

*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 Due Process Hearing Officer Final Decision and Order**

### **Closed Hearing**

### **ODR File Number**

23126-1920KE

### **Child's Name**

L.S.

### **Date of Birth**

[redacted]

### **Parents**

[redacted]

### Counsel for Parents

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### **Local Educational Agency**

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### **Hearing Officer**

Michael J. McElligott, Esquire

### **Date of Decision**

09/01/2020

## Introduction

This special education due process hearing concerns the educational rights of L.S. ("student"), a student who formerly resided in the Baldwin-Whitehall School District ("District").<sup>1</sup> The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")<sup>2</sup> as a student who requires special education to address the student's needs related to an emotional disturbance and a specific learning disability. The parties disagree over whether or not the student should have been identified for services earlier and over the appropriateness of District programming.

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 January 2018. Analogously, the parent asserts these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").<sup>3</sup> Furthermore, the parent claims that the District acted with deliberate

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<sup>1</sup> The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student. The student's family moved out of the District in March 2020.

<sup>2</sup> 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").

<sup>3</sup> 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").

indifference toward the student's needs and, therefore, makes a claim for disability discrimination under Section 504.

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 parent is not entitled to any remedy.

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

### **Issues**

1. Has the District denied the student FAPE in its handling of the student's programming/placement over the period January 2018 through the beginning of the 2019-2020 school year?<sup>4</sup>
2. Has the District treated the student with deliberate indifference, amounting to discrimination against the student on the basis of disability?

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<sup>4</sup> The first evidentiary hearing on May 13, 2020 was related to fact-finding regarding whether parents "knew or should have known" (KOSHK) of the actions which formed the basis of their complaint at a point prior to December 2017, two years prior to the filing date of their complaint in December 2019. Thereafter, on May 19, 2020, the undersigned hearing officer issued a KOSHK ruling, finding that events in the student's education and home life in the fall of 2017 diverged dramatically from everyone's (both parents and teachers) prior understanding of the student, events which led to therapeutic hospitalizations through early January 2018. Neither party knew or should have known prior to January 2018 of the actions that led to parents' complaint. Therefore, a denial-of-FAPE evidentiary record was developed as of January 2018 and thereafter. The parties agreed that the student would enroll in a therapeutic educational setting for the 2019-2020 school year and do not dispute that program/placement.

3. If either/both of the questions is/are answered in the affirmative what, if any, remedy is owed to the student?

### **Findings of Fact**

All evidence in the record, both exhibits and testimony, were 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.<sup>5</sup>

### ***Prior Evaluations & Programming***

1. In March 2015, in the spring of the student's [redacted] grade year, the student underwent a private neuropsychological evaluation. Until this time, the student attended private parochial school. (Parents Exhibit ["P"]-1; Notes of Testimony ["NT"] at 61-131).
2. Following the issuance of the private report, the parents requested an evaluation of the student by the District. In May 2015, the District issued its evaluation report. (P-2; S-47).
3. The District evaluation report concluded that the student did not have a disability and did not qualify for special education. While the private neuropsychologist seemed a bit more concerns with the student's

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<sup>5</sup> Much of the documentary evidence, and testimony, centered on an outsized focus on email exchanges and communications between the parents and various educators. This evidence amounted to hundreds of pages of documentary evidence, and hours of testimony where witnesses were simply asked to identify and confirm the content of those emails. (See, e.g., School District Exhibit ["S"]-35, S-36, S-37, S-38, S-39, S-40. This decision is focused largely on the more relevant evidence presented in the student's evaluation, programming, and education-related documents.

speech and language presentation, the results of the private neuropsychological report largely aligned with the District's evaluation. (P-1, P-2).

4. The private neuropsychologist noted some emotional and behavioral needs of the student, but these manifestations were reported only at home—there were no emotional or behavioral needs noted in the school environment. (P-1).
5. The student returned to the parochial school for the 2015-2016 school year, the student's [redacted] grade year. (NT at 61-131).
6. The student enrolled in the District in the 2016-2017 school year, the student's [redacted] grade year. (P-3; S-1; NT at 61-131).
7. Due to academic concerns in the fall of 2016, the District requested permission to evaluate the student and, in December 2016, the District issued an evaluation report ("ER"). The December 2016 ER recommended that the student be identified as student with a specific learning disability in reading comprehension. The December 2016 ER indicated that the student was experiencing more significant social/emotional/behavioral difficulties at home rather than in the school environment. (P-3; S-1).
8. At the same time, in December 2016, the student's individualized education program ("IEP") team met to craft the student's IEP. (S-2).
9. The student completed the remainder of [redacted] grade with the support of the December 2016 IEP.

### ***2017-2018 / [Redacted] Grade***

10. The December 2016 IEP was in effect in the 2017-2018 school year, the student's [redacted] grade year. (S-2).

11. In the fall of 2017, the trajectory of the student's education markedly changed.
12. The student was involved in incidents involving a particular peer. (S-7, S-50; NT at 61-131). The parents retained counsel and were discussing a Title IX complaint for gender discrimination. (S-7, S-8; NT at 61-131, 149-187).
13. The student's IEP was revised in October 2017. The IEP included a safety plan for the student related to the peer interaction. (P-12; S-6, S-9).
14. At the same time, the District requested, and received from parents, permission to re-evaluate the student. (S-11).
15. In September 2017, the student was absent from school for only a day or two. In October 2017, it is not apparent that the student was absent from school for any day. (S-32).
16. In November 2017, the student's behavior at home deteriorated to the point where the student was hospitalized, a hospitalization which continued with multiple admissions to therapeutic facilities, from that time until the student returned to the District in January 2018. (P-6, P-7, P-8; S-52, S-54, S-55; NT at 61-131).
17. In December 2017, during the student's time away from the District, it issued a re-evaluation report ("RR") based on the evaluation process that had been unfolding since October 2017. (P-13; S-11, S-13).
18. In January 2018, upon the student's return to the District, the student's IEP was revised based on information shared by the parents

related to the student's hospitalizations. The IEP also included an updated safety plan for the student. (S-15, S-16).

19. The January 2018 IEP identified academic needs in reading comprehension and writing, social-skills needs, and needs related to the negative peer interaction. (S-16).
20. The January 2018 IEP included goals in reading comprehension, writing, and self-advocacy. (S-16)
21. The January 2018 IEP included modifications and specially-designed instruction in task-approach, task-completion, assignment and testing modifications, time for work completion and academic support in a support classroom, modified reading instruction, and a pass for access to staff member when needed, among other modifications. (S-16).
22. The January 2018 IEP called for the student to participate in group sessions with the District social worker. (S-16; S-31).
23. The student's placement was largely in regular education with supports (outside of the academic support in a class period every other day and the sessions with the social worker), with the student spending 95% of the school day in regular education. (S-16).
24. The student's IEP was further revised in March 2018. (S-14, S-44).
25. The March 2018 IEP revision increased the time in the academic support class to a class period each day. (S-14; NT at 685-721).
26. In April 2018, the parents obtained a second private neuropsychological evaluation. (S-17).

27. In May 2018, the student's IEP team met to discuss the student's IEP. (S-19; NT at 480-585, 587-682, 974-996).
28. In May 2018, the student began homebound instruction through the remainder of the school year. (S-18; NT at 352-402, 480-585).
29. As had been the pattern over the entire school year, problematic behaviors were exhibited by the student frequently at home, but these behaviors were not exhibited in the school environment. (S-17; NT at 263-348, 352-402, 480-585, 587-682, 685-721, 729-814, 974-996).
30. While in school-based programming in the spring of 2018, the student made progress over the spring of 2018. (S-12, S-14, S-30, S-31; NT at 263-348, 352-402, 685-721).
31. The student attended extended school year programming for one day in the summer of 2018 but found it to be unsatisfying and did not return. (NT at 480-585).
32. In June 2018, the District requested, and received from parents, permission to re-evaluate the student. (S-20).
33. Over the spring and summer of 2018, the parties engaged in a mutual misunderstanding as to mental health records from the most recent partial hospitalization placement from late December 2017/early January 2018. Parents thought the District had been provided with those records; the District did not know that parents wished to have the records provided to the District. The misunderstanding was resolved in the summer of 2018, and the parents hand-delivered those records to the District in August 2018. (S-21; NT at 263-348, 480-585, 587-682).



**2018-2019 / [Redacted] Grade**

34. In August 2018, in anticipation of the 2018-2019 school year, the student's IEP team met to consider a draft of the RR, based on the parents' consent in June 2018, as well as potential revisions to the IEP. (S-14; P-15; S-20, S-22; NT at 406-470).
35. The draft RR contained a full history of the student's hospitalization history and the results of prior evaluations (both District and private). (P-15; S-20, S-22; NT at 406-470).
36. The draft RR continued to identify the student as a student with a specific learning disability and recommended that the student be identified as a student with an emotional disturbance. The draft RR contained academic, task-approach and task-completion, and social-skills recommendations, as well as recommendations for support where the student might exhibit emotional support needs in the school environment. (P-15; S-20, S-22).
37. The proposed August 2018 IEP included class periods for emotional management skills, in addition to the class period for academic support, with the student spending 75% of the school day in regular education. (S-14).
38. At the August 2018 IEP meeting, the District updated the safety plan. (S-14, S-41).
39. Based on the discussions at the August 2018 IEP team meeting where the IEP revisions and RR were considered, parents decided to enroll the student in a private parochial school which provided certain supports to the student through an IEP. (P-48; S-23; NT at 480-585, 943-970).
40. The IEP at the private school contained the results of the prior evaluations except for the draft content from the most recent RR. The

IEP included academic goals (math, reading, vocabulary, writing, spelling) and a social skills goal. (S-23).

41. In August 2018, the parents filed a compliance complaint with the Bureau of Special Education ("BSE") at the Pennsylvania Department of Education. (S-25).
42. In September 2018, after the student had enrolled in the private school, the District issued the RR. (P-15; S-22).
43. In October 2018, BSE issued its complaint investigation report, finding that the District (a) had complied with certain elements of implementation of the student's IEP over the 2017-2018 school year and failed to comply with other elements of its implementation, and (b) had complied with re-evaluation procedures. (S-25).
44. The student remained at the private school throughout the 2018-2019 school year and made progress. (S-24; NT at 480-585, 943-970).

### ***2019-2020 / [Redacted] Grade***

45. The student returned to the District for the 2019-2020 school year, the student's [redacted] grade year. (P-51; NT at 480-585).
46. In August 2019, the District re-evaluated the student. (S-27).
47. In August 2019, the student's private therapist shared her opinion that the student should attend an educational placement with a therapeutic component. (P-53).
48. The student's IEP team concluded that the student should be placed in a partial hospitalization program for the 2019-2020 school year, and the student began to attend this placement for the 2019-2020 school year. (S-28, S-29, S-34).

49. In March 2020, the family relocated from the District. (NT at 480-585).

### **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. (Andrew 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)).

Here, the District's programming from January 2018, as represented by the January 2018 IEP and its revisions in March 2018 and August 2018, was reasonably calculated to yield meaningful education benefit in light of the student's unique circumstances. And, as implemented, the student made progress under the terms of those IEPs.

In terms of the period January – June 2018, the January 2018 IEP including revisions met the student's needs in the educational environment and contained appropriate goals to meet those needs. The modifications and specially-designed instruction in the IEP addressed the student's needs and, as the school year progressed, the progress monitoring, grades, and teacher input in the IEPs and evaluations reports over that period, all as reflected in the testimony of the educators who testified at the hearing, indicate that the student made progress on the goals and engaged in significant learning.

In terms of the revisions for the 2018-2019 school year, the District additionally identified the student as a student with an emotional disturbance, accounted for more special education support in the August 2018 IEP revision. But the elements of the student's special education programming, at their core, remained remarkably consistent even outside of any formal identification—targeted academic support, executive functioning modifications for task-approach and task-completion, a safety plan to allow the student to feel safe from a particular peer, social work support to build social skills and peer-related problem-solving skills, and time away from the

regular education environment to allow for these things to be implemented and monitored. The student's IEP, as revised throughout the spring of 2018 and with the proposed revisions of August 2018, was appropriate.

This provides the basis for finding that the parents are not entitled to reimbursement for tuition at the private parochial school in the 2018-2019 school year. 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. Here, the District's programming, as implemented in the period January – June 2018, provided meaningful education benefit to the student and, as proposed in August 2018 for the 2018-2019 school year, was reasonably calculated to provide meaningful education benefit.

Therefore, as programming was implemented and proposed, the District met its FAPE obligation.

With the District having met its obligations to the student, there is no need to proceed to step two (the appropriateness of the private school program) and step three (a balancing of the equities between the parties) of the Burlington-Carter analysis.

The most significant factor which mitigates against a finding of denial-of-FAPE, however, is the fact that the student's problematic behaviors—and the record is clear that the student engaged in serious acting-out and at-risk behaviors over this course of time—were exhibited almost exclusively outside of the school environment. This blunts a major focus of the parents' evidence (and, most likely, their sense of disappointment with the District)—the provision of mental health records from the period of hospitalizations. Parents were clearly frustrated that documentation they thought was in the possession of the District had not been requested or provided. It is clear, however, that those records, even had they been in the possession of the District, would not have materially changed the educational programming for the student. That documentation brought to light mental health diagnoses for the family and made therapeutic recommendations then undertaken privately by the family. These things are vitally important for the psychological treatment of the student. But those things did not impact, nor would have impacted, the District's approach to educating the student. In

school, the student was mostly well-adjusted, entirely well-behaved, and responsive to the academic, executive functioning, and social-skills supports put in place by the District. In that regard, the parents' frustration with the records-sharing issue, while understandable, did not and would not change the trajectory of the appropriateness of the student's programming.<sup>6</sup>

In sum, then, from the time the student returned from the series of hospitalizations in January 2018, the District's programming provided FAPE to the student, or was an offer of FAPE. Accordingly, there is no remedy owed to the student or parents for a denial of FAPE.

### ***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).<sup>7</sup> The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section

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<sup>6</sup> The compliance deficit determined by BSE in its complaint investigation report also plays no role in the denial-of-FAPE determinations in this decision. Complaint investigations undertaken by BSE, for regulatory compliance, are distinct from special education due process for determinations of denial-of-FAPE. The two processes are entirely different in terms of purpose, process, standards, and remedy. (See 34 C.F.R. §§300.151-300.153, 300.500-300.537). To have found, as BSE did, certain regulatory compliance issues with the student's programming does not amount to a denial of FAPE. Likewise, determining that the District provided FAPE does not forestall BSE from pointing out compliance flaws, and providing directives to the District to correct those flaws.

<sup>7</sup> 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.

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 analysis is adopted here— the District did not deny FAPE to the student in the design and/or implementation of its programming over the period from the time the student returned from the series of hospitalizations in January 2018.

### ***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. The entirety of the record shows that the District was responsive to the student's needs, communicated and collaborated with the parents, and



worked diligently to provide programming for the student which would provide the student with access to, and the opportunity to benefit from, District programs.

Accordingly, the District has not acted with deliberate indifference toward the student.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the Baldwin-Whitehall School District met its obligations to propose and to implement appropriate special education programming for the student. The school district did not treat the student with deliberate indifference as a student with a 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

09/01/2020