

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
Final Decision and Order

Closed Hearing

ODR File Number:

22865 19-20

Child's Name:

A.B.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

02/10/2020

Introduction

This matter concerns the educational rights of a student (the Student).¹ The Student attended a Pennsylvania charter school (the Charter) during the 2018-19 school year. The Charter School placed the Student in a private school for children with learning disabilities (the Private School) at the Charter's expense in April 2019. The Student then transferred to the School District (the District) at the start of the 2019-20 school year.

The Student's guardian (the Guardian) requested this hearing against the District to maintain the Student's placement at the Private School at the District's expense. The Guardian argues that the District must fund the Student's placement because the Private School is the Student's pendent, or "stay-put" placement. The Guardian also argues that the District must fund the Student's placement at the Private School in order to comply with the IDEA's intrastate transfer rule.

At the hearing, the Guardian also demanded compensatory education for a period of time that the Student received no special education at the start of the 2019-20 school year. There is a dispute about whether that issue is properly before me.

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

For reasons set forth in the decision below, I find that the Private School is the Student's pendent placement for the period of time that this due process hearing is pending; that the intrastate transfer rule does not require the District to place the Student in the Private School; and that the demand for

¹ Except for the cover page, identifying information is omitted to the extent possible.

compensatory education must be dismissed because it was not included in the Guardian's complaint.

Issues

The Guardian presents a demand for the Student's placement at the Private School at the District's expense. This is not, however, a tuition reimbursement case. Rather, the Guardian advances two theories under which the District is obligated to fund the Student's placement at the Private School: First, the Guardian argues that the Private School is the Student's pendent, or "stay-put," placement. Second, the Guardian argues that the District must fund the Student's placement at the Private School in order to comply with the "comparable services" provision of the IDEA's intrastate transfer rules.²

There is some confusion as to whether the Guardian's pendency claim is moot. During the hearing session, I confirmed that the Student was attending the Private School. Since the Student was attending the Private School, I asked the Guardian to confirm that the pendency issue was moot. The Guardian agreed. NT at 37. However, it is not clear that the District was (or is) funding the Student's placement at the Private School. In context, I take the Guardian's answer to my question about mootness to mean that the Guardian did not require an immediate placement order at the time the hearing convened. The question of whether the District is obligated to fund the Student's placement while this matter is pending is not moot.

Regarding the demand for compensatory education, the District takes the position that no such demand appears in the Guardian's complaint. The

² Both standards are explained and discussed below.

Guardian takes the position that a demand for compensatory education is included in a demand for "such other relief as may be proper and just."

The issues in this case, therefore, are:

1. Does the IDEA's pendency rule require the District fund the Student's placement in the Private School?
2. Does the IDEA's intrastate transfer rule require the District to fund the Student's placement in the Private School or place the Student in the Private School?
3. Is the Guardian's demand for compensatory education pleaded and, if so, is the Student owed compensatory education?

Findings of Fact

There are no substantive, outcome-determinative factual disputes in this case. The parties filed joint stipulations of fact, and their documentary evidence was admitted via stipulation. Citations throughout this decision are P-# for the Guardian's exhibits, S-# for the District's exhibits, NT at # for the transcript, and Stip. at # for the parties' stipulations.

I have reproduced all of the parties' stipulations within these findings verbatim except as indicated. My edits are for the purpose of removing identifying information. An unedited copy of the stipulations is made part of the record of this case as Hearing Officer Exhibit 1.

I make findings of fact only as necessary to resolve the issues before me. The issues before me are completely resolved through the parties'

stipulations. I adopt the parties' stipulations as my own findings. To provide additional context, I highlight some of the documentary evidence in other sections of this decision. I do that in other sections so that my own review of the evidence will not be conflated with the parties' stipulations.

Through adoption of the parties' stipulations, I find as follows:

1. [The Student] was born on [birthday] and resides with [the Guardian] at [address] within the boundaries of [the District]. Stip. at 1.
2. [The Student's] Local Educational Agency ("LEA") from kindergarten through the end of fifth grade was [the Charter]. The Charter only serves students in kindergarten through fifth grade. Stip. at 2.
3. With the end of the 2018-2019 school year, [the Student] had completed fifth grade and was no longer enrolled at the Charter. Stip. at 3.
4. Guardian knew that the Charter only served students through fifth grade and that [Guardian] would have to enroll [the Student] in the District following 2018-2019 ESY. Stip. at 4.
5. The District is [the Student's] current LEA. [The Student] has been enrolled in the District since September 11, 2019. Stip. at 5.
6. Guardian filed a due process complaint on October 16, 2019 because [the Guardian] believed that the District failed to honor [the Student's] NOREP and implement [the] NOREP and IEP for [a private school (the Private School)] ... Stip. at 6.

7. [The 2016-17 school year was the Student's third grade year. The Student was enrolled in the Charter during the 2016-17 school year. The Guardian requested that the Charter evaluate the Student during the 2016-2017 school year because the Guardian was concerned about the Student's lack of progress]. Stip. at 7.
8. Based on teacher observations and because [the Student] had not made appropriate progress and the Charter's initial evaluation (S-2; P-1) failed to adequately guide the Charter in its programming, the Charter agreed to fund an independent educational evaluation in the fall of 2018. Stip. at 8.
9. [The Private School] provides educational programming consistent with [the independent evaluator's] recommendations. Stip. at 9.
10. The evidence in this case would establish that [the Student] is making appropriate progress at [the Private School]. Stip. at 10.
11. [The Private School] specially designs instruction tailored to meet the needs of students who are far behind their peers academically. Stip. at 11.
12. [The Private School] provides small class size and individualized instruction for students who are unable to learn in a traditional classroom setting. Stip. at 12.
13. [At the Private School, each] of [the Student's] classes [have] a total of 4 or 5 students. All ... teachers hold special education certifications

- and provide individualized instruction, using, among other strategies, repetition, review and a slower rate of instruction. Stip. at 13.
14. The pace of [the Student's] instruction is determined by [the Student's] progress and tailored to [the Student's] needs. Stip. at 14.
 15. The learning environment at [the Private School] is calm and quiet. Stip. at 15.
 16. [The Student] frequently interacts with ... teachers across all subjects. [Teachers] pre-teach background knowledge prior to introducing new material, provide [the Student] with additional time to respond to questions and repetition to assure mastery and teach skills in a sequential manner across all content areas. Stip. at 16.
 17. To address [the Student's] working memory deficits, [the Private School] continually assesses whether content is moving into [the Student's] long term memory. Stip. at 17.
 18. In addition to the small class size that permits constant opportunities for modeling of skills, outlines, graphic organizers, visual checklists and constant check-in are among the strategies [the Private School] uses to address [the Student's] executive functioning deficits. Stip. at 18.
 19. [The Student] has one teacher for decoding, reading comprehension, and written expression, which are the first three instructional periods of the day. The reading curriculum is Orton-Gillingham, which is a

research-based direct, explicit, multi-sensory, structured, sequential, diagnostic, and prescriptive reading program. Stip. at 19.³

20. [The Private School's] written expression curriculum is also research-based, the pace is determined by [the Student's] mastery, and the strategies learned in the written expression instructional period are consistently employed throughout all content areas. [The Student] is taught using the Writing Revolution curriculum. Stip. at 20.
21. The [Private School's] math curriculum is research-based, visual and concrete and includes hands on, project-based learning and strategies that include visuals and use of manipulatives. Instruction is at [the Student's] pace and new material is not introduced until current material is mastered. [The Student] is taught math using the enVision math curriculum. Stip. at 21.
22. [The Student's] reading and writing teacher also teaches science, which is also a research-based curriculum. [The Student's] instruction in science is tailored to [the Student's] reading and writing levels. [The Student] is taught science using the FOSS curriculum. Stip. at 22.
23. [The Student's] social studies curriculum is likewise tailored to [the Student's] reading and writing level and incorporates strategies from those curricula. Stip. at 23.

³ To my knowledge, Orton-Gillingham is a method of reading instruction, not a reading curriculum. Nevertheless, I accept the parties' stipulation as to the method of reading instruction that the Student receives, regardless of the the Private School's curriculum. In case it is not clear, this footnote was not part of the parties' stipulations.

24. [The Student's] small class size meets the needs of students with auditory processing and language comprehension difficulties because it permits teachers to, among other things, repeat information, assess individual understanding, repeat directions, and use visuals to insure understanding. Stip. at 24.
25. To address attention deficits, [the Private School's] class periods are limited to 50 minutes with breaks between instructional periods and there are no less than 3 structured recess periods per day. Stip. at 25.
26. [The Student] completed his 2018-2019 school year including [ESY] at [the Private School]. Stip. at 26.
27. Every student at [the Private School] is identified with some type of disability. There are no non-disabled students at [the Private School]. Stip. at 27.
28. [The Private School] is not an approved private school by the Pennsylvania Department of Education. Stip. at 28.
29. [The Private School] has never implemented any IEP for Student. Stip. at 29.
30. [The Private School] did not implement Student's IEP at S-8. Stip. at 30.
31. No one at [the Private School] ever communicated with any teachers or administrators from the Charter school regarding Student's needs or programming and the Charter school was never involved in monitoring

- or participating in any way in Student's education at [the Private School]. Stip. at 31.
32. [The Private School] has never reported any data, such as report cards or teacher feedback, regarding Student to the Charter School. Stip. at 32.
 33. Because [the Student] aged-out of the Charter with the conclusion of his fifth-grade year – 2018-2019 school year, [Guardian] sought to enroll [the Student] in the District where they reside. Stip. at 33.
 34. Guardian's first communication with the District was a telephone call to the District on August 26, 2019 before the start of the new – 2019-2020 school year. [The Guardian] was told to come in to register [the Student] on September 9, 2019. Stip. at 34.
 35. The first day of school for the 2019-2020 school year was September 4, 2019. Stip. at 35.
 36. When Guardian went to the District on September 9, 2019, the District told her to come back the next day. Stip. at 36.
 37. When [the Guardian] came back the next day, the District told [the Guardian] that [the Guardian's] residency documentation was insufficient. Stip. at 37.
 38. Guardian returned the following day on September 11, 2019, and the District accepted [the Student's] enrollment packet ("September 11 Enrollment Packet"), which is S-11. Stip. at 38.

39. If called at hearing, Guardian would testify that [the Guardian] had gone to the District on or around September 5, 2019 to obtain the Enrollment Packet and began to complete it that week in preparation for [the] meeting at the District. Stip. at 39.
40. Guardian identified [the Student] as a student in need of special education services. Stip. at 40.
41. [The Guardian] also listed [the Private School] as [the Student's] school from May to July 2019. Stip. at 41.
42. Guardian also provided a copy of the IEE along with the September 11 Enrollment Packet. Stip. at 42.
43. As part of the September 11 Enrollment Packet, Guardian also provided a release of information including special education data (psychological neurological, psychiatric, IEP, NOREP, etc.). Stip. at 43.
44. On September 13, 2019, the [District's] special education supervisor called Guardian. Guardian would testify that the special education director told Guardian that she would need a week to review the IEE. Guardian reminded the special education supervisor that [the Student] was not attending school. Guardian told the special education supervisor that [the Student] had attended [the Private School] on a NOREP. In the call, the special education supervisor asked Guardian to come to a meeting on September 20, 2019. Stip. at 44.

45. The District had only the IEE and Guardian's statement that [the Student] had been placed at [the Private School] when it determined that [the Student] would receive supplemental learning support in the NOREP dated September 20, 2019 (P-4). Stip. at 45.
46. Guardian attended a meeting on September 20, 2019. The only other person at the meeting was the supervisor of special education. Stip. at 46.
47. At the time of the hearing, the supervisor of special education was no longer employed by the District. Stip. at 47.
48. At the September 20, 2019 meeting, the District did not present a draft IEP. Stip. at 48.
49. At the meeting the supervisor of special education hand wrote and gave Guardian a NOREP for supplemental learning support ("September 20, 2019 NOREP"), which is P-4. Stip. at 49.
50. If called to testify at hearing, Guardian would testify that [Guardian] did not raise or discuss a settlement agreement at the meeting, that [Guardian] told the supervisor of special education that the Charter placed [the Student] at [the Private School] on a NOREP, [Guardian] wanted [Student] to continue at [the Private School], and [the Student] was not currently in school. Stip. at 50.
51. If called at hearing, Guardian does not know why the supervisor of special education hand wrote into P-4 during the September 20, 2019 meeting that student was placed in a private school due to a

settlement agreement and ... does not recall whether [Guardian] told the special education supervisor the statement was wrong during the September 20, 2019 meeting. Stip. at 51.

52. Guardian disapproved the September 20, 2019 NOREP and requested mediation. Stip. at 52.
53. Guardian provided a copy of the April 1, 2019 NOREP (S-9) for a placement in full time learning support at [the Private School] with the disapproved NOREP. Stip. at 53.
54. Guardian sent [the Student] to school in the District beginning on September 23, 2019. Stip. at 54.
55. The District placed [the Student] in a regular education classroom. The District told Guardian that [the Student] would be pulled for reading and math support. Stip. at 55.
56. [The Student] told Guardian that [the Student] could not learn in the regular education classroom and pleaded with [the Guardian] to ... return to [the Private School.] [The Student] told Guardian that the classroom was too loud, [other] students disobeyed the teacher and [the Student] was unable to focus and learn. Stip. at 56.
57. After a week, Guardian removed [the Student] from the District and placed [the Student] back at [the Private School]. Stip. at 57.
58. Guardian attended the meeting ("October 23, 2019 Meeting"). The school principal, Student's special education teacher and the Director

of Special Education also attended for the District. A regular education teacher did not attend the meeting. The principal signed in both as the principal and as the regular education teacher. The principal is not a regular education teacher. Stip. at 58.

59. If called at hearing, Guardian would testify that the IEP discussed at the October 23, 2019 meeting has a handwritten notation reading: "PARENT COPY FOR MEETING ON 10/23/19." Stip. at 59.
60. The team discussed that the Charter had issued the NOREP for [the Private School] on April 1, 2019. Stip. at 60.
61. If called to testify, Guardian would testify that she does not recall the precise date she received S-17, but that it was not until early to mid-November. Stip. at 61.
62. Guardian and the District participated in a resolution meeting on October 31, 2019. At the meeting, the District gave Guardian a Permission to Evaluate and Guardian signed it at the meeting. To date, the District has not completed [the Student's] reevaluation. Stip. at 62.
63. The evidence in this case would establish that the first time the District provided Guardian with a permission to evaluate was October 31, 2019. Stip. at 63.
64. The first time the District offered a NOREP for full time learning support was November 4, 2019. Stip. at 64.

65. The IEP that is S-17 was drafted after the discussion at the October 23, 2019 meeting. No draft IEP from the District was developed or presented to the Guardian prior to her receiving S-17. Stip. at 65.

Witness Credibility

Only one witness testified during the due process hearing. The parties then agreed to send stipulations. While I find that the witness was generally credible, the stipulated facts are sufficient to resolve the issues presented in this case. No part of this decision depend upon a credibility determination.

Discussion

I. The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

II. Pendency

II(a). The Stay-Put Rule

The IDEA requires LEAs to maintain a child's current educational placement while special education litigation is pending. 20 U.S.C. § 1415(j) provides as follows:

Except as provided in subsection (k)(4) [regarding disciplinary placements], during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

This pendency rule, also referred to as the "stay-put" rule, creates an "automatic preliminary injunction" designed to "protect handicapped children and their parents during the review process," by "block[ing] school districts from effecting unilateral change in a child's educational program."

Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 82, 83 (3d Cir. 1996) *citing Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996).

Pendency determinations are highly fact specific. *See id.* "Although [Parents] need not meet the traditional preliminary injunction standard, an injunction under the stay-put provision is only available where the LEA proposes or effects a change in a student's "educational placement."" *R.B. v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 756 (E.D. Pa. 2010) *citing Union Beach Bd. of Educ.*, 2009 U.S. Dist. LEXIS 108148, 2009 WL 4042715, at * 4.

A student's last approved IEP often, but not always, is the student's pendent placement. The pendency rule is intended to minimize disruption to the

Student's placement, and so I must determine what placement was operative at the time of the dispute, regardless of what is written in the IEP:

The stay-put rule thus requires that the child's placement under the IDEA at the time a disagreement arises between the parents and the school district — what the statute terms the "then-current educational placement" — be protected while the dispute is pending. To determine that placement, this court has looked to the IEP "actually functioning when the 'stay put' is invoked." *Drinker*, 78 F.3d at 867 (citing *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir. 1990)); see also *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996). The operative placement could be either a public school or a private school that the local district was financing to satisfy the requirement that every child be given a free, appropriate education.

M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 (3d Cir. 2014), cert denied *Ridley Sch. Dist. v. M.R.*, 135 S. Ct. 2309 (2015).

II(b). The Student's Pendent Placement

As discussed above, the pendency issue is not moot in this case. I am sensitive to the fact that current case law imparts long-term consequences to pendency decisions. Nevertheless, I must resolve the question of whether the pendency rule requires the District to pay for the Student's private school placement for any period of time. To do that, I must determine the Student's last-approved placement and the Student's operative placement at the time that the hearing was requested.

The Charter School placed the Student into the Private School via a NOREP. The Guardian approved that NOREP on April 1, 2019. The Student then transferred to the District on September 11, 2019. The District issued its NOREP on September 20, 2019, and the Guardian rejected the District's NOREP. Next, the Guardian requested this hearing on October 16, 2019. Consequently, the Private School is the Student's last-approved placement.

The Student attended school at the District from September 23, 2019 to September 27, 2019. See Stips. 54, 57. After September 27, 2019, the Student attended the Private School. Consequently, the Private School was the Student's operative placement when this hearing was requested.

I find that the Private School was the Student's pendent placement because it was both the Student's last approved placement and the Student's operative placement when this hearing was requested.

My analysis is purposefully myopic. The District argues that the Charter School's April 2019 IEP is fraudulent. I am sympathetic to that argument. The timing of the April 1, 2019 NOREP is suspect, and the stipulations concerning the Guardian's allegations against the Charter School heighten that suspicion. After a dispute between the Guardian and the Charter School, the Charter School provided a "Cadillac" IEP once the Student had a foot out of its door.⁴ I can think of no more cost-effective way for the Charter School to resolve claims with the Guardian than by manufacturing conditions to make the District responsible for funding the Student's placement at the Private School. The Student's one week of attendance at the District does not alter the overarching circumstances of this case. Despite my suspicions,

⁴ See *Doe v. Bd. of Educ.*, 9 F.3d 455 (6th Cir. 1993)

I make no finding as to whether the Charter School's April 2019 NOREP is fraudulent because I have no authority to decide that issue. It is certainly possible that the Guardian and a third party perpetrated a fraud against the District, but I must constrain myself to apply the IDEA's pendency rule to the stipulated facts of this case.

II(c). Funding the Pendent Placement

The District must fund the Student's placement at the Private School while this hearing is pending. Pendency is triggered not by a disagreement between the parties, but rather by the initiation of due process proceedings. In this case, the Private School became the Student's pendent placement on October 16, 2019. Pendency ends with the issuance of this Decision and Order. I make no determination about how pendency should apply if either party appeals this Decision and Order because I have no authority to do so. Such determinations are properly before the appellate tribunal, if any.

III. Intrastate Transfers

III(a). The Intrastate Transfer Rule

The IDEA includes a procedure for students who transfer from one LEA to another within the same state. The intrastate transfer rule, found at 20 U.S.C. § 1414(d)(2)(C)(i)(I), is as follows:

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free

appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

Federal regulations implementing the intrastate transfer rule, found at 34 C.F.R. 300.323, are as follows:

If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either -

1. Adopts the child's IEP from the previous public agency; or
2. Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

Pennsylvania adopts those federal regulations through its own special education regulations at 22 Pa. Code § 14.102(a)(1)(xxvii).

III(b). Comparison of Services

Both parties agree that the intrastate transfer rule applies in this case. The parties disagree about whether the District offered comparable services. My analysis hinges on a distinction between the pendency rule and the intrastate transfer rule. The pendency rule looks to the last-approved placement or the Student's operative placement. In contrast, the intrastate transfer rule looks to the Student's IEP at the time of the transfer.

In Pennsylvania, NOREPs are the mechanism by which placements are offered and approved. NOREPs are the prior written notice contemplated by the IDEA. IEPs are different. IEPs form the blueprint for a child's special education within a placement. Consistent with IDEA mandates, IEPs come before NOREPs. IEP teams determine what special education and related services a child needs and then determine the least restrictive environment in which the child's program can be delivered.

The distinction between a child's placement and a child's program is logical in the context of the intrastate transfer rule. The rule contemplates situations where a child's placement is changing. The IDEA instructs LEAs to provide a program comparable to what the child's pre-transfer IEP required until a new IEP is in place.

In this case, the Charter School offered an IEP with its April 2019 NOREP. Stip. at 6, S-8. I look to that IEP, not the NOREP, to determine if the District offered comparable services. In doing so, I look exclusively to the IEP's specially designed instruction (SDI) and related services. The SDI and related services comprise the special education program offered by the Charter School. They are the "services" contemplated in the IDEA's

intrastate transfer rule. Other aspects of the IEP, such as the goals and the placement, are not “services.” The goals set expectations and benchmarks for the Student’s progress while the SDI and related services are the services that enable the Student to achieve those goals. Similarly, the placement describes where the services will be provided, but the placement is not the service. The intrastate transfer rule only requires comparable services, and so the placement and the goals are irrelevant to the analysis.

Neither party argues that the SDI and related services offered in the Charter School’s April 2019 IEP are inappropriate.⁵

The April 2019 IEP provided no related services.⁶

The following table compares the SDIs in the Charter School’s last IEP to the SDI offered by the District on November 4, 2019. SDI from the Charter School’s IEP are taken verbatim from S-8 at 25-26. SDI from the District’s IEP are taken verbatim from S-17 at 15-16.

Charter School’s IEP	District’s IEP
Use of manipulatives	Use of manipulatives
Modified homework and assignments	Modified homework and assignments (reduced items)
Graphic Organizers	Graphic Organizers
Provide notes and outlines for key concepts or terms	Provide notes and outlines for key concepts or items
Extra time to complete assignments (homework/tests)	Extra time to complete assignments (homework/tests)
Modeling	Modeling
Word Bank	Word banks
Visual aids	Visual aids
Scaffolding	Scaffolding

⁵ The District argues that the Private School placement through the April 2019 NOREP is fraudulent. The same argument applies to placement determinations in the April 2019 IEP but does not extend to the program represented by the April 2019 IEP.

⁶ The Charter School wrote “None at this time.” in the Related Services section of the April 2019 IEP.

Repeated Directions	Repeated directions
Think Time	Think time
Assistance with decoding	Assistance with decoding
Use of Calculator	Use of a calculator
Use of Chunking Techniques for reading comprehension	Use of chunking techniques for reading comprehension
	Direct instruction in a research-based math intervention program that is structured, systematic, and multi-sensory
	Direct instruction in a research-based reading intervention program that is structured, systematic, and multi-sensory
	Direct instruction in written expression skills
small group instruction for reading and math support	

Like the Charter School, the District offered no related services.⁷

The services offered in the District’s IEP were comparable to those in the Charter School’s IEP. I find that the “small group instruction for reading and math” offered by the Charter School is comparable to the District’s offer of direct instruction in reading, written expression, and math.⁸ All other services were identical.

III(c). The District’s Compliance with the Intrastate Transfer Rule

The Student enrolled in the District on September 11, 2019. The parties met on September 20, 2019, and the District offered a NOREP placing the

⁷ The District wrote “n/a (Note: [Student] has no history of receiving or needing related services)” in the Related Services section of its IEP.

⁸ In the most literal way, there is no evidence on this point. This finding, however, is consistent with my experience. More importantly, it is the Guardian’s burden to establish that the District’s offer is not comparable to the Charter School’s services. The absence of evidence on this point favors the District.

Student in supplemental learning support. Stip. at 45, P-4. The District offered no IEP at that time. Therefore, from September 11 to 20, 2019, the District offered no special education services as all. The absence of an offer is not comparable to the services offered by the Charter School. This violates the intrastate transfer rule.

Discussed above, a NOREP is a placement offer and the mechanism by which LEA's seek parental consent to implement IEPs. In this case, the September 20, 2019 NOREP was issued without an IEP. That NOREP offered placement in supplemental learning support but says nothing at all about what services the Student would receive. Supplemental learning support is a placement, not a service. The District, therefore, offered a placement without offering services. The absence of services is not comparable to the services offered by the Charter School. This violates the intrastate transfer rule.

The Guardian requested this hearing on October 16, 2019. With a hearing pending, the parties met again on October 23, 2019. The District brought a draft IEP to the meeting. Stip. at 59, 65; S-17.⁹ I find that the IEP at S-17 was offered on November 4, 2019. I make this determination because the only NOREP issued by the District after September 20, 2019 was the NOREP dated November 4, 2019, and that NOREP matches the October 2019 IEP's placement type. C/f S-17 at 21-22 and S-19.

In sum, from the Student's enrollment in the District on September 11, 2019 through the District's offer of services on November 4, 2019, the District did not offer comparable services to those in the Charter School's IEP. From November 4, 2019 onward, the District offered comparable services.

⁹ I give little weight to stipulations about how the Guardian would have testified if called. The parties agree, however, that the IEP at S-17 was "drafted *after* the discussion at the October 23, 2019 meeting." Stip. at 65, emphasis added.

The District's obligation to offer comparable services ends when the District either adopts the Charter School's IEP or evaluates the Student and proposes its own IEP. The District sought the Guardian's permission to evaluate the Student on October 31, 2019. The District's evaluation was still pending as of January 27, 2020 (the date of the parties' stipulations). I make no finding concerning the timeliness of the District's evaluation because that issue is not before me. Rather, I find that the District complied with the IDEA's intrastate transfer rule on and after November 4, 2019 by offering services comparable to those in the Charter School's IEP.

III(d). Remedies for Intrastate Transfer Violations

The only remedy that the Guardian demands for the District's violation of the intrastate transfer rule is placement at the Private School at the District's expense. The Guardian does not demand tuition reimbursement, which would require a *Burlington-Carter* analysis.¹⁰ Rather, the Guardian claims that the District must place the Student in the Private School in order to provide comparable services.

Based on the parties' stipulations, I find that the District was never required to place the Student in the Private School in order to provide comparable services. Rather, the Private School provides services above and beyond those offered through the Charter School's IEP. I deny the Guardian's demand for placement in the Private School to remedy any violation of the intrastate transfer rule on that basis.

¹⁰ See *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). See also *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

Further, even if the District was obligated to place the Student in the Private School for the period of time before it offered comparable services, that period ended on November 4, 2019. From November 4, 2019 onward, the District offered comparable services.

In sum, from September 11, 2019 through November 4, 2019, the District violated the IDEA's intrastate transfer rule by failing to offer services comparable to those in the Charter School's IEP of April 2019. However, the Guardian did not prove by preponderant evidence that placement in the Private School is an appropriate remedy for this violation (either on an ongoing basis or for the period of time during which the violation occurred). For practical purposes, I recognize that the Private School was the Student's pendent placement during this period of time, but the Guardian did not establish the Student's right to placement at the Private School independent of the pendency rule.

IV. Compensatory Education

As noted in the introduction to this Decision, the Guardian demands compensatory education for the period of time during which the Student received no special education from the District. That period of time runs from Wednesday, September 11, 2019 through and including Friday, September 27, 2019. From Monday, September 30 onward, the Student attended the Private School.

As a threshold matter, the District argues that the Guardian's demand for compensatory education is not properly before me. I agree. The Guardian did not include a demand for compensatory education in the due process

complaint. I dismiss the Guardian's demand for compensatory education for that reason.

The IDEA's pleading standards are set forth at 20 U.S.C. § 1415(b)(7)(A). Per those requirements, complaints must include certain identifying information, "a description of the nature of the problem ... facts relating to such problem... [and] a proposed resolution of the problem" *Id.*

IDEA pleading standards are most typically examined in the context of sufficiency challenges. IDEA complaints are presumptively sufficient unless challenged. 20 U.S.C. § 1415(c)(2)(A). The District did not raise a sufficiency challenge in this case. The complaint is, therefore, presumptively sufficient. That does not mean that claims appearing nowhere in the complaint are presumptively pleaded.

In *Schaffer v. Weast*, 546 U.S. 49 (2005), the United States Supreme Court described the IDEA's pleading requirements as "minimal." *Id.* at 54. Albeit in unpublished decisions, the Third Circuit has explicitly rejected arguments "that that the Supreme Court's description of these pleading standards as "minimal" in [*Schaffer*] somehow converts the specific statutory provision into a bare notice pleading requirement." *M.S.-G v. Lenape Regional High School Dist. Bd. of Educ.*, 306 Fed. Appx. 772, 775 (3d. Cir. 2009).

I subscribe to the logic of one of the few published decisions on this topic, although it is from another jurisdiction, holding that an "exacting, all-inclusive cataloguing of all legal theories and facts that [claimants] intended to invoke at the administrative hearing" is not necessary for an IDEA complaint to be sufficient, and claimants need not "plead with specificity every legal theory and fact underlying... claims in advance of the hearing."

Escambia County Bd. of Educ. v. Benton, 406 F.Supp.2d 1248, 1260 (S.D. Ala. 2005). It should be noted that the Third Circuit considered *Escambia County* in the *M.S.-G.* decision and found the facts of those cases to be distinguishable. In doing so, the Third Circuit did not explicitly adopt or reject the logic of *Escambia County*.

Compensatory education is neither legal theory nor a fact underlying a claim. Rather, compensatory education is a remedy. If a complaint includes a demand for a remedy, the complaint is sufficient even if it fails to state every fact supporting the demand – but the demand itself cannot be inferred. To hold otherwise invites a form of trial by ambush that the IDEA is designed to prohibit.

I do not agree that including a demand for “such other relief as may be proper and just” is sufficient to infer a demand for compensatory education in general, or as applied in this case. Nothing in the complaint placed the District on notice that the Guardian would seek compensatory education at the due process hearing. The Guardian’s demand for compensatory education was never pleaded and is, therefore, dismissed.

Conclusions

From October 16, 2019, through the transmission of this final Decision and Order, the Private School is the Student’s pendent placement. The District is obligated to fund the cost of tuition at the Private School on a *pro rata* bases during the pendency period. The District is not obligated to fund associated costs beyond tuition, if any, arising from the Private School placement.

I make no determination about whether the Student's pendent placement is the product of fraud. I draw no conclusions about the impact of any appeal upon my pendency determination because doing so is both premature and beyond my authority.

The District violated the IDEA's intrastate transfer rule from September 11, 2019 through November 4, 2019. The Guardian demanded placement at the Private School to remedy this violation but did not prove entitlement to Private School placement as a remedy. The District's violation, therefore, does not entitle the Student to placement at the Private School.

Finally, the Guardian did not include a demand for compensatory education in the due process complaint. Rather, the Guardian raised this demand for the first time at the due process hearing. I dismiss the demand for compensatory education because it was not pleaded.

ORDER

Now, February 10, 2020, it is hereby **ORDERED** as follows:

1. The District is obligated to fund the Student's tuition at the Private School from October 16, 2019 through the date of this Order on a *pro rata* basis.
2. The District violated the IDEA's intrastate transfer rule as described above. The Student is not owed placement in the Private School to remedy this violation.
3. The Guardians' demand for compensatory education is dismissed because no such demand appears in the Guardian's complaint.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford

HEARING OFFICER