

*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

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### DECISION

Child's Name: G.K.

Date of Birth: [redacted]

Dates of Hearing:<sup>1</sup>

February 8, 2017 – February 23, 2017 – May 22, 2017

CLOSED HEARING

ODR Cases #18356-1617AS

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Colonial School District

Karl Romberger, Esquire

250 Flourtown Road

331 East Butler Avenue

Plymouth Meeting, PA 19520

New Britain, PA 18901

Date of Decision:

June 13, 2017

Hearing Officer:

Michael J. McElligott, Esquire

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<sup>1</sup> The parents' complaint was filed in late October 2016 and scheduled for hearing in mid-December 2016. Parents requested rescheduling to allow them to consult with an attorney. In mid-January 2017, parents confirmed that they would be representing themselves. The February 2017 hearing sessions were held, with a third session scheduled for early April 2017. Due to an illness of the hearing officer, an April 2017 hearing session needed to be cancelled, and the hearing concluded at the May 2017 session. Throughout the scheduling process, dates were selected to accommodate travel by the student's father.

## **INTRODUCTION**

Student (“student”)<sup>2</sup> is pre-adolescent student residing in the Colonial School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>3</sup>. The student has been identified under the terms of IDEIA as a student with a disability with needs in reading comprehension, written expression, math problem-solving, and social language/social skills.

Parents dispute the appropriateness of the student’s programming and progress toward goals. Of particular concern to parents are the student’s continuing struggles on regular education assessments.

For the reasons set forth below, I find that on certain goals in the student’s individualized education program (“IEP”), the student did not make progress. In other instances, I find that there are substantive issues and procedural violations that amount to a denial of FAPE. Therefore, compensatory education will be awarded. However, there is much in the student’s programming that evidences appropriate IEP goals, and that programming and those goals will be addressed in directives to the student’s IEP team.

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<sup>2</sup> The generic term “student”, and gender-neutral pronouns, will be utilized throughout the decision to protect the student’s confidentiality.

<sup>3</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. See also 24 PA Code §§14.101-14.162.

## **ISSUES**

Did the student make progress on goals under the currently implemented IEP?

Is the proposed September 2017 IEP appropriate?

## **FINDINGS OF FACT**

### 2015-2016 – 4<sup>th</sup> Grade

1. In October 2015, in the 2015-2016 school year, the student’s 4<sup>th</sup> grade year, the student’s IEP was revised. (School District Exhibit [“S”]-12).
2. The October 2015 IEP contained six goals: one for reading comprehension involving understanding inferential questions based on fictional text, one for written expression across three-paragraph writing, one for word-problems in mathematics, one to address [certain behaviors] and two in speech/language (responding with situational reasoning “which make sense to (the) listener” and on-topic responses in adult & peer conversations). (S-12 at pages 16-19).
3. By the end of the 2015-2016 school year, the student had made definitive progress on the goals in written expression, word-problems in mathematics, and reduction of [the behaviors]. S-46 at pages 5-6, 8-9).
4. By the end of the 2015-2016 school year, the student had made seeming progress on the situational-reasoning goal for speech and language, although the data on this goal is questionable. While there was seeming progress on the situational-reasoning goal, the average score on the goal (68.4% over 2015-2016) fell well short of the goal (80%).<sup>4</sup> The first four probes (October – December 2015) averaged 43.75% and the final four probes averaged 83.75 %. This data is somewhat skewed, however, because the student was

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<sup>4</sup> Gauging the student’s progress on these annual goals is difficult given the IEP progress-monitoring reporting. The progress monitoring reporting is graphed over multiple school years and not annually (S-46). Therefore the slope of the line indicating progression toward goals—very helpful in gauging how a student progresses annually on annual goals—in the IEP cannot be relied upon. While multi-year reporting might give some degree of insight into a student’s educational progress, it is not accurate in portraying a student’s annual progress. Accordingly, the hearing officer has compartmentalized the data to gauge how annual progress might be measured.

assessed from October 2015 – April 2016 approximately every 21 days (a total of nine probes); in May 2016, however, the student was assessed approximately every six days (a total of six probes over the month). (S-46 at page 1).

5. By the end of the 2015-2016 school year, the student had made progress on the adult & peer conversations goal for speech and language. The data here was less questionable, with the average score on the goal (79.3% over 2015-2016) in effect at the goal level (80%). The individual probe data, however, does not show the skew in the other speech and language goal with steady goal progression across all fifteen probes over the school year. (S-46 at pages 3-4).
6. By the end of the 2015-2016 school year, the student had failed to make progress in reading comprehension. The baseline in the goal was 50% for correct answers on inferential questions, with a goal of 75%. Over the course of the 2015-2016 school year, the student averaged 42.5% across all probes, failing even to average the baseline level. (Only one probe over the course of the school year—the last probe in May 2016 at 55% -- was above the baseline level.) (S-46 at page 7).
7. Throughout the 2015-2016 school year, the student's curriculum-based/benchmark assessments showed that the student was below basic on an instructional reading level assessment in September 2015 (for 4<sup>th</sup> grade comprehension and 95+% accuracy or 5<sup>th</sup> grade comprehension and 90-94% accuracy), and below basic in benchmark testing in November 2015 and February 2016. The student was basic on an instructional reading level assessment in April 2016 (using the same comprehension/accuracy rubric), and basic on benchmark testing in May 2016. (S-52).
8. Throughout the 2015-2016 school year, the student's curriculum-based/benchmark assessments showed that the student was proficient in the mathematics benchmark in November 2015, basic in the mathematics benchmark in February 2016, and basic on the mathematics benchmark in May 2016. (S-53).
9. Throughout the 2015-2016 school year, the student's curriculum-based/benchmark assessment showed that the student was below basic in narrative writing in November 2015, proficient in writing conventions in November 2015, below basic in informational writing in February 2016, proficient in writing conventions in February 2016, basic in opinion writing in May 2016, and proficient in writing conventions in May 2016. (S-54).

10. In May 2016, parents requested that the student repeat 4<sup>th</sup> grade, a request denied by the District. For the 2016-2017, then, the student was promoted to 5<sup>th</sup> grade. (S-16).

11. In May 2016, after the District's decision on grade-promotion, the parents filed a special education due process complaint. (S-17).

### Summer 2016

12. Following the filing of the May 2016 complaint, mediation and resolution discussions between the parties led to an agreement, addressing various issues related to programming and information-sharing between the parties. Included as part of the mediation agreement was the parties' agreement to have the District fund an independent educational evaluation ("IEE") and to have the parties participate in a facilitated IEP meeting. (S-23, S-24, S-26).

13. In August 2016, an independent educational evaluation ("IEE") was issued. As outlined in the mediation agreement, the IEE addressed "achievement testing— read(ing), writing, math by certified school psych". The independent evaluator indicated in the IEE that its purpose was "to ascertain (the student's) current academic achievement levels. Educationally relevant recommendations were provided on the basis of the academic assessment results." (S-23, S-28 generally, and at page 1).

14. On achievement testing in the August 2016 IEE, using instrumentation based on the "performance of a national normative group of same-age and grade students", the student scored in the average range in all composite scores for both age-based and grade-based norms, and in the above average range in basic reading, again for both age-based and grade-based norms. (S-28 at pages 4-6).

15. On achievement testing in the August 2016 IEE, for age-based norms, the student scored in the average range on all sub-tests, except for the pseudoword decoding sub-test where the student scored above average, and reading comprehension and oral expression sub-tests where the student scored below average. (S-28 at page 5).

16. On achievement testing in the August 2016 IEE, for grade-based norms, the student scored in the average range on all sub-tests, except for the mathematics reasoning, word reading, pseudoword decoding, and spelling sub-tests where the student

scored above average, and the reading comprehension sub-test where the student scored below average. (S-28 at page 6).

17. The August 2016 IEE identified learning challenges and needs in focus/concentration/task-persistence, reading comprehension deficits as to both age and grade norms, voice level, math problem solving deficits, math calculation difficulties, recall/retrieval difficulty, expressive language (especially word-retrieval), challenges with grammar, syntax, and writing mechanics, and written expression deficits in theme development and organization of writing. In identifying these challenges/needs, the evaluator often commented that the student exhibited these challenges/needs even though the student's achievement scores were in the average or above average ranges. ((S-28 at page 7)).
18. The August 2016 IEE contained multiple recommendations by the independent evaluator for the student's educational programming. (S-28 at pages 8-9).

#### 2016-2017 – 5<sup>th</sup> Grade

19. At some point in late August 2016 or early September 2017—the record does not speak to the exact date—the 2016-2017 school year, the student's 5<sup>th</sup> grade year, commenced.
20. In late September 2016, as agreed to by the parties in mediation, a facilitated IEP meeting was held. (S-31, S-32).
21. The IEP team worked on a draft IEP, including parent input. Of particular concern to parents were aspects of the IEP such as the student's reading and mathematics needs, and short-term objectives (as signposts within goals) in the IEP. Additional concerns of parents included performance on regular education assessments, including curriculum/benchmark assessments, and extra homework. (S-32, S-34, S-35).
22. The September 2016 IEP contained five goals: one for reading comprehension involving answering factual and inferential questions based on non-fiction and fiction text, one for written expression across three-paragraph writing, one for word-problems in mathematics, and two in speech/language (situational-reasoning “which make sense to (the) listener” and inferencing the perceived thinking and/or behavioral impact of participants in an observed interaction). The goal in the October 2015 IEP related to [behaviors] had been mastered and was removed in the September 2016 IEP. (S-34 at pages 18-21).

23. The reading comprehension and mathematics goals each contained multiple short-term objectives. (S-34 at pages 18-19, 21).
24. In early October 2016, the District circulated the revised IEP to the parents. Parents indicated disagreement with certain aspects of the proposed IEP and filed the special education due process complaint which led to these proceedings. (S-36, S-37, S-38).
25. The progress monitoring data for the 2015-2016 school year, however, reveals some confusing, if not troubling, indications about the student's goals in the September 2016 IEP. (S-34, S-48, S-58, S-59).

### *Speech & Language Goals*

26. Early on in the progress monitoring for the 2015-2016 school year, the student's speech and language goals were as follows: For the situational-reasoning goal, the goal in its entirety was "(the student) will provide verbal explanations to support...responses to a variety of reasoning tasks (e.g., why/how questions, problem-solving, problem avoidance, inferences, taking the perspective of others) which make sense to (the) listener with 80% accuracy over three observations in various educational settings. [Baseline: Performances ranged from 55-95% last spring.]"; for the inferencing observed interactions goal, the goal in its entirety was "When presented with a picture scene or a live scene, (the student) will be able to utilize visual cues to engage in conversations about what a character—or person—is thinking and/or how a character's—or person's—behaviors may impact others in that situation. (The student) will do this successfully in 80% of trials over three observations in various educational settings." (S-34 at page 20, S-48 at pages 1, 5).
27. The student was assessed on the situational-reasoning goal once each in September 2016 and October 2016 and twice in November 2016. The student was assessed on the inferencing observed interactions goal once in October 2016 and once in November 2016. (S-48 at pages 1, 5; S-58 at pages 1, 3).
28. At some point in the fall of 2016, however, the student's speech and language goals changed. The situational-reasoning goal, in its entirety, changed to: "When presented with age-appropriate information via verbal descriptions, pictures, videos, or

- live actions (the student) will provide independent verbal responses to a variety of questions which require (the student) to demonstrate...ability to take the perspective of another. Questions will include what a character—or person—is thinking and/or how a character’s—or person’s—behavior may impact others in that situation. Responses will be accurate and provide sufficient details to satisfy the questions 85% of the time over five consecutive observations in the speech and language therapy setting. [Baseline: 75% average, but scores are inconsistent.]”. (S-59 at page 4).
29. The progress monitoring data points in October 2016 and November 2016 across both situational-reasoning goals do not align. (S-48 at page 1-2, S-58 at page 1-2, S-59 at page 4).
30. The second of the two situational-reasoning goals does not appear in the September 2016 IEP. (S-34).
31. At some point in the fall of 2016, the inferencing observed interactions goal changed to: “When presented with age-appropriate information via verbal descriptions, pictures, videos, or live actions (the student) will provide independent verbal responses to a variety of questions which require (the student) to demonstrate...logic, reasoning, and explanation skills. Responses will provide the correct type of information being sought and be accurate 80% of the time over five consecutive observations in the speech and language therapy setting. [Baseline: 70-100% - Objectives have been added to define strengths and weaknesses more clearly.]” The inferencing observed interactions goal also now included three short-term objectives. (S-59 at pages 13-15).
32. The progress monitoring data points in October 2016 and November 2016 across both inferencing observed interactions goals do not align. (S-48 at page 5, S-58 at page 3, S-59 at pages 13-15).
33. In progress monitoring on the second of the inferencing observed interactions goals, the student did not make progress on the three short-term objectives. (S-59 at pages 13-15).

### *Reading Goal*

34. In the September 2016 IEP, the student’s reading goal, including five short-term objectives, was written with a baseline at “BAS level S (28)/beginning of fifth grade reading level – [50%]”. Progress monitoring began on that goal with data points generated on the goal once in September 2016, once in October 2016, and

twice in November 2016, and multiple data points on the short-term objectives in October and November 2016. (S-34 at page 18, S-48 at pages 3, 7; S-58 at pages 6-9).

35. In January 2017, the baseline on the goal changed to “BAS level T (29)/ beginning/middle of fifth grade reading level – 50%”. Yet the progress monitoring itself reveals that on the five probes over September 2016 – December 2016, the student achieved assessments of 50%, 50%, 10%, 70%, and 20%, an average of 40%. (S-59 at pages 1-2).<sup>5</sup>
36. Over the course of the 2016-2017 school year, the data on the five short-term objectives show that the student performed well on answering questions outside the text; stagnant performance on word meaning, identifying main idea/key supporting details, and understanding presentation of information inside a text; and slightly declining performance on answering questions about point of view/structure of the text. (S-59 at pages 8-12).

#### *Written Expression Goal*

37. The student’s written expression goal in the September 2016 IEP was, in its entirety: “When given a prompt or self-selecting a topic, (the student) will demonstrate the following: 3 paragraphs with each paragraph including a beginning sentence, at least 3 detail sentences, and a concluding sentence for up to 5 points for each paragraph totaling 15 points. (The student) will achieve at least 12 out of a possible 15 points.” (S-34 at page 19).
38. The student was assessed on the written expression goal twice in October 2016 and twice in November 2016. (S-48 at pages 4, 7; S-58 at page 4).
39. At some point in the fall of 2016, however, the written expression goal changed: “When given a 5<sup>th</sup> grade writing prompt, based on the PA State Writing Standards Rubric, (the student) will score at least a 3 [proficient] out of a possible 4 on all 5 writing domains on 4 out of 5 consecutive writing probes. Baseline: 5<sup>th</sup> Grade PA State Writing Standard Rubric – Scored Advanced (4) or Proficient (3) on 0 out of the 5 writing domains.” (S-59 at page 3).
40. The progress monitoring data points, in October 2016 and November 2016 (two probes each month), were provided on the points-scale from the first goal (out of 15 possible points). The progress monitoring data points thereafter, November 2016

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<sup>5</sup> Here again, the District presented multi-year progress monitoring (2015-2016 and 2016-2017) on the annual goal, making progress difficult to gauge. (S-59 at page 1).

through May 2017, were on a percentage scale (out of 5 possible writing domains exhibited—0%, 20%, 40%, etc.). (S-48 at page 4, S-58 at page 4, S-59 at page 3).

41. On the second of the two written expression goals, the student showed progress over the period November 2016 – May 2017. (S-59 at page 3).

*Mathematics Goal*

42. The September 2016 IEP had a mathematics goal for correctly implementing the steps to solve, and then correctly solve, a set of multi-step, mixed (i.e., addition and subtraction mix, or multiplication and division mix) word problems. (S-34 at page 21).
43. The progress monitoring on the mathematics goal indicates that the student made progress on the mathematics goal. (S-59 at page 5).
44. The data on the two short-term objectives, however, show that the student had uneven, and cumulatively slightly declining, performance over the course of the 2016-2017 school year on both of the short-term objectives in mathematics. (S-59 at pages 6-7).

*Private Reading Assessment*

45. In November 2016, the student was assessed at a local learning center, receiving poor ratings on an informal reading inventory and scoring at the 1<sup>st</sup> percentile in a reading comprehension achievement measure. In December 2016, the student began to receive private tutoring in reading at a local tutoring center. In January 2017, the center issued a report indicating that the student was being instructed by the center at a 3<sup>rd</sup> grade instructional level. (Parents' Exhibits 1, 2).

**DISCUSSION AND CONCLUSION OF LAW**

**IDEIA/Denial of FAPE**

To assure that an eligible child receives a free appropriate public education (“FAPE”) (34 C.F.R. §300.17), an IEP must be reasonably

calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning” (Endrew F. v. Douglas County School District, U.S. , S.Ct. , 197 L. Ed. 2d 335 (2016); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (Endrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

In this case, two broad findings must be stated at the outset. First, the student made progress on many (although not all) IEP goals over the course of the 2016-2017 school year. And, second, those IEP goals are appropriate, although there is a degree of explanation necessary in that regard as set forth below. What is problematic, to the point where the student was denied FAPE and/or the parents were denied an appropriate level of parental participation in the IEP process, is a host of substantive and procedural issues over the course of the school year.

One, the student’s original speech and language for situational-reasoning was inappropriate as written. The fatal aspect of the goal is how the student’s responses were gauged for accuracy as “mak(ing) sense to the listener”. The problem here is two-fold: First, the listener subjectively makes the decision as to whether the response is accurate; while there may be a degree of subjectivity in such a goal, here progress is leveraged entirely on the listener without any objectivity in the assessment. Second, the goal is ostensibly to allow the student to reason

through social, inferential, and problem-solving situations; where one listener begins to understand the student's communication and interaction patterns, "making sense" may take place with that listener while a different listener without a history with the student may view the accuracy of the student's responses differently. This is a prejudicial flaw in the situational-reasoning goal.

Two, it is unclear at what reading level the student is being instructed for the reading goal. The first reading goal had a BAS baseline of level S/beginning 5<sup>th</sup> grade. The goal was written, however, for achievement at the beginning of 6<sup>th</sup> grade reading-level. The question arises, then, as to whether the student's progress is being gauged on a 5<sup>th</sup> grade reading level, working toward a 6<sup>th</sup> grade reading level, or is being gauged entirely on progress at a 6<sup>th</sup> grade reading level.

Apparently, it was the former case (5<sup>th</sup> grade reading level transitioning to a 6<sup>th</sup> grade reading level) because the baseline changed to BAS level T/beginning-middle of 5<sup>th</sup> grade. But whether the student was presented with any 6<sup>th</sup> grade reading-level material (BAS level unknown) is not on this record, so goal progress is impossible to measure with any concreteness. Percentages on reading probes for the reading goal are listed through September 2016 – May 2017, but the instructional level of those probes is not known, at least on the surface of the progress report which parents, or any reader other than the student's special education teacher, could understand.

Added to this is the fact that the student was instructional, at the outset of the student's 4<sup>th</sup> grade year, at BAS level M/end of 2<sup>nd</sup> grade reading level (S-12 at page 5). While no BAS level was made part of the student's baseline or goal in the October 2015 IEP, the student failed to achieve beyond 55% on any reading probe in the 2015-2016 school year (25%, 25%, 50%, 50%, 50%, 55%) when the goal called for 75% goal achievement. In 4<sup>th</sup> grade, then, it seems highly questionable that the student started the school year at a 2<sup>nd</sup> grade instructional level, scored well below goal-achievement levels and began 4<sup>th</sup> grade at a beginning 5<sup>th</sup> grade reading level. The record was not developed by the parties enough to allow this disparity of reading levels between the October 2015 and September 2016 IEPs to be characterized as a substantive flaw, but in the context of the other IEP flaws, it is a reasonable question, especially in light of the private reading assessment.

What is quite clear, however is that the goal design and progress monitoring do not allow parents to understand the terms of progress for the student's reading. This obviously impedes their ability to participate meaningfully in understanding implementation of the student's special education programming. Compensatory education will be awarded.

Three, this change-in-goal issue for reading is slight in comparison to the substantial changes—indeed, the re-writing—of the speech and language, and written expression, goals. The situational-reasoning goal was not only entirely re-written, but three short-term objectives were added. The inferencing from observed interactions goal was entirely re-

written. The written expression goal was also entirely re-written, moving from the points-scoring of student work to statewide writing domains rubric, a sea change not only in the goal but in the assessment of that goal.

And although the exact timing of these goal changes is not known, it appears that the changes in the goals all occurred after the parents' complaint was filed in late October 2016, which would be a violation of the pendency/stay-put obligation of the District. This is not a legal conclusion, however, because the exact timing of the goal changes cannot be ascertained on this record. There is also no signed notice of recommended educational placement ("NOREP") in the record, so perhaps the parents agreed to these goal changes. Even if this is the case, though, the September 2016 IEP of record includes the original goals, not the updated goals listed on the progress monitoring. Given the tenor of this record and parents' views, however, it is preponderant that the parents were not involved in the wholesale changes of the goals and, even if they were, those changes were not reflected in the IEP of record. Therefore, compensatory education will be awarded.

Accordingly, then, the various substantive flaws and procedural violations related to lack of parental participation will lead to an award of compensatory education. There will also be directives to the IEP team, as well as an order for a comprehensive, independent reading assessment.

## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the School District denied the student a free appropriate public education through substantive flaws in IEP design and through denying parents meaningful participation in aspects of the IEP design and ability to understand/monitor the student's special education programming. Equitably, then, 300 hours of compensatory education will be awarded to the parents.

Additionally, given the lack of clarity and conflicting data regarding the student's reading level, the School District is ordered to fund at public expense a comprehensive reading evaluation by an independent evaluator. The independent evaluator shall be selected by parents. Although the exact qualifications of the independent evaluator are left to parents, at a minimum the independent evaluator must have an active Pennsylvania reading specialist certification at the time of the evaluation. To the extent it deems it advisable, the School District may request from the independent evaluator proof of this certification status before the evaluator undertakes the evaluation.

With the issuance of this order, the student's reading goal and mathematics goal shall be those goals, including any short-term objectives, as listed in the September 2016 IEP. With the issuance of this order, the student's speech and language goals shall be the two goals, including any short-term objectives, as listed in the progress monitoring documents at S-59. With the issuance of this order, the student's written

expression goal shall be the goal as listed in the progress monitoring documents at S-59.

No later than August 20, 2017, the student's IEP team shall meet to update present levels information, goal baselines, goals, and short-term objectives for the 2017-2018 school year. Other aspects of the student's IEP shall be addressed as the IEP team deems it necessary. To the extent the comprehensive, independent reading evaluation report has been issued by the time of this IEP team meeting, this information as to the student's reading levels, and goals, specially designed instruction and/or related services related to reading, shall be explicitly included and made part of the student's reading programming. To the extent it is not available by the time the IEP team meets, the IEP team shall meet within 5 school days of the date the report is made available.

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

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire  
Special Education Hearing Officer

June 13, 2017