

"By Order dated February 22, 2022, by the Honorable NITZA I. QUIÑONES ALEJANDRO U.S.D.C.J., #22225-18-19 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 Hearing Officer Final Decision and Order

Decision After Remand

ODR File Number:

26276-21-22

Child's Name:

D.S.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

05/07/2022

INTRODUCTION AND PROCEDURAL HISTORY

This case was remanded to the undersigned by the U.S. District Court of the Eastern District of Pennsylvania after the Court affirmed on all issues save one, concluding that Student was entitled to compensatory education for a portion of the 2018-19 school year, a remedy not awarded in the November 2019 administrative decision. *Downingtown Area School District v. D.S.*, 2022 U.S. Dist. LEXIS 30341, 2022 WL 523563 (E.D. Pa. 2022).

The Parents of D.S. (Student),¹ who was resident of the Downingtown Area School District (District) during the relevant time period, filed an administrative complaint in May 2019 raising claims under the Individuals with Disabilities Education Act (IDEA),² Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA).⁴ Following a due process hearing, the Parents were awarded reimbursement for tuition and related expenses at a private school (Private School) for the 2018-19 and 2019-20 school years. That remedy was based on a conclusion that the District denied Student a free, appropriate public education (FAPE). Student was not awarded compensatory education for the start of the 2018-19 school year prior to enrollment in Private School; and the Parents' claims for earlier school years were dismissed.

The sole issue on remand is the calculation of compensatory education for the first eleven weeks of the 2018-19 school year. Following a review of

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482; 34 C.F.R. §§ 300.1 – 300. 818; 22 Pa. Code §§ 14.101 – 14.163.

³ 29 U.S.C. § 794; 34 C.F.R. §§ 104.1 – 104.61.

⁴ 42 U.S.C. §§ 12101-12213.

the record developed through the 2019 hearing,⁵ an award of compensatory education shall be made for a portion of that time period.

ISSUE

What amount of compensatory education is due for the portion of the 2018-19 school year when Student was enrolled in the District?

FINDINGS OF FACT

1. A new Individualized Education Program (IEP) was developed for Student in May 2018. This IEP incorporated assessment information from the May 2018 RR as well as progress on IEP goals. At that time, Student reportedly was performing below grade-level benchmarks in reading fluency, reading comprehension, and mathematics computation. Word identification/spelling skills similarly remained well below expectations (between the 7th and 19th percentile). Overall, Student was attaining below grade level benchmarks in reading skills throughout the school year. (S-14 at 12-16.)
2. There was a significant amount of input from the Parents into the May 2018 IEP. Their concerns focused on weak reading skills (particularly fluency and comprehension) and sought a Wilson Reading Program for Student; more information about the reading programs provided; and additional IEP goals and items of specially designed instruction. (S-14 at 17-18.)

⁵ References throughout this decision will be to the original record Notes of Testimony (N.T.), Parent Exhibits (P-), and School District Exhibits (S-), and a majority of the findings of fact herein were previously set forth in the original decision.

3. Needs in the May 2018 IEP were identified in basic reading skills and reading fluency. Annual goals targeted reading decoding (real and nonsense words from noted baselines) and reading fluency (increasing words read correct per minute from a noted baseline). (S-14 at 18, 24-25.)
4. Program modifications and items of specially designed instruction were: direct multisensory reading instruction for decoding and encoding; prewriting activities and discussion with teacher monitoring and graphic organizers; monitoring of reading comprehension and written expression; visual aids; ensuring Student's attention; clearly stated directions; study guides and outlines; check-ins for assignments; and test and assignment accommodations (assessments read aloud if not measuring reading ability, extended time, separate location). This IEP also specified that the SETT⁶ process was to begin at the start of the 2018-19 school year. (S-14 at 26-27.)
5. The May 2018 IEP proposed learning support at an itinerant level, with Student still receiving special education instruction outside of the regular classroom for basic reading skills and reading fluency. Student was eligible for ESY services in 2018, and the IEP for the school year would otherwise effectively be implemented in the fall. The Parents approved the accompanying Notice of Recommended Educational Placement (NOREP). (S-14 at 29-32, 38-41.)
6. A transition meeting was held to prepare Student for entry into [redacted] grade. (N.T. 271, 273, 478. 561, 575-78; P-3 at 29.)

⁶ An assistive technology framework for assessing the Student, Environment, Task, and Tools.

7. Student's ESY program in 2018 provided individual Wilson Reading instruction two days each week for one hour each day to address decoding and encoding needs; reading comprehension was also addressed. Student began at a level beyond the first sub-step (1.3) and progressed to sub-step 1.6 by the end of the program. (N.T. 350-56; S-16 at 9.)

August 2018 Independent Neuropsychological Evaluation

8. The Parents obtained an independent neuropsychological evaluation (INE) of Student in the summer of 2018, with a report issued in August 2018. The Parents shared that report with the District when they received it. (N.T. 523; P-1.)
9. The August 2018 INE concluded that Student presented with a Specific Learning Disability in Reading due to phonological dyslexia. Recommendations included direct multisensory literacy intervention, executive functioning coaching, individualized and small group instruction, small class sizes, project-based assignments, with various accommodations in the educational environment including assistive technology. (P-1.)

2018-19 School Year [redacted]

10. Student entered the [redacted] grade at the start of the 2018-19 school year. (N.T. 461-62.)
11. Student was in a co-taught language arts class in [redacted] grade for literature and writing. That class had a regular education and special education teacher, with the latter providing support as needed for Student such as with note-taking. (N.T. 462-63, 515-17.)
12. Student was provided Wilson Reading instruction in [redacted] grade by a reading specialist, in a small group with one other student, as the IEP team had agreed. The reading specialist determined where

Student needed to begin at the start of that school year based on an administration of the Wilson Assessment of Decoding and Encoding (WADE) and other assessments. She was able to effectively work with both students in the group despite their unequal levels in the program, allowing both to participate in instruction and practice. (N.T. 283-84, 296, 310, 320, 338-39, 570; S-26.)

13. The Wilson Reading Program provides direct, explicit, sequential, multisensory instruction in decoding and encoding daily. Students are expected to master the skills before moving onto the next step. The Wilson Program does not directly address comprehension or fluency. (N.T. 296, 307-08, 327, 331-32.)
14. The Wilson Reading instruction was provided to Student during one of two encore or optional classes. Students had choices of encore classes that could include an intervention class for that period. (N.T. 464-65.)
15. Student's reading comprehension was monitored in the fall of 2018 only through the benchmark assessments provided to all students. (N.T. 529.)
16. The District initiated the SETT process for Student in September 2018. Identified barriers were basic reading and reading fluency skills. Suggested tools were an iPad with a text-to-speech application; access to audio books; and digital versions of textbooks when available. Not all materials were available in audio format, however. Student would also trial keyboards. (N.T. 519-20, 537-38, 595-96, 610; S-17.)
17. Student's IEP was revised in September 2018 following completion of the August 2018 private INE report that included a diagnosis of dyslexia. Information on the SETT process was added, and the

present levels were updated to reflect benchmarks on the new goals for the start of that school year. Results of the administration of the WADE were also incorporated. New items of specially designed instruction incorporated recommendations from the SETT process, including speech-to-text and text-to-speech technology. The Parents did not return the NOREP. (S-18.)

18. Student checked in with the special education case manager during an end of day advisory period most days of the week in [redacted] grade. Student had the opportunity to review assignments and ask for clarification of expectations. On rare occasions, Student may have needed to also check with specific teachers about specific homework and assignments. The check-ins were effective for Student. (N.T. 462, 467-72, 515-16.)
19. In late October 2018, the Parents provided a ten day notice of their intention to enroll Student in the Private School and seek tuition and related expenses. (N.T. 595; P-21 at 44; S-19 at 5.)
20. In early November 2018, the reading specialist administered the Phonological Awareness Screening Test (PAST) to Student to gauge automaticity and guide instruction. Student was at the basic phoneme level without automaticity in recognizing syllables. (N.T. 321-24; S-19 at 11-13.)
21. In November 2018, the reading specialist administered the Test of Silent Word Reading Fluency (TOSWRF) to assess word recognition skills. Student scored at the sixth percentile (poor range). (N.T. 324; S-19 at 13.)
22. The IEP team met again following the ten day notice. Student was reportedly making progress toward the reading goals in the Wilson Reading Program (from level 2.1 to level 3.1 in decoding and

encoding) and improvement on reading fluency probes (approaching mastery). Results of the PAST and the TOSWRF were also added. The District proposed two additional goals, one in encoding skills (from a baseline of 50% to 80% accuracy) and one in reading comprehension (increasing correct responses on grade level cloze passages). However, the reading comprehension would be addressed through a regular education class focused on higher-level reading skills. (N.T. 335-36; S-19.)

23. New items of specially designed instruction in the November 2018 IEP were for direct instruction in vocabulary and reading comprehension; a keyboard for assistive technology; and Student not being required to read aloud in front of peers. (S-19 at 35-38.)
24. Student was formally withdrawn from the District on November 19, 2018 to attend the Private School. (P-21 at 49; S-20.)

DISCUSSION AND APPLICATION OF LAW

The District Court agreed with this hearing officer's determination in the original decision that the District's program for the first eleven weeks of the 2018-19 school year denied Student FAPE, but noted that the undersigned "denied Parents an award of compensatory education" for that period of time. *Downingtown, supra*, 2022 U.S. Dist. LEXIS 3034 at *41, 2022 WL 523563 at _____. The original decision, in relevant part, concluded that, "Certainly within six weeks into [the 2018-19] school year the District had reason to take, and should have taken, steps to ascertain whether Student's reading comprehension and related weaknesses were appropriately supported." Based on the applicable timelines for those steps to occur, this hearing officer determined that no compensatory education was warranted. In remanding this issue, the Court emphasized Student's

need for individualized intervention for reading comprehension and vocabulary deficits through special education, access to the general education curriculum through provision of assistive technology, and an absence of monitoring of Student's progress on reading skills.

Compensatory education is an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.*

The original decision identified the first six weeks of the 2018-19 school as the period of reasonable rectification. This hearing officer concludes that an additional one hour per day of additional specialized reading instruction to address reading comprehension and vocabulary skill deficits, with regular progress monitoring, is appropriate as comparable to that in the November 2018 IEP revision.⁷ One additional hour per week for consistent access to the general education curriculum through appropriate assistive technology is also warranted. The total award, therefore, is six hours of weekly compensatory education for the five-week interval between the end of the reasonable rectification period and Student's enrollment in the private school, for a total of thirty (30) hours.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the

⁷ See S-19 at 38 (providing for "up to" one additional period of daily direct instruction in vocabulary and reading comprehension, with other direct reading instruction specified as 48 minutes per day (S-19 at 36)), rounded up to one hour for ease of calculation and progress monitoring of those skills.

compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress if Student re-enrolls. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

ORDER

AND NOW, this 7th day of May, 2022, in accordance with the foregoing, it is hereby **ORDERED** as follows on remand from the District Court.

1. Student is awarded a total of thirty (30) hours of compensatory education. All of the conditions and limitations on that award set

forth above are expressly made a part hereof as though set forth at length.

2. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter its terms.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 26276-21-22