

*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.G.

Date of Birth: [redacted]

Dates of Hearing:<sup>1</sup>

October 27, 2016  
December 22, 2016  
January 12, 2017  
January 18, 2017  
January 26, 2017  
January 31, 2017

### **CLOSED HEARING**

ODR Case #17998-1617AS

Parties to the Hearing:

Parent[s]

New Hope-Solebury School District  
180 West Bridge Street  
New Hope, PA 18938

Date of Decision:

Hearing Officer:

Representative:

Caryl Oberman, Esquire  
705 Easton Road  
Willow Grove, PA 19090

Claudia Huot, Esquire  
Wisler Pearlstein  
Blue Bell Executive Campus  
460 Norristown Road – Suite 110  
Blue Bell, PA 19422

March 14, 2017

Michael J. McElligott, Esquire

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<sup>1</sup> The parties presented evidence over the October, December, and January sessions. Counsel for the parties requested time to submit written closing statements thereafter.

## **INTRODUCTION**

Student<sup>2</sup> is a late-teen aged student residing in the New Hope-Solebury School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>3</sup> for specially designed instruction/related services as a student with attention difficulties, receptive and expressive speech and language needs, and specific learning disabilities in reading, mathematics, and written expression.

Parents claim that the student was denied a free appropriate public education (“FAPE”) during the student’s enrollment in the District for the school years 2013-2014, 2014-2015, and the fall semester of 2015 and seek a compensatory education remedy for those alleged denials, including extended school year (“ESY”) services for the summer of 2015. In the midst of the 2015-2016 school year, the student was enrolled unilaterally in a private placement. Parents seek tuition reimbursement for that private placement, for the spring semester of 2016, for a private summer program in the summer of 2016, and the entire 2016-2017 school year. Parents seek a tuition reimbursement remedy for that enrollment, for the end of the 2015-2016 school year and

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<sup>2</sup> The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

<sup>3</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 §§14.101-14.163 (“Chapter 14”).

the 2016-2017 school year. Parents also seek reimbursement for the out-of-pocket expense for private tutoring.

The District counters that at all times it provided FAPE to the student for the period of the student's enrollment. As such, the District argues that the parents are not entitled to remedy, whether compensatory education or tuition reimbursement.

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

### **ISSUES**

Did the District deny the student FAPE for the 2013-2014, 2014-2015, and/or the first half of the 2015-2016 school years?

Did the District deny the student FAPE related to ESY services in the summer of 2015?

If the answer to either of these questions is in the negative, is the student entitled to compensatory education?

Are parents entitled to tuition reimbursement for the unilateral private placement for the second half of the 2016-2017 and/or the 2016-2017 school years?

Are parents entitled to reimbursement for the expense of private tutoring?

### **FINDINGS OF FACT**

1. In May 2010, while attending a private school in another state, the student was privately evaluated. (Parent Exhibit ["P"]-2, P-4; School District ["S"]-8).

2. Shortly thereafter, in September 2010, the student relocated to the District. In its initial evaluation report (“ER”), the District adopted the findings of the private May 2010 evaluation and conducted its own assessments in speech and language and occupational therapy. (P-4; S-8).
3. The September 2010 ER identified the student with needs in reading, mathematics, speech and language, as well as noting attention needs. (P-4; S-8).
4. In April 2013, the District re-evaluated the student. (P-16; S-24).
5. The April 2013 re-evaluation report (“RR”) continued to identify the student with needs in reading, mathematics, and written expression, pragmatics and expressive speech and language, as well as attention/task difficulties. (P-16; S-24).
6. In April 2013, the student’s individualized education program (“IEP”) team also met to revise the student’s IEP based on the April 2013 RR. The April 2013 IEP was in effect at the outset of the 2013-2014 school year. (P-17; S-21, S-22).

#### April 2013 IEP

7. The April 2013 IEP, which guided the student’s instruction over most of the 2013-2014 (through March 2014) year, contained two reading goals (reading comprehension and reading fluency), two

- mathematics goals (computation and concepts/applications), a written expression goal, and a speech and language goal. (S-21).
8. Over the course of the April 2013 IEP in the 2013-2014 school year, from November 2013 through March 2014, the student made progress in reading comprehension, progressing from 25% with a 4<sup>th</sup> grade narrative passage/75% with look-backs, and 81% with a 4<sup>th</sup> grade expository passage, to 63% with a 5<sup>th</sup> grade narrative passage/100% with look-backs and 56% with a 5<sup>th</sup> grade expository passage. (P-15, P-17; S-21, S-25).<sup>4</sup>
  9. Over the course of the April 2013 IEP in the 2013-2014 school year, from November 2013 through March 2014, the student made progress in reading fluency, progressing from 125 words per minute with decoding accuracy of 97%, at level 4, to 129 words per minute with decoding accuracy of 99%, at level 4. (P-15, P-17; S-21, S-25).
  10. Over the course of the April 2013 IEP in the 2013-2014 school year, from November 2013 through March 2014, the student made progress in mathematics computation, progressing from scores of 12, 9, 10, 12 (average of 10.75, for a non-rounded baseline of 10), on 6<sup>th</sup> grade probes, to scores of 18, 9, 22, 20, 13 (average 16.4, a non-rounded score of 16). (P-15, P-17; S-21, S-25).

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<sup>4</sup> In the progress monitoring data on the April 2013 IEP, the most comprehensive progress monitoring is in S-21, with data recorded through March 2014.

11. Over the course of the April 2013 IEP in the 2013-2014 school year, from November 2013 through March 2014, the student made progress in mathematics concepts/applications, progressing from scores of 6, 8, 10, 7, 11 (average 8.4), on 5<sup>th</sup> grade probes, to scores of 10, 9, 11, 11 (average 10.25), on 5<sup>th</sup> grade probes. (P-15, P-17; S-21, S-25).
12. Over the course of the April 2013 IEP in the 2013-2014 school year, from November 2013 through March 2014, the student made progress in written expression, progressing from in goal areas from scores of content/2, organization/2, conventions/2, and style/2 to scores of content/2.8, organization/3.1, conventions/1.5, and style/2.1. (P-15, P-17; S-21, S-25).
13. Over the course of the April 2013 IEP in the 2013-2014 school year, from November 2013 through March 2014, the student did not make progress in speech and language. With a goal of 80% correct on inferential reasoning in social scenarios, the student remained at 75% in November 2013 and 75.5% in January 2014. (P-15, P-17; S-21, S-25).<sup>5</sup>

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<sup>5</sup> There was no progress monitoring data reported in speech and language in March 2014.

14. The student's special education teacher's characterization of progress on the academic goals was in line with the progress monitoring data. (P-20; Notes of Testimony ["NT"] at 448-627).
15. In March 2014, the student's April 2013 IEP was revised as part of the annual IEP process. (P-22; S-32).<sup>6</sup>
16. Over the course of the 2013-2014 school year, the student received private tutoring sessions, approximately weekly. (P-3; NT at 279-295).

#### March 2014 IEP

17. The March 2014 IEP, which guided the student's instruction over the end of the 2013-2014 school year and most of the 2014-2015 school year (through March 2015), contained two reading goals (reading comprehension and reading fluency), two mathematics goals (computation and concepts/applications), two written expression goals (conventions and style/word choice), and a speech and language goal. (P-22; S-32).
18. Over the course of the March 2014 IEP, at the end of the 2013-2014 school year and through March 2015 in the 2014-2015 school year, the student made progress in reading comprehension,

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<sup>6</sup> The annual review process began in February and March 2014, but the final approval, via an agreed-to notice of recommended education placement, was in May 2014 with further revision in June 2014. The first page of the IEP, however, has an implementation date of March 2014, therefore it will be referred to as the March 2014 IEP. (P-22; S-32, S-33).

progressing on one measure from scores of 21, 20, 17, 11, 17 (average of 17.2) on level 5, in June 2014, to scores of 26, 17, 23, 20, 23, 29 (average of 23) on level 5, in March 2015. On another measure, in June 2014, the student scored 63% with a 6<sup>th</sup> grade narrative passage and 81% with a 6<sup>th</sup> grade expository passage, both with look-backs; in March 2015, the student scored 100% with a 6<sup>th</sup> grade narrative passage and 100% with a 6<sup>th</sup> grade expository passage, both with look-backs. (P-21 at pages 4-5, P-22; S-34).<sup>7</sup>

19. Over the course of the March 2014 IEP, at the end of the 2013-2014 school year and through March 2015 in the 2014-2015 school year, the student made progress in reading fluency, progressing from an average of 135 words per minute at an average of 98% accuracy at the 4<sup>th</sup> grade level, in June 2014, to an average of 136 words per minute at an average of 98% accuracy at the 5<sup>th</sup> grade level. (P-21 at pages 1-3, P-22; S-34).
20. Over the course of the March 2014 IEP, at the end of the 2013-2014 school year and through March 2015 in the 2014-2015 school year, the student made progress in mathematics computation, progressing from an average score 22.25 on probes at level 6, in June 2014, to an average score of 27 on probes at

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<sup>7</sup> In the progress monitoring data on the March 2014 IEP, the most comprehensive progress monitoring is in S-34, with data recorded through March 2015.



- level 7, in March 2015. The IEP team decided that probes/data-gathering on mathematics computation by removed. (P-22; S-34).
21. Over the course of the March 2014 IEP, at the end of the 2013-2014 school year and through March 2015 in the 2014-2015 school year, the student made progress in mathematics concepts/application, progressing from a baseline score of 9 on probes at level 6, in June 2014, to an average score of 17.6 on probes at level 6. (P-22; S-34).
22. Over the course of the March 2014 IEP, at the end of the 2013-2014 school year and through March 2015 in the 2014-2015 school year, the student did not make progress in written expression/conventions. From a baseline score of 69% (4.8/7 sentences) in June 2014, the student scored at 62.5% (10/16) in March 2015. (P-22; S-34).
23. Over the course of the March 2014 IEP, at the end of the 2013-2014 school year and through March 2015 in the 2014-2015 school year, the student made progress in written expression/style and word-choice, progressing from a baseline score of 29% (2/7 sentences), in June 2014, to an average score of 75% (12/16 sentences). (P-22; S-34).
24. Over the course of the March 2014 IEP, at the end of the 2013-2014 school year and through March 2015 in the 2014-2015 school year, the student made progress in speech and language,

progressing from a baseline score of 75% accuracy in inferential reasoning from curriculum-based text, in June 2014, to an average score of 80%, in March 2015. This represented goal mastery, and it was recommended that the student be exited from speech and language services. (P-22; S-34).

25. In February 2015, the District contacted parents regarding ESY services in written expression for the summer of 2015. In June 2015, the parents placed the student in a private summer program. (P-29, P-33).
26. The student's special education teacher's characterization of progress on the academic goals, and the speech and language therapist's input, were in line with the progress monitoring data. (P-32; S-38, S-43; NT at 448-627).
27. In March 2015, the student's March 2014 IEP was revised as part of the annual IEP process. (P-32; S-38, S-43).<sup>8</sup>
28. Over the course of February and April 2015, the student engaged in a private evaluation process with the same evaluator who performed the private evaluation in May 2010. (P-28; S-40; NT at 307-371).<sup>9</sup>

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<sup>8</sup> The annual review process began in February and March 2015, but the IEP team was working on further revisions through June 2015, including working with the recommendations from a private evaluation report considered by the IEP team in June 2015. The first page of the IEP, however, has an implementation date of March 2015, therefore it will be referred to as the March 2015 IEP. Also, the IEPs at S-38 and S-40 appear to be identical, but both documents will be cited. (P-28, P-32; S-38, S-40, S-43).

<sup>9</sup> The private evaluation report is undated as to issuance. The student was evaluated in two sessions in February 2015 and two sessions in April 2015. Therefore, this private

29. In June 2015, the student's IEP team met to consider the results and recommendations of the February/April 2015 private evaluation report. (P-28; S-40, S-46).
30. Based on the results and recommendations of the February/April 2015 private evaluation report, changes in the March 2015 IEP were made to the specially designed instruction/program modifications, the student's educational placement, and the placement reporting data. The goals in the March 2015 IEP remained the same. (P-32; S-38, S-43, S-46, S-48, S-65).
31. Over the course of the 2014-2015 school year, through May 2015, the student received private tutoring sessions, approximately weekly. (P-3; NT at 279-295).

#### March 2015 IEP

32. The March 2015 IEP, which guided the student's instruction through the end of the 2015-2016 school year and the first half of the 2016-2017 school year (when the student began to attend a private placement), contained two reading goals (reading comprehension and reading fluency), one mathematics goal (concepts/applications), and two written expression goals

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evaluation report will be referred to as the February/April 2015 evaluation report. (P-28; S-40).

(conventions-sentence formation and conventions-grammar/capitalization/spelling). (P-32; S-38, S-43).

33. Over the course of the March 2015 IEP, which guided the student's instruction through the end of the 2015-2016 school year and the first half of the 2016-2017 school year (when the student began to attend a private placement), the student made progress in reading comprehension, progressing from 50% comprehension questions correct, in June 2015, to 90% comprehension questions correct, through January 2016. (P-35, P-45).
34. Over the course of the March 2015 IEP, which guided the student's instruction through the end of the 2015-2016 school year and the first half of the 2016-2017 school year (when the student began to attend a private placement), the student made progress in reading fluency, progressing from an average of 130 words per minute at an average of 98% accuracy at the 5<sup>th</sup> grade level, in June 2015, to an average of 140 words per minute at an average of 97% accuracy, through January 2016. (P-35, P-45).
35. Over the course of the March 2015 IEP, which guided the student's instruction through the end of the 2015-2016 school year and the first half of the 2016-2017 school year (when the student began to attend a private placement), the student made did not make progress in written expression/conventions-sentence

- formation, with a baseline score of 69%, in June 2015, and a score of 60.5% through January 2016. (P-35, P-45).
36. Over the course of the March 2015 IEP, which guided the student's instruction through the end of the 2015-2016 school year and the first half of the 2016-2017 school year (when the student began to attend a private placement), the student did not make progress in written expression/conventions-sentence formation, with a baseline score of 69%, in June 2015, and a score of 60.5% through January 2016. (P-35, P-45).
37. Over the course of the March 2015 IEP, which guided the student's instruction through the end of the 2015-2016 school year and the first half of the 2016-2017 school year (when the student began to attend a private placement), the student made progress in written expression/conventions-grammar-capitalization-spelling, progressing from a baseline of 43% on scored written work, in June 2015, to an average of 90.33% on scored written work through January 2016. (P-35, P-45).
38. Over the course of the March 2015 IEP, which guided the student's instruction through the end of the 2015-2016 school year and the first half of the 2016-2017 school year (when the student began to attend a private placement), the student made progress in mathematics concepts/applications, progressing from scores of 12, 8, 9 (an average of 9.6) on level 7 probes, in June

2015, to scores of 13, 16, 17 (an average of 15.33) on level 7 probes, through January 2016. (P-35, P-45).

#### Enrollment in Private Placement

39. In early January 2016, parents informed the District that they intended to enroll the student in a private placement and seek reimbursement for that placement. (P-41; NT at 38-180).
40. In late January 2016, the parents enrolled the student in the private placement for the remainder of the 2015-2016 school year (through June 2016). (P-44; NT at 38-180).
41. At the time the parents signed the private placement enrollment contract and paid the private placement tuition in January 2016, they submitted a withdrawal form to the District, withdrawing the student from the District. Approximately two weeks later, in early February 2016, parents communicated with the District that the withdrawal form had been submitted in error. (P-46; NT at 38-180).

#### February 2016 IEP

42. In February 2016, the student's IEP team, including counsel for parents and the District, met to revise the student's IEP. (P-50; S-58).

43. The February 2016 IEP contained eight goals, two in reading (reading comprehension and reading fluency), two in written expression (conventions/sentence formation and convention/grammar-capitalization-spelling), three in mathematics (2-step equations, factors, and word problems), and one in self-advocacy. (P-50; S-58).
44. The February 2016 IEP contained, by and large, the specially designed instruction/program modifications in the March 2015 IEP, based on the results and recommendations of the February/April 2015 private evaluation report. There were, however, additions related to homework, testing, writing across the curriculum, rubrics and materials, directions, and memory aids. (P-50; S-58, S-65).
45. In late March 2016, the District issued a notice of recommended educational placement (“NOREP”) for ESY services in written expression, reading fluency, and mathematics in the summer of 2016. Parents rejected the NOREP, indicating that the student needed summer services aligned with the program at the private placement. (S-59).

#### Continuing Enrollment in Private Placement

46. In late March 2016, the parents informed the District that they would continue the student’s enrollment at the private

placement for the 2016-2017 school year, seeking reimbursement for this placement. (P-48, P-49).

47. The private placement provides appropriate services to the student to address the student's needs. (P-51, P-52, P-54, P-55, P-56, P-57, P-61, P-64; NT at 193-274).

#### Witness Credibility

48. All witnesses testified credibly. (NT at 38-180, 193-274, 279-295, 307-371, 373-445, 448-525, 532-627, 631-663, 669-691, 700-794, 804-807).

49. The heaviest weight was accorded to the testimony of the student's special education teacher in the 2013-2014, 2014-2015 school years, and the special education teacher in the 2015-2016. (NT at 448-525, 532-627, 700-794).

### **DISCUSSION AND CONCLUSIONS OF LAW**

To assure that an eligible child receives 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 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)).

Progress under the April 2013, March 2014, and March 2015 IEPs

The compensatory education claims for the 2013-2014, 2014-2015 and first half of the 2015-2016 school years center on the April 2013, March 2014, and March 2015 IEPs. Each of these IEPs was reasonably calculated to yield meaningful education benefit based on the student's needs and, as a result of the implementation of those IEPs by the District, the student made meaningful, measurable progress across most goal areas.

There were instances over these school years where progress monitoring revealed that the student did not make progress on certain goals. But those were isolated, although the student's needs in written expression are clearly the most consistent need on this record. Taken together, the instruction and progress across these three IEPs, spanning the student's learning from April 2013 through January 2016, support a finding that the student was provided a FAPE, making progress in reading, mathematics, speech and language, and (albeit haltingly) written expression.

The District, through the April 2013, March 2014, and March 2015 IEPs, designed and implemented special education services that allowed

the student to engage in, and exhibit, significant learning. Accordingly, the District provided a FAPE to the student, and there will be no award of compensatory education.

Tuition Reimbursement: Spring 2016 & 2016-2017 School Year

Long-standing case law and the IDEIA itself provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also*, 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parents' tuition reimbursement claim for the 2016-2017 school year in this matter proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3)).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program, or controlling program, at the time the family made the decision to seek a private placement and whether it was reasonably calculated to yield meaningful education benefit. If the school district programming is not appropriate, the second step is an examination of the appropriateness of the private placement. And, if the private placement is appropriate, the third step is to examine the equities between the parties to see if those equities

impact the claim for reimbursement. The steps are distinct and sequential. (34 C.F.R. §300.17; Rowley; Ridgewood; M.C..)

Here, the March 2015 IEP— in place in January 2016, when the parents enrolled the student in the private placement—was reasonably calculated to yield, and was providing, meaningful education benefit to the student. Under the March 2015 IEP, the student exhibited significant learning through the final months of the 2014-2015 school year and was engaged in significant learning in the 2015-2016 school year through January 2016.

The February 2016 IEP, which was proposed in the weeks after the student's enrollment in the private placement, was also reasonably calculated to yield meaningful education benefit. There were marked changes to the language of the February 2016 IEP when compared to the March 2015 IEP. But the substantive changes were the addition of a goal related to self-advocacy, the expansion of the mathematics goals, and certain additions/revisions to specially designed instruction and program modifications. Through the February 2016 IEP, the District was prepared to address the same academic goal areas as it always had and would have simply enhanced the already effective instructional/programming strategies and methods in place for the student. The February 2016 was appropriate and was designed to afford the student the opportunity for continued significant learning.

When the school district's last-offered or last-operational program is appropriate, as is the case here, the school district has met its obligations to the student, and the second and third steps of the Burlington-Carter analysis (respectively, whether the private placement is appropriate and whether the equities between the parties impacts the tuition reimbursement remedy) are not undertaken. Accordingly, the District provided appropriate programming to the student through January 2016 and proposed an appropriate program through the February 2016 IEP, so there is no tuition reimbursement remedy owed to the parents.

#### Reimbursement for Tutoring & Summer Programming

Over the period of the 2013-2014 and 2014-2015 school years, approximately August 2013 through May 2015, the student received private tutoring. The student also engaged in private summer programming in the summers of 2015 and 2016. All of these activities were privately funded by parents, who seek reimbursement for those activities.

Any claim for reimbursement of out-of-pocket expenses by a parent is governed by the Burlington-Carter analysis. In effect, whether for tutoring, or outside programming, or private school tuition, whenever a parent expends private resources for an alleged failure of a school district in its obligations under the IDEIA, the claim is the same: 'We have had to

absorb private expense as a result of the school district's failure.' The analysis then—has the school district failed in its obligations, have the parents sought an appropriate private remedy for that failure, and do the equities between the parties impact the claim for reimbursement—is the same.

Here, in terms of the claim for reimbursement for private tutoring, the District, through the April 2013 and March 2014 IEPs, met its obligations to the student to design and implement appropriate programming over the 2013-2014 and 2014-2015 school years. Therefore, based on step one of the Burlington-Carter analysis, the District programming being delivered over those school years allowed the student to engage in significant learning: There is no basis for reimbursement of the parents' private tutoring expense.

Likewise, in terms of the claims for reimbursement for private summer programming in summer 2015 and summer 2016, in both cases the District proposed appropriate ESY programming.<sup>10</sup> Again, based on step one of the Burlington-Carter analysis, the District proposed programming to address the student's needs for recoupment and/or regression given the school break, and there is no basis for

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<sup>10</sup> The proposal for the summer of 2015 was for written expression. The proposal for the summer of 2016 was for written expression, reading, and mathematics. Based on this record, the student's needs in written expression were consistent. There did not appear to be problematic issues of recoupment/regression in reading and mathematics. Of course, nothing prohibits the IEP team from ensuring the continuation of significant learning with ESY programming as it sees fit. (P-29, P-32, P-50, S-38, S-43, S-58, S-59).

reimbursement of the parents' private placements for the summers of 2015 and 2016.

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**ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the School District provided a free appropriate public education, or proposed programming to provide a free appropriate public education, for all periods encompassed by the 2013-2014, 2014-2015, 2015-2016, and 2016-2017 school years, including the summers of 2015 and 2016. The School District is not responsible for any compensatory education remedy or any reimbursement remedy related to the claims in this matter over those school years.

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

*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

March 14, 2017