

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: S.M.

Date of Birth: [redacted]

Dates of Hearing:

March 28, 2014

April 25, 2014

May 7, 2014

May 21, 2014

May 22, 2014

June 9, 2014

CLOSED HEARING

ODR Case #14512-1314KE

Parties to the Hearing:

Parent[s]

Philadelphia School District
440 North Broad Street
Philadelphia, PA 19130

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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June 30, 2014

July 22, 2014

Jake McElligott, Esquire

INTRODUCTION

[Student] is [a pre-teenaged] student residing in the School District of Philadelphia (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)¹ for specially designed instruction/related services as a student with autism and attention deficit hyperactivity disorder (“ADHD”). [Redacted.]²

The student attended District schools through the end of the 2012-2013 school year. In the spring of 2013, the parties settled a special education dispute as of April 2, 2013.

As part of the settlement agreement, the parties undertook a series of mutual obligations. As the 2013-2014 school year approached, the parties could not agree on the educational program for the student. Ultimately, the student’s parents rejected the District’s recommended education program/placement and enrolled the student in a private educational placement for the 2013-2014 school year.

Parents claim that the individualized education plan (“IEP”) proposed by the District for the 2013-2014 school year was inappropriate, and filed the special education due process complaint that led to these proceedings. Parents seek compensatory education for the

¹ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

² [Redacted.]

period from April 2, 2013 through the end of the 2012-2013 school year (a period when the student was still enrolled at the District) and tuition reimbursement for the private resources utilized to fund the private placement for the 2013-2014 school year. Parents also claim that the District failed to provide appropriate [redacted].

The District counters that it provided a free appropriate public education (“FAPE”) to the student for the period of the student’s enrollment from April 2, 2013 to the time the student dis-enrolled from the District and that the program proposed for the student for the 2013-2014 school year is appropriate. As such, the District argues that the parents are not entitled to remedy.

For the reasons set forth below, I find that the District failed to provide FAPE to the student for the period of enrollment after April 2, 2013 and failed to propose an appropriate IEP for the 2013-2014 school year. Therefore, the parents are entitled to, respectively, compensatory education and reimbursement. Parents did not meet their burden, however, regarding claims related to inappropriate [redacted].

ISSUES

Did the District provide the student with FAPE
for the period from April 3, 2013
through the end of the 2012-2013 school year?

If not, is the student entitled to compensatory education?

Was the proposed IEP for the 2013-2014 school year appropriate?

If not, are parents entitled to reimbursement of the private resources utilized to fund a private placement for the 2013-2014 school year?

Is the student entitled to compensatory education for [redacted], both in the 2012-2013 school year after April 2, 2013 and in the 2013-2014 school year?

PROCEDURAL HISTORY

- A. On April 2, 2013, the parties entered into a settlement agreement to resolve all previous issues of dispute between the parties regarding the student's education. The settlement agreement settled addressed all claims between the parties from the beginning of time through April 2, 2013. (Hearing Officer Exhibit ["HO"]-3).
- B. On December 11, 2013, the parents filed the special education due process complaint which led to these proceedings. Parents alleged, *inter alia*, that the student had been denied FAPE for the period April 3, 2013 through the end of the 2012-2013 school year. Additionally, parents sought reimbursement for a private placement for the 2013-2014 school year. The District filed a timely response to the complaint. (HO-1, HO-2).
- C. Contemporaneously with the filing of its response to the complaint, the District filed a motion to dismiss for lack of jurisdiction. The District argued that parents' complaint was rooted in interpretation of the April 2013 settlement agreement and that special education due process did not have jurisdiction over such an issue. Parents responded and, after extensive briefing and argument, the hearing officer issued a ruling that (a) the terms of the April 2013 settlement agreement seemed to address the issue of any subsequent dispute between the parties, and (b) a factual record regarding the parents' allegations needed to be created. Therefore, the District's motion was denied. (HO-4, HO-5, HO-6, HO-7, HO-8, HO-9).
- D. After a prehearing conference call with counsel, the hearing officer limited evidence to focus on the student's programming in place on April 3, 2014 and facts related to the student's programming thereafter. Evaluations, as important signposts in understanding how the student's needs at a point in time and as how those needs may have evolved, were deemed admissible regardless of when the

evaluation was performed. Evidence regarding communications and programming prior to April 2, 2014 was deemed irrelevant, in light of the April 2013 settlement agreement, and excluded, especially (in the hearing officer's view) given significant public policy concerns in fostering settlement/resolution without the specter of having evidence surface out of past events where the parties had ostensibly put their disagreements behind themselves. Parents objected to the limitations on evidence. The first hearing session was dedicated to paying out procedural matters, consideration of exhibits in light of the evidentiary directives, and objections on the record. (HO-10, HO-13, HO-14, HO-15; Parents' Exhibit ["P"]-19, P-20, P-22, P-23, P-24 at pages 1-11, P-27, P-42 at pages 1-5, P-43 at pages 1-6; Notes of Testimony ["NT"] at 1-102).

- E. Further evidentiary issues included parents' motion to compel document disclosure, parents' motion for potential adverse inference and District response, District's offer of proof for the admission of certain documents and parents' response, and District's offer of proof as to the admission of a late-surfacing exhibit and parent's response. Some of these filings resulted in written hearing officer rulings, some resulted in rulings on the record, and some did not require any hearing officer action. (HO-11, HO-16, HO-17, HO-18, HO-19; NT at 1-102).

FINDINGS OF FACT

1. In September 2011, near the beginning of the student's 3rd grade year, the student was identified under IDEA as a student with a health impairment. [Redacted.] (P-21).
2. In June 2012, the student was re-evaluated and further identified as a student with autism. (P-17, P-26).
3. In the 2012-2013 school year, the student was enrolled in 4th grade.
4. In November 2012, the student's last agreed-to IEP was issued. (School District Exhibit ["S"]-15).
5. In February and March 2013, the parents obtained private psycho-educational, speech and language ("S&L"), occupational therapy ("OT"), and autism-programming reports. (P-13, P-14, P-15, P-16).

6. On April 2, 2013, the parties' dispute over the student's educational programming was resolved with the execution of a settlement agreement between the parties. (HO-3).
7. Under the terms of the April 2013 settlement agreement, the parties undertook mutual obligations. (HO-3).
8. Under the terms of the April 2013 settlement agreement, parents released multiple claims against the District, including for the purposes of this decision claims under IDEA, Chapter 14, and 22 PA Code §15.1-15.11, "from the beginning of time up through the date parents execute this settlement agreement." (HO-3 at page 1).
9. Under the terms of the April 2013 settlement agreement, the District agreed to establish a substantial fund of compensatory education hours, with access to those hours by parents for services up to an hourly rate of \$60 per hour. (HO-3 at page 2).
10. Under the terms of the April 2013 settlement agreement, certain terms and limitations were placed on parents' use of the compensatory education hours, although a provision of the settlement agreement addressed the potential for "parents (to) use the compensatory education to fund an out-of-District placement". (HO-3 at pages 2-3).
11. Under the terms of the April 2013 settlement agreement, parents agreed to cooperate with the District's subsequent evaluation and IEP processes. (HO-3 at page 3).
12. Under the terms of the April 2013 settlement agreement, if the parents agreed that a program/placement offered by the District would be the student's pendent placement "unless otherwise determined by an ODR hearing officer". (HO-3 at page 3).
13. The student completed the 2012-2013 school year under the terms of the November 2012 IEP. (S-4, S-15).
14. The November 2012 IEP indicated that the student's behavior impeded the student's learning or that of others and included a positive behavior support plan. Input and data contained in the November 2012 IEP supported the conclusion that in-school behavior was challenging for the student. (S-15).
15. The November 2012 IEP contained one behavior goal regarding task-attention and time-on-task. (S-15 at page 16).

16. Progress monitoring on the student's goal in May and June 2013 indicate that the student made progress on the behavior goal. The student's 4th grade teacher also testified credibly that the student made progress. (S-4; NT at 259-321).
17. In April 2013, shortly after the execution of the April 2013 settlement agreement, the District sought, and parents provided, permission to re-evaluate the student, including parental input which was timely provided. (P-28).
18. In late May 2013, the District issued its S&L re-evaluation. (P-29).
19. In early June 2013, the District issued its comprehensive re-evaluation report ("RR"). (P-32; S-5, S-6).
20. In mid-June 2013, the District prepared a draft IEP and met, but the student's IEP did not contain OT and nurse's data. (S-7, S-8, S-9; NT at 153-155).
21. In mid-June 2013, the District collected OT and nurse's data, and the June 2013 RR was updated. (S-10, S-35).
22. In mid-August 2013, the student's IEP team met to discuss the student's IEP. (P-37; S-11).
23. The August 2013 IEP indicated that the student's behavior did not impede the student's learning or that of others. (P-37).
24. The August 2013 IEP continued the inclusion of one goal related to attention to task and time-on-task. (P-37 at page 23).
25. The August 2013 IEP called for OT as a related service but did not contain S&L services. The provision of OT was listed as "750 minutes/IEP term". (P-37 at page 25).
26. In the days after the August 2013 IEP meeting, the parents rejected the August 2013 IEP, citing their concerns shared in June 2013 IEP meeting, and reiterated at the August meeting, that the IEP did not appropriately address the student's "socio-emotional, behavioral, and developmental needs". The parents informed the District of their intent to enroll the student privately at District expense. (P-39).

27. In late August 2013, parents enrolled the student in a private placement. (P-12).
28. The private placement included an explicit education plan for academics. Additionally, the education plan noted the student's needs in social interaction and emotional management in dealing with others and with disruptions to routine. (P-3, P-4).
29. In addition to academic goal-setting, the private placement education plan included goals in expressive and receptive S&L, auditory processing, and OT. (P-4).
30. The student made progress at the private placement over the 2013-2014 school year. (P-6, P-7, P-8, P-9; NT at 918-985).
31. In mid-April 2014, after the commencement of the hearing, an incident occurred at the private placement that potentially implicated the student. A problematic writing was discovered in school that was attributed to the student. The private placement investigated and could not verify that the student produced the writing. On this record, the incident was resolved with the private placement's investigation and did not have an effect on the student's program at the private placement. (S-16; NT at 1108-1124).
32. Parents offered testimony from various expert witnesses, the professionals who had authored reports in February and March 2013. These expert witnesses were found to be credible. (NT at 637-814, 824-913, 993-1045, 1050-1102).
33. Parents, District witnesses, and witnesses from the private placement were all found to be credible. (NT at 134-331, 344-542, 562-635, 918-985, 1108-1124).
34. No witness's testimony was accorded more weight than any other witness.

DISCUSSION AND CONCLUSIONS OF LAW

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” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

April 2013 through the 2012-2013 School Year

After the parties executed the April 2013 settlement agreement, the student continued to receive programming under the November 2012 IEP. This IEP was inappropriate to meet the student’s needs. It contains one goal, geared to attention to task and time-on-task. But the evaluation history and the IEP itself indicate that the student has more profound behavioral needs, especially involving social interaction with adults and peers, and processing changes in routine. None of these issues are addressed in the November 2012 IEP with S&L, OT, or autism support programming.

Accordingly, the student was denied FAPE for the period from April 3, 2013 through the end of the 2012-2013 school year. Compensatory education will be awarded as set forth below.

Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEA, compensatory education is an equitable remedy that is available to a claimant. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied FAPE “is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” (M.C. at 397).

Here, the student was denied FAPE from April 3, 2013 through the end of the 2012-2013 school year due to the inappropriateness of the November 2012 IEP. The District, however, immediately pursued a re-evaluation process after the execution of the April 2013 settlement agreement. The District had in hand for only 1-2 months the private reports, and, understandably, the focus of the District (and parents) was to make sure that the parties had a perfected understanding of the student’s educational needs and to program for those needs. Added to this is the fact that on the one goal where the District was programming for the student, the student made progress over April-June 2013. For all of these reasons, as a matter of equity, the amount of compensatory

education for the denial of FAPE after April 2013 through the end of that school year should not be overly burdensome to the District.

At the hearing, the parties stipulated that there were 56 school days from April 3, 2013 through the end of the 2012-2013 school year.³ Therefore, parents will be awarded 56 hours of compensatory education for the denial of FAPE for the period April 3, 2013 through the end of the 2012-2013 school year.

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District

³ NT at 1046.

professionals who provided services to the student during the period of the denial of FAPE.

2013-2014 School Year & Reimbursement

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)).

In this matter, the District argues that parents should be barred from utilizing the proceeds of the April 2013 compensatory education settlement to fund a private placement. This legal argument was denied as part of a pre-hearing ruling process. First, the April 2013 settlement agreement, by its terms, envisioned such a potential use of compensatory education hours (translated into a monetary equivalent). Second, while there was an argument that the nexus between the compensatory education fund established through the April 2013 settlement agreement and claims for tuition reimbursement for the 2013-2014 school year amount to enforcement of the settlement agreement, the claims

presented by parents have not, to this point, been considered by special education due process. Third, ultimately the nature of parents' private resources utilized to fund a private placement—parent assets, a bequest, lottery proceeds, a bag of money found on the street, or compensatory education hours which have been monetized—is immaterial. The tuition reimbursement framework speaks to parental resources privately expended and reimbursable when a school district has failed in its obligations under the IDEA. At that point, the Burlington-Carter analysis is fact-intensive and multi-faceted and may well result in a finding that parents are not entitled to reimbursement for their private expenditure. But the nature of that private expenditure, once undertaken, is immaterial. Accordingly, as made explicit in the pre-hearing ruling and reiterated here, the District's argument regarding the nature of the expenditure is rejected (*see* NT at 179-191).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program and whether it was reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Ridgewood; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)). In this case, the August 2013 IEP was not reasonably calculated to yield meaningful education benefit. By and large, the deficiencies in the November 2012 IEP (the last agreed-to IEP) continue in the August 2013 IEP. Of deepest concern is the lack of any substantive S&L programming to address the student's needs in

functional communication and social interaction. The student's cognitive ability allows the student to carry the day academically. But behavior, some task-oriented but much more socially-oriented, continues to be problematic. And these issues are not at all addressed in the August 2013 IEP. And while the student's on-task behavior improved, the student still presents challenging behavior at times in the educational environment; the August 2013 IEP explicitly discounts this consideration, which has been a consistent need for the student.

Also, there is a prejudicial procedural flaw in the August 2013 IEP. The District's structuring of related services for OT lists the delivery of services for "X minutes/IEP term" is prejudicial. The IEP is, as most IEPs are, crafted to provide services for a chronological year (in this case from June 2013-June 2014). The IEP calls for 750 minutes of OT over this term. It is prejudicially unclear and malleable to provide a block of minutes of servicing over the course of a chronological year, especially where a student requires some degree of persistence in the delivery of services. More appropriate would be, again as is most often the case, to schedule through the IEP the delivery of services on a weekly basis (e.g., "X minutes/week"). While an IEP team is in the best position to determine the scheduling of such services for a student, to provide a block of minutes over the course of a year is, on its face, a prejudicial procedural flaw.

For the foregoing reasons, the August 2013 IEP proposed by the District is inappropriate. When a school district program is found to be inappropriate at step one of the Burlington-Carter analysis, step two of the analysis is an examination of the appropriateness of the private placement which the parents have selected. In this case, the private placement was appropriate. The private placement explicitly programmed for the student's needs in all areas, especially those areas which impact the student most significantly in the educational environment—social, emotional, and expressive/receptive language. The record is clear that the student made progress at the private placement over the 2013-2014 school year.

The private placement selected by parents is appropriate. Therefore, the parents have met the burden at step two of the Burlington-Carter analysis.

When the school district's proposed program is found to be inappropriate, as here, and the private placement is found to be appropriate, as here, the third step of the Burlington-Carter analysis is to determine if tuition reimbursement is a fair remedy and, if so, in what amount. This is the so-called "balancing of the equities" step. Here, the equities do not weigh decidedly in favor or against either party. But having met their burden at steps one and two of the Burlington-Carter analysis, the third step provides no impediment to reimbursement.

Accordingly, the student's parents are entitled to reimbursement.

[Redacted]

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to 56 hours of compensatory education for the period from April 3, 2013 through the end of the 2012-2013. The nature and limits of the compensatory education is set forth above in the *Compensatory Education* section.

The parents are also entitled to reimbursement for the 2013-2014 private placement. If the reimbursement was out-of-pocket, upon presentation to the District by the parents of proof of payment for tuition and fees for the 2013-2014 school year, the District is ordered to pay the amount reflected in the parents' proof of out-of-pocket payment. This payment shall be made within 90 calendar days of the date the parents present the proof of payment. If the reimbursement was through the fund of compensatory education hours established in the April 2013 settlement agreement, the reimbursement shall be in the form of an amount of compensatory education hours. This amount of compensatory education hours shall equal the amount of the tuition and fees paid to the private placement through the compensatory education fund for the 2013-2014 school year divided by \$60 (the compensatory hourly rate

established in the April 2013 settlement agreement). The nature and limits of the resulting amount of compensatory education hours is set forth above in the *Compensatory Education* section.

As of the date of this order, the student's pendent placement for the upcoming school year is the private placement where the student attended for the 2013-2014 school year, to the extent the private placement does not decline to enroll the student.

The student's IEP team is ordered to re-convene to consider the student's IEP. To account for the potential unavailability of requisite members of the IEP team given the intervening weeks of summer, the IEP team shall convene on or before September 5, 2014.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

July 22, 2014