

DELAWARE DEPARTMENT OF EDUCATION

SPECIAL EDUCATION DUE PROCESS HEARING PANEL

In the Matter of
REDACTED

Complainant,

DE DP #21-05

v.

REDACTED School District

Respondent.

Hearing Panel:

Jessica Weinberg, Esq., Panel Chairperson

Vicki McGinley, Ph.D., Educator Panelist

Paul King, Layperson Panelist

Representatives:

Alex T. Corbin, counsel for Complainant

Jennifer Kinkus, counsel for Respondent

DECISION

PRELIMINARY MATTERS

The Complainant, REDACTED, (hereafter referred to as “Student”) through REDACTED Parents (hereinafter jointly referred to as “Complainants”) filed a Due Process Complaint on November 18, 2020. Prior to the hearing, the Respondent filed a Sufficiency Challenge and Motion to Dismiss. In an Order dated December 8, 2020, the hearing panel denied both requests. Said Order is incorporated herein by reference.

A prehearing conference was convened in this matter on December 8, 2020 via Zoom. As a result of said conference, a Prehearing Conference Order was entered. Said Order is incorporated herein by reference. The parties agreed that the Respondent would introduce evidence first.

Prior to the hearing, the parties filed a motion to extend the hearing panel's decision deadline.¹ The motion was granted. As a result, the deadline for the hearing panel's decision was extended to February 19, 2021.

The hearing was conducted via Zoom on three consecutive dates: on January 15, 2021, January 18, 2021 and January 19, 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 and briefs. 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 provided the Student with a FAPE for the 2019-2020, and 2020-2021 school years?

2) Whether the Student is entitled to tuition reimbursement for the REDACTED PRIVATE school for the 2019-2020 and 2020-2021 school years?

3) Whether the student is entitled to compensatory education services for the 2017-2018 and 2018-2019 school year?

¹ A joint request to extend the 45 day timeline to February 19, 2021 was submitted by the parties on December 9, 2020 via electronic mail. However, the hearing panel was not aware of the submission until the first day of the hearing.

4)Whether the Complainant is entitled to reimbursement of attorney fees.²

FINDINGS OF FACT

Based upon the parties' joint stipulations of facts (hereafter referred to as "JS") as contained in their joint pre-hearing memorandum, the testimony, and the evidence in the record³, the hearing panel makes the following findings of fact:

1. Student is the REACTED of REDACTED PARENTS. (JS
2. Student was born on REDACTED and is currently REDACTED years old. (JS. 2)
3. Student attended REDACTED School 1 in the REDACTED School District (the "District") beginning with the 2013-2014 school year (REDACTED GRADE) until the 2018-2019 school year (REDACTED grade). (JS 3)
4. At some point during REDACTED grade, the Student received Tier Reading Interventions.

However, the Tier level is not known. (Hearing Tr. vol. 1, 59:16-20; Hearing Tr. vol. 2, 476:18-24.)

5. Student received Tier III Reading Interventions for 150 minutes per week during the 2017-2018 (Grade REDACTED) school year. From September 2017 to December 2017, Road to Reading was used to address phonics and decoding. From December 2017 to June 2018, the Read Naturally Fluency program was used to address comprehension and fluency. (JS 5)

²The hearing officer advised Complainant's counsel that the hearing panel does not have authority to render a determination regarding attorney's fees. That authority lies solely with the courts. 20 U.S.C. § 1415(i)(3)(A).³The parties agreed upon joint exhibits in advance of the hearing ("JE").

6. Student ended the fourth marking period of REDACTED grade with a “3” which corresponds with “progressing.” (JE 32-156)

7. Student received Tier II Reading Interventions for 100 minutes per week. From September 2018 to June 2019 the Read Naturally Fluency program was used to address comprehension and fluency. In October 2018, Student received phonics/decoding, fluency and work recognition interventions. From October 2018 through November 2018 Student received support for vocabulary and fluency. From December 2018 through June 2019, Student received support for vocabulary and comprehension. (JS 7)

8. Student ended the fourth marking period of REDACTED grade with a “2” which corresponds with “needs improvement.” (JE 32-156)

9. Student is currently in REDACTED grade (2020-2021 school year) and is attending The PRIVATE School in REDACTED, Delaware. (JS 8)

10. Student also attended The PRIVATE School for the 2019-2020 school year (REDACTED grade). (JS 9)

11. If Student had attended REDACTED grade in the District, REDACTED would have attended REDACTED School 2. (JS 10)

12. Student did not attend any school days at REDACTED School 2, or any other school in the District, during the 2019-2020 school year. (JS 23)

13. During REDACTED grade, the Parents requested an evaluation from the Child Study Team (“CST”) due to their concerns related to reading however, their request was denied.

14. The Student's REDACTED grade teacher recommended that testing be conducted. Initial testing was conducted in REDACTED grade during the 2017-2018 school year, however, the Student was not found eligible for special education. (Hearing Tr. vol. 2, 478:10-18.)

15. At the request of the Complainants, the Student was referred to the CST due to concerns related to reading comprehension skills and low confidence. (JE 23-124)

16. Student received a psychoeducational evaluation performed by Certified School Psychologist. (hereafter referred to as "SCHOOL PSYCHOLOGIST"). The dates of the evaluation were January 12, 2018, January 18, 2018, January 31, 2018 and February 2, 2018. (JS 11)

17. At the time of SCHOOL PSYCHOLOGIST'S evaluation, the Student was REDACTED years REDACTED months old and in REDACTED grade (JE 23-124). On the WIAT-III subtests, the Student's scores for reading comprehension fell in the 2.9 grade equivalency and 8.4 age equivalency, word reading fell in the 2.6 grade equivalency and 8.4 age equivalency, pseudoword decoding fell in the 3.1 grade equivalency and 8.0 age equivalency, and oral reading rate fell in the 2.6 grade equivalency and 7.8 age equivalency. REDACTED scored in the low average range in the fluid reasoning index of the Wechsler Intelligence Scale for Children - Fifth Edition. All other tests administered fell in the Average to above average range. ⁴(JE 23)

18. No classroom observation of the Student was included in the Psychological Evaluation. (Hearing Tr. vol. 1, 106.)

⁴The Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), Wechsler Individualized Achievement Test-Third Edition (WIAT-III) and Test of Written Language-Fourth Edition (WIAT-III) were administered. (JE 23-124)

19. Student demonstrated symptoms of anxiety during the Psychological Evaluation. In light of anxiety exhibited by the Student during Pearson's testing, Respondent requested the Complainants complete behavior rating scales. (JE 23-133 and T (Hearing Tr. vol. 1, 84:10-16; Hearing Tr. vol. 2, 483-484:14-4.) This was administered by Pearson after February 6, 2018. (JS 13)

20. On the Behavioral Assessment for Children, the mother's ratings fell within the At-Risk range for anxiety, depression, withdrawal and social skills. The teacher rating fell within the average range. (JE 24-136)

21. An Addendum to the Pearson Evaluation Report was developed which included the results of the Behavior Assessment. (JE 17)

22. On February 6, 2018, Student's Individualize Education Program ("IEP") Team determined that Student did not meet the eligibility criteria to receive special education and related services under the Individuals with Disabilities in Education Improvement Act of 2004, 20 U.S.C. § 1400, *et seq.* ("IDEA"). (JS 12)

23. The Evaluation Summary Report dated February 6, 2018 included the following screening assessments: Star Reading, Star Math, DIBELS, Informal Decoding Inventory Pt. 1, Road to Reading Levels Assessment, DIBELS NEXT 04 BOY, DIBELS NEXT 01 EOY, DIBELS NEXT 01 MOY, DIBELS NEXT01 BOY, Smarter Math, Gr REDACTED Spring Math Universal Screening Tool, Gr REDACTED Winter Math Universal Screening Tool, Gr REDACTED Fall Math Universal Screening Tool, REDACTED Spring Math Universal Screening Tool, KN Winter Math Universal Screening Tool, REDACTED Fall Math Universal Screening Tool, Smarter ELA; Results from the Psychological Evaluation. The "Observations and Recommendations by Teacher(s) and Related Services Provider(s)," The

“Learning Disability” section was not completed, and the results of the Behavior Assessment System for Children are not included. (JE 22)

24. The Star Reading Assessment administered on January 12, 2018 revealed that the Student achieved a 3.9 grade equivalency. (JE 22)

25. Student was found eligible for a 504 Plan on June 12, 2018. Student’s teachers were responsible for implementation and monitoring of the 504 Plan. (JS 15)

26. The 504 Plan included the following accommodations:

- a. Check for understanding of direction and that directions are being followed;
- b. Monitor progress of work completion for accuracy;
- c. Encourage [Student] to ask for help or clarification when REDACTED does not understand;
- d. Allow extra time to complete assignment and assessments, as needed;
- e. Read question to [Student], as needed and when permitted;
- f. Refocus attention, as needed;
- g. Periodically, have [Student] repeat back and/or summarize direction and concepts;
- h. Utilize tools such as “Peer Teaching” to help reinforce the learning;
- i. Preferential seating, near the site of instruction and away from distractions;
- j. Provide predictable routines and a warning regarding any changes in routine. (JE 21)

27. Complainants requested an Independent Educational Evaluation (“IEE”) for Student and the District granted that request on December 21, 2018. (JS 16)

28. Dr. Harris Finklestein conducted the IEE and the report was issued on or about February 4, 2019 (JS 17)

29. Dr. Finkelstein completed testing in January and February 2019. He did not observe the Student in school. Dr. Finkelstein diagnosed the Student with Attention-Deficit/Hyperactivity Disorder, predominantly inattentive presentation, mild. In his report he made the following recommendations:

- a. small group instruction whenever possible as REDACTED learns best in situation with minimal distractions and heightened supports from adults;
- b. seating within the classroom that is relatively free of distractions and offers easy access to REDACTED teacher. It is helpful for REDACTED teacher to cue REDACTED in a subtle fashion or to offer REDACTED a brief break should REDACTED attention waiver;
- c. When speaking to [Student] it is important to utilize brief statements with proper intonation to emphasize important points;
- d. It is important to accompany verbal information with visual reference points. [Student] tends to benefit from the presentation of illustrations, models or demonstrations so that REDACTED does not have to hold as much verbal information;
- e. [Student] tends to prefer highly predictable situations. It is helpful to create schedules and lists so that REDACTED can anticipate each step of a process;
- f. Prior to the introduction of new skills, it is helpful to have the Student demonstrate previously learned skills;
- g. Dividing tasks into multiple parts and providing extra adult feedback following each work component. It would also be beneficial for the Student to be provided with a system where REDACTED can indicate to REDACTED teacher that REDACTED needs help or more time without REDACTED classmates being aware of the request;
- h. Preview reading material so REDACTED can anticipate the content of the materials as REDACTED reads it. REDACTED should be encouraged to make predictions;
- i. Provide clarification of directions for in-class assignments and tests. Support should be provided discreetly and away from other students;
- j. Pre-teaching of new subjects so that REDACTED has some familiarity when introduced to the new subjects at school;
- k. Be referred for art therapy.
- l. Consult with medical professional to determine if medical intervention may be useful in enhancing REDACTED attention and diminishing REDACTED anxiety.
(JE 19)

30. On or about April 11, 2019, the Complainants sent a letter to the District addressed to “To Whom It May Concern” outlining areas of concerns related to the Student and REDACTED diagnosis of Generalized Anxiety Disorder. They also requested school based counselling and an IEP under the classification of Other Health Impaired- General Anxiety Disorder. (JE 18)

31. Student was found to meet the eligibility requirements to receive special education and related services under the IDEA in the category of Other Health Impairment on May 7, 2019. (JS 18)

32. Student’s Initial IEP was developed on June 12, 2019 with an initiation date of September 3, 2019. (JS 19)

33. On or about August 21, 2019, the Parents sent REDACTED a letter dated September 20, 2019⁵ stating the programming, services and placement the District is offering does not meet Student’s needs. In the event that an appropriate program could not be provided by the District, the Complainants “intend to place” the Student at REDACTED PRIVATE School for the 2019-2020 school year and asked the District to “fund the tuition.” (JE 13)

34. The Parties conducted an IEP meeting on or about August 26, 2019, which the family attended. (JS 20)

35. A Revised IEP was developed for Student on August 26, 2019 with an initiation date of September 3, 2019. (hereinafter “August 2019 IEP”) (JS 21.) The IEP included the following:

- a. 90 minutes small group instruction every other day;

⁵The letter is dated September 20, 2019, but based on the content of the letter and the testimony surrounding the letter, it is accepted that it was delivered on or about August 21, 2019. (Hearing Tr. vol. 1, 268:6-18)

- b. Direct specialized instruction in evidence-based reading comprehension strategies 3 times each week for 15 minutes each session;
- c. Direct specialized instruction in question types and formulation of answers 3 times each week for 15 minutes each session;
- d. Specialized instruction in emotional and self-regulation and how to apply them (generalize) to the general education setting and life, 3 times each week for 10 minutes each session;
- e. Individual counseling services 2 times each week for 30 minutes each session; and
- f. Consultative counseling services 1 time each week for a total of 40 minutes each month.

36. In addition, the August 2019 IEP included goals in the areas of reading comprehension, written responses to text-based comprehension questions, and emotional and self-regulation. Classroom modifications included:

- a. teacher modeling and scaffolding of how to locate clues and make inferences;
- b. allow extra time to read and answer questions;
- c. break assignments into manageable chunks of work;
- d. frequent checks for understanding;
- e. highlight important information in text;
- f. teacher and peer modeling;
- g. student re-reading passages;
- h. opportunities for choral reading;
- i. sticky note summaries in story;
- j. whisper phone as needed;
- k. extended time to process;
- l. simplify directions;
- m. seating close to source of instruction;

- n. seating that limits distractions as much as possible;
- o. non-verbal clues to attend;
- p. further explanations of concepts found in fictions stories that may require additional information in order for REDACTED to process;
- q. previewing important content & vocabulary related to topics taught in content classes during Learning Support block;
- r. opportunities to answer comprehension questions and apply taught strategies on REDACTED instructional level to increase independence and close the gap to meet grade level expectations.
- s. multiple readings of questions;
- t. highlight key information in questions;
- u. orally reading REDACTED written responses to check for meaning;
- v. peer editing of written work;
- w. extended time to process;
- x. examples of responses that meet standard as a model;
- y. visual schedules of lists of events that are predictable;
- z. forewarning of changes to expectations/schedules;
- aa. cues as needed to utilize anxiety-reducing strategies taught in counseling;
- bb. a discreet system with teachers where [Student] can ask for help or indicate a need for a break;
- cc. frequent check ins during academic tasks and activities to ensure understanding and comprehension of the task or activities;
- dd. consultative services for parents, teachers and therapists working with [Student], so they are aware of the strategies that REDACTED is learning and can support REDACTED educational environment;
- ee. weekly communication with parents to provide information regarding the strategies that are being taught in the counseling sessions;
- ff. Daily check ins and check outs (AM and PM) with a consistent point person (adult staff member) to monitor emotional/academic status. (JS 21)

37. The first day of the 2019-2020 school year for the District was September 3, 2019.
(JS 22)

38. On September 3, 2019, the Complainants sent an email to REDACTED and REDACTED stating that they continued to “have concerns about the IEP and the services” that the District can provide. They then stated they were “moving forward with placing [Student] in a private school.” (JE 34)

DISCUSSION

Issue No. 1: Whether Student is entitled to tuition reimbursement for the REDACTED PRIVATE School for the 2019-2020 and 2020-2021 school years?

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).

In determining if a FAPE was provided, the first area of inquiry is if the IEP is appropriate and enables a child to make progress in light of the child’s circumstances. 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 August 2019 IEP which ended on November 7, 2019 was developed over multiple meetings, after consideration of all the evaluations, including Dr. Finklestein's evaluation, and with input from the teachers and staff at both the REDACTED School 1 and REDACTED School 2. The August 2019 IEP included most of the recommendations from Dr. Finkelstein's report. The IEP contained measurable goals and objectives and appropriate accommodations and supports to address the Student's reading and social/emotional needs. Additionally, the short-term IEP allowed for close monitoring of the Student's progress which would have enabled appropriate IEP amendments to be made, if necessary. Although no specific goal was included for reading fluency, we do not believe the lack of this goal, particularly because REDACTED was only slightly below grade level in this area, would be dispositive of a lack of a FAPE. As to the issue of whether the District provided the student with a FAPE for the 2019-2020, and 2020-2021 school years: we **find** that the August 2019 IEP was appropriate and provided a FAPE to the Student and therefore, I **find** for the Respondent on this issue.

Issue No. 2: Whether the Student is entitled to tuition reimbursement for the

REDACTED PRIVATE school for the 2019-2020 and 2020-2021 school years?

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). 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.

Whether Student is entitled to tuition reimbursement for the REDACTED PRIVATE School for the 2019- 2020 and 2020-2021 school years, we **find** Student is not entitled to reimbursement for tuition at REDACTED PRIVATE School because they do not meet the first prong of the test for such reimbursement. Thus, a determination of whether the REDACTED PRIVATE School is appropriate for the Student is not warranted here.

Issue #3: Whether the student is entitled to compensatory education services for the
2017-2018 and 2018-2019 school year?

A student is entitled to compensatory education when a school district fails in its obligations under the IDEA. A court "is authorized to grant 'such relief as the court determines is appropriate,' includingcompensatory education." G.L. v. Ligonier Valley School District Authority, 802 F.3d 601, 608 (3d Cir. 2015) (*quoting* A.W. v. Jersey City Pub. Schs., 486 F.3d 791, 802 (3d Cir. 2007)) Compensatory education is to attempt to place the student at the same position they would have been if the school district had provided the appropriate educational supports in a timely manner. *See Id.* at 608, *See also*, Reid v. District of Columbia, 401 F.3d 516, 518, 365 U.S. App. D.C. 234 (D.C. Cir. 2005). This "judicially-created remedy . . . has received the imprimatur of this Court," D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 496 (3d Cir. 2012), and reflects the "broad discretion," Bucks Cnty. Dep't of Mental Health/Mental

Retardation v. Pennsylvania, 379 F.3d 61, 67 (3d Cir. 2004), that Congress has granted to the courts "to remedy the deprivation of the right to a free appropriate education," Carlisle Area Sch. v. Scott P., 62 F.3d 520, 536 (3d Cir. 1995).

Complainants contend that Respondent failed to identify the Student as one requiring special education services, and that such obligation exists regardless of whether REDACTED failed or was retained in a grade. In other words, the severity of the disability should not be taken into account. Complainants further contend that the Student did not make meaningful progress since REDACTED never reached grade level standards for REDACTED or REDACTED grade despite receiving Response to Intervention ("RTI") services and a 504 Plan, which renders the Student eligible under the classification category of Specific Learning Disability as per Delaware Administrative Code section 925.90. (Compl. Closing pp. 4, 6, & 7) As such, the Student is entitled to compensatory education services for this time period.

Respondent contends that the Student should not have been identified as a student with a disability since the Student was routinely promoted from grade to grade, REDACTED did not exhibit a pattern of strengths and weaknesses, nor was REDACTED failing to respond to the interventions REDACTED was receiving. Specifically, Respondent maintains that the Student's progression from Road to Reading (phonics/decoding) to Read Naturally (comprehension/fluency) within Tier III RTI demonstrates that the Student was making progress. Relying on the Student's Star Scores and progress report, Respondent maintains that DE Regulation § 925.12.8.5 which requires a mandatory referral for an initial evaluation if, after 18 "weeks of Tier 3 interventions...a child has not made sufficient progress toward end-of-year benchmarks, was not triggered here. (Resp't Closing p. 33)

Under IDEA, school districts must ensure that children with disabilities or children who are reasonably suspected of having disabilities are identified, located and evaluated and that a

practical method is developed and implemented to determine which children with disabilities are currently receiving special education and related services. This obligation is referred to as the school district's "Child Find" obligation and is a continuing obligation. IDEA § 612(a)(3); 34 C.F.R. §300.111; 14-900 Del. Code Regs. § 11; Ridley School District v. M.R. and J.R. ex. rel. E.R., 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); J.S. ex rel. B.S. v. Green Brook Twp. Pub. Sch. Dist., Civil Action No. 19-18691 (MAS) (ZNQ), 2020 U.S. Dist. LEXIS 224025 (D.N.J. Nov. 30, 2020).

The Delaware Administrative Regulations define the purpose of its Child Find provision as "to identify those individuals who require special education; and identify individuals who need general education interventions." 14-923 Del. Code Regs. § 11.0 (Lexis Advance through Delaware's Register of Regulations: Volume 24, Issue 8, February 1, 2021).

Under IDEA, a child with a disability is defined as:

- (i) A child with a mental impairment, hearing impairments, including deafness, speech or language impairments, visual impairments (including blindness), social emotional disturbances (refer to in this title as 'serious emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities; and
- (ii) Who by reason thereof needs special education and related services.

IDEA §602(3); 14-923.3.0.

When a school district evaluates a student to determine whether [he or she] has a disability, the student must be evaluated in all areas of suspected disability. The school district must consider a variety of assessments, including observations; the evaluation must be sufficiently comprehensive, and the evaluation must include consideration of parental input. IDEA §614; 34 C.F.R. § 300.301 through 305.

An IEP Team may determine that a child has a specific learning disability if:

(iii) The child does not achieve adequately for the child's age or to meet State approved grade level standards in one of more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State approved grade level standards.

- i. Oral expression.
- ii. Listening comprehension.
- iii. Written expression.
- iv. Basic reading skill.
- v. Reading fluency skill.
- vi. Reading comprehension.
- vii. Mathematics calculation.
- viii. Mathematics problem solving; and

(iv) The child does not make sufficient progress to meet age or State approved grade level standards in one or more of the areas identified above when using a process based on the child's response to scientific, research-based intervention. 14-925 Del. Code. Reg. § 9.0-9.1.2

School districts are required to establish and implement procedures to determine whether a child responds to scientific RTI for reading and mathematics. Public agencies shall use rubrics approved by the Department of Education to evaluate and select programs of instruction and Tier 2 and Tier 3 interventions for reading and mathematics. The RTI procedures shall include tiers and types and duration of services and interventions described in 12. 6 through 12. 10. 14-925 Del. Code Reg. § 12.0

Tier III intervention shall be a minimum of one hundred and fifty (150) minutes per week. Tier III interventions shall be delivered for at least 6 school weeks. Progress shall be monitored weekly against established benchmarks. 14-925 Del. Code Reg. § 12.8.1 through 12.8.2

If, after 6 school weeks of Tier III interventions (or up to a total of 18 school weeks of interventions), a child has made progress toward benchmarks, but is not on a trajectory to meet end-of-year benchmarks, the instructional support team shall meet to review the child's program and progress, to assure that the child is receiving differentiated needs-based instruction. In addition, the instructional support team's review shall include fidelity of program implementation, pacing, and appropriateness of instructional groupings. Based on its review, the instructional support team shall determine whether: additional assessments are required; additional changes to instructional or behavioral methods are required; or the child shall be referred for an initial evaluation for special education services. 14-925 Del. Code Reg. § 12.8.4

If, after an additional 6 school weeks of Tier III interventions (or up to a total of 24 school weeks of interventions), a child has not made sufficient progress toward end-of year benchmarks, the instructional support team shall refer the child for an initial evaluation for special education services. 14-925 Del. Code Reg. § 12.8.5

REDACTED Grade

Based on the testimony of REDACTED, a special education teacher, formerly an educational diagnostician at the REDACTED School 1, the Student received Tier III interventions for reading the entire fourth grade year and Tier II interventions the entire REDACTED grade year. (Hearing Tr. vol. 1 258:24, Hearing Tr. vol 1. 259:1-5.)

REDACTED conducted an observation of the Student in REDACTED classroom and REDACTED was part of the team that: found the Student ineligible for an IEP, monitored REDACTED progress with the 504 Plan

accommodations and RTI progress, subsequently found REDACTED eligible for an IEP, and developed the IEP.

REDACTED also confirmed that the Student was not achieving adequately with other peers REDACTED same age or state approved grade level standards, and that REDACTED progress in the Star assessment for REDACTED grade, was variable, which was not sufficient. (Hearing Tr. vol. 1, 276:10.) While REDACTED required prompting to concede this information, we found REDACTED to be a credible witness in light of REDACTED involvement in the Student's educational oversight and planning.

At the end of the school year, Student was "Progressing" in Reading, Writing, Foundational Skills, and Language as noted by REDACTED REDACTED grade Progress Report where REDACTED received "3s" in each of these areas.

The Student also received a "Below Standard" rating on the English language arts/literacy assessment given in spring 2018, the end of REDACTED REDACTED-grade year. REDACTED had an overall achievement level of 1 which correlates to "Does not meet" and is defined as "The student has not met the achievement standard and needs substantial improvement to demonstrate the knowledge and skills of state standards in English language arts/literacy." (JE 39-176.)

REDACTED, the Student's REDACTED-grade teacher at the REDACTED School 1 testified that REDACTED had the Student in an extra small group reading instruction to work on lower level books for fluency and this was separate and apart from REDACTED Tier reading support taught by another teacher (Hearing Tr. vol. 1 44:21-24 and Hearing Tr. vol. 1, 45:1-13.) In addition, in response to the Student feeling anxious reading at home, REDACTED would keep REDACTED in for recess, pull REDACTED from the Y in the morning or after school to work with REDACTED in a fun way on reading. (Hearing Tr. vol 1. 50: 12-24 and Hearing Tr. vol. 1, 51:1-11.)

REDACTED Grade

This difficulty in Language Arts- Reading continued into the Student's REDACTED grade year where REDACTED received grades of "1" indicating "Below Standard" in Foundational Skills for the first two marking periods, progressing to grades of "2" in the last two marking periods indicating "Needs Improvement." In Reading, REDACTED received a grade of "2" all four marking periods. (JE 32.) REDACTED, the Student's REDACTED grade ELA teacher and RTI instructor at REDACTED School 1, testified that the Student "absolutely" struggled in reading, specifically fluency and comprehension. (Hearing Tr. vol. 1, 180:19-20.) REDACTED further stated that the Student started the year focusing on fluency then REDACTED moved into fluency and comprehension, and then in November, REDACTED went into the vocabulary and comprehension group where REDACTED remained for the rest of the year. (Hearing Tr. vol. 1, 181: 11-24.) REDACTED further explained that REDACTED designation of "Needs Improvement" on the Student's REDACTED grade report card, meant that "the skill isn't mastered at a REDACTED grade level." (Hearing Tr. vol. 1, 182: 9-15.) In addition, REDACTED testified that the Student's DIBELS scores for the end of the year in REDACTED grade revealed that REDACTED reading fluency score of 113 words per minute was slightly below average. (Hearing Tr. vol. 1, 266: 12-17.)

REDACTED also described the Student as "a great student in every aspect but there were times STUDENT just didn't understand what was going on and kind of faded out." (Hearing Tr. vol. 1, 187: 1-5.)

On cross examination, she conceded that the Student never achieved a REDACTED grade level in reading. (Hearing Tr. vol. 1, 198: 3-9.) REDACTED also acknowledged that REDACTED could not recall instances in which the Student would approach REDACTED when REDACTED was having difficulty as opposed to REDACTED checking in with the Student. (Hearing Tr. vol. 1, 193: 1-14.)

We found REDACTED testimony to be particularly credible since REDACTED had a strong understanding of the Student's reading skills and REDACTED spoke candidly about them, without being prompted to do so on cross-examination. We believe REDACTED testimony strongly supports that the Student did not meet grade level expectations for REDACTED grade in reading, that REDACTED did not make sufficient progress utilizing RTI, and that STUDENT should have been referred for testing.

No testimony was provided by Respondent to demonstrate that Respondent's instructional support team reviewed the "fidelity of program implementation, pacing, and appropriateness of instructional groupings and determined whether: additional assessments are required; additional changes to instructional or behavioral methods are required; nor did the instructional team refer the Student for an initial evaluation for special education services as required by Del. Code Reg. § 12.8.4.

In the instant case, we **find** that the Respondent failed in its Child Find obligation when it did not appropriately consider the failure of the Student to progress past Tier III supports for over 24 weeks. We also **find** that REDACTED did not make sufficient progress toward end-of-year benchmarks in REDACTED REDACTED-grade year, the 2017-2018 school year as is evidenced by REDACTED progress report and Delaware Department of Education English Language Arts/Literacy Assessment. Further, We find that REDACTED did not make sufficient progress toward end-of-year benchmarks in the REDACTED-grade year notwithstanding RTI supports and a 504 Plan as is evidenced by REDACTED 2018-2019 progress report. We further find the Respondent failed to comprehensively review all data and wrongfully determined that the Student did not meet the eligibility requirements for a Specific Learning Disability as defined above. Therefore, in response to Issue #3: whether the Student is entitled to compensatory education services for the 2017-2018 and 2018-2019 school years, we **find** that the Student is entitled to compensatory education for the 2017-2018 and 2018-2019 school years.

In determining the statute of limitations related to the provision of FAPE and compensatory education, we look first to determine the “knew or should of known” date (“KOSHK”). This is the date when the Complainants should have known that they had a claim against the District related to the education of the Student. G.L. v. Ligonier Valley School District Authority, 802 F.3d 601, 623 (3d Cir. 2015). Parents have two years from the KOSHK date to file a claim against a school district regarding the education of a student. *Id.* at 624.

We **find** that the KOSHK date is February 4, 2019, the date the independent educational evaluation by Dr. Finklestein was completed. This report provided the Complainants with a comprehensive assessment of all the Student’s needs- educational, emotional, and concentration for the first time. It informed the Complainants and the Respondent, with regard to the needs of the Student. It was this evaluation that led the Respondent to finally offer the Student an IEP. While the Complainants believed their REDACT was eligible for an IEP due to reading difficulties, they did not know why and what REDACT needed which is specifically the reason they asked for an Independent Evaluation. The evaluation by Dr. Finklestein gave Complainants a better understanding of the Student’s challenges and needs. (Hearing Tr. vol. 2, 498-499:16-2; Hearing Tr. vol. 2, 503.) Lastly, Respondent failed to produce any evidence to demonstrate that any other date should be considered. The date the Complaint was filed, November 18, 2020, is within the two-year statute of limitations.

The two-year statute of limitations relates to the KOSHK date, and is not a limitation on the provision of compensatory education. *See Id.* at 624 noting “[t]he statute of limitations goes only to the filing of the complaint, not the crafting of remedy. Also, at 624, “[C]ompensatory education must cover the entire period and must belatedly provide all education and related services previously denied and needed to make the child whole.” In the Third Circuit, this standard

has been further refined and “children deprived of a FAPE are 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.’” Rayna P. v. Campus Cmty. Sch., No. 16-63, 2018 U.S. Dist. LEXIS 135739, at *19 (D. Del. Aug. 10, 2018), (quoting Ligonier Valley School, 802 F.3d at 618-19).

The purpose of providing compensatory education is to “place a disabled [child] in the same position they would have occupied but for the school district’s violations of IDEA Ligonier Valley School, 802 F.3d at 608. Further, “a child’s right to compensatory education ‘accrue[s] from the point that the school district knows or should know’ of the injury to the child, and the child ‘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.’” *Id.* at 618-619, quoting M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 396-97 (3d Cir. 1996) Based on the testimony of the REDACT, the Student was receiving RTI services during STUDENTS third-grade school year. (Hearing Tr. vol 2, 476:11-13.) This was confirmed by REDACT REDACT-grade teacher, REDACT testimony. (Hearing Tr. vol. 1, 59:16-20) The Complainants also requested a CST evaluation that year. (Hearing Tr. vol.2, 478:14-18.) Therefore, the District knew or should have known prior to the start of the Student’s REDACT grade year, 2017-2017 school year, that REDACT was in need of specialized education and related services.

As we seek to place the Student at the same position REDACT would have occupied but for the denial of FAPE, we considered several different options. First, a full school day hour for hour award for both the 2017-2018 and 2018-2019 school years. However, this was quickly discarded because although the Student did not receive a FAPE for those school years, REDACT did receive some benefit of REDACT education. REDACT received RTI interventions and a 504 Plan, which while separately

or in combination did not provide REDACT a FAPE, they did provide REDACT some supports to partially benefit from REDACT education. Therefore, we do not believe there is sufficient basis to order this remedy. We also considered requiring the District to provide specialized instruction and counseling to the Student. However, given that the Student is now enrolled at a private school providing such services outside the school day may not be possible nor no longer appropriate. Therefore, we look toward the IEP that was ultimately proposed by the District, and that we determined provides an appropriate program and supports to allow the Student to make meaningful progress in light of REDACT unique circumstances. That IEP provides for:

1. 90 minutes small group instruction every other day;
2. Direct specialized instruction in evidence-based reading comprehension strategies 3 times each week for 15 minutes each session;
3. Direct specialized instruction in question types and formulation of answers 3 times each week for 15 minutes each session;
4. Specialized instruction in emotional and self-regulation and how to apply them (generalize) to the general education setting and life, 3 times each week for 10 minutes each session;
5. Individual counseling services 2 times each week for 30 minutes each session; and
6. Consultative counseling services 1 times each week for a total of 40 minutes each month

Neither party presented evidence regarding the school calendars for the 2017-2018 and 2018-2019 school years. However, based on published calendars by the Delaware Department of Education there were 171 school days in the 2017-2018 school year and 170 school days in the 2018-2019 school year. See <https://education.delaware.gov/about-doe/calendars/>

Calculating on an hour per hour basis for the specialized instruction and related services⁶ we arrived at 424 hours of compensatory education that is required to be provided to the Student.

Respondent has not provided a rate at which the Student should be compensated other than to state it should not be based on the tuition at REDACTED PRIVATE SCHOOL. (R Closing Argument, page 52.) Complainants have stated that a rate of \$70 - \$75 an hour is appropriate based on case law. (Hearing Tr. vol. 1, 37:8-10.) The case law in this area supports an hourly rate of \$75. *See* Rayna P. at *25, *See also* M.P. v. Campus Cmty. Sch., No. 16-151, at *23 2018 U.S. Dist. LEXIS 173907 (D. Del. Oct. 9, 2018), *See also*, Heather D. v. Northampton Area Sch. Dist., 511 F. Supp. 2d 549, 560 (E.D. Pa. 2007).

We have determined a compensatory education award of **\$31,800** should be awarded to the Student. This is based on 424 hours of specialized education and related services that the Student was entitled to for the 2017-2018 and 2018-2019 school year. As noted above, this is based on the August 2019 IEP which we found provided the Student a FAPE. The breakdown is as follows:

1. 90 minutes small group instruction every other day (90 X 85 days= 7650 minutes);
2. Direct specialized instruction in evidence-based reading comprehension strategies 3 times each week for 15 minutes each session (15 X 3 X 26 weeks = 1170 minutes);
3. Direct specialized instruction in question types and formulation of answers 3 times each week for 15 minutes each session; (15 X 3 X 26 weeks = 1170 minutes);
4. Specialized instruction in emotional and self-regulation and how to apply them (generalize) to the general education setting and life, 3 times each week for 10 minutes each session (10 X 3 X 26 weeks = 780 minutes);

⁶ ½ of 170 school days is 85 school days, we are assuming 10 months in the school calendar and 26 weeks.

5. Individual counseling services 2 times each week for 30 minutes each session; (30 X 2 X 26 weeks = 1560 minutes) and
6. Consultative counseling services 1 time each week for a total of 40 minutes each month (40 X 10 months = 400).
7. Total minutes for both 2017- 2018 and 2018 – 2019 equals 25,460 minutes or 424 hours, rounded to the nearest hour.
8. At a reasonable hourly rate of \$75 each hour that equals \$31,800.

Issue#4: Whether the Complainant is entitled to reimbursement of attorney fees.

I am not authorized to decide on matters of attorney fee awards and therefore decline to address that issue.

CONCLUSION

Our findings as to the issues raised are as follows:

1. Whether Respondent provided the Student with a FAPE for the 2019-2020, and 2020-2021 school years? We find the Respondent did provide the Student with a FAPE for the 2019-2020 and 2020-2021 school years.

2. Whether the Student is entitled to tuition reimbursement for the REDACTED PRIVATE school for the 2019-2020 and 2020-2021 school years? We find the Student is not entitled to tuition reimbursement for the REDACTED PRIVATE school for the 2019-2020 and 2020-2021 school years.

3. Whether the Student is entitled to compensatory education services for the 2017-2018 and 2018-2019 school years? We find the Student is entitled to compensatory education services for the 2017-2018 and 2018-2019 school years as calculated above.

4. Whether the Complainant is entitled to reimbursement of attorney fees? We do not have jurisdiction to determine attorney fee awards, and therefore, decline to make a finding for this Issue.

/s/ Jessica Weinberg

2/19/21

Jessica Weinberg, Esq., Panel Chairperson

Date

Vicki A. McGinley

2/19/21

Vicki McGinley, Ph.D., Educator Panelist

Date

/s/ Paul King

2/19/21

Paul King, Layperson Panelist

Date4