

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. 28351-23-24

Child's Name:

T.G.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Michael J. McElligott, Esquire

Date of Decision:

04/09/2024

Introduction

This special education due process hearing concerns the educational program and placement of T.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 as of that date of the alleged acts/omissions which form the basis of their complaint. *See* Hearing Officer Exhibit ("HO") 1 – Complaint; HO-2

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 through 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 the District.

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?

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

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

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

Relevant Prior Education History – 2020-2021 School Year - [redacted]

Grade

1. In November 2020, in the fall of the student's [redacted] grade year, the student was identified as eligible for special education services. (Joint Exhibit ["J"]-10; Notes of Testimony ["NT"] at 299-447).
2. The student was identified as a student with specific learning disabilities in reading (decoding, sight words, reading fluency) and written expression (spelling, written expression). (J-10).
3. In January 2021, the student's individualized education program ("IEP") team had finalized an IEP with programming approved by the parents. (J-13, J-16; NT at 149-292, 538-647).
4. The January 2021 IEP contained three reading goals (decoding, sight word recognition, fluency) and two writing goals (encoding/spelling, written expression goal. (J-16 at pages 37-44; NT at 538-647).
5. The January 2021 IEP contained special education for a specialized reading and encoding/spelling curriculum, "a research-based multi-sensory intensive intervention reading program designed for targeted structure approach to teaching phonological processing, decoding and

spelling weaknesses taught by a teacher trained in the use of the program”, in a small group of students (3 or less) at the same level of instruction. The instruction would take place three times per week, 45 minutes per session. (J-16 at page 45; NT at 538-647).

6. The January 2021 IEP also included instruction and modifications to address the student’s executive functioning, organization, and attention. (J-16 at pages 45-48).
7. In March 2021, the student was observed by a District speech and language (“S&L”) pathologist. The November 2020 evaluation report recommended a S&L screening for potential speech articulation needs. The S&L pathologist noted that the student was missing two teeth and exhibited a slight articulation issue with the ‘r’ sound but concluded that the student’s articulation was age-appropriate and did not recommend S&L services. (J-10 at page 25; NT at 832-851).
8. In March 2021, the District issued a 2nd trimester progress-monitoring report on the IEP goals, indicating progress on the goals, although instruction had been in effect for only 10 weeks. (J-16, J-20).
9. In March 2021, at approximately the same time as the progress-monitoring was issued, the parents signed an enrollment contract with the private placement which the student ultimately attended. (J-22; NT at 149-292).

10. In March 2021, as part of the application/enrollment process at the private placement, the private placement administered S&L screening instruments. (Parents Exhibit ["P"]-72).
11. In April 2021, the student's IEP team met to consider extended school year ("ESY") programming for the student in the summer of 2021. (J-24 at pages 51-53).
12. The ESY programming in the April 2021 IEP included work on the decoding, encoding/spelling, and written expression goals to maintain progress and prevent regression. (J-24 at pages 51-53).
13. In May 2021, parents disapproved the ESY programming for the summer of 2021. (J-26).
14. In June 2021, the District issued a 3rd trimester progress-monitoring report on the IEP goals. (J-29).
15. The student progressed on IEP goals over the period January – June 2021:
 - On the decoding goal, the student progressed from step 1.1 to 1.2 in the specialized reading program at accuracy levels of 93% and 94%.
 - On the encoding/spelling goal, the student progress from step 1.1 to 1.2 in the specialized reading program (from 67% accuracy to 88% accuracy in real words and from 75% to 83% accuracy in nonsense words).

- On the sight word goal, the student progressed from 53% to 75% accuracy on a pre-primer list of words and from 0% to 33% accuracy on a primer list of words).
- On the fluency goal, the student progressed from 94% accuracy at level C to 100% at level C and began work at level D at 76% accuracy.
- On the written expression goal, the student progressed from 3-5 word responses using sentence fillers to 5-6 word written sentences in response to a prompt.

(J-29; NT 538-647).

16. In June 2021, at approximately the same time as the progress-monitoring was issued, the parents informed the District that they were formally enrolling the student in the private placement which the student ultimately attended and would look to the District for tuition reimbursement for the placement. (J-31; NT at 149-292).
17. In July 2021, the parents signed a contract with the private placement for the provision of S&L services in the 2021-2022 school year in weekly 15-minute sessions. (J-36; NT at 863-989).

2021-2022 School Year –[redacted] Grade

18. The January 2021 IEP 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-16).
19. 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. (Parents Exhibit [“P”]-11; NT at 149-292, 863-989).
20. The student began the 2021-2022 school year at the private placement. (NT at 149-292, 863-989).
21. 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 863-989).
22. 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 538-647, 863-989).
23. The private placement also employs staff who are largely trained in reading intervention and focuses on delivering reading instruction in small groups. (NT at 863-989).

24. In October 2021, the private placement was again administered S&L screening instruments to inform S&L services. (P-72).
25. 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-12, P-13).
26. Over the course of the 2021-2022 school year, through the 2nd trimester of the school year (approximately late February/early March) the student did not progress in oral reading fluency based on curriculum-based measures, remaining at the 1st/2nd percentile in the fall and winter assessments. (P-67).⁵
27. Over the course of the 2021-2022 school year, through the 2nd trimester of the school year (approximately late February/early March) the student progressed in mathematics on curriculum-based measures, moving from the 17th to the 31st percentile between the fall and winter assessments. (P-63).⁶

⁵ A number of these duplicate assessment results were made part of the record—P-27, P-28, P-67, P-68. The results reflect different types data (cumulative results and weekly assessment probes). The particular exhibit cited has (a) the most comprehensive results that are (b) the most legibly reproduced.

⁶ A number of these duplicate assessment results were made part of the record—P-24, P-25, P-26, P-29, P-30, P-31, P-62, P-63, P-64, P-65, P-66. The results reflect different types data (cumulative results, mapping results to curriculum areas, sub-test areas). The particular exhibit cited has (a) the most comprehensive results that are (b) the most legibly reproduced.

28. 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. (J-37; NT at 149-292).
29. In March 2022, with information that the private placement was providing the student with S&L services and support in mathematics, the District requested permission to re-evaluate the student. (J-43).⁷
30. In May 2022, the District issued its re-evaluation report ("RR"). (J-50; NT at 299-447).
31. In the May 2022 RR, the District evaluator included input from parents, information from the report cards at the private placement, and an observation of the student at the private placement. (J-50).
32. The May 2022 RR included a comprehensive S&L evaluation completed by a District S&L pathologist. The S&L evaluator concluded that the student should not be identified as a student with a S&L impairment and did not qualify for S&L services. (J-50 at pages 27-33; NT at 743-827).
33. The May 2022 RR included updated assessments of the student's strengths and needs in mathematics. The District evaluator found that the student qualified for a specific learning disability in mathematics

⁷ The findings of fact prior to this finding are through the late February/early March 2022 period because of the parents' re-engagement with the District in February 2022 and the re-evaluation process undertaken in March 2022.

(computation, math problem-solving, math fluency). (J-50 at pages 45-49; NT at 299-447).

34. Updated executive functioning, attention, and behavior ratings indicated that the student should be identified as a student with an other health impairment related to an attention deficit hyperactivity disorder profile. The evaluator recommended supports in these areas. (J-50 at pages 45-49; NT at 299-447).
35. In early June 2022, the student's IEP team met to discuss the student's IEP. The parents did not make the student available for updated baseline testing in IEP goal areas. (J-51, J-56 at pages 7-8; NT at 149-292, 453-526).
36. By late June 2022, the student's parents had provided input for the IEP. (J-56 at pages 7, 45-47).
37. The June 2022 IEP included eight goals: three reading goals (decoding, sight word recognition, fluency), two writing goals (encoding/spelling, written expression), two mathematics goals (computation/math fact fluency, problem-solving), and a goal to address attention/executive functioning. (J-56 at pages 58-73).
38. The baselines in the goals in the June 2022 IEP were developed from information contained in report cards and data from the private placement. (J-56 at pages 58-73).

39. The June 2022 IEP provided for continued use of the specialized reading curriculum the District had formerly utilized and was being utilized by the private placement, 45-minutes per session four times per week. Reading instruction included daily special education instruction in fluency and sight word recognition. (J-56 at pages 74-80).
40. The June 2022 IEP provided for daily special education instruction in mathematics, 70 minutes per day. (J-56 at pages 74-80).
41. The June 2022 IEP contained ESY programming for the summer of 2022. including work on all IEP goals to maintain progress and prevent regression. (J-56 at pages 82-88).
42. Given the new IEP goals and the increased instruction in special education settings, the amount of time the student spent in regular education settings markedly declined in the June 2022 IEP to 54% of the school day (as opposed to 86% of the school day in the January 2021 IEP). (J-16 at pages 50-53, J-56 at pages 89-92).
43. In April 2022, the private placement administered certain S&L assessments, concluding that the student should continue to receive S&L services. (P-73; NT at 863-989).
44. In May 2022, the private placement assessed the student with an instrument specific to the specialized reading curriculum within

which the student was being educated. The student had made progress across the first level of the reading curriculum. (P-33).

45. 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 cards. (P-14).
46. Over the final trimester of the 2021-2022 school year, (approximately early March through June) the student marginally progressed in oral reading fluency based on curriculum-based measures, rising from the 2nd percentile in the winter assessment to the 4th percentile in the spring assessment. (P-67).
47. Over the final trimester of the 2021-2022 school year, (approximately early March through June) the student's progress declined in mathematics on curriculum-based measures, declining from the 31st percentile in the winter assessment to the 18th percentile in the spring assessment. (P-63).
48. In early July 2022, the parents rejected the District's proposed ESY programming for the summer of 2022 and the 2022-2023 school year. (J-54, J-55, J-56).
49. In mid-July 2022, the parents signed an enrollment contract with the private placement. (J-61).

2022-2023 School Year –[redacted] Grade

50. The June 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-56).
51. 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. The grading report for the summer program also included input on social/emotional/behavioral presentation. (P-15; NT at 149-292, 863-989).
52. The student began the 2021-2022 school year at the private placement. (NT at 149-292, 863-989).
53. In September 2022, the parents signed a contract for additional S&L services in the 2022-2023 school year at the private placement. (P-65).
54. In February 2023, the parents, through counsel, inquired with the District about an offer of ESY programming for the summer of 2023 and for programming in the 2023-2024 school year. (J-66; NT at 149-292).⁸

⁸ The parents request for remedy extends only through programming for the summer of 2023. In the findings of fact that follow, there are necessary findings as to the content of an IEP crafted in the spring of 2023. That IEP is judged only as it is, or is not, an appropriate offer of FAPE for the remainder of the 2022-2023 school year (February – June 2023) and for ESY programming for the summer of 2023.

55. Over the course of the 2022-2023 school year, the student made progress in the curriculum of the private placement based on the student's report cards. (P-35, P-36, P-37).
56. In April 2023, the student's IEP team met to devise the student's IEP. (P-73).
57. The parents did not make the student available for updated baseline testing in IEP goal areas. (J-73 at page 6; NT at 149-292, 652-738).
58. The student's parents provided input for the April 2023 IEP. (J-73 at page 32).
59. The April 2023 IEP included eight goals: three reading goals (decoding, sight word recognition, fluency), two writing goals (encoding/spelling, written expression), two mathematics goals (computation/math fact fluency, problem-solving), and a goal to address attention/executive functioning. (J-73 at pages 42-59).
60. The baselines in the goals in the April 2023 IEP were developed from information contained in report cards and data from the private placement. (J-73 at pages 42-59).
61. The April 2023 IEP provided for continued use of the specialized reading curriculum the District had formerly utilized and was being utilized by the private placement, 60-minutes per session five times per week. Reading instruction included daily special education

instruction in fluency and sight word recognition. (J-73 at pages 60-67, 77).

62. The April 2023 IEP provided for daily special education instruction in written expression, 30 minutes per day, five times per week. (J-73 At pages 60-67, 77).
63. The April 2023 IEP provided for daily special education instruction in mathematics, 70 minutes per day, five times per week. (J-73 at pages 60-67, 77).
64. The April 2023 IEP provided for special education instruction in executive functioning/task-initiation/organization, 30 minutes per session, three times per week. (J-73 at pages 60-67, 77).
65. The April 2023 IEP contained ESY programming for the summer of 2023. including work on all IEP goals to maintain progress and prevent regression. (J-73 at pages 68-75).
66. The amount of time the student would spend in regular education settings under the April 2023 IEP remained 54% of the school day. (J-73 at pages 77-79).
67. Over the course of the 2022-2023 school year, the student did not progress in oral reading fluency based on curriculum-based measures in the fall and winter assessments, remaining at the 2nd percentile; in the spring assessment, the student made marginal progress, scoring at the 4th percentile. (P-41).

68. Over the course of the 2022-2023 school year, the student progressed in mathematics on curriculum-based measures between the fall and winter assessments, moving from the 4th to the 10th percentile; in the spring assessment, the student declined to the 4th percentile. (P-39).
69. In May 2023, the private placement assessed the student with an instrument specific to the specialized reading curriculum within which the student was being educated. The student had made progress across the second level of the reading curriculum. (P-45).
70. In May 2023, parents disapproved the District's proposed ESY programming for the summer of 2023. At the same time, the parents requested tuition reimbursement for 2023 summer programming at the private placement and the 2023-2024 school year. (P-55).
71. The student attended the private placement in the summer of 2023. The summer 2023 program at the private placement included instruction in reading, writing, mathematics, as well as arts-based geography activities. The grading report for the summer program also included input on social/emotional/behavioral presentation. (P-38; NT at 149-292, 863-989).

Procedural Note

By way of procedural explanation, parents filed their complaint in late July 2023. (HO-1). [redacted].

Initial hearing planning involved marshaling the testimony of 34 witnesses across the [redacted] records. [redacted]. 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. The testimony of the District S&L evaluator who conducted the comprehensive S&L evaluation for the May 2022 RR was accorded heavy weight; she testified in very concrete and persuasive terms as to why (1) the assessment and position of the private placement in support of S&L services were flawed and (2) the results and conclusions of her evaluation supported the District's position that the student does not require S&L services.

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 January 2021 IEP for the summer of 2021 was appropriate. By the time the District proposed ESY programming through an April 2021 revision of the IEP, the student was in the midst of making progress across all IEP goals (J-20), progress which continued to accelerate through the end of the school year (J-29). The proposed ESY programming recommended that the student continue to receive specialized instruction in all IEP goal areas utilizing instruction that was proving to be successful.

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 January 2021 IEP for the 2021-2022 school year was appropriate. The District was prepared to continue the goal-driven, specialized instruction in reading and written expression in the January 2021 IEP. Again, the student exhibited progress over the period January – 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 January 2021 IEP was reasonably calculated in light of the student's unique and specific needs in reading and written expression 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 January 2021 IEP, it has met its obligations at step one of the Burlington-Carter analysis. Parents are not entitled to tuition reimbursement at the private placement through the spring of 2022 when the student's IEP team undertook a re-evaluation and revision of the student's IEP.

In response to the parents' February 2022 request for an offer of District-based programming and parents' reports of services at the private placement in mathematics and S&L, the District undertook the re-evaluation process that resulted in the May 2022 RR. That RR resulted in somewhat dramatic changes to the student's programming, so an examination of the June 2022 IEP (which was eventually proposed) in light of the May 2022 RR—and by extension, the initial November 2020 evaluation report—is warranted.

The first of the areas that was probed by the District in the May 2022 RR was the potential need for S&L services. The District's comprehensive

S&L evaluation, performed as part of the RR, fully supports a finding that the District did not overlook or miss the need for S&L services and a finding that the student does not require such services, at least as part of an appropriate offer of programming by the District. This is based largely on the strength of the District's comprehensive S&L evaluation weighed against the incomplete and selective assessments utilized by the private placement, as elucidated by the District S&L evaluator in her testimony (NT at 743-827). In short, the lack of any S&L support in the student's programming at the District is not a grounds for finding that programming inappropriate.

The second of the areas that was probed by the District in the May 2022 RR was the potential need for support and specialized instruction in mathematics. Indeed, the RR identified the student with a specific learning disability in mathematics in various areas. Did the District, then, overlook or miss needs in mathematics when it issued its initial evaluation in November 2020?

In the November 2020 ER (J-10), parents indicated concerns in multiple areas, including mathematics; they reported that the student could not complete the end-of-year mathematics assessment in [redacted]. (J-10 at pages 2-3). An observation of a mathematics-concept lesson by the District evaluator as part of the evaluation, however, indicated that the student was participating and accurately answering the numeric concepts being probed by the teacher. (J-10 at page 4).

Standardized achievement testing in the November 2020 ER yielded scores of 89 in math problem-solving and 102 in numerical operations, yielding a mathematics composite score of 95. These achievement scores were commensurate with the student's cognitive profile (full-scale IQ of 99). (J-10 at pages 12-13).

Taking all of this data together, with the evaluation report as of November 2020 and the January 2021 IEP, there is no indication that the student was exhibiting difficulty with academics or achievement levels in mathematics. Thus, when the concern was presented in March 2022 and probed by the District, clearly the student's academic and achievement profile at the private placement had changed in the intervening months. The District evaluator performed multiple achievement assessments in mathematics and those updated results supported the District's conclusion that the student was, as of May 2022, exhibiting needs related to a specific learning disability in mathematics.

The third of the areas that was probed by the District in the May 2022 RR was a renewed examination of the student's executive functioning needs. As with the student's profile in mathematics, did the District overlook or miss needs in executive functioning when it issued its initial evaluation in November 2020? Executive functioning was also a matter of concern voiced by the parents in the November 2020 evaluation report; likewise, the student's teachers reported that task-focus, attention, and task-persistence

were areas where the student needed support. (J-10 at pages 2-4). The November 2020 evaluation report utilized multiple instruments to attempt to understand whether the student required support in executive functioning, attention, and behavior. (J-10 at pages 15-19).

Most striking is that the results of scores and ratings varied markedly between parents, and what they were experiencing in the home environment, and the student's teacher, and what she was experiencing in the school environment. (J-10 at page 22-23). The evaluator was careful to paint a nuanced picture that, while the student did not qualify for an identification as a student with the other health impairment of ADHD and was "generally displaying age appropriate executive functioning in the school environment.... with the exception of weaknesses noted in (the student's) ability to sustain working memory", the student required certain supports in the school environment and should be monitored to see if these aspects of the student's executive functioning might shift, requiring more support. (J-10 at pages 22-23).⁹

In sum, then, coming out of the November 2020 evaluation, the executive functioning and learning-affect components of the student's profile did not support an identification of the student as student with ADHD or an

⁹ The evaluator also sagely pointed out that the experiences and ratings were conducted in the fall of 2020 when the District was still utilizing remote instruction, or hybrid instruction, as a result of the COVID-19 school closure; a move to full in-person instruction and/or more time with the student might impact the teacher's results. (J-10 at page 23).

other health impairment related to executive functioning needs. But the District was cognizant of a certain degree of need, and the January 2021 IEP provided those supports and modifications. (J-16 at pages 45-48).

By May 2022, once again matters related to executive functioning had dramatically shifted over the time that the student spent in the private placement in the 2021-2022 school year. The May 2022 RR clearly identified that the student's learning affect in the private placement had changed, and the student required much more support in the area of executive functioning: A formal identification as a student with an other health impairment (an ADHD profile), an IEP goal, and specialized instruction were now required.

The result of all of the foregoing is twofold. One, the District did not miss or overlook the student's potential needs for support in S&L, mathematics, or executive functioning. The November 2020 evaluation report was cohesive and its conclusions in all three areas were fully supported at that time. By May 2022, with new experiences and data from the private placement along with the District's own assessments, the student's needs for goal-driven, specialized instruction in mathematics and executive functioning were established; any potential need for explicit S&L support or programming could be appropriately discounted.¹⁰

¹⁰ This conclusion holds for all of the programming proposed by the District—the January 2021 IEP, the June 2022 IEP, and the April 2023 IEP. The lack of S&L programming or support, at any time, does not support a finding of a denial of FAPE. (J-16, J-56, J-73).

Two, with the May 2022 RR in hand, the June 2022 IEP (which looked dramatically different from the January 2021 IEP) was appropriate in light of what the District knew about the student at the time it was crafted. At certain points in examination of District witnesses, the implication was that the changes in the June 2022 IEP (new goals, additional instruction/supports/modifications, an increase in the time the student spent in special education) somehow reflected back upon the programming in, and results under, the January 2021 IEP. Such an implication is unwarranted—the January 2021 IEP was appropriate in light of the November 2020 evaluation report, and the June 2022 IEP was appropriate in light of the May 2022 RR. The only difference was the student’s learning profile at the private placement over the 2021-2022 school year through May 2022, a learning profile which had markedly shifted and was appropriately re-calibrated by the District in its proposal of the June 2022 IEP.

Therefore, the June 2022 IEP was reasonably calculated in light of the student’s unique and specific needs in reading, written expression, mathematics, and executive functioning to allow the student to gain meaningful education benefit through significant learning in what ostensibly have been the tail end of the 2021-2022 school year.

Thus, with the District undertaking an appropriate re-evaluation and IEP process in the spring of 2022, resulting in an appropriate June 2022 IEP, it 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 spring of 2022 when the student’s IEP team worked to revise the student’s IEP in light of the May 2022 RR.

Summer 2022 Programming. The ESY programming proposed by the District in the June 2022 IEP for the summer of 2022 was appropriate. By the time the District proposed concrete ESY programming through the June 2022 IEP, it understood that the student’s needs had markedly changed since the student has left to attend the private placement. As a result, it recommended ESY programming for the student to continue to receive specialized instruction in all IEP goal areas, including the newly-crafted goals.

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—reading, written expression, mathematics, and executive functioning. Therefore, with the District proposing appropriate ESY programming for the summer of 2022, it has met its obligations at step one of the Burlington-Carter analysis. Parents are not entitled to tuition reimbursement for summer 2022 programming at the private placement.

2022-2023 School Year. The analysis above as to the appropriateness of the June 2022 IEP is adopted here. The June 2022 IEP was reasonably calculated in light of the student’s unique and specific needs in reading, written expression, mathematics, and executive functioning to allow the

student to gain meaningful education benefit from significant learning in the 2022-2023 school year, through April 2023 when the District proposed a new IEP in light of parents' February 2023 request for an offer of programming.

The April 2023 largely mirrors the June 2022 IEP, as it should. The District's understanding of the student's needs from the May 2022 RR had not changed. The April 2023 IEP was updated where necessity dictated such updates. Parental concerns were updated as of April 2023, as were the views of the educators from the private placement who were working with the student in the 2022-2023 school year. The present levels of the student's academic and functional performance were also updated, based on the student's experiences and results at the private placement to that point in the 2022-2023 school year. Baselines in the student's goals were also updated, based on what the District could glean from the student's report cards and academic data at that point in the private placement.¹¹

¹¹ The findings and reasoning of this decision support the conclusion that, at every juncture where the District was charged with programming for the student's needs, the District proposed appropriate programming, thereby meeting its obligations at step 1 of the Burlington-Carter analysis. For that reason, steps two and three of the analysis (the appropriateness of the private placement and the balancing of the equities between the parties) are not addressed. It must be noted, however, that the parents' declining to allow the District to gauge its own concrete baselines for IEP goals in the June 2022 and April 2023 IEPs might have weighed against them in terms of the equities. Their reasons were understandable but not necessarily defensible; where the claim is that the District did not understand the student's needs and failed to program appropriately, yet the District is forestalled from gathering foundational data for effective goal-writing in an IEP, a consideration of the equities naturally comes to mind.

In sum, the April 2023 IEP was reasonably calculated in light of the student's unique and specific needs in reading, written expression, mathematics, and executive functioning to allow the student to gain meaningful education benefit from significant learning in the 2022-2023 school year, from April 2023 through the end of the 2022-2023 school year.

Therefore, with the District proposing appropriate programming in the April 2023 IEP for the remainder of 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 over the period from April 2023 through the end of 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. Much like the appropriateness of the April 2023 IEP generally, the District recommended ESY programming for the student to continue to receive specialized 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—reading, written expression, mathematics, and executive functioning. 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. As pointed out in footnote 11, steps two and three of the Burlington-Carter analysis were unnecessary, given the conclusions that, at all times, the District met its burden to propose appropriate programming for the student. 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 the repeated 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 was 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, the District proposed appropriate programming through the January 2021, June 2022, and April 2023 IEPs. In doing so, it met its obligations to provide the student with FAPE. Those findings and conclusions are adopted here: At all times, the District met its obligations to provide the student with 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 summer of 2022, 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.

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

04/09/2024