

*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**

### REINSTATEMENT ORDER/ CLOSING ORDER AND MEMORANDUM OF THE HEARING OFFICER

In Re: File Number 14277-1314KE

Special Education Due Process Hearing for **K.N.**

Having been informed by counsel that the parties reached a point where, despite a mutual understanding regarding all but one term of a settlement, the agreement could not be finalized because the School Board of the Tunkhannock Area School District (District) declined to approve the settlement agreement because of disagreement over that material term, which the parties were unable to resolve, it is **HERBY ORDERED** that the complaint in the above-captioned matter is **REINSTATED**.

It is **FURTHER ORDERED** that the undersigned hearing officer hereby asserts jurisdiction over the reinstated complaint for the sole purpose of resolving the parties' dispute over the permitted use of the agreed settlement funds as set forth below.

It is **FURTHER ORDERED** that the compensatory education funds, in the amount to which the parties previously agreed, **shall not be used** by Parent on behalf of Student to pay for tuition, room and board, college textbooks or for other ordinary expenses required for matriculation at a two year or four year college or university for courses that earn college credits for Student, generally, or credits that may be applied

toward an associate degree, a bachelor's degree or a post graduate degree at a two year or four year college or university that confers such degrees.

It is **FURTHER ORDERED** that the compensatory funds to which the parties previously agreed, **may be used** by Parent on behalf of Student for any of the following purposes, in addition to such other purposes, if any, to which the parties previously agreed, and to which the School Board of the School District expressed no disagreement prior to the date Parent requested reinstatement of the complaint:

1. Instruction/tutoring in basic academic skills and/or content areas, including but not limited to tutoring to assist Student in passing/benefitting from post-secondary education classes in any subject area, as well as non-credit remedial courses that may be required in order for Student to be admitted to a college or university to take college courses for credit, whether or not such courses/credits are included within a program expected to lead to a degree.
2. Assistive technology, including but not limited to computers, tablets, and software/applications to assist Student in post-secondary education and/or employment/employment training. An assistive technology evaluation is explicitly included among the services which Parent may obtain for Student with compensatory education funds.
3. Transition services/special education services of the type offered or provided to secondary education students, or IDEA-eligible students who may defer a diploma in order to receive additional special education/transition services within the District and/or Intermediate Unit 18, and/or any other program or training for which District provides or has ever provided funding for IDEA eligible students through age 21, other than college tuition for credit as described above. A transition evaluation is explicitly included among the services which Parent may obtain for Student with compensatory education funds.
4. Employment skills training programs at any facility, such as traditional vo-tech schools, or technical institutes, that serve both secondary students who have not yet graduated from high school as well as adults, or that provide the same type of training available at institutions within the Commonwealth of Pennsylvania that serve secondary education students, even if the specific program accepts only post-secondary students.

5. Social skills training, counseling and/or psychological/behavioral treatment services.
6. Any other services or equipment to which the parties have agreed or may agree, provided that any unresolvable future disagreement will limit the parties to the uses of the compensatory education funds described in this order.
7. The time in which the compensatory education award may be used shall be governed by the parties' prior or subsequent agreement, provided that if there is no current or future agreement, the compensatory education funds shall be used by Student's 26<sup>th</sup> birthday.

It is **FURTHER ORDERED** that based upon the representations of counsel that the parties satisfactorily resolved all other matters in dispute between them with respect to the above-captioned case, and the only issue in dispute preventing final settlement of this matter via approval of the School Board of the School District was use of compensatory education funds for post-secondary education services, which has now been resolved by this Order, any claims not specifically addressed by this order and memorandum are denied and dismissed, this case is **DISMISSED** and jurisdiction is relinquished.

DATED: May 7, 2014

Anne L. Carroll  
Anne L. Carroll, Esq.  
HEARING OFFICER

## MEMORANDUM

In March 2014, counsel for Parent requested reinstatement of this case. During a March 24, 2014 conference call, counsel disclosed that all matters in dispute between the parties had been satisfactorily resolved except for a limited question concerning use of the compensatory education fund, as to which the parties had agreed on an amount. Specifically, Parent requested that Student, who is expected to graduate at the end of the current school year, be permitted to use the fund for post-secondary education, including college tuition. The District School Board was unwilling to approve a settlement that included such use of compensatory education funds.

After discussion with counsel concerning several options for bringing this matter to a conclusion, such as a full hearing on all matters included in the due process complaint, thereby negating the entire settlement, a hearing limited to use of the compensatory education funds, and briefs on the single legal issue in dispute, the parties agreed to submit briefs detailing their respective positions on the issue of appropriate use of the compensatory education fund, and further agreed to a decision by the hearing officer limited to that matter alone. Accordingly, the parties submitted their briefs on April 22, 2014 and this matter is now ready for disposition in accordance with the decision date set at that time.

It should be noted, first, that parties to a special education dispute may choose to resolve it on any terms on which they willingly and freely agree, including use of compensatory education funds for post-secondary education. When the parties cannot agree, however, as in this case, and a decision is needed, appropriate use of compensatory

education funds is necessarily governed by the legal principles that provide the legal underpinnings for compensatory education awards entered after a full hearing.

Compensatory education is an equitable “remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3<sup>rd</sup> Cir. 2009) (internal quotation marks and citation omitted). An award of compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3<sup>rd</sup> Cir. 2010), citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). See also, *Central School District (sic) v. K.C.*, 2013 U.S. Dist. LEXIS 94065 at \*32 (E.D. Pa. 2013):

The award "should aim to place disabled children in the same position they would have occupied but for the school district's violations" by "replacing educational services the child should have received in the first place." *Reid v. D.C.*, 401 F.3d 516, 518, 365 U.S. App. D.C. 234 (D.C. Cir. 2005) (cited with approval by *Ferren C.*, 612 F.3d at 717-18).

The legal principles governing compensatory education awards clearly suggest the rulings embodied in the order set forth above. Parent’s argument that alleged IDEA violations that occur late in an eligible student’s public school career should enable him or her to use compensatory education funds for any purpose that addresses the student’s “educational needs” is far too broad. Unlike legal damages or even general equitable relief intended to compensate for a fault-based breach of duty or violation of law, the remedy of compensatory education was created to address a very specific type of loss based on a very specific type of violation, *i.e.*, the services that comprise a free, appropriate public education (FAPE) that a local educational agency (LEA) must provide

to an eligible student under the IDEA statute, in accordance with relevant court and administrative agency decisions and guidance.<sup>1</sup> Legal damages, particularly, and to a lesser extent, general equitable relief, focus on providing a monetary award for the opposing party's breach of duty or other wrongdoing. Although the amount must be reasonably related to the value of the loss, the choice of how to use resulting funds is left entirely to the recipient who may, *e.g.*, choose not to replace a damaged vehicle, but use the funds for another purpose. Although the value of a loss of educational services is often as difficult, if not more difficult to determine than other kinds of loss occasioned by a breach of duty, the purpose of compensatory education is limited and very clear, *i.e.*, to replace the services that were denied to the greatest extent possible. It follows, therefore, that a compensatory education award cannot be used for "new" rather than "replacement" educational services.

Clearly, an LEA, which is a school district for a school-age child under Pennsylvania law, does not provide college courses for credit toward a degree or otherwise.<sup>2</sup> Consequently, using compensatory education funds for college tuition or other college expenses cannot possibly provide an eligible student with services that a school district should have provided, and cannot restore such student to the position s/he would have occupied absent an IDEA violation. Far from fulfilling the remedial

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<sup>1</sup> These comments are not forgetting or ignoring Student's claims under §504 of the Rehabilitation Act of 1973. It is very clear, however, that the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with a FAPE, and that a §504 claim for denial of FAPE is governed by the same standards and legal principles that apply to IDEA claim. *See D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008). Nothing in the complaint suggests that the §504 claims differ at all from the IDEA claims.

<sup>2</sup> Although high schools often provide Advanced Placement classes, as well as the opportunity for students to take the test that may lead to the equivalent of college credit, such classes fulfill high school requirements and any effect beyond high school is determined by the post-secondary institutions.

purposes of the IDEA statute by requiring the District to pay what it should have paid all along, use of compensatory education funds for college would simply provide a windfall for Student.

On the other hand, use of the compensatory education fund is not as limited as the District appears to request. School districts must provide both special education and such related services as required by an eligible Student to benefit from special education. At all grade levels, school districts are required to provide assistive technology to students who need it in order to receive a FAPE, and at the secondary level, school districts are required to provide transition services, and such transition services may, and often do, include remedial instruction. A compensatory education award may properly be used for any and all such services, as well as for evaluations to the extent necessary. Moreover, remedial instruction does not need to be delivered at a secondary school or by a secondary teacher, as long as such instruction is designed to improve basic skills, including reading, writing and math skills necessary to succeed in post-secondary education classes. All such services, under appropriate circumstances, could be required to assure that an eligible Student receives a FAPE. In addition, IDEA eligibility can continue to age 21, and school districts often fund programs during a “13<sup>th</sup> year” that might not be available to a student still attending a secondary school. Although a school district is ordinarily not required to provide such programs to students who fulfill regular high school education requirements, using a compensatory education award for a program that admits students who completed high school but remain IDEA eligible does not expand a school district’s responsibility.

In short, if a service or device might be provided to an eligible student, or to a regular education student during the school age years or years of potentially continuing IDEA eligibility, it qualifies as an appropriate use of compensatory education funds. The specific examples of appropriate potential uses of compensatory education funds listed and described above are intended to provide both a broad general outline and specific examples of the type of services that remain within the scope of secondary education services.

DATED: May 7, 2014

Anne L. Carroll

Anne L. Carroll, Esq.  
HEARING OFFICER