

By Order dated November 18, 2020, by the Honorable Gene E.K. Pratter, ODR File Number 21435 18-19 was remanded. This is the remanded hearing officer decision.

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 Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

24412-2021

Child's Name

[A.S.]

Date of Birth

[redacted]

Parents

[redacted]

Counsel for Parents

Kathleen Metcalfe, Esquire
Raffaele & Associates
1230 County Line Road
Bryn Mawr, PA 19010

Local Educational Agency

Colonial School District
301 E. Montgomery Avenue
Ardmore, PA 19003

Counsel for LEA

Karl Romberger, Esquire
331 E. Butler Avenue
New Britain, PA 18901

Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

06/30/2021

Introduction

This special education due process hearing concerns the educational rights of A.S. ("student"), a student who resides in the Colonial 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 to address the student's needs. The parties disagree over the student's educational programming for the 2019-2020 school year.

The parties were involved in a previous round of special education due process at ODR file number 21435-1819. In that decision, in March of 2019, the parties contested whether or not the District had provided a free appropriate public education ("FAPE") to the student in the 2018-2019 school year and whether the District had proposed an appropriate program for the 2019-2020 school year. The undersigned hearing officer found that the District did not deny the student FAPE in the 2018-2019 school year and that the District's proposed program for the 2019-2020 school year was appropriate.³

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 The one-session transcript decision at ODR file number 21435-1819 is made part of this record as Hearing Officer Exhibit ("HO")-9. The transcript at ODR file number 21886-1819 was an affiliated matter decided at the same time as 21435. The transcript for 21886 was

Parents appealed the decision to the federal District Court for the Eastern District of Pennsylvania (“the Court”). On appeal, the Court found evidentiary errors which led to an incomplete evidentiary record.⁴ The Court vacated the decision and remanded the case for development of an evidentiary record as instructed by the Court.

Specifically, the Court identified three evidentiary errors to be remedied on remand, which in turn could fully inform the evidentiary record. The errors were:

- 1) Bringing into the record the parents’ reason for not communicating their consent to allow the District to communicate with the private placement which they were seeking to support;
- 2) Development of evidence related to the appropriateness of the parents’ selected private placement for the 2019-2020 school year; and
- 3) Deepening of the evidence developed as it related to the District’s proposed in-district programming for the 2019-2020 school year. (HO-3).

made part of the record at 21435 and so is included in this record as HO-10. The decision at 21435 is made part of this record at HO-11. This numbering accounts for eight hearing officer exhibits which were part of the record at 21435.

⁴ The opinion of the Court is included in this record as HO-12.

Therefore, the issues presented for resolution in this decision are the same as those presented at 21435-1819. For reasons set forth below, I find that the District did not deny FAPE to the student in the 2018-2019 school year and proposed an appropriate program for the student in the 2019-2020 school year.

Issues

1. Did the District provide the student with FAPE in the 2018-2019 school year?
2. Are parents entitled to tuition reimbursement for their unilateral private placement of the student in the 2019-2020 school year?

Findings of Fact⁵

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to

⁵ The record developed upon remand was slightly expansive. Not knowing where evidence might be necessary, and mindful that the Court had found error in limiting certain evidence, or not deepening certain evidence, in the original record at 21435, this hearing officer erred on the side of admitting evidence. But the inquiry was what the parties did, nor did not do, in approximately December 2018 – February 2019 as it contemplated educational decisions for the student. It is well-settled that “(t)he appropriateness of the IEP is judged as of the time it was developed.” D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010). Therefore, evidence developed on this record—including the testimony of the District special education teacher, a teacher from the private placement for which parents seek reimbursement, and the independent evaluator who issued the November 2019 IEE—is relied upon only as that evidence might have informed the parties’ deliberations in the winter of 2018/2019.

resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. As the result of a ruling in an even earlier round of special education due process between the parties (at ODR file number 19718-1718), the student's placement at a private school ("private school #1) for the 2018-2019 school year was established as a matter of pendency. (HO-11 at Finding of Fact ["FF"]-1).
2. The decision at 19718 provided explicitly that the student's pendent placement would remain at private school #1 pending the issuance of an independent education evaluation ("IEE") ordered at that file number. (HO-1 at FF-1).
3. The IEE was issued in November 2018, on the same date that the parents filed the complaint at 21435. (HO-11 at FF-3).
4. After various procedural occurrences, including the parties' attempt at mediation and the filing of an amended complaint, an interim pendency ruling was issued in February 2019, maintaining the student's placement at private school #1. (HO-11 at FF-1).
5. To provide support and services for its students, private school #1 contracted with another private academy ("Academy") that focuses on serving students with autism. The student in this matter received services from Academy providers while attending private school #1. (HO-11 at FF-2).
6. The independent evaluator who issued the IEE in November 2018 completed a thorough evaluation of the student, including records-review, assessments

and testing, input from parents and educators, and observations of the student. (HO-11 at FF-3).

7. In December 2018, following the issuance of the IEE, the student's IEP team (including the independent evaluator) met to design an IEP for the student. (HO-11 at FF-4).
8. The December 2018 IEP included updated levels of academic and functional performance, including data from the IEE. (HO-11 at FF-5).
9. The December 2018 IEP included thirteen goals, three in appropriate classroom/peer-related behavior, four in pragmatic expressive language, four in academic areas (two each in reading and mathematics), one in handwriting, and one in social skills (HO-11 at FF-6).
10. The December 2018 IEP contained extensive modifications and specially-designed instruction ("SDI") (modifications and SDI that were identical to those found in the August 2018 IEP, which the independent evaluator agreed were appropriate and comprehensive). (HO-11 at FF-7).
11. The December 2018 IEP provided for individual OT 30 minutes weekly with 15 minutes monthly of OT consultation, individual S&L therapy 30 minutes weekly, small group S&L therapy 30 minutes weekly, and 30 minutes monthly of S&L consultation, social skills instruction four times monthly, and regular education social skills group four times monthly. (HO-11 at FF-8).
12. The December 2018 IEP recommended that the student receive programming in a specialized District learning support classroom, for students grades K – 3rd, for 54% of the school day, with the student included in regular education for arrival, morning meeting, art/music/gym/library,

lunch, recess, assemblies, class parties, and pack-up/dismissal. (HO-11 at FF-10).

13. The District elementary school with the specialized classroom is the student's neighborhood school in the District, the elementary school the student would attend even if not identified under IDEIA. (HO-11 at FF-11).

14. The specialized District classroom in the 2019-2020 school year was staffed by a special education teacher with, at that time, 18 years of experience in special education, and 7 years as the teacher in that classroom. (Notes of Testimony ["NT"] at 199).

15. The specialized District classroom in the 2019-2020 school year had eleven students, roughly equally distributed with students in 1st – 3rd grade. (NT at 200-201).

16. Four of those students were in the classroom the entire school day, although at times one of the four would sometimes leave the room for behavioral reasons. (NT at 201-204).

17. Of the remaining seven students, math and language arts instruction was delivered at the same time in the specialized classroom (each at the student's individualized grade level performance), with some of the student's leaving the specialized classroom for academic subjects like science or social studies, or for specials such as gym, art, and library. Some students would also receive related services in the classroom while others would receive related services outside of the classroom. (NT at 204-213).

18. The daily schedule of the District specialized classroom was broken down into approximately 35-45 minute blocks for academic subjects, lunch, and recess.

Writing and language arts were allotted 70 minutes. Other periods had less time allotted but still had a specific purpose (e.g., morning meeting or related services time). (Joint Exhibit-1).

19. The District specialized classroom included a number of other professionals, including a classroom aide and behavioral support aides who, while assigned to specific students, would collaborate and support other students as needed. (NT at 233-234).
20. The testimony of the District classroom teacher is credited that her classroom is effective and organized on a daily basis to address the unique learning needs of each child in a planned and structured way. (NT at 237-241).
21. The independent evaluator opined in the IEE that the student should receive support and services in a "specialized school" with small class size and minimal transitions between environments. She shared this view at the December 2018 IEP meeting. (HO-11 at FF-12).
22. The independent evaluator shared her opinion in the December 2018 IEP team meeting that the student's placement at private school #1 involved being pulled out of the regular education classroom and being provided with services and support in a specialized-learning classroom, limiting interaction with typically-developing peers and increasing the number of transitions. In the view of the independent evaluator, this dynamic rendered the placement at private school #1 inappropriate. (HO-11 at FF-13, FF-14).
23. The independent evaluator testified that the student should be in an academically-oriented environment, rather than an autism-support

environment, with limited transitions and small class size/teacher-to-student ratios. (HO-11 at FF-15).

24. At the recommendation of the independent evaluator, at the December 2018 IEP team meeting another private placement ("private school #2") was identified where the student might receive more appropriate programming. (HO-11 at FF-16).

25. It was the particular concern— indeed a stated requirement— of the parents that, regardless of the student's placement in the 2019-2020 school year, the student continue to receive autism-support services from the Academy. The parents were willing to consider a placement at private school #2 for the 2019-2020 school year but only if the student's autism-support services were provided by Academy providers. (HO-11 at FF-18, FF-19).

26. In January 2019, the District formally recommended private school #2 as the educational placement for the student. The formal placement recommendation contained these explicit operational conditions: "This placement would start a) after signed parent consent to issue a referral and b) [private school #2] accepts [the student]. (HO-11 at FF-21; P-7 at page 2).

27. In February 2019, given concerns about the student's transition in the midst of a school year and the pendency ruling issued that same month, the District confirmed for parents that the student would complete the current 2018-2019 school year at private school #1. (HO-11 at FF-22).

28. The District requested consent from the parents to share educational records and information with private school #2 for its referral of the student for

- placement at private school #2. Parents did not provide consent or respond to the District's requests for such consent. (HO-11 at FF-23; NT at 336-337).
29. In February and March 2019, the student's family was experiencing difficulty due to medical and caretaking issues revolving around the student's grandparents. (NT at 85-94).
30. In March 2019, at the time of the hearing, it was the parents' understanding that private school #2 was in the midst of negotiations with the Academy, and seeking Commonwealth approval, for the provision of autism-support services by Academy providers at private school #2 (akin to the arrangement the Academy had with private school #1). (HO-11 at FF-20).
31. In March 2019, a one-session hearing was concluded for ODR file number 21435-1819. (HO-9).
32. In April 2019, the decision at 21435 was issued, finding that the student should remain at private school #1 as the transition to a new placement at that point in the school year would adversely affect the student. The District was found not to have denied FAPE to the student in the 2018-2019 school year. The District's proposed program and placement was found to be appropriate. (HO-11).
33. The student's parents subsequently enrolled the student at private school #2, paying tuition for the 2019-2020 school year. (NT at 96).
34. The student's classroom at private school #2 in the 2019-2020 school year was staffed by an early education teacher without special education certification who, at that time, had 3 years of teaching experience. (NT at 262-263, 275-276).

35. The student's classroom at private school in the 2019-2020 school year had seven students, in 2nd grade, a group [Student] stayed with through the whole day. (NT at 263-265).
36. The daily schedule at private school #2 was broken down into 40 minute blocks for academic subjects, lunch, and recess. Reading was allotted a double block. (NT at 264-265).
37. The student's program at private school #2 appears to have been wholly academic, without a special education component. (P-14, P-16; NT at 266-272, 280-281, 314-317).
38. The parents' hoped-for servicing of the student at private school #2 through related services provided in coordination with the Academy did not materialize. Private school #2 and the Academy never entered into a formal collaboration. (NT at 100, 278, 325-327).
39. In October 2019, the independent evaluator who authored the November 2018 IEE observed the student at private school #2. (P-13; NT at 290-300).
40. The independent evaluator testified that her October 2019 observation, in light of her November 2018 IEE and its recommendations, led her to conclude that the student's 2019-2020 placement at private school #2 was appropriate for the student. (P-3; NT at 300-306).
41. The testimony of the independent evaluator in comparing educational environments focused on the differences between private school #1 and private school #2. (NT at 311).
42. Parents had appealed the decision at 21435, and the Court's opinion and remand, as outlined above, followed. (HO-12).

43. In the initial hearing session for these proceedings, counsel and the hearing officer agreed that the record in this matter would build off the record created at 21435 and necessarily address the three evidentiary matters that the Court had identified as errors in the previous hearing process. (NT at 5-21).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. The testimony of the District special education teacher was found to be highly persuasive and was accorded heavy weight.

All other witnesses were awarded a relatively equal degree of weight. While not diminishing the credibility of the testimony of the private school teacher, her testimony was accorded less weight than the testimony of the District special education teacher.

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 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)).

Here, the process at 21435 probed questions of the student's 2018-2019 and, more significantly, 2019-2020 programming and placement. At that time, these were prospective questions. In this matter, upon remand, the questions have become retrospective.

2018-2019 School Year. As indicated in the decision at 21435, by the time that decision was issued in April 2019, the student had been in a placement at private school #1 for multiple school years. Neither party was satisfied with the placement, but pendency in that program/placement, in effect, tied everyone's hands until the decision was issued. At that time, with two months remaining in the school year, it was the considered judgment of the hearing officer that the student should not be transitioned out of that placement to a different placement would be more problematic than simply finishing the school year *in situ*.

Yet, as set forth below, the District's proposed program and placement as represented by the December 2018 IEP was appropriate. Therefore, the District met its obligation to have an appropriate program available to the student, should the

family had chosen to seek educational services from the District. Therefore, there was no denial of FAPE in the period April – June 2019.⁶

2019-2020 School Year. Given the passage of time and parents' unilateral private placement at private school #2, parents' claim that the District's proposed 2019-2020 programming as represented by the December 2018 IEP is inappropriate transformed from a prospective placement question into a retrospective tuition-reimbursement 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

⁶ Too, the records at both 21435 and in this matter show that the parties' evidentiary focus was on the 2019-2020 programming/placement (prospectively, and retrospectively in each instance) and not the remainder of the 2018-2019 school year.

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.

At step one of the Burlington-Carter analysis, the District's proposed December 2018 IEP is appropriate. The December 2018 IEP was reasonably calculated to provide the student with significant learning in light of the student's unique, individual needs. The District's understanding of the student's present levels of academic and functional performance was comprehensive and incorporates the insights from the IEE. The thirteen IEP goals are comprehensive and appropriate. The modifications and specially-designed instruction were comprehensive. And as noted in the decision at 21435, the District's program—with its ability to engage regular education peers—and placement—in the student's neighborhood school— also meet the least restrictive environment considerations of IDEIA.

The findings of fact above, and these observations about the proposed District program, were the foundation of the holding at 21435 that the December 2018 IEP was reasonably calculated to yield meaningful education benefit. As instructed by the Court, the evidentiary record was deepened in this matter by including the testimony of District educators who would have worked with the student in the 2019-2020 school year. In the view of this hearing officer, these witnesses bolster the conclusion that the December 2018 IEP was appropriate as it would have been delivered in the District in the 2019-2020 school year.

Most especially, the testimony of the District special education teacher who would have implemented the December 2018 IEP was accorded heavy weight. Her testimony about the operation of the District's specialized classroom augmented the sense of its appropriateness for the student, including concrete information about the age-appropriateness of the class and its small size. Her testimony clarified that the student's transitions would be managed and regular, at class passing times and not on an *ad hoc* basis (as understood in conjunction with Joint Exhibit 1), and that, to the extent the IEP team decided that the student should remain entirely in the specialized classroom, that could be accomplished, as it was with some fellow classmates. Finally, what the student's mother and the independent evaluator saw as a chaotic or unstructured learning environment, the witness effectively explained as a dynamic learning environment where all students were receiving appropriate, individualized instruction in a comfortable physical space with the monitoring and support of a number of adults. In short, the abstracted appropriateness of the District's proposed program for the 2019-2020 school year became concrete and authentic as related by the veteran special education teacher who oversaw that classroom and taught those children.

Therefore, at step one of the Burlington-Carter analysis, the District's proposed programming as outlined in the December 2018 IEP, and proposed placement in the District's specialized classroom, are appropriate.

At step two of the Burlington-Carter analysis, on this record the program at private school #2 is not appropriate. Parents seek reimbursement for out-of-pocket tuition payment due to their unilateral placement decision. Therefore, the concrete programming delivered to the student needs to be gauged at step two of the

analysis.⁷ As instructed by the Court, the evidentiary record was deepened in this matter by including the testimony of an educator from the private placement and re-calling the independent evaluator who issued the November 2018 IEE.

The finding that the program at private school #2 is inappropriate is grounded in the fact that there is no indication in the evidence that private school #2 delivered special education to the student. The student's primary teacher is not a special education teacher. This, by itself, is not necessarily a fatal flaw in the programming, so long as someone at the placement is delivering modifications and instruction that is akin to special education. But that was not happening at the private placement—the instruction is entirely grounded in regular education.

There is no specially-designed instruction to meet the unique, individual needs of the student. This is formal "special education" (that is, a modified curriculum to address the student's needs). This, by itself, is not necessarily a fatal flaw in the programming, as a private school need not replicate IDEIA special education nomenclature, so long as there is some sense that the private placement is delivering a curriculum that is designed to meet the unique, individual needs of a student. But that was not happening at the private placement—the curriculum is not modified in any way for this student.

There are no modifications or accommodations to meet the unique, individual needs of the student. More than once, the teacher at the private placement was asked about how the student's unique, individual needs were addressed through

⁷ Here, the focus of the analysis is programming at the private placement prior to the Commonwealth school closure in March 2020 due to the COVID-19 pandemic.

program modifications, and she could not identify any (nor could the independent evaluator when asked to identify such things which might have been observed by her during her observation). This, by itself, is not necessarily a fatal flaw in the programming, so long as there is a sense that the private placement understands adaptation in approach and methodology as necessitated by the unique, individual needs of the student. But the private placement was just responding to the student when needed, as it would any other student, without any intentional approach to modifying or adapting for the student's needs.

All of these factors taken together lead to a conclusion that private school #2 did not develop, and did not implement, a special education program for the student.⁸ It is clearly a small learning environment, with regular education supports and an academic focus. One can agree that private school #2 appears to be a pleasant place for schooling.

But the student has multiple, significant needs. The November 2018 IEE and the District's proposed December 2018 IEP clearly reflect the depth and intricacy of what the student requires in an educational program. Those needs can only be addressed by special education delivered by professionals trained and/or

⁸ A linchpin of the parents' hoped-for programming at private school #2 was the delivery of related services in conjunction with the Academy. Ultimately, this did not come to pass. The parents arranged for speech and language services through the local intermediate unit, and the record is unclear as to whether the student received any occupational therapy services. This event, however, cannot be laid at the feet of the private placement in terms of special education programming. It was thought that the private placement could meet the student's needs in those regards, but that turned out not to be the case.

experienced in working with special needs learners, through a program that understands the modifications/adaptations in how the student's program needs to be delivered. On this record, none of these things are present in the private placement program.

Therefore, at step two of the Burlington-Carter analysis, the private placement selected by the family was inappropriate for the student in the 2019-2020 school year.

At step three of the Burlington-Carter analysis, the equities between the parties are balanced to see if those equities weigh decisively one way or the other, or play no role in the tuition reimbursement analysis. Without a doubt, the issue that stands out as a potential matter of equities between the parties are their differing views about the lack of communication by parents over the period February and March 2019. As instructed by the Court, the evidentiary record was deepened in this matter by making part of the record the parents' views in that regard. Here, the equities are equally balanced and play no role one way or the other in the tuition reimbursement analysis.

In terms of how the lack of parental communication unfolded, in January 2019, the District offered to support the student's placement at private school #2. The District issued a formal notice of recommended educational placement ("NOREP") in this regard, explicitly conditioned on a formal referral process through parental consent to share information with the private school and the student's acceptance by the school. Through February and March of 2019, the District never received the parents' consent or communication about the District's request therefor. With the more deeply developed record, it is clear that at this time the

family was working through health and caretaking issues related to the student's grandparents. In March, however, the matter moved to hearing and to decision in April. Any sense that the District would support the placement evaporated.

One can follow the chain of events clearly. As to how those events factor into the equities, the District was waiting for the parents to provide consent to work through the referral process, and, due to life circumstances, the parents found that they could not provide that consent. The due process hearing overtook the parties, and the opportunity to work through an agreed-to process slipped away. Neither party has more of an equitable claim than the other in these events.

The parents argue that the District could have moved forward with information-sharing and the referral process without explicit parental consent. This assertion is rejected for two reasons. One, the January 2019 NOREP was written with the condition that parental consent for that information-sharing (along with acceptance by the private placement) would be part of the process of placing the student at private school #2. Two, the District sought to have this explicit consent because of the litigious stance between the parties over the years. (NT at 336-337). In January 2019, the student was in the middle of 1st grade and had already been through one special education due process proceeding and had the complaint at 21435 pending. Whether or not one agrees with the District's view, holding such a view—that it wished to have explicit, concrete consent allowing it to share the student's educational records with a third party— is understandable from the District's perspective.

Thus the equities are equally balanced and play no role one way or the other in the tuition reimbursement analysis.

In sum, the District's proposed programming, through the IEP of December 2018, was appropriate. The student's programming at the private placement in the 2019-2020 school year was not appropriate. The equities do not play a role in the tuition reimbursement analysis. Accordingly, the parents' claim for tuition reimbursement cannot be supported.

•

ORDER

In accord with the findings of fact and conclusions of law as set forth above, this hearing process has undertaken a deepening of the evidentiary record, upon remand, as directed by the federal District Court for the Eastern District of Pennsylvania.

The Colonial School District did not deny the student a free appropriate public education in the period April – June 2019 in the 2018-2019 school year.

Parents are not entitled to tuition reimbursement for their unilateral private placement of the student in the 2019-2020 school year.

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

06/30/2021