This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactons do not affect the substance of the document.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

Re: ODR No. 7967/07-08 LS
PP
Pleasant Valley School District

For the Student:

For the School District:

Pleasant Valley School District
Route 115
Brodheadsville, PA 18322-2002

Kristine M. Roddick, Esq.
King, Spry
1 West Broad Street, Suite 700
Bethlehem, PA 18018

Type of Hearing:	Closed
Hearing Date:	January 4, 2008
Date Record Closed:	January 9, 2008
Decision Date:	January 23, 2008
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student alleges that he was denied a free and appropriate public education (FAPE) for an unspecified period of time prior to January 4, 2007. The School District counters that it never denied FAPE to Student while he attended its schools, and further that it had no obligation to provide FAPE to Student because he was not a School District resident while attending its public schools. For the reasons described below, I conclude that, although Student was denied FAPE, he is not entitled to compensatory education from this School District because he was a resident of a different school district at the time of the FAPE denial.

ISSUE

Whether the School District denied FAPE to Student from August 1, 2003 through January 4, 2007?

FINDINGS OF FACT

1. Student is a xx or xx year old, 9th grade child with a disability. [1] While attending first grade in the [redacted] School District (hereinafter "Neighboring School District #1"), Student began receiving speech and language support, occupational therapy, and learning support services. (SD1, p.2; N.T. 80-81) [2]
2. In Student's 3rd grade school year, 2000-2001, his family appeared to have moved into the School District, and Student began receiving speech and language

---

[1] Student's mother testified that his date of birth is xx/xx/xx, although all documentary evidence in the record indicates that he was born on [one year later] on xx/xx/xx. (P5; SD1; N.T. 26, 42

[2] References to "P," "SD," and "HO" are to the exhibits of the Parents, School District and Hearing Officer, respectively. References to "N.T." are to the transcript of the January 4, 2008 hearing session.

support, occupational therapy, and learning support services from the School District. (SD1, p.2; SD3; N.T. 50) Periodically, the School District requested proof of residency, with which requests Student's family did not comply. (SD28)

3. Student attended School District's 7th grade twice. During his first 7th grade school year (2004-2005), in three different probes using the same 4th grade level story "Amelia Earhart," Student's fluency increased from 41 wpm in November 2004 to 53 wpm in March 2005 to 74 wpm in October 2005. (N.T. 110, 124) In all three probes, Student's accuracy or word recognition remained the same at around 90% while his comprehension levels fluctuated from 38% to 13% to 75%. (SD4, p.1; SD9, p.1)
4. Student's August 1, 2005 report card at the end of his first 7th grade school year (2004-2005), indicates that Student was retained in 7th grade after failing Math, Language Arts, Science, Geography, Music and Health classes, with 33 absences and 28 tardies. (SD5; N.T. 21)
5. In November 2005, at the beginning of his second 7th grade school year, Student's instructional reading level was still at a 4th grade level, with weaknesses in decoding and comprehension, and he was at a 3rd grade instructional writing level, with a need for support in spelling, organization, and conventions. (SD6, pp.9, 13; SD8, pp.6, 9; N.T. 104) At the end of Student's second 7th grade school year (2005-2006), he failed Language Arts and German classes, he passed Science and Health by a single point each, and he had 32 absences and 3 tardies for the year. (SD11)

6. The School District's reading specialist first testified that Student "absolutely" made progress in reading fluency and comprehension in 2004-2005, but later testified that Student's progress involved moving from "struggling at the 3rd grade level" to "getting closer to being able to read instructionally on a 4th grade level." (N.T. 110, 127) Although she drafted his second 7th grade (2005-2006) IEP with a goal to read a 5th grade level passage instructionally, she did not know Student's baseline achievement on 5th grade level reading passages. (N.T. 131-134) She further testified that, although Student was doing well in phonetics and fluency, and needed assistance in comprehension, she chose to keep Student in the linguistics-phonetics program, and not to recommend use of the School District's reading comprehension program (Soar to Success), because Student was already making such great progress in the linguistics-phonetics program. (N.T. 122, 136)
7. At the beginning of 8th grade, 2006-2007, Student enrolled in a private, parochial school. (N.T. 47) On November 13, 2006, his parent requested, and subsequently withdrew, a due process hearing alleging that the School District had failed to provide FAPE. (SD13) After one semester at the private school, Student returned to the School District's public school on January 4, 2007, and the School District requested permission to reevaluate Student. (SD14; SD15; SD16; N.T. 47, 49, 89, 157)
8. Student's March 2007 IEP reported an instructional reading level of 3rd grade, which was a grade level lower than the 4th grade instructional reading level reported in his November 2005 IEP. (Compare SD18, p.6 to SD 8, p.6) At the end of 8th grade (2006-2007), Student failed all of his classes except Reading and

Music, with 17 absences and 14 tardies. (SD25) Student's parent stipulates, however, that she was satisfied with the services that Student received after January 4, 2007, and therefore Student's claim for compensatory education is limited to the time period before January 4, 2007. (N.T. 100)

9. Also during the Spring 2007 semester, the School District intensively investigated Student's residency. (SD28, p.2; SD33) Concluding that Student was not a School District resident, the School District requested tuition reimbursement for past education, and it refused to enroll Student for the upcoming 2007-2008 school year without satisfactory proof of residency. (SD28, p.2) Just before the 2007-2008 school year, Student's parent sought preliminary injunctive relief, asking the Monroe County Court of Common Pleas to order the School District to enroll Student for the 2007-2008 School year. (SD28, p.2) After an evidentiary hearing, the Court denied the request, finding that the testimony and evidence of Student's parent was evasive, convoluted, contradictory, and insufficient to grant injunctive relief. (SD28, p.9)
10. It is undisputed that Student currently resides in the [redacted] School District (Neighboring School District #2), not in the School District. (N.T. 46) Student is now enrolled in the Neighboring School District #2's public schools because that is where he resides. (N.T. 46, 77-78) His parent reports that he is thriving academically in Neighboring School District #2. (N.T. 26-27, 31, 35-36, 80)
11. This special education due process hearing is the result of a July 16, 2007 rejection by Student's parent of the School District's March 14, 2007 Notice of Recommended Educational Placement (NOREP). (P1) On August 21, 2007, I

determined that Student's July 16 complaint was not sufficient, and I cancelled the scheduled September 7, 2007 due process hearing. On September 6, 2007, Student's parent submitted a sufficient amended complaint and I scheduled a hearing for October 22, 2007. On October 3, 2007, the parties conducted an unsuccessful resolution meeting. (N.T. 51) On October 19, 2007, I continued the hearing to December 14, 2007 to permit Student's parent to retain counsel. (HO2, p.41) On December 13, 2007, in reaction to inclement weather conditions, I rescheduled the hearing to January 4, 2008. On January 3, 2008, Student's parent requested a continuance because two of her witnesses, the school psychologist in Neighboring School District #2 and the president of Student's residential development, were unavailable to appear on January 4. (HO 3; N.T. 13-14) I denied the continuance request because I believe that Student's parent and her witnesses had ample time, between December 13, 2007 and January 4, 2008, within which to rearrange their schedules. (N.T. 16)

12. Parent is difficult to understand, both verbally and in writing. (SD26; HO2, pp. 7-38) At the hearing, she was at various times rambling, disjointed, and disingenuously confused. (N.T. 28-34, 37, 48, 54, 78, 81-82, 138) She refused to be specific even with respect to the existence of Student's disability. (N.T. 38, 43, 69, 79-80) She suggested that the School District had illegally retained Student in 7th grade, and then later admitted that she had requested his retention. (N.T. 21, 93) She denied that Student incurred excessive absences from school, until she was shown report cards documenting those absences, after which she offered confusing explanations for Student's excessive absences. (N.T. 91-94) Her

testimony was so confusing and contradictory that I do not accord it any credibility.

13. At the January 4, 2008 hearing, Hearing Officer exhibits HO1-HO3 were admitted into the record. (N.T. 162) Parent exhibits P1-P5 were admitted into the record. (N.T. 162) School District exhibits SD1, SD2, SD4-SD9, SD11, SD 15, SD25, SD28, SD32 and SD37 were admitted into the record, with SD7, SD28 and SD32 being admitted over objection. (N.T. 168, 177)

CONCLUSIONS OF LAW

14. The maximum period of alleged FAPE denial that may be claimed in this case is from August 1, 2003 to January 4, 2007.
15. Student did not receive a FAPE from September 1, 2004 to January 4, 2007.
16. On August 1, 2005, Student's parents knew, or should have known, about the alleged action that forms the basis of the complaint in this case.
17. The School District is not liable for Student's FAPE denial because Student was not a resident of the School District.

DISCUSSION

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all resident Students who qualify for special education services. 20 U.S.C. § 1412 The School District program will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.) Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

Burden of Proof

The United States Supreme Court has held that, in an administrative hearing challenging a special education IEP, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) If the evidence produced by the parties is completely balanced, or in equipoise, then the non-moving party prevails and the party with the burden of persuasion (i.e., the party seeking relief) must lose. Schaffer v. Weast, supra. If the evidence is not in equipoise, but rather one party's evidence is preponderant, or of greater weight or more convincing than the other party's evidence, then that party prevails whose evidence tips the scales.

Statute of Limitations

While Congress clearly intended to limit claims under the IDEIA and to require parents to file timely claims, Special Education Opinion No. 1757 (2006), Congress was not very clear in articulating the limits and time lines that it had in mind. Section 615(b)(6)(B) of the IDEA, 20 USCA §1415(b)(6)(B), permits parents to allege in their complaints violations that occurred not more than 2 years before the date the parents knew or should have known about the alleged action that forms the basis of the complaint. Section 615(f)(3)(C) of the IDEA, 20 USCA §1415(f)(3)(C), permits parents to sit on their claims for a full 2 years after the date they knew, or should have known, about the alleged action that forms the basis of the complaint.

I simplistically refer to these claims limitations and timeline provisions as the IDEIA's "what" (615(b)(6)(B)) and "when" (615(f)(3)(C)) provisions, respectively, both of which hinge upon the "magic date" when the complainant knew, or should have known, about the alleged action that forms the basis of the complaint. Thus, in cases such as this, my role is first to ascertain the magic date, and then determine whether the claim alleges violations that occurred not more than 2 years prior to the magic date (the "what"), and whether the complaint was filed within 2 years after the magic date (the "when").

I find that the magic date in this case is August 1, 2005, when Student's August 1, 2005 report card indicates that, at the end of his first 7th grade school year (2004-2005), Student was retained in 7th grade after failing Math, Language Arts, Science, Geography, Music and Health classes, with 33 absences and 28 tardies. (SD5; N.T. 21) On that magic date of August 1, 2005, Student's parents knew, or should have known of the alleged actions forming the basis of their complaint. On that magic date, they were entitled to file a due process claim alleging such violations going back 2 years, or to August 1, 2003 (the what). Also on that magic date, they were permitted to begin waiting 2 years, or until August 1, 2007, before filing their complaint (the when).

In this case, Student's parent did file a timely special education due process hearing request on July 16, 2007. (P1) Student's parent also stipulated that she was satisfied with the services that Student received after January 4, 2007. (N.T. 100) Therefore, the maximum period of liability for Student's claim for compensatory education is the time period from August 1, 2003 to January 4, 2007.

Student did not receive FAPE from September 1, 2004 to January 4, 2007

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412 This requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed, and the educational benefit must be more than a trivial or de minimis educational benefit. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988)

An IEP must include present levels of educational performance, measurable annual goals, appropriate objective criteria by which it may be determined on at least an annual basis whether the student is making progress and goals are being achieved, and the specially designed instruction which will be provided. 20 U.S.C. § 1414(d); 34 C.F.R. §300.347 First and foremost, of course, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.346

There is little evidence regarding Student's educational program and placement prior to his first 7th grade school year (2004-2005). Thus, I have no basis in the record for finding FAPE denial before September 1, 2004. There is much more evidence in the record for the period from September 1, 2004 to January 4, 2007 and, not surprisingly, the parties differ regarding whether or not Student made meaningful educational progress during that time.

The School District's reading specialist first testified that Student "absolutely" made progress in reading fluency and comprehension in 2004-2005, but later testified that Student's progress involved moving from "struggling at the 3rd grade level" to

"getting closer to being able to read instructionally on a 4th grade level." (N.T. 110, 127) I find, however, that Student barely progressed at all in reading both during and after that school year.

In his first 7th grade school year (2004-2005), Student's accuracy or word recognition remained the same at around 90% while his reading comprehension levels fluctuated inexplicably from 38% to 13%. (SD4, p.1) This was hardly consistent with his IEP's expectations that he would improve decoding to 95% accuracy and comprehension to at least 75% at the 4th grade level. Clearly, the School District should have recognized during that school year that Student's progress monitoring results were inconsistent with IEP expectations, and therefore that some sort of instructional change was needed – or at least should have been considered. Instead, Student failed Math, Language Arts, Science, Geography, Music and Health classes and was retained for another year in 7th grade. (SD5; N.T. 21)

In November 2005, at the beginning of his second 7th grade school year, Student's instructional reading level was still at the 4th grade level that he'd started at the year before, and he was at a 3rd grade instructional writing level. (SD6, pp.9, 13; SD8, pp.6, 9; N.T. 104) Remarkably, without any instructional changes that I can discern, his IEP reading goal expected Student to read instructionally at the 5th grade level. (SD6, p.10) Just as remarkably, this goal was written without any idea of what was Student's baseline achievement in reading at the 5th grade level. (N.T. 131-134) Further, although Student allegedly was doing well by that time in phonetics and fluency, and his need was in comprehension, his IEP chose to keep Student in the linguistics-phonetics program rather than recommend use of the School District's reading comprehension program (Soar to

Success). (N.T. 122, 136) At the end of his second 7th grade school year, 2005-2006, although Student failed fewer classes than the year before, he still failed Language Arts. (SD11)

After his return from a semester of 8th grade at a parochial school, Student's March 2007 IEP reported an instructional reading level of 3rd grade, which was a decrease from the previous year's 4th grade instructional reading level, and a regression back to the level reported in the IEP two years before. (Compare SD18, p.6 to SD 8, p.6 to SD 3, p.3) At the end of 8th grade (2006-2007), Student failed all of his classes except Reading and Music. (SD25)

Nothing in the record suggests that Student lacks the cognitive ability to make faster, and more, progress in reading. What was lacking was appropriate educational programming, with systematic progress monitoring and thoughtful instructional design changes based upon that progress monitoring. This constitutes a denial of FAPE. 20 U.S.C. § 1414(d); 34 C.F.R. §300.347; Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) Accordingly, I find that Student was denied FAPE beginning on September 1, 2004 (his first 7th grade school year).

Student's parent stipulates that she was satisfied with the services that Student received after January 4, 2007. (N.T. 100) Thus, if I conclude that Student was denied FAPE from September 1, 2004 (the beginning of his first 7th grade school year) to January 4, 2007.

No Compensatory Education Obligation Because

Student was not a Resident of this School District

Residency clearly is the legal hook that obligates School Districts. Both state and federal law link a disabled child's right to a free and appropriate public education to that child's residency. 20 USCA §1412(a)(1)(A) and (a)(3)(A); 34 CFR §300.101(a); 24 P.S. §24-1302; 22 Pa. Code §14.121 This tenet is so fundamental that some school districts have even created a "move-out" policy by which they voluntarily agree to accept additional educational obligations (on a limited basis) to children who move out of a school district near the end of a school year – to enable those children to continue their education for the rest of the term in the former school district. See In Re a Student in the Central Dauphin School District, Special Education Opinion No. 914 (1999)

Because residency is so important to establishing school districts' obligations, school districts are authorized to require proof of residency, although the School Code does not specify the nature of the proof required. 24 P.S. §24-1301 Substantial case law has developed around the type of proof required to establish residency. Thane v. Cumberland Valley School District, 724 A.2d 978, 29 IDELR 892 (Pa. Cmwlth. 1999), 560 Pa. 366, 744 A.2d 1272 (2000); In Re a Student in the West Shore School District, Special Education Opinion No. 1643-B (2005); In Re a Student in the Methacton School District, Special Education Opinion No. 1531-B (2004) (Reviewing locations where parent owned property, paid taxes, maintained personal possessions, etc.); In Re a Student in the Chichester School District, Special Education Opinion No. 1599 (2005) (Reviewing whether aunt had provided necessary guardianship and residency affidavits.)

While local school boards typically resolve residency issues, special education hearing officers may do so where the residency dispute is intertwined with a disabled child's right to FAPE. In Re a Student in the Ridgeway Area School District, Special

Education Opinion No. 1803 (2007); In Re a Student in the Upper Merion School District, Special Education Opinion No. 1198 (2001); In Re a Student in the Central Dauphin School District, Special Education Opinion No. 914 (1999) Where the questions of residency and FAPE are not intertwined, however, a hearing officer has no reason to determine residency, and therefore has no jurisdiction in a case if the only dispute is the child's residency. In Re a Student in the Ridgeway Area School District, Special Education Opinion No. 1803 (2007)

In this case Student's family appeared to have moved into the School District at the beginning of Student's 3rd grade school year, 2000-2001. (SD1, p.2; SD3; N.T. 50) Periodically, the School District requested proof of residency, with which requests Student's family did not comply. (SD28) After returning from parochial school for the Spring 2007 semester, the School District intensively investigated Student's residency and concluded that Student was not a School District resident. (SD 33; SD28, p.2) Just before the 2007-2008 school year, Student's parent was denied preliminary injunctive relief to enroll Student in the School District for the 2007-2008 School year. (SD28, pp.2, 9) It is now undisputed that Student resides in Neighboring Area School District #2, not in the School District. Student is now enrolled in the Neighboring School District #2's public schools because that is where he actually resides. (N.T. 46, 77-78) [3]

This record establishes to my satisfaction that Student was not a resident of the School District during the claim period at issue in this case (August 1, 2003 to January 4,

[3] I recognize that this decision does not identify what was Student's actual school district of residence during the period of FAPE denial from September 1, 2004 to January 4, 2007. That is because this complaint was filed solely against School District, and so the distinct issue is "whether Student resided in School District at that time," not "where did Student reside at that time?"

2007). After an evidentiary hearing regarding residency, the Court of Common Pleas found that the testimony and evidence of Student's parent was evasive, convoluted, contradictory, and insufficient to grant injunctive relief. (SD28, p.9) I similarly found Student's parent's testimony so confusing and contradictory that I do not accord it any credibility. (N.T. 28-34, 37, 48, 54, 78, 81-82, 138) This record contains no evidence of residency in the School District and I have no basis upon which to give Student's parent, who bears the burden of proof in this case, any benefit of the doubt on the issue. Absent residency, this School District had no obligation to provide FAPE to Student, and consequently Student has no entitlement to compensatory education from this School District. [4]

At first glance it may seem unfair for the School District to educate Student from 3rd through 8th grades (with one semester at a parochial school), fail to provide FAPE at least from September 1, 2004 to January 4, 2007, and yet not be held accountable for that FAPE denial simply because Student happened not to be a School District resident. I do not believe this is an unfair result however, because for every Pennsylvania student with a disability, there is a school entity of last resort that is responsible for that child's FAPE. 22 Pa. Code §§14.102(b), 14.103 Student in this case just happened to attend the public schools of, and to seek due process relief from, a different school district than the one in which he actually resided and that actually owed him FAPE. Nothing in my decision

---

[4] I still wonder, as I did at the hearing, whether a School District claim for tuition reimbursement might somehow imply School District obligations, contractual or equitable (as opposed to statutory or constitutional), regarding the quality of the educational services for which tuition reimbursement is sought. (N.T. 57) That, however, is for another forum to decide.

today prevents Student from identifying and seeking relief from his school district of residence that actually was responsible for providing him FAPE.

In fact, if Student had identified the school district in which he actually resided, and if he had filed for due process relief against that school district, I am not aware of any legal theory that would allow that school district to avoid all accountability for FAPE simply because it was unaware that Student was one of its residents. If Student had filed this due process complaint against both that school district and the School District in the instant matter, I would not dismiss the residential school district and hold the School District liable for compensatory education simply because everyone was mistaken as to where Student actually lived. Accordingly, even though I have concluded that School District did not provide FAPE to Student while he was attending its schools, at least from September 1, 2004 to January 4, 2007, I will not hold the School District liable for compensatory education.

CONCLUSION

The statute of limitations limits Student's compensatory education claim to the period from August 1, 2003 to January 4, 2007. From September 1, 2004 to January 4, 2007, while Student was attending the School District's public schools, Student did not receive FAPE. Student is not entitled to compensatory education from this School District, however, because he was a resident of a different school district at the time of the FAPE denial.

ORDER

No action is required of the School District.

Daniel J. Myers

Hearing Officer

January 23, 2008

Re: ODR No. 7967/07-08 LS
Student
Pleasant Valley School District