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Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: C.G.

Date of Birth: [redacted]

Date of Hearing:

May 9, 2012

### **CLOSED HEARING**

ODR Case # 2923-1112AS

Parties to the Hearing:

Parents

Greater Johnstown School District  
1091 Broad Street  
Johnstown, PA 15906-2437

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

John J. Kuzmiak, Esquire  
442 Main Street  
Johnstown, PA 15901

May 9, 2012

May 29, 2012

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is an [elementary school-aged] student residing in the Greater Johnstown 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> Specifically, the student has been identified as a student with specific learning disabilities in reading and mathematics and a health impairment, namely attention deficit hyperactivity disorder (“ADHD”).

Parents assert that the student’s educational placement was unilaterally changed by the District after parent initiated a previous round of special education due process in November 2011, in violation of the “stay-put” provisions of the IDEIA and Chapter 14.<sup>2</sup>

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

### **ISSUES**

Did the District violate the student’s stay-put protections, triggered by the parents filing of a complaint in November 2011?

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<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.

<sup>2</sup> 34 C.F.R. §300.518; 22 PA Code §14.102(a)(2)(xxxii). The previous round of special education due process unfolded over January-March 2012. The decision, issued by this hearing officer, is found at 2557-1112AS.

## **FINDINGS OF FACT**

1. In November 2010, the District issued its evaluation report (“ER”). The November 2010 ER concluded that the student was eligible for special education and related services as a student with specific learning disabilities in reading and mathematics, and the qualifying health impairment of ADHD. (Special Education Decision 2557-1112AS at findings of fact 10, 13).
2. On December 8, 2010, the student’s IEP team met, and the District issued a notice of recommended educational placement (“NOREP”) recommending that the student receive itinerant learning support services in accord with an individualized education plan (“IEP”) issued the same day. (School District Exhibit [“S”]-1, S-2).
3. The student completed the 2010-2011 school year under the December 2010 IEP. (Special Education Decision 2557-1112AS at findings of fact 17-20).
4. On November 17, 2011, the IEP team met to revise the student’s IEP. (S-3; Notes of Testimony at 53).
5. On the same day as the IEP meeting, on November 17, 2011, the student’s mother filed a special education due process complaint. The District received a copy of the complaint on November 18, 2011. (Hearing Officer Exhibit [“HO”]-2).
6. On December 6, 2011, the District began implementing the November 2011 IEP to guide its delivery of special education to the student. (NT at 70; Special Education Decision 2557-1112AS at finding of fact 28).
7. Under the November 2011 IEP, the student received itinerant special education for 40 minutes per day in small group instruction as in the December 2010 IEP. The student also received one-on-one special education instruction for an additional 30 minutes per day. The student also received an additional 90 minutes per day in reading/language arts instruction outside of the regular education classroom. (HO-3, HO-4, HO-5; Special Education Decision 2557-1112AS at finding of fact 29).

8. On December 16, 2011, the parents returned the NOREP, indicating that the parents did not approve of the recommendations for programming in the proposed November 2011 IEP. (S-4).
9. On January 12, 2012, the parents filed a complaint with the Pennsylvania Department of Education Bureau of Special Education (“PDE”) regarding the fact that the District implemented the November 2011 IEP after parents had filed for special education due process. (S-8, S-9).
10. On March 5, 2012, the parents filed a special education due process complaint that led to these proceedings. (S-10).
11. On March 12, 2012, PDE issued its findings on the parents’ complaint lodged with PDE. The District was found to have violated the student’s stay-put protections. (S-11).
12. On March 13, 2012, the District suspended additional special education instruction implemented under the November 2011 IEP. (NT at 70).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Stay-Put Protection

Whenever a student is involved in a special education due process hearing, “during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing,...unless the (school district) and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.” (34 C.F.R. §300.518(a)). This provision is commonly referred as to the “stay-put” provision, or pendency provision. A student’s “current educational placement” refers

to “the operative placement actually functioning at the time the dispute first arises; if an IEP has been implemented, then that program’s placement will be the one subject to the stay-put provision.” *Drinker v. Colonial School District*, 78 F.3d 859 (3d Cir. 1996), 867, quoting *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 625-626 (6<sup>th</sup> Cir. 1990).<sup>3</sup>

In this case, the parents filed for special education due process on November 17, 2011, the date of the November 2011 IEP meeting. (FF 5). Thereafter, however, the District moved forward with the implementation of the November 2011 IEP even though the stay-put safeguard was triggered with the filing of the parents’ special education due process complaint. (FF 5, 6, 7). From December 6, 2011 onward, the student moved to a more restrictive educational program, with specially designed instruction toward IEP goals in a setting outside of regular education increasing from 40 minutes per day to 160 minutes per day. (FF 7).

The District’s violation of the student’s stay-put protections is clearly prejudicial. Not only is it a violation of clear and well-understood statutory requirement, but, here, the violation resulted in a much more restrictive placement for the student. (FF 7). Additionally, as an important equitable consideration, the parties share a highly contentious history. Parents’ anger and resentment at the hearing session, and prior to that at the multiple sessions convened for the hearing at 2557-

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<sup>3</sup> The holding in *Drinker* regarding a student’s current educational placement for stay-put purposes was reiterated by the Third Circuit in a non-precedential slip opinion in *L.Y. v. Bayonne Bd. of Educ.*, 384 Fed. Appx. 58, (3d Cir. 2010). And, *see generally*, *Honig v. Doe*, 484 U.S. 305 (1988).

1112AS, is palpable. The District showed considerable professional patience with parents who could be, at times, adversarial; it must be a very frustrating position for the District to find itself in. But that nettlesome relationship becomes even less collaborative through unilateral actions like the District's.

Accordingly, an award of compensatory education will follow.

#### Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEIA, 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, the student was placed unilaterally by the District in a much more restrictive educational placement in violation of the student's stay-

put protections. (FF 4, 5, 6, 7, 9, 10, 11). The December 2010 IEP provided 40 minutes daily of specially designed instruction geared to IEP goals; the November 2011 IEP, implemented after the parents had filed for due process, provided 160 minutes of specially designed instruction geared to IEP goals. (FF 2, 3, 4, 5, 6, 7). While the increase may have been taken in good faith by the District, the additional 300% increase in special education servicing, in violation of the stay-put requirement, will be the basis of an award of compensatory education.

Under the student's December 2010 IEP, the student received 40 minutes of specially designed instruction toward IEP goals. (FF 7). Beginning on December 6, 2011, the District was implementing 160 minutes of specially designed instruction toward IEP goals. (FF 7). Additional instruction ceased on March 13, 2012. (FF 12). Therefore, 120 minutes (2 hours) of compensatory education will be awarded to the student for each school day attended between December 6, 2011 and March 13, 2012.

Accordingly, there will an award of compensatory education for the prejudicial violation of the student's stay-put protections.

### **CONCLUSION**

The District committed a prejudicial procedural violation of the student's stay-put protections by unilaterally changing the student's

placement after the parents filed for special education due process in November 2011.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the District violated the student's stay-put protections under IDEIA and Chapter 14 when it unilaterally changed the student's placement after the parents filed a special education due process complaint in November 2011.

The student is entitled to 2 hours of compensatory education for each school day attended between December 6, 2011 and March 13, 2012.

Any claim not specifically addressed in this decision and order is denied.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

May 29, 2012