

**DELAWARE DEPARTMENT OF EDUCATION SPECIAL EDUCATION
DUE PROCESS HEARING PANEL**

In the Matter of
REDACTED

Complainant, DE DP #22-03

v.
REDACTED School District

Respondent.

Hearing Panel:

Beth C. Manes, Esq., Panel Chairperson

Joe-Anne Corwin, Educator Panelist

Jon Fletcher, Layperson Panelist

Representatives:

Alex T. Corbin, counsel for Complainant

Michael P. Stafford, counsel for

Respondent

DECISION

PRELIMINARY MATTERS

The Complainant, REDACTED (hereafter referred to as “Student”), through REDACTED Parents (hereinafter jointly referred to as “Complainants” or “Parents”) filed a Due Process Complaint against REDACTED School District (hereinafter referred to as “Respondent” or the “District”) on July 30, 2021. The Respondent filed an Answer on August 9, 2021. On August 11, 2021, a Resolution Session was held.

A prehearing conference was convened in this matter on August 18, 2021, via Zoom. As a result of said conference, a Prehearing Conference Order, dated August 20, 2021, was entered. A Revised Prehearing Conference Order was entered on August 30, 2021. Said Orders

are incorporated herein by reference. The parties agreed that the Respondent would introduce evidence first.

The hearing was conducted via Zoom over three nonconsecutive dates: September 27, 2021, September 29, 2021, and September 30, 2021. The Complainants called three witnesses and the Respondent called nine witnesses. The hearing panel finds all the witnesses credible, although the testimony of each witness has been given different weight.

Subsequent to the hearing, both parties filed written closing arguments. All arguments, conclusions, and proposed facts submitted by the parties have been considered. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

ISSUES PRESENTED

The issues presented in the due process hearing as identified by the parties in the Prehearing Conference and on the first day of the hearing are:

1. Whether the District proposed an IEP that provided the student with a FAPE.
2. Whether the Student is entitled to tuition reimbursement for the REDACTED PRIVATE School for 2020-2021 school year.

FINDINGS OF FACT

Based upon the testimony, and the evidence in the record, the hearing panel makes the following findings of fact:

1. REDACTED is the REDACTED of REDACTED and REDACTED (J6, JX0173).

2. REDACTED was born on REDACTED and is REDACTED years old (J6, JX0173).

3. REDACTED is a child who is eligible for special education and related services through an IEP under the classification of Autism. (J6, JX0173).

4. REDACTED attended school in the District until the end of the 2018-2019 school year. (Hearing Trans. vol. 3, 706:3-7).

5. REDACTED attended the REDACTED PRIVATE School for the 2019-2020 school year. (J18).

6. On June 20, 2020, the Complainants emailed REDACTED, Executive Director of Pupil Services at the District, stating that they were “considering returning [REDACTED] to the District for the upcoming school year” and “requesting an updated IEP from the District.” (J5, JX0298).

7. On June 25, 2020, REDACTED, responded to the request indicating that the District would conduct evaluations and develop an IEP. The email noted that the District’s goal would be to re-determine eligibility and develop an IEP “prior to the beginning of the school year in order for [the Complainants] to make the most informed decision with regard to [REDACTED].” (J5, JX0298).

8. The following day, June 26, 2020, REDACTED, Education Diagnostician at the District, emailed the Complainants a release of information providing the District with permission to communicate with REDACTED PRIVATE School regarding REDACTED. (J5, JX0297.)

9. The Complainants returned the executed release of information form on June 29, 2020. (J5, JX 0297).

10. On June 30, 2020, REDACTED emailed REDACTED, the Executive Director of the REDACTED PRIVATE School requesting REDACTED's educational records. (J25 JX0364).

11. On July 1, 2020, REDACTED, emailed the Complainants the Permission to Evaluate, Prior Written Notice, and Procedural Safeguards. (J5, JX0300).

12. On July 6, 2020, the Complainant returned the executed Permission to Evaluate. (J5, JX0303).

13. A Psychoeducational Evaluation was conducted on July 21, 2020, and July 22, 2020, by REDACTED, M.S. NCSP, Psychologist for the District. (J2, Hearing Trans. vol. 1, 47:7-14).

14. A Speech/Language Evaluation was conducted on July 28, 2020, by REDACTED, M.A., M.S., CCC-SLP, Speech-Language Pathologist for the District. (J3).

15. On August 5, 2020, the Complainants emailed REDACTED, Principal at REDACTED School stating “[a]t this time, I do not feel that the programming, services, and placement that the School District is offering for the upcoming school year will meet [REDACTED]’s educational needs. I am providing notice that I intend to place [REDACTED] at REDACTED PRIVATE School for the 2020-2021 school year, and I would ask that the District fund the tuition.” (J28, Hearing Tr. vol. 3 579:4 – 580:3).

16. REDACTED responded to the August 5, 2020 email on August 11, 2020, expressing that the request for public funding was premature because the District complied with all IDEA timelines, completed evaluations, and an Invitation to Meeting was forthcoming, which would allow the IEP team, including the Complainants to meet, determine eligibility, and develop REDACTED IEP. (J24, JX0311).

17. On August 11, 2020, REDACTED, emailed the Complainant a Notice of Meeting for September 2, 2020, and a Parent Input Form. (J9, J10, J24, JX0311).

18. An Occupational Therapy Evaluation was conducted on August 10, 2020, and August 11, 2020, REDACTED M.S., OTR/L, District Occupational Therapist. (J4, Hearing Tr. vol. 2 372:1-376:22).

19. The Complainant responded that REDACTED PRIVATE School start date was August 19, 2020, but they would still meet on September 2, 2020. (J24, JX0313).

20. This was the first time the District was put on notice of the REDACTED PRIVATE School's start date. (Hearing Trans. vol 3, 581:7-15).

21. On August 26, REDACTED M.ED. BCBA, the District Behaviorist emailed REDACTED M.Ed. BCBA, the REDACTED PRIVATE School's Behaviorist, requesting additional information regarding behavioral data provided by PRIVATE School. (J25, JX0391).

22. On September 2, 2020, an IEP meeting was held. (J1).

23. The IEP that was proposed included:

a. A primary classification of Autism with a secondary classification of Other Health Impairment;

b. Direct instruction in math calculation using supportive tools - 5 times per school week, 15 minutes each session, special education setting;

c. Direct instruction with number sense - 5 times per school week, 10 minutes each session, special education setting;

d. Direct instruction in responding to text via writing - 5 times per school week, 20 minutes each session, special education setting;

- e. Direct instruction in reading fluency - 5 times per school week, 10 minutes per each session, special education setting;
- f. Direct instruction in self-regulation - 5 times per school week, 20 minutes per session, special education setting;
- g. Direct instruction in self-regulation - 5 times per school week, 15 minutes per session, general education setting;
- h. Direct instruction on appropriate peer engagement - 3 times per school day, 5 minutes per session, general education setting;
- i. Direct instruction on appropriate peer engagement - 5 times per school week, 15 minutes per session, special education setting;
- j. Direct instruction with application of skills - 3 times per school day, 10 minutes per session, general education setting;
- k. Direct instruction with application of skills - 5 times per school week, 15 minutes per session, special education setting;
- l. The student was eligible to participate in the 12-month program;
- m. The setting was a “B” setting, with the Student served inside the regular classroom greater than or equal to 40% of the day and no more than 79% of the day;
- n. Counseling Services Group, 120 minutes per month, general education setting;
- o. Counseling Services, Individual, 120 minutes per month, special education setting;
- p. Occupation Therapy, Consultative, 30 minutes per month, general education setting;

q. Speech/Language Pathology Services, Consultative, 60 per month, general education setting. (J6).

24. The District also provided a draft Behavior Service Plan that continued the services provided by REDACTED PRIVATE School until data collection and observations were completed. (J7).

25. The Prior Written Notice dated September 2, 2020, identified two parental requests that the District refused:

- a. Parent request for an itemized daily schedule of [Student] during the meeting;
- b. Parent written request via email on 8/5/2020 for public taxpayer funds to support [REDACTED's placement at a private school in Pennsylvania, the REDACTED PRIVATE School. (J8)

26. On September 14, 2020, the Complainant returned the Prior Written Notice and the IEP, both signed with a handwritten note that "I agree that [REDACTED] is in need of special education services and agree that REDACTED requires services under IDEA; however, I do not agree that the program offered by the District is appropriate and therefore, per my Aug. 5, 2020 notice to the District, [REDACTED] will attend REDACTED PRIVATE School for the 2020-2021 school year." (J6, JX0201, J8, JX0224).

27. The District start date for students for the 2020-2021 school year was September 16, 2020. (J12, Hearing Trans. vol. 3, 582:6-15).

DISCUSSION

Issue No. 1: Whether the District proposed an IEP that provided the student with a FAPE.

A school district is required to provide a free appropriate public education (hereafter referred to as “FAPE”) to students requiring special education. They are further required to provide “an educational program reasonably calculated to enable a child to make progress in light of the child’s circumstances.” K.D. v. Downingtown Area Sch. Dist. 904 F.3d 248 (3d Cir. 2018) (quoting Endrew F., ex rel. Joseph F. v. Douglas City Sch. Dist. RE-1, 137 S.Ct. 988, 1001 (2017)). “Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Id.* at 255 (quoting Endrew F., 137 S.Ct. at 999). The IEP need not provide the maximum or optimal services but must be tailored to provide appropriate goals and supports to allow the child to make reasonable progress. *See C.F. v. Radnor Twp. Sch. Dist.*, No. 17-4765, 2019 U.S. Dist. LEXIS 41264 at 24-25 (E.D. Pa. Mar. 14, 2019) *citing* Parker C. through Todd v. W. Chester Area Sch. Dist., No. CV 16-4836, 2017 U.S. Dist. LEXIS 104068, 2017 WL 2888573, at *7 (E.D. Pa. July 6, 2017); *see also* Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 563(E.D. Pa. 2013) (citing P.P. ex rel. Michael P. v. W. Chester Areas Sch. Dist., 585 F.3d 727, 729-30 (3d Cir. 2009)) (stating that “maximal or optimal educational services or results are not guaranteed under the IDEA”). What a school district must do, however, is “identify goals for meaningful improvement relating to a student’s potential.” Coleman, 983 F. Supp. 2d at 563 (*citing* P.P. ex rel. Michael P., 585 F.3d at 729-30).

The September 2, 2020 IEP provides an appropriate placement.

The September 2, 2020, IEP provides an appropriate education program because it contains appropriate goals and supports to allow REDACTED to make reasonable progress in

school. The academic goals within the IEP address the Student's weaknesses related to mathematics, reading comprehension and writing comprehension, reading fluency, peer interactions, social skills, and application of learned skills. (J6).

The placement proposed for the Student for the 2020-2021 school year was also appropriate, as it was the least restrictive environment. The District proposed that Student be placed in a "B" setting. The proposed setting was a specialized classroom that is designed for children with both autism and mental health diagnoses. The classroom was staffed by a teacher of Autism, a paraprofessional (who was also a Registered Behavior Technician), and an Emotional Support Therapist (who was also a licensed clinical social worker). (Hearing Trans. vol. 1, 114:9-14, 115:2-19). The teacher was certified to teach students with autism and had obtained a board-certified behavioral analyst ("BCBA") degree. (Hearing Trans. vol. 1, 93:19-22). The emotional support therapist is a licensed clinical social worker ("LCSW"), who is also the district trainer for crisis response models. (Hearing Trans. vol.1, 115:18-24, 116:1-4). In addition to the staff assigned to the classroom, the Student would receive counseling services from REDACTED, a licensed professional counselor of mental health ("LPCMH") who would provide evidence-based therapies, including CBT, individually or as part of a dyad or group. (Hearing Trans. vol. 1, 224:7-11, 228:16-24, 232:9-24). The Student would spend between 49 and 79 percent of REDACTED day in the classroom, and the balance of the day with neurotypical peers.

The Parent testified that REDSACTED asked questions at the September 2, 2020 IEP meeting regarding the structure of the District program, in part because there was no breakdown provided as to which classes the Student would attend in the special education classroom versus the general education classroom and environment. (Hearing Trans. vol. 1, 103:10-21).

Additionally, the Parent wanted to know if the program would be remote, hybrid, or in person. If there would be the switching of classes? How would data collection happen while they were remote? What did the sensory room look like? What would breaks look like? (Hearing Trans. vol 3. 716:2-21). Although many of these questions could not be answered, given the uncertainty due to the pandemic, the panel finds that not having a specific schedule nor a physical description of the classroom and other areas of the school does not deprive the Student of FAPE.

The September 2, 2020 IEP provides an appropriate Behavior Support Plan.

The IEP also contained a draft Behavior Support Plan (“BSP”). The District behaviorist, REDACTED, requested behavioral data from REDACTED PRIVATE School on August 26, 2020. (J25, Hearing Test. vol. 1, 151:15-24, 152:1-12). When the data was not provided in time for the September 2, 2020 IEP meeting, the District utilized the existing REDACTED PRIVATE School behavior plan to create a draft plan for the Student. (Hearing. Trans. vol.1 166:18-23, 170:13-19). The behavior plan would be adjusted as data was collected on the Student’s transition back to the District. (J7, JX0207, Hearing Trans. vol.1, 168:22-24, 169:1-14). The District behaviorist testified that she would require approximately three weeks to collect the data needed to complete the plan. (Hearing Trans. vol. 1, 171:3-19). It was noted that the District was starting the school year remotely, and data would initially be collected remotely, and then when in-person instruction started, new data would be collected so as to update the BSP. (Hearing Trans. vol.1, 193:15-24, 194:1-24, 195:1-12).

Similarly, REDACTED testified that when a student transfers to the REDACTED PRIVATE School, and needs a BSP, REDACTED, the REDACTED PRIVATE SCHOOL BCBA, would collect behavioral data on a new child, in the classroom, playground, and across a

multitude of environments. (Hearing Trans. vol. 3, 654:4-10). REDACTED testified that the plan usually takes about two to three months to develop, as they like to give the child time to acclimate to a new environment. (Hearing Trans. vol. 3, 654:20-24). REDACTED further testified that REDACTED PRIVATE SCHOOL will then modify the plan if needed. (Hearing Trans. vol. 3, 655:3). The Student entered REDACTED PRIVATE SCHOOL in August 2019, and REDACTED was not provided with a BSP until October 7, 2019. (J20, JX0260, Hearing Trans. vol. 3, 658:12-17). The BSP was then revised on November 4, 2020. (J20, JX0260). The District was provided with a copy of the BSP that was in place at the end of the 2019-2020 school year. It is this plan on which they based their initial District BSP. (Hearing. Trans. vol.1 166:18-23, 170:13-19).

The BSP proposed as part of the IEP was a draft, but that does not constitute a denial of FAPE. It continued the components of the BSP in place at REDACTED PRIVATE SCHOOL. The District had experience with the Student, and would be able to quickly collect current data, and adjust the BSP accordingly. It is disingenuous for the Parents to argue that the absence of a final BSP (which was in large part still in draft because REDACTED PRIVATE SCHOOL failed to provide data, and the District did not have sufficient time or opportunity to collect their own) was reason to reject the IEP. A year earlier, the Parents placed the Student at REDACTED PRIVATE SCHOOL and there was no BSP in place until October 7, 2019, and that one was further modified on November 4, 2019. The panel does not find that the fact that the BSP was still in draft form constitutes a denial of FAPE.

The September 2, 2020 IEP provides appropriate related services.

The Parents also argue that because the IEP did not delineate the related services such as speech therapy and occupational therapy, it denied the Student a FAPE. The District as part of their reevaluation conducted a Speech/Language Evaluation and an Occupational Therapy Evaluation. (J3, J4). Both these evaluations support continued speech and occupational therapy services, but on a consultative basis. The District Occupational Therapist testified that based on functional performance, there was no need for direct services. (Hearing Trans. vol. 2, 395:17-24, 396:1-4). The District Speech Therapist noted that the Student required assistance generalizing skills that REDACTED already developed so they are more natural. (Hearing Trans. vol. 1, 331:9-21). In addition, the Student was not receiving speech and language services at REDACTED PRIVATE SCHOOL. (Hearing Trans. vol. 1, 339:20-24, 340:1-6). The panel does not find that the fact that occupational therapy and speech therapy were provided on a monthly consultative basis as opposed to direct service denied the Student of a FAPE.

In conclusion, as to the issue of whether the District provided the student with a FAPE for the 2020-2021 school years: we **find** that the September 2020 IEP was appropriate and provided a FAPE to the Student and therefore, we **find** for the Respondent on this issue.

Issue No. 2: Whether the Student is entitled to tuition reimbursement for the REDACTED PRIVATE school for 2020-2021 school year.

Parents, acting on behalf of the Student, have the right to reimbursement of tuition at a unilateral placement if the Student's IEP is not appropriate and does not provide a FAPE, and if they demonstrate that the unilateral placement is appropriate. *See H.L. v. Downingtown Area School District*, 624 Fed. App'x 64 (3d Cir. 2015); *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993) *Upper Freehold Reg'l Bd. of Educ. v. T. W.*, 496 F. App'x 238,

242 (3d Cir. 2012). The test is conjunctive and both parts must be met in order for tuition reimbursement to be granted. As found above, the District did offer an appropriate IEP that would have conferred a FAPE to the student. Therefore, the Student does not meet the first prong of the test for reimbursement of a unilateral placement.

Since the first prong of the test for such reimbursement has not been met, a determination of whether the REDACTED PRIVATE School is appropriate for the Student is not warranted here. As a result, we **find** the Student is not entitled to reimbursement for tuition at the REDACTED PRIVATE School.

CONCLUSION

Our findings as to the issues raised are as follows:

1. Did Respondent provide the Student with a FAPE for the 2020-2021 school year?

We find the Respondent did provide the Student with a FAPE for the 2020-2021 school year.

2. Is the Student entitled to tuition reimbursement for the REDACTED PRIVATE

School for the 2020-2021 school year? We find the Student is not entitled to tuition reimbursement for the REDACTED PRIVATE School for the 2020-2021 school year.

3. Is the Complainant entitled to reimbursement of attorney fees? We do not have

jurisdiction to determine attorney fee awards, and therefore decline to make a finding on this issue.

Beth C. Manes Esq., Panel Chairperson

Date

Joe-Anne Corwin, Educator Panelist

Date

John Fletcher/s

November 4, 2021

Jon Fletcher, Layperson Panelist

Date