

*This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.*

# Pennsylvania Special Education Hearing Officer

## DECISION

Child's Name: [redacted]  
Date of Birth: [redacted]

Dates of Hearing:<sup>1</sup>  
June 21, 2016  
July 28, 2016  
October 5, 2016  
October 24, 2016  
October 26, 2016  
November 30, 2016  
December 6, 2016

### **CLOSED HEARING**

ODR Case #17531-1516AS

Parties to the Hearing:

Parent[s]

Mt. Lebanon School District  
7 Horsman Drive  
Pittsburgh, PA 15228

Date of Decision:  
Hearing Officer:

Representative:

Edward Feinstein, Esquire  
429 Forbes Avenue  
Suite 1300  
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December 31, 2016  
Michael J. McElligott, Esquire

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<sup>1</sup> The hearing was scheduled in May 2016 and was rescheduled at the joint request of the parties. The hearing commenced on June 21, 2016. In the midst of opening statements, the hearing officer, for the first time, was informed by the parties that the last agreed-upon educational placement for the student was in April 2015. The hearing officer ended the hearing at that point and scheduled the July 28<sup>th</sup> session for evidence on a hearing officer-ordered interim placement for the 2016-2017 school year, pending the issuance of this decision. A September session was cancelled as the parties felt the dispute might be resolved. A resolution could not be consummated, and the remaining sessions concluded the hearing with evidence on the parent's denial-of-FAPE claims.

## **INTRODUCTION**

[The Student] (“student”)<sup>2</sup> is a [mid-teenaged] student residing in the Mt. Lebanon 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”)<sup>3</sup> for specially designed instruction/related services as a student with autism and attention deficit hyperactivity disorder.

Parent claims that the student was denied a free appropriate public education (“FAPE”) over multiple school years— the 2014-2015, 2015-2016, and the current 2016-2017 school years.<sup>4</sup> Parent claims compensatory education as a remedy. Additionally, parent claims that the District has violated its obligations to the student under Section 504 of the Rehabilitation Act of 1973 (“Section 504”).<sup>5</sup>

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<sup>2</sup> The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

<sup>3</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

<sup>4</sup> In her complaint, parent alleges denial of FAPE in the end of the 2012-2013 school year and the entire 2013-2014 school year as well. As documented below in the Findings of Fact, the student moved into the District in March 2013 (the spring of 6<sup>th</sup> grade). The student completed the 2013-2013 school year (7<sup>th</sup> grade) and was identified as eligible for special education in June 2014, at the end of 7<sup>th</sup> grade. The student’s initial IEP was approved and in effect shortly after the 2014-2015 school year (8<sup>th</sup> grade) began. In the opening statement, parent’s counsel summarized the request for remedy as: “(I)t is our contention that (the student) has been denied FAPE going back to the first IEP, and that (the student) should have been identified, at the latest, early in (the) eighth grade year....” Notes of Testimony at 22 (internal parenthetical substitutions added). Additionally, nearly the entirety of the denial-of-FAPE evidentiary record revolves around the 8<sup>th</sup>, 9<sup>th</sup>, and current 10<sup>th</sup> grade years.

<sup>5</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for services to “protected handicapped students”.

The District counters that at all times it provided FAPE to the student for the period of the student's enrollment. As such, the District argues that the parent is not entitled to remedy.

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

### **ISSUES**

Did the District provide the student with FAPE over the 2014-2015, 2015-2016, or 2016-2017 school years?

If not, is the student entitled to compensatory education?

Is the District liable for remedy for alleged failure in its obligations under Section 504?

### **PROCEDURAL HISTORY**

- A. Parent filed her complaint in March 2016. (Hearing Officer ["HO"]-1).
- B. The complaint did not yield details about the student's current program (in spring 2016) or about the upcoming school year (2016-2017), the student's 10<sup>th</sup> grade year.
- C. A hearing session was scheduled for May 2016 but was rescheduled at the joint request of the parties. The hearing was rescheduled to June 21, 2016.
- D. At the June 21<sup>st</sup> hearing session, counsel presented opening statements on behalf of their clients. Over the course of the

opening statements, it became apparent for the first time not only that the student's program for 2016-2017 was not agreed upon but that the last agreed-upon individualized education plan ("IEP") for the student was reached for the student's 8<sup>th</sup> grade year—the 2014-2015 school year. That program remained in place in throughout the student's 8<sup>th</sup> and 9<sup>th</sup> grade years (the 2014-2015 and 2015-2016 school years). (Notes of Testimony ["NT"] at 14-34).

- E. Because the student was heading into 10<sup>th</sup> grade ostensibly under the terms of an 8<sup>th</sup> grade IEP, the hearing officer instructed the parties that a one-session evidentiary hearing would be held to take evidence as to each party's view of what an appropriate program for the student should look like for the 2016-2017 school year. (NT at 34-39).
- F. The evidentiary hearing was held July 28, 2016 and resulted in an interim ruling for the student's 2016-2017 school year, pending the issuance of this decision. (HO-2).
- G. A September 2016 hearing session was cancelled as the parties felt they might have a resolution. This did not bear fruit, and the hearing concluded over sessions in October, November, and December 2016.

## **FINDINGS OF FACT**

1. In April 2013, the spring of the student's 6<sup>th</sup> grade year, the student enrolled in the District. (Joint Exhibit ["J"]-10 at page 3, J-11 at page 2; NT at 48-49).

### 2012-2013/6<sup>th</sup> Grade

2. The student earned grades in the District for only the 4<sup>th</sup> quarter of the 2012-2013 school year— Bs in English, mathematics, and social studies, and Cs in literature, science and unified arts. (J-33).
3. In the spring of 2013, the student scored proficient in reading and advanced in mathematics on the Pennsylvania System of School Assessment testing. (School District Exhibit ["S"]-6).

### 2013-2014/7<sup>th</sup> Grade

4. Over the course of the 2013-2014 school year, the student's 7<sup>th</sup> grade year, the student received regular education supports, including an after-school tutoring program and the recommended use of dictation software for "resistance to writing". (Parent's Exhibit ["P"]-42; J-10 at page 4).
5. In March 2014, parent requested an evaluation of the student. The District was granted permission by parent to conduct a Section 504 evaluation. (S-28, S-29; J-1).
6. In April 2014, the District was granted permission by parent to conduct an evaluation for eligibility for special education services under IDEIA. (J-2).
7. In April 2014, the parent provided input and a letter from a community-based mental health agency where the student was receiving individual counseling and services in a social skills group. (P-14; S-31).
8. In May 2014, the District issued its Section 504 evaluation. The student's 7<sup>th</sup> grade teachers and school counselor indicated that the student exhibited poor planning and organization skills, especially where planning and independent work were involved, exhibited poor task completion (homework and projects), struggled

- with writing assignments, and had difficulty with socialization with peers and adults. (J-10).
9. The May 2014 Section 504 evaluation recommended that the student qualified for a Section 504 plan/Chapter 15 service agreement as a student with a disability, namely attention deficit hyperactivity disorder (“ADHD”) and anxiety. (J-10).
  10. In June 2014, the District issued its evaluation report (“ER”) for IDEIA eligibility. (J-11).
  11. The input of the student’s teachers and counselor in the June 2014 ER was consistent with the input received from those individuals for the May 2014 Section 504 evaluation. More detail was provided, however, regarding deficiencies in socialization with peers, occasional disrespect/confrontation with some adults, and emotional regulation (“easily upset, angry, and frustrated”... “overly assertive and almost aggressive”). (J-11 at page 5).
  12. The student’s input and evaluator’s observations during testing for the June 2014 ER were consistent with teacher input—the student is interested in and excels at science/technology/mathematics and has a dislike for writing, especially starting writing assignments. (J-11 at page 6).
  13. On cognitive ability testing for the June 2014 ER, the student’s general intellectual ability score was 132 (98<sup>th</sup> percentile). (J-11 at pages 7-8).
  14. On achievement testing for the June 2014 ER, the student’s scores in reading and mathematics, on composite measures and sub-tests, did not reveal any significant discrepancies between the student’s cognitive ability and achievement. (J-11 at pages 8-9).
  15. On achievement testing for the June 2014 ER, the student’s scores in writing, both the composite score (108) and the spelling and writing samples sub-tests (109 and 103, respectively), revealed significant discrepancies from the student’s overall cognitive ability (132). The District evaluator opined, however, that “(the student’s) skills in written expression are not significantly lower than predicted [less than one standard deviation] from the estimate of (the student’s) intellectual functioning. As such, the results are not consistent with criteria for a ‘Specific Learning Disability’ in written expression”. (J-11 at page 10).

16. In the June 2014 ER, the student's scores on cognitive measures of executive functioning (planning, organization, attention, emotional regulation, etc.), ranged from average to superior. (J-11 at pages 13-15).
17. On a behavior rating inventory as to observable executive functioning skills, however, the student's parent and six teachers almost uniformly rated the student as clinically-significant or at-risk in almost every sub-scale. On the sub-scales, all raters scored the student with clinically-significant scores in emotional control; all raters scored the student with clinically-significant or at-risk scores in inhibition, ability to shift, initiation, and planning/organization. The student's behavior regulation index was rated as clinically-significant by all raters. The student's metacognition index was rated as clinically-significant by the parent and three teachers and as at-risk by three teachers. The student's global executive composite, incorporating all sub-scales, was rated clinically-significant by the parent and five teachers and at-risk by the remaining teacher. (J-11 at pages 15-17).
18. The District evaluator noted the distinct differences between the cognitive assessment of executive functioning skills "under ideal testing conditions" and the "pervasive and much more noticeable deficits" in daily/less structured settings. (J-11 at page 17).
19. In the June 2014 ER, the student's social/emotional/behavioral assessments revealed less consistent scoring than the executive functioning assessment. Seven teachers completed rating scales. On the depression sub-scale, four teachers rated the student as clinically-significant and three rated the student as at-risk. On the internalizing problems sub-scale, one teacher rated the student as clinically-significant, three rated the student as at-risk, and three rated the student borderline.<sup>6</sup> On the adaptability sub-scale, one rater rated the student as clinically-significant and five raters rated the student as at-risk. On the social skills sub-scale, one rater rated the student as clinically significant and three raters rated the student as at-risk.<sup>7</sup> (J-11 at pages 18-20).

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<sup>6</sup> These internalizing-problems sub-scale scores were not reported by rater separately in the text of the ER but are represented graphically by rater using a unique symbol for every rater on a scoring matrix. The photocopy quality of J-11 is somewhat muddied on this sub-scales reporting, and the rater's scores are tightly clustered at the high-borderline/at-risk level. (J-11 at pages 19-20).

<sup>7</sup> The data-reporting for the adaptability and social-skills sub-scales mirrors that in footnote 6. Graphical representations were used to establish the factual finding.

20. The student's self-ratings indicated almost uniformly clinically-significant ratings except for relations with parents (at-risk) and sensation-seeking (no concern). The most outsized self-ratings were in atypicality, internalizing problems, and the emotional symptoms index; in functional areas, the most outsized self-ratings were interpersonal relations and personal adjustment. (J-11 at pages 20-22).
21. Assessment of the student's ADHD in the June 2014, using rating scales completed by the student's mother and seven teachers, confirmed the previous diagnosis of ADHD shared with the District by the student's mother. (J-11 at pages 22-25).
22. The June 2014 ER included assessment for autism spectrum disorder. The student's parent and seven teachers completed rating scales. While there was marked scatter across domains and sub-scales, all raters found the student to have elevated scores in the social/communication domain (three 'slightly elevated', one 'elevated', and four 'very elevated'), and the peer-socialization sub-scale (two 'slightly elevated', three 'elevated', three 'very elevated'). On the social/emotional reciprocity sub-scale, seven of the eight raters rated the student with elevated scores (two 'slightly elevated', two 'elevated', and three 'very elevated'). (J-11 at pages 25-26).
23. A functional behavior assessment ("FBA") was conducted as part of the June 2014 ER. The most problematic behaviors identified by the student teachers and school counselor were refusal to complete tasks/assignments, refusal to take out work/materials, difficulties working with other students, and poor organizational skills. At times, the student would follow teachers around the classroom. (J-11 at page 27).
24. The FBA included the following input from teachers: "(The student's) teachers agreed that (the student) displays the 'most resistance with writing tasks'. They indicated that (the student) struggles with the process of writing and seeks constant approval of...work. This is reportedly true across all subject areas." (J-11 at page 27).
25. The FBA noted multiple instances of difficulty with peer socialization, including condescension, rigidity, feeling wronged by others, difficulty working through disagreement, lack of interaction/connection with peers. The ER noted, however, that



teachers did not believe difficult peer interactions were the result of malice on the part of the student. (J-11 at pages 27-28).

26. The FBA identified antecedents to the student's problematic behavior as presented with non-preferred tasks, real or perceived negative social interaction, receiving constructive criticism, and group work. Problematic behaviors were identified as refusal to comply with tasks/directives/requests, arguing with peers or adults, and leaving seat to address teacher. The perceived functions of the problematic behaviors were to avoid non-preferred tasks, to gain adult attention, and the avoid/minimize feelings of anxiety related to quality/accuracy of work. The consequences employed to address the behaviors were verbal redirection and ignoring the behaviors. (J-11 at pages 30-31).
27. The June 2014 ER found explicitly that the student did not exhibit any specific learning disabilities. (J-11 at pages 31-34).
28. The June 2014 ER concluded that the student should be identified as a student with autism (high-functioning) and the health impairment of ADHD. The District evaluator attributed the anxiety, emotional regulation, and executive functioning deficits in the student's evaluation profile as related to the student's autism spectrum disorder. (J-11 at pages 34-37).<sup>8</sup>
29. The student's final grades in 7<sup>th</sup> grade were: As in band and physical education, Cs in [foreign language], mathematics, literature, science, and social studies, and a failing grade in English. (J-33).
30. In the spring of 2014, the student's scored advanced in reading and mathematics on the Pennsylvania System of School Assessment testing. (S-7).

#### 2014-2015/8<sup>th</sup> Grade

31. The student's IEP team met twice in July 2014 and twice in August 2014. (J-21)
32. In August 2014, the student's IEP team met and crafted an IEP. (J-16).

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<sup>8</sup> [Redacted.]

33. The August 2014 IEP contained fourteen goals, four in [redacted], four in organization and planning, one in written expression, two goals in behavior, and three in social cues/social skills. (J-16 at pages 18-49).
34. The August 2014 IEP included extensive specially designed instruction and modifications in writing, in-class accommodations, teacher strategies for interacting/re-directing, organizational strategies, ability to leave class/access counselor, communication with parent and support teachers, and socialization strategies. The student was also given [other redacted] accommodations, as well as given access to the same regular education afterschool tutoring program which the student found helpful in 7<sup>th</sup> grade. (J-16 at pages 49-60).
35. The student attended one 44-minute session per week for individual social work services and one 44-minute session per week for group social work services. (J-16 at page 60).
36. The parent explicitly asked that the student not attend a co-taught inclusion class or a learning support class. Multiple witnesses, including the parent and student, indicated that the student has an aversion to being viewed as a student who requires academic support or anything during the school day outside of an entirely regular education setting. (P-16 at pages 61-62; J-21; see *generally* NT at 48-94, 191-213, 706-795, 809-829).
37. The parent agreed to the program/placement outlined in the August 2014 IEP. (J-21).
38. The student's mathematics goal for algebra [was for] instruction [that] was self-paced and self-directed by the student through an online mathematics program administered by the local intermediate unit. The student would engage in online mathematics lessons during classroom time while the teacher worked with other students in the class using live instruction. This was described as specially designed instruction as "self-paced online mathematics program with district teacher support". (S-11 at pages 12-13; J-16 at pages 25-28, 59).
39. The District math teacher did not provide support, instead relying on the online instructor from the intermediate unit to support the student. (P-25; S-11, S-13 at page 7, S-16; NT at 331-339).

40. Over the course of the school year, the student logged on for only 2,314 minutes (approximately 38 hours of instruction) in the online environment yet earned a final grade of A for mathematics. (P-34).
41. The student's parent was an active communicator, and the August 2014 IEP was revised at various times over the 2014-2015 school year (once in October 2014, twice in November 2014, once in December 2014, and twice in January 2015). (P-44; S-11, S-13, S-16, S-22; J-16 at page 2).
42. In December 2014, a positive behavior support plan to address problematic behaviors such as arguing with adults/peers, refusing to comply with teacher requests, use of profanity, and lack of perspective-taking. Antecedents to the behavior included requests to stop using technology for games rather than instruction, embarrassment at in-class support or excusal from class for support, requests to work in groups, real or perceived negative social interactions with peers and adults, or anxiety over task completion and/or quality. The positive behavior support plan was not presented to the parent until February 2015. (J-14).
43. The December 2014 positive behavior support plan included two behavior goals and various program modifications and specially designed instruction. (J-14).
44. In March 2015, the student was involved in a classroom incident where the student had an altercation with a classmate—the student initiated contact with the classmate (by purposefully applying a foreign substance to the student), and the classmate physically assaulted the student. (P-44 at pages 83-84; NT at 437-477).
45. In addition to the March 2015 classroom incident, intermittently through the 2014-2015 school year, the student experienced negative interactions with peers and adults. (S-16).
46. Following the March 2015 classroom incident, the student's IEP was further revised to include weekly counseling services. (J-16; P-45).
47. In April 2015, the student's August 2014 IEP was revised for the final time. Even though the August 2014 IEP had been revised multiple times over the course of the 2014-2015, the document as it existed in April 2015 was largely the same as it was in August 2014. This was the last agreed-upon program/placement for the

- student prior to the filing of parent's complaint in March 2016. (P-45; J-16; HO-1).
48. Over the course of the 2014-2015 school year, the student made progress on the IEP goals. (J-16; P-45).
  49. Throughout the 2014-2015 school year, the student utilized the afterschool regular education tutoring and found great value in it. (S-16; NT at 116-140).
  50. Throughout the 2014-2015 school year, the student's parents and teachers communicated regularly using an online school-home communication log. The reports reveal that the student had a degree of academic and behavioral success but that the issues related to task/assignment completion were prevalent across multiple academic subjects. (P-25; S-14).
  51. The nature of the communication log changed after the March 2014 classroom incident, to include daily monitoring of inappropriate behavioral interactions between the student and others. (P-25; S-14).
  52. In the spring of 2015, the student scored proficient in mathematics on the Pennsylvania Keystone Exam. The student scored proficient in language arts and mathematics, and advanced in science, on the Pennsylvania System of School Assessment testing. (S-24, S-25; P-37).

#### 2015-2016/9<sup>th</sup> Grade

53. For the 2015-2016 school year, the student was transitioning from a District middle school to the District high school, a transition which involved planning and communication in the spring of 2015. (P-25, P-44; S-14).
54. In July 2015, the parent and District communicated about the student's technology and writing support needs for the upcoming 2015-2016 school year. (S-11).
55. In late August 2015, the District requested permission to perform an updated FBA in the high school environment. The parent refused permission. (J-4).

56. In late August 2015, the student's annual IEP meeting took place. The District issued a notice of recommended educational placement ("NOREP") with this IEP. Parent returned the NOREP (at the same time as the refusal of permission to re-evaluate), disapproving the NOREP and adding, in part, this statement: "This is not appropriate. Use 'stay put' IEP from 04/24/15 since that is the most recent agreed-upon IEP." (J-23).
57. With the rejection of the August 2015 IEP, the District implemented the April 2015 IEP. (P-45).
58. Throughout the 2015-2016 school year, the student had daily check-in/check-out procedures with the special education teacher, mainly taking place after school. The student attended to these more frequently in the first half of the year than in the second half. (P-39; NT at 481-492).
59. In October 2015, reviewing the student's experience with the online algebra class, the District issued a NOREP for compensatory education. The parent did not return the NOREP. (J-22).
60. As part of the stay-put services, the student again engaged in online mathematics instruction, in geometry. The student again engaged in online mathematics lessons during classroom time while the teacher worked with other students in the class using live instruction. The geometry teacher, not understanding the special education implications of stay-put requirements, testified credibly about the unsatisfactory nature of the arrangement. (S-23; NT at 282-329).
61. At some point in the fall of 2015, parent retained experienced special education counsel (different from counsel who represented her in these proceedings) who attended certain meetings over the course of, roughly, October 2015 – January 2016. (NT at 1025-1026, 1030, 1034-1042).
62. In October 2015, the District requested permission to re-evaluate the student, including multiple assessments. The parent did not immediately act on/return the document. (P-6, P-8).
63. In November 2015, the District twice requested, through the issuance of a NOREP, that the student's geometry instruction shift from online instruction to classroom instruction. The parent disapproved the NOREPs and online geometry instruction continued. (J-24, J-25).

64. In November and December 2015, the parent returned the permission to evaluate with detailed information about conditions for the re-evaluation process. Parent shared that the student would be undergoing a private neuropsychological evaluation. (J-5, J-6, J-8, J-9).
65. In December 2015, the online geometry instruction had become untenable—the student had completed only 9% of the online course. The District issued a third NOREP to shift geometry instruction from online to the classroom. In January 2016, the parent approved the NOREP allowing for the change in mathematics class. All other provisions of the April 2015 IEP remained in place as part of the student’s stay-put program/placement. (J-26; P-37 at pages 10-13).
66. In January 2016, given the parent’s indications about a private neuropsychological evaluation and the conditionally-approved permission granted to the District to re-evaluate the student, the District issued an updated permission to re-evaluate the student. Parent granted permission for the student to be re-evaluated. (J-9).
67. In February 2016, the District produced data on the student’s present educational levels through the second quarter of 9<sup>th</sup> grade. (P-37).
68. Two of the four [redacted] goals from the April 2015 IEP were written explicitly for middle school programming and could not be implemented at the high school. Even given the difficulties with online geometry instruction, the geometry teacher worked with the student individually on the mathematics goal. The [redacted] goal was implemented as well. The progress monitoring reflects progress on these latter two goals. (P-37 at pages 4-5).
69. The student made progress on two of the organization goals. The student did not make progress on a third organizational goal for assignment-tracking, mainly because the student did not access the technology (online calendar and email communication from teachers). (P-37 at pages 6-7, 10).
70. The student made progress on the writing goal, although late completion impacted the student’s grades on most writing assignments. However, the student did not work at all on a major writing project—a literary research paper. (P-37 at page 7; S-19).

71. The student made progress on all five social skills goals (two of which were delivered in the summer of 2016), although initially in the school year the student did not wish to participate in social skills sessions with the District social worker. (P-37 at pages 7-10).
72. The student continued to struggle with work completion in all classes, although most teachers noted that the student's interactions with them and peers were appropriate. Still, the student would often seek not to interact, or work fluidly, in groups. (P-37 at pages 10, 13-15).
73. In early March 2016, the District proposed an IEP revision to allow the student to receive social work services after school and provide an academic study hall. Parent disapproved the NOREP. (J-28).
74. In mid-March 2016, parent filed the special education due process complaint which led to these proceedings. (HO-1).
75. In late March 2016, the District issued its re-evaluation report ("RR"). Present levels of performance were updated, but the bulk of the RR was focused on a FBA. The RR also included an occupational therapy ("OT") assessment, a speech and language ("S&L") assessment, and an assistive technology ("AT") assessment. (J-12).
76. The March 2016 RR continued to identify the student as a student with autism, the health impairment of ADHD, and [redacted]. Given the student's continuing needs in task/assignment completion and "resistance to writing across the curricula", the RR recommended that the student receive daily academic support from a special education teacher. (J-12, generally and at pages 31-32).
77. In April 2016, the District proposed an IEP and issued a NOREP. Parent disapproved the NOREP and, by letter and email in May 2016, provided specific input into her views on deficiencies in the IEP. (J-19, J-31; S-4, S-5).
78. In April 2016, parent obtained private AT and OT evaluations. (P-6, P-7).
79. In May 2016, parent obtained a private neuropsychological evaluation. (P-9).

80. In mid- May 2016, at parent's request, the March 2016 RR was re-issued to include grade-equivalent scores for certain assessments in the RR. (J-13).
81. In late May 2016, the District issued a new IEP and NOREP, taking into consideration some but not all of the parent's concerns shared in the letter/email returned with the April 2016 NOREP. Parent disapproved the NOREP. (J-20, J-32).
82. The IEP issued by NOREP in late May 2016 is dated April 2016 since it contains revisions of that document. Therefore, for clarity between the two IEP documents, it will be referred to as the April/May 2016 IEP. (J-20).
83. The April/May 2016 IEP identified the student's consistent needs evident across the entire record—planning/organizing, task/assignment completion, social skills/interaction, and support for written work. (J-20 at page 61).
84. The April/May 2016 IEP includes a positive behavior support plan based on the FBA completed for the March 2016 RR. (J-20 at pages 64-68).
85. Because the student had reached age 14, the April/May 2016 IEP includes detailed transition planning. (J-20 at pages 42-53, 68-72).
86. The April/May 2016 IEP includes four [redacted] goals (math, science, [redacted], and field of interest), one goal in written expression, and one goal for organization. (J-20 at pages 81-83).
87. The April/May 2016 IEP contains eight behavioral goals, of varying sorts, which are incorporated as part of the student's positive behavioral support. One goal is for assignment completion across core academic classes. One goal is for self-advocacy when faced with a non-preferred activity (group work or writing assignments) to request alternative participation or work product. Two goals are for social skills instruction. Three goals, in conjunction with a school psychologist, are for self-awareness of behavioral triggers and developing appropriate behavioral responses. One goal, tailored to extended school year services, is for self-awareness and self-monitoring of behavior. (J-20 at 85-94).
88. The April/May 2016 IEP includes extensive specially designed instruction and modifications in writing, in-class accommodations, a permanent pass to leave class when the



- student seeks supports from District personnel, teacher strategies for interacting/re-directing, continued check-in/check-out procedures each school day, weekly study skills instruction, assistive technology, organizational strategies, explicit procedures should the student encounter bullying or negative peer attention, and weekly progress reporting. (J-20 at pages 95-106).
89. The April/May 2016 IEP provides for weekly individual sessions with a contracted social worker, and twice monthly sessions, each, for group sessions with the social worker and sessions with a District school psychologist. (J-20 at page 107, 112).
90. The April/May 2016 IEP considers multiple options providing academic support-- regular education study center/math lab/writing lab access, regular education study hall, academic support study hall (taught by a special education teacher). The parent does not wish for any special education academic support during the school day. (J-20 at pages 108-112).
91. Ultimately, the April/May 2016 IEP calls for a daily period of academic support provided by a special education teacher. (J-20 at page 112).
92. In June 2016, parent obtained a second private neuropsychological evaluation, as well as private S&L and cognitive therapy evaluations. (P-11, P-12, P-13).
93. Academically, the 2015-2016 school year was problematic for the student, especially in the second semester. The student earned Bs in applied engineering and robotics. The student earned the following semester 1/2 grades in academic courses: English D/F, social studies C/F, geometry B/D, chemistry B/F, [foreign language] C/F. (J-33).

#### 2016-2017/10<sup>th</sup> Grade

94. The *Procedural History* section above details the course of these proceedings over June and July 2016.
95. The April/May 2016 IEP is the student's current program/placement, as ordered by this hearing officer in the interim ruling of August 2016 prior to the start of the school year. (J-20; S-27; HO-2).

96. Over the fall semester of 2016, the student has not engaged in or attended the academic support sessions. (NT at 1073-1076).

## **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 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

Overall, the record over these school years shows that the student made meaningful education progress. To be sure, there are concerns in some of the District’s programming, ultimately leading to a finding that it denied FAPE to the student in specific regards. But for the most part, the District has met its obligations to the student. Specific examinations of each school year follow:

### **Denial of FAPE/IDEIA – 8<sup>th</sup> Grade: 2014-2015 School Year**

In 8<sup>th</sup> grade, the student’s August 2014 IEP was appropriate. The student made progress and, of all the school years on this record, the 8<sup>th</sup> grade year was the most successful for the student.

One area, though, is of concern: the online mathematics instruction. Here, there are two issues. One, for a student who has consistently demonstrated, even at this point in the educational history, difficulty with task/assignment completion, a self-directed online learning experience is hugely problematic. This inability of the student to work to task-completion turned out to hamstring mathematics instruction in 8<sup>th</sup> grade. Two, and more pointedly, the August 2014 IEP called for the math teacher to support the student's instruction, but the teacher left support entirely in the hands of the online mentor. The result was that the student had no support in mathematics and, unsurprisingly, the student received minimal mathematics instruction that year. The District recognized this in the fall of 2015 when it offered compensatory education.

While it may be argued that this was a failure of [redacted] and not special education, this argument must be rejected. It is not a matter of content area concern; instead, it is a matter of task/assignment completion. Therefore, an award of compensatory education will be made related to the inappropriate design/support for the student in online algebra in 8<sup>th</sup> grade.

Otherwise, the student's programming was designed and implemented appropriately. Throughout the school year, the District responded to multiple requests of the parent for revision of the August 2014 IEP, and the District responded definitively and effectively with

programming after the classroom incident in March 2015. But, as indicated, the failure in the design and implementation of mathematics support was a denial of FAPE.

Denial of FAPE/IDEIA – 9<sup>th</sup> Grade: 2015-2016 School Year

The considerations of the provision of FAPE in 9<sup>th</sup> grade are more complicated. The student went the entire school year under the terms of the August 2014 IEP as a stay-put program/placement.

The denial of FAPE resulting from online algebra instruction continued with the student remaining in online geometry instruction. Again, the entire design and implementation of this programming, in light of the student's needs, amounts to a denial of FAPE. The District recognized this early on when, in late September/early October 2015 by issuing a NOREP addressing mathematics and offering compensatory education. Where the District might claim that its hands were tied because of the parent's assertion of stay-put protections, it is at this point—early in the school year—that the District knew that online mathematics instruction for the student was inappropriate. Quite simply, it should have filed a special education due process complaint of its own (22 PA Code §14.162), seeking to remedy the impasse over mathematics instruction through a hearing officer order/directive. It did not avail itself of special education due process, however, and the student continued to languish in online instruction, completing only 9% of the online material

before parent finally agreed in January 2016 to live instruction. The student's struggles in the second semester, in a course as sequential as geometry, stem directly from the student not receiving appropriate instruction and support in the first semester (as the geometry teacher testified to during his testimony, NT at 282-331). Accordingly, the student will be awarded compensatory education.

Beyond the mathematics issue, the question of FAPE in 9<sup>th</sup> grade, especially in the second semester when the student's academic performance drastically declined is unclear. On balance, the entirety of the record supports a conclusion that the District did not deny the student FAPE. Ultimately, it is a situation where the District worked diligently with the parent, attempting to reach agreement on programming to no avail. This is not to denigrate the concerns of the parent, which are clearly held in good faith. But by the fall of 2015/winter of 2016, the parent had counsel and had withheld permission to re-evaluate the student. Often, seeming agreement at IEP team meetings turned thereafter into hesitation or disagreement by the parent. Unlike the situation above where the mathematics issue was clear, here the District cannot be faulted for not pursuing special education due process for directive clarity on the student's programming.

This is not to excuse the drastic academic results of the second semester. But by March 2016 parent had filed her own special education due process complaint, and the long-awaited re-evaluation process was

underway (in addition to multiple private evaluations). No one can look at the record of the spring of 2016, least of all the parties who both share a degree of burden in the way matters unfolded, and feel that the student was well-served in the second semester of 9<sup>th</sup> grade. Still, the record taken as a whole cannot support a finding of a denial of FAPE, solely at the feet of the District, as a result of these matters. Accordingly, outside of the mathematics issue in the preceding paragraph, there will be no award of compensatory education related to the student's 9<sup>th</sup> grade programming.

Denial of FAPE/IDEIA – 10<sup>th</sup> Grade: 2016-2017 School Year

Based on the interim ruling by this hearing officer in August 2016 for the current school year, the student has had a program/placement for through the date of this decision. That interim ruling is herewith made decisive—the student's program/placement shall be that as outlined in the April/May 2016 IEP (J-20). It is a comprehensive program which is appropriately designed to provide meaningful education benefit to the student in light of the student's well-documented needs.

What is presented, however, is a unique situation where, having an appropriate program in place, the student refuses to engage in it, specifically to attend the academic support class where the student would receive absolutely necessary support on an absolutely necessary daily basis. Succinctly put, the parent's/student's position is that

services must be provided outside of a special education paradigm. While this might be possible for some students, here the District's position carries the day—the student's organizational, writing, and social-skills needs are simply too complex to appropriately address in a regular education paradigm.

Matters have reached a point of paralysis, and the student's academic needs—built on a foundation of outstanding cognitive ability—are suffering. Therefore, the District's proposed program of April/May 2016 IEP, providing for daily academic support and the social-skills/counseling services outlined in that IEP (in addition to the myriad other services outlined in that 114-page document), is deemed appropriate and shall serve as the student program/placement through the effective date of that IEP.

#### 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, less any period for reasonable rectification by the school district. (Ridgewood; M.C.).

Here, the awards of compensatory education are based on the inappropriate mathematics instruction in 8<sup>th</sup> and 9<sup>th</sup> grades. Turning first to the compensatory education for 8<sup>th</sup> grade algebra, the student received only approximately 38 hours of mathematics instruction when normally the student should have received approximately 135 hours (approximately 45 minutes per period over 180 school days). While the student made some degree of progress as evidenced by the final grade in mathematics in 8<sup>th</sup> grade, it was entirely through the student's own efforts, as the District failed to support the student in any way. Therefore, the remaining 97 hours will be awarded as compensatory education.

Turning then to the compensatory education for 9<sup>th</sup> grade geometry, the student received completed only 9% of the online geometry instruction in the fall semester and then, after live instruction began in January 2016, earned a grade of D for the semester. In effect, the District's failures continuing the online mathematics failures from 8<sup>th</sup> grade and not seeking to utilize special education due process when, clearly, continuing the situation was untenable, the student was, in effect, denied appropriate mathematics instruction for the entire year. Therefore, the same calculation will be applied to calculate compensatory education— approximately 135 hours (approximately 45 minutes per period over 180 school days) will be awarded as compensatory education.



### 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). 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)).

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 regarding mathematics instruction in the 2014-2015 and 2015-2016 school years. The District met its Section 504 denial-of-FAPE obligations as to all other claims.

### 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. Indeed, instances of denial of FAPE notwithstanding, the record is clear that the District has consistently and diligently worked with parent and sought to accommodate her requests, even, as set forth above, beyond the point where it knew or should have known that further collaboration was unlikely to yield agreement. In short, there was

no indifference whatsoever in the District's approach to the student's education.

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 with regard to mathematics instruction in the 2014-2015 and 2015-2016 school years. The student is awarded 232 hours of compensatory education.

The student's programming for the 2016-2017 shall be the program/placement outlined in the April/May 2016 IEP in the record at J-20.

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

December 31, 2016