

*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: GA

Date of Birth: xx/xx/xxxx

Dates of Hearing:  
November 18, & November 19, 2009  
January 27, February 4, & March 4, 2010

### **CLOSED HEARING**

ODR Case # 10052-08-09-KE

Parties to the Hearing:

Fran Fattah, Esq.  
Chester-Upland School District  
1720 Melrose Avenue  
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Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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March 29, 2010

April 13, 2010

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is an 18-year old student residing in the Chester-Upland School District (District) who has been identified as a student eligible under federal and Pennsylvania special education laws as a student with a hearing impairment.<sup>1</sup> The student has been receiving educational services through an individualized education plan (“IEP”) developed by District. For the entirety of the student’s K-12 education until October 2008, however, the student’s IEP has been implemented in a hearing support classroom in the nearby [Redacted District].<sup>2</sup>

Following a behavior incident in October 2008, the student was removed from the placement at [Redacted District] . The student’s parent alleges that District has denied the student a free appropriate public education (“FAPE”) from October 22, 2008—when District removed the student from the hearing support placement—through the beginning of the 2009-2010 school year.

For the reasons set forth below, I find in favor of the student for certain deprivations within this recovery period.

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<sup>1</sup> It is this hearing officer’s preference to cite to the implementing regulation of the Individuals with Disabilities in Education Act of 2004 at 34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162.

<sup>2</sup> The hearing support classroom is merely housed at [Redacted District] . The classroom is staffed and operated by the Delaware County Intermediate Unit.

## **ISSUES**

Has District denied the student a FAPE from October 22, 2008 through December 4, 2008 when the student was excluded from the hearing support classroom at [Redacted District] but was not being educated?

Has District denied the student a FAPE from December 5, 2008 through February 19, 2009 when the student was in a 45-day diagnostic placement?

Has District denied the student a FAPE from February 19, 2009 through the end of the 2008-2009 school year when the student remained in the diagnostic placement?

Has District denied the student a FAPE at the beginning of the 2009-2010 school year?

## **FINDINGS OF FACT**

1. The student has been identified as a student with a hearing impairment. Specifically, the student has severe sensori-neural hearing loss in the right ear and severe-to-profound sensori-neural hearing loss in the left ear. (District Exhibit-37).<sup>3</sup>
2. For the student's entire K-12 education, the student has received hearing support services in [Redacted District] . In the 2006-2007

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<sup>3</sup> A companion complaint against [Redacted District] , based on the same series of events underlying this decision, was filed at 10286-08-09-KE alleging violations of Section 504 of the Rehabilitation Act of 1973 for claims that [Redacted District] discriminated against the student based on his disability. Parent filed a motion to consolidate the two cases. Parent's motion was granted to promote judicial efficiency and to ensure that, should a remedy need to be apportioned in some way between District and [Redacted District] arising out of identical facts, there would be one, consistent record. See Hearing Officer Exhibit 2. Therefore, the record consists of three sets of exhibits—District's, [Redacted District] 's, and parent's. Note, however, that the decisions resolving each complaint are being filed separately.

- school year, the student entered 9<sup>th</sup> grade at a [Redacted District] high school. ([Redacted District] Exhibit-1; Notes of Testimony [“NT”] at 862).
3. In 9<sup>th</sup> grade, the 2006-2007 school year, the student received detention on six days and one day of out-of-school suspension. There was one incident of physical horseplay which resulted in three days of detention; the other detentions and the one-day suspension were the result of cutting detention or Saturday school, and one teacher removal from class. ([Redacted District] Exhibit-2).
  4. In 10<sup>th</sup> grade, the 2007-2008 school year, the student’s discipline record was more extensive. ([Redacted District] Exhibit-2).
  5. In October 2007, the student was involved in a pushing incident which resulted in two days of detention. ([Redacted District] Exhibit-2).
  6. In November 2007, the student cut two detention periods, which resulted in further detention and Saturday school. The student was also involved in an incident with another student in gym class that resulted in one day of suspension. ([Redacted District] Exhibit-2).
  7. In January 2008, the student was involved in a fight that resulted in a 4-day suspension. ([Redacted District] Exhibit-2).

8. In early April 2008, a school-based team met to discuss the problematic behaviors building over the school year and particularly the January 2008 fight. The team decided to perform a functional behavior analysis. The student's parent was not involved in the meeting because, contemporaneously, the student's grandmother (the mother of the parent) was terminally ill and nearing her passing. (Parent Exhibit-2; District Exhibit-40).
9. Approximately two weeks later, in mid-April 2008, the student received a detention for cutting a scheduled detention. Three days later, the student was involved in a fight that resulted in another 4-day suspension. ([Redacted District] Exhibit-2).
10. The day after the fight, the functional behavior assessment was issued. (District Exhibit-38).
11. A re-evaluation report, following the functional behavior assessment, was issued in May 2008 along with a positive behavior support plan. (District Exhibits 36, 37).
12. In June 2008, an IEP meeting was held. (District Exhibit-35).
13. At this time, the student and the student's mother were informed by the [Redacted District] school counselor that further fights would probably result in the student being removed from the District. This was referred to, with some dispute at the hearing, as a "three strikes rule". Still, the District was clear in June 2008 that

- further altercations could have consequences for the student at the District. (NT at 618-628).
14. In 11<sup>th</sup> grade, the 2008-2009 school year, the student was involved in a fight on October 22, 2008. ([Redacted District] Exhibit-2; District Exhibit-34).
  15. A manifestation determination meeting was held October 28, 2008, and the student's behavior was found not to be a manifestation of the student's disability. The team recommended that the student be placed in a 45-day diagnostic placement "to help determine needs". (District Exhibit-33).
  16. The manifestation determination worksheet indicates that the student's mother participated by telephone. The paperwork indicated that the team agreed to the transfer, but the student's parent disputes that she was ever in agreement with the manifestation determination result or the transfer to the "diagnostic" placement. (Parent's Exhibit-26; District Exhibit-33; NT at 904-911, 986).
  17. The student's parent was not provided with the manifestation determination worksheet or any paperwork related to the manifestation determination process. (NT at 107, 11, 233, 902).
  18. The determination that the behavior was not a manifestation of the student's behavior neglected to consider the potentially

significant emotional /behavioral/psychological issues that had been swirling around the student, and which everyone involved with the student recognized, since the prior school year. (District Exhibit-19 at page 4, 25, 33, 36 at page 1, 40 at page 2, 50; NT at 215-217, 306, 615-616, 749, 834, 1281-1286).

19. The recommendation of the school-based members of the manifestation determination team for a 45-day “diagnostic” placement indicates, in and of itself, that there were doubts about the student’s educational programming. (District Exhibit-31; NT at 125, 306, 751-752, 785, 1115, 1229, 1273-1277, 1301).
20. Following the manifestation determination process, the student’s mother disagreed with what unfolded in the ensuing weeks, ultimately requesting mediation regarding the student’s educational program and placement. In early December, the student’s mother approved a notice of recommended educational placement (“NOREP”). (District Exhibit 26, 31; [Redacted District] Exhibit 6; NT at 920).
21. The student began the 45-day diagnostic placement on December 4, 2008. (District Exhibit 26).
22. The student performed well at the diagnostic placement. There were no behavioral incidents. The diagnostic placement notified District that it felt the behavioral structures in place at the

- diagnostic placement were in appropriate for the student. (District Exhibit 19; NT at 136, 278, 285, 477, 679).
23. The 45-day placement was to have expired on February 18, 2009. At that point, the District out-of-district placement coordinator contacted [Redacted District] and was informed that the student could not return to [Redacted District] . (District Exhibit-21; NT at 683-685, 760-761).
24. The student did not return to [Redacted District] in the 2008-2009 school year, although it was the desire of the student and the student's parent to do so. (NT at 922, 939).
25. An IEP meeting was held in March 2009 but no NOREP for the student's educational placement was presented. (District Exhibit 14, 15; NT at 335).
26. The student remained in the diagnostic placement from February 18, 2009 through the end of the 2008-2009 school year without any IEP team intervention or District NOREP.
27. Parent filed complaints against [Redacted District] and District in May 2009.
28. In June 2009, District presented a draft IEP at the resolution meeting held as a result of the initiation of due process. (District Exhibit 10).

29. In August 2009, District presented a NOREP to implement the “IEP (03/24/09 06/29/09)” at District high school. The student’s parent rejected the NOREP. (District Exhibit 9).
30. On September 3, 2009, the federal District Court for the Eastern District of Pennsylvania issued a temporary restraining order determining that the student’s pendent placement for 12<sup>th</sup> grade, the 2009-2010 school year, was at [Redacted District] pending the determination of these proceedings. (Hearing Officer Exhibit-3).
31. On September 22, 2009, District issued a NOREP for the “provision of special education and related services as outlined in the IEP in the student’s home school and (vo-tech placement)”. It is unclear what IEP the NOREP is referring to. (District Exhibit 8).
32. Through counsel, parent admits that she did not “press her claim” or “address” compensatory education for the 2009-2010 school year and avers that the student has received FAPE in the [Redacted District] placement in the 2009-2010 school year. (Parent’s Closing Statement at page 4).

## **DISCUSSION AND CONCLUSIONS OF LAW**

October 22, 2008 – December 4, 2008

From October 22, 2008 through December 4, 2008, the student went without education services. Throughout late October, November, and early December, 2008, District was on notice that the student and parent disagreed with the manifestation determination process and the placement decisions being pursued by the District. Even though District's position was that the "diagnostic" placement was necessary and appropriate, it is clear that the District knew that the student was going without any educational services during this period. Even as it worked toward another educational placement, it is a denial of FAPE for the District, without even proposing homebound instruction of some sort, to knowingly allow the student to go without educational services for approximately six weeks.

Accordingly, an award of compensatory education will follow.

December 4, 2008 – February 18, 2009

Whenever the placement of a student with a disability is changed as a result of a violation of a code of student conduct, the representative of the school district, the parent, and relevant members of the child's IEP team must assemble to determine if the behavior that led to the discipline is a manifestation of the student's disability.<sup>4</sup> If so, then the school district must refrain from implementing the discipline at that time

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<sup>4</sup> 34 C.F.R. §300.530(e).

and undertake certain further actions; if not, then discipline may be imposed as it would be for a student without an IEP.<sup>5</sup>

In this case, the manifestation determination process, which is ultimately the responsibility of District, was procedurally and substantively flawed. First, the student's parent was not made an integral part of the manifestation determination team and was not given the information or ability to meaningfully participate due to nature of her telephone participation and her lack of paperwork. These procedural flaws amount to a denial of FAPE in and of itself. Second, the substantive decision is flawed because the student clearly had issues that at least implicated further considerations, and perhaps were explicit cautions that the student's behavior were manifestations of a disability or a potential disability given the student's history. Third, there is no provision in federal or Pennsylvania special education law for a "diagnostic" placement under the manifestation determination regulations.<sup>6</sup> The manifestation determination process denied the student FAPE as the result of deeply flawed procedural and substantive violations.

Accordingly, an award of compensatory education will follow.

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<sup>5</sup> Id. at §300.530(c),(f).

<sup>6</sup> As indicated, the options for a manifestation determination process are (1) a determination that the behavior was not a manifestation of the student's disability, (2) a determination that the behavior was a manifestation of the student's disability, or (3) a unilateral change-of-placement by school personnel where the disciplinary incident involves drugs or weapons. 34 C.F.R. §300.530.

February 19, 2009 – End of 2008-2009 School Year

As indicated above, the student underwent a wrongful change-in-placement as the result of a flawed manifestation determination process. Even though this is the case, February 19, 2009 became an operative date because, given how District was proceeding, the “diagnosis” would have been completed. As of February 2009, however, District was unable to offer the student an educational program. The student remained in the diagnostic placement by default, and even when the IEP team reconvened in late March 2009, the District was not in a position to offer the student a program or placement.

At that point, it is clear that [Redacted District] was unwilling to allow the student to attend the program hosted in its building. Yet it was equally clear that the diagnostic placement was too restrictive for the student. The denial of FAPE from February 19, 2009 onward is based on a clear violation that the student be educated in the least restrictive environment (“LRE”). Both federal and Pennsylvania law require that the placement of a student with a disability be in the LRE.<sup>7</sup> Pursuant to the mandate of 34 C.F.R. §300.114(a)(2):

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or severity of the disability is such that education in regular

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<sup>7</sup> 34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993).

classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

Here, District allowed inappropriate separate schooling to form the basis of the student’s program due to inability or indifference to propose an appropriate program.

Accordingly, an award of compensatory education will follow.

#### 2009-2010 School Year

There is nothing in the record that would support an award of compensatory education for the 2009-2010 school year. Given the federal court’s order, and the admission of parent through counsel, the student has been in an appropriate program for the 2009-2010 school year.

Accordingly, there will be no award of compensatory education for the 2009-2010 school year.

#### 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>8</sup> The right to compensatory education accrues from a point where a school district knows or should have known that a student

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<sup>8</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).

was being denied FAPE.<sup>9</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>10</sup>

Here, I find that District denied the student FAPE from the day its manifestation determination process wrongfully changed the student’s placement on October 22, 2008 and continued through the end of the 2008-2009 school year.

Therefore, the student will be awarded 5.5 hours of compensatory education for every District school day from October 22, 2008 until the end of District’s 2008-2009 school year.<sup>11</sup>

As for the nature of the compensatory education award, the parent 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.

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<sup>9</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996).

<sup>10</sup> M.C. at 397.

<sup>11</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.

There are financial limits on the parent's discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs, or to any lump-sum the parties might decide upon to settle the compensatory education claim. The costs to the District of providing the awarded hours of compensatory education, or the lump-sum, 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.

### **CONCLUSION**

The District School District has denied the student FAPE due to its procedural and substantive violations of federal and Pennsylvania special education laws, including the LRE mandates of those laws. An award of compensatory education will follow.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, parent is awarded compensatory education, subject to the nature and limits set forth above, in an amount equal to 5.5 hours for every District school day from October 22, 2008 through the end of the 2008-2009 school year.

Pursuant to the September 3, 2009 order of court issued by the federal District Court for the Eastern District of Pennsylvania, however, the District School District may not, in the words of the order, “(alter) (the student’s placement at [Redacted District] ) without the consent of (the student’s) natural guardian or further Order of this Court.”

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

April 13, 2010