at [Redacted School] , taken in conjunction with the credible testimony of the student’s mother, reveals that the student was not provided with a FAPE while enrolled at St Michael’s. (FF 8, 9, 10).

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<sup>4</sup> 22 PA Code §§14.101-14.162.

<sup>5</sup> 34 C.F.R. §300.17.

<sup>6</sup> Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

<sup>7</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

<sup>8</sup> M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996).

It is undisputed that the District did not participate in any aspect of the student's educational programming while at [Redacted School] . (FF 11). Because the District is responsible for any denial of FAPE to the student while the student was a non-resident inmate at [Redacted School] , any remedy for the denial of FAPE falls to the District. (FF 11, 21).

In sum, then, from October 3, 2008 through June 9, 2009, the student was denied a FAPE. Any compensatory education award as the result of the denial, then, falls to the District to provide.

#### 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.<sup>9</sup> 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.<sup>10</sup> 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.”<sup>11</sup>

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<sup>9</sup> 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).

<sup>10</sup> Ridgewood; M.C. .

<sup>11</sup> M.C. at 397.

Here, I find that District's failure to be involved in the design, implementation and/or oversight, and monitoring of the student's educational program at [Redacted School] denied the student FAPE and supports an award of compensatory education. On October 3, 2008, the student became a non-resident inmate of [Redacted School] . (FF 4). It appears reasonable that within one week of enrollment at [Redacted School] , the District, through a communication with [Redacted School] , should have ascertained that a non-resident inmate student was now at [Redacted School] (i.e., a new student had arrived at [Redacted School] and the District was now responsible for the special education programming for the newly-arrived student.<sup>12</sup>) So by October 10, 2008, the District should have known about its obligations under the Pennsylvania Public School Code.

At that point, under the procedures and forms of the Pennsylvania Department of Education for school districts to communicate with one another about the residency status of students who are non-resident inmates at facilities, the District would have had 30 days to ascertain from the school district of residence an affirmation that the student was to be receiving special education services from the District.<sup>13</sup> This confirmation would have been ascertained by November 9, 2008.

Therefore, by November 9, 2008, the District should have reasonably been in a position to know about the student's enrollment as

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<sup>12</sup> 24 P.S. §13-1306; *see* HO-11.

<sup>13</sup> 24 P.S. §13-130; *see* HO-11 at Exhibit A.

a non-resident inmate at [Redacted School] and had that fact confirmed by the student's district of residence. The reasonableness of the District's inquiry into the student's program does not, however, end there. The District might reasonably have requested, and arguably should have requested, to evaluate the student in order to prepare its own IEP for delivery at [Redacted School] . Parental permission for such an evaluation could have been reasonably received within a week (November 16<sup>th</sup>) such that the District could have issued its own evaluation by January 15, 2009.<sup>14</sup> The District would need to have had its own IEP in place within ten school days thereafter, or by January 30, 2009.<sup>15</sup>

Thereafter, it is reasonably calculated that the District was responsible from January 30, 2009 through June 9, 2009 for the provision of FAPE under the terms of its own evaluation and an IEP it developed.

A regulatory school day for a student in 7<sup>th</sup>-12<sup>th</sup> grades in Pennsylvania is 5.5 hours.<sup>16</sup> As a matter of equity, however, it does seem that holding the District accountable for the entirety of the deprivation of FAPE is not fair. The District has argued in good faith that it did not intentionally deprive the student of FAPE. Indeed, it argues that it did not even negligently deprive the student of FAPE. Quite simply, it argues

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<sup>14</sup> 34 C.F.R. §300.323(c); 22 PA Code §14.124(b).

<sup>15</sup> 22 PA Code §14.131(a)(6). This hearing officer takes judicial notice by consulting a 2009 calendar that the 10<sup>th</sup> school day after January 15, 2009 would have been January 29, 2009. Accounting for the Martin Luther King, Jr. holiday, however, places the 10<sup>th</sup> school day on January 30, 2009.

<sup>16</sup> 22 PA Code §11.3.

that it had no knowledge whatsoever of the student's enrollment at [Redacted School] . While this fact does not excuse the failure of its obligations under 24 P.S. §13-1306, and consequently its failures under IDEIA and Pennsylvania special education law, it does mitigate against full hour-for-hour compensation.<sup>17</sup>

Accordingly, as a matter of equity, the compensatory education award will be calculated at a rate of 50% of the instruction of the student should have received in the District's provision of FAPE to the student while the student was a non-resident inmate at [Redacted School] .

As for the nature of the compensatory education award, the parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services 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 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 furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly

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<sup>17</sup> Ridgewood; M.C.

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.

### **CONCLUSION**

Due to the District's denial of FAPE to the student while the student was a non-resident inmate at [Redacted School] , located within the geographical boundaries of the District, the District is responsible for an award of compensatory education.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the District denied the student a free appropriate public education from January 30, 2009 through June 9, 2009.

Parents are awarded compensatory education, subject to the nature and limits set forth above, in an amount equal to 2.75 hours for every school day attended by the student at [Redacted School] , and every day of excused absence, from January 30, 2009 through June 9, 2009.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

April 27, 2010