

*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**

### **Open Hearing**

#### **ODR File Number**

24767-20-21

#### **Child's Name**

[T.C.]

#### **Date of Birth**

[redacted]

#### **Parents**

*Pro se*

[redacted]

#### **Local Educational Agency**

Phoenixville Area School District  
386 City Line Avenue  
Phoenixville, PA 19460

#### ***Counsel for LEA***

Jason Fortenberry, Esquire  
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#### **Hearing Officer**

Michael J. McElligott, Esquire

#### **Date of Decision**

10/12/2021

## Introduction

This special education due process hearing concerns the educational rights of T.C. ("student"), a student who resides in the Phoenixville Area School District ("District").<sup>1</sup>

The parties disagree over whether the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA") as student who requires special education.<sup>2</sup> Notwithstanding this identification dispute, the student received programming for certain needs under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").<sup>3</sup> The parents claim that the District's Section 504 programming was inappropriate to meet the student's needs.

As a result of these disagreements, the parents unilaterally enrolled the student in a private placement. They seek tuition reimbursement for this private placement.

Finally, the parents claim the District discriminated against the student in violation of Section 504 anti-discrimination provisions.

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.

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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.

<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").

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

### **Issues**

1. Did the District fail to identify the student as a student who was eligible for special education under IDEIA?
2. To the extent that the District provided programming, was it appropriate?
3. To the extent that the answer to either or both of these questions is/are “no”, are the parents entitled to remedy?

### **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.

### ***Prior Educational Background***

1. Prior to entering District schools in kindergarten, the student was evaluated by the local intermediate unit for early intervention services after parents indicated concerns with the student’s social and emotional development. The evaluation concluded that the student was exhibiting appropriate development across all domains. (Parents’ Exhibit [“P”]-25b).

2. In kindergarten, the student made appropriate progress, although at points in the school year, there were notations about the student needing to improve, or showing improvement, in listening, task focus, and social interactions with peers. (P-7 at page 1; P-7a).
3. In 2<sup>nd</sup> grade, the student was made part of a group social-skills group. After those sessions ended, the student continued with individual sessions with a school counselor. (P-7 at pages 2-5).
4. In 3<sup>rd</sup> grade, the parents requested that the individual sessions with the counselor continue. The parents shared concerns with the building principal regarding the student's interactions with peers and adults, heightened anxiety, and self-esteem, specifically referencing a request for special education. (P-2, P-7 at pages 8-11, P-8; Notes of Testimony ["NT"] at 751-879).

**2018-2019 / [Redacted] Grade<sup>4</sup>**

5. In [redacted] grade, predominantly in the latter half of the school year, the student exhibited impulsive and off-task behaviors which led to email exchanges with teachers. In February 2019, the student was invited to join a social-skills group. (P-10).
6. In March 2019, parents provided consent to conduct an evaluation of the student. (P-1c; School District Exhibit ["S"]-13; NT at 293-452).
7. In May 2019, the District issued its evaluation report ("ER"). (P-1).

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<sup>4</sup> In September 2020, the parents filed a complaint related to these matters in federal court ("the Court"). The Court deferred to special education due process as the necessary fact-finding administrative process, and in April 2021, the parents filed the complaint leading to these proceedings. Therefore, the scope of parents' claims was determined to have accrued as of September 2018, two years prior to the filing date of their complaint with the Court, as the District had been placed on notice of the parents' potential claims at that time. (Hearing Officer Exhibit ["HO"]-1, HO-7, HO-8, HO-9, HO-12, HO-72).

8. The May 2019 ER contained parent input, student input, and teacher input, as well as background information on the student's health, developmental, and education background. (P-1).
9. The May 2019 ER contained formal assessments in cognitive ability, achievement testing, and behavioral ratings. (P-1).
10. Parent input in the May 2019 ER indicated particular concerns with impulsivity, attention and task focus, following directions, anxiety, self-esteem, and socialization with peers. (P-1 at pages 2-4; P-1d).
11. Student input in the May 2019 ER indicated particular concerns with sustaining attention, hearing directions, task-persistence, organization, distractibility, and with emotional responses to situations with others. (P-1 at pages 2-4).
12. Teacher input in the May 2019 ER indicated that she observed the student to get lost in thought, to allow self-esteem issues to impact class participation, and at times to engage in inappropriate social interactions. Teacher input also indicated that she was employing classroom strategies to address off-task behavior and distraction, movement breaks ("to help with...attention regulation like that of...classmates"), following directions, and avoiding instances where self-esteem may be called into question ("Given [the student's] background, it is important for [the student] to not think that [the student] is disappointing [the] teacher...").(P-1 at pages 4, 8).
13. Observations for the May 2019 ER yielded two different views of the student. In one observation, an academic small-group activity, the student was engaged in the instruction and activity. In a second observation, a video presentation in a less-structured group setting, the student was inattentive and active, ultimately being moved by the teacher to the back of the class group so as not to disturb classmates. (P-1 at page 5).

14. During testing for the evaluation, the student took time away from the observation for a restroom break, sometimes inappropriately interrupted the evaluator, and on multiple occasions voiced comments about answers or participation which were self-deprecating, self-diminishing, or self-doubting. (P-1 at page 6).
15. The evaluator noted that the student was very self-aware of behaviors that interfered with learning, specifically with sustaining attention (especially with lecture-style direct instruction over longer periods of time). The student was also very self-aware that feelings of inadequacy, or having made a mistake, often stayed top of mind and distracted the student for an extended period of time thereafter. (P-1 at pages 6-7).
16. The parents provided an extensive background history for the student's development. (P-1 at pages 9-10; P-1d).
17. The May 2019 ER included cognitive testing. The results of the cognitive testing present disparate information in terms of the student's overall cognitive ability. In beginning to describe the assessment results, the ER indicates that "{the student's} performance on the six core subtests [of the cognitive assessment] that make up the General Conceptual Ability (GCA) resulted in a standard score of 101, 53<sup>rd</sup> percentile which is within the average range...." (pointed parentheses used to protect student confidentiality, bracketed parentheses added for understanding, standard parentheses in the original). A table laying out the subtest scores (where only five are listed) and the GCA, however, indicate that the GCA score is 119, at the 90<sup>th</sup> percentile. The description of the results also includes a statement that the student's "cognitive profile is similar to (the student's) cognitive profile established in 2016", as evidence of consistency of those results. The record is entirely bereft, however, of

any cognitive testing being performed prior to the May 2019 evaluation process. (P-1 at page 10; NT at 293-452).

18. The District evaluator's testimony at the hearing referenced the GCA of 119. (NT at 293-452).
19. The May 2019 ER included achievement testing. Testing results were largely in the average or high average ranges. Some subtests (silent reading fluency, word recognition fluency, spelling) were deeply discrepant when utilizing a GCA of 119, although these were not noted in the report. (P-1 at pages 14-15).
20. The May 2019 ER included behavior ratings, provided by the parent, teacher, and student (through self-report). (P-1 at pages 7, 15-16).
21. The parent's behavior ratings were clinically significant for hyperactivity and attention problems, and at-risk for conduct problems and activities of daily living. (P-1 at page 16).
22. The teacher's behavior ratings were at-risk for aggression and bullying. Anecdotally, the teacher reported that the student was sometimes the aggressor/teaser with peers in bullying situations. (P-1 at page 16).
23. The student's self-report ratings were clinically significant for attention problems and self-esteem, and at-risk for attitude toward school, attitude toward teachers, anxiety, hyperactivity, interpersonal relations, and personal adjustment. (P-1 at page 7).
24. The May 2019 ER did not include comprehensive ratings from the raters, only select ratings. (P-1 at pages 7, 15-16).
25. The May 2019 ER concluded that the student had a disability in the form of a health impairment (attention deficit hyperactivity disorder ["ADHD"]/executive functioning impairment) but concluded that the student did not require special education. Instead, the

evaluator recommended that the student receive accommodations through a Section 504 plan. (P-1 at pages 19-20).

26. In May 2019, the District developed a Section 504 plan that included the following accommodations: assignment chunking and teacher check-ins with each "chunk", preferential seating, use of wait-time and positive reinforcement, use of a quiet space when necessary, extra time for assignment completion, access to the school counselor. (P-3).
27. In June 2019, the student's parents approved the Section 504 plan, to be implemented in the following school year. (P-16).
28. The student's grades in [redacted] grade showed that the student consistently met grade level expectations and did not show the need for improvement in learning-skills affect. (S-3).

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

29. In the 2019-2020 school year, prior to the COVID-19 pandemic school closure in March 2020, the student had problematic interactions with peers, culminating in early March with a verbal interaction that escalated to a physical confrontation. (P-11 at pages 4-10).
30. Prior to the school closure in March 2020, the student's grades in the first three quarters showed that the student consistently met grade level expectations and did not show the need for improvement in learning-skills affect. (S-4).
31. In December 2019, the student began to treat with a neuropsychiatrist who diagnosed the student with ADHD and general anxiety disorder. (P-23; NT at 462-572).



32. In mid-March 2020, as a result of the COVID-19 pandemic, schools in Pennsylvania were closed, a closure that ultimately was extended for the remainder of the 2019-2020 school year.
33. Following the school closure, the District designed and implemented a continuity of education plan to provide online education to students. (P-73).
34. In April 2020, the parents and a District school counselor corresponded about the student's difficulties in the online learning environment. (P-12).
35. In May 2020, a teacher emailed about the student being disengaged and not submitting any work in a multi-step project. (P-15).
36. The student struggled in the online learning environment, and the behaviors which had impacted the student's learning (inattention, lack of engagement, anxiety) intensified. (NT at 927-953, 967-1144, 1150-1161).

**2020-2021 / [Redacted] Grade**

37. In August 2020, the parents shared with the District their concerns about the student's education in light of the fact that the District would continue to utilize an online learning environment for the 2020-2021 school year. Parents requested that the student return to in-person learning. (P-16).
38. The parents communicated with the District's director of special education, and the student's Section 504 team discussed revisions to the Section 504 plan. (P-18; S-14).

39. The revised Section 504 plan included two accommodations for the online learning environment—removal of certain classes to allow for more breaks and schedule flexibility, and use of private chat features to allow the student to communicate directly with teachers and teachers to communicate directly with the student. (P-6, P-18; S-18).
40. Through September 2020, the parents continued to request a return to in-person learning. (P-32).
41. [Redacted] (NT at 967-1144).
42. Throughout the 2020-2021 school year, the student struggled with attention, assignment completion, and anxiety across multiple classes. (P-19, P-21, P-22b, P-58, P-62, P-66, P-68, P-70; S-15, S-16, S-18; NT at 927-953, 967-1144, 1150-1161).
43. The District did not seek to re-convene the student’s Section 504 plan.
44. The student’s grades through the third quarter of [redacted] grade were As and Bs. This included, however, multiple instances of “re-grading” work after resubmission. (P-43; S-5; NT at 927-953, 967-1144, 1150-1161).
45. In March 2021, the parents withdrew the student from the District and unilaterally enrolled the student in a private placement. (S-10, S-16).
46. In April 2021, the student’s treating neuropsychiatrist drafted a letter indicating that an online learning environment would not be effective for the student. At the hearing, the neuropsychiatrist testified that with the student’s diagnostic profile, her opinion was that the

student could not sustain attention and concentration in an online learning environment. The testimony of the private placement educator was accorded heavy weight. (P-24; NT at 462-572).

47. The private placement is a religious school with a rigorous academic program. (P-38a; NT at 86-281).
48. The private placement conducted admission assessments to gauge prospective students' achievement level. The student scored low on the admissions assessments. (P-31).
49. The private placement provides support for special needs learners through an individualized learning plan and instruction from teachers who have special education certificates. (P-17; NT at 86-281).
50. An educator from the private placement with deep experience in special education supported the student after the student's enrollment in the private placement. The educator testified that the student exhibited significant need for support in the areas which had long been a part of the student's educational needs (attention, impulsivity, self-esteem). The testimony of the private placement educator was accorded heavy weight. (p-29; NT at 86-281).
51. The student made progress at the private placement, although the student's grades were generally lower than at the District. (P-30a).
52. As part of hearing planning, numerous witnesses were identified, most of whom were the student's teachers over the [current and previous] grades. Ultimately, neither party chose to call any of those witnesses. Therefore, the record is devoid of any testimony from a

District witness who worked directly with the student (HO-12; NT at 879-912).<sup>5</sup>

53. The hearing process was procedurally intricate given the volume of communication and various motions filed by the parents. Parents were often disappointed, or incredulous, with certain rulings and with the procedural elements of the hearing as it unfolded. (HO-3, HO-5 to HO-8, HO-10 to HO-12, HO-14 to HO-15g, HO-23 to HO-76; see NT generally).

54. The parents deeply distrust the District. The District, for its part, has acted in good faith toward the student, but the breakdown in the relationship between the parties may hamper their ability to be honest brokers in the education of the student.

### **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.

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<sup>5</sup> After one session for opening statements and two sessions taking testimony from witnesses, four additional hearing sessions remained on everyone's calendars to conclude the hearing. Parents indicated at the end of the second session taking testimony that they were not going to call any more witnesses. The hearing officer gave District counsel the opportunity to consult with his client given this sudden turn of events; ultimately, the indication from District counsel was that the District did not intend to call any more witnesses. The hearing officer entertained the possibility that he might call District witnesses himself to develop a record more fully; upon consideration, the hearing officer felt he would not insert himself into the evidentiary matrix that the parties had decided for themselves and so he did not require that any witness be produced at his request. One of the remaining sessions was utilized for the testimony of the family members (the student's father, mother, and grandmother. (HO-43, HO-46; NT at 879-912).

## Discussion

### ***IDEIA/Denial-of-FAPE***

*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)).

*Child-Find*. A critical aspect for the provision of FAPE is a school district’s “child find” obligation, requiring states, through local education agencies like school districts, to ensure that “all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated.” (34 C.F.R. §300.111(a)(i)). This provision places upon school districts the “continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes.” P.P. ex rel. Michael P. v. West Chester Area Sch. Dist., 585 F.3d 727, 738 (3d Cir. 2009). The evaluation of children who are suspected to have a disability must take place within a reasonable period of time after the school is on notice of behavior or needs that are likely to reflect a disability. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 250 (3d Cir. 1999).

*Evaluation.* Finally, where a school district conducts an evaluation under its child-find obligation, that evaluation must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the student is a child with a disability and, if so, what must be provided through the student’s IEP in order for that student to receive FAPE. (34 C.F.R. §300.304(b)). The evaluation must assess “all areas related to the suspected disability”, must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”, and must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and (34 C.F.R. §300.304, generally, and specifically at §§300.304(b)(2-3),(c)(4)).

Here, the legal analysis will be taken up as the legal issues surface over the chronology of events.

First, as to the parents’ child-find claims, the record does not support a finding that the District knew, or should have known, that the student should have been evaluated for potential special education or Section 504 services prior to the spring of 2019, when it undertook an evaluation process. There are communications in the record from parents with concerns about the student. At one point, one of these parental emails referenced an individualized education program (“IEP”) document. But the testimony of the elementary school principal was persuasive and, taken altogether, the record simply does not support a finding that the District failed in its child-find obligation in the school years prior to the 2018-2019 school year. In fact, it appears that the evaluation process in March 2019 was undertaken at the

appropriate time, as the student's behavior began to present more problematic incidents in the winter and early spring.

Second, the May 2019 ER is appropriate, but it contains flaws which give this hearing officer pause. To that point—the spring of 2019—the student exhibited consistent needs related to attention, focus, task-persistence, peer relationships, and self-esteem/anxiety. As pointed out above, these needs were present but not acute until the spring of 2019. The input and observations of the ER confirm that the student was increasingly exhibiting these behaviors and the impact in the educational environment was building. Yet the behavioral ratings assessment results in the May 2019 ER are not listed in a comprehensive way. Only two numeric scores are listed from the teacher's ratings, with approximately six from the parents' ratings, and in excess of six from the student's self-report. To see the full scope of each raters' scores would provide a reader with the full scope of the assessment results. There are descriptors, but only generalized descriptors for the teacher's ratings, while the parents' and student's descriptors are assessment-specific (at-risk or clinically-significant). In short, the behavior ratings assessment results, as related in the report, are scattered and clouded.

But this is a matter of best practice rather than appropriateness. More concerning is the fact that the student's self-report ratings show a pervasive sense of need, with multiple scores registering as at-risk or clinically significant. Those self-report ratings markedly stand out. But the record taken as a whole to that point, and the contents of the May 2019 ER itself, render a very close call the conclusion of whether the student qualified for special education. On balance, the District's conclusion that the student did not require special education will not be overturned—in this regard, the student's academic performance shows that the behavioral challenges of the student were not, at that point, significantly interfering with learning.

However, those behavioral challenges were numerous and seemingly deepening.

Another point of concern for the May 2019 ER are the disparate scores reported for cognitive testing. Put simply, there are two scores—103 and 119—and it is not clear which score was the student’s score. There is a definitive statement that the GCA was 101 (with its attendant percentile). Yet the table of results lists the GCA as 119 (with its attendant percentile). From the testimony of the District evaluator, she clearly saw the score of 119 as the operative indicator of cognitive ability. But any doubt on this point (“what is the student’s overall cognitive ability?”) is problematic, especially where a significant-discrepancy analysis is employed to gauge potential learning disabilities. Another layer of confusion is that the ER references prior cognitive testing, where that indication does not appear to be any part of the student’s prior educational history. So the May 2019 ER contains two cognitive testing scores and a substantive error in terms of the student’s testing history. These faults undermine one’s confidence in what is presented in the ER.

Here too, though, these flaws in the May 2019 ER do not rise to the level to invalidate its conclusion. Taken as a whole, the record supports a finding that the content and conclusions of the May 2019 ER are appropriate. Still, it is a very, very close call and, with the intervening events related to the COVID-19 pandemic and the drastic effect on the student’s schooling, a re-evaluation is in order to make sure that, as the student presents today, an identification for special education services is not warranted. And so the order will address as a matter of remedy the evaluation of the student going forward.

Accordingly, the District met its child-find obligation, and the District’s May 2019 ER is appropriate but presents concerns which warrant a re-evaluation as a matter of remedy.



### ***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>6</sup> The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly 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)).

As outlined above, the District's conclusion, in May 2019, that the student did not require special education was not inappropriate. Recognizing that the student had needs related to ADHD/executive-functioning, the District developed a Section 504 plan.

The appropriateness of the Section 504 plan must be considered in three phases: the 2019-2020 school year prior to the COVID-19 school closure, the 2019-2020 school year during the COVID-19 school closure, and the 2020-2021 school year.

In the 2019-2020 school year prior to the COVID-19 school closure, there is no indication on this record that the design or implementation of the Section 504 plan was inappropriate. Matters changed, however, in mid-March and the remainder of the school year with the COVID-19 school closure. Moving to the online learning environment proved to be very challenging for the student. The student's Section 504 plan was written for implementation in an in-person learning environment and over the final

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<sup>6</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

quarter of the 2019-2020 school year, that was an impossibility. Here, however, it is the considered opinion of this hearing officer that denial-of-FAPE for the student should not be imputed to the District over the period March – June 2020. This finding has two elements: One, the sudden and broad-reaching societal effects of the COVID-19 pandemic in March 2020 were extraordinary. Even into April 2020 these effects were still roiling the world, the schools no less than other elements of society. Therefore, this backdrop must be understood for the FAPE determination for this student. Two, by April into May 2020, the District had a continuity-of-education plan to ensure that students in the District, including students with IEPs and Section 504 plans, could receive their education. No doubt, there were elements of difficulty with the student’s education, as educators, the student, and the student’s parents grappled with the new delivery modality of online learning and the provision of education services (and Section 504 supports) to the student. But instruction and supports were in place, and the record supports a finding that the student was provided with FAPE over the period of May and June 2020. In sum, the student was not denied FAPE in the period from mid-March 2019 through the end of the 2019-2020 school year.

With the onset of the 2020-2021 school year, however, the calculus of FAPE for the student changed. The suddenness and novelty of online learning environments employed across an entire school district did not play as large a role in the dynamics of education. School districts had time to prepare health and safety plans for the reopening of schools. As a critical part of that preparation, those plans could account more readily than in the spring for special needs learners. In the instant case, all of this applies to the student—the District knew what online learning environments would look like and how best (or at least to better) to employ them, it had time to prepare its health and safety plan as the return to school might impact

special needs learners like the student, and it had time to hold IEP or Section 504 meetings to make those individualized arrangements. None of this is to say that the District, or any school district, in the fall of 2020 should have, by necessity, returned to in-person schooling. But it is to say most definitively that, regardless of what return-to-school would look like, it accounted for the individualized needs of students with disabilities.

That did not happen here, in the case of this student. As an initial matter, on this record, only the parents' vigilance appears to have moved the District to revise the student's Section 504 plan. The parents were communicating with District administrators, as the school year began, and those communications led to revisions of the Section 504 plan. Perhaps there would have been a Section 504 meeting without the prompting and participation of the District's director of special education. But even when the meeting came about in early September, it was tardy—those were the types of things that should have been happening with the student so that Section 504 programming was already discussed, and necessarily revised in light of continuing the online learning environment, before the school year began.

Additionally, of the accommodations for the student listed in the Section 504 plan from May/June 2019, only two could be wholly adopted for the online learning environment (wait time/opportunity to participate, use of positive feedback). Four of the accommodations could not be utilized at all in the online learning environment (preferential seating, movement breaks [taking the student off-camera or with a darkened webcam], quiet space away from the environment for assessments, up to twice the allotted time for class assessments). Three of the accommodations may have been available to the student, although with difficulty (chunking of assignments with regular check-ins by the teacher, use of "challenge work" or audiobooks when the student disengaged from learning, student check-in with the

school counselor at the student's request). One would not be surprised if these latter three accommodations could not be implemented in the online learning environment. So a large majority of the student's Section 504 accommodations either could not be implemented, or could be implemented (if at all) with difficulty. Yet none of these accommodations were revised or re-visited prior to the 2020-2021 school year, or early on in that school year.

Two accommodations were added to the Section 504 plan in September 2020: Removing classes from the student's schedule to allow for flexibility to work with teachers, and the use of private chat features in the online learning environment for those check-ins or private communication. While neither is deficient, neither markedly addresses the student's needs in the online learning environment, the same needs the student has always exhibited to one degree or another—inattentiveness, task-focus, distractibility, self-esteem/anxiety. In fact, the latter of these two accommodations (private chats with teachers) arguably exacerbate needs such as inattentiveness, distractibility, and self-esteem/anxiety, as the student was forced to take time and attention away from the learning environment to stand out alone in engaging the teacher.

None of this is to say that the parents' position carries the day, that the student needed to be returned to in-person learning. The denial of FAPE comes not from a lack of in-person learning but in not significantly revising the Section 504 so that the accommodations could meet the student's needs in an online learning environment.

Finally, to consider the record as a whole for the 2020-2021 school year, one sees how the student foundered as the school year unfolded. The challenges presented by the student's needs were not being addressed by the Section 504 plan in the online environment, and month by month the

student continued to falter. The District might point to the student's grades in the [redacted] grade year (S-5) to show that the student continued to perform well academically. But the entirety of the record produced here for the 2020-2021—work product, emails, other communications, the credible testimony of the student's parents and grandmother about the student's struggles, coupled with the credible testimony of the state of the student's attention and task-approach skills upon arriving at the private placement in March (see *Findings of Fact* 42, 50)—clearly establishes a finding that the District denied the student FAPE in the 2020-2021 school year.

Accordingly, compensatory education will be awarded.

### ***Section 504/Discrimination***

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. True, the May 2019 ER was sub-optimal and there was a Section 504 denial-of-FAPE. But the District always acted with responsiveness and in good faith in addressing the student's needs. To read the emails of District administrators, teachers, and staff is to see a host of educators working to answer the concerns of the parents, and to undertake their responsibilities to

evaluate the student and program for the student. In short, whatever the faults laid at the feet of the District here, deliberately mis-serving the student and failing to communicate or work collaboratively with the parents are not among those faults.

Accordingly, it will be an explicit finding that the District did not discriminate against the student on the basis of the student's disability.

### ***Compensatory Education***

Where a school district has denied FAPE to a student under the terms of IDEIA, and by analogy under the terms of Section 504, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)).

In this case, the District denied the student FAPE through an inappropriate Section 504 plan for accommodating the student's needs in the online learning environment in the 2020-2021 school year from the outset of the school year through the date the parents withdrew the student from the District in March 2021. Therefore, compensatory education will be awarded.

Considering the record as a whole as it relates to the 2020-2021 school year, and the equitable nature of compensatory education, it is the considered opinion of this hearing officer that the student should be awarded 1.0 hour of compensatory education for each day the student attended in the online learning environment in the 2020-2021 school year. This figure is based on the fact that the denial-of-FAPE was ostensibly a daily occurrence—the District was not in a position to accommodate the student and/or in fact did not accommodate the student where such accommodation was

necessary. But the denial of FAPE was not global and did not impact the student's learning in all scenarios each school day.

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future Section 504 plans (or IEPs, as may be applicable), or identified educational needs. These hours must be in addition to any then-current Section 504 plan (or IEP) and may not be used to supplant a Section 504 plan (or an IEP). These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree in writing mutually and otherwise as to the use of the compensatory education hours.

### ***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)). This framework is adopted here to consider the parents' tuition reimbursement claim for their unilateral private placement.

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's programming/position. 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.

At step one of the Burlington-Carter analysis, and as set forth above, the District's Section 504 plan was inappropriate for the student in the 2020-2021 school year.

Step two of the Burlington-Carter analysis requires that a unilateral private placement be appropriate in meeting the special education needs of a student. Here, the private placement is clearly appropriate. The private placement has experienced special education teachers assessing student's strengths and needs to craft accommodations through a formal individualized learning plan.

At step three of the Burlington-Carter analysis, the equities must be weighed between the parties. Here, the equities do not weigh decidedly in favor, or against, either of the parties. There is one factor, though, that must be accounted for: The private placement is a religious school where Bible classes are taught two periods per week and where chapel attendance is required one day per week. Given the religious character of the private placement, a sense of faith is implicit in many instances in the life of the school. It is first and foremost a rigorous academic environment, but its religious character will not allow for full tuition reimbursement by a public entity.

Accordingly, the District shall reimburse parents for 90% of the private placement tuition.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is awarded 1 hour of compensatory education for each day the student attended the Phoenixville Area School District's online learning environment in the 2020-2021 school year prior to the student's withdrawal from the school district in March 2021.

The school district shall reimburse the parents for 90% of the student's tuition for the 2020-2021 and 2021-2022 school years.

The school district did not discriminate against the student on the basis of disability.

As an equitable consideration going forward, the student needs to be re-evaluated for potential identification under IDEIA as a student with a disability, or at the least for a re-set of the parties' understanding of the needs of the student. The lack of trust and common ground between the parties therefore requires that an independent evaluator conduct an evaluation for consideration by the student's multi-disciplinary team. Therefore, under the authority granted to a hearing officer by 34 C.F.R. §300.502(d)/22 PA Code §14.102(a)(2)(xxix), in light of the flaws in the May 2019 evaluation report outlined above, the District shall fund a comprehensive independent re-evaluation, under the terms that follow.

On or before November 12<sup>th</sup>, the parents shall provide, through e-mail communication to the school district's director of special education, the names and curricula vitae/resumes, of at least three (but no maximum number) independent evaluators experienced in conducting comprehensive re-evaluations for educational programming ("independent evaluator"), who will make themselves available to conduct this independent re-evaluation.

On or before November 19<sup>th</sup>, the school district, to the extent it wishes, may select the independent evaluator from the individuals identified by the parents to conduct the independent re-evaluation ("selected independent evaluator"), indicating the selection by email communication to the parents from the school district director of special education administrator. As the school district considers which independent evaluator it might choose to conduct the independent re-evaluation, there shall be no contact with the potential evaluators by any employee or contractor of the school district. The school district's consideration shall be made only upon review of the evaluators' curriculum vitae/resumes.

When the school district has indicated to the parents the selected independent evaluator it has chosen, the cost of the independent re-evaluation shall be at the selected independent evaluator's rate or fee and shall be borne by the school district at public expense. As those arrangements are made by the school district, the selected independent evaluator shall be made to understand that it is hoped, but not required or ordered, that the independent re-evaluation report can be issued as soon as practicable, but no later than January 25<sup>th</sup>, sixty calendar days beyond November 19<sup>th</sup>, the last day for the selection of an evaluator by the school district. The selected independent evaluator shall also be made to understand that the purpose of the re-evaluation is to obtain an independent, comprehensive basis to gauge whether, if at all, the student is eligible under IDEIA as a student with a disability.

The record review, input, observations, assessments, testing, consultation, scope, details, findings, recommendations, and any other content in the independent re-evaluation report, shall be determined at the sole discretion of the selected independent evaluator, as the selected independent evaluator feels is necessary.

If by November 19<sup>th</sup>, the school district does not wish to select the independent evaluator, or has not indicated by email its selection to the parents, the parents may consider this lack of choice and/or communication by the school district to place in their hands the selection of the independent evaluator from the list it provided to the school district. The same timelines for the suggested completion and issuance of the independent re-evaluation report apply where the parents have selected the independent evaluator.

After the issuance of the independent re-evaluation report, the student's multi-disciplinary team shall meet to consider the independent re-evaluation report to see whether, if at all, the student qualifies under IDEIA as a student with a disability, or if not, how the independent re-evaluation might inform the understanding of the student's Section 504 team.

Parents' claims in their complaint related to the Americans with Disabilities Act are dismissed for lack of jurisdiction under 22 PA Code §§14.101-14.162 and 22 PA Code §§15.1-15.11.

Nothing in this order should be read to limit the ability of the parties to mutually agree otherwise as to the terms of this order, so long as any such agreement is in writing.

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

10/12/2021