

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 Hearing Officer

DECISION

Child's Name: R.B.

Date of Birth: [redacted]

Dates of Hearing:

August 8, 2016

August 17, 2016

August 30, 2016

CLOSED HEARING

ODR Case #17916-1516AS

Parties to the Hearing:

Parent[s]

Bethel Park School District
301 Church Road
Bethel Park, PA 15102

Date of Decision:

Hearing Officer:

Representative:

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October 18, 2016

Michael J. McElligott, Esquire

INTRODUCTION

[The student] (“student”)¹ is a [mid-teenaged] student residing in the Bethel Park School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² for specially designed instruction/related services as a student with an emotional disturbance.

Parents claim, in their complaint, that the student was denied a free appropriate public education (“FAPE”) during the student’s enrollment in the District for the school years 2013-2014 and 2014-2015 and seek a compensatory education remedy for that alleged denial. In the 2015-2016 school year, the student was enrolled unilaterally in a private placement, and parents seek a tuition reimbursement remedy for that enrollment in the 2015-2016 school year. Additionally, parents claim that the District has violated its obligations to the student under Section 504 of the Rehabilitation Act of 1973 (“Section 504”).³

The District counters that at all times it provided FAPE to the student for the period of the student’s enrollment, including the proposed programming rejected by parents prior to the unilateral

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is 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 §§14.101-14.163 (“Chapter 14”).

³ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for services to “protected handicapped students”.

enrollment of the student in a private placement. As such, the District argues that the parents are not entitled to remedy, whether compensatory education or tuition reimbursement.

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

ISSUES

Did the District provide the student with FAPE for the school years 2013-2014 and 2014-2015?

If not, is the student entitled to compensatory education?

Are parents entitled to tuition reimbursement for the unilateral private placement for the school years 2014-2015 and 2015-2016 school year?

FINDINGS OF FACT

2013-2014 School Year

1. The student was adopted by the parents at a young age. Prior to the adoption, the student suffered severe physical and emotional trauma. (Notes of Testimony [“NT”] at 564-567).
2. In the 2013-2014 school year, the student attended 8th grade in a local parochial school. (NT at 566-573).
3. In the fall of 2013, the student was admitted to a psychiatric hospital and, thereafter as part of step-down planning, to a partial

hospitalization program. (Parents' Exhibit ["P"]-1, P-2; NT at 566-573).

4. In December 2013, the student left the parochial school and enrolled in the District. (NT at 574).
5. In January 2014, with the student back in a partial hospitalization program, the District issued its evaluation report ("ER") for the student. (P-22).⁴
6. The January 2014 ER noted that the student's primary needs are in the areas of peer interaction/socialization and appropriate interaction with adults. The student curses and acts inappropriately/defiantly, often in an attempt to gain peer approval. (P-22).
7. The January 2014 ER found that the student's IQ was 99, in the average range, including a score in the superior range (120) on the working memory index. On achievement testing, the student did not exhibit any significant discrepancies between intellectual ability and achievement, with all broad scores and subtests in the average range (with the exception of the passage comprehension subtest, where the student scored in the low average range). (P-22).

⁴ The student attended a District school for only one day when the student took an overdose of medication. The student was treated in a therapeutic environment and then received education for the remainder of the 2013-2014 school year in the partial hospitalization program. (NT at 579-580).

8. The student's grades and academic performance were As and Bs, with one C in social studies. (P-22).
9. On a behavior assessment in the January 2014 ER, the student's mother rated the student as slightly at-risk for conduct problems, social skills, and withdrawal; and at-risk for aggression and adaptability, the externalizing problems composite, and the behavioral symptoms index. The student's mother rated the student as clinically significant for anxiety, depression, and the internalizing problems composite. The student's teacher rated the student as at risk for depression and the internalizing problems composite without any clinically significant ratings. (P-22).
10. On a behavior assessment self-report in the January 2014 ER, the student's own ratings were at-risk for somatization, locus of control, atypicality, and self-reliance; and clinically significant for anxiety, depression, sense of inadequacy, social stress, relations with parents, interpersonal relations, and self-esteem. The student's composite ratings were clinically significant for emotional symptoms, internalizing problems, and personal adjustment. (P-22).
11. The January 2014 ER identified the student as requiring special education as a student with an emotional disturbance. (P-22).

12. The January 2014 ER recommended an educational environment “that endorses acceptance and trust in order to build self-esteem and social stress.” (P-22 at page 12).
13. The January 2014 ER further recommended regular meetings with a school employee trained in mental health, certain classroom modifications, and specially designed instruction in the form of peer mediation skills in a social skills/peer mentoring program. (P-22 at page 12).
14. In February 2014, the student’s individualized education program (“IEP”) team met to design the student’s IEP. (S-7).
15. The February 2014 IEP updated the student’s academic performance from the partial hospitalization program, where the student continued to receive As and Bs in all academic classes. On academic performance testing at the program, the student’s grade-equivalency scores were uniformly at grade level. (S-7).
16. The February 2014 IEP contained two goals, one for positive social interactions, and one for appropriate attention-seeking. (S-7).
17. The February 2014 IEP was crafted for delivery at the partial hospitalization program, with all specially designed instruction, program modifications, related services, and supports for personnel to be delivered at the program. (S-7).

18. In February 2014, the District issued a notice of recommended educational placement (“NOREP”), recommending continued placement at the partial hospitalization program through the remainder of the 2013-2014 school year. Parents approved this placement. (P-18).
19. A positive behavior support plan was designed by the partial hospitalization program for implementation at the program. (S-3).
20. The student finished the partial hospitalization program with straight As for final spring semester grades. (S-5; NT at 579-580, 583).

2014-2015 School Year

21. In the 2014-2015 school year, the student returned to the District. (NT at 583-586).

September 2014 IEP

22. In early September 2014, the student’s IEP team met. (S-7).
23. The February 2014 IEP, for implementation at the partial hospitalization program, was utilized entirely for the September 2014 IEP, with intermittent handwritten notations regarding items for removal or for programming at the District. No typewritten revisions were added in the September 2014 IEP. (S-7).

24. The transition plan in the September 2014 IEP remained the same, except that the “agency responsible” was “changed from (the partial hospitalization program to (District high school) staff”. The student’s academic classes at the District were included as part of the transition plan. (S-7 at page 10).
25. The September 2014 IEP indicated that the student would participate in statewide assessment at the District. (S-7 at page 16).
26. The goals in the September 2014 IEP—the social interaction goal and the appropriate attention-seeking goal—remained the same. (S-7).
27. The only program modification in the September 2014 IEP, for delivery at the District high school, was “clear and concise directions”. The two related services were bus transportation from the student’s home to the District high school and meetings with a District social worker 2-4 times per month. (S-7 at page 19).
28. In the September 2014 IEP, the five supports for personnel at the partial hospitalization program from the February 2014 IEP were removed, replaced by one support for District personnel, quarterly high school department meetings. (S-7 at page 20).
29. The September 2014 IEP indicates that “(the student) will participate in the general education curriculum with the exception of...study skills class” 90% of the school day. The IEP does not

- indicate how this study skills period is related to the student's IEP goals or related services. (S-7 at pages 22-24).
30. The student's placement in the September 2014 IEP is described as itinerant learning support and itinerant emotional support at the District high school. (S-7 at page 23).⁵
31. While the September 2014 IEP included regular meetings with a school employee trained in mental health (a District social worker), the September 2014 IEP did not contain any of the classroom modifications, or specially designed instruction in the form of peer mediation skills in a social skills/peer mentoring program, as recommended in the January 2014 ER. (P-22 at page 12, S-7).
32. The September 2014 IEP does not indicate whether the positive behavior support plan from the partial hospitalization program was utilized. The District did not design a new positive behavior support plan as part of the IEP. (S-7).
33. The District did not issue a NOREP for the September 2014 IEP.
34. The student attended the District high school through most of October 2014. (NT at 583-586).

⁵ While indicating that the September IEP would be delivered at the District high school, the original February 2014 IEP indications that the student would not be educated in the neighborhood school because special education and services required in the student's IEP cannot be provided in the neighborhood school. (S-7 at page 23).

35. In late October 2014, the student began an intensive outpatient program at a psychiatric hospital, three afternoons per week. The student's IEP team met to reflect this scheduling plan, calling for science instruction to be delivered in a cyber environment. This revision was handwritten, along with the handwritten revisions in the September 2014 IEP (P-3; S-9; NT at 585-592).
36. In late October 2014, the District issued a NOREP for the student to be placed in itinerant learning support under the terms of the September 2014 IEP with the October 2014 schedule. (P-19).
37. The student participated in the outpatient program for approximately three weeks before the family sought discharge from the program in early November 2014. (P-3; S-9).
38. The student was intending to return to the District but took a potential overdose of medication and was re-admitted to the partial hospitalization program where the student remained until December 2014. (NT at 585-595).
39. After discharge from the partial hospitalization program, the student was placed by the District on homebound instruction. (NT at 593-596).
40. The student's IEP team did not convene over November 2014, December 2014, or January 2015. (NT at 586-597).

41. In January 2015, the parents contacted the District, indicating that they did not feel the District was not meeting the student's needs. Parents requested that the District re-evaluate the student. (P-4).

February 2015 IEP

42. In early February 2015, the student's IEP team met. (S-16).

43. The February 2015 IEP contained the student's grades earned at the District in the first quarter of the school year. The student earned As and Bs. (S-16 at page 6).

44. The February 2015 IEP indicates the following in the levels of functional performance: "When (the student) was in the high school class setting, (the student) sought out attention from...peers in a negative manner. [Redacted.] (The student) would also have emotional situations [redacted].... Para support would then escort (the student) to the social worker or principal at the high school." (S-16 at page 7).

45. The February 2015 IEP, where the IEP team was asked to consider how the student's disability affects involvement/progress in the general education curriculum, indicates that "the student is a student whose academic performance is negatively impacted due to a learning and emotional disability. Due to this disability there is a...discrepancy between achievement and ability in the

- classroom that is not correctable without specially designed instruction.” (S-16 at page 7).
46. The goals in the February 2015 IEP—the social interaction goal and the appropriate attention-seeking goal—remained the same as they were in the February 2014 and September 2014 IEPs. (S-7, S-16 at pages 14-15).
47. The modifications in the February 2015 IEP included three modifications geared to academics—supplemental classroom notes, extended time on tests/quizzes, help with organization skills/homework completion. None of these modifications were recommended in the January 2014 ER, and the specially designed instruction in the form of peer mediation skills in a social skills/peer mentoring program, as recommended in the January 2014 ER, was not part of the February 2015 IEP. (S-16 at page 16).
48. The February 2015 IEP continued to include, as a related service, 2-4 visits per month with a “District social worker/mental health therapist”. (S-16 at page 16).
49. The February 2015 IEP continued to indicate that “(the student) will participate in the general education curriculum with the exception of...study skills class” 90% of the school day. The IEP does not indicate how this study skills period is related to the student’s IEP goals or related services. (S-16 at pages 18-20).

50. The student's placement in the February 2015 IEP is solely described as itinerant learning support at the District. Itinerant emotional support was removed as a placement. (S-16 at page 19).
51. The February 2015 IEP included a positive behavior support plan designed by the District. (S-17).
52. In February 2015, contemporaneously with the IEP meeting, the District sought and parents granted permission to re-evaluate the student. (P-21).
53. In March 2015, the District updated its evaluation of the student with a two-page addendum letter by a District school psychologist. The ER addendum also included diagnoses from multiple providers, including major depressive disorder/single episode severe, major depressive disorder/recurrent, dysthymic disorder, panic disorder. (P-23).
54. The March 2015 ER addendum reiterated the identification of the student as having an emotional disturbance and recommended "a highly individualized and specialized program of instruction operated within a therapeutic milieu where treatment can be integrated within the educational setting." (P-23).

March 2015 IEP

55. In March 2015, after the issuance of the ER addendum, the student's IEP team met. (S-21).

56. The March 2015 IEP was identical to the February 2015 IEP, indicating in the present levels and placement sections that the student would be transitioning to a Pennsylvania approved private school where therapeutic services are available. (S-21).
57. The March 2015 IEP indicated that the student's placement would be 100% outside of regular education. The student's placement was also changed from solely learning support to solely emotional support. The parents shared that they might be interested in an out-of-state placement with an emphasis on students who have trauma-related therapeutic needs. (S-21 at pages 19-21; S-35).
58. In early March 2015, the District issued a NOREP for the student to be placed at the Pennsylvania approved private school under the terms of the March 2015. Parents approved this recommendation, and the student left homebound instruction and began to attend the Pennsylvania approved private school. (P-24; S-22, S-23; NT at 595-596, 607).
59. In mid-March 2015, a private treating psychiatrist provided a letter to the student's parents, indicating that she thought the student should be placed in a residential trauma treatment program with an educational component. (P-6; S-24).

April 2015 IEP

60. In mid-April 2015, the student's IEP team met. (P-26; S-27, S-35).
61. The April 2015 IEP is markedly different from the February 2015 and March 2015 IEPs.⁶ It is crafted for implementation in the Pennsylvania approved private school. (S-27).
62. The April 2015 IEP contained present levels of academic performance from the Pennsylvania approved private school, where the student received all As and one B in all academic work over the third and fourth quarters to that point in the school year. (S-27 at pages 6-9).
63. The April 2015 IEP contained present levels of functional performance from the Pennsylvania approved private school, where the student exhibited needs in appropriately coping with failure, accepting consequences for behavioral choices, appropriately expressing anger/disappointment, appropriately behaving in non-classroom settings, and appropriately asking for assistance. (S-26 at pages 9-11).
64. The April 2015 IEP contained four goals. Two of the goals—the social interaction goal and the appropriate attention-seeking

⁶ The student's partial hospitalization program in the spring of 2014, under the terms of the February 2014 IEP at S-7, is under the same umbrella organization as the Pennsylvania approved private school. Therefore, there are similarities between the February 2014 IEP and the April 2015 IEP.

- goal—have been part of the student’s IEPs from the beginning. Two additional goals were added, one for appropriately expressing emotion and one for coping skills when dealing with disappointment or behavioral consequences. (S-7, S-16, S-26 at pages 21-24).
65. The April 2015 IEP contains multiple aspects of specially-designed instruction/modifications and supports for school personnel. Access to a social worker/mental health therapist was removed as the approved private school is a therapeutic setting. (S-26 at pages 25-26).⁷
66. The April 2015 IEP indicates that, given the nature of the approved private school, the student will not participate in the general education curriculum. The student’s placement is described as full-time emotional support. (S-26 at pages 29-31).
67. The April 2015 IEP contains an updated positive behavior support plan. (S-28).
68. In early May 2015, the District issued a NOREP, recommending continued placement in the Pennsylvania approved private school. Parents rejected the recommendation. (P-27; S-29).

⁷ The April 2015 IEP also included the indication that the student qualified for extended school year services (ESY) for the summer of 2015. This ESY determination had been made by, and agreed to, the student’s IEP team in March 2015. (P-25).

69. The student continued to attend the Pennsylvania approved private school through the end of the 2015-2016 school year, earning straight As. (S-3; NT at 607).

Private Out-of-State Placement

70. In June 2015, the parents contacted the District, indicating their intention to enroll the student in the out-of-state placement with an emphasis on students who have trauma-related therapeutic needs, the placement parents broached with the District at the March 2015 IEP meeting. (P-8; S-35).

71. In June 2015, the parents undertook this unilateral enrollment, and the student began to attend the out-of-state placement. (P-16; NT at 621-622).

72. The out-of-state placement focuses on therapeutic and educational services “for complexly traumatized youth and their caregiving systems” including intensive treatment and individualized education planning. The out-of-state placement is approved for elementary and secondary education by the state education agency where the placement is located. (P-12, generally and quoted at page 1; P-13; NT at 441-486).

73. The student attended the out-of-state placement from June 2015 through July 2016. (P-14, P-15; NT at 622-627).

74. In June 2016, parents filed the special education due process complaint which led to these proceedings.

DISCUSSION AND CONCLUSIONS OF LAW

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” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

Denial of FAPE/IDEIA: 2013-2014 School Year

In the 2013-2014 school year, the student came to the District in December 2013. After attending a District middle school for one day, the student had an overdose incident and from that point through the end of the school year, the student attended the partial hospitalization program.

The District did everything that was required of it—comprehensively evaluating the student and programming appropriately, through the February 2014 IEP, for the student’s needs. Goals were aligned with, at that point, the District’s understanding of the student’s

needs and there was a positive behavior support plan in place for the placement. And even though the recommendations of the January 2014 ER were not part of the February 2014 IEP, the most vital components—access to a mental health specialist and social skills/peer interaction instruction—were accounted for by virtue of the therapeutic nature of the placement. The student made progress on the behavior goals in the February 2014 IEP and the student did well academically.

Here, it must be pointed out that the record shows that even as the student and family courageously worked through the psychological and emotional issues unfolding in the student's life, the student's academic performance was never an issue. The student consistently showed (a) that learning disabilities/challenges were never part of the student's needs and (b) that regardless of where the student was receiving treatment and/or schooling, the student consistently made academic progress. This finding plays a role in the decision where the 2014-2015 school year is considered.

Accordingly, in the 2013-2014 school year, the District proposed programming that was reasonably calculated to provide meaningful education benefit given the student's behavioral and emotional support needs, and the student made progress on goals related to those needs.

Denial of FAPE/IDEIA: 2014-2015 School Year

In the 2014-2015 school year, the District failed in its obligations to provide the student with FAPE. In September 2014, when the student's IEP team had anticipated the student's return to the District, it did not have an IEP prepared for consideration by the team for implementation at the District. The District simply, and literally, scratched out the references in the February 2014 IEP that were specific to the partial hospitalization program and indicated that those would not apply because the student would attend the District. It was, in effect, an IEP designed for implementation at the partial hospitalization program, not an individualized program for implementation at the District. Given the student's psychological and emotional profile, which was comprehensively understood through the January 2014 ER, let alone the experience of the District over the period December 2013 – June 2014, the September 2014 IEP, on its face, is a denial of FAPE.

This is beside the fact that the District evaluator in the January 2014 ER made multiple recommendations for the student regarding classroom modifications and social skills/peer mediation instruction which were not made part of the September 2014 IEP. Understandably given the way the 2013-2014 school year unfolded (see above), this was the first opportunity for the District to include the programming the District itself identified as necessary for the student, yet it did not include that in the September 2014 IEP.

As can be seen in the District's own characterization of the student's in-school behavior with peers and adults in the February 2015 IEP, the student clearly struggled with the same behavioral/emotional support needs over the period of September-October 2014. At that point, the student again left the District for educational placements with a therapeutic component, only to return in December 2014 from those placements for homebound instruction.

At no point over November 2014, December 2014, or January 2015 did the student's IEP team meet. The District was spurred to convene the IEP team only when parents contacted the District by letter in late January 2015 to request a re-evaluation.

Here, the chronology of the student's educational journey at the District takes a strange turn. In February 2015, the student's IEP team met and the only substantive changes from the September 2014 IEP, aside from the updated levels of performance which indicated the student's inappropriate behaviors with peers (leading to peer exclusion) and defiant behaviors with adults (leading to removal from class), were to include language and program modifications regarding learning disabilities/challenges. The February IEP speaks of "a student whose academic performance is negatively impacted due to a learning and emotional disability. Due to this disability there is a...discrepancy between achievement and ability in the classroom that is not correctable

without specially designed instruction.” This statement makes no sense whatsoever in light of the record as a whole.

Likewise, program modifications were added for supplemental notes, test-taking, organizational skills, and homework completion. Again, the record is devoid of any sense that these program modifications were necessary. And the student’s placement descriptors were changed from a student requiring solely emotional support to a student requiring both emotional support and learning support. On the contrary, as pointed out above, the student’s outstanding academic performance across grade levels and placements is (in addition to the unquestioned need for behavioral/emotional support) the most consistent aspect of the record. The District clearly understood the student’s needs, and strengths. These learning-problem/learning-support elements in the February 2015 IEP, then, warrant doubts about the appropriateness of the District’s handling of the IEP document, and more broadly the student’s programming, in the midst of the 2014-2015 school year.

By April 2015, however, the student’s IEP team had decided that the student should transition from the District to full-time emotional support placement at an approved private school with, again, a therapeutic component. This April 2015 IEP, radically different from the February 2015 IEP and drafted for implementation at the approved private school, was appropriate and will be examined in more detail below.

Still, from the period September 2014 – April 2015, the District’s programming by design and implementation was inappropriate.

Accordingly, compensatory education will be awarded.

Compensatory Education. Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEIA (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area School District v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)).

Compensatory education accrues from a point where a school district knew or should have known that it was failing in its obligation to provide a FAPE (Ridgewood; M.C.).

Here, a precise sense of the timing and nature of the denial of FAPE in the 2014-2015 school year is difficult. What is not difficult is to gauge that this record, in terms of the District’s acts and omissions in the September 2014 and February 2015 IEPs, and the general inappropriateness of the District’s programming over September 2014 – April 2015, requires an equitable award of compensatory education.

In Pennsylvania, 990 hours of schooling over a minimum of 180 school days are the minimum amount of school hours for a student in grades 7-12. (22 PA Code §§11.1, 11.3(a)). This amounts to a minimum of 5.5 hours per school day. As indicated above, the student has never had academic difficulties, so the student, on this record, has made

academic progress. The failure of the District to provide FAPE is founded in its inappropriate programming, both by design and/or implementation, for the student's behavioral/emotional needs. As a matter of equity, this hearing officer will award 2.75 hours of compensatory education for every school day over the period September 2014 – April 2015. To simplify the calculation by using 20 school days to define a month, then, the eight months represented by the period September 2014 – April 2015 represent 160 school days. Therefore, parents will be awarded 440 hours of compensatory education (2.75 compensatory education hours x 160 school days).

Denial of FAPE/IDEIA: 2015-2016 School Year

Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also*, 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parents' tuition reimbursement claim for the 2015-2016 school year in this matter proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3)).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program, or controlling program, at the time the family made the decision to seek a private placement and whether it was reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Ridgewood; M.C.)

In this case, the programming in the April 2015 IEP for delivery in the Pennsylvania approved private school for the student's education when the student was unilaterally enrolled by parents in the private placement was appropriate. Unlike the District's programming in the September 2014 and February 2015 IEPs, the programming in the April 2015 IEP contained four goals, all founded on the student's behavioral/emotional needs. Appropriate specially designed instruction and program modifications, including a placement-specific positive behavior support plan, were part of the April 2015 IEP. While the student was in that placement for approximately two months, the student made progress over those months on the behavioral/emotional support goals (and continued to exhibit excellent academic progress), but the program was reasonably calculated to continue providing meaningful education benefit to the student. For the foregoing reasons, the April 2015 IEP by the District is appropriate.

When a school district program is found to be appropriate at step one of the Burlington-Carter analysis, the school district has met its obligations to the student under IDEIA. A family may continue to seek, or

engage in, a private placement, but such a placement will be at private expense. It is therefore unnecessary to engage in step two of the analysis (an examination of the appropriateness of the private placement) and step three of the analysis (a weighing of the equities between the parties).

Accordingly, because the program last proposed by the District in the April 2015 IEP was reasonably calculated to provide FAPE to the student, and when implemented allowed the student to make meaningful education progress, the family is not entitled to tuition reimbursement for the 2015-2016 school year.

Denial of FAPE/Section 504

Section 504 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 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)).

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.

Here, based on the findings of the related to denial of FAPE in the foregoing “Denial of FAPE/IDEIA” sections, those findings and that reasoning are adopted here. Therefore, analogously as found for claims under IDEIA, the District failed in its obligations to provide FAPE under Section 504 in the 2014-2015 school year and met its obligations in the 2013-2014 and 2015-2016 school years.

Discrimination under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) the student is disabled or has a handicap as defined by Section 504; (2) the student is “otherwise qualified” to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) the student was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of the student’s disability (34 C.F.R. §104.4; S.H. by Durrell v. Lower Merion School District, 729 F.3d 248 (3d Cir. 2013); *see also*, Ridgewood and W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995)).

In the instant case, the first, second and fifth prongs of this analysis are undisputed. While not a matter of evidence, the third prong—the receipt of federal funds by the District—is a near certainty. The crux of a finding that the District discriminated against the student

in this matter, then, is the fourth prong: was the student excluded from participation in, denied the benefits of, or subject to discrimination at the District is as the result of the student's disability? To prevail in answering this multi-faceted question, a student must show that, through acts and/or omissions, a school district acted with deliberate indifference in failing to meet its obligations under Section 504. (S.H.).

Here, the District did not act with deliberate indifference in any regard. Therefore, any claim for discrimination under Section 504 is denied.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District failed to provide a free appropriate public education to the student in the 2014-2015 school year. The family is awarded 440 hours of compensatory education.

The District has not acted with deliberate indifference in any manner regarding the student's status as a student with a disability.

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

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

October 18, 2016