

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.Z.

Date of Birth: [redacted]

Dates of Hearing:

December 19, 2012

February 6, 2013

February 8, 2013

March 1, 2013

March 13, 2013

March 14, 2013

March 20, 2013

CLOSED HEARING

ODR Case #13127-1213AS

Parties to the Hearing:

Parent

Philadelphia School District
440 North Broad Street
Philadelphia, PA 19130

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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April 24, 2013

May 14, 2013

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (“student”) is [an elementary school-aged] student residing in the Philadelphia School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)¹ for specially designed instruction/related services for autism and speech and language impairment.

As the result of compensatory education hours received as the result of a settlement agreement from a prior dispute between the parent and an early intervention provider, the student received home-based services since January 2012. Over the spring and summer 2012, as the 2012-2013 school year approached, the student’s kindergarten year, the parties could not agree on the educational program for the current school year. In October 2012, parent filed the special education due process complaint that led to these proceedings. Parent claims that the individualized education plan (“IEP”) proposed by the District for the 2012-2013 school year is inappropriate. The District counters that the program proposed for the student is appropriate.

The student continued to receive privately-obtained home-based services as the 2012-2013 school year commenced and over the course of

¹ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163.

the school year. As the result of rescheduling mutually requested by the parties, the initial hearing session was not held until December 19, 2012. At the initial session, for the first time, the parties concurred that an initial issue was parent's claim that pendency applied to the student's home-based programming. The December 19, 2012 and February 6, 2013 sessions were devoted solely to opening statements and evidence regarding pendency. The February 8, 2013 session was a conference call session for oral argument on the issue of pendency. On February 18, 2013, this hearing officer issued an interim ruling, holding that pendency did not apply and that the District was not responsible, as the result of pendency, for the student's private home-based programming.

Therefore, parent's claim for retrospective remedy is a request for reimbursement of private family resources (i.e., use of the compensatory education hours) due to the District's alleged failure to offer a program that is reasonably calculated to yield meaningful education benefit (a claim for remedy explicitly framed in this way for the parties in the February 18th ruling). Additionally, as set forth above, parent claims that the proposed IEP for the 2012-2013 school year is inappropriate going forward. The District maintains that the proposed IEP is appropriate.

For the reasons set forth below, I find that the District proposed an IEP for the 2012-2013 school year that was, on balance, largely appropriate. There were, however, some non-fatal flaws in the IEP which will be addressed in the order. And given the need to plan for the 2013-

2014 school year, the order will also address explicitly issues related to the transition of the student for the upcoming school year.

ISSUES

Is the proposed IEP for the 2012-2013 school year appropriate?

If not, is parent entitled to reimbursement of private resources expended for the home-based programming for the 2012-2013 school year?

If not, what should the student's educational program entail going forward?

STIPULATIONS

Stipulation #1 – School District Exhibit [“S”]-14 is a six-page exhibit. As originally presented, S-14 was a 45-page exhibit. By agreement of the parties, all pages except for pages 2, 3, 42, 43, 44, and 45 have been removed from the exhibit. (Notes of Testimony [“NT”] at 1198-1200).

Stipulation #2 – Upon any participation by the student in District-based programming, a one-on-one aide would be provided to the student. (NT at 1200-1203).

FINDINGS OF FACT

1. From an early age, the student was identified with significant cognitive, communication, behavioral, and social/emotional needs

- related to autism. (Parent's Exhibit ["P"]-1, P-3, P-5, P-6, P-7; S-1, S-3, S-4, S-10; *see generally* NT at 52-144, 1205-1456).
2. The student was receiving early intervention services under an individual family services plan through the fall of 2011. (P-1, P-7, P-11, P-23; S-1; NT at 53).
 3. In November 2011, the student's parents and the early intervention provider resolved a dispute regarding disagreements over the student's past programming. The resolution included provisions for a bank of compensatory education hours for use by the parents to meet the student's educational needs.² (P-8; NT at 53-54).
 4. Since spring 2012, and continuing through the 2012-2013 school year at the time the hearing unfolded, the student received private home-based programming by utilizing compensatory education hours from the November 2011 settlement. (P-11, P-25; NT at 53-54, 144-227, 486-587).
 5. In March 2012, the District requested permission to evaluate the student as part of planning a transition to school-age programming. (P-10; NT at 55-57).
 6. On April 30, 2012, the District issued re-evaluation report, identifying the student with autism and speech/language disorder.

² The November 2011 release and settlement agreement was executed by the student's mother and father. In the instant case, however, the student's father did not participate, and parent's counsel represented only the student's mother.

- The re-evaluation report was provided to the student's mother on May 17, 2012. (P-12; S-10; S-13; NT at 645-730, 903-905).
7. On May 17, 2012, the District created a draft IEP for consideration by the IEP team. (P-20; S-14; Stipulation #1).
 8. The May 17th IEP erroneously indicated that the student did not have behaviors that impacted student learning or the learning of others. After the IEP meeting in early June, however, the District made behavior planning part of its process. (P-20 at page 5, P-21, P-25; NT at 922-924, 948-950).
 9. The May 17th IEP indicated that the student would not receive the services of a one-on-one aide. At the hearing, however, the parties stipulated that should the student receive District-based programming, a one-on-one aide would be part of the student's program. (P-20 at page 6; Stipulation #2).
 10. The May 17th IEP noted as part of the student's present levels of academic achievement and functional performance that the student exhibited delays in communication, behavior (including persistent crying, high pitched screaming, and eloping), academics, and peer interaction. (P-20 at pages 7-8; NT at 914).
 11. The May 17th IEP contained four goals, one each in:
 - initiating/maintaining interpersonal communication (including short-term objectives such as requesting

assistance, maintaining eye contact, following commands, and interactive communication);

- developing self-help and self-care skills (including short-term objectives such as manipulating clothing, requesting a tissue, and requesting use of the bathroom);
- developing school-readiness skills (including short-term objectives such as identifying/copying first and last name, identification of letters/numbers and shapes/colors, and the concept of opposites);
- and social skills/peer interaction (including short-term objectives such as sustained engagement in peer activity, turn-taking, and one-on-one play).

(P-20 at pages 14-21; NT at 914-915).

12. The May 17th IEP contained program modifications and specially designed instruction specific for each of the four goals and, more globally, in a separate section. (P-20 at pages 14-21; NT at 597-609; 915-916).
13. The May 17th IEP contained conflicting information regarding the provision of occupational therapy (“OT”). In the related services section of the IEP, a total of 300 minutes was to be provided, ostensibly over the entire duration of the IEP (September 2012-May 2013). Yet in the program modifications/specially designed instruction, 10 sessions of OT were to be utilized to develop and

- incorporate sensory strategies and fine motor skills after observation/interaction in the school environment. (P-20 at page 22; NT at 916-919, 925-926, 964-965).
14. The yearlong duration for OT services is a production error in the IEP. The District intended to utilize ten 30-minute sessions (for a total of 300 minutes) to assess the student in the classroom and develop OT services accordingly. (P-20 at page 22; NT at 916-919, 925-926, 964-965).
 15. The May 17th IEP contained a total of 600 minutes of speech and language services over the entire duration of the IEP (September 2012-May 2013), an average of 17 minutes per week over 36 school weeks. (P-20 at page 22; NT at 609-613).
 16. The May 17th IEP found the student to be eligible for extended school year services. (P-20 at page 24).
 17. The May 17th IEP indicated that the student's school assignment in the draft IEP was [Redacted] Elementary. The educational placement section of the IEP, under the entry labeled "name of school building where the IEP will be implemented" is left blank. (P-20 at page 28; NT at 911-912).
 18. The May 17th IEP indicated that the student would participate in the regular education environment for 10% of the school day (approximately 0.67 hours in a 6.65-hour school day). (P-20 at page 29; NT at 920-921).

19. On June 1, 2012, the student's IEP team met to discuss the IEP. At the IEP meeting, the student's mother presented a letter to the team regarding the student's profile and mother's views on the student's needs. The District's special education liaison followed up after the meeting regarding certain issues that had surfaced at the IEP meeting. (P-19, P-20, P-21; S-14; NT at 59-67, 905-910, 921-922).
20. The District issued a notice of recommended educational placement ("NOREP") for an autism support classroom. (P-20; S-14 at pages 42-45; NT at 920-921; Stipulation #2).
21. Following the June 1st IEP meeting, the District emailed a positive behavior support plan to the parent with a request to facilitate communication with the private home-based program provider so the District could begin to craft a positive behavior support plan for the student. (P-21, P-25; NT at 922-924, 967-968).
22. The student's mother wished to observe the classroom where the student might be educated and so did not immediately return the NOREP. In the days after the June 1st IEP meeting, the student's mother consulted with an educational advocate on how to proceed. (P-21; S-14 at pages 42-45; NT at 68-70, 920-921, 927-929).

23. On June 5th, the District communicated with the student's mother about attempting to arrange a classroom observation. Given the late date in the school year, the District had difficulty arranging a kindergarten autism support observation. The District was, however, able to arrange an observation of a 1st-3rd grade autism support classroom. The student's mother consulted with an educational advocate regarding these issues. (P-21; NT at 70-78, 234-235, 927-929, 968-969).
24. On June 11, 2012, the student's mother returned the NOREP, indicating that she did not approve of the District's recommended program/placement. On the NOREP, the student's mother indicated that she wished to pursue mediation. (S-14 at pages 42-43).
25. Over the following week, the District and the parent exchanged emails regarding the NOREP. (P-24, S-15).
26. In late June, the Office for Dispute Resolution communicated with the parties regarding the scheduling of a mediation session. (P-27; S-16).
27. On July 9, 2012, the parties met for mediation, including a tour of certain District facilities. The mediation was unsuccessful. (S-19, S-29; NT at 231, 235-239).
28. In August 2012, the parent sent a letter to the District indicating continued disagreement with the May 17th IEP. The

parent initiated another request for mediation. The District, however, declined to participate in a second round of mediation. (P-31, P-32, P-33, P-34; S-18, S-19, S-30; NT at 70-78, 82-84, 240-243).

29. By late August 2012, the District had clarified that the student was being offered an autism support placement at [Redacted] Elementary School, and a place was being held for the student. The District indicated that it felt the program/placement was appropriate and requested that the parent return a NOREP which was being sent. (P-36).
30. Throughout September 2012, staff and administration at [Redacted] Elementary contacted the parent by phone and voicemail message, indicating that a space was being held at the autism support classroom at [Redacted] Elementary. (S-21; NT at 296-307).
31. Instruction and support in the autism support classroom at [Redacted] Elementary was in collaboration with the Center for Autism Research at the Children's Hospital of Philadelphia for research purposes. The program utilized applied behavior analysis methods of discrete trial training, pivotal response training, and teaching of functional routines. As part of the program, teachers receive training and support in delivering a specific autism instructional curriculum and data collection related to the

curriculum/research study. (S-27; S-28; NT at 733-892, 999-1146).

32. On October 5, 2012, parent filed the special education due process complaint that led to these proceedings. (P-43).
33. In October 2012, a speech and language progress report contained recommendations for the student's expressive and receptive communication needs. (P-45).
34. Hearing sessions on December 19, 2012 and February 6, 2013 involved evidence regarding parent's claim of pendency in the private home-based programming. Following these sessions, on February 8, 2013, the parties presented oral arguments regarding the issue of pendency and submitted briefs in support of their positions. (Hearing Officer Exhibit ["HO"]-1, HO-2; NT at 1-330).
35. On February 4, 2013, an independent educational program evaluation report by a board-certified behavior analyst was issued. The evaluation recommended intensive one-one-one teaching in the home environment and school environment utilizing applied behavior analysis techniques. (P-54; NT at 376-486).
36. On February 18, 2013, this hearing officer issued a ruling denying parent's request for pendency in the private home-based programming. (HO-3).
37. In March 2013, as the hearing was coming toward its end, a private OT report was issued. The report made extensive

recommendations, both clinical and educational, recommending 60 minutes per week of OT in the school environment. (P-58; NT at 1147-1192).

38. From June 2012 onward, the parent communicated effectively in English with multiple individuals at the District. Additionally, in the summer of 2012, parent consulted with previous counsel and an educational advocate regarding the progress of her concerns and planning for future steps. While mother is not a native speaker of English, language issues did not hinder the parties or prejudice parent. (P-19, P-21, P-31, P-36; S-14 at page 3, S-15, S-21, S-25; *See generally* NT at 52-144, 1205-1456).

DISCUSSION AND CONCLUSIONS OF LAW

To assure that an eligible child receives a free appropriate public education (“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 (3rd Cir. 1999)), not simply *de minimis* or minimal

education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

Long-standing case law and the IDEA 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 a tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEA. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)). Additionally, a school district need not provide services to a student for parents to make a tuition reimbursement claim; parents may reject a proposed IEP and seek tuition reimbursement for a private placement, even where the student has not attended the program outlined in the IEP. Forest Grove v. T.A., 557 U.S. 230 (2009).

In this case, parent's claim is not strictly for tuition reimbursement because the use of private resources is not for a tuition-based private placement. As outlined in the *Introduction and Procedural History* section above, however, the analysis of parent's claim proceeds analogously to a tuition reimbursement claim.

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program and whether it was

reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Ridgewood; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)). In this case, the IEP proposed for the student's 2012-2013 kindergarten year is reasonably calculated to yield meaningful education benefit. For this reason, parent's claim regarding programming going forward is also addressed by this finding, as the proposed IEP is largely appropriate.

More specifically, the IEP proposed for the 2012-2013 school year is reasonably calculated to yield meaningful education benefit taken as a whole and in each of its constituent parts. The District, through its special considerations and present levels, had an accurate gauge of the student when the student was presented for school-age services.

On the surface of the IEP, it appears that the District was not addressing the student's significant behavior needs. But subsequent events, at and after the June 1st IEP meeting, indicate that the District was aware of the needs and sought to address those in consultation with the private home-based service provider. Similarly, the IEP indicates that the student does not require a one-on-one aide. By stipulation, however, and made explicit by the order in this decision, this issue has been/will be addressed.

The goals in the IEP are wholly appropriate. Each addresses the needs that the student presents and the goals, read in conjunction with the short-term objectives and specially designed instruction targeted for

each goal, are reasonably calculated to yield meaningful education benefit.

The program modification/specially designed instruction section presents certain issues which need to be refined (and will be addressed in the order of this decision). But the deficits do not amount to a denial of FAPE. Specifically, the confusion over the amount of OT services, viewed in the entirety of the record, indicates that the District intended to take ten 30-minute sessions (or some combination of 300 minutes) to assess the student's OT needs in the educational environment. Although the IEP listed such services as unfolding over the entire school year, the record supports the conclusion that this was an error in producing the IEP vis a vis the anticipated duration of the OT assessment. The largest flaw in the IEP, though, is the amount of speech and language services. While the student's academic instruction in the research-affiliated autism curriculum is targeted in many ways to language and communication, and IEP goals address those issues, the student's significant communication needs warrant a more intense delivery of explicit speech and language services. This, too, will be addressed in the order.

As for the student's placement, the District worked diligently to place the student in a kindergarten autism support classroom. The quality of the research-affiliated instruction weighs in favor of a finding of appropriateness of the District's program.

In sum, the program proposed by the District for the 2012-2013 school year was reasonably calculated to yield meaningful education benefit. As such, the Burlington-Carter analysis ends after the first step, and there is no need to continue to the second step (the appropriateness of the private programming) and third step (an examination of the equities between the parties). In addition, by finding the proposed program to be appropriate, parent's claims about the student's program going forward also fail.

Accordingly, parent is not entitled to reimbursement by the District for the use of private resources for home-based programming in place of the proposed IEP for the 2012-2013 school year. The proposed program is appropriate going forward.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the educational program proposed by the District for the 2012-2013 school year was reasonably calculated to yield meaningful education benefit. As a result, the District does not owe reimbursement to the parent for private resources used in procuring home-based programming in place of a District-based program.

Certain matters need to be addressed in the IEP and will be made explicit in this order. The student's IEP team shall convene within 30 days of the date of this order to revise the 2012-2013 IEP for the upcoming 2013-2014 school year.

In addition to any matter which the IEP team feels is necessary to revise or address in the 2012-2013 IEP, the IEP team explicitly shall:

- update the student's present levels of academic achievement/functional performance based on information from the student's private home-based instruction over the current school year;
- coordinate with the private home-based service provider to ensure that a positive behavior support plan is drafted with

the provider's input and in place for the first day of kindergarten instruction in the 2013-2014 school year;

- review goals, program modifications, and specially designed instruction for continued appropriateness;
- ensure that the student's OT needs are addressed, as a related service, as outlined in the private OT evaluation of March 2013;
- provide, as a related service, 30 minutes per week of direct speech and language support as outlined in the private speech and language assessment of October 2012;
- explicitly plan to place the student in a kindergarten autism support classroom which utilizes the training, support, and coordination of the research-affiliated autism curriculum which is a collaboration between the District and the Children's Hospital of Philadelphia's Center for Autism Research;
- the placement ordered in the foregoing bullet point shall be at the District elementary school offering such a classroom which is closest to the student's neighborhood school; and
- provide, as stipulated, a one-on-one aide who is trained in conjunction with the research-affiliated autism curriculum/methods.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

May 14, 2013