

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

**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

Closed Hearing

ODR File Number

23602-1920AS

Child's Name

A.M.

Date of Birth

[redacted]

Parents

[redacted]

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Hearing Officer

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Date of Decision

02/02/2021

Introduction

This special education due process hearing concerns the educational rights of A.M. ("student"), a student who resides in the Wallingford-Swarthmore School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student who requires special education to address the student's needs related to a health impairment (attention deficit hyperactivity disorder – "ADHD") and a specific learning disability in written expression.

The student's parents claims that the District denied the student a free appropriate public education ("FAPE") through various acts and omissions related to the student's educational programming since the summer of 2018, including the 2018-2019, 2019-2020, and 2020-2021 school years, inclusive. Parents seek compensatory education for the summer 2018 and 2018-2019 school year, as well as tuition reimbursement for a unilateral private placement undertaken by parents for the 2019-2020 and 2020-2021 school years.

¹ The generic use of "student", and avoidance of personal pronouns, are 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 §§14.101-14.162 ("Chapter 14").

Analogously, denial-of-FAPE and discrimination claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”), will be considered.³

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the parents are not entitled to any remedy.

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

Issues⁴

1. Did the District provide a FAPE to the student in the summer of 2018, and the 2018-2019 school year, and/or propose programming to provide FAPE in the 2019-2020 and 2020-2021 school years?
2. If not, are the student or parents entitled to remedy?
3. Did the District discriminate against the student on the basis of disability?

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 (“Chapter 15”). While parents do not explicitly make claims under Section 504, and do not present such a claim in opening statements, in their closing statement, parents make a claim for reimbursement for a private evaluation under anti-discrimination provisions of Section 504. Therefore, this will be addressed in the decision even though it was not presented as an explicit issue at the hearing.

⁴ In their amended complaint, parents alleged denial-of-FAPE for the 2017-2018 school year as well. In opening statements, however, parents clarified through counsel that their claims were based on the student’s programming in the summer of 2018 and thereafter. (Notes of Testimony [“NT”] at 52-54).

Findings of Fact

All evidence in the record, both exhibits and testimony, was considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

Evaluation History

1. In November 2012, in the student's 2nd grade year, the student was evaluated by the District. [redacted] The student was found to be not eligible for special education, although a Section 504 plan was recommended for attention difficulties. (School District Exhibit ["S"]-1).
2. In May 2014, in the student's 4th grade year, the student was re-evaluated. The District identified the student as eligible for special education with a health impairment (ADHD) and a specific learning disability in written expression. [redacted] Additionally, the student received occupational therapy support in the form of assistive technology. (S-3).
3. In May 2017, in the student's 6th grade year, the student was re-evaluated. The student continued to be identified as a student requiring special education for attention and written expression, [redacted]. The evaluator noted relative deficits in the student's cognitive profile for working memory and processing speed, which

interfered with the student's ability to marshal and organize cognitive information. (S-9).

4. Academic work in terms of its content was not problematic for the student. In fact, given the student's intellect, academic content has never presented qualitative challenges. Attention and task-approach/organization have always been the primary challenges to the student's written expression. (S-1, S-3, S-9; NT at 71-206, 211-292, 298-396, 410-504, 590-696, 701-786).

2018-2019 / 8th Grade

5. In May 2018, the student's individualized education program ("IEP") team met to revise the student's IEP. This IEP was in place in the 2018-2019 school year, the student's 8th grade year. (S-15).
6. The May 2018 IEP contained extensive information on the student's present levels of academic and functional performance. (S-15).
7. The May 2018 IEP contained teacher input, with consistency across multiple subjects that the student was very intelligent and submitted quality work but struggled with written work, organization and task-completion, and attention. (S-15).
8. The May 2018 IEP contained parental concerns, which aligned with the student's needs in the educational environment, namely support in writing and organizational/time-management needs. (S-15).
9. The May 2018 IEP identified student needs in executive functioning (organization, task-approach), self-advocacy, and written expression. (S-15).
10. The May 2018 IEP included transition goals and planning. (S-15).
11. The May 2018 IEP included three goals, each addressing an area of need for the student— written expression (initiation/brainstorming, completing assignments), executive functioning (organization, time-

- management, task-approach, task-persistence), and self-advocacy (engagement and planning with teachers on writing tasks). (S-15).
12. The May 2018 IEP contained specially-designed instruction and modifications to address the student's needs in written expression, task-approach in writing assignments (including an organization/self-advocacy organizational chart), and attention/focus. (S-15).
 13. The student received 47 minutes per day of learning support with the special education teacher. (S-15; NT at 298-396).
 14. The May 2018 IEP continued monthly support in occupational therapy. (S-15).
 15. The May 2018 IEP contained extended school year ("ESY") goals for summer programming. The goals focused on written expression and self-advocacy in writing assignments. (S-15).
 16. Over the summer 2018 ESY program, the student made progress on initiation of writing and production of writing (outlining and output), but the student did not produce a completed piece of writing. (Parents Exhibit ["P"]-15).
 17. In November 2018, the student began to exhibit the behavior of [redacted]. The student's mother described this behavior as severe; the student's special education teacher described the behavior as evident but not severe. The teacher's testimony was credited. (NT at 71-206, 298-396).⁵
 18. In November 2018, the student and family began to receive professional counseling services. (NT at 71-206, 512-554).

⁵ The testimony of the student's mother was largely credited, but detailed recall and articulate responses to questions by the family's attorney gave way to a lack of recall and somewhat non-responsive answers to questions by the District's attorney. This was an observable change in affect and engagement that leads the hearing officer to accord less weight to the mother's testimony where it differed markedly, in a material way, from other witnesses' testimony.

19. Over the holiday break, parents requested that the student's IEP be re-visited for a "re-set" on the student's programming. (P-3; NT at 71-206, 298-396).
20. In January 2019, the student's IEP team met to revise the student's IEP. The District also requested permission to re-evaluate the student to perform a functional behavior assessment ("FBA"). (S-20, S-22).
21. Some of the student's supports were provided after school. The January 2019 IEP removed these indications so that the student's supports were provided during the school day. (S-20; NT at 71-206, 298-396).
22. In January – March 2019, the student began to work with a community-based robotics team, spending on average 3 hours per evening, 3-5 evenings per week. (S-25; NT at 71-206).
23. In March 2019, the parents provided permission for the FBA, which was completed that same month. (P-8; S-22).
24. The March 2019 FBA largely confirmed what had already been known about the student's needs. It indicated that the student was resistant to written work, having difficulty initiating and persisting in writing assignments, all amounting to work-avoidance for non-preferred tasks. Attendant to this was the further indication that the student had difficulty in self-advocacy by failing to ask questions or engage teachers. (P-8).
25. In April 2019, the parents requested a speech and language ("S&L") evaluation. In May 2019, the S&L evaluation was issued, indicating the student's relative deficits in executive processing were not related to S&L needs in receptive language or language processing. S&L services were not recommended. (S-30, S-32; NT at 563-579).

26. In May 2019, the student's IEP team met for its annual revision of the student's IEP. (S-33).
27. A large portion of the IEP meeting centered on the student's English class placement for the student's 9th grade year. The District was recommending, based on the student's work in language arts in 8th grade, the student's needs in written expression, and the student's results on the District-wide English placement test for high school, that the student enroll in college-placement English in 9th grade. The parents wished for the student to be enrolled in a higher-level English class, honors English. (S-17, S-18, S-33 at page 9; NT at 211-292, 298-396, 797-876).
28. Over the course of the student's 8th grade year, the student made progress on the written expression goal. The assessments across three metrics was uneven, but by the end of the school year, the student was largely successful across all three metrics (with providing details to support writing being a relative strength all year). (P-10).
29. Over the course of the student's 8th grade year, the student made progress on the executive functioning goal. The assessments across the two metrics (homework completion and classwork completion) was uneven. The student was most successful in assignments in science, mathematics, and social studies. The student was less successful, but consistent, in assignments in language arts. The student was clearly unsuccessful in assignments in French. (P-10).
30. Over the course of the student's 8th grade year, the student made clear progress on the self-advocacy goal. (P-10).
31. The May 2019 IEP continued to include goals in written expression, executive functioning, and self-advocacy. (S-33).

32. The May 2019 IEP continued to include specially-designed instruction and modifications in each area of need (written expression, executive functioning, and self-advocacy). (S-33).
33. The May 2019 IEP proposed that, when the student transitioned to high school in 9th grade, the student would receive 80 minutes of learning support in the fall of 2019, with this level of servicing to be gauged (for maintenance, increase, or decrease) for the spring of 2019. (S-33).
34. The May 2019 IEP contained ESY goals and programming. (S-33).
35. The parents accepted the proposed ESY programming for the summer of 2019, but rejected the school-year programming in the IEP. (S-33, S-34).
36. The student attended approximately half of the ESY-2019 sessions. The student made progress in working through a text and producing, with teacher support, written work. (P-16).
37. In the spring of 2019, the parents had started to explore enrolling the student in a private placement. (NT at 71-206).
38. In July 2019, the parents informed the District that they intended to enroll the student in a private placement and would look to the District to fund the placement. (S-36).
39. In July 2019, the parents also initiated a private evaluation process. (S-37; NT at 71-206, 701-786).

2019-2020 / 9th Grade

40. For 9th grade, the student enrolled in a private placement. (NT at 71-206, 590-696).
41. The private placement serves [redacted]. (S-71, S-72; NT at 590-696).

42. The private placement does not provide individualized special education supports. The accommodations the student receives are school-wide interventions for all students (e.g., extended time for assignments, use of a laptop computer). (S-71, S-72; NT at 590-696).
43. The private placement's individualized growth plan for the student in the 9th grade did not contain programming; the growth plan was simply a list of parental concerns/aspirations ("what would you like your child to accomplish?"). (P-12; S-47).
44. In September 2019, after the student had enrolled in the private placement, the private evaluator issued her report. (S-37).
45. The private evaluation entirely supported the conclusions that the District's previous evaluations, FBA, and experience with the student had determined—the student's executive functioning relative deficits impacted learning in initiation, task-approach, and task completion; the student exhibited difficulty maintaining interest and attention with non-preferred tasks, especially writing; and the student had a significant discrepancy between a very high IQ and achievement in written expression. (S-37).
46. In October 2019, the private evaluator observed the student in the private placement and issued an addendum to her report. (S-42).
47. In October 2019, the District permission to re-evaluate the student. (S-41).
48. In January 2020, the District issued its re-evaluation report ("RR"). (S-46).
49. The January 2020 RR included the identified strengths and weaknesses, and recommendations, from the private evaluation. The RR also contained input from the student's experience, at that point, in the private placement. (S-46).

50. The January 2020 RR continued to recommend that the student be identified as a student with the health impairment ADHD and a specific learning disability in written expression. (S-46).
51. In February 2020, in light of the January 2020 RR, the student's IEP team met to revise the student's IEP. (S-48).
52. The February 2020 IEP contained extensive information on the student's present levels of academic and functional performance, including information from the student's 8th grade year, from the private evaluation, and from the January 2020 RR, as well as input solicited from parents. (S-48).
53. The February 2020 IEP contained teacher input from the private placement and review, at that point, of the student's academic progress in the private placement. (S-48).
54. The February 2020 IEP identified student needs in executive functioning (organization, task-approach), self-advocacy, and written expression. (S-48).
55. The February 2020 IEP included transition goals and planning. (S-48).
56. The February 2020 IEP maintained the student's goals in written expression executive functioning, and self-advocacy. The IEP proposed new metrics for monitoring progress on the self-advocacy goal. (S-48).
57. The February 2020 IEP contained expanded specially-designed instruction and modifications to address the student's needs in written expression, task-approach in writing assignments, and attention/focus. (S-48).
58. The student's placement changed to reflect a program entirely in the regular education setting. (S-48).

59. The February 2020 IEP continued monthly support in occupational therapy and added school counseling sessions twice monthly. (S-48).
60. The February 2020 IEP contained an ESY goal for written expression. (S-48).
61. On March 17, 2020, Pennsylvania schools closed as a result of the COVID-19 pandemic, a school closure which lasted through the remainder of the school year.
62. During the school closure, the private placement continued educating the student using online learning. (NT at 71-206, 590-696).
63. The student's academic performance at the private placement was, as it was at the District, very good, although the student displayed many of the same challenges with task-initiation/task-completion in, and production of, written work, and lack of attention with non-preferred tasks. (P-17).

2020-2021 / 10th Grade

64. The student returned to the private placement for 10th grade. (NT at 71-206, 590-696).
65. Aside from general testimony of an administrator from the private placement, who had no instructional contact with the student, the record contains scant evidence as to programming, assessments, or academic results for the student in 10th grade. (NT at 590-696).
66. In April 2020, the parents filed the complaint which led to these proceedings.

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

Discussion

IDEIA/Denial-of-FAPE

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). 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 individual needs, not simply *de minimis* or minimal education progress. (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

In this matter, parents claim a compensatory education remedy for allegations related to ESY programming in the summer of 2018 and the 2018-2019 school year. After enrolling the student in the private placement,

parents claim tuition reimbursement as a remedy for the 2019-2020 and 2020-2021 school years. Each of the parents' claims will be considered as they unfold over time.

First, however, it must be pointed out that over dozens of exhibits, multiple evaluations, IEPs, progress monitoring, and private placement reports that there is remarkable consistency across the entire record on fundamental aspects of the student's strengths, challenges, and education. [redacted]. The student's needs are clear: executive functioning support for task-initiation, organization, and task-completion for non-preferred tasks, especially writing; the production of written expression itself; and self-advocacy to seek out and engage teachers to support those needs. Over multiple school years, in the District and the private placement, and as recognized by multiple evaluators, these needs are evident with very little variability.

Summer 2018 & 2018-2019 School Year. In the summer of 2018, prior to the student's 8th grade year, and throughout 8th grade at the District, the District implemented programming that fully met the student's needs and led to progress on the student's goals. In the summer of 2018, the student made clear progress. Over the course of the 8th grade school year, progress was not always uniform, but a granular look at the student's progress monitoring shows progress, especially from the start of the school year to its

end. The testimony of the student's 8th grade teachers, both the language arts teacher (NT at 211-292) and the special education teacher (NT at 298-396), is also very strong that the goal-driven, specially-designed instruction for the student under the terms of the IEPs was effective. Taken all together, the District designed and implemented programming for the student's 8th grade year that was reasonably calculated to provide, and did provide, significant learning in light of the student's unique needs. Accordingly, the District did not deny FAPE to the student, and no compensatory education remedy is owed to the student for 8th grade.

Tuition Reimbursement. 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); 22 PA Code §14.102(a)(2)(xvi)).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program, or last-operative

program, and whether it was reasonably calculated to yield meaningful education benefit. Step two of the Burlington-Carter analysis involves assessing the appropriateness of the private placement selected by the parents. At step three of the Burlington-Carter analysis, the equities must be balanced between the parties.

2019-2020 School Year. At step one of the Burlington-Carter analysis for 9th grade, both the May 2019 and February 2020 IEPs were reasonably calculated to yield meaningful education benefit in the form of significant learning to the student in light of the student's unique needs. This was especially the case where the parties disputed the student's placement track for high school English. The record weighs heavily in favor of a finding that the District's proposal for college-placement English was appropriate (NT at 797-876, 890-969).

Therefore, the District met its obligation to the student to propose appropriate programming for 9th grade. Even were this not to be the case, however, the private placement is not appropriate for the student. In short, the private placement is a very strong academic program [redacted], and it is no surprise that, academically, the student is doing well there. But step two of the Burlington-Carter analysis requires that a unilateral private placement be appropriate in meeting the special education needs of a student. In effect, in any tuition reimbursement claim, parents assert that a

school district has not met those needs and, as a consequence, the parents must seek out support for those needs elsewhere, at their own expense. But where that is not the case—where the private placement is not in a position to meet those needs, or is not meeting those needs—the claim must fail at step two of the Burlington-Carter analysis.

And that is the case here: the private placement is providing no individualized, programmatic interventions targeted to the unique needs of the student. Again, the private placement may be providing a challenging academic environment where the student is doing well; but it is not providing for the student’s special education needs. Thus, parent’s claim for tuition reimbursement cannot be supported for this failure at step two of the Burlington-Carter analysis.

To comprehensively address the Burlington-Carter analysis, at step three of the Burlington-Carter analysis, the equities do not weigh decidedly in favor, or against, either of the parties.

Accordingly, the District proposed appropriate programming for the student in 9th grade. Therefore, the District met its FAPE obligation to the student, and parents are not entitled to a tuition reimbursement remedy.

2020-2021 School Year. As pointed out above, there is very little evidence in the record oriented specifically to the student’s 10th grade year. The February 2020 IEP would be the District’s last-proposed programming,

and it is appropriate, reasonably calculated to yield significant learning in light of the student's unique needs. Thus, step one of the Burlington-Carter analysis supports a conclusion that the District met its obligations to the student in the current school year. Nothing in the record cures the deficiencies of the programming at the private placement at step two of the Burlington-Carter analysis. And, again, a balancing of the equities between the parties does not impact these findings.

Overall, then, when implementing educational programming for the student in 8th grade, and in proposing programming for the 9th and 10th grades, the District provided FAPE to the student.

Section 504/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).⁶ The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504/Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be

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.

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 analysis is adopted here— the District provided FAPE to the student in implementing programming in 8th grade and proposed appropriate programming for 9th and 10th grades.

Section 504/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 on the basis of disability, has been subject to disability discrimination 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 in its purported acts/omissions. (S.H., *id.*).

Here, the District did not act with deliberate indifference toward the student. In fact, the record weighs heavily toward a finding that throughout the 8th, 9th, and 10th grades, the District was diligently engaged in attempting to understand the student's needs and in designing/implementing programming that addressed those needs. The

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

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Wallingford-Swarthmore School District met its obligations to provide, or to propose, special education programming that provided a free appropriate public education to the student in the student's 8th, 9th, and 10th grade school years.

The Wallingford-Swarthmore School District did not discriminate against the student on the basis of disability.

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

s/ *Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire
Special Education Hearing Officer

02/02/2021