

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: B.A.

Date of Birth: [redacted]

Dates of Hearing:

July 29, 2015

July 31, 2015

August 21, 2015

September 2, 2015

November 20, 2015

CLOSED HEARING

ODR Case #16011-1415AS

Parties to the Hearing:

Parent[s]

Unionville-Chadds Ford SD
740 Unionville Road
Kennett Square, PA 19348

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Michael Connolly, Esquire
30 Cassatt Avenue
Berwyn, PA 19312

Anne Hendricks, Esquire
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

February 8, 2016

February 24, 2016

Jake McElligott, Esquire

INTRODUCTION

Student (“student”)¹ is an early teen-age student residing in the Unionville-Chadds Ford School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² for specially designed instruction/related services as a student with a health impairment, specifically a seizure disorder.

Parents claim, in their complaint, that the student was denied a free appropriate public education (“FAPE”) for the school years 2010-2011 through 2013-2014, inclusive, and seek a compensatory education remedy for that alleged denial. In August 2014, the student was enrolled unilaterally in a private placement, and parents seek a tuition reimbursement remedy for that enrollment in the 2014-2015 and 2015-2016 school years, in addition to a private school summer program in the summer of 2014.

As set forth more fully in the *Procedural History* section, the parents’ claims related to the school years 2010-2011, 2011-2012, and 2012-2013 (through March 2013) were not a matter of evidence based on untimely filing of those claims as presented in parents’ complaint of

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

March 2015. Evidence was developed for the parents' claims for the school years 2012-2013 (March 2013 and thereafter) through 2015-2016, inclusive.

Additionally, parents claim that the District has violated its obligations to the student under Section 504 of the Rehabilitation Act of 1973 ("Section 504").³

The District counters that at all times it provided FAPE to the student for the period of the student's enrollment, including the proposed programming rejected by parents prior to the unilateral enrollment of the student in a private placement. As such, the District argues that the parents are not entitled to remedy, neither compensatory education nor tuition reimbursement.

For the reasons set forth below, I find in favor of the District on all claims.

ISSUES

Did the District provide the student with FAPE for the school years 2012-2013 (beginning in March 2013) and 2013-2014?

If not, is the student entitled to compensatory education?

Is the last proposed programming from the District, prior to the unilateral private enrollment, reasonably calculated to yield meaningful education benefit?

³ It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for services to "protected handicapped students".

If not, are parents entitled to tuition reimbursement for the unilateral private placement for the school years 2014-2015 and 2015-2016, and/or for the private school summer program in the summer of 2014?

Are parents entitled to reimbursement for a private neuropsychological report issued in September 2014?

PROCEDURAL HISTORY

- A. On March 13, 2015, the student's parents filed the special education due process complaint which led to these proceedings, and the District filed a timely response to the complaint. (School District ["S"]-1, S-2).⁴
- B. On July 29, 2015, at the initial session of the hearing, this hearing officer ruled in accord with long-standing hearing-level practice in Pennsylvania that, notwithstanding parents' claim for remedy for periods prior to March 13, 2013, the scope of the parents' claims for remedy would be limited to that date, two years prior to the

⁴ Parents' complaint was mis-dated. The date on the complaint is March 13, 2014. Both parties agree, however, that this was a typographical error, and the correct date of the complaint is March 13, 2015. (See Notes of Testimony ["NT"]-July 29th session at 27-28, 51-56; NT-September 2nd session at 694-697.) The citations to the NT will all include a date-specific indication as to which session is involved. Due to production errors by the court reporting agency, there are large swathes of the transcript with duplicate page numbers. The initial July 29th session, for example, includes substantive testimony over pages 5-379. The second July 31st session, though, did not pick up with page number 380; instead, the agency re-set the pagination, and the substantive testimony in that session runs from pages 4-216. A similar production error in the third session of August 21st has transcript pages running from 222-379. As such, any citation to the NT will include date-specific sessions so that the citation to testimony is accurate.

- filing date of their complaint. (Notes of Testimony [“NT”]-July 29th at 52-57).
- C. At the time of the July 29th session, pending before the Court of Appeals for the Third Circuit of the United States (“Third Circuit”) was an appeal brought directly on this issue, namely the application of two IDEIA statutory provisions and if/how those provisions should be read as a statute of limitations related to IDEIA claims.
- D. The pending appeal before the Third Circuit was known to counsel for both parties and the hearing officer, so to preserve their record in the instant matter in light of the uncertainty of the question, parents objected to the hearing officer’s ruling. The objection was noted by the hearing officer and overruled, with the further indication that should the Third Circuit issue an opinion which impacted the parents’ claim, the issue would be addressed at that time. (NT-July 29th session at 27-28, 51-56; NT-September 2nd session at 694-697).
- E. The hearing unfolded over three additional sessions, with evidence ostensibly concluding at a session on September 2, 2015. At that session, counsel for the parties and the hearing officer collaborated on a schedule for the submission of written closing arguments by September 28, 2015 and a decision due date of October 20, 2015. (NT-September 2nd session at 689-698).

- F. On September 22, 2015, shortly before the deadline for the submission of the parties' closing arguments, the Third Circuit issued its opinion in *G.L. v. Ligonier Valley School Authority*, 802 F.3d 601 (3d Cir. 2015), which addressed the issue of the timeliness of the filing of complaints under IDEIA. (HO-3).
- G. In brief, and as set forth more fully at Hearing Officer Exhibit ["HO"]-4, *G.L.* recognizes that the IDEIA imposes a filing requirement of two years from the date when the complaining party knew or should have known ("KOSHK") of the violations/actions which form the basis of the complaint but that the scope of a remedy for a timely-filed claim does not have a nexus with the filing date of that timely-filed claim. (HO-4).
- H. The timeliness of the filing of a complaint, therefore, hinges on the KOSHK date(s), and KOSHK dates(s) is/are a matter for fact-finding. Accordingly, this hearing officer directed an offer-of-proof exchange between the parties where each party would set forth its positions vis a vis the KOSHK date(s) as to violations/actions in parents' complaint that were not a matter of evidence as of the hearing session on September 2, 2015. (HO-3).
- I. Each party filed timely offers-of-proof as to the party's view of operative KOSHK dates in the matter, and an evidentiary hearing, framed by the parties' offers-of-proof was held on November 20, 2015. (HO-1, HO-2; NT-November 20th session).

- J. On January 6, 2016, by interim order upon consideration of the parties' KOSHK offers-of-proof and the evidence from the November 20th session, this hearing officer ruled that the parents knew or should have known, with their possession, understanding, and sharing with the District of a June 2012 neuropsychological report, and the consequent individualized education program ("IEP") revisions in October 2012, that alleged programmatic deficiencies as explicated in that report were potential violations/adverse actions by the District that supported claims of denial of FAPE, indeed the claims brought forward in the complaint of March 13, 2015. (HO-1, HO-2, HO-4).
- K. As a result of this ruling, with a KOSHK date established as a matter of evidence as of October 2012, there was no need to expand the evidentiary record which began chronologically with the programming in place on March 13, 2013. (HO-4).

FINDINGS OF FACT

1. The student suffered a stroke in utero that has led to epilepsy and a lifelong seizure disorder. Additionally, the student has a condition known as electrical status epilepticus of sleep (ESES), a epileptic condition resistant to medication management where the person has sub-clinical seizures during sleep. The student has also

- been diagnosed with attention deficit disorder. (Parents' Exhibit ["P"]-1 at pages 29-31, P-3, P-12; NT-July 29th at 143-147, 160-163, NT-August 21st at 232-233).
2. The student has attended the District since kindergarten and has had an IEP for all school years. (P-3, P-14; see generally P-1, P-5a, P-5b, P-7, P-8, P-10, P-13, P-15, P-17, P-19, P-20, P-24).
 3. In May 2010, near the end of the student's 1st grade year, the student was re-evaluated. (P-3).
 4. The May 2010 re-evaluation report ("RR") found that the student's academic achievement was commensurate with a full-scale IQ of 115 and so did not identify the student with any learning disability. (P-3 at pages 6-10, 16).
 5. The May 2010 RR included an assessment of social/emotional functioning. The parent rater rated the student borderline significant, or significant, on most sub-scales of the Conners' Rating Scales. The teacher rater rated the student as significant in only one sub-scale, Peer Relations. (P-3 at pages 10-11).
 6. The May 2010 RR reported elevated scores across two of three school-based raters for pragmatic communication. The speech and language evaluator noted inconsistency among the three raters and ultimately determined that the student did not require direct speech and language instruction, although the evaluator

- recommended situation-specific instruction in social/pragmatic communications. (P-3 at 12-14).
7. The May 2010 RR identified the student as a student with a health impairment related to the seizure disorder, and a speech and language disorder. (P-3 at pages 14-15).
 8. The May 2010 RR recommended modifications, supports, and specially designed instruction to support the student with social skills/pragmatic communication, directions, transitions, and gross motor skills. (P-3 at page 18).
 9. Throughout the school years 2010-2011 and 2011-2012, the student had IEPs, including multiple revisions of those documents. (P-5a, P-5b, P-7, P-8).
 10. In April 2012, the student underwent a neuropsychological evaluation at the Children's Hospital of Philadelphia ("CHOP"). In June 2012, a comprehensive neuropsychological evaluation report was issued with diagnoses of intractable complex partial epilepsy, encephalopathy/not otherwise specified, and attention deficit disorder. (P-12).
 11. After sharing the June 2012 CHOP neuropsychological report with the District at the outset of the 2011-2012 school year, the student's IEP was revised, and the District sought permission to re-evaluate the student in light of the June 2012 neuropsychological report. (P-12, P-13, P-14, P-15; HO-4; NT-July

29th session at 159-167, NT-September 2nd session at 391-393, 401-408, NT-November 20th session at 745-749).

12. In December 2012, the District issued a RR, including results from the June 2012 CHOP neuropsychological report and additional assessments performed by the District in light of that report. The December 2012 RR also included an update on the student's gross motor/physical therapy needs. (P-14).
13. The December 2012 RR found that the student had cognitive/achievement strengths and weaknesses but that overall the student was not exhibiting deficits that would lead to an identification of any specific learning disability. (P-14 at page 22).
14. The December 2012 RR, while finding that the student did not qualify as a student with any specific learning disability, recommended academic support in reading comprehension skills and written expression. (P-14 at pages 22-23).
15. The December 2012 RR noted significant teacher-reported levels of inattention, executive functioning difficulties, and organizational difficulties. The RR also noted continued social difficulties. (P-14 at pages 16-18, 23).
16. The December 2012 RR found that the student did not have gross motor skill deficits and did not require physical therapy. The RR identified the student as a student with a health impairment related to the seizure disorder. (P-14 at 3-4, 20-23).

17. The December 2012 RR recommended modifications, supports, and specially designed instruction to support the student with attention, planning, and organization. (P-14 at page 23).
18. In January 2013, following the issuance of the December 2012 RR, the student's IEP was revised. The January 2013 IEP was the IEP in place in March 2013, which bounds the evidentiary record based on the parents' complaint of March 2015. (P-15; S-1; HO-4).
19. The January 2013 IEP contained three goals: one for task initiation/focus, one for reading comprehension, and one for writing. (P-15 at pages 22-23).
20. The January 2013 IEP contained program modifications and specially designed instruction to address writing, executive functioning (planning and organization), social skills, reading comprehension, expressive and receptive language, inattention, and two seizure-response plans (one for the bus and one for school). (P-15 at pages 23-27).
21. Under the terms of the January 2013 IEP, the student spent 85% of the day in regular education. (P-15 at pages 31-33).
22. Progress monitoring data over January – November 2013 indicated that the student made progress on the task initiation/focus and that the student mastered the reading

- comprehension goal. The student's results on the writing goal were uneven. (P-27 at pages 14-15; *see also* P-35).
23. At the outset of the 2013-2014 school year, the student was placed in a regular education mathematics class that did not have learning support. The student encountered difficulty with attending to instruction and completing work. The student was placed in a different regular education mathematics class, this one with a learning support component, and the student's engagement in learning improved. (P-17 at page 10, P-31 at pages 2, 7-11, 16-17; NT-July 29th at 316, 321, 328-335, NT-July 31st at 150-151, 214, NT-September 2nd at 524-525).
24. In December 2013, the student's IEP team met for its annual consideration of the student's IEP, to be implemented in January 2014. (P-17).
25. The January 2014 IEP contained present levels of academic performance that indicated the student's inattention inhibited performance on reading comprehension with longer passages. The student's written expression was proficient with single paragraph samples but identified needs in organization and content with multi-paragraph samples. (P-17 at page 9).
26. The January 2014 IEP indicated that the student's needs included these areas (reading comprehension and multi-paragraph writing), in addition to inattention, executive

- functioning/organization skills, and social interactions. (P-17 at pages 11-12).
27. The January 2014 IEP contained two goals: one for reading comprehension, and one for writing. (P-17 at pages 17-18).
 28. The January 2014 IEP contained program modifications and specially designed instruction to address writing, executive functioning (planning and organization), social skills, reading comprehension, expressive and receptive language, inattention, and two seizure-response plans (one for the bus and one for school). (P-17 at pages 19-21).
 29. Under the terms of the January 2014 IEP, the student spent 77% of the day in regular education. (P-17 at pages 26-27).
 30. Progress monitoring data over January – March 2014 indicated that the student made progress on both the reading comprehension goal and the writing goal. (P-27 at page 16).
 31. In April 2014, the student’s IEP was revised to add a goal in executive functioning, including daily instruction in listening skills, memory strategies, study strategies, reasoning, and organization. (P-19 at pages 16-17).
 32. Under the terms of the April 2014 IEP, the student spent 69% of the day in regular education. (P-19 at pages 24-25).
 33. In May 2014, the student’s IEP was revised, breaking the student’s writing goal into two more detailed goals, one for

organization of multi-paragraph essays and one for content in multi-paragraph essays. (P-20 at pages 18-19).

34. All District witnesses who directly delivered instruction to the student testified credibly that, for the most part, the student's educational programming included the modifications and specially designed instruction called for in the student's IEPs over the school years 2012-2013 through 2013-2014, inclusive. This testimony was accorded heavy weight. (NT-July 29th at 314-378, NT- July 31st at 146-215, NT- August 21st at 316-378, NT- September 2nd at 390-510, 516-640).
35. In the summer of 2014, the student underwent a private neuropsychological evaluation at parents' expense with a focus on the student's educational needs. (P-23; P-31 at page 56).
36. In the summer of 2014, the student was enrolled in a private school summer program. (P-22, P-30; S-10; NT at 201-204).
37. In August 2014, the student's parents informed the District that they intended to place the student in a unilateral private placement at public expense. Initially, the parents indicated that they were going to place the student in the private school where the student had attended summer programming. Ultimately, though, the student was unilaterally placed in another private placement. The student was enrolled in this private placement and attended in the 2014-2015 school year; the student currently

attends the school in the 2015-2016 school year. (P-21; S-6 at page 1; NT-July 29th at 200-201).

38. In September 2014, the private neuropsychological report was issued. The September 2014 neuropsychological report confirmed the understandings of the student, namely that a health impairment related to the student's seizure disorder impacts the student's attention, social skills, and executive functioning. The independent evaluator also identified the student with "specific learning disorder due to weaknesses in inferencing, organization, executive control and retrieval". The report identified needs in written expression and reading comprehension. (P-23, generally and at page 22; NT-August 21st at 227-311).
39. In November 2014, the student's IEP team met to revise the student's IEP. The November 2014 IEP continued to include goals in reading comprehension, executive functioning, written expression/organization, and written expression/content. A goal in social skills was added to the IEP. (P-24 at 21-24).
40. The November 2014 IEP continued to include an expanded utilization of program modifications and specially designed instruction to address writing, executive functioning (planning and organization), social skills, reading comprehension, inattention, and two seizure-response plans (one for the bus and one for school). Additional learning support and support in mathematics,

classroom environment issues (seating, cueing, classroom rules, etc.), homework, and testing accommodations were added as modifications. (P-24 at pages 26-30).

41. The November 2014 IEP included explicit weekly social skills instruction, as well as explicit consultation between classroom teachers, special education teachers, speech/language therapy consultations, and consultation with the social skills instructor. (P-24 at page 31).
42. Under the terms of the November 2014 IEP, the student spent 68% of the day in regular education. (P-24 at pages 35-37).
43. The District's grades in the student's 4th grade year, the 2012-2013 school year, were reported as numbers in detailed achievement sub-areas within each curricular area: 3 represented "demonstrates", 2 represented "partially demonstrates", and 1 represented "minimally demonstrates". Across all sub-areas, the student's numeric grades were 2, 2+, or 3. The curricular area itself was assigned a letter grade. Across the curricular areas the student's grades in reading were B+, A-, B, A-, in writing were A, A-, A-, A+, in math were A-, B+, B, B, in science were A, A, A, A, and in social studies were B+, B+, B+, A. (P-26 at pages 11-12).
44. The District's numeric grades in the student's 5th grade year, the 2013-2014 school year, across all sub-areas, the student's numeric grades were 2, 2+, or 3. Significantly, the student received

a 1 in the first quarter in sub-areas of “organizes materials and supplies”, “remains on task”, “transitions smoothly between activities”, and “works independently” in the Work/Study Habits area. The student also received a 1 in the first quarter in the sub-area of “demonstrates active listening” in the Language Arts: Writing area. The student also received a 1 in the first and third quarters in the sub-area of “perseveres in problem solving” in the Mathematics area. The letter grades in each curricular area itself was assigned a letter grade. Across the curricular areas the student’s grades in reading were B-, A, A (second quarter not graded), in writing were A, A, A, A, in math were D, B+, A, B+, in science were C+, A-, A, C, and in social studies were A-, A-, A-, B. (P-26 at pages 13-14).

45. On the student’s 4th grade Pennsylvania System of School Assessment (“PSSA”) testing in the spring of 2013, the student achieved proficiency in mathematics and science, and basic in reading. (P-28).
46. The private placement which the student attended in 2014-2015, and currently attends, is a private school that enrolls students “who struggle to achieve academic and social success due to performance-based learning differences including ADHD, high-functioning autism spectrum disorders, specific learning disabilities, or anxiety.” (S-11 at page 2).

47. The private school provides individualized education programming for the student, and the student has made progress in the private placement. (NT-July 31st at 76-142).

DISCUSSION AND CONCLUSIONS OF LAW

To assure that an eligible child receives 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)).

Denial of FAPE/IDEIA: 2012-2013 & 2013-2014 School Years

On this record, the student’s needs in the educational environment have been consistent over the course of the student’s educational history. Namely, the student has overarching needs in executive functioning (active listening, organization, prioritizing, etc.). These needs impact various areas of functioning in the school environment. Academically, the student has shown a consistent need for support in reading, particularly reading comprehension, and writing (both for

organization and for content). Finally, the student has also shown a consistent need for support in social skills. From the outset on this record, with the District's RR of May 2010, through the neuropsychological report of June 2012 and the District's follow-on RR of December 2012, through the neuropsychological IEE of September 2015, the student's identified needs have remained consistent.

In light of this clear evaluative/diagnostic background, the questions in this matter, then, are: Has the District, through its evaluation processes and reports, identified these needs? Has the District, through the design of the student's programming, proposed IEPs reasonably calculated to yield meaningful education benefit? And has the District, through the implementation of those IEPs, facilitated the student's learning and progress to a significant degree (or, said in the negative, learning and progress that is not merely minimal)? On this record, the answer to all three questions is "yes".

The District's RRs of May 2010 and December 2012 were comprehensive and accurately identified the student's educational needs. Indeed, a chronological reading of the May 2010 RR, the June 2012 CHOP neuropsychological report, the December 2012 RR, and the September 2014 private neuropsychological report reveals that every evaluator, including the District's school psychologist, has the same understanding of the student's diagnoses and attendant educational needs.

Likewise, the District's IEPs throughout the school years 2012-2013 through 2013-2014 contain goals and programming that specifically address these needs. The constant revision of the student's IEPs, including over time more supports outside of regular education in special education environments (although still appropriately non-restrictive), support a conclusion that when the District was confronted with new information, and/or saw needs developing in school, and/or worked on parents' concerns for the student's programming or progress, it revised the student's IEPs or adjusted the student's programming.⁵ And, ultimately, the student made progress, gaining meaningful education benefit from the educational programming designed and implemented for the student over those school years.

In sum, the District's RRs of May 2010 and December 2012 were comprehensive and clearly identified the student's needs in attention/executive functioning, reading comprehension, writing, and social skills. The subsequent programming in the IEPs of January 2013, January 2014, March 2014, and May 2014 all contained goals and/or explicit specially designed instruction which fully addressed these needs. And the record taken as a whole shows that the student made progress in these areas of need, as well as academically overall. Accordingly, the District met its obligations to the student under IDEIA for the school

⁵ The changes to the student's mathematics instruction in the fall of 2013 are the starkest example, among others, of the District adjusting the student's programming in light of these examples. See Finding of Fact 23.

years 2012-2013 or 2013-2014, and the family is not entitled to compensatory education.

Denial of FAPE/IDEIA: 2014-2015 and 2015-2016 School Years

Long-standing case law and the IDEIA 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 IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3)).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program, or controlling program, at the time the family made the decision to seek a private placement and whether it was reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Ridgewood; M.C.) In this case, the programming which controlled the student's education when the student was unilaterally enrolled by parents in August 2014 was the IEP of May 2014. (P-20).

The IEP of May 2014 correctly identifies the student's needs, contains appropriate goals in reading comprehension, executive

functioning, and writing (both for organization and for content). The modifications and specially designed instruction support these goals and address in detail all of the student's needs, including increased direct support for executive functioning (in addition to the direct instruction in executive functioning which was added in the March 2014 IEP revision). In short, the May 2014 IEP, the last-offered IEP which parents had in hand before they made their private placement enrollment decisions (both for the summer 2014 private school program and the ultimate enrollment for school years 2014-2015 and 2015-2016) is reasonably calculated to yield meaningful education benefit.

The November 2014 IEP, which is in the record as an IEP the parties considered after the student was enrolled in the private placement doesn't enter into the calculus of the private placement decision made by parents in the summer of 2014. Even if one assumes, *arguendo*, that the November 2014 IEP should be considered as an IEP that might impact the Burlington-Carter tuition reimbursement analysis, it is an IEP which does not alter in any material way the goals, modifications, or specially designed instruction that the student would have received under the May 2014 IEP. It too, if one was inclined to make it part of the Burlington-Carter analysis (and this hearing officer does not), would be an IEP that is reasonably calculated to yield meaningful education benefit.

For the foregoing reasons, the IEP proposed in May 2014 proposed by the District is appropriate.

When a school district program is found to be appropriate at step one of the Burlington-Carter analysis, the school district has met its obligations to the student under IDEIA. A family may continue to seek, or engage in, a private placement, but such a placement will be a private expense. It is therefore unnecessary to engage in step two of the analysis (an examination of the appropriateness of the private placement) and step three of the analysis (a weighing of the equities between the parties).

Accordingly, because the program last proposed by the District in the IEP of May 2014 was reasonably calculated to provide FAPE to the student, the family is not entitled to tuition reimbursement for the school years 2014-2015 or 2015-2016.

Denial of FAPE/Section 504

Section 504 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁶ The provisions of IDEIA and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly

⁶ Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally* P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009)).

Here, based on the findings of the related to denial of FAPE in the foregoing “Denial of FAPE/IDEIA” sections, those findings and that reasoning is adopted here. Therefore, analogously as found for claims under IDEIA, the District met its obligations to provide FAPE under Section 504.

Discrimination under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) the student is disabled or has a handicap as defined by Section 504; (2) the student is “otherwise qualified” to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) the student was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of the student’s disability (34 C.F.R. §104.4; S.H. by Durrell v. Lower Merion School District, 729 F.3d 248 (3d Cir. 2013); *see also*, Ridgewood and W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995)).

In the instant case, the first, second and fifth prongs of this analysis are undisputed. While not a matter of evidence, the third

prong—the receipt of federal funds by the District—is a near certainty. The crux of a finding that the District discriminated against the student in this matter, then, is the fourth prong: was the student excluded from participation in, denied the benefits of, or subject to discrimination at the District as the result of the student’s disability? To prevail in answering this multi-faceted question, a student must show that, through acts and/or omissions, a school district acted with deliberate indifference in failing to meet its obligations under Section 504. (S.H.).

Here, the District did not act with deliberate indifference in any regard. Therefore, any claim for discrimination under Section 504 is denied.

Reimbursement for Neuropsychological Report of September 2014

Parents privately paid for the September 2014 private neuropsychological report. Analogous to the view of the November 2014 IEP in the tuition reimbursement analysis above, the September 2014 private neuropsychological report had not been issued by August 2014 when the decision was made by parents to enroll the student in the private placement. More substantively, even in considering the September 2014 private neuropsychological report, while it is very detailed, the report did not present information that was entirely new for an understanding of the student’s needs or potential programming in school. While it may serve to deepen understanding of the student’s

needs, or help to flesh out further details related to programming, the September 2014 private neuropsychological report did not place the parties in a position where the trajectory of understanding the student's needs was changed; and the programming in the November 2014 IEP, largely the same as in the appropriate May 2014 IEP, bears this out.

Therefore, the District is not required to reimburse parents for the evaluation process, or for the preparation/drafting of the September 2014 private neuropsychological evaluation, or for the testimony of the evaluator at the hearing.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District ("District") met its obligations to the student under both IDEIA and Section 504 to provide a free appropriate public education in the school years 2012-2013 through 2015-2016, inclusive. No remedy is owed by the District.

Additionally, the District has not acted with deliberate indifference in any manner regarding the student's status as a student with a disability.

Finally, the District is not required to reimburse the parents for the cost of the September 2014 neuropsychological evaluation.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

February 24, 2016