

**STATE DEPARTMENT OF EDUCATION
STATE OF OKLAHOMA**

IN THE MATTER OF)
[Student]) DPH No. 2042
DUE PROCESS HEARING)

DUE PROCESS APPEAL DECISION

PETITIONERS: [Parents]
REPRESENTATIVE: [Parent Attorney}
RESPONDENT: [School District]
REPRESENTATIVE: [School District Attorney]
HEARING DATES: February 11-13, 2013
March 7, 2008

HEARING DECISION: April 30, 2013
APPEAL REQUEST: June 3, 2013
APPEAL DECISION: July 3, 2013
APPELLATE OFFICER: Charles Robert Davis, PhD

Appeal Decision

DPH 2042

ISSUES

On appeal the Parents requested that the Student receive compensatory education for the 2011 Extended School Year (ESY) and from the time he was at the second school until December 2012.

The Hearing Officer's Decision awarded 144 hours of compensatory education, after finding that the School should have provided the Student academic services for 2012 ESY to meet its FAPE obligation to the Student who has a disability. Otherwise, the Hearing Officer found that the School had met its Individuals with Disabilities Education Act (IDEA) obligations or that the Student was not present to received services. The Hearing Officer's award of 144 hours has not been appealed and therefore it stands as ordered.

This decision will address the following two questions:

1. Should the Student receive compensatory education services related to ESY 2011?
2. Should the Student receive compensatory education services related to the School-Years 2011-12 and 2012-13 until December 2012?

FINDINGS OF FACT

The following are findings related to this Appeal Decision.

1. The Student has been qualified for services under IDEA with the disability category of autism. (PX 31)
2. The Mother took the Student to the first two days of ESY 2011, but did not return after finding the program lacked initial organization. (TR 1006-1011)
3. During School-Year 2011-12 the Student was placed at a second (actually the fourth school, but second during the time considered in these proceedings) elementary school until March 2012. (TR 109)
4. According to a former District special education administrator and a former District special education teacher, the Student was not receiving an appropriate educational program while at the second elementary school. (TR 276-324 and 801-840)
5. In March 2012 the Student was moved to a third school (actually the fifth school, but third during the time considered in these proceedings), to be with the Student's previous teacher from School-Year 2010-11. (TR 167)
6. After the Parents filed for due process, the School has added an additional assistant, provided outside consultation for the Student's teacher, and the teacher has attended additional training. (TR 44 and 455-460)

**CONCLUSIONS OF LAW
and
RATIONALE**

Should the Student receive compensatory education services related to ESY 2011?

The School made ESY educational services available for Student during the summer of 2011. The Student attended briefly but the Mother chose not to return, because the program lacked the organization on the first day that she felt was essential to the Student's education and safety. (TR 1006-1010) The action of opting out of ESY 2011 was a unilateral decision by the Parents, which undermines their claim for compensatory education. Therefore, the student will not receive compensatory education services for ESY 2011. The Student did participate in related services during ESY 2011.

Should the Student receive compensatory education services related to the School-Years 2011-12 and 2012-13 until December 2012?

It is clear from the testimony of the former Assistant Director of Special Services and the Teacher who had the Student in SY 2010-11 and again after the March 2012 change of schools that during SY 2011-13 the Student did not receive FAPE. (TR 276-324 and 801-840). Instead of benefiting from the School's program, the Student actually regressed during SY 2011-12, according to these witnesses.

In the opinion of this Appeal Officer, the Rowley standard was not met during this time. *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley (Rowley)*, 458 U.S. 76, 102 S.Ct. 3034, 3042, 73 L.Ed.2d 690 (1982).

When FAPE has been denied, Hearing and Appeal Officers may utilize Compensatory Education. *Letter to Kohn*, 17 IDELR 522 (OSERS). There are two forms of Compensatory Education either "current" or "future". Current Compensatory Education may include extended day programs, extended year services, summer school or tutoring. Future Compensatory Education is a promise now to provide education beyond the student's 22nd birthday, if needed. The Hearing Officer has awarded current compensatory for the denial of FAPE during ESY 2012. This Appeal Officer deems future compensatory education as appropriate for the denial of FAPE during SY 2011-12. Further, that the future compensatory education would be the choice (at the discretion of the parents}, if they hold guardianship at that time, otherwise the Student as an adult will decide if an additional year is appropriate. The content of the IEP for this potential extended time, if needed, would remain a team decision. It is felt that this remedy will encourage the School to continue its renewed efforts that have been evident since the Parents filed for due process.

In this case the burden of proof rests with the Parents as the party who filed for the due process hearing and appeal. *Schaffer v, Weast*, 126 S.Ct. 528, 535 (2005). It is the

opinion of this Appeal Officer that the burden of proof was not met in issue/question one, but was in the second.

DECISION

The Appeal Officer finds that:

1. The Student should not receive compensatory education services related to ESY 2011.
2. The Student should receive compensatory education services related to the School-Year 2011-12. The Student is eligible for an additional year of education. At the Parents' or Student's (depending on guardianship) discretion the Student may attend public school for IDEA services until the age of twenty-three. Whereas other students in this State may attend for IDEA services until the age of twenty-two the Student in this case has the right to an additional year as compensation for the School's failure to provide FAPE during SY 2011-12 until March of 2012. This compensatory education is in addition to that order by the Hearing Officer. Again that order was for 144 hours of current compensatory education and it should be delivered within a reasonable time after the receipt of this decision.

CONCLUDING STATEMENT

The decision of the Appeal Officer is final and binding upon both parent and school. Any party aggrieved by the findings and decision made in a hearing review has the right to bring a civil action under the IDEA in a State or Federal Court of competent jurisdiction within 90 days of the date of the decision below. 34 CFR § 300.516

[Signature of Appeal Officer]

Charles Robert Davis, Ph.D.
Appeal Office

3 July 2013
Date