

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

Final Decision and Order

CLOSED HEARING

ODR File Number 18996 16 17

Child's Name: S.S.

Date of Birth: [redacted]

Dates of Hearing:¹

7/18/2017, 10/11/2017, 10/12/2017, 11/13/2017, 1/5/2018

Parents:

[redacted]

Jonathan Corchnoy, Esquire, 1515 Market Street, Suite 1510
Philadelphia, PA 19102
Counsel for Parents

School District:

Antietam School District, 100 Antietam Road
Reading, PA 19606

Shawn Lochinger, Esquire, 331 East Butler Avenue
New Britain, PA 18601
Counsel for the LEA

Hearing Officer: Michael J. McElligott **Date of Decision:** 2 / 20 /2018

¹ The hearing convened with opening statements via videoconference at the July 2017 session. Four sessions were scheduled in early October, two in the first week of October and two in the second week. Parents' counsel practices in both Florida and Pennsylvania and, due to travel complications related to Hurricane Irma in western Florida and parents' counsel's inability to travel to the early-October hearing sessions, those two sessions needed to be rescheduled to the November and January dates. Additionally, after the conclusion of the evidence, counsel for the parties requested time to submit written closing statements.

INTRODUCTION

Student (“student”)² is a post-teen aged student who resides in the Antietam School District (“District”) and formerly attended the District. The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)³ as a student with an intellectual disability and speech/language impairment.

Parents claim that the student was denied a free appropriate public education (“FAPE”) for the 2015-2016 and 2016-2017 school years and the current 2017-2018 school year and seek tuition reimbursement for the private placement where the student attends.⁴ Analogously, parents assert denial-of-FAPE claims and request for remedy under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).⁵ The parents also claim, in very pointed allegations regarding alleged abusive conduct and

² The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

³ 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”).

⁴ In their complaint, parents also sought a prospective tuition payment for the 2018-2019 school year. Because tuition reimbursement as a remedy is exactly that—reimbursement for retrospective tuition payments undertaken by parents—this 2018-2019 claim is not considered for remedy. In the alternative, in their complaint, parents request as a remedy an amount of compensatory education for prospective programming to establish a fund for future educational expenses. The parents’ claims, however, are grounded exclusively in allegations of past denial of FAPE. As such, the prospective nature of the requested remedy—the 2018-2019 school year—is not considered part of any request for remedy; only retrospective tuition reimbursement claims are considered.

⁵ 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 (“Chapter 15”).

discriminatory omissions by District employees, that the District engaged in disability-based discrimination, in violation of the protections of Section 504.

The District counters that at all times it met its FAPE obligations to the student under IDEIA and Section 504. The District vigorously denies that any alleged abuse or wrongful omissions occurred and that, at all times, it met its obligations to the student under all aspects of Section 504. Accordingly, the District argues that the parent is not entitled to any remedy.

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

ISSUES

Did the District deny the student FAPE in the 2015-2016, 2016-2017, or 2017-2018 school years?

If so, are parents entitled to tuition reimbursement?

Did the District discriminate against the student?

FINDINGS OF FACT

1. The student attended District schools since kindergarten. (School District Exhibit ["S"]-3 at page 1; Notes of Testimony ["NT"] at 77-180, 246-288.)
2. In October 2013, the fall of the student's 9th grade year, a District re-evaluation report ("RR") indicated that the student's cognitive ability (from a November 2011 RR score) was in the moderately disabled range. (S-3 at page 2).
3. The October 2013 RR reported that, on the 2013 Pennsylvania Alternative State Assessment, the student scored at the novice level in reading (exhibiting the ability to identify words depicted in a picture; to identify a picture by feature; and to identify meaning in a word/sentence). The student scored at the proficient level in

mathematics (exhibiting the ability to identify money, sets, and most/least in a set, to orient materials; to match items of equal length, size, and capacity; to identify short/long items; and to identify biggest/smallest in area and capacity). The student scored at the proficient level in science (exhibiting the ability to identify a picture in a pictograph; to identify the picture of a living organism; to match like objects based on physical quality; and to identify pictures of sources of food). (S-3 at page 2).

4. Teacher input in the October 2013 RR indicated that the student generally came to class prepared and was social/interacted well with classmates and peers. The teacher indicated that the student required frequent prompting and assistance and, at times, the student would engage in work refusal or failure to follow directions/complete work. (S-3 at page 3; NT at 716-769).
5. The October 2013 RR continued to identify the student as a student with an intellectual disability and speech/language impairment. (S-3 at page 5).
6. In November 2013, the student's individualized education plan ("IEP") team met to craft the student's IEP. (Parents Exhibit ["P"]-20; S-4).
7. The November 2013 IEP included present levels of academic achievement in reading (basic skills for non-readers: phonemic awareness, sound-symbol identification, sounding out, word/picture matching), writing (upper-case, lower-case, name-writing, address, date of birth, parents' names), mathematics (number identification and counting to 100, oral counting, quantity discrimination), and listening comprehension. (P-20 and S-4 at pages 7-8).
8. The November 2013 IEP included a functional behavior assessment and positive behavior support plan to address instances of the student's work refusal or failure to follow directions/complete work. (P-19; P-20 and S-4 at pages 9, 19).
9. The November 2013 IEP included transition goals focused on independent living. (P-20 and S-4 at pages 12-13).
10. The November 2013 IEP included goals and short-term objectives in reading, mathematics, following directions, independent living, speech/language, handwriting. (P-20 and S-4 at pages 16-18).
11. The November 2013 IEP included specially designed instruction, program modifications, and related services (speech and language, occupational therapy). (P-20 and S-4 at pages 20-21).

12. The November 2013 IEP indicated that the student was eligible for extended school year services over the summer. (P-20 and S-4 at page 22).
13. The November 2013 IEP indicated that the student would receive all academic instruction in the life skills classroom and would participate with non-disabled peers in the regular education environment for lunch, assemblies, special classes, and physical education. (P-20 and S-4 at page 23).
14. The November 2013 IEP recommended placement in supplemental life skills support at the District's middle/senior high school building. (P-20 and S-4 at pages 24-25).
15. Over the course of September - November 2013, the student had seven incidents where the student urinated in school (twice in September, four times in October, and once in November). The student's mother would bring a change of clothes to school. In November, the District responded to these behaviors by instituting a classroom visual reminder for bathroom breaks on the student's desk and by keeping a change of clothes on hand for the staff to assist the student in self-changing; the student's mother was no longer summoned to the school. After the classroom plan was implemented, the student no longer had urination issues in school. (P-25; NT at 77-180, 246-288, 591-639, 716-769, 774-795, 799-816).⁶
16. In December 2013, the parents requested an independent educational evaluation ("IEE") at public expense. (S-5).
17. In January 2014, the District denied parents' request for an IEE at public expense and filed a special education due process complaint to defend its evaluation process and its October 2013 RR. (S-5; HO-1).
18. In April 2014, the parties reached a settlement agreement whereby parents waived all claims against the District prior to the date of the settlement agreement in exchange for tuition payments by the District at

⁶ The student's urination issues in the fall of 2013 were reflected in the nurse's records of the District's school nurse. At the time of the hearing, the school nurse was employed by another educational entity and was no longer a District employee. Parents' counsel requested a subpoena for the appearance of this witness, and a subpoena was issued. The witness, however, resisted the subpoena and did not appear at the proceedings. The hearing officer had no means to enforce the subpoena, and enforcement of the subpoena through a tribunal with such authority was not sought by counsel for either party. Therefore, the records of the District's school nurse were admitted by stipulation of the parties. (P-27; HO-11; NT at 708-710).

a private placement selected by parents for the remainder of the 2013-2014 school year and the 2014-2015 school year, including summer programming in the summers of 2014 and 2015. (S-6; HO-2).

19. The April 2014 settlement agreement provided that the student would be re-evaluated by the District, with parents' consent and collaboration, by March 2015, with an IEP to be in place by April 2015. Upon completion of the March/April 2015 RR/IEP processes, the parties agreed that the April 2015 IEP would be the pendent program/placement for the student. (S-6; HO-2).
20. The student finished the 2013-2014 school year at the private placement. (NT at 77-180, 246-288, 341-398).
21. One time during the 2013-2014 school year while working with the student, in frustration, the classroom aide kicked the leg of the chair of the student. The classroom teacher took over instruction at that point in the lesson. (NT at 643-698, 716-769).
22. In June 2014, the student attended [an event] with peers who also had disabilities and who had been in District schools or classes with the student. At that [event], parents of the students shared concerns with the student's parents of the behavior of the classroom teacher and classroom aide in the student's classroom at the District. (NT at 77-180, 246-288).
23. In the summer of 2014, the student attended a community-based summer camp. (NT at 231-246).
24. In August 2014, the student began to attend the private placement. In September 2014, the private placement crafted an IEP for the student. (P-27).
25. The September 2014 IEP at the private placement mirrored the structure of a public local educational agency in Pennsylvania. (P-27).
26. The September 2014 IEP at the private placement contained updated present levels of functional/academic performance. (P-27 at pages 5-15).
27. The September 2014 IEP at the private placement included transition goals focused on employment skills and independent living. (P-27 at pages 16-19).
28. The September 2014 IEP at the private placement included goals in speech/language, reading, writing/keyboarding, mathematics,

independent living (hygiene), employment (school-based job/task structures), and following directions. (P-27 at pages 22-31).

29. The September 2014 IEP at the private placement included specially designed instruction, program modifications, and related services (speech and language, occupational therapy). (P-27 at pages 31-32).
30. The September 2014 IEP at the private placement indicated that the student was eligible for extended school year services over the summer. (P-27 at pages 33-34).
31. The September 2014 IEP at the private placement indicated that the student “is not able to participate in general education classes” and, as the private placement is “a self-contained special education school” the student’s placement was a full-time life skills classroom. (P-27 at page 35-37).
32. In February 2015, pursuant to the provisions of the April 2014 settlement agreement, the District re-evaluated the student and issued a RR. (S-7).
33. The February 2015 RR contained updated information from parents and educators at the private placement. (S-7).
34. The February 2015 RR included updated speech and language, occupational therapy, and physical therapy assessments, updated assessments of the student’s cognitive ability, academic achievement, and social/emotional/behavioral functioning, as well as adaptive behavior functioning. (S-7).
35. The February 2015 RR included a vocational assessment to gauge vocational interests of the student. (S-7).
36. The February 2015 RR included updated progress-monitoring data on the student’s IEP goals at the private placement. (S-7).
37. The February 2015 RR recommended continued identification of the student as a student with an intellectual disability and speech/language impairment, along with extensive programming recommendations based on the updated assessments, and information (input and progress monitoring) from the private placement. (S-7).
38. In early April 2015, the student’s IEP team met to craft an IEP based on the February 2015 RR, an IEP to be implemented beginning in the 2015-2016 school year. (S-10).

39. The April 2015 IEP contained the assessment data, teacher input, classroom observation, and recommendations from the February 2015 RR. (S-10 at pages 7-20).
40. The April 2015 IEP contained goals and instruction/activities for transition in community-based instruction/vocational training, part-time employment, and independent living. (S-10 at pages 21-23).
41. The April 2015 IEP contained thirteen goals, including one goal each in functional vocabulary, reading fluency (at the 1st grade level), functional writing, social skills/conversation skills, independent living (household and personal care), self-advocacy/direction-following, and occupational therapy; two goals in functional mathematics (money-counting/budgeting, telling time); and four goals in speech/language (utilizing vocational vocabulary, following spatial directions, verbal item discrimination, and answering text-based “wh” questions). (S-10 at pages 28-34).
42. The April 2015 IEP contained specially-designed instruction and program modifications, as well as related services (speech/language and occupational therapy). (S-10 at pages 35-38).
43. The April 2015 IEP indicated that a decision on extended school year programming for the summer of 2016 would take place by February 2016 after the IEP team could review data in the 2015-2016 school year. (S-10 at page 39).
44. The April 2015 IEP recommended placement in supplemental life skills support at the District’s middle/senior high school building. (S-10 at pages 41-44).
45. The April 2015 IEP meeting included the parents sharing with the IEP team concerns they had over interactions between the student and the classroom teacher and the classroom aide when the student last attended the District, an individual who would continue to be involved with the student should the student return to the District. The District indicated that the aide in question would not work in the student’s classroom. (NT at 77-180, 246-288, 591-639).
46. Contemporaneously with the April 2015 IEP team meeting, the District issued a notice of recommended educational placement (“NOREP”), recommending that the student return to the District for instruction under the April 2015 IEP. (S-11).

47. In mid-April 2015, the parents returned the April 2015 NOREP, indicating neither approval nor disapproval, and requested another meeting to address their concerns with the proposed program/placement. (S-11).
48. Parents also provided extensive written input which was incorporated into the April 2015 IEP. (S-10a, S-10 at page 20).
49. Parents' written input included a purported dialogue with the student on the student's preference for the private placement, where the student purportedly shared negative comments about the classroom teacher and the classroom aide from the 2013-2014 school year. Included in this purported dialogue were the aide's alleged kicking of the student's chair and shaking the student and negative/aggressive conduct by the classroom teacher and classroom aide. (S-10a at pages 1-3).
50. Parents' written input included concerns for the student's "safety and well-being" of the student, that the student's previous placement at the District included shaming and taunting by District staff (with specific reference to the issues in school involving urination). (S-10a at page 4).
51. Parents' written input faulted the life skills instruction the student had previously received at the District in past school years. (S-10a at page 4).
52. Parents' written input compared their concerns with District programming to that of the programming at the private placement which in their opinion was more nurturing and educationally rewarding. (S-10a at page 4).
53. Parents' written input also included a bulleted list of programming revisions that they wished to be included in the April 2015 IEP. (S-10a at page 4).
54. At one of the IEP meetings to consider the April 2015 IEP, the student's mother read aloud the parental input. Because it included pointed characterizations of the classroom teacher, the District's director of special education felt that the teacher was becoming emotional as the input was being read aloud, and excused the teacher from the room. The District investigated the incidents contained in the parents' input document, but the District did not develop, and could not corroborate, any information that would lead to further action. (S-10a, S-14; NT at 591-639, 716-769, 799-816).

55. In May 2015, the parents hired a private reading tutor to work with the student. (P-10; NT at 296-328).
56. The reading tutor opined that the student's reading ability was at the kindergarten level in May 2015. (NT at 296-328).
57. The reading tutor has worked with the student approximately once-to-twice per week since May 2015, up to and including the time of her testimony in these proceedings. (P-12; NT at 296-328).
58. At the hearing, the reading tutor testified that the student was reading at approximately the first grade level. (NT at 296-328).
59. In mid-June 2015, parents sent a letter to the District, indicating that they considered the District's proposed program/placement as outlined in the April 2015 IEP to be inappropriate. They indicated, in a subject heading to the letter, "10 Day Notice of Intent to Unilaterally Place our son (student's name) in a Private Placement and Seek Reimbursement Later". In the body of the letter, parents conclude "We believe (the private placement) had provided for all these needs and more, and thus have chosen to fund it ourselves until this dispute can be resolved." (P-14; S-12).
60. In late June 2015, the District's director of special education sent parents a response letter, acknowledging the parents' concerns. The District's position was that it felt the proposed program/placement outlined in the April 2015 IEP and NOREP were appropriate. In its relevant part as to the parents' claim for potential tuition reimbursement, the District responded:
- "The current offer of FAPE presented with a NOREP dated 04/08/15 continues to be the District's proposal for special education services for the 2015-16 school year. If you wish to enroll (the student) privately at the (private placement), you may do so at your own expense. Parents have the right to enroll their child in private school at their own expense at any time. If you have specific concerns about the District's IEP, we are willing to convene the IEP team to address your concerns. If we don't hear from you, we will assume that you do not wish for us to convene such a meeting." (P-15; S-13).
61. In the summer of 2015, as part of the April 2014 settlement agreement, the student attended a community-based summer camp. (NT at 231-246).

62. In the summer of 2015, at some time after the exchange of letters in June 2015, the student's parents engaged in a conversation with a peer of the student and that peer's mother. The peer and the peer's mother shared concerns they had that the peer had witnessed the classroom aide kick the student's chair when the student and the peer would not stop giggling. (P-40; NT at 77-180, 246-288).
63. In early July 2015, the student gave a sworn, written statement in front of a Pennsylvania notary, witnessed by the parents' educational advocate, indicating that the peer had witnessed alleged behavior by the classroom teacher and classroom aide, including the chair-kicking incident by the aide, yelling at students by both the teacher and the aide, yelling and cursing by both the teacher and the aide particularly at the student, the aide's removal of lunch from the student or not providing lunch to the student, the teacher's and aide's segregating the life-skills students at lunch, the aide's forcefully grabbing of the student with both hands, the teacher's forcing the student to eat food, including cheese,⁷ that the class had made in cooking class. On its face, the statement was signed by the student's peer but was not scribed by the student's peer. (P-40).
64. In late July 2015, the parents and District, each with counsel, met to discuss the information related to alleged school and classroom incidents. Parents only shared vague allegations of abusive behavior but did not share detailed information about specific incidents, actors, or allegations. (S-14; NT at 77-180, 246-288).
65. At the meeting and at the hearing, parents claim that, through their counsel, they informed the Office of the Pennsylvania Attorney General ("Attorney General's Office") of the allegations which had come to light through the conversations with the peer and the peer's mother, and the statement of the peer. Aside from parents' assertion of their counsel's purported communication with the [Attorney General's Office], there is no evidence of this communication. (NT at 77-180, 246-288).
66. There is no evidence on this record of any response, involvement, or investigation undertaken by the Attorney General's Office.
67. Parents took no other action to inform other authorities of the allegations of abusive behavior. (NT at 77-180, 246-288).
68. In response to the parents' assertions at the July 2015 meeting, counsel for the District later that day sent a letter to parents' counsel, vehemently requesting further information so that the District could

⁷ The student is lactose intolerant. (NT at 254).

investigate the vague allegations. Parents did not respond to the request for more detailed information. (S-14).

69. The student returned to the private placement for the 2015-2016 school year. (P-28, P-29, P-33; NT at 77-180, 246-288, 341-398, 402-418, 422-452).
70. In September 2015, the student's mother, the District's director of special education, the special education teacher from the private placement, and the principal from the private placement met to craft an Equitable Participation Plan ("EPP"). (S-15).
71. The EPP is entitled, in full, "Equitable Participation Plan for students attending private school". (S-15 at page 1).
72. At its outset, in a section called "About an Equitable Participation Plan", the student's EPP states:

"Every child with a disability is entitled to a 'free and appropriate public education' offered in the least restrictive environment. The programs and services that comprise a 'free and appropriate public education' for each child are determined by an Individualized Education Program (IEP) team and are proposed to the parents of the child in the form of an IEP. Parents have the right to forgo public school placement and to enroll their child in a private school of their choice and at their expense. They also have the right to request that their child dual enroll in the public school to receive some or all of the special education programs and services identified in the IEP developed for their child. The Equitable Participation Plan team makes decisions about the particular programs and services for which the child will receive in the public schools while attending the private school that his or her parents have selected. The Equitable Participation Plan is not an IEP and does not necessarily contain all of the programs and services that would constitute a 'free and appropriate public education'. The role of the Equitable Participation Plan team is to determine the programs and services, already identified within the IEP, in which the student will be invited to participate." (S-15 at page 1).
73. Under the terms of the EPP, the student received speech and language, and occupational therapy, services at the private placement. (S-15).

74. In describing the educational placement of the student in terms of access to regular education, the EPP states: “(The student) is currently receiving full time life skills programming in a private school setting at parents' expense. (The student) will not participate with students without disabilities in a general education classroom setting for any part of (the student's) day while attending the private special education program. The Antietam School District will provide related services including Speech/Language Therapy (direct and consultation), Occupational Therapy (direct and consultation), Physical Therapy (consultation only) and Transportation as outlined throughout this Equitable Participation Plan. All services will be provided to (the student) at the (private placement).” (S-15 at page 29).
75. In the description of the educational placement, the EPP states: “Parents have privately enrolled (the student) at (the private placement) and Antietam SD has agreed to provide related services through their Equitable Participation Plan.” (S-15 at page 30).
76. In January 2016, the parent of the peer who had given a written statement in July 2015 provided a written statement to parents (without notarization) reiterating the information recorded by the peer in the peer's written statement. (P-41).
77. In mid-May 2016, the parents sent a letter to the District, reiterating concerns about the student's time at the District. (P-16).
78. The first line of the May 2016 letter reads as follows: “Please consider this letter our formal '10 Day Notice' and 'Notice of Dual Enrollment' for (the student).” The letter goes on to indicate that the student would return to the private placement for the 2016-2017 school year and focused on the provision of speech and language, and occupational therapy, services at the private placement, and the dual enrollment status of the student. (P-16).
79. The May 2016 letter does not contain explicit reference to the parents' position that it was looking to the District to provide tuition payment, or reimbursement, for the 2016-2017 school year. (P-16).
80. At the end of May 2016, the student was seen by a private psychologist. (P-2; NT at 187-227).
81. In her report, the private psychologist related the same information as had been related by parents, and the student's peer, to this time as to allegedly problematic school-based incidents. (P-2)

82. The private psychologist opined that the student did not meet the diagnostic criteria for diagnosis of post-traumatic stress disorder but noted that, as reported by the student's mother and the student, she believes that the student has negative experiences in, and negative connotations about, the life skills classroom at the District. (P-2; NT at 187-227).
83. In August 2016, the District participated in crafting the student's EPP for the 2016-2017 school year at the private placement for the provision of speech and language, and occupational therapy, services to the student at the private placement. (S-16).
84. The August 2016 EPP team meeting participants, by role, were the same as the participants in the September 2015 EPP meeting and contains identical, or nearly identical, language to the September 2015 EPP as related in Findings of Fact 70-75. (S-16).
85. In August 2016, on the same day immediately after the EPP team considered the EPP, the private placement held an IEP team meeting. The August 2016 IEP at the private placement mirrored the structure of a public local educational agency in Pennsylvania. No one from the District was invited to attend, or to participate, in the private-placement IEP meeting. (S-17).
86. In January 2017, the student's mother provided the May 2016 report of the private psychologist. (NT at 77-180, 246-288).
87. In February 2017, the District requested permission to re-evaluate the student as part of its biennial obligation to re-evaluate a student with an intellectual disability. (P-21; NT at 482-514).
88. In March 2017, the District prepared and issued its RR, including updated assessments in speech/language and occupational therapy, as well as input from the student's educators at the private placement. (S-18).
89. On April 4, 2017, the student's multi-disciplinary team ("MDT") met to consider the March 2017 RR. (S-18; NT at 77-180, 246-288, 482-514, 823-826).
90. On the same day as the MDT meeting, the student's EPP team, and the private-placement IEP team all met to discuss the student's EPP and IEP in light of the District's March 2017 RR. (S-19, S-20).
91. At the April 2017 MDT meeting, parents requested that the District develop an IEP based on the March 2017 RR. The District's director of

special education began to develop an IEP. The next day, April 5, 2017, the parents filed the special education due process complaint which led to these proceedings. (S-18, S-19, S-20; HO-3; NT at 482-514, 823-826).

92. The testimony of the student's mother and the District's director of special education conflict about whether a District IEP was to be discussed at the April 2017 MDT meeting (in effect, making it both a MDT meeting and an IEP meeting). Given the totality of the evidence, the testimony of the District's director of special education is credited. (S-18, S-19, S-20; NT at 482-514, 823-826).

93. The student completed the 2016-2017 school year at the private placement. (P-31, P-34).

94. The student enrolled in the private placement for the 2017-2018 school year. (NT at 77-180, 246-288, 341-398).

CREDIBILITY FINDINGS

All witnesses testified credibly.

Here, it must be noted that, given the pointed allegations related by parents as to alleged misconduct by the classroom teacher and classroom aide, explicit credibility findings must be made as to the student's mother, and each of those two District witnesses.⁸

This hearing officer finds as a matter of credibility that the student's mother, and even though the student did not testify but because of the testimony of the private psychologist, the student as well, believe that negative interactions between the student and the classroom teacher and classroom aide took place.

⁸ Please note that whether abusive actions took place in the classroom in the 2013-2014 school year, as alleged, is not considered for fact-finding in this decision. This hearing officer is not trained in investigating or determining such things and would not undertake such an examination as a matter of fact-finding. It is the considered opinion of this hearing officer, but only an opinion, that such behavior did not occur as alleged, or that interactions between the classroom teacher and/or classroom aide and students in the classroom were mis-construed by those students in the classroom which, by its very nature, would be providing services to students with significant impairment(s). This is not to diminish anyone's report or perception of events, but it is pointed out as another layer of complexity related to any fact-finding on such matters through this process. Most importantly, it is clear that those reporting the alleged acts believe that those acts took place, so there are no grounds for an opinion that those reports were made in bad faith.

This hearing officer finds as a matter of credibility, including demeanor and affect during testimony as well as the substance of that testimony as well, that the classroom teacher is highly unlikely to have engaged in any connotatively negative behavior with the student, or any student, in the class.

This hearing officer finds as a matter of credibility, including demeanor during the testimony as well as the substance of that testimony as well, that the classroom aide recognizes that the chair-kicking incident was unprofessional and regrets it. It is a further finding that the classroom aide is highly unlikely to have engaged in any abusive or unprofessional behavior with the student. It must be noted here, however, that the affect of the classroom aide—including, especially, the cadence and tonal quality of her voice—is rough. While not a finding of fact, it is the considered opinion of this hearing officer that interactions between the classroom aide and students in a life-skills classroom could very well be mis-construed by the latter.

DISCUSSION AND CONCLUSIONS OF LAW

Denial of FAPE - IDEIA

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 in light of his or her needs (Endrew F. ex rel. Joseph F. v. Douglas County School District, U.S. , S. Ct. , 197 L. Ed. 2d 335, (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (Endrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).⁹

⁹ While in some parts of the United States the U.S. Supreme Court decision in Endrew F. presented a new and higher standard to gauge the appropriateness of meaningful

Tuition Reimbursement Claim. Long-standing case law and the IDEIA itself provide for the potential for private school tuition reimbursement, including related out-of-pocket expenses absorbed by parents, 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 any parents' 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. If the school district programming is not appropriate at step one, the second step is an examination of the appropriateness of the private placement. Finally, if the private placement is appropriate at step two, the third step is to examine the equities between the parties to see if those equities impact the claim for reimbursement. The steps are distinct and sequential.

special education programming, the standards laid out in Andrew F. have been the longstanding standards enunciated by the Third Circuit Court of Appeals and have been the applicable standards to judge the appropriateness of special education programming in Pennsylvania.

Importantly for this matter, to qualify for tuition reimbursement, parents must provide notice to the school district that they intend to seek tuition reimbursement for a unilateral private placement undertaken by parents. Specifically, the parents must provide notice, either at an IEP team meeting or prior to removing the student from school district programming, that they are dissatisfied with the school district's provision of educational programming for the child and that they intend to look to the school district to fund a unilateral private placement undertaken by parents. (34 C.F.R. §300.148(d)(1)(i)).

Here, taking the notice requirement first, in June 2015 the parents clearly placed the District on notice, as required under IDEIA, that they were enrolling the student privately for the 2015-2016 school year (in effect, continuing the private placement that the District had funded under the terms of the April 2014 settlement agreement). The District replied by letter that it stood by its offer of programming through the April 2015 IEP. But that is not enough to forestall parents' claim in this matter, under this complaint, for tuition reimbursement for the 2015-2016 school year. In effect, the District viewed the parents letter—clearly required statutory notice—along the lines of a tennis serve, to be volleyed back with a letter of its own, denying that owed any private tuition. But it was placed on notice of a potential claim for tuition reimbursement for the 2015-2016 school year, and the parents' claim for

tuition reimbursement for that school year in the instant matter was timely. (G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015)).¹⁰

The notice requirement for a potential reimbursement claim, however, has a very different outcome for the 2016-2017 private placement. The parents' May 2016 letter to the District does not place the District on notice that they would look to the District to fund the private placement. The letter, in a very different format and using very different language from the June 2015 letter, does not even imply, let alone request, that the parents would seek to hold the District at risk of funding the private school tuition for 2016-2017. Indeed, the letter seems to seek only that, going forward, the equitable participation/dual enrollment status of the student be maintained. This is especially powerful in light of the parties' interactions to this point in the chronology—the parties had a contentious relationship, the parents previously provided a very different letter regarding District funding of the private placement, and the equitable participation process, including a collaborative EPP, had been in place for a year. It is reasonable to support, and in fact is an explicit conclusion here, that the District's conclusion that the parents had come to accept that the student would be privately placed at their own expense.¹¹ Therefore, as a matter of law,

¹⁰ If the District was determined that its April 2015 IEP should be reviewed, at that time, as an offer of FAPE, it could have, and arguably should have, filed for special education due process in defense of that offer. 22 PA Code §14.162(c).

¹¹ Indeed, pursuant to footnote 10, the District could have, and arguably should have, in light of the notice requirement, sought to defend its April 2015 IEP, given the fact that it was put on notice of a potential claim for tuition reimbursement. But reading the May 2016 letter does not provide such notice. The entire point of such notice is that a school district can gauge its position, both in terms of educational programming and a potentially initiating special education due process, in light of parents' assertion through its notice to the school district. Without such notice, as here in terms of the

the parents did not place the District on notice that it was expected to fund the 2016-2017 school year

Then, in early April 2017 following the MDT meeting to consider the March 2017 RR, the parents' complaint followed before the student's IEP team could consider an IEP for the 2017-2018 school year. Therefore, pendency in the private placement, but not at District expense, applied to the 2017-2018 school year. (34 C.F.R. §300.518).

In sum, then, the parents' claim for tuition reimbursement for the 2015-2016 school year will be considered substantively below, but parents' claims for tuition reimbursement for the 2016-2017 and 2017-2018 school years are barred as a matter of law.

As indicated above, 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. Here, the April 2015 IEP as proposed by the District was appropriate. The student's present levels of educational and functional performance were comprehensive, including information from the educators at the private placement (where the student was completing the 2014-2015 school year). The transition and academic goals and short-term objectives were appropriate, addressing the student's areas of need, and the specially-designed

May 2016 letter, the school district cannot respond as it might want to and as the law spells out is can/should.

instruction/program modifications were crafted to lead to progress on the student's goals. The speech and language, and occupational therapy, services would be continued as those services were being provided at the private placement under the EPP. In sum, had the student returned to the District in the fall of 2015 for the 2015-2016 school year, the proposed IEP was reasonably calculated to yield meaningful benefit, in the form of significant learning for the student.

When the school district's last-offered or last-operational program is appropriate, as is the case here, the school district has met its obligations to the student, and the second and third steps of the Burlington-Carter analysis (respectively, whether the private placement is appropriate and whether the equities between the parties impact the tuition reimbursement remedy) are not undertaken. Accordingly, the District's proposed April 2015 IEP was appropriate, so there is no tuition reimbursement remedy owed to the parents for the 2015-2016 school year.

Section 504/Chapter 15 – Denial of FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).¹² The provisions of IDEIA/Chapter 14 and related case law, in regards

¹² Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEA/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.

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 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)). Therefore, the foregoing IDEIA denial-of-FAPE analysis is adopted here— the parents are not entitled to tuition reimbursement for Section 504 denial-of-FAPE.

Section 504/Chapter 15 – Discrimination

Additionally, the provisions of Section 504 bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against, has been discriminated against in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F.3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district. (S.H., *infra*).

Here, the District did not act with deliberate indifference in its actions with the student or family. Without making any factual determinations as to the alleged claims of the family as to alleged abusive behavior (see footnote 8), as of April 2015, the District was placed on notice that there may have been alleged problematic behavior by one or more of its employees in the life skills

classroom in the 2013-2014 school year. It immediately undertook an internal investigation and found no problematic behavior on the part of its employees had taken place. Then, in July 2015, those reports took on a more pointed (albeit still vague, as reported to the District) aspect. The District stood by its earlier investigation and asked for details of the more pointed allegations, to cut through the vagueness and to investigate further. No such information was forthcoming. In these areas, and in the areas of reports of alleged problematic behavior on the part of its employees, the District acted with concern and alacrity, not indifference of any sort. Therefore, Section 504 discrimination claims as to those events (both alleged and, in communications/interactions between the parties, actual) are not supported.

As to Section 504 discrimination claims outside of those events, at all times in the communications/interactions between the parties regarding the re-evaluation of the student, the student's IEPs and EPPs, and the student's educational programming generally over the 2015-2016, 2016-2017, and 2017-2018 school years, the District did not discriminate against the student or family.

Accordingly, Section 504 discrimination claims are denied.

•

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District's proposed programming for the 2015-2016 school year was appropriate, and parents are not entitled to tuition reimbursement for that school year. As a matter of law as set forth above, parents are not entitled to tuition reimbursement for the 2016-2017 and 2017-2018 school years.

The School District did not discriminate against the student on the basis of the student's disability.

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

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

February 20, 2018