

"By Order dated June 27, 2022 By the District Court of the Eastern District of Pennsylvania, #23602-19-20 was remanded. This is the remanded hearing officer decision."

Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

26710-21-22

(upon remand from the District Court for the Eastern District of Pennsylvania of the decision at ODR file number 23602-1920AS)¹

Child's Name

A.M.

Date of Birth

[redacted]

Parents

[redacted]

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Hearing Officer:

Michael J. McElligott, Esquire

Date of Decision

07/27/2022

¹ This remand, as described below, is rather limited in scope. This decision was originally issued at ODR file number 23602-19-20. The bulk of the decision at 26710-21-22 remains the same as, and is identical to, the decision at 23602. There has been no removal of any material from the decision at 23602. Where material is newly developed here at 26710, as instructed on remand, that material is denoted with bold and italics text for the ease of identifying that newly developed material.

Introduction

This special education due process hearing concerns the educational rights of A.M. ("student"), a student who resides in the Wallingford-Swarthmore School District ("District").² The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")³ as a student who requires special education to address the student's needs related to a health impairment (attention deficit hyperactivity disorder – "ADHD") and a specific learning disability in written expression.

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

² The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

³ It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 ("Chapter 14").

Analogously, denial-of-FAPE and discrimination claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”), will be considered.⁴

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.

The decision at ODR file number 23602-19-20 was in favor of the District.

By order dated June 27, 2022, the District Court for the Eastern District of Pennsylvania remanded to this hearing officer the matter at ODR file number 23602-19-20 with the following directive: “This remand will be limited and there is no need to take additional evidence. The Hearing Officer does not need to reanalyze Parents’ allegations of procedural violations of the IDEA. The only question to be answered on remand is: Whether the District’s plan for A.M.’s [2019-2020 and 2020-2021] education was ‘appropriately ambitious’ in light of A.M.’s unique characteristics under the

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

standard of [Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017)].

Issues⁵

1. Did the District provide a FAPE to the student in the summer of 2018, and the 2018-2019 school year, and/or propose programming to provide FAPE in the 2019-2020 and 2020-2021 school years?
2. If not, are the student or parents entitled to remedy?
3. Did the District discriminate against the student on the basis of disability?
4. ***Was the District's plan for the student's [2019-2020 and 2020-2021] education 'appropriately ambitious' in light of the student's circumstances under the standard of Endrew F.?***

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.

⁵ In their amended complaint, parents alleged denial-of-FAPE for the 2017-2018 school year as well. In opening statements, however, parents clarified through counsel that their claims were based on the student's programming in the summer of 2018 and thereafter. (Notes of Testimony ["NT"] at 52-54).

Evaluation History

1. In November 2012, [redacted] the student was evaluated by the District. [redacted] The student was found to be not eligible for special education, although a Section 504 plan was recommended for attention difficulties. (School District Exhibit ["S"]-1).
2. In May 2014, [redacted] the student was re-evaluated. The District identified the student as eligible for special education with a health impairment (ADHD) and a specific learning disability in written expression. [redacted] Additionally, the student received occupational therapy support in the form of assistive technology. (S-3).
3. In May 2017, [redacted], the student was re-evaluated. The student continued to be identified as a student requiring special education for attention and written expression [redacted]. The evaluator noted relative deficits in the student's cognitive profile for working memory and processing speed, which interfered with the student's ability to marshal and organize cognitive information. (S-9).
4. Academic work in terms of its content was not problematic for the student. In fact, given the student's intellect, academic content has never presented qualitative challenges. Attention and task-approach/organization have always been the primary challenges to the student's written expression. (S-1, S-3, S-9; NT at 71-206, 211-292, 298-396, 410-504, 590-696, 701-786).

2018-2019 [redacted]

5. In May 2018, the student's individualized education program ("IEP") team met to revise the student's IEP. This IEP was in place in the 2018-2019 school year, [redacted]. (S-15).
6. The May 2018 IEP contained extensive information on the student's present levels of academic and functional performance. (S-15).

7. The May 2018 IEP contained teacher input, with consistency across multiple subjects that the student was very intelligent and submitted quality work but struggled with written work, organization and task-completion, and attention. (S-15).
8. The May 2018 IEP contained parental concerns, which aligned with the student's needs in the educational environment, namely support in writing and organizational/time-management needs. (S-15).
9. The May 2018 IEP identified student needs in executive functioning (organization, task-approach), self-advocacy, and written expression. (S-15).
10. The May 2018 IEP included transition goals and planning. (S-15).
11. The May 2018 IEP included three goals, each addressing an area of need for the student— written expression (initiation/brainstorming, completing assignments), executive functioning (organization, time-management, task-approach, task-persistence), and self-advocacy (engagement and planning with teachers on writing tasks). (S-15).
12. The May 2018 IEP contained specially-designed instruction and modifications to address the student's needs in written expression, task-approach in writing assignments (including an organization/self-advocacy organizational chart), and attention/focus. (S-15).
13. The student received 47 minutes per day of learning support with the special education teacher. (S-15; NT at 298-396).
14. The May 2018 IEP continued monthly support in occupational therapy. (S-15).
15. The May 2018 IEP contained extended school year ("ESY") goals for summer programming. The goals focused on written expression and self-advocacy in writing assignments. (S-15).
16. Over the summer 2018 ESY program, the student made progress on initiation of writing and production of writing (outlining and output), but the student did not produce a completed piece of writing. (Parents Exhibit ["P"]-15).

17. In November 2018, the student began to exhibit the behavior of fingernail-picking. The student's mother described this behavior as severe; the student's special education teacher described the behavior as evident but not severe. The teacher's testimony was credited. (NT at 71-206, 298-396).⁶
18. In November 2018, the student and family began to receive professional counseling services. (NT at 71-206, 512-554).
19. Over the holiday break, parents requested that the student's IEP be re-visited for a "re-set" on the student's programming. (P-3; NT at 71-206, 298-396).
20. In January 2019, the student's IEP team met to revise the student's IEP. The District also requested permission to re-evaluate the student to perform a functional behavior assessment ("FBA"). (S-20, S-22).
21. Some of the student's supports were provided after school. The January 2019 IEP removed these indications so that the student's supports were provided during the school day. (S-20; NT at 71-206, 298-396).
22. In January – March 2019, the student began to work with a community-based robotics team, spending on average 3 hours per evening, 3-5 evenings per week. (S-25; NT at 71-206).
23. In March 2019, the parents provided permission for the FBA, which was completed that same month. (P-8; S-22).
24. The March 2019 FBA largely confirmed what had already been known about the student's needs. It indicated that the student was resistant to written work, having difficulty initiating and persisting in writing assignments, all amounting to work-avoidance for non-

⁶ The testimony of the student's mother was largely credited, but detailed recall and articulate responses to questions by the family's attorney gave way to a lack of recall and somewhat non-responsive answers to questions by the District's attorney. This was an observable change in affect and engagement that leads the hearing officer to accord less weight to the mother's testimony where it differed markedly, in a material way, from other witnesses' testimony.

preferred tasks. Attendant to this was the further indication that the student had difficulty in self-advocacy by failing to ask questions or engage teachers. (P-8).

25. In April 2019, the parents requested a speech and language (“S&L”) evaluation. In May 2019, the S&L evaluation was issued, indicating the student’s relative deficits in executive processing were not related to S&L needs in receptive language or language processing. S&L services were not recommended. (S-30, S-32; NT at 563-579).
26. In May 2019, the student’s IEP team met for its annual revision of the student’s IEP. (S-33).
27. A large portion of the IEP meeting centered on the student’s English class placement for the student’s [2019-2020 school] year. The District was recommending, based on the student’s work in language arts in [the 2018-2019 school year,] the student’s needs in written expression, and the student’s results on the District-wide English placement test for high school, that the student enroll in college-placement English [in the 2019-2020 school year.] The parents wished for the student to be enrolled in a higher-level English class, honors English. (S-17, S-18, S-33 at page 9; NT at 211-292, 298-396, 797-876).
28. Over the course of the student’s [2018-2019 school] year, the student made progress on the written expression goal. The assessments across three metrics was uneven, but by the end of the school year, the student was largely successful across all three metrics (with providing details to support writing being a relative strength all year). (P-10).
29. Over the course of the student’s [2018-2019 school] year, the student made progress on the executive functioning goal. The assessments across the two metrics (homework completion and classwork completion) was uneven. The student was most successful

in assignments in science, mathematics, and social studies. The student was less successful, but consistent, in assignments in language arts. The student was clearly unsuccessful in assignments in French. (P-10).

30. Over the course of the student's [2018-2019 school] year, the student made clear progress on the self-advocacy goal. (P-10).

31. The May 2019 IEP would have been in effect for only a few weeks of the student's [2018-2019 school] year. The IEP would have been in place for most of the student's [2019-2020 school] year. (S-33 at page 4).

32. The May 2019 IEP **identified needs in, and** continued to include goals in, written expression ("**particularly beginning and completing an assignment in a timely manner**"), executive functioning ("**organization, self-regulation, and focusing skills**"), and self-advocacy. (S-33 at pages 23, 31, 37, 40).

33. The written expression goal, in pertinent part, is as follows: "(The student) will develop greater independence as a writer as measured by (1) initiating...written response within 15 minutes after actively brainstorming with the teacher and (2) [producing] writing with sufficient details and content, as measured by a writing rubric (3) [Submit]...finished product by the due date". The student would exhibit these aspects of writing and assignment completion 90% of the time on every writing assignment. (S-33 at page 31; bracketed material slightly edited for grammar).

34. The executive functioning goal focused on time management, task initiation, organization, planning and execution with a goal of completion and submission of assignments (both homework and classwork) in all academic classes 90% of the time. (S-33 at page 37).

- 35. The self-advocacy goal focused on aspects of engagement and clarification with teachers, planning, use of an agenda, and self-explanation of the purpose and directions for a project (whether short-term or long-term) in any class. The goal was written for 100% accuracy across these various measures of self-advocacy, tracked on a detailed rubric. (S-33 at pages 40, 57).**
36. The May 2019 IEP continued to include specially-designed instruction and modifications in each area of need (written expression, executive functioning, and self-advocacy). (S-33 at pages 48-50).
- 37. In written expression, the specially designed instruction to facilitate the written expression goal would be utilized on every writing assignment for the student. The rubric for increasing self-advocacy would be utilized not only for specially-assigned projects but for every writing assignment. (S-33 at pages 48-49, 57).**
- 38. In executive functioning, the modifications for attention and focus, assignment completion, and agenda use would take place on a daily basis, and overall organization of the student's academic life would take place on a weekly basis. (S-33 at page 49).**
39. The May 2019 IEP proposed that, when the student transitioned to high school [redacted] the student would receive 80 minutes of learning support in the fall of 2019, with this level of servicing to be gauged (for maintenance, increase, or decrease) for the spring of 2019. (S-33).⁷

⁷ Under the terms of the May 2019 IEP, the student would have been in the regular education environment for 85% of the school day. Once the student transitioned to the high school [redacted] it is unclear, with the District's block schedule (instead of "period" schedule) what percentage of time the student would be in regular education with one 80-minute block every day in a supported special education environment. (See, generally, NT at 797-876).

40. The May 2019 IEP contained ESY goals and programming. (S-33).
41. The parents accepted the proposed ESY programming for the summer of 2019, but rejected the school-year programming in the IEP. (S-33, S-34).
42. The student attended approximately half of the ESY-2019 sessions. The student made progress in working through a text and producing, with teacher support, written work. (P-16).
43. In the spring of 2019, the parents had started to explore enrolling the student in a private placement. (NT at 71-206).
44. In July 2019, the parents informed the District that they intended to enroll the student in a private placement and would look to the District to fund the placement. (S-36).
45. In July 2019, the parents also initiated a private evaluation process. (S-37; NT at 71-206, 701-786).

2019-2020 [redacted]

46. For [the 2019-2020 school year], the student enrolled in a private placement. (NT at 71-206, 590-696).
- 47. *As indicated above, had the student attended [redacted] at the District, the May 2019 IEP would have been in place for most of [the 2019-2020 school year] (S-33).***
48. [redacted]. (S-71, S-72; NT at 590-696).
49. The private placement does not provide individualized special education supports. The accommodations the student receives are school-wide interventions for all students (e.g., extended time for assignments, use of a laptop computer). (S-71, S-72; NT at 590-696).
50. The private placement's individualized growth plan for the student [redacted] did not contain programming; the growth plan was

simply a list of parental concerns/aspirations (“what would you like your child to accomplish?”). (P-12; S-47).

51. In September 2019, after the student had enrolled in the private placement, the private evaluator issued her report. (S-37).
52. The private evaluation entirely supported the conclusions that the District’s previous evaluations, FBA, and experience with the student had determined—the student’s executive functioning relative deficits impacted learning in initiation, task-approach, and task completion; the student exhibited difficulty maintaining interest and attention with non-preferred tasks, especially writing; and the student had a significant discrepancy between a very high IQ and achievement in written expression. (S-37).
53. In October 2019, the private evaluator observed the student in the private placement and issued an addendum to her report. (S-42).
54. In October 2019, the District permission to re-evaluate the student. (S-41).
55. In January 2020, the District issued its re-evaluation report (“RR”). (S-46).
56. The January 2020 RR included the identified strengths and weaknesses, and recommendations, from the private evaluation. The RR also contained input from the student’s experience, at that point, in the private placement. (S-46).
57. The January 2020 RR continued to recommend that the student be identified as a student with the health impairment ADHD and a specific learning disability in written expression. (S-46).
58. In February 2020, in light of the January 2020 RR, the student’s IEP team met to revise the student’s IEP. (S-48).
- 59. *The proposed February 2020 IEP would re-set the annual IEP schedule, such that it would be in effect at that point. Therefore the February 2020 IEP would be in place for the remainder of [the 2019-2020 school year] and would be in***

effect until February 2021, a majority of [the 2020-2021 school year]. (S-48 at page 1).

60. The February 2020 IEP contained extensive information on the student's present levels of academic and functional performance, including information from the student's [2018-2019 school] year, from the private evaluation, and from the January 2020 RR, as well as input solicited from parents. (S-48).
61. The February 2020 IEP contained teacher input from the private placement and review, at that point, of the student's academic progress in the private placement. (S-48).
62. The February 2020 IEP identified student needs in executive functioning (organization, task-approach, **self-regulation, and focusing**), self-advocacy, and written expression, "**particularly beginning and completing an assignment in a timely manner**". (S-48 at page 27).
63. The February 2020 IEP included transition goals and planning. (S-48).
64. The February 2020 IEP maintained the student's goals in written expression executive functioning, and self-advocacy. The IEP proposed new metrics for monitoring progress on the self-advocacy goal. (S-48).
65. **The written expression goal was largely the same as the written expression goal in the May 2019 IEP. In pertinent part, is as follows: "(The student) will develop greater independence as a writer as measured by (1) initiating...written response within 15 minutes after actively brainstorming with the teacher and (2) writing with sufficient details and content, as measured by a writing rubric and (3) submitting...finished product by the due date". The student would exhibit these aspects of writing and assignment completion 90% of the time on every writing assignment for two consecutive marking periods. (S-48 at page 35).**

- 66. The baseline of the written expression goal, gauged at the end of [the 2018-2019 school year] when the student was still enrolled at the District, indicated that the student was at 50% in initiation, 75% in details/content, and 75% in timely completion. (S-48 at page 35).**
- 67. The executive functioning goal was nearly identical to the executive functioning goal in the May 2019 IEP focused on time management, task initiation, organization, planning and execution with a goal of completion and submission of assignments (both homework and classwork) in all academic classes 90% of the time. (S-48 at pages 36-37).**
- 68. The baseline of the executive functioning goal, gauged at the end of [2018-2019 school year] when the student was still enrolled at the District, indicated that in academic classes the student's homework completion rate ranged from 36% - 71% (with 100% completion in science) and the student's classwork completion rate ranged from 36% - 85% (with 100% completion in mathematics). (S-48 at pages 36-37).**
- 69. The self-advocacy goal was revised. The self-advocacy goal was written to assist with work completion and written assignments across assignments, not just for projects. A scoring rubric would be employed for both identifying and implementing strategies/accommodations, logging both the use and self-gauge of effectiveness. (S-48 at page 38).**
- 70. The goal was written for 100% scoring on the rubric over 12 weeks of weekly reviews with teachers. A baseline for the goal would be established once the student returned to instruction at the District. (S-48 at page 38).**
- 71. The February 2020 IEP contained expanded specially-designed instruction and modifications to address the student's needs in written**

expression, task-approach in writing assignments, and attention/focus. (S-48).

72. In written expression, the specially designed instruction to facilitate the written expression goal would be continue to be utilized on every writing assignment for the student. The rubric for increasing self-advocacy would be utilized not only for specially-assigned projects but for every writing assignment. (S-48 at pages 41-42).

73. In executive functioning, the modifications for attention and focus, understanding purpose of each assignment, and assignment completion, would take place on a daily basis. Organization/assistance with an assignment and timeline calendar would take place on a weekly basis. (S-48 at pages 42-44).

74. In self-advocacy (applied in a written expression context), a modification included collaboration on a daily basis between the student and teachers on alternative assignments to overcome writer's block. The student would also collaborate with teachers weekly in the schedule/content for the District's daily self-directed block of a student's schedule ("5th block"). (S-48 at page 43).

75. The student's placement changed to reflect a program entirely in the regular education setting, **with 100% of the day spent in regular education.** (S-48 at pages 47-49).

76. The February 2020 IEP continued monthly support in occupational therapy and added school counseling sessions twice monthly. (S-48).

77. The February 2020 IEP contained an ESY goal for written expression. (S-48).

78. On March 17, 2020, Pennsylvania schools closed as a result of the COVID-19 pandemic, a school closure which lasted through the remainder of the school year.
79. During the school closure, the private placement continued educating the student using online learning. (NT at 71-206, 590-696).
80. The student's academic performance at the private placement was, as it was at the District, very good, although the student displayed many of the same challenges with task-initiation/task-completion in, and production of, written work, and lack of attention with non-preferred tasks. (P-17).

2020-2021 [redacted]

81. *The February 2020 IEP would have been in place for the outset of the student's [2020-2021 school] year. (S-48).*

82. The student returned to the private placement for [the 2020-2021 school year]. (NT at 71-206, 590-696).

83. Aside from general testimony of an administrator from the private placement, who had no instructional contact with the student, the record contains scant evidence as to programming, assessments, or academic results for the student in [the 2020-2021 school year]. (NT at 590-696).

84. In April 2020, the parents filed the complaint which led to these proceedings.

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a

witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

Discussion

IDEIA/Denial-of-FAPE

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (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)). ***The Court has instructed upon remand that the evidence be reviewed in light of whether the District's proposed programming for the student's [2019-2020 and 2020-2021 school] years is "appropriately ambitious in light of (the student's) circumstances."*** Andrew F., 580 U.S. at , 137 S. Ct. 988, 1000).

In this matter, parents claim a compensatory education remedy for allegations related to ESY programming in the summer of 2018 and the

2018-2019 school year. After enrolling the student in the private placement, parents claim tuition reimbursement as a remedy for the 2019-2020 and 2020-2021 school years. Each of the parents' claims will be considered as they unfold over time.

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

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

especially from the start of the school year to its end. The testimony of the student's [redacted] teachers, both the language arts teacher (NT at 211-292) and the special education teacher (NT at 298-396), is also very strong that the goal-driven, specially-designed instruction for the student under the terms of the IEPs was effective. Taken all together, the District designed and implemented programming for the student's [2018-2019 school] year that was reasonably calculated to provide, and did provide, significant learning in light of the student's unique needs. Accordingly, the District did not deny FAPE to the student, and no compensatory education remedy is owed to the student for [the 2018-2019 school year.]

Tuition Reimbursement. Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); see also 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program, or last-operative program, and whether it was reasonably calculated to yield meaningful

education benefit. Step two of the Burlington-Carter analysis involves assessing the appropriateness of the private placement selected by the parents. At step three of the Burlington-Carter analysis, the equities must be balanced between the parties.

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

Examining the record in deeper detail, and mindful of the Court's instruction to identify whether or not the May 2019 and February 2020 IEPs (which would govern the student's programming in the [2019-2020 and 2020-2021 school years], had the student continued enrollment with the District) are appropriately ambitious in light of the student's circumstances, the District's programming for those school years, as laid out in those IEPs is appropriately ambitious in light of the student's circumstances.

The May 2019 IEP outlines the programming that would have been in place at the outset of the student's [2019-2020 school] year. The goals in the May 2019 IEP are appropriately ambitious. Both the

written expression and the executive functioning goals are written for 90% attainment levels on all assignments. (S-33 at pages 28, 37). The self-advocacy goal is written for 100% attainment on every project, utilizing a detailed rubric. (S-33 at pages 40, 57).

The specially-designed instruction and program modifications also reflect appropriately ambitious instructional implementation. The specially-designed instruction in written expression is to be implemented for every writing assignment, the executive functioning modifications are to be implemented on a daily basis throughout the school day, and self-advocacy instruction and modifications are to be implemented with every project the student would be assigned.

In terms, then, of the goals that would have guided the student's special education programming, the District set very high standards. In terms of the instruction and program modifications that would have been employed, the District was proposing diligent daily or weekly implementation (as dictated by the particular service) that was intricate in its design.

Therefore, the District met its obligation to the student to propose appropriate programming for [the 2019-2020 school year] Even were this not to be the case, however, the private placement is not appropriate for the student. In short, the private placement is a very strong academic program [redacted], and it is no surprise that, academically, the student is doing well there. But step two of the Burlington-Carter analysis requires that a unilateral private placement be appropriate in meeting the special education

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

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

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

Accordingly, the District proposed appropriate programming for the student in [the 2019-2020 school year.]. Therefore, the District met its FAPE obligation to the student, and parents are not entitled to a tuition reimbursement remedy.

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

programming, and it is appropriate, reasonably calculated to yield significant learning in light of the student's unique needs.

The February 2020 IEP was proposed to have been in place for the latter portion of [the 2019-2020 school year] and most of [the 2020-2021 school year]. An examination of the programming proposed in that IEP also supports a conclusion that it was appropriately ambitious in light of the student's unique circumstances.

The written expression and executive functioning goals in the February 2020 IEP are the same as in the May 2019 and, as outlined above, are appropriately ambitious. (S-48 at pages 35-37). Additionally, in the February 2020 IEP the goals contain baselines which were not yet available in May 2019. The baseline for the written expression goal shows that the student was at, roughly, the 75% level in the written expression metrics. (S-48 at page 35). The baseline for the executive functioning goal shows that, as a rough average, the student was completing homework at a 70.4% rate and completing classwork at a 75.4% rate. (S-48 at pages 36-37). In both cases, the 90% goal-setting was appropriately ambitious.

The self-advocacy goal was revised from the May 2019 IEP. The self-advocacy goal in the February 2020 goal was set for attainment at 100% on a weekly monitoring schedule for twelve consecutive weeks. The goals in all three areas are appropriately ambitious.

As with the specially-designed instruction in the May 2019 IEP, the specially-designed instruction and program modifications in the February 2020 IEP were appropriately ambitious—with implementation of instruction and modifications in written expression for every written assignment, for executive functioning on a daily or weekly basis, and for self-advocacy/assignment completion across assignments and settings.

Finally, in the February 2020 IEP, the student’s placement was recommended as 100% in regular education, with no time spent in a special education environment. (S-48 at pages 47-49). This recommendation can also be characterized as appropriately ambitious— instruction and goal-progress would be in an entirely regular education setting, helping the student to understand, to develop, and to generalize the strategies and skill-sets in environments with non-disabled peers.

For all of these reasons, the District’s proposed programming outlined in the February 2020 IEP was appropriately ambitious as proposed in February 2020.

Thus, step one of the Burlington-Carter analysis supports a conclusion that the District met its obligations to the student in the current school year. Nothing in the record cures the deficiencies of the programming at the private placement at step two of the Burlington-Carter analysis. And, again, a balancing of the equities between the parties does not impact these findings.

Overall, then, when implementing educational programming for the student in [the 2018-2019 school year], and in proposing programming for the [2019-2020 and 2020-2021 school years], the District provided FAPE to the student.

Section 504/Denial-of-FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁸ 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— the District provided FAPE to the student in implementing programming in [the 2018-2019 school year] and proposed appropriate programming for [the 2019-2020 and 2020-2021 school years]

Section 504/Discrimination

⁸ 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.

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

Here, the District did not act with deliberate indifference toward the student. In fact, the record weighs heavily toward a finding that throughout the [2018-2021 time frame], the District was diligently engaged in attempting to understand the student's needs and in designing/implementing programming that addressed those needs. The District did not discriminate against the student on the basis of the student's disability.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Wallingford-Swarthmore School District met its obligations to provide, or to propose, special education programming that provided a free

appropriate public education to the student in the [2018-2019, 2019-2020, and 2020-2021 school] years.

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

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

s/ *Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire
Special Education Hearing Officer

07/27/2022