

*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: J.T.

Date of Birth: [redacted]

Dates of Hearing:

April 12, 2011

May 6, 2011

May 24, 2011

May 31, 2011

June 1, 2011

June 7, 2011

### **CLOSED HEARING**

ODR Case # 1462-10-11-KE

Parties to the Hearing:

Parent[s]

Pine-Richland School District  
Administration Building  
702 Warrendale Road  
Gibsonia, PA 15044

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pamela Berger, Esquire  
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Pittsburgh, PA 15211

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June 27, 2011

July 16, 2011

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

[Student] (hereinafter “student”) is a [teenaged] student residing in the Pine-Richland School District (“District”) who has been identified as a student with a disability, specifically autism, 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 nature of the student’s school day regarding the provision of special education programming. The student’s parents also allege that, through multiple acts and omissions, the District has denied the student a free appropriate public education (“FAPE”) as required under IDEIA and Chapter 14. Additionally, parents assert that the student has been the subject of disability discrimination under the applicable provisions of Section 504 of the Rehabilitation Act of 1973 (“Section 504”).<sup>2</sup>

Parents seek compensatory education as a result of the alleged deprivations of FAPE and a finding that the District has discriminated against the student in violation of Section 504. Parents also ask that specific aspects of the student’s school day be addressed in the order,

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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> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15., 15.10 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of “protected handicapped students”.

including provision for an extended school day (that is, services provided outside of the school day). The District counters that at all times it has provided a FAPE to the student and met its obligations under IDEIA, Chapter 14, and Section 504. Additionally, the District asserts that it can provide a FAPE to the student within the school day.

For the reasons set forth below, I find in favor of parents in some regards and in favor of the District in other regards.

### **ISSUES**

Was the student denied a FAPE in the 2009-2010 and/or 2010-2011 school years?

Is the last-proposed individualized education plan (“IEP”) of January 2011 reasonably calculated to yield meaningful education benefit?

Did the District engage in discrimination in its treatment of the student?

What should the student’s school day look like for the 2011-2012 school year?

### **FINDINGS OF FACT**

#### **Chronology**

1. In the summer of 2009, the student moved into the District from [another state]. The student entered 6<sup>th</sup> grade at the District. (Joint Exhibit [“J”]-1, J-2, Notes of Testimony [“NT”] at 34-35, 314).
2. The student was receiving special education services in [the other state]. A draft evaluation report was issued by the [other state] school district in June 2009. (J-2).
3. At the outset of the 2009-2010 school year, the student’s educational programming was guided by the evaluation and IEP

- from the [other state] school district. In September 2009, the District requested, and received from parents, permission to evaluate the student. (J-3).
4. In October 2009, the student's IEP team developed an IEP, again based largely on the student's IEP from the [other state] school district with additional information from the District after acclimating to the new school. (J-4).
  5. In October 2009, the student also underwent a functional behavior assessment that resulted in a positive behavior support plan. (J-6).
  6. The student's parents did not approve the District's recommended educational placement, indicating that there were outstanding issues related to study guides and curriculum. Those issues were subsequently addressed such that, in November 2009, the October 2009 IEP was approved by parents. (J-7, J-10).
  7. The October 2009 IEP contained two goals in reading, one goal in mathematics, one goal in writing, two goals in speech, and one goal in occupational therapy. (J-4).
  8. In November 2009, the District issued its evaluation report. The District's evaluation report recommended that the student continue to be identified as a student with autism. (J-8).
  9. In December 2009, the parties met to revise the student's IEP in light of the evaluation report and the student's continuing enrollment at the District. The student's parents did not approve the District's recommended educational placement, requesting an informal meeting to discuss the recommendation. The informal meeting centered on writing instruction. (J-9, J-10, J-12).
  10. In January 2010, the parties having resolved parents' issues with writing instruction, parents approved the December 2009 IEP. (J-9, J-10, J-12).
  11. The December 2009 IEP contained one goal in reading, one goal in mathematics, one goal in writing, two goals in speech, and one goal in occupational therapy. (J-4).
  12. In January 2010, the District also requested, and received from parents, permission to perform a functional behavior assessment. (J-11).

13. In March 2010, the District undertook a functional behavior assessment that resulted a positive behavior support plan. (J-13, J-14).
14. In March 2010, the student was also found eligible for extended school year (“ESY”) services in reading and speech and language, along with a summer camp experience. (J-15).
15. In early April 2010, in accord with District practice when children move from the elementary school environment to the middle school environment, the student’s father met with a group of District employees to coordinate issues of planning and transition to the District’s middle school for 7<sup>th</sup> grade. The group meeting, which was not an IEP team meeting, ended abruptly when the student’s father voiced disagreement with how the group was discussing delivering the student’s special education program in the middle school. Thereafter, the parties agreed to meet again in an effort to discuss further the student’s programming. (J-27; P-3; NT at 645-650).
16. In May 2010, the parties met again, as an IEP team, to discuss how the student’s special education program could be delivered in the middle school. The District presented various options for the delivery of regular education and special education/related services, options which the family disagreed with. (J-16, J-27).
17. The District’s position was, and has continued to be, that it can provide a FAPE to the student at the middle school within the school day. The parents’ position was, and has continued to be, that the student requires an extended school day (that is, services delivered outside of the school day).
18. In June 2010, the parents filed a complaint with the Pennsylvania Department of Education’s Bureau of Special Education (“PDE”), alleging various wrongful acts and omissions on the part of the District. (P-2).
19. In July 2010, the District revised the student’s IEP and sent it to the parents along with a notice of recommended educational placement (“NOREP”). The NOREP was returned to the District, noting that the parents did not agree with the IEP or recommended programming. (J-17, J-29).
20. In early August 2010, the student’s IEP team met to discuss the student’s IEP. After a District consultation with PDE, the IEP

- team utilized the factors for determining eligibility for ESY services in determining the student's eligibility for extended school day services. Using this analysis, the school-based members of the IEP team found that the student did not qualify for an extended school day. Parents disagreed. The IEP team was unable to reach agreement. At the meeting, however, parent requested an evaluation in written expression. (J-18, J-20).
21. In mid-August 2010, the District performed an evaluation in written expression. (J-19, J-30).
  22. In mid-August, PDE issued its complaint investigation report, making certain findings and ordering certain corrective actions. (Parents' Exhibit ["P"]-2).
  23. In late August 2010, the District revised the student's IEP and sent it to the parents along with a NOREP. The NOREP was returned to the District, noting that the parents did not agree with the IEP or recommended programming. (J-21, J-22).
  24. In early September 2010, parents requested an independent educational evaluation at District expense, a request that was granted by the District. (J-23).
  25. Following parents' request for an IEE, a series of independent evaluations were undertaken in the fall of 2010, resulting in the issuance of an independent occupational therapy ("OT") report, an independent speech and language report, and an independent neuropsychological report. (P-17, P-18, P-21).
  26. In January 2011, the results of the independent evaluations were included in an IEP, the last-offered IEP. (J-24).
  27. In January 2011, the District also issued permission to evaluate for a functional behavior assessment. The permission was mis-directed to parents' counsel; parents did not receive the request until February 2011. (J-26).
  28. The January 2011 IEP contained one goal in reading, one goal in mathematics, one goal in writing, four goals in speech, and one goal in occupational therapy. (J-4).
  29. In February 2011, the parents filed a due process complaint which form the basis of these proceedings. (P-1).

### Reading

30. Both the District's evaluation and the independent neuropsychological evaluation identified comprehension as the primary deficit in the student's reading. (J-8 at page 17; P-21 at pages 7, 11).
31. In [the other state], the student received a reading program called Visualizing & Verbalizing ("V&V"). The District provided V&V as part of the reading goal in all IEPs. (J-4, J-9, J-17, J-21, J-24).
32. From the 5<sup>th</sup> grade present levels of educational performance ascertained in June 2009 in the IEP from the [other state] school district through the progress monitoring data of the third quarter of 7<sup>th</sup> grade (approximately two school years in the District), the student moved up from V&V workbook 3a to 5a. (J-1, J-4, J-24; P-24 at page 3).
33. Over the same period, the student showed consistency in answering higher-order thinking questions based on reading in the V&V program at progressive levels, including percentages correct overall and percentages correct both with and without prompting (J-1, J-4, J-24; P-24 at page 3).

### Written Expression

34. Both the District's evaluation and the independent neuropsychological evaluation identified needs in the area of written expression. (J-8 at page 17; P-21 at page 11).
35. In the District's written expression assessment performed in August 2010, the District assessor provided the student with a graphic organizer as part of the assessment. Additionally, the assessor mis-calculated the student's raw score on the vocabulary sub-test. (J-19, J-30; NT at 495, 610-612).
36. Even though a District school psychologist testified that the use of the graphic organizer and the scoring error minimally affected the assessment and its results, the irregularities diminish the reliability of that assessment. (NT at 610-612).
37. The student's written expression goal has changed over the course of the IEPs at the District. The goal in the October 2009 IEP was written in terms of multi-paragraph writing in light of Pennsylvania academic standards. The goal in the December 2009 IEP was written in terms of raising the student's score on a 12-point writing rubric. Following the written expression assessment

- in August 2010, the goal was revised in terms of paragraph elements. (J-4 at page 20, J-9 at page 17, J-21 at page 24).
38. The student's writing goal has fluctuated markedly across IEPs. The most recent goal, written in January 2011, is vague. Additionally, even though in January 2011 the writing rubric score was abandoned as part of the writing goal, progress monitoring data in February and March 2011 show that the student was still being assessed using the 12-point rubric instead of paragraph elements. (J-4 at page 20, J-9 at page 17, J-21 at page 24; P-24 at page 4).
39. As part of the student's present levels of academic performance in the January 2011 IEP, the student's language arts teacher reported that "(the student's) writing consists largely of simple sentences...." lacking "detail and artistic vibrancy". Vocabulary and grammar were described in the same vein—"basic, lacking in subtlety/nuance". (J-24 at page 8).
40. The student's writing samples support the report of the language arts teacher, with more accomplished samples in the record seemingly beyond the student's abilities in written expression. (School District Exhibit ["S"]-8, S-9, S-10, S-11).
41. The January 2011 IEP corrects the flaws in the written expression goal by crafting a clear, measurable goal. (J-24 at page 31).

#### Speech & Language

42. The District's evaluation and the independent neuropsychological evaluation, as well as the independent speech and language evaluation, identified needs in the area of speech and language. The student exhibits significant deficits in expressive and receptive language, as well as pragmatics. Based on this record, these deficits have been present throughout the student's educational history and, along with reading, form the student's most significant educational needs. (J-1, J-2, J-8 at page 18; P-18; P-21 at page 11).
43. The October 2009 and December 2009 IEPs contained two speech and language goals, one centered on targeted vocabulary and the other centered on appropriately attending to/contributing to appropriate social interactions. (J-4 at pages 21-22, J-9 at pages 18-19, J-17 at pages 23-24, J-21 at pages 25-26).



44. Progress monitoring data from March 2010 through April 2011 shows that the student has made halting progress on the social interaction goal<sup>3</sup> and made progress on the vocabulary goal. (P-24 at pages 5-9).
45. The January 2011 IEP contained four speech and language goals, two centered on appropriate social/classroom interactions, one centered on correct grammar and sentence formation in expressive communication, and one centered on content-area vocabulary. These goals address the same areas as the speech and language goals in prior IEPs, but the January 2011 goals are more detailed. (P-24 at pages 32-35).

### Social Skills

46. The October 2009 and December 2009 IEPs contained specially designed instruction to provide as-needed instruction for appropriate social behaviors. (J-4 at page 24, J-9 at page 21, J-17 at page 27).
47. At the outset of the student's 6<sup>th</sup> grade year, the student participated in a social skills group led by a District school counselor. Parents objected to these sessions because the sessions were led by a school counselor and not a speech and language therapist. Based on parents' objections, the student stopped attending the counselor-led social skills group. (J-8 at page 9; NT at 74-75).
48. The January 2011 IEP contained specially designed instruction to provide weekly participation in a social skills group. (J-24 at page 39).
49. None of the evaluators in their reports, nor witnesses during testimony, focused on social skills deficits to any great extent. Clearly, the student has needs in social interaction, but those needs were addressed by the IEP team largely through speech and language programming. (J-8, J-9, J-24, P-18, P-21; *see generally* NT at 1-1281).

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<sup>3</sup> The data on social interactions was heavily influenced by the student's familiarity with the other individual with whom the student was interacting. J-24 at pages 7-9.

### Occupational Therapy/Sensory Needs

50. There are two aspects to the student's occupational therapy ("OT") needs: fine motor skills as those skills impact the student's handwriting and a sensory diet to allow the student to regulate sensory needs. (J-1, J-2, J-8, J-9 at pages 7-8 and 20, J-24 at pages 17-24, P-17).
51. The student's OT goal in the IEPs focuses on handwriting. (J-9 at page 20).
52. From April 2010 through March 2011, the student's progress in handwriting was stagnant, declining from copying 37 words in two minutes to the 25-30 words range in two minutes. (P-24 at page 10).
53. The handwriting goal in the January 2011 IEP is clear and measurable. (J-24 at 36).
54. In the 2010-2011 school year, the student received sensory breaks in the mid-morning and mid-afternoon. These breaks are proposed to continue in the January 2011 IEP. (J-24 at page 37; NT at 458-463).

### ESY Services

55. The student received ESY services in the summer of 2010, both as direct service and in a camp environment. The ESY services were appropriate. (P-7).

### School Day

56. The District middle school runs on an A/B schedule, alternating A days and B days throughout the year. Each school day consists of eight academic periods and a lunch period. Each period is 43 minutes. (NT at 450-467, 668, 672).
57. The eight periods include: math, science, social studies, English, reading, gym/world languages (alternating on A/B days), band, and unified arts (art/consumer science/tech ed/keyboarding, each offered in a separate quarter). (NT at 450-457).
58. During the period when band is offered, the District offers an alternating schedule with an academic support class. Academic support is a class where both special needs students and students

without special needs can receive various academic services and supports. (NT at 453-455).

59. In the 2010-2011 school year, the student received V&V instruction in place of world language.<sup>4</sup> (NT at 456-459).
60. In the 2010-2011 school year, the student received some speech and language services and some OT services during sensory breaks. (NT at 461-464).
61. As part of written closing arguments, the parties were asked to provide to the hearing officer a specific sense of what each party felt would be an appropriate school day for the student. (NT at 1278-1279).
62. Parents propose a school day where days A and B are nearly identical, except for daily sensory breaks and lunch every other day with a social skills group. Additionally, parents propose that V&V instruction, speech and language services and OT be delivered outside of the school day. (See parents' closing argument at Exhibit D).
63. The District proposes a program where the student receives regular education instruction except for the following: V&V instruction takes the place of world language in the alternating arrangement with gym, and an alternating arrangement between band and academic support. (See District's closing argument at pages 40-41).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Provision of FAPE

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

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<sup>4</sup> The student receives V&V on a Monday-Wednesday-Friday schedule (and gym on a Tuesday-Thursday schedule) instead of on A/B days.

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)).

*IEP of December 2009 & Its Implementation.* Here, the District has provided FAPE in some regards and, in other regards it has not. The District has provided FAPE to the student in reading (FF 30, 31, 32, 33), speech and language (FF 42, 43, 44), social skills (FF 46, 47, 48, 49), sensory needs (FF 54), and ESY (FF 55).

The District has not provided FAPE to the student in written expression (FF 34, 35, 36, 37, 38, 39, 40), and handwriting (FF 51, 52, 54). In the case of written expression, the goal in the December 2009 IEP is prejudicially vague. (FF 37, 38). The progress monitoring is muddled. (FF 38). The District’s assessment process in August 2010 was flawed. (FF 35, 36). Most importantly, the record taken as a whole, especially a review of what the District purports to be the student’s achievement in writing in light of the student’s work product in written expression (FF 39, 40), supports a finding that the District has denied the student a FAPE in written expression from January 25, 2010 through the end of the 2010-2011 school year.<sup>5</sup> In the case of handwriting, the student made no progress on the handwriting goal in the December 2009 IEP. (FF 51, 52, 54).

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<sup>5</sup> The December 2009 IEP was approved by parents, and thus became operative, on January 25, 2010. (FF 10).

An award of compensatory education will be fashioned accordingly.

*Appropriateness of January 2011 IEP.* In all aspects of the student's program, the January 2011 IEP is reasonably calculated to yield meaningful education benefit and, as such, is appropriate. The reading (FF 31), speech and language (FF 45), social skills (FF 48), sensory needs (FF 54), and ESY services<sup>6</sup> (FF 55) are all appropriately addressed in the January 2011 IEP.

Even in the two areas of deprivation—written expression and handwriting—the goals are clearly written and reasonably calculated to yield meaningful education benefit in those areas (FF 41, 53). In the case of written expression, the prior goals were flawed, but that has been remedied in the January 2011 IEP. (FF 37, 38, 39, 40, 41). In the case of handwriting, the prior goals were not flawed—the student simply made no progress on the goals. (FF 50, 51, 52); like the previous goals in handwriting, the goal in handwriting in the January 2011 IEP continues to be appropriate. (FF 53).

This is a general conclusion. In the discussion of the student's school day below, certain elements of the January 2011 IEP may change as the result of the order accompanying this decision. But the substantive provisions of the January 2011 IEP—goals, specially designed instruction, related services, and supports for school personnel—are appropriate.

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<sup>6</sup> The record does not speak to, nor did the parties present as an issue, the student's ESY programming for summer 2011.

Accordingly, except as noted below, the IEP of January 2011 is appropriate to guide the student's instruction going forward.

#### Discrimination under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability. Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

In the instant case, there is no dispute that the student is disabled and is otherwise qualified to participate in school activities; the District knows and acknowledges that the student is disabled. While not made an explicit matter of proof in this case, it is a near certainty that federal funding flows to the District.

Thus, the legal determination to be made is whether the student "was excluded from participation in, denied the benefits of, or subject to discrimination at the school". The student was not explicitly discriminated against. Indeed, the overwhelming weight of the record is clear that the District acted at all times in good faith and, whatever

choices it made, it made those choices in an effort to provide a FAPE to the student as best it could. The District did not engage in discrimination.

It is equally clear, however, that the student was excluded from participation in, and denied the benefits of, instruction in world language. (FF 59). Again, this was not an act of bad faith on the District's part. But its decision to provide V&V instruction wholly in place of world language excluded the student entirely from that part of the regular education curriculum and denied the student the benefits thereof.

Accordingly, a finding will be made in the order to this effect.

#### Student's School Day

Since April 2010, the parties have not been able to agree on the structure of the student's school day. (FF 15). There are, in the mind of this hearing officer, broad areas of general agreement between the parties about the student's needs and, to an extent, the programming the student requires. But when the theoretical "what?" intersects with the necessary questions of "where?" and "when?" and "by whom?" that are inherent in the design of school-based programming, any sense of resolution has faltered.

For that reason, this hearing officer pointedly asked the parties to provide their views on the recommended provision of services to the student inside, and in parents' case outside, the school day. (FF 61, 62,

63). Parents, in effect, are requesting a regular education program with sensory breaks and a social skills group in every other lunch period. Specially designed reading instruction and related services would be delivered outside of the school day. (FF 62). This is untenable; certainly, the student can be provided with a FAPE within the school day, especially given the flexibility available in the District's middle school day. (FF 56, 57, 58).

The District's proposed school day would, however, repeat its error in denying the student access to world language. (FF 59, 63). This is not allowable. Additionally, the student received, and would continue to receive, some related services during sensory breaks. (FF 60). While this is not a denial of FAPE, it is far from optimal.

Where the terms of an order might normally refer to a child's IEP team certain decisions, in this matter the views of the parties necessitate a more detailed order regarding the student's school day.

In the 2010-2011 school year, the student received approximately 78 hours of direct V&V instruction.<sup>7</sup> The student received 20.5 hours of speech and language services<sup>8</sup> and 16 hours of OT services.<sup>9</sup>

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<sup>7</sup> The student received V&V every Monday-Wednesday-Friday for a full class period. Each class period is 43 minutes. (FF 56, 59). 3 classes per week x 36 school weeks = 108 V&V classes. Therefore, 108 classes x 43 minutes = 4644 minutes, or 77.4 hours. To make sure the reckoning gives every benefit of rounding to the student, this has been raised to 78 hours.

<sup>8</sup> The student received speech and language for a total of 1230 minutes, or 20.5 hours. (J-17 at page 29).

<sup>9</sup> The student received OT services for a total of 960 minutes, or 16 hours. (J-17 at page 29).



In the January 2011 IEP, the student's speech and language services increase to 32 hours<sup>10</sup> and OT services remain at 16 hours.<sup>11</sup> Obviously, V&V instruction—in the student's area of primary academic need—must not diminish.

Furthermore, the student must not be excluded entirely from any part of the regular education curriculum so long as inclusion in the regular curriculum is appropriate. Therefore, world language must be included in the student's school day, and no other area of the regular education curriculum can be wholly excised from the student's middle school classes.

The flexibility of the District's middle school day affords the student the opportunity to experience the entire regular education curriculum yet still receive special education and related services, whether as inclusion or pull-out services. (FF 56, 57, 58).

Accordingly, the student's school day for the 2011-2012 school year will be structured as follows:

- math, science, social studies, English, and reading will be offered to the student every day in the regular education environment;
- where appropriate, specially designed instruction and/or related services may be included in these classes;

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<sup>10</sup> The January 2011 IEP proposes speech and language services for 1920 minutes, or 32 hours.

<sup>11</sup> The January 2011 IEP proposes OT services for 960 minutes, or 16 hours.

- gym and world language will be offered to the student on the A/B schedule, just as it is for non-identified students in the middle school;
- V&V instruction and unified arts will be offered on the Monday-Wednesday-Friday and Tuesday-Thursday schedule utilized for V&V instruction in 7<sup>th</sup> grade;
- band and academic support will be offered during the same period, alternating one with the other on A/B days;
- academic support periods may be used for specially designed instruction, related services, social skills, and other academic/programming needs for the student where a pull-out environment is appropriate;
- a sensory break must be provided each school day in the mid-morning and the mid-afternoon;
- with the addition of pull-out time in the student's schedule available in the academic support period, there should be no need to deliver any instruction or related services during the sensory breaks;
- the student will attend a regular education homeroom, although provision should be made in case the student requires a sensory break before instructional periods begin;
- the student will obviously attend lunch which may, but need not, include social skills or other programming.

The end result of this school day is that the student will spend approximately 86.25% of instructional time at the District middle school in regular education.<sup>12</sup> Importantly, the school day outlined above will still provide 81 hours of V&V instruction. And while there will be less time spent in unified arts and band, all aspects of the District’s regular education program is open to the student.

An order will be fashioned accordingly.

### 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

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<sup>12</sup> This calculation is based on the fact that, with 8 instructional periods per day x 180 days = 1440 instructional periods in the District’s middle school year. Of these instructional periods, 6 periods per day (for a total of 1080 periods)—math, science, social studies, English, reading and gym/world language, totaling 75%—are entirely in regular education. Band is an additional 90 periods in regular education, or 6.25%. Two periods of unified arts per week is an additional 72 periods in regular education, or 5%. The total percentage of time spent in regular education, not including the non-instructional time in homeroom and lunch, is 86.25%.

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 denied the student a FAPE in written expression from January 25, 2010 through the end of the 2010-2011 school year. The record does not include with clarity any indication of the exact amount of the student’s deprivation in written expression. Because it is an area where the student demonstrates a higher degree of need, and the sense of progress is so murky over the time period in question (FF 37, 38, 39, 40, 41), it is this hearing officer’s considered opinion that an amount of time equivalent to two class periods per school week be awarded as compensatory education. Therefore, 81 hours of compensatory education will be awarded.<sup>13</sup>

Additionally, the student made no progress in handwriting over the period from January 25, 2010 through the end of the 2010-2011 school year. (FF 50, 51, 52). The December 2009 IEP called for 16 hours of OT services. Again, the record is not clear as to how much of this might be related to handwriting and how much, if any, might be related to sensory needs. Given the lack of progress, the benefit of the doubt in terms of

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<sup>13</sup> Recognizing that compensatory education is an equitable remedy, and to make the calculation of the award more efficient, 90 minutes (instead of 86 minutes) per school week will be used to calculate the award. January 25<sup>th</sup> is approximately the halfway point for 36 weeks of instruction from, roughly, September through May. January 25, 2010 through the end of the following school year amounts to 54 weeks of instruction. So, 1.5 hours per school week x 54 school weeks = 81 hours.

deprivation must be given to the student. Therefore, 16 hours of compensatory education will be awarded.

Finally, the student was entirely excluded from, and denied the benefits of, world language class for the 2010-2011 school year. Therefore, all of this instructional time—67.5 hours—will be awarded as compensatory education.<sup>14</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 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, 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

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<sup>14</sup> First, as indicated directly above in note 12, 45 minutes per class (instead of 43 minutes) will be used in this calculation. Thus, 45 minutes per class x 90 classes per year = 4050 minutes, or 67.5 hours.

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 student was denied a FAPE from January 25, 2010 through the end of the 2010-2011 school year in written expression and handwriting. The student was excluded from participation in, and denied the benefits of, world language class in the 2010-2011 school year. Compensatory education will be awarded for these deprivations.

All other aspects of the student's programming from January 25, 2010 through the end of the 2010-2011 school year are appropriate, as are the substantive portions of the January 2011 IEP.

This hearing officer has structured the student's school day for the 2011-2012 school year.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to 163.5 hours of compensatory education as follows:

- 67.5 hours as the result of excluding the student from participation in, and denying the student the benefits of, the world language class;
- 16 hours as the result of a denial of FAPE for handwriting; and
- 81 hours as the result of a denial of FAPE for in written expression.

The January 2011 IEP shall be implemented for the student's programming in the 2011-2012 school year.

The student's school day for the 2011-2012 school year shall be structured as follows:

- math, science, social studies, English, and reading will be offered to the student every day in the regular education environment;
- where appropriate, specially designed instruction and/or related services may be included in these classes;
- gym and world language will be offered to the student on the A/B schedule, just as it is for non-identified students in the middle school;
- V&V instruction and unified arts will be offered on the Monday-Wednesday-Friday and Tuesday-Thursday schedule utilized for V&V instruction in 7<sup>th</sup> grade;

- band and academic support will be offered during the same period, alternating one with the other on A/B days;
- academic support periods may be used for specially designed instruction, related services, social skills, and other academic/programming needs for the student where a pull-out environment is appropriate;
- a sensory break must be provided each school day in the mid-morning and the mid-afternoon;
- with the addition of pull-out time in the student's schedule available in the academic support period, there should be no need to deliver any instruction or related services during the sensory breaks;
- the student will attend a regular education homeroom, although provision should be made in case the student requires a sensory break before instructional periods begin;
- the student will obviously attend lunch which may, but need not, include social skills or other programming.

The exact order of the periods is left to the discretion of the IEP team. Within 30 days of the date of this order, the IEP team shall convene to finalize the student's school day for 2011-2012 as outlined in this order, or, by agreement of the team, a different school day.



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

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

July 16, 2011