

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

Closed Hearing

ODR No. 28350-23-24

Child's Name

J.G.

Date of Birth

[Redacted]

Parents

[Redacted]

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

04/30/2024

Introduction

This special education due process hearing concerns the educational program and placement of J.G. ("student"), a student who resides in the Lower Merion 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 ("IDEA")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 IDEA. 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 provide appropriate programming as of June 2021.⁴ As a result, parents undertook a

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").

⁴ In their complaint, parents asserted a claim for compensatory education for the 2020-2021 school year, for the period that the District provided special education to the student, through June 26, 2021, an agreed-upon date preserving the timeliness of parents' claims. The District sought to limit the evidentiary scope of the hearing, arguing that parents knew, or should have known, ("KOSHK") prior to June 26, 2021 of the alleged acts/omissions which form the basis of the parents' complaint. Thus, the first session of the hearing developed KOSHK evidence, resulting in a KOSHK ruling that limited to parents' claims to the period of June 26, 2021 and thereafter, as parents definitively knew prior to that date of the alleged acts/omissions which form the basis of their complaint. *See* Hearing Officer Exhibit ("HO") 1 – Complaint;

unilateral private placement of the student (including certain related services). Parents claim that the District failed to propose appropriate programming for the student for the 2021-2022 and 2022-2023 school years, including the summers of 2021, 2022, and 2023. Parents seek tuition reimbursement for the private placement which the student has attended from the summer of 2021.

The District counters that, at all times, it proposed appropriate programming the period of parents' claims. Therefore, the District argues, parents are not entitled to remedy.

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

Issue

Are parents entitled to tuition reimbursement for the student's private placement in the 2021-2022 and/or 2022-2023 school year(s), including programming in the summers of 2021, 2022, and 2023?

HO-2 District Response to Complaint; HO-3 District Motion to Limit Claims; HO-4 – Parents Response to Motion to Limit Claims; HO-4 – KOSHK Ruling.

Stipulations⁵

- A. The student is a [redacted] grade student who resides within the District's boundaries. The student currently attends a private placement, selected by the parents, where the student was unilaterally enrolled in the summer of 2021.
- B. The student attended school in the District from 2017-2018, the student's [redacted] year, through the 2020-2021 school year, the student's [redacted] grade year.
- C. [redacted]
- D. [redacted]
- E. [redacted]
- F. [redacted]
- G. From [redacted] through [redacted] grade, the student at the center of this matter was identified as a general education student.
- H. Parents requested an evaluation for the student in spring 2020, during the District-wide school closure due to the COVID-19 pandemic.

⁵ The parties' stipulations are edited for stylistic consistency. The stipulations notwithstanding, evidence was developed by the parties in some of those regards. Should there be any discrepancy between the stipulations and the findings of fact, the findings of fact will govern. The parties stipulations, as submitted, are included in the record as HO-5 – Stipulations.

- I. The District initiated an evaluation for the student per parents' request. A Permission to Evaluate ("PTE") was issued on May 8, 2020. Parents signed the PTE on May 9, 2020. (J-3, J-4).
- J. Based on this review, the District issued an initial evaluation report ("ER") on June 3, 2020 which found the student ineligible for special education. (J-7).
- K. The District issued a new PTE on September 14, 2020. The District provided the PTE to the family via email. (J-10, J-11).
- L. The District completed the evaluation, which included in-person testing, on October 23, 2020. The student was found eligible for special education services under the classification of specific learning disabilities in reading, written expression, and math. Parents received a copy of the October 2020 ER. (J-13).
- M. On November 9, 2020, the student's special education case manager emailed parents a videoconference link to participate in an individualized education program ("IEP") meeting. A procedural safeguards notice accompanied this email. (J-15).
- N. On November 11, 2020, the District held an IEP meeting to discuss the ER and proposed supports and services. Parents were present and participated as documented in the parental concerns section of the IEP. (J-14, J-16).

- O. On November 12, 2020, parents sent an email to the District with additional questions and concerns regarding the student's reading program. This input was documented in the IEP. (J-16 at page 12).
- P. The District issued the final IEP and notice of recommended educational placement ("NOREP") to parents via email on November 20, 2020. (J-18).
- Q. On December 1, 2020, parents signed and approved a NOREP and the student began receiving special education services. (J-19).
- R. On December 8, 2020, the student's special education teacher for reading emailed parents the results of a standard assessment for the reading program the student was receiving, which established the student's baselines for instruction within the program. The student's mother responded to this email and shared her own impressions of the student's strengths and needs related to reading. (J-25, -26).
- S. On December 10, 2020, the student's IEP was revised to incorporate the results of certain assessments in the student's reading program and to update IEP goal baselines. Parents received a copy of the revised IEP. (J-27).
- T. On January 20, 2021, the District held an IEP meeting for potential revisions and to discuss the student's progress with parents present. The present levels section of the IEP was revised to reflect the team's

discussion and the student's progress on each of the IEP goals and to reflect parental input. (J-30; J-31 at pages 13-17, 32-33).

- U. On January 27, 2021, the District completed a re-evaluation assessing the student's speech and occupational therapy ("OT") needs. The student was found ineligible for speech services but eligible for OT services. (J-34).
- V. On January 28, 2021, the student's special education teacher emailed parents with updated data regarding the student's math benchmark scores. The teacher also provided updated benchmark data for written expression. (J-35).
- W. On February 24, 2021, the District held an IEP meeting to revise the student's IEP. (J-37).
- X. On February 26, 2021, the District issued a finalized IEP and NOREP to Parents. Parents signed and approved the NOREP on March 1, 2021. (J-38).
- Y. On March 2, 2021, a different special education teacher emailed Parents with the results of the student's most recent assessment within the reading program. (J-40).
- Z. On March 6, 2021, parents completed an application for enrollment at the private placement for the student. (J-70).
- AA. On March 22, 2021, parents completed and submitted an enrollment contract for the private placement for the student. The

contract stated, in part, as follows: “[Parents] agree that the obligation to pay the tuition and fees for the full academic year is unconditional and that no portion of the tuition or fees, whether paid or still outstanding, will be refunded or canceled, regardless of subsequent absence, withdrawal or dismissal of the above student from (the private placement).” (J-71 at page 2).

BB. On April 18, 2021, the District completed an IEP revision to document the student’s eligibility for extended school year (“ESY”) services in the summer of 2021. Parents consented to the revision without an IEP meeting. (J-43, J-44).

CC. On April 21, 2021, the District shared with the family the finalized IEP and NOREP for ESY services. (J-45).

DD. On May 4, 2021, parents signed and rejected the NOREP for ESY services. Parents included the following statement: “We believe (the student) needs daily instruction in (the reading program), ELA, and math to not only avoid regression, but help to reduce the gap between (the student’s) current level and that of (the student’s) peers... (The student) will be attending an intensive enrichment program for children with language-based learning differences for the month of July to cover his needs.” (J-46).

EE. On or about May 5, 2021, the District received the family’s signed NOREP and responded in writing that it had received it. The

District acknowledged that the family was forgoing their right to ESY services for the student in the summer of 2021. (J-47).

FF. On or around June 14, 2021, the District issued to parents a report card for the student. (J-48).

GG. On or around June 15, 2021, the District shared the student's final IEP progress report for the 2021-2022 school year with the family. The progress report included data for each goal for each marking period. (J-49).

HH. On June 18, 2021, the family provided 10-day notice to the District and indicated their intention to enroll the student at the private placement and seek reimbursement at a later date. The family's notice stated as follows: "The District's proposed placement and Individualized Education Plan (including goals, related services, and specially designed instruction) do not adequately address (the student's) Specific Learning Disabilities in reading, writing, and math, and/or (the student's) documented issues in visual motor coordination, handwriting, encoding, emotional regulation, executive functioning, and attention. We believe (the student) needs access to additional educational/remedial services, a more intensive special education program, and a placement in a smaller classroom setting." (J-50).

II. On June 25, 2021, the District responded in writing to the family acknowledging receipt of the NOREP and 10-day notice, denying the

family's request for reimbursement, and providing a copy of a due process complaint notice and procedural safeguards notice. (J-51).

JJ. Parents withdrew the student from the District and unilaterally placed the student at the private placement.

KK. The student has remained at the private placement for ESY services in the summer of 2021, for the 2021-2022 school year, for ESY services in the summer of 2022, for the 2022-2023 school year, for ESY services in the summer of 2023, and for the 2023-2024 school year.

LL. In February 2022, the family, through counsel, made outreach to the District to request an offer of FAPE for ESY services in the summer of 2022 and for the 2022-2023 school year. (J-56).

MM. The District offered an IEP and NOREP in March 2022. (J-60, J-59).

NN. On March 25, 2022 the Family signed and returned the March 2022 NOREP, indicating they disapproved and requesting a due process hearing. The family also sent a 10-day notice indicating that they intended to keep the student at the private placement and seek reimbursement later. (J-59, J-61).

OO. On March 30, 2022, the District responded in writing to the family acknowledging receipt of the NOREP and 10-day notice, denying

the family's request for reimbursement, and providing a copy of a due process complaint notice and procedural safeguards notice. (J-62).

PP. The family did not file a due process complaint at that time.

QQ. On July 11, 2022, the family sent an email to the District requesting a copy of the student's educational records. The family attached a release of records for their attorney to the email. (S-79).

RR. In early 2023, the family, through counsel, made outreach to the District to request an offer of FAPE for the 2023-2024 school year. The District held an IEP meeting on April 19, 2023 and sent a NOREP to Parents on May 9, 2023. (J-66, J-68).

SS. On June 26, 2023, in advance of potential litigation, the District and the family entered into a 30-day tolling agreement. The Parties agreed that any claim brought on behalf of the student on or before July 26, 2023 would be treated as if filed on June 26, 2023.

TT. On or around June 29, 2023, the student's educational records were shared with parents through their attorney.

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.

2020-2021 School Year – [redacted] Grade

1. In October 2020, the student was identified as a student with specific learning disabilities in reading (phonological processing/phonetic decoding), written language (spelling, written expression), and mathematics (computation, problem-solving, math fact fluency). (Stipulations G – L; J-14; Notes of Testimony [“NT”] at 276-396/399).
2. In November 2020, the student’s IEP team crafted an IEP for the student (referred to hereafter as the ‘November 2020 IEP’). In December 2020, parent approved the implementation of the November 2020 IEP. (Stipulations M – Q; J-16, J-19, J-23; NT at 143-268/271, 397-480/483).
3. In December 2020, the November 2020 IEP was revised to include the results of a reading assessment and update the baselines in the IEP goals. (Stipulations R, S; J-27; NT at 397-480/483).
4. The November 2020 IEP included six goals, one each in math computation, math applications/problem-solving, encoding/spelling, decoding, written expression, attention/executive functioning. (J-27 at pages 25-35).
5. Under the terms of the November 2020 IEP, the student received specialized reading instruction 45 minutes per session, three times per week, in a special education setting in a group of no more than three

students; instruction in written expression 30 minutes daily in special education; instruction in mathematics 60 minutes daily in special education; and instruction in executive functioning 20 minutes weekly in special education. (J-27 at pages 39-40).

6. The student's placement called for the student to spend 31% of the school day in special education settings. (J-27 at page 45).
7. The student began the specialized reading program at step 1.3 (J-25, J-26).⁶
8. In January 2021, the District provided updated progress information with benchmark scores in mathematics and written expression. (Stipulation V; J-35).
9. In January 2021, the District issued a re-evaluation report ("RR") based on an evaluation of potential need for supports in S&L and OT. The student was determined to need OT support. (Stipulation U; J-34).
10. By January 2021, the student had mastered steps 1.3 and 1.4 in the specialized reading program and was beginning step 1.5. The student's IEP team considered increasing the amount of time spent in the specialized reading program but decided against it given the student's progress over December and January. (J-31 at pages 7-8).

⁶ The steps in the reading program are sequential, with sub-steps (e.g., 1.1, 1.2, 1.3, etc.), and do not represent grade levels or grade-level skills. Movement from sub-step to sub-step, and then to the next step, is based on mastery of skills.

11. In February 2021, the November 2020 IEP was revised to include information from the January 2021 RR, including the addition of an OT goal and a small-group weekly OT session of 30 minutes. (Stipulations W, X; J-37 at pages 6-7, 39, 44; J-38).
12. With the addition of OT services, the student's placement in special education increased slightly, calling for the student to spend 32% of the school day in special education settings. (J-37 at page 50).
13. In early March 2021, the District updated the parents that the student had mastered all sub-steps at step 1 of the specialized reading curriculum and was moving to step 2. (Stipulation Y; J-40).
14. Shortly after the progress update by the District, in March 2021, parents completed an application for the student to attend the private placement. Later that month, parents completed a contract for enrollment at the private placement. (Stipulation Z, AA; J-70, J-71).
15. In early April 2021, the parents received a financial award letter, and final amount due, from the private placement. (J-72).
16. In mid-April 2021, the November 2020 IEP was revised to include ESY eligibility and programming for the student in the summer of 2021. The student would receive instruction in encoding/spelling, decoding, and written expression. (Stipulations BB, CC; J-44 at pages 7, 48-51).

17. In May 2021, parents rejected the NOREP for the proposed ESY programming. (Stipulation CC, DD; J-46).
18. In June 2021, the District updated the student's progress in the specialized reading curriculum. The student exhibited mastery through step 2.3. (J-52).
19. In June 2021, the District provided progress monitoring on the student's IEP goals from the November 2020 IEP (and the February 2021 OT goal). (Stipulation GG; J-49).
20. On the math computation goal over the period December 2020 – June 2021, the student improved accuracy of calculations and moved up one level of computation facts. (J-49 at pages 1-2).⁷
21. On the math applications/problem-solving goal over the period December 2020 – June 2021, the student improved accuracy of applications and problem-solving and moved up one level of applications. (J-49 at pages 3-4).
22. On the encoding/spelling goal over the period December 2020 – June 2021, the student progressed through level 2.3 in the specialized reading program, with probed scores consistently in above the 80% goal level. (J-49 at pages 5-7).

⁷ J-49 is a 34-page exhibit. The substance of the exhibit is at pages 1-17; pages 17-34 are a duplication.

23. On the decoding goal over the period December 2020 – June 2021, the student progressed through level 2.3 in the specialized reading program, with probed scores consistently in above the 93% goal level (14/15) for real words and 86% goal level (13/15) for nonsense words. (J-49 at pages 8-10).
24. On the written expression goal over the period December 2020 – June 2021, from baseline of 5/20 on a writing rubric, the student scored 8/20 at the end of the second trimester and 10/20 at the end of the school year. (J-49 at pages 11-12).
25. On the attention/executive-functioning goal over the period December 2020 – June 2021, from a baseline of 4/8 on a skills rubric, the student scored 6/8 at the end of the second trimester and 7/8 at the end of the school year. (J-49 at pages 13-15).
26. The District issued the student’s [redacted] grade report card. (Stipulation FF; J-48).
27. On the OT goal over the period February – June 2021, from a baseline of 80% accuracy and 0/4 on a skills rubric, the student scored 2/4 and 3/4 at the end of the school year, exhibiting 80% levels on orientation-to-line, letter case, and letter formation. (J-49 at pages 16-17).
28. In late June 2021, the student’s parents provided a 10-day notice to the District that they were enrolling the student at the private

placement and would look to the District for tuition reimbursement.

The District acknowledged the notice. (Stipulation HH, II; J-50, J-51).

2021-2022 School Year – [redacted] Grade

29. The November 2020 IEP, with subsequent revisions, would have governed the ESY programming in the summer of 2021 and student's education at the District at the outset of the 2021-2022 school year. (J-44).

30. The student attended the private placement in the summer of 2021. The summer 2021 program at the private placement included instruction in reading, writing, mathematics, as well as arts-based geography activities. (Stipulation KK; Parents Exhibit ["P"] -26; NT at 494-584).

31. The student began the 2021-2022 school year at the private placement. (Stipulation KK; NT at 494-584).

32. The private placement is a special education school focusing on students who largely have, among other learning differences, language-based learning disabilities in reading and writing. (NT at 494-584).

33. The private placement utilizes the same specialized reading curriculum—a research-based, multi-sensory intensive intervention

reading program—that the District was utilizing for the student’s instruction. (NT at 494-584).

34. The private placement also employs staff who are largely trained in reading intervention and focuses on delivering reading instruction in small groups. (NT at 494-584).

35. In July 2021, the private placement assessed the student’s level within the specialized reading assessment. The student was placed at step 2.4 of the specialized reading program, aligning with mastery at step 2.3 in June 2021 when the student left the District. (J-52; P-63 at page 7; NT at 494-584).

36. In July 2021, the parents contracted for OT services at the private placement, twice weekly for 45 minutes per session. (P-71; J-60 at page 7).

37. Over the course of the 2021-2022 school year, through the 2nd trimester of the school year (approximately late February/early March) the student made progress in the curriculum of the private placement based on the student’s report cards. (P-27, P-28).

38. Over the course of the 2021-2022 school year, through the 2nd trimester of the school year (approximately late February/early March) the student made progress in oral reading fluency based on curriculum-based measures, moving from the 64th to the 71st percentiles in the fall and winter assessments. (P-34).

39. Over the course of the 2021-2022 school year, through the 2nd trimester of the school year (approximately late February/early March) the student regressed in mathematics based on curriculum-based measures, moving from the 71st percentile in the fall assessment to the 52nd percentile in the winter assessment. (P-32).
40. In February 2022, the parents, through counsel, inquired with the District about an offer of ESY programming for the summer of 2022 and for programming in the 2022-2023 school year. (Stipulation LL; J-56).
41. In March 2022, the student's IEP team met to discuss an IEP for the student for implementation at the District. (Stipulation MM; J-60).
42. The March 2022 IEP included updated parental concerns. (J-60 at pages 7-8, 22).
43. The March 2022 IEP updated the levels of academic performance for the student, including the progress monitoring through the end of the [redacted] grade year at the District and the student's achievement and scores through the first trimester at the private placement. (J-60 at pages 10-16).
44. The March 2022 IEP included an indication that should the student return to the District, an assistive technology assessment would be undertaken to balance OT support in handwriting with

keyboarding to promote the student's ability to produce written work.
(J-60 at page 16).

45. The March 2022 IEP updated the levels of functional performance for the student, including the progress monitoring for the attention/executive-functioning goal through the end of the [redacted] grade year at the District and the student's progress through the first trimester at the private placement. (J-60 at pages 16-20).
46. The March 2022 IEP updated the levels of OT performance for the student, including the progress monitoring for the OT goal through the end of the [redacted] grade year at the District and the student's progress in OT through the first trimester at the private placement. (J-60 at pages 20-22).
47. The March 2022 IEP included goals in the same areas as the District's previous IEPs, including OT. (J-60 at pages 32-39).
48. In drafting the goals, the District utilized the most recent information from the private placement, which was forwarded by the parents. (J-58; NT at 638-691).
49. In the March 2022 IEP, the baseline for the math computation goal was based on the student's achievement at the private placement (29 points at the 4th grade level). The goal was written for achievement of 21 points at the 5th grade level. (J-60 at page 32).

50. In the March 2022 IEP, the baseline for the math applications/problem-solving goal was based on the student's achievement at the private placement (92% the 4th grade level). The goal was written for achievement of 80% at the 5th grade level. (J-60 at page 33).
51. In the March 2022 IEP, the decoding and encoding/spelling goals were combined, with a baseline based on the student's step level at the private placement at the start of the school year, as the level had not yet been updated in the documentation provided by the parents. (J-60 at page 34)
52. The decoding/encoding goal was written for 93% goal level (14/15) for decoding for both real and nonsense words (or 86% – 13/15 – with self-correction) and 80% goal level (12/15) for encoding/spelling both real and nonsense words. (J-60 at page 34).
53. In the March 2022 IEP, the baseline for the written expression goal was based on the student's needs, as identified by the private placement, in brainstorming, topic/closing sentences, elaborating details, and writing conventions. The goal was written for achievement of proficiency on the Pennsylvania Writing Rubric in Content, Organization, and Conventions. (J-60 at page 35).
54. In the March 2022 IEP, the baseline for the attention/executive-functioning goal was based on the student's needs, as identified by the

private placement, in task-initiation, following directions, and accessing supports. The goal was written for documented task-initiation, task-persistence, and task-completion. (J-60 at page 37-38).

55. In the March 2022 IEP, the baseline for the OT goal was repeated from the OT goal in the February 2021 IEP and did not include information from the OT input provided by the private placement. The OT areas in the February 2021 IEP and proposed in the March 2022 IEP, however, were geared to progress in the same areas being addressed through OT support at the private placement (correct letter case and sizing, orientation, writing line, and use of assistive technology to support writing). (J-60 at page 39).

56. The March 2022 IEP proposed continuation of the specialized reading curriculum. The IEP proposed continuation of the level of special education services that the student had received under the District's prior IEPs (in reading, 45 minutes, three times per week; in mathematics, 60 minutes daily; in written expression, 30 minutes daily; in executive functioning, 20 minutes, once per week). (J-60 at pages 40-44).

57. The March 2022 IEP proposed an increase in the level of OT support (once weekly for 30 minutes in the special education classroom, once weekly for 15 minutes pushing into the regular education classroom). (J-60 at page 44).

58. The March 2022 IEP found the student to be eligible for ESY programming in the summer of 2022, with instruction on the decoding/encoding and written expression goals. (J-60 at pages 45-47).
59. The student's placement in special education in the March 2022 IEP remained at 32% of the school day. (J-60 at page 52).
60. The parents rejected the NOREP issued with the March 2022 IEP. (Stipulation MM, NN; J-59).
61. In March 2022, the student's parents provided a 10-day notice to the District that they were returning the student to the private placement and would look to the District for tuition reimbursement. The District acknowledged the notice. (Stipulation OO; J-61, J-62).
62. In April 2022, the parents completed a contract for enrollment at the private placement. (J-73).
63. Over the final trimester of the 2021-2022 school year, (approximately early March through June) the student made progress in the curriculum of the private placement based on the student's report card. (P-29).
64. Over the final trimester of the 2021-2022 school year, (approximately early March through June) the student progressed in oral reading fluency based on curriculum-based measures, rising from

the 71st percentile in the winter assessment to the 75th percentile in the spring assessment. (P-34).

65. Over the final trimester of the 2021-2022 school year, (approximately early March through June) the student continued to regress in mathematics on curriculum-based measures, declining from the 52nd percentile in the winter assessment to the 29th percentile in the spring assessment. (P-32).
66. By the conclusion of the school year at the private placement, the student was working on step 4.1 in the specialized reading curriculum. (P-29 at page 7; P-36).⁸
67. In July 2022, the parents received a financial award letter, and final amount due, from the private placement. (J-74).

2022-2023 School Year – [redacted] Grade

68. The March 2022 IEP would have governed the ESY programming in the summer of 2022 and student's education at the District at the outset of the 2022-2023 school year. (J-60).

⁸ On the assessment itself, administered on May 31, 2022, the indication on multiple pages is that the "sub-step completed at time of administration" is 4.1. (P-36). On the final report card issued by the private placement at the conclusion of the 2021-2022 school year, which is undated, the indication provided for the specialized reading curriculum is that "students are currently working in step 4.1". (P-29 at page 7). This finding of fact, then, is based on the official indication through grade/progress reporting—that is, working on sub-step 4.1—rather than a notation on the assessment.

69. The student attended the private placement in the summer of 2022. The summer 2022 program at the private placement included instruction in reading, writing, mathematics, as well as arts-based geography activities. (Stipulation KK; P-30).
70. The student began the 2022-2023 school year at the private placement. (Stipulation KK; NT at 494-584).
71. In September 2022, the parents completed a contract for OT services at the private placement. (P-72).
72. Over the course of the 2022-2023 school year, through the 2nd trimester of the school year (approximately late February/early March) the student made progress in the curriculum of the private placement based on the student's report cards. (P-37, P-38).
73. Over the course of the 2022-2023 school year, through the 2nd trimester of the school year (approximately late February/early March) the student's progress was stagnant in oral reading fluency based on curriculum-based measures, moving from the 70th to the 68th percentiles between the fall and winter assessments. (P-44).
74. Over the course of the 2022-2023 school year, through the 2nd trimester of the school year (approximately late February/early March) the student made slight progress in mathematics based on curriculum-based measures, moving from the 39th percentile in the fall assessment to the 43rd percentile in the winter assessment. (P-40).

75. In April 2023, the parents provided 10-day notice to the District that they would seek reimbursement for ESY programming for the summer of 2023 and for programming in the 2023-2024 school year. (Stipulation RR; J-63).
76. In April 2023, the student’s IEP team met to discuss an IEP for the student for implementation at the District. (Stipulation RR; J-66).⁹
77. The April 2023 IEP included goals in the same areas as the District’s previous IEPs, including OT. (J-66 at pages 30-39).
78. The April 2023 IEP found the student to be eligible for ESY programming in the summer of 2023, with instruction in all goal areas—math computation, math applications/problem-solving, decoding/encoding, written expression, executive functioning, and OT. (J-66 at pages 44-47; NT at 696-747).
79. In May 2023, the parents rejected the ESY programming NOREP issued with the April 2023 IEP. (P-60).
80. In May 2023, after the IEP team’s deliberations over April and May, the parents re-submitted to the District a 10-day notice regarding their intention to seek tuition reimbursement for ESY

⁹ The complaint which ultimately followed and led to these proceedings sought reimbursement only for ESY programming the summer of 2023 and did not place at issue the reimbursement for the parents’ unilateral placement for the 2023-2024 academic year. Therefore, consideration of the April 2023 IEP will be limited to the appropriateness of the ESY-2023 programming. (HO-1;J-66).

programming in the summer of 2023 and the 2023-2024 school year.
(J-69).¹⁰

81. Over the final trimester of the 2022-2023 school year, (approximately early March through June) the student made progress in the curriculum of the private placement based on the student's report card. (P-39).
82. Over the final trimester of the 2022-2023 school year, (approximately early March through June) the student slightly regressed in oral reading fluency based on curriculum-based measures, moving from the 68th percentile in the winter assessment to the 65th percentile in the spring assessment. (P-44).
83. Over the final trimester of the 2022-2023 school year, (approximately early March through June) the student slightly regressed in mathematics on curriculum-based measures, moving from the 43rd percentile in the winter assessment to the 40th percentile in the spring assessment. (P-40).
84. By the conclusion of the school year at the private placement, the student was working on step 6.1 in the specialized reading curriculum. (P-39 at page 7).
85. In June 2023, parents filed the complaint which led to these proceedings. (HO-1).

¹⁰ See footnote 9.

Procedural Note

By way of procedural explanation, parents filed their complaint in late July 2023. (HO-1). At the same time that parents filed the complaint in the instant matter, parents also filed complaints for [redacted] siblings, along similar lines (compensatory education claims with a KOSHK component, and tuition reimbursement for enrollment of the [redacted] siblings over multiple school years at the private placement).

Initial hearing planning involved marshaling the testimony of 34 witnesses across the [redacted] records. Some of those witnesses would have testified as to all [redacted] siblings, some as [redacted] siblings, some as to only [redacted] siblings. Certain witnesses would testify as to all the school years at issue across the [redacted] records; certain witnesses would testify as to some assortment of school years; certain witnesses would testify as to only one school year. Thus, the [redacted] matters involved very intricate planning to coordinate the testimony of various witnesses.

One of those complaints was resolved between the parties. [Another] complaint for the [redacted] proceeded alongside the complaint in the instant matter, and 27 witnesses needed to be accounted for.

Ultimately, the planning could not easily be coordinated and each matter needed to proceed on its own timeline (necessitating the appearance

of witnesses on separate dates for one record or the other). And, indeed, by the time the parties began to present evidence over January/February/March 2024, the witness list had shrunk dramatically. But the intricate, at times arduous, hearing planning over the period September 2023 – January 2024 meant that the conclusion of the hearing and issuance of this decision took longer than those procedures normally would have.

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. No witness's testimony was accorded markedly more or less weight than any other witness.

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 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)).

In considering parents' claim, 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 the parents' 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)).

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.

Parents' claims will be examined chronologically, specifically claims for reimbursement for programming in the summer of 2021, the 2021-2022 school year, the summer of 2022, the 2022-2023 school year, and the summer of 2023.

Summer 2021 Programming. The ESY programming proposed by the District in the April 2021 IEP revisions for the summer of 2021 was appropriate. By the time the District proposed ESY programming, the student was exhibiting progress across all IEP goals, progress which continued through the end of the school year (J-49). While the proposed ESY programming did not recommend that the student continue to receive specialized instruction in all IEP goal areas—focusing only on encoding/spelling, decoding, and written expression—the student's needs and progress to that point, having been in special education since December 2020 for approximately four instructional months, supported the District's ESY recommendation for the summer of 2021.

The proposed programming was reasonably calculated to maintain the progress and significant learning that the student had been exhibiting, in light of the student's unique and specific needs in reading and written expression. Therefore, with the District proposing appropriate ESY programming for the summer of 2021, it has met its obligations at step one of the Burlington-Carter analysis. Parents are not entitled to tuition reimbursement for summer 2021 programming at the private placement.

2021-2022 School Year. The programming proposed by the District in the November 2020 IEP, with subsequent revisions over the 2020-2021 school year which were last re-visited in April 2021, would have been in effect for the start of the 2021-2022 school year and would have governed the student's programming through November 2021. This programming was appropriate. The District was prepared to continue the goal-driven, specialized instruction in mathematics, decoding, encoding/spelling, written expression, executive functioning, and OT outlined in the November 2020 IEP, as revised. Again, the student exhibited progress over the period December 2020 – June 2021 under the terms of the IEP, and its proposed programming for the intervening summer of 2021 was reasonably calculated to maintain that progress and prevent regression. Therefore, overall the November 2020 IEP, with its revisions, was reasonably calculated in light of the student's unique and specific needs in mathematics, decoding, encoding/spelling and written expression, along with executive functioning and OT, to allow the student to continue to gain meaningful education benefit through significant learning into the 2021-2022 school year.

Thus, with the District proposing to continue appropriate programming in the 2021-2022 school year under the terms of the November 2020 IEP, with its revisions, the District has met its obligations at step one of the Burlington-Carter analysis. Parents are not entitled to tuition reimbursement at the private placement for the 2021-2022 school year.

What the student's programming might have looked like over the period November 2021 through the end of the 2021-2022 school year is unknowable—the parents had withdrawn the student from the District, and the student's IEP team did not meet until the parents requested a renewed offer of FAPE in the spring of 2022. Yet the record is substantial that the student's concrete and knowable programming for the 2021-2022 school year was reasonably calculated to yield meaningful education benefit in the form of continued significant learning in light of the student's unique learning needs.

Summer 2022 Programming. The ESY programming proposed by the District in the March 2022 IEP for the summer of 2022, unlike the offer of ESY programming for the previous summer, was not appropriate. By the time the District proposed concrete ESY programming through the March 2022 IEP, it should have understood that the student was exhibiting declining benchmark scores in mathematics. (J-58 at pages 3, 5). As a result, the District's recommended ESY programming for the student should have included instruction in mathematics.

It must be pointed out that there is conflicting data, of a more granular nature, that the student was making progress in mathematics. (J-58 at pages 2, 4). And the anecdotal grading of the student's work in mathematics at the private placement did not indicate overarching concerns. (J-58 at pages 6-9). But the severe slope of the line, showing regression, on

the student's composite mathematics benchmark and the sharp decline in the percentile performance of the student (from the 71st to the 52nd percentiles) certainly support the conclusion that the student should have been provided with support in mathematics as part of the ESY programming. (J-58 at pages 3, 5).¹¹

The proposed programming was not reasonably calculated to maintain progress in mathematics in light of the student's unique and specific needs. Therefore, the District's proposal of ESY programming for the summer of 2022 did not meet its obligations at step one of the Burlington-Carter analysis.

At step two of the Burlington-Carter analysis, the appropriateness of the private programming must be considered. Here, the ESY programming at the private placement, in mathematics particularly, was appropriate. (P-30).

There are no equitable factors which would impact the award of tuition reimbursement (step three of the Burlington-Carter analysis). Therefore, parents are entitled to tuition reimbursement for the summer 2022 summer programming at the private placement.

2022-2023 School Year. Aside from the flaw related to a lack of mathematics instruction as part of the ESY programming, the March 2022

¹¹ While it could not be part of the District's considerations in March 2023, the student's continued regression on the benchmark—declining to the 29th percentile—at the end of the school year unfortunately validates the sense that the student required ESY support in mathematics. (P-32).

IEP is an appropriate document, laying out the understanding of the student's present levels of performance, the goals, the specially-designed instruction and modifications, and the related services that would frame the student's special education programming. The March 2022 IEP was reasonably calculated in light of the student's unique and specific needs in decoding, encoding/spelling, written expression, mathematics, executive functioning and OT to allow the student to gain meaningful education benefit from significant learning in the 2022-2023 school year. Particularly, the March 2022 IEP goals are crafted to triangulate the data the District had from the private placement while still providing a concrete sense of what the goals and instruction would look like in the context of a return to the District in the 2022-2023 school year.

Therefore, with the District proposing appropriate programming in the March 2022 IEP for the 2022-2023 school year, it has met its obligations at step one of the Burlington-Carter analysis. Parents are not entitled to tuition reimbursement for programming at the private placement for the 2022-2023 school year.

Summer 2023 Programming. The ESY programming proposed by the District in the April 2023 IEP for the summer of 2023 was appropriate. Here, the District cured the flaw in the March 2022 IEP by providing instruction in all IEP goal areas. The proposed programming was reasonably calculated to maintain progress and significant learning in light of the student's unique

and specific needs in all areas of need— mathematics, decoding, encoding/spelling, written expression, executive functioning and OT.

Therefore, with the District proposing through the April 2023 IEP appropriate ESY programming for the summer of 2023, it has met its obligations at step one of the Burlington-Carter analysis. Parents are not entitled to tuition reimbursement for summer 2023 programming at the private placement.

Appropriateness of Private Placement. Steps two and three of the Burlington-Carter analysis were unnecessary (outside of the examination of the ESY programming for the summer of 2022), given the conclusions that the District largely met its burden to propose appropriate programming for the student over the school years in question. By way of *dicta*, however, the record supports the notion—although not a concrete conclusion— that the private placement, in pursuing its mission, provides strong programming for students with language-based learning differences.

But on this record, there was an implication that the District's programming was not as accomplished as the programming that might be offered at the private placement, that class size, or the training of staff, or the design of programming were somehow lacking at the District (or, said the other way around, was superior at the private placement). Without taking a position specifically on this record or in general about views of schooling, one must be cautious not to substitute one's perception of private

schooling for the obligations of a school district under the terms of IDEA/Chapter 14. The question is never “how does the school district’s program stack up with the private school’s?”; the question is always “did the school district deliver, or propose to deliver, a program that is reasonably calculated to yield meaningful education benefit in the form of significant learning in light of a student’s unique needs?”.

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 IDEA/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, in the March 2022 IEP the District failed to propose appropriate ESY programming for the summer of 2022. The District proposed appropriate programming through the November 2020 IEP (including its revisions), the March 2022 IEP outside of the proposed ESY programming, and the April 2023 IEP. Those findings and conclusions are

adopted here as to the proposed IEPs and the provision of FAPE under the terms 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, the Lower Merion School District met its obligations to the student to propose appropriate special education programming for the summer of 2021, the 2021-2022 school year, the 2022-2023 school year, and the summer of 2023. Accordingly, parents are not entitled to a tuition reimbursement remedy for any of those periods.

The District's proposed extended school year programming ("ESY") for the summer of 2022 was not appropriate, and the parents obtained appropriate ESY programming in its place. Therefore, the parents are entitled to tuition reimbursement for the private summer 2022 program. The District shall reimburse the parents for this program upon the parents providing, through counsel, proof of payment for this tuition, or a billing statement from the private placement of any balance due for that tuition.

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

04/30/2024