

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

26191-21-22

Child's Name

S.K.

Date of Birth

[redacted]

Parents

[redacted]

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

10/25/2022

Introduction

This special education due process hearing concerns the educational program and placement of S.K. ("student"), a student who resides in the Radnor Township School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student who requires special education. Parents claim that the District failed to provide the student with programming designed to provide a free appropriate public education ("FAPE") under IDEIA. Parents also bring a denial-of-FAPE claim under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").³

The student's parents claim that the District failed to propose appropriate programming for the student for the 2020-2021 and 2021-2022 school years, including the summers of 2020 and 2021. As a result, parents undertook a unilateral private placement of the student and seek tuition reimbursement (including for private tutoring).

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² 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 §§14.101-14.162 ("Chapter 14").

³ It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See *also* 22 PA Code §§15.1-15.11 ("Chapter 15").

The District counters that its proposed programming over the periods of parents' claims are appropriate for the student. Therefore, the District argues, parents are not entitled to tuition reimbursement.

Issue

Are parents entitled to tuition reimbursement for the student's private placement in the 2020-2021 and/or 2021-2022 school year(s)?

Stipulations⁴

- A. The student is a [redacted] year old student [redacted] who lives in the District.
- B. The student, at all times relevant hereto, was eligible for special education services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et. seq., (hereinafter IDEA), and pursuant to Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, (hereinafter Section 504), due to specific learning disabilities (math, reading, and writing), a health impairment, and a speech or language impairment.

⁴ The parties' stipulations are edited for stylistic consistency. Certain stipulations appear in the findings of fact below, as evidence was developed by the parties in those regards, the stipulations notwithstanding. Should there be any discrepancy between the stipulations and the findings of fact, the findings of fact will govern.

- C. In the spring of the 2019-2020 school year, the District re-evaluated the student.
- D. The District's re-evaluation report dated May 1, 2020, concluded that the student remained eligible for IDEA and Section 504 services due to specific learning disabilities, health impairment, and speech and language impairment.
- E. The District conducted an individualized education program ("IEP") meeting on May 28, 2020, and subsequently offered an IEP for the student that provided for an itinerant level of learning support and speech and language support.
- F. The IEP also provided for extended school year ("ESY") services during the summer of 2020.
- G. In a ten-day letter dated June 10, 2020, the parents notified the District that they would be providing the student with ESY services during the summer of 2020, that they would be placing the student at a private placement for the 2020-2021 school year, and that they would be seeking reimbursement at a later date for these placements.
- H. In response, the District sent a letter to the parents dated June 11, 2020, stating that the District was available for an IEP meeting and eager to address their concerns through the IEP process.
- I. In a subsequent ten-day letter dated August 17, 2020, the parents notified the District that they would be placing the student at a

different private placement for the 2020-2021 school year, and that they would be seeking reimbursement at a later date for this placement.

- J. In response, the District sent a letter to the parents dated August 18, 2020, stating that the District was available for an IEP meeting and eager to address their concerns through the IEP process.
- K. The parents contacted the District through their counsel on February 2, 2021, and inquired about what programming the District had available for the student's ESY programming and for the 2021-2022 school year.
- L. The parents allowed the District to re-evaluate the student in the spring of 2021.
- M. The District's re-evaluation report dated April 23, 2021, also concluded that the student remained eligible for IDEA and Section 504 services due to specific learning disabilities, a health impairment, and speech and language impairment.
- N. The District conducted an IEP Meeting on May 19, 2021, and subsequently offered an IEP for the student that provided for a supplemental level of learning support.
- O. The IEP also provided for ESY services during the summer of 2021.
- P. In a ten-day letter dated June 1, 2021, the parents notified the District that the student would be attending the second of the private

placements for ESY during the summer of 2021, that they would be placing the student in this private placement for the 2021-2022 school year, and that they would be seeking reimbursement at a later date for these placements.

Q. In response, the District sent a letter to the parents dated June 2, 2021, stating that the District was available for an IEP meeting and eager to address their concerns through the IEP process.

Findings of Fact

All evidence in the record, both exhibits and testimony, was considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

Prior Educational History

1. The student attended District schools from [redacted] (2015-2016 school year) through [redacted] grade (2017-2018 school year). (Notes of Testimony ["NT"] at 59-163).
2. In December 2014, prior to the student beginning [redacted] in the District, the student was privately evaluated. (Joint Exhibit ["J"]-9; NT at 451-528).

3. The December 2014 evaluation found the student to have a general ability index of 101. Tests in executive functioning, language, fine motor/visual motor skills, and learning and memory were all in the average range. Achievement scores in academic areas were in the average range for letter/word identification; the student's scores in math computation, math reasoning, and written expression were statistically discrepant from the student cognitive ability. The evaluation noted that the student engaged, at times, in problematic behaviors. (J-9).
4. In June 2015, prior to enrollment in [redacted] the District, parents shared the private evaluation with the District. The District performed an initial evaluation, including a speech and language ("S&L") evaluation, occupational therapy ("OT") evaluation, pre-academic skills, reading, mathematics, and writing, and behavior. (School District Exhibit ["S"]-3).
5. The June 2015 evaluation report ("ER") recommended that the student receive support in S&L for articulation, expressive skills, and word retrieval and support in OT for self-regulation and handwriting. (S-3).
6. The District's June 2015 ER recommended that the student be identified as a student with a health impairment (attention deficit hyperactivity disorder ["ADHD"]). The report recommended that the

student's academics and behavior be monitored in the District for indications that the student required additional support. (S-3).

7. In February 2018, in the midst of the student's [redacted] grade year, the student was privately evaluated by the same evaluator who performed the 2014 evaluation. (J-11).
8. The February 2018 report indicated that, by the time of the evaluation, the student had been identified as a student with specific learning disabilities, a health impairment (ADHD), and S&L impairment. (J-11).
9. In May 2018, the student's individualized education program ("IEP") in place at the District was revised. (J-3).
10. The parents pursued a private placement for the student (different from the private placement in the instant dispute) in the summer of 2018. (J-97).
11. The student attended the private placement for the 2018-2019 ([redacted] grade) and 2019-2020 school years ("[redacted] grade private placement"). (J-97; NT at 59-163).
12. In October 2019, the parties entered into a settlement agreement to resolve tuition reimbursement claims related to the [redacted] grade private placement. As part of that agreement, the District supported [redacted] private placement for the 2018-2019 and 2019-2020 school years. (S-96, S-97).

13. In May 2019, near the end of the student's [redacted] grade year at the private placement, the District re-evaluated the student, updating the S&L and OT evaluations. (J-13).
14. The District continued to identify the student as a student with specific learning disabilities with interventions in reading, mathematics, and writing, as well as a health impairment (ADHD), and S&L impairment. (J-13).
15. In May 2020, near the end of the student's [redacted] grade year at the private placement and anticipating a return to the District from the [redacted] grade year private placement, the District re-evaluated the student. (J-14).
16. Updated curriculum-based assessment performed by the District for the May 2020 re-evaluation indicated that the student was well below grade-level in mathematics. The student was reading at a 2.6 grade level. (J-14 at pages 6-7).
17. The District continued to identify the student as a student with specific learning disabilities with interventions in reading, mathematics, and writing, as well as a health impairment (ADHD), and S&L impairment, including recommendations for programming. (J-14).
18. Throughout these school years, the parents retained a private tutor to support the student. (P-10; NT at 171-215).

Summer 2020 & 2020-2021 School Year

19. In May 2020, following the May 2020 evaluation report (“RR”), the District proposed an IEP for implementation in the 2020-2021 school year, the student’s [redacted] grade year. (J-4).
20. The May 2020 IEP included present levels of academic performance, including information from the [redacted] grade private placement and the assessment data from the May 2020 RR. (J-4).
21. The May 2020 IEP recommended S&L and OT support, interventions in reading “particularly comprehension”, mathematics, writing, and peer relations; accommodations for memory and attention skills; and coping strategies for resiliency skills. (J-4 at page 11).
22. The May 2020 IEP included nine goals in mathematics computation, reading comprehension, reading fluency, paragraph writing, mathematics applications and reasoning, social skills, S&L (receptive language/word retrieval and pragmatic language), and OT (handwriting). (J-4 at pages 15-24).
23. The May 2020 IEP contains program modifications and specially designed instruction in most areas where goal-based instruction would take place except for reading. There are no accommodations or specially-designed instruction in reading. (J-4 at pages 26-28).

24. The May 2020 IEP recommended that the student receive extended school year programming (“ESY”) in the summer of 2020. (J-4 at pages 29-31).
25. The student’s placement in the May 2020 IEP indicated that the student would receive 25 minutes per week each in S&L, OT, and social skills, as well as 30 minutes per day each in language arts and mathematics. (J-4 at pages 28, 32-33).⁵
26. The testimony of the District middle school special education teacher who testified to the May 2021 IEP was found to be highly credible. Her testimony was accorded heavy weight. (NT at 823-878).
27. In June 2020, the parents rejected the May 2020 IEP and informed the District that they intended to seek a private placement for the student in the summer of 2020 and continue the [redacted] grade private placement for the 2020-2021 school year. Parents requested the District’s support of these placements. The District stood by its May 2020 IEP and declined to support the placements. (J-5, J-19, J-20).
28. In the summer of 2020, the student participated in summer programming at the private placement (“current private placement”)

⁵ The special education educational environment calculation in the May 2020 IEP is incorrect. In the IEP, the calculation indicates that the student would receive an itinerant level of support. A District witness clarified that the student’s level of support was a supplemental level of support. NT at 739-816.

which the student currently attends. (Parents Exhibit ["P"]-13, J-19; NT at 59-163).

29. After experiencing summer programming at the current private placement, parents decided that they wished to enroll the student in the current private placement for educational programming rather than the [redacted] grade private placement. (NT at 59-163).
30. The parents informed the District of the change in their plans for a private placement and again requested that the District support the student in the current private placement for the 2020-2021 school year. The District declined to support the placement. Parents enrolled the student in the current private placement. (J-21; P-11, P-14; S-106).
31. The current private placement is a school that focuses on serving students with learning challenges, especially children with language- and literacy-related disabilities. (NT at 59-163, 287-324, 347-430).⁶
32. Over the course of the 2020-2021 school year, the student received targeted instruction in reading comprehension, oral reading fluency, writing, basic reading, mathematics, OT, and S&L. (J-26, J-27, J-28).

⁶ As a matter of consistent practice, the private placement where student currently attends does not make itself available to provide evidence in special education due process hearing. Evidence related to the current private placement is documentary in nature, as well as testimony from witnesses with a second-hand familiarity with practices at the private placement or first-hand familiarity that is not recent. (P-11, P-12; NT at 287-324, 347-432).

33. Although progress monitoring indicated that reading comprehension would be monitored utilizing a comprehension tool developed by the private placement, for the 2020-2021 school year that data was reported in only anecdotally and not reported for the use of the assessment tool. Whether or not the student made progress in reading comprehension cannot be determined. (J-26 at pages 3-4, J-27 at pages 3-4, J-28 at pages 3-4).
34. Over the course of the 2020-2021 school year, the student did not make progress on oral reading fluency, starting the school year with a score of 93 words correct per minute, below average at the 18th percentile. The student finished the school year with a score of 96 words correct per minute, well below average at the 8th percentile. (J-26 at page 4, J-27 at page 4, J-28 at page 4, J-30).
35. Although reported in an anecdotal way, over the course of the 2020-2021 school year the student made progress in writing. (J-26 at pages 5-6, J-27 at pages 5-6, J-28 at pages 5-6).
36. Over the course of the 2020-2021 school year, the student made progress within the structured reading instructional program for basic reading, moving from a level 1.3 to 3.2. (J-26 at page 6, J-27 at pages 6-7, J-28 at pages 7-8).⁷

⁷ The steps within the structured reading curriculum do not correlate to grade-level work or performance. Likewise, the number and focus of decimalized sub-steps within each level vary. As such, the reported steps and sub-steps are simply notations of work within the curriculum. As a sequential program, however, a

37. Over the course of the 2020-2021 school year, the student made slow but consistent progress in mathematics, moving from the a score of 11 points on the assessment (4th percentile nationally), to 16 points (8th percentile), to 20 points (17th percentile). (J-26 at pages 7-8, J-27 at pages 9-10, J-28 at pages 9-11).
38. Over the course of the 2020-2021 school year, the progress monitoring does not allow a reader to gauge the progress, or lack of progress, in OT goals. The OT goals are written in terms of 'trial success' (e.g., "(the student) will plan and sequence through a 3-step activity to completion with 2 or less prompts in 80% of trials"). The reported progress, except for money-counting and telling-time, is not reported in terms of trial success; instead, all data is reported anecdotally. The student made progress on the money-counting and telling-time goals. Overall, whether or not the student made progress in OT cannot determined. (J-26 at pages 10-11, J-27 at pages 13-14, J-28 at pages 13-14).
39. Over the course of the 2020-2021 school year, the student largely met the articulation goal and made progress on receptive language/word retrieval goal. (J-26 at pages 12-13, J-27 at pages 15-16, J-28 at pages 15-16).

student cannot move through the sub-steps, or to a new step, without mastering the current sub-step or step. (NT at 347-340).

40. In March 2021 (with some content updated in April 2021), the District re-evaluated the student. (J-16).
41. The March/April 2021 RR contained updated information from the current private placement and additional assessments of the student. (J-16).
42. The March/April 2021 RR continued to identify the student as a student with specific learning disabilities with interventions in reading, mathematics, and writing, as well as a health impairment (ADHD), and S&L impairment, including recommendations for programming. (J-16).
43. The March/April 2021 RR recommended that the student receive specially-designed instruction in math reasoning, math computation, reading fluency, basic reading, and written expression, as well as instruction in S&L. The RR recommended that the student receive consultative, rather than direct, OT services. (J-16 at page 36).

Summer 2021 & 2021-2022 School Year

44. In May 2021, the student's IEP team met to consider an IEP based on the March/April 2021 RR. (J-6).
45. In May 2021, the District proposed an IEP for implementation in the 2021-2022 school year, the student's [redacted] grade year. (J-6).

46. The May 2021 IEP included present levels of academic performance, including comprehensive information from the March/April 2021 RR. (J-6).
47. The May 2021 IEP identified the need for goals, specially-designed instruction, and/or support in math reasoning, math computation, reading fluency, basic reading, attention/memory/executive functioning/coping strategies, written expression, and S&L. (J-6 at pages 16-17).
48. The May 2021 IEP included nine goals in reading comprehension, pragmatic language, figurative language, memory/recall, mathematics computation, mathematics reasoning, reading fluency, multi-paragraph writing, and OT (handwriting and task sequence). (J-6 at pages 23-36).
49. The May 2021 IEP contains program modifications and specially designed instruction in most areas where goal-based instruction would take place. There are no accommodations or specially-designed instruction in reading. (J-6 at pages 37-41).
50. The May 2021 IEP recommended that the student receive ESY programming in the summer of 2021. (J-6 at page 43).
51. The student's placement in the May 2021 IEP indicated that the student would receive 50 minutes per week in S&L, 30 minutes per week in OT, 47 minutes per day each in the special education setting

in intensive language arts and intensive mathematics (with an additional two periods of 47 minutes each for intensive language arts and an additional two periods of 47 minutes each for intensive math, over the District's middle school 8-day instructional cycle), 47 minutes for four periods of mathematics lab over the 8-day instructional cycle, and a pair of 33-minute periods over the 8-day instructional cycle in each of writing, executive functioning, and reading decoding. Over the course of the 8-day instructional cycle, the student would spend approximately half of the school day in special education settings and half the day in regular education settings. (J-6 at pages 44-46; S-132; NT at 823-878, 884-936).

52. In June 2021, the parents rejected the May 2021 IEP and informed the District that they intended to seek a private placement for the student in the summer of 2021 and continue enrollment in the current private placement for the 2021-2022 school year. Parents requested the District's support of these placements. The District stood by its May 2021 IEP and declined to support the placements. (J-7, J-8, J-23, J-24, J-25).

53. Parents enrolled the student in the current private placement for summer 2021 programming and the 2021-2022 school year. (P-12, P-15, P-16).

54. In October 2021 (and updated in January 2022), the private evaluator who had been working with the student since 2014 issued an updated evaluation report. (J-17).
55. In April 2022, the District issued an updated RR. (J-18).
56. Over the course of the 2020-2021 school year, the student received targeted instruction in reading comprehension, oral reading fluency, writing, basic reading, mathematics, OT, and S&L. (J-31, J-34).
57. Although progress monitoring indicated that reading comprehension would be monitored utilizing a comprehension tool developed by the private placement, for the 2021-2022 school year that data was reported in only anecdotally and not reported for the use of the assessment tool. Whether or not the student made progress in reading comprehension cannot be determined. (J-31 at pages 2-3, J-34 at pages 3-4).
58. Over the course of the 2021-2022 school year, the student did not make progress on oral reading fluency, starting the school year with a score of 124 words correct per minute, below average at the 24th percentile. The student's mid-year score finished the school year with a score of 111 words correct per minute, below average at the 14th percentile. After February 2022, oral reading fluency data was not

collected and there was no end-of-year level obtained. (J-31 at page 14, J-34 at page 17, J-35, J-36).

59. Over the course of the 2021-2022 school year, the student made progress in writing, advancing (content, vocabulary, sentence writing) or maintaining (structure, grammar, style) in all skills. (J-31 at page 3, J-34 at page 4).
60. Over the course of the 2021-2022 school year, the student made progress within the structured reading instructional program for basic reading, moving from a level 3.3 to 5.1. (J-31 at pages 13-14, J-34 at pages 16-17, J-44).
61. Over the course of the 2020-2021 school year, the student's levels of performance were stagnant, moving from the a score of 199 points on the assessment (25th percentile nationally), to 197 points (8th percentile), to 209 points (26th percentile). Grading and teacher comment provide anecdotal evidence of success in certain areas of mathematics, but the measure of goal progress in mathematics—a curriculum-based, nationally-normed assessment—showed stagnation in the mathematics goal. (J-31 at pages 4-5, J-34 at pages 5-7, J-38, J-39).⁸

⁸ A measure of number sense fluency—not specifically related to measuring goal progress—declined over September 2021 – February 2022, when data was no longer collected. (J-37).

62. Over the course of the 2021-2022 school year, the student made progress on OT goals, showing goal mastery in certain areas and measurable progress in all areas. (J-31 at pages 7-8, J-34 at pages 10-11).
63. The S&L goals are written in terms of 'trial success' (e.g., "(the student) will identify multiple interpretations of a person's behavior or words when presented with a social scenario given fading support in 4/5 trials"). The reported progress is not reported in terms of trial success; instead, all data is reported anecdotally. Overall, whether or not the student made progress in S&L cannot be determined. (J-31 at pages 11-12, J-34 at pages 14-15).
64. In June 2022, an expert in (1) the instructional implications of reading and language arts curriculum, (2) special education and delivery of specially designed instruction generally, and (3) in reading and language arts instruction for special needs learners, retained by the parents, issued a report supporting the parents' position that the current private placement was providing appropriate instruction and that, based on her review of the District's proposed IEPs, such appropriate instruction would not be provided as proposed by the District. (P-7; NT at 347-430).
65. This expert witness had three years of teaching experience at the current private placement from 2011-2014. Given the time that

has passed, her testimony and report were only slightly credited to the extent that it touched on programming at the current private placement. Her training, background, and comprehensive experience, however, led her testimony and report to be accorded some degree of weight as it touched on matters related to literacy education, special education, and the basic reading program utilized by the current private placement. (P-7, P-8; NT at 347-430).

66. In July 2022, an expert in (1) the consideration and selection of reading and language arts curricula for adoption by organizations, (2) the delivery of professional development training to teachers, (3) how programming is aligned with the goals of teaching reading at an organizational (not instructional) level, and (4) in regular education instruction, issued a report supporting the parents' position that the current private placement was providing appropriate instruction and that, based on her review of the District's proposed IEPs, such appropriate instruction would not be provided as proposed by the District. (P-5, P-6; NT at 287-324).

67. Given the fact that the expert witness' background was largely geared to professional development of educators and organizational approaches to literacy, with little-to-no instructional experience in reading or special education, her testimony and report were accorded very little weight. (P-5, P-6; NT at 287-324).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

Discussion

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). 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, with appropriately ambitious programming in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Additionally, in considering parents' claim, long-standing case law and the IDEIA 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 proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program, or last-operative program, and whether it was reasonably calculated to yield meaningful education benefit. Step two of the Burlington-Carter analysis involves assessing the appropriateness of the private placement selected by the parents. At step three of the Burlington-Carter analysis, the equities must be balanced between the parties.

The analysis of parents' reimbursement claims will be considered in three parts: (1) claims for ESY programming, (2) the 2020-2021 school year, and (3) the 2021-2022 school year.

ESY Programming. Here, the parents have not carried their burden of proof regarding evidence that the ESY programming offered by the current private placement is appropriate. There is no need to undertake the Burlington-Carter analysis because the record is devoid of any evidence, that might be applied at step two of the analysis, as to the appropriateness of the summer programming in summer 2020 or summer 2021. The parents are obviously hamstrung by the policy of the current private placement to decline to participate in special education due process hearings. But where there is ample documentary evidence to provide a picture of the student's programming, instruction, and progress for the 2020-2021 and 2021-2022 school years (thereby allowing, below, for a complete Burlington-Carter analysis to be undertaken), even that is lacking for the student's ESY programming at the current private placement. Accordingly, these claims for reimbursement will be denied for the lack of any probative evidence in the record.

2020-2021 & 2021-2022 School Years. At step one of the Burlington-Carter analysis, the District's proposed IEPs are largely appropriate, but they are deficient in one, critical regard. In the specially-designed instruction in both the May 2020 and May 2021 IEPs, there is no indication of the type of reading instruction which will be delivered to the student. This area of instruction addresses the student's most profound areas of need—reading

instruction across multiple pillars of literacy (decoding, fluency, comprehension). The parents simply were not placed in a position, through the explicit terms of the May 2020 and May 2021 IEPs, to understand the type of special education instruction that the student would receive in reading.

This is especially perplexing because social skills instruction, mathematics instruction, written expression, and handwriting instruction in the modifications/specially-designed instruction in the May 2020 and May 2021 IEPs contain explicit specially-designed instruction, such that parents can weigh what and how the student would be instructed in those areas. They may not agree and the IEP team may work with any or all of these areas of instruction. But similar specificity in the area of the student's deepest need is missing. This is a fatal flaw in the May 2020 and May 2021 IEPs and denied the parents an opportunity to understand how FAPE would be delivered to the student in reading.

To be clear, a consistent theme of parents, presented through counsel, is that a specific reading curriculum was not named in the IEP. There is a distinct and necessary difference between the delivery of specially designed instruction and a specific, named curriculum. The basis in the foregoing paragraph for finding that the District denied the student FAPE through that one (but absolutely critical) element of the IEP is not that the District did not name a specific curriculum; the provision of FAPE does not require any

particular curriculum to be delivered. Certainly, an agreement by an IEP team naming a particular curriculum is certainly allowable. Yet while it might be allowable, in almost every circumstance an IEP is written, especially in terms of its specially designed instruction, in terms of the specialized approach to instruction and not in terms of a specific curriculum. This gives educators the flexibility to move between curriculum, or approaches, or materials in ways that might be necessary to afford the student the opportunity for significant learning. And families can be assured that educators can do exactly that when necessary—providing the student with appropriate instruction as needed and described in the IEP, without the constraint of a particular curriculum from a particular publisher.

In that regard, the finding is that the denial of FAPE is rooted in the lack of any concrete and explicit understanding of how the District intended to provide specially-designed instruction for reading to the student rather than the failure to name or identify a specific reading curriculum.

Having found that the May 2020 and May 2021 IEPs are inappropriate in this one but critical regard, step two of the Burlington-Carter analysis turns to an examination of the appropriateness of the programming provided by the current private placement. The evidence fully supports a finding that this programming was designed to deliver, and ultimately did deliver, significant learning to the student in light of the student's unique needs. Granted, there are areas of the student's progress across the two school

years which are not perfected. There is no definitive sense of the student's progress, or lack of progress, in reading comprehension in either school year. And the student consistently failed to make progress in oral reading fluency. Progress in OT in the 2020-2021 school year is indeterminate, as is progress in S&L in the 2021-2022 school year. But these are discrete elements in a mosaic of overall meaningful progress at the current private placement over the 2020-2021 and 2021-2022 school years. Parents have carried their burden of proof on this record as to step two of the Burlington-Carter analysis.

At step three of the Burlington-Carter analysis, the equities do not weigh in favor or against either party. Therefore, the equities between the parties play no role in understanding a tuition reimbursement remedy in this matter.

Accordingly, tuition reimbursement will be ordered for the 2020-2021 and 2021-2022 school years.

Section 504/Denial-of-FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1). The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are

broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See generally P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009)).

As outlined above, the IEPs proposed in May 2020 and May 2021 were inappropriate and failed to propose programming that would provide FAPE. The award of tuition reimbursement under the IDIEA claims make parents whole in light of this record, so there will be no additional remedy provided under the provisions of Section 504/Chapter 15.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, parents are awarded tuition reimbursement for the unilateral private placement they undertook for the student in the 2020-2021 and 2021-2022 school years. Reimbursement for extended school year summer programming in the summers of 2020 and 2021 is denied for lack of evidence.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

10/25/2022