

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

22849-1920AS

Child's Name

B.P.

Date of Birth

[redacted]

Parents

[redacted]

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Hearing Officer

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Date of Decision

11/17/2020

Introduction

This special education due process hearing concerns the educational rights of B.P. (“student”), a student who resides in the Lower Merion 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, an emotional disturbance and a specific learning disability.

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 2017-2018 school year through December 2019, inclusive.³ Parents seek compensatory education, as well as tuition reimbursement for a unilateral private

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”).

³ The District asserts that parents “knew or should have known” (KOSHK) of the actions which formed the basis of their complaint at a point prior to October 2017, two years prior to the filing date of their complaint in October 2019. Because the contested KOSHK period—that is, the period where denial-of-FAPE evidence may be irrelevant due to alleged untimely filing—the KOSHK determination was back-loaded as part of this decision. During the hearing the parties developed any KOSHK evidence they felt was necessary and presented, in closing statements, their legal arguments as to whether parents knew, or should have known, prior to October 2017 about the claims which form the basis of their complaint as to alleged denial-of-FAPE for the period of September/October 2017. KOSHK findings as to this period are presented below.

placement undertaken by parents over the period October 2018 through December 2019.

Analogously, the parents assert these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).⁴ Furthermore, the parents claim that the District acted with deliberate indifference toward the student’s needs and, therefore, make 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 parents are not entitled to any remedy.

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

Issues

1. Did parents know, or should they have known, prior to October 2017 of the claims presented in their complaint as to the period September/October 2017?
2. Has the District met its obligations to provide FAPE to the student?

⁴ 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”).

3. If questions are answered in the negative, is compensatory education owed to the student and/or is tuition reimbursement owed to the parents?
4. Has the District treated the student with deliberate indifference?

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.

Prior Evaluations & Programming

1. In April 2014, as part of a continuing enrollment at a private school, the student underwent a cognitive re-evaluation to gauge the student's learning needs. The cognitive re-evaluation indicated that the student had attention deficit hyperactivity disorder ("ADHD") and reading difficulties. (School District ["S"]-1).
2. The April 2014 cognitive re-evaluation indicated that the student's full-scale IQ was in the average range, but that this likely did not reflect the student's true cognitive ability given the student's scores in executive functioning (both working memory and processing speed). (S-1).
3. The evaluator noted that the student was anxious and flustered in the testing environment but that these affects abated over time. The evaluator did not report any social/emotional/behavioral needs in the testing environment or in the private school environment. (S-1).
4. In October 2015, as the student was in 8th grade, the student was evaluated by a private evaluator, anticipating the transfer to a high school environment in the following school year. (S-2).

5. The October 2015 private evaluation indicated that the student experience a degree of tumult in the prior school year (2014-2015), including work with psychological professionals and multiple medication adjustments. (S-2).
6. The October 2015 evaluation identified a similar cognitive profile of the student, namely that the student's full-scale IQ was in the average range but that scores in working memory and processing speed led the evaluator to conclude that the student's intellectual ability was markedly higher. (S-2).
7. On behavioral assessments, the student's father did not rate the student as clinically significant in any sub-test or index. The student's mother rated the student as clinically significant for attention problems. The student's teachers rated the student as clinically significant in attention problems and hyperactivity. (S-2).
8. The private evaluator identified academic needs related to ADHD as well as needs in reading, written expression (organizing writing), and mathematics (calculation and math fluency). (S-2).
9. In April 2016, in anticipation of enrolling in high school at the District, the parents shared the October 2015 private evaluation, and the District evaluated the student. (S-10).
10. The April 2016 evaluation report ("ER") included much of the content from the October 2015 private evaluation, as well as school-based observation by the District evaluator and input from the student's teachers at the private school. (S-10).
11. The observation and input confirmed what had been reported in prior evaluations, namely that the student is most hampered by organizational and attention deficits in academic settings, including some impulsivity. (S-10).
12. The April 2016 ER contained updated cognitive and achievement assessments. The student's IQ was in the average range, with indications that information retrieval was again an area of deficit, although the District evaluator did not make this explicit, as had other evaluators. In terms of the student's achievement scores, the evaluator noted weaknesses in reading and, to a degree, mathematics. On the District's achievement assessment, the student's ability in written expression were noted as the strongest component of academic achievement. (S-10).

13. The April 2016 ER contained updated behavior rating scales. The student's mother rated the student as exhibiting clinically significant scores in more areas than in the October 2015 private evaluation, namely in attention problems, somatization, adaptability, and hyperactivity. (S-10).
14. Two teachers from the private school rated the student as clinically significant in the sub-tests of hyperactivity and somatization. The student's math teacher rated the student as clinically significant in many more sub-tests (anxiety, depression, attention problems, learning problems, and atypicality) as well as in multiple index scores (internalizing problems, externalizing problems, school problems, and behavioral symptoms). The student's English teacher did not rate the student at clinically-significant levels in any other sub-test or index score. (S-10).⁵
15. The April 2016 ER recommended that the student be identified as a student with a health impairment (ADHD) with supports and modifications to address the student's attention needs. The April 2016 ER also noted the student's need for executive functioning support as well as academic support in reading. (S-10).
16. In May 2016, an individualized education program ("IEP") was developed, and the student entered the District high school in the 2016-2017 school year. (S-12; Notes of Testimony ["NT"] at 183-308).
17. Nothing in the record indicates that anyone at the District was informed that the student experienced the need for more intensive counseling or psychological support, nor, so far as the private evaluations in April 2014 and October 2015 or the District evaluation in April 2016 reflect, was this information shared with any of those evaluators. (S-1, S-2, S-10; NT at 183-308, 384-441, 1123-1233).

⁵ This rating patterns mirrored the same raters' results in the October 2015 private evaluation. In both October 2015 private evaluation and the April 2016 ER, both evaluators attributed the disparity in the teachers' ratings to the difficulty of the academic challenge for the student. (S-2, S-10).

KOSHK – Claims re: September/October 2017

18. The student's IEP was revised multiple times over the course of the student's 9th grade year, the 2016-2017 school year. Each time, the parents were provided with procedural safeguards notices. (S-16, S-17, S-18, S-19, S-21; NT at 183-308).
19. Nothing in the record indicates that the student experienced any academic or behavioral difficulties in the 9th grade year, except for poor grades in mathematics, or the early fall of 10th grade, the 2017-2018 school year. (S-21, S-37, S-54 at pages 31-32, S-59; NT at 63-170, 183-308).

2017-2018 / 10th Grade, as of October 2017

20. In November 2017, the District's student assistance program received a confidential referral [redacted]. (S-22; NT at 183-308, 1054-1122).
21. The program coordinator reached out to the student and parents. The student denied that any intervention was necessary, and the parents declined the student assistance services, indicating that the student had private counseling and psychological support. (S-22; NT at 183-308, 1054-1122).
22. In early February 2018, the student was involved in acting-out behavior with another student in social studies class. The incident was discussed and addressed by the teacher and the student's parents and did not have any overarching consequences. (Parents' Exhibit ["P"]-4; S-56; NT at 183-308, 679-705).
23. In mid-February 2018, the student's IEP team met for its annual review of the student's IEP. (S-24).
24. The teacher input and IEP goal progress in the February 2018 IEP indicated that the student was performing well in classes and making significant progress on IEP goals to that point in the 2017-2018 school year. (S-24).
25. The February 2018 IEP indicates that the student's strengths were, among other things, working well with peers and class participation. The student's needs were identified as continuing support in reading and independent learning skills. (S-24).

26. The February 2018 IEP included two goals, one in reading comprehension and one in task-initiation/task-completion. Specially-designed instruction and modifications included these goal areas, in addition to support for reading fluency. (S-24).
27. The student's placement in the February 2018 IEP included two instructional-support periods per 4-day academic cycle. This was a reduction from four instructional-support periods per 4-day cycle, a change which the IEP team felt was appropriate as the student no longer required that level of support for goal-progress. (S-24, S-25; NT at 183-308, 566-673).
28. The parents approved this IEP and placement recommendation. (S-25).
29. Over the third and fourth quarters of the 2017-2018 school year, the student had mastered the reading goal in the February 2018 IEP and was making progress on the task-initiation/task-completion goal. (S-26).
30. Over the course of the 2017-2018 school year, the student's grades did not reflect any outsized academic difficulty, achieving As and Bs in all core academic subjects (English, mathematics, science, and social studies), except for lower grades on chemistry mid-term and final exams (a C and D+, respectively) and a lower grade (C-) on the geometry final exam. (S-37 at page 2).
31. In June 2018, on or about the final day of school for the 2017-2018 school year, the student was involved in a serious disciplinary incident. (S-27, S-36; NT at 180-308, 980-1052).
32. The student [was involved in an incident involving drugs]. Given the seriousness of the incident and the seeming danger to another individual, community police became involved. The student did not provide accurate information to the police officers and attempted to deceive them. (S-27, S-36; NT 183-308, 980-1052).
33. In the summer of 2018, the student was admitted to a partial hospitalization program for counseling/psychiatric support. The student was diagnosed with major depressive disorder and unspecified anxiety disorder. The student reported hearing voices and negative self-image. (P-2, P-7; NT at 183-308).

34. At that time, the District was not provided with discharge information, or follow-up documentation, for the student's partial hospitalization program. (S-38; NT at 183-308, 384-441, 980-1052, 1123-1233).
35. The parents pursued potential private placements, but multiple private schools denied admission to the student. (P-2).

2018-2019 / 11th Grade

36. Upon the student's return to the District in the 2018-2019 school year, the District sought to implement discipline for the June 2018 incident. (S-27, S-29, S-30, S-31; NT at 183-308, 980-1052).
37. The family waived the informal meeting required for the level of discipline which the District sought to impose. (S-28, S-29; NT at 980-1052).
38. In September 2018, the District sought permission to re-evaluate the student. (P-13; S-32; NT at 384-441).
39. The District recommended several 45-day alternative placements to assess the student's educational needs in light of the June 2018 disciplinary incident and to aid in the student's transition back to the District. (P-13; NT at 183-308, 384-441).
40. Upon visiting the placements, the parents selected an alternative placement near to the student's home. (P-11, P-13; S-33, S-34, S-35; NT at 183-308, 315-379, 384-441).
41. The student was formally enrolled in the 45-day placement in late September 2018. (S-35; NT at 315-379).
42. Shortly after enrolling in the 45-day placement, the student's family reported to the placement alleged derogatory remarks directed toward the student based on the student's religious heritage and personal insults directed at the student. (P-20, P-23; NT at 183-308, 315-379).
43. The 45-day placement investigated and could not confirm or develop further information about the alleged remarks. (p-23; NT at 315-379).

44. The student attended the 45-day placement for approximately 12 school days. (NT at 315-379).
45. In October 2018, an IEP meeting was held to discuss the student's programming at the 45-day placement. Prior to this IEP meeting, the family had begun to work with a private placement where they anticipated the student might attend. (S-66, S-75; NT at 183-308, 315-379).
46. The October 2018 IEP at the 45-day placement included present levels of functional and academic performance from the District's February 2018 IEP. (S-75).
47. The October 2018 IEP at the 45-day placement included a program-wide behavior program (preparation, social interaction, following directions, work effort, and work completion), daily access to the learning support classroom, and individual counseling once weekly. (S-75).
48. The October 2018 IEP at the 45-day placement continued the student's goals in reading and task-initiation/task-completion, as well as the specially-designed instruction and modifications, from the February 2018 IEP. (S-75).
49. The October 2018 IEP team meeting also included discussion of further schedule, lunch, and hall pass accommodations which would allow the student access to a trusted adult, when needed, for support. (NT at 315-379).
50. While at the 45-day alternative placement, the student had performed well academically and behaviorally, and had not voiced to staff any concerns and did not exhibit any academic or behavioral difficulty. (S-38, S-75; NT at 315-379).
51. The parents shared concerns at the October 2018 IEP meeting that the student was not adjusting well to the 45-day alternative placement. At the meeting, the family did not discuss any intention to pursue a private placement. (S-75; NT at 183-308, 315-379).
52. Over this period, late September into early October 2018, the student's private psychiatrist saw a marked decline in the student's behavior and affect and began a very heavy regimen of psychotropic medications. (P-18; NT at 721-799).

53. Over this period, the psychiatrist was unaware that the juvenile division of the Court of Common Please was issuing its final determinations and findings on the student's guilt regarding the charges brought against the student stemming from the June 2018 incident. (S-36, S-54 at pages 36-37; NT at 721-799).
54. In October 2018, the parents enrolled the student in a private placement. (S-66; NT at 183-308).
55. In November 2018, the District issued its re-evaluation report ("RR"). (S-38).
56. The November 2018 RR included extensive parental input regarding the transition from the 45-day alternative placement to the unilateral private placement, and the parent's views on the District's lack of support in the previous school year. (S-38).
57. As part of the assessment for the November 2018 RR, the student voiced to the District evaluator that the student had deeply enjoyed the time the student was enrolled at the District and was remorseful about the June 2018 incident, indicating "I'm not the same person". The evaluator opined that the student seemed to wish to share more with her, but that the student said "I can't talk to you without my attorney". (S-38; NT at 883-966).
58. The District evaluator spoke with four individuals who had provided, or who were as of the date of the November 2018 RR were providing, psychiatric, psychological, or counseling services to the student. Three of these professionals voiced support for the idea of the student returning to an academic environment with support. One of these three individuals supported the idea that the student should return to the District with such support. One of these three individuals voiced concern with the student's medication regime, questioning whether the student could function appropriately in social and academic environments under such heavy medication. The fourth individual who was managing the student's medication regime, indicated that he felt it was necessary. (S-38; NT at 883-966).
59. The November 2018 RR process was the first time that the District was aware that the student had been involved in such intensive therapy, even prior to the June 2018 incident, or that the student was involved in a heavy medication regimen at that time. (S-38; NT at 384-441, 883-966, 1123-1233).

60. The District evaluator completed updated cognitive assessment, finding that given the student's long-identified deficits in executive functioning, the student's IQ testing might be of limited reliability and was likely not a reliable indicator of the student's true intellectual ability. Achievement testing, also consistent with past assessments, showed that the student exhibited relative weakness in reading and some components of mathematics. (S-38).
61. In the opinion of the evaluator, the student's anxiety and then-current affect, given a heavy medication regimen and juvenile adjudication near its peak, were likely impacting many of the student's assessment results. (S-38).
62. The District evaluator recommended that the student continue to be identified as a student with a health impairment (ADHD), an emotional disturbance, and specific learning disability in reading, and that specially-designed instruction and modifications target support for the student's executive functioning needs. (S-38; NT at 883-966).
63. In December 2018, the District proposed an IEP for the student's return to the District. (S-40).
64. The December 2018 IEP contained the extensive input and results from the November 2018 RR. (S-40).
65. The December 2018 IEP contained an exhaustive list of the student's needs in light of the developments in the student's social, emotional, behavioral, and academic life since the February 2018 IEP. (S-40).
66. The December 2018 IEP contained three goals, one in reading, one in organization and task-approach, and one in emotional self-knowledge and self-regulation (including involving others for support). (S-40).
67. The December 2018 IEP included extensive specially-designed instruction and modifications, including support in executive functioning, reading, and math. (S-40).
68. The student's placement in the December 2018 IEP included six instructional-support periods per 4-day academic cycle, including two group counseling session per month. (S-40).
69. In December 2018, because of the involvement of counsel for both parties at that point, the District's chief special education

administrator was involved in reviewing the December 2018 IEP prior to its issuance to the parents. (S-58 at page 395; NT at 384-441, 566-673, 1123-1233).

70. The parents elected to maintain the unilateral private placement. (NT at 183-308).

71. The private placement where the student began to attend in October 2018 is an alternative school where most teachers do not hold teacher certifications and where special education is not offered. (NT at 806-877).

72. The student took classes in mathematics, English, history, and French. (S-63).

73. From the time of the student's enrollment in October 2018 through January 2019, the student received no specialized instruction or structured modifications. (NT at 806-877).

74. In January 2019, the private placement developed a "formal education plan". (S-67).

75. The formal education plan at the private placement contains an overview of the student, but the three goals:

- {1} "build back trust and willingness to take risks",
- {2} "confidence and trust in adults", and
- {3} "complete high school"

and five accommodations/modifications:

- {1} "if [the student] is shutting down, immediately change tactic and make the lesson or work appear like something entirely different",
- {2} "do not assume [the student]...is emotionally capable of big things. [The student] needs to heal and learn to trust again",
- {3} "focus on successes...not gaps",
- {4} "praise...strength, resilience, and hard work", and
- {5} "keep...emotional state in mind at all times. If... shutting down, it is a much bigger deal than it seems. Don't underestimate...fears or depression"

are general pedagogical approaches not specially-designed instruction or program modifications. (S-67).

76. Over the course of January and February 2019, the student completed Court-ordered community service under the supervision of the private placement. (S-65).
77. The student's private psychiatrist testified he saw marked improvement in the student's affect and functioning in approximately February 2019, to the point where he felt the student's medication regimen could be scaled back. The psychiatrist was unaware that the student had largely complied with the decree of the juvenile division of the Court of Common Pleas stemming from the June 2018 incident. (NT at 721-799).
78. The student completed 11th grade, the 2018-2019 school year, at the private placement. (S-63; NT at 806-877).
79. In June 2019, a private evaluator issued a private evaluation report. (S-42).
80. The June 2019 private evaluation recommended that the student be identified as a student with a health impairment (related to ADHD as well as the mental health diagnoses), and specific learning disabilities in reading, mathematics, and written expression. The evaluator recommended that identifying the student with an emotional disturbance be held in abeyance, pending more stability in the student's life. (S-42).
81. The private evaluator's conclusions and recommendations are discounted for the following reasons:
- The evaluator appears to view the June 2018 disciplinary incident to be 'recent' rather than approximately one year prior to the June 2019 report;
 - Even though the private evaluator had reviewed the District's November 2018 RR, the evaluator administered the same cognitive and achievement assessments, oblivious to the practice effect of utilizing the same instruments within one year of a prior administration;
 - The evaluator's explanation of her reasoning for not being concerned about practice effect is not credited;
 - The evaluator's testimony as to review of the student's prior IEPs was not convincing;
 - The evaluator was not provided with copies of April 2014 cognitive assessment or with discharge paperwork from the partial hospitalization program in the summer of 2018; and

- The evaluator's social/emotional recommendations are entirely medical or for outside the school environment.

(S-42; NT at 458-560).

2019-2020 / 12th Grade

82. In August 2019, the parents informed the District in writing that it was enrolling the student in the same private placement from the previous school year and would seek tuition reimbursement. The parents also informed the District of the private evaluator's June 2019 report. (S-43; S-68 at page 476; NT at 183-308).
83. In September 2019, the parents provided a copy of the June 2019 evaluation report to the District. (S-42).
84. In September 2019, the student's IEP team met to discuss the student's needs and a potential return to the District. (S-45).
85. The September 2019 IEP contained significant revisions from the December 2018 IEP, including the student's transition plan (based on information provided by parents related to the student's summer 2019 employment experience). (S-45).
86. The student's placement in the September 2019 IEP included eight instructional-support periods per 4-day academic cycle, including two group counseling session per month. (S-45).
87. The District issued a notice of recommended educational placement ("NOREP") with the September 2019 IEP. The parents returned the NOREP in mid-October 2019 with the indication that they approved the IEP and recommended placement, with implementation beginning in January 2020. (S-46).
88. In November 2019, the student's IEP met again to devise a transition plan for the student's re-entry to the District high school. (S-77).
89. In January 2020, the student returned to the District and graduated from the District in the spring of 2020. (NT at 183-308, 384-441, 1123-1233).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. The testimony of the 45-day alternative placement representative (NT at 315-379) and the District school psychologist (883-966) were particularly credited. The testimony of the June 2019 private evaluator (NT at 458-560) was particularly discounted.

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)).

Also, as an initial matter, the parties dispute whether the parents' complaint was timely filed. (G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015). Under the holding of G.L., actions or omissions

which form the basis of a parent’s complaint must be filed within two years of when parent knew or should have known (“KOSHK”) of the acts and/or omissions which provide the basis for the complaint. Should acts or omissions at a point prior to two years before the filing of the complaint requires a fact-based determination as to whether parent knew or should have known of the acts or omissions which form the basis of the claim(s) in the complaint. If so, parent’s claims may be untimely.

In this matter, parents claim a compensatory education remedy beginning in the 2017-2018 school year. Because parents’ complaint was filed in October 2019, the alleged acts/omissions for the contested KOSHK period is very brief—approximately six weeks over September through mid-October 2017. Therefore, the parties argued in closing statements as to whether parents knew or should have known of the acts/omissions which form the basis for their complaint for this brief period.

Here, each segment of the parents’ claims as they unfold over time will be separately considered.

KOSHK Period: September/October 2017. The evidence in this record does not support a finding that the parents knew or should have known in the first weeks of the 2017-2018 school year of the actions/omissions which form the basis of their complaint. Therefore, this evidence is rightly part of the denial-of-FAPE evidentiary record. Having so found, however, there was

clearly no denial-of-FAPE over these weeks or, as set forth immediately below, at any point in the 2017-2018 school year.

2017-2018 School Year: October 2017 – June 2018. The District did not deny FAPE to the student in the 2017-2018 school year. The IEPs which governed the student's education that year (the April 2017 IEP and the February 2018 IEP), the student's 10th grade year, were entirely appropriate, with an understanding by all members of the IEP team that the understanding of the student's strengths and needs, the goals, the specially-designed instruction were all reasonably calculated to yield meaningful education benefit in light of the student's unique educational profile. And, indeed, the student made progress over the course of 10th grade, to the point that the reading goal was nearly mastered in the spring of that year and the student's overall academic performance was strong-to-excellent.

Accordingly, it is the legal conclusion of this hearing officer in light of this record that the District provided FAPE to the student in the 2017-2018 school year and no compensatory education remedy is owed to the student.

2018-2019 School Year: September/October 2019. Obviously, in June 2018, the student made a tragic mistake. By [participating in an incident that involved drugs] and then compounding that terrible mis-step by obfuscating and being dishonest with school administrators and the police,

the student's educational path (and, regrettably, the course of the student's life in the late teenage/early adult years) catastrophically de-railed.

In the first few weeks of the 2018-2019 school year, as the District is permitted to do in matters involving the possession or use of illegal substances (*see generally*, 34 C.F.R. §300.530; 34 C.F.R. §300.530(g)(2)), the District placed the student in a 45-day alternative education setting to ascertain the student's needs in light of the disciplinary incident. The student did not adjust well to the alternative placement (although as much as parents were concerned for the student in the placement, the record is not dispositive that the student was struggling in the alternative placement). But, here again, the September 2018 IEP prepared for the student at the alternative placement was reasonably calculated to yield meaningful education benefit and the October 2018 IEP meeting, where parents' concerns were ascertained and the IEP was in line for revision, would have provided further refinements and programming.

Before that could happen, however, the parents removed the student from the alternative placement. This does not change the fact that, given what the District knew at the time and working diligently with the representatives from the alternative placement, the District's programming at the alternative placement was reasonably calculated to yield meaningful education benefit in light of the student's unique needs.

Accordingly, it is the legal conclusion of this hearing officer in light of this record that the District provided FAPE to the student in the period of September/October 2019 while at the alternative placement and no compensatory education remedy is owed to the student.

2018-2019 School Year: Tuition Reimbursement. In October 2018, the parents undertook a unilateral private placement for which they seek tuition reimbursement. Parents are not entitled to reimbursement for tuition at the private school for the period 2018-2019 school year after the student's enrollment in October 2018. Here, the legal analysis is more intricate.

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. In this matter, when parents undertook the unilateral

private placement, the District's programming at the alternative placement was appropriate. While one could end the analysis here, there is factual weight behind finding that as events unfolded beyond October 2018, the District continued to be in position to offer FAPE to the student.

First, the November 2018 RR is comprehensive. In fact, of all the evaluation documents in the record, this hearing officer finds it to be the most persuasive, especially in light of the testimony of the evaluator. The November 2018 RR placed the District in a position to fully understand the student's needs.

Second and consequently, in December 2018, a wholly appropriate IEP which was responsive to the student's needs and accounted for the additional insights and information which had previously been unavailable to the District was proposed. Again, each element of the December 2018 IEP—the background information, the goals, the specially-designed instruction, and the placement were all reasonably calculated to provide meaningful education benefit in light of the student's unique needs.

So while the parents' satisfaction with the private placement undertaken in October 2018 is understandable, the first step of the Burlington-Carter analysis weighs definitively in the District's favor.⁶

⁶ Here, the parents' repeated implication that the role of the District's senior special education administrator in the December 2018 IEP process was somehow unwarranted or problematic, that assertion must be dismissed. The District was working diligently with a very fluid situation where, already, parents' counsel was involved. It is not surprising, and certainly not any basis for a denial-of-FAPE claim,

Step two of the Burlington-Carter test involves assessing the appropriateness of the private placement selected by the parents. Here, parents have failed to demonstrate that the private placement attended by the District in the remainder of the 2018-2019 school year was appropriate. Initially, from October 2018 through January 2019, the private placement was entirely academic, without any programming tailored to address the student's long-identified special education needs in executive functioning, which underlay the student's need for academic support in reading and mathematics.

Then, in January 2019, the formal education plan of the private placement was developed. But this document, with its goals and its instructional recommendations to teaching staff, cannot be the basis for a claim that it addresses the student's special education needs. Clearly, it was developed in good faith. But just as clearly, it provides nothing more than superficial pedagogical approaches that are not reasonably calculated to target the student's unique special education needs. Therefore, even if parents had carried their burden of persuasion at step one of the Burlington-Carter analysis, at step two of the analysis, parents' tuition reimbursement would be unsupportable.

to have such an administrator involved in the ultimate issuance of the District's proposed programming.

To complete the Burlington-Carter analysis, at step three one must balance the equities between the parties. Here, the equities do not weigh decidedly in favor, or against, either of the parties.

In sum, then, the District's proposed program as outlined in the December 2018 IEP is an appropriate offer of FAPE and the private placement selected by the parents, while satisfying to them and the student, is not reasonably calculated to yield meaningful education benefit in light of the student's unique, and long-identified, special education needs.

Accordingly, it is the legal conclusion of this hearing officer in light of this record that in December 2018 the District proposed a program reasonably calculated to provide FAPE to the student for the remainder of the 2018-2019 school year, that the programming at the private placement was not reasonably calculated or implemented to provide the student with FAPE and, thus, no tuition reimbursement is owed to the parents.

2019-2020 School Year: Tuition Reimbursement. The same examination holds for the parents' tuition reimbursement claim for the 2019-2020 school year, through December 2019. The District's December 2018 IEP, as outlined above, was already an appropriate offer of FAPE. The revisions of that IEP in September 2019 were entirely appropriate in light of the June 2019 private evaluation (although this evaluation was significantly less reliable, on this record, than the District's November 2018 RR) and, more importantly, in light of an authentic engagement with parents in terms

of what they sought for the student to allow the student to return to the District. At step one of the Burlington-Carter analysis, then, the District again proposed a robust program to provide FAPE to the student.

At step two of the Burlington-Carter analysis, for the same reasons as in the prior school year, the programming at the private placement failed to provide FAPE to the student and for the same reasons. And, again, nothing in the equities-balancing at step three of the Burlington-Carter analysis disturbs those conclusions.

Accordingly, it is the legal conclusion of this hearing officer in light of this record that in September 2019, building on the appropriateness of the December 2018 IEP, the District proposed a program reasonably calculated to provide FAPE to the student for the remainder of the 2019-2020 school year, that the programming at the private placement was not reasonably calculated or implemented to provide the student with FAPE and, thus, no tuition reimbursement is owed to the parents.

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).⁷ 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 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— throughout this record, over the course of the 2017-2018, 2018-2019, and 2019-2020 school years (through December 2019), the District provided, or proposed, programming that was reasonably calculated to yield meaningful education benefit to the student in light of the student’s unique needs.

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.

⁷ 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.

§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.

Where parents are frustrated with the response related to regular education disciplinary processes arising out of the June 2018 disciplinary incident, that may be understandable. But nothing on this record singularly, or the record taken as a whole, supports a conclusion that the District acted with deliberate indifference as a result of the student's status as a student with a disability.

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 Lower Merion School District at all times on this record over the course of the 2017-2018, 2018-2019, and 2019-2020 school years (through December 2019) provided, or proposed, programming that provided the student with a free appropriate public education. No remedy is owed in light of parents' claims.

Additionally, the Lower Merion School District did not act with deliberate indifference toward the student based on the student's 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

11/17/2020