

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

Final Decision and Order

CLOSED HEARING

ODR File Number 19378 16 17

Child's Name: K. S.

Date of Birth: [redacted]

Dates of Hearing:

8/30/2017, 9/20/2017, 10/11/2017

Parent:

[redacted]

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Hearing Officer: Michael J. McElligott **Date of Decision:** 11/30/2017

INTRODUCTION

Student (“student”)¹ is an early teen-aged student who resides in the 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 as a student with specific learning disabilities.

Parent claims that the student was denied a free appropriate public education (“FAPE”) for a period from July 2015 through the date of the complaint related to allegations of deficiencies in a re-evaluation process/report issued in May 2017, as well as alleged deficiencies in the student’s programming over that period.³ Parent seeks a quantitative/hour-for-hour compensatory education as a remedy. Analogously, parent asserts these claims and request for remedy under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).⁴

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 Parent sought a compensatory education remedy “for the period of time referenced throughout this complaint”. (Hearing Officer Exhibit (“HO”) 4 – Amended Complaint at page 14). The amended complaint at HO-4 includes allegations related to an evaluation process/report in May 2014, but makes an explicit reference to an allegation to “(failure) to provide a free appropriate public education, (‘FAPE’), from July 20, 2015, to present”. (HO-4 at page 2). The evidentiary record included the student’s initial evaluation report in May 2011, the re-evaluation report in May 2014, and another re-evaluation report in May 2017, as well as individualized education plans dated May 2015 and thereafter. Taken all together, then, the scope of the denial-of-FAPE evidence was largely focused on the period from May 2015 forward with the history/documentation of the student’s evaluations at the District playing somewhat of a role in denial-of-FAPE considerations, all as set forth below.

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”).

The District counters that at all times it met its obligations to the student under IDEIA and Section 504, both in terms of evaluation and programming. Accordingly, the District argues that the parent is not entitled to any remedy, compensatory education or otherwise.

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

ISSUES

Did the District deny the student FAPE over the period July 2015 to the present?

If so, is compensatory education owed to the student?

Did the District discriminate against the student, acting with deliberate indifference toward the student in light of the student's disabilities?

FINDINGS OF FACT

1. In June 2011, at the end of the 2010-2011 school year (the student's 1st grade year), the student was identified as a student with a specific learning disability in mathematics, requiring special education, and a health impairment, requiring support in organization and direction-following. The June 2011 evaluation report ("ER") also recommended support in reading/language arts. (Parent's Exhibit ["P"]-2).
2. The June 2011 also noted that the student had a serious [medical] condition that required daily medication. The ER indicated a general report by the student's physicians that the [redacted] condition might impact the student's learning, but at no point in the student's education, on this record, did the condition result in specific modifications or accommodations in the educational environment. (P-2).
3. In May 2014, the spring of the 2013-2014 school year (4th grade), the student was re-evaluated. The May 2014 re-evaluation report ("RR") did not update any of the student's cognitive or achievement testing. While some of the contents of the May 2014 RR were materially updated

(including current assessments and classroom observations), the May 2014 RR is largely, verbatim, the June 2011 ER. The May 2014 RR, however, identified the student as a student only with specific learning disabilities without identification as a student with a health impairment. (P-2, P-3).

IEP for 2014-2015/5th Grade⁵

4. In June 2014, the student's individualized education plan ("IEP") team met in its annual meeting to consider the student's IEP. (School District Exhibit ["S"]-11).
5. The June 2014 IEP contained four goals (two in reading and two in mathematics) and placed the student two hours per day for pullout resource room instruction in reading and mathematics. (S-11).
6. The baselines for the goals in the June 2014 IEP were drawn from the May 2014 RR, based on the student's achievement on computerized, curriculum-based measurement testing. (P-3; S-11).
7. In the student's June 2014 IEP, the baseline for the reading fluency goal was 91 words correct per minute on a 4th grade probe.⁶ The goal was written for the student to achieve 123 words correct per minute on a 5th grade probe. (S-11 at pages 8, 17).
8. In the student's June 2014 IEP, the baseline for the reading comprehension goal was 16 correct responses on a 4th grade probe. The goal was written for the student to achieve 20 correct responses on a 5th grade probe. (S-11 at pages 8, 18).
9. In the student's June 2014 IEP, the baseline for the math computation goal was 22 correct responses on a 4th grade probe. The goal was written

⁵ Because the student's IEP team would meet in late May or June, near the end of a school year, the implementation of the IEP under consideration largely took place in the following school year. Therefore, consideration of the IEPs in this decision are tagged to the "upcoming" school year (e.g., 2014-2015—5th grade), even though the IEP met near the end of the prior school year (June 2014, the end of 4th grade).

⁶ At this finding of fact ("FF"), as well as those at FF 7-10, the present levels of academic achievement in the June 2014 IEP contains a seeming typographical error carried over from the May 2014 IEP. The present levels, copied out of the May 2014 RR, refer to probes at the 2nd grade level for reading fluency, math computation, and math concepts/applications. The baseline data in the IEP goals, however, corrects this to baseline data using 4th grade probes. (P-3 at page 14; S-11 at page 8-9, 17-20).

for the student to achieve 43 correct responses on a 4th grade probe. (S-11 at pages 9, 19).

10. In the student's June 2014 IEP, the baseline for the math concepts/applications goal was 5 correct responses on a 4th grade probe. The goal was written for the student to achieve 13 correct responses on a 4th grade probe. (S-11 at pages 9, 20).
11. Over the course of the 2014-2015 school year (5th grade), in the implementation of the June 2014 IEP, the student's progress reporting, across all goals, does not accurately reflect the goal attainment levels. (S-11 at pages 17-20; S-15 at pages 12-17).
12. The progress report for the reading fluency goal reflected a goal of 120 words correct per minute, not 123 words correct per minute, although the student made progress on the goal, achieving 121 words correct per minute on 5th grade probes by mid-May. (P-4 at page 4; S-15 at pages 12-17).
13. The progress report for the reading comprehension goal reflected a goal of 15 correct responses, not 20 correct responses, although the student made progress on the goal and, having mastered it by mid-February, had progressed to 5th grade probes. (P-4 at page 5; S-15 at pages 12-17).
14. The progress report for the math computation goal reflected a goal of 20 correct responses, not 43 correct responses, although the student made progress on the goal, and, having mastered it by mid-March, had progressed to 5th grade probes. (P-4, at page 5; S-15 at pages 12-17).
15. The progress report for the math applications/concepts goal reflected a goal of 11 correct responses, not 13 correct responses, although the student made progress on the goal, and, having mastered it by early February, had progressed to 5th grade probes. (P-4 at page 5; S-15 at pages 12-17).
16. Notwithstanding the errors in the progress reports, the student seemingly made progress on the goals in the June 2014 IEP. (P-4 at pages 4-5; S-11 at pages 17-20; S-15 at pages 12-17).
17. In late May 2015, near the end of the student's 5th grade year, the student's IEP team met in its annual meeting to consider the student's IEP. (P-4).

IEP for 2015-2016/6th Grade

18. In the May 2015 IEP, the present levels of academic achievement indicate that the student's baselines in the four goal areas were as follows:

- reading fluency – 121 words correct per minute on 5th grade probes
- reading comprehension – 17 correct responses on 5th grade probes
- math computation – 21 correct responses on 5th grade probes
- math applications/concepts – 6 correct responses on 5th grade probes

(P-4 at pages 4-5).

19. The goals in the May 2015 IEP mirrored the goals from the June 2014 IEP, written to reflect the student's achievement on computerized, curriculum-based measurement testing. (P-4 at pages 15-18).

20. The reading fluency goal, from a baseline of 121 words correct per minute on 5th grade probes, was written for the student to achieve 150 words correct per minute on 5th grade probes. (P-4 at page 15).

21. The reading comprehension goal, from a baseline of 17 correct responses on 5th grade probes, was written for 21 correct responses on 5th grade probes. (P-4 at page 16).

22. The math computation goal, from a baseline of 21 correct responses on 5th grade probes, was written for 33 correct responses on 5th grade probes. (P-4 at page 17).

23. The math applications/concepts goal, from a baseline of 6 correct responses on 5th grade probes, was written for 9 correct responses on 5th grade probes. (P-4 at page 18).

24. The student's placement continued to be two hours per day for pullout resource room instruction in reading and mathematics. (P-4).

25. Over the course of the 2015-2016 school year (6th grade), in the implementation of the May 2015 IEP, the student made progress on the

reading fluency goal. While the student never met the 150 words correct per minute on 5th grade probes, in early November the student moved to 6th grade probes. The student increased words correct per minute on 6th grade probes from 104 to 154, with a definitive (although not steep) trend-line. (S-15 at pages 3-4).

26. Over the course of the 2015-2016 school year (6th grade), in the implementation of the May 2015 IEP, the student made no progress on the reading comprehension goal. The progress monitoring indicates great variability in weekly scores on 5th grade probes (ranging from 10 – 24 correct responses), but the trend-line is nearly flat. (S-15 at pages 6-7).

27. Over the course of the 2015-2016 school year (6th grade), in the implementation of the May 2015 IEP, the student's math computation goal is a hash. On 5th grade probes, the student's baseline was 21 correct responses. The 6th grade special education teacher's initial probes, through early October, were 12 correct responses, so the special education teacher set the goal for the year at 21 correct responses with a baseline at 12 correct responses. The student ostensibly made progress on this "adjusted" goal—with variable probe scores from 9 to 31, with a definitive positive trend-line, but aside from two outlier probes at the end of the school year (25 and 31) the student came nowhere near to achieving even the original baseline of 21 correct responses. (S-15 at pages 10-11; Notes of Testimony ["NT"] at 313-316).

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28. Over the course of the 2015-2016 school year (6th grade), in the implementation of the May 2015 IEP, the student made no progress on the math applications/concepts goal. Ostensibly, the student met the goal, achieving 9 correct responses on 5th grade probes over the final three consecutive probes in May 2016, but the trend-line is nearly flat. (S-15 at pages 8-9).

29. In late May 2016, near the end of the student's 6th grade year, the student's IEP team met in its annual meeting to consider the student's IEP. (P-5; S-13).

30. The parent did not attend the May 2016 IEP meeting, asking that the IEP be sent to her. The parent returned a notice of recommended educational placement ("NOREP") mid-June 2016, approving the May 2016 IEP and recommended placement. (S-13 at pages 1-2, 30-33).

IEP for 2016-2017/7th Grade

31. Given the student's move to the District junior/senior high school in 7th grade, the student's placement in pullout resource room services changed from two hours hour daily, one hour each for reading and mathematics, to 42 minutes daily for mathematics and 42 minutes daily for reading, and 42 minutes daily for language arts. (P-5; S-13).
32. Even though the student had shown slight or no progress, by and large, with 5th grade probes, the student's baselines and goals in the May 2016 IEP were written for probes on a 6th grade level. (P-5 at pages 6, 15-18; S-13 at pages 8, 17-20).
33. In the May 2016 IEP, the student's reading fluency baseline was 129 words correct per minute on 6th grade probes with a goal of 160 words correct per minute. (P-5 at pages 6, 15; S-13 at pages 8, 17).
34. In the May 2016 IEP, the student's reading comprehension baseline was 18 correct responses on 6th grade probes with a goal of 31 correct responses. (P-5 at pages 6, 16; S-13 at pages 8, 18).
35. In the May 2016 IEP, the student's math computation baseline was 12 correct responses on 6th grade probes with a goal of 22 correct responses. (P-5 at pages 6, 17; S-13 at pages 8, 19).
36. In the May 2016 IEP, the student's math applications/concepts baseline was 12 correct responses on 6th grade probes with a goal of 21 correct responses. (P-5 at pages 6, 18; S-13 at pages 8, 20).
37. Over the course of the 2016-2017 school year (7th grade), in the implementation of the May 2016 IEP, the student made progress on the reading fluency goal. Through February 2017, the student made definitive progress on 6th grade probes both in terms of the scores and the trend-line. (S-15 at pages 27-28).
38. Over the course of the 2016-2017 school year (7th grade), in the implementation of the May 2016 IEP, the student made seeming progress on the reading comprehension goal. The progress monitoring indicates an initial probe-score of 12 correct responses. Thereafter, through January 2017, the student recorded 6th grade probe-scores ranging from 24-38 with a very strong trend-line. (S-15 at pages 1-2).
39. Over the course of the 2016-2017 school year (7th grade), in the implementation of the May 2016 IEP, the student made no progress on the math computation goal. The progress monitoring through March 2017 indicates great variability in weekly probe-scores on 5th grade

probes (ranging from 12 – 25 correct responses), but the trend-line is nearly flat. (S-15 at pages 20, 22).

40. Over the course of the 2016-2017 school year (7th grade), in the implementation of the May 2016 IEP, the student made no progress on the math applications/concepts goal. The progress monitoring through February 2017 indicates an initial probe-score of 15 correct responses with consistently lower probe-scores in the weeks thereafter (ranging from 4 – 10 correct responses), but the trend-line is nearly flat. (S-15 at pages 23-2).
41. As indicated over the foregoing findings of fact related to progress monitoring, data on goal-specific progress monitoring ceased over the period January – March 2017 (variously for each goal). (S-15).

Events of 2016-2017 School Year (7th Grade)

42. In September 2016, an incident occurred [redacted]. (P-6; NT at 429-447).
43. In November 2016, the student was hospitalized in an incident related to the [redacted] condition, and intermittently on days both prior to and following the hospitalization. The District did not know of the nature of the absence and did not have excuses for the absences, so it sent an automated letter because the student had met a benchmark number of unexcused absences. Thereafter, the absences were excused. (P-7; NT at 415-428).

May 2017 RR

44. In March 2017, in response to parent's concerns and at her request, the District sought permission to re-evaluate the student, permission which was granted by the parent. (S-19).
45. In May 2017, the District issued its RR. (P-8; S-20).
46. The May 2017 RR included the cognitive and achievement testing from the June 2011 ER. (P-8; S-20).
47. The May 2017 RR reported baseline and goal data on the computerized curriculum-based measurements utilized for the May 2016 IEP goals. The baseline and goal data reported in the RR have no connection, either in terms of probe levels or probe-scores, with any data

in the May 2016 IEP goals or the goal progress-monitoring. (P-5, P-8; S-15, S-20).

48. The May 2017 RR indicates by report of the student's mother and a teacher that the student had low self-esteem, made self-deprecating remarks, and reported bullying by other students. (P-8; S-20).
49. The evaluator in the May 2017 re-evaluation attempted to update the student's cognitive and achievement testing, but the student was reserved and did not attempt to answer or engage many questions which led, in the opinion of the evaluator, unreliable results. (P-8; S-20; NT at 200-258).
50. The May 2017 RR assessed the student for potential emotional disturbance. Three of the student's teachers completed a scales instrument. On every sub-scale, the student was scored by the teachers as "not indicative of emotional disturbance" except for one teacher who scored the student as "indicative of emotional disturbance" in the unhappiness/depression sub-scale. This teacher also heard and engaged the student over self-deprecating remarks the student had made. (P-8; S-20).
51. The May 2017 RR identified the student as a student with specific learning disabilities in math calculation and math problem-solving. (P-8; S-20).
52. At the initial session of the hearing, the District evaluator testified as to the cognitive/achievement assessment results in the May 2017 RR, indicating that "I question the accuracy of both the assessments administered to (the student) in 2017". (NT at 223.)
53. Based on this testimony and the June 2011 ER, May 2014 RR, and May 2017 RR in evidence at that point, this hearing officer issued an interim order, under his authority pursuant to IDEA and Chapter 14, for an independent educational evaluation ("IEE") at public expense. (HO-7; NT at 270-273).

IEP for 2017-2018 (8th Grade)

54. In light of the May 2017 RR, contemporaneously with the issuance of the RR, the student's IEP team met to consider the student's IEP. The student's mother participated by telephone. (P-9; S-21, generally and at page 4).

55. The May 2017 IEP included a reading fluency goal. The data collection indicates that the student as of February 2017 was 179 words correct per minute on a 6th grade probe, but that probe (and two other probes in February 2017) was reported in the present levels of academic achievement in the IEP as being on a 7th grade probe. This is not supported by the data-reporting. The last data probe (161) is also reported in the IEP but is not part of the data collection. (P-9 at page 6; S-15 at pages 27-28, S-21 at page 10).
56. The May 2017 IEP included a reading comprehension goal. The data collection indicates that the student, following an initial data probe of 13 correct responses, scoring in the 20s and 30s on correct responses on 6th grade probes. Yet the present levels of academic achievement in the IEP as being on 7th grade probes. This is not supported by the data-reporting. The last data probe (31) is also reported in the IEP but is not part of the data collection. (P-9 at page 6; S-15 at pages 1-2, S-21 at page 10).
57. The May 2017 IEP included a math computation goal. The data collection indicates that the student's initial probe was 15 correct responses. Through two probes in February 2017 and one in March 2017, the student's probes were 21, 17, and 15 on 6th grade probes. The last data probe (18) is also reported in the IEP but is not part of the data collection. (P-9 at page 6; S-15 at pages 20, 22; S-20 at page 10).
58. The May 2017 IEP included a math applications/concepts goal. The data collection indicates that the student's initial probe was 15 correct responses. Thereafter, through late February, on 6th grade probes, the student once achieved 10 correct responses, but all other probes were in the single digits.
59. The last data probes reported in the IEP were 7 correct responses, 4, 4, and 7. Yet the final two probes—4 and 7 respectively—were not part of the data collection. (P-9 at page 6; S-15 at pages 23-24, S-21 at pages 10-11).
60. The May 2017 IEP removed both the reading fluency and reading comprehension goals with the indication that the student no longer required those goals. (P-9 at page 6; S-21 at page 10).
61. The math computation goal in the May 2017 IEP does not contain the grade level of the probe to be utilized. Instead, the goal simply says "(the student) will improve from scoring 12 correct responses to 22 correct responses on three out of four consecutive probes" with reference to 25th percentile norms without reference to the grade level of those norms. Additionally, the baseline of 12 correct answers for math

computation appears nowhere in the contemporaneous probe data (neither in the data collection at S-15 nor in the present levels data earlier in the IEP). (P-9 at page 6, 23; S-15 at pages 20, 22; S-21 at page 27).

62. The math applications/concepts goal in the May 2017 IEP does not contain the grade level of the probe to be utilized. Instead, the goal simply says “(the student) will improve from scoring 12 correct responses to 21 correct responses on three out of four consecutive...probes” with reference to 25th percentile norms without reference to the grade level of those norms. Additionally, the baseline of 12 correct answers for math computation appears nowhere in the contemporaneous probe data (neither in the data collection at S-15 nor in the present levels data earlier in the IEP). (P-9 at page 6-7, 25; S-15 at pages 23-24, S-21 at page 29).
63. In the May 2017 IEP, the student would continue to receive pullout resource room instruction for 42 minutes daily in mathematics and 42 minutes daily in language arts. (P-9 at pages 26, 34; S-21 at pages 30, 38).⁷

IEP Meeting – September 2017

64. At the conclusion of the first hearing session in late August 2017, this hearing officer, on the record at the end of the session, issued an oral order for the student’s IEP team to meet to see if, given the evidence presented at the first session, the IEP team might agree to any revisions to the May 2017 IEP. (NT at 261-265).
65. The IEP team met, but even though the IEP discussed concerns and potential revisions (almost exclusively to the accommodation and modifications in section VI of the IEP), no changes were made to the goals in the May 2017 IEP. (HO-6; S-29).
66. As part of the IEP team meeting and IEP itself, the day before the IEP team meeting in early September, the student was administered the computerized curriculum-based measurement probes in math computation and math applications/concepts. On a 6th grade probe, the student achieved 24 correct responses on the math computation assessment. On a 6th grade probe, the student achieved 8 correct

⁷ Apparently inadvertently, the 42-minute instructional period was left as part of the specially-designed instruction but was not part of the student’s special education placement calculation. (See P-9 at page 28, S-21 at page 32).

responses on the math applications/concepts assessment. (S-29 at page 10).

67. In the latter half of September 2017, this hearing officer issued an interim ruling to add modifications for extended time on classwork or homework, a weekly 30-minute session with a school counselor, access to the school counselor on an *ad hoc* basis where it might be deemed necessary/desirable by either the student or the counselor, and development of a bullying-reporting plan for the student to engage the school counselor where bullying might impact the student. (HO-7).⁸

WITNESS CREDIBILITY

All witnesses testified credibly, and no one witness's testimony was accorded materially more or less weight than any other witness. Where discrepancies exist in terms of the details of one witness's recollection of events over another's, such discrepancies are considered differing recollection of events and not as disingenuous.

DISCUSSION AND CONCLUSIONS OF LAW

Denial of FAPE

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 needs (Endrew F. ex rel. Joseph F. v. Douglas County School District, U.S. , S. Ct. , 197 L. Ed. 2d 335, (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir.

⁸ The interim ruling also ordered the IEE referenced in FF 53.

1999)), not simply *de minimis* or minimal education progress. (Andrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).⁹

Here, the student was denied FAPE. The nature of that denial is seeded in the convoluted, at times undocumented, at times contradictory, progress monitoring data and IEP goal-baselines and goals. The findings of fact above in terms of these issues is muddled. Yet it is the most clarity this hearing officer can bring to the tangle of progress monitoring, IEP goal-baselines, and IEP goals over the years in evidence. In short, on this record and consequently in the student's educational programming, it is often impossible to cleanly follow over the course of an IEP, or from IEP to IEP, the student's progress. Where do IEP baselines come from? At what grade level are the probes? Are those grade levels consistent across data collection, or does the grade level change? Has the student met an IEP goal as written? These are questions which can sometimes be answered on this record but, especially as time passed and the student moved from grade to grade, the answers become less clear. Ultimately, that lack of clarity, even for a reader experienced in special education and IEP drafting and progress monitoring documentation, amounts to a denial of FAPE when a parent is attempting to understand how her child is being provided with special education services and the progress (or lack of progress) the child

⁹ While in some parts of the United States the U.S. Supreme Court decision in Andrew F. presented a new and higher standard to gauge the appropriateness of special education programming, the standard laid out in Andrew F. has been, for all intents and purposes, the longstanding standard enunciated by the Third Circuit Court of Appeals and has been the applicable standard to judge the appropriateness of special education programming in Pennsylvania.

is exhibiting. It is a definitive roadblock to parental understanding and participation in the education of a child.

More specifically: In the 2014-2015 school year (5th grade), the student's goals and progress monitoring were relatively clear—the baselines and goals were geared to 4th grade probes rising to 5th grade probes in both reading goals and were geared to progress across 4th grade probes in both mathematics goals. It seems the student made progress on these goals, ending each goal with probes on the 5th grade level and new baselines for the 2015-2016 school year (6th grade) solidly in 5th grade curriculum. But perhaps this is too sanguine. First, the quarterly progress monitoring sheets contained consistently wrong data about the goal-level for each probe across all four IEP goals. Perhaps this is just lack of attention to detail. But one surmises something more is at play—when such clear IEP goal levels are spelled out in the IEP, why are they wrong in the IEP progress monitoring? This is the first of many unanswered questions, unanswered on this record and certainly unanswered when the question, from an IEP perspective, is so straightforward. Second, based on results of the student's progress in the upcoming 2015-2016 school year (6th grade), this year-end goal data for the 2014-2015 school year (5th grade) seems to be deeply flawed. There was no testimony presented about this data, this progress monitoring, or the June 2014 IEP. Still, as set forth below, beginning with the May 2015 IEP with its inaccurate baselines and lack of progress, serious questions arise about the provenance and reliability of the progress monitoring data going into the 2015-2016 school year (6th grade).

In the 2015-2016 school year (6th grade), although the student made progress in reading fluency—clearly a relative strength across all of the student’s IEPs— the student failed to make any progress at all in reading comprehension and math applications/concepts. And gauging progress on the math computation goal in the May 2015 IEP is an impossibility—it is, to this hearing officer, incomprehensible to attempt to fit together the jigsaw puzzle of grade levels, probes, baselines, data collection, and progress that undergird the math computation goal. Here, the District’s acts/omissions in measuring IEP goal progress rose to the level of a denial of FAPE. Accordingly, compensatory education will be awarded.

In the 2016-2017 school year (7th grade), even though the student made ostensibly no progress on three of four IEP goals with probes at the 5th grade level, the goals in the May 2016 IEP were inexplicably drafted for probes at the 6th grade level. Outside of reading fluency (again, a clear relative strength for the student), the progress data on 6th grade probes is difficult to comprehend. On the reading comprehension goal, after an initial probe at 12 correct responses, the student’s probes at the 6th grade level soared to the range of 24-38 correct responses—this, after the student made no progress at all on 5th grade probes the year before. Again, as with the prior year’s progress monitoring, the progress monitoring on the math computation and math applications/concepts show no progress at all. Setting aside the reading fluency success, progress on one of the remaining three goals is, on one hand, incredulous and, on the other hand, on the two other goals is non-existent.

This lack of clarity and lack of progress amount to a denial of FAPE and, accordingly, compensatory education will be awarded.

Without explanation, the progress monitoring probes ceased for each of the four IEP goals at various times over January – March 2017. This in itself leads to doubts over even a slight reliability the data might have to inform baseline data for the IEP goals in the May 2017 IEP for the 2017-2018 school year (8th grade). But final data points from probes appear in the May 2017 RR which are nowhere to be found in the progress monitoring as it petered out in the winter and early spring of 2017. Again, one is at a loss to understand where roughly, let alone exactly, the student's progress toward IEP goals was as the multi-disciplinary team met to discuss the May 2017 RR and the May 2017 IEP.¹⁰

Yet the May 2017 IEP eliminated both reading goals. In the case of the reading fluency goal, this is somewhat defensible. In the miasma of progress monitoring on this record, clearly shining through is the student's consistent progress in reading fluency. Removing that goal from the student's IEP does not amount to a denial of FAPE. But the student had not made progress on the reading comprehension goal over the past two school years (2015-2016 and 2016-2017). This is a fatal flaw in the May 2017 IEP, and the IEP team will be directed to restore it in the IEP going forward.

¹⁰ Flaws in the May 2017 RR, here not laid entirely at the feet of the District, as set forth above, were addressed in the interim order directing the District to fund an IEE at public expense.

As for the two remaining math goals in the May 2017 IEP, those goals are inappropriate as written. The baselines in both goals appear out of whole cloth, unrelated to any probe data in the contemporaneous record. The goals are also prejudicially vague—while correct-response goals are provided, the grade level at which the probes will be employed is missing in both goals. A lack of clarity on this point diminished understanding of the student’s progress in prior IEPs; lack of any grade-level reference whatsoever will not provide further clarity. Accordingly, the IEP team will be directed to revise the two math goals in the May 2017 IEP.

For the reasons set forth above, the student will be awarded compensatory education, and the IEP team will be given specific directives for revisions to the May 2017 IEP.

Section 504/Chapter 15

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).¹¹ The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be

¹¹ Pennsylvania’s Chapter 14, at 22 PA Code §14.101, utilizes the term “student with a disability” for a student who qualifies under IDEA/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.

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 denied the student FAPE under the obligations of Section 504/Chapter 15 in an analogous way as it denied the student FAPE under the obligations of IDEIA/Chapter 14.

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, has been discriminated against 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. (S.H., *infra*). Here, while the District has failed to provide the student with FAPE, it has not in any way discriminated against the student, or taken actions against the student with deliberate indifference in light of the student's disabilities.

Accordingly, the District denied the student FAPE under the provisions of Section 504/Chapter 15 but did not discriminate against the student under the anti-discrimination provisions of the same statutory/regulatory frameworks.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The award of compensatory education accrues from a point where a school district knows, or should have known, that a student was being denied FAPE, accounting for a reasonable rectification period to remedy the proven denial-of-FAPE. (Ridgewood; M.C.).

In this case, a precise calculation of compensatory education in light of the District's denial-of-FAPE is not possible. As set forth in this decision, the denial of FAPE is rooted in obstructing parental participation in the understanding the student's special education program due to the confusing and, at times, contradictory progress monitoring. Likewise, what progress monitoring can be deciphered often revealed that the student made no progress. But both of these elements are, as those things have unfolded on this record, about what isn't clear, or what isn't there, as much as what is. That makes a precise quantitative compensatory education calculation practically impossible.

Compensatory education, however, is always an equitable remedy. Therefore, as a matter of equity, the student will be awarded 400 hours of compensatory education, roughly an hour for every school day over the course

of the 2015-2016 school year (6th grade), 2016-2017 school year (7th grade) and to this point in the 2017-2018 school year (8th grade).

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

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District denied the student a free appropriate public education. This deprivation continued through the date of this decision. In light of this deprivation, and again as set forth above, the student is equitably awarded 400 hours of compensatory education.

The student's IEP shall be the May 2017 IEP, incorporating all of the hearing officer additions to the IEP as ordered in the September 2017 interim ruling and hereby made a permanent part of the student's May 2017 IEP.

Furthermore, the May 2017 IEP shall incorporate all of the proposed accommodations and revisions as outlined in the proposed September 2017 IEP at pages 1-3 of S-29 on this record except as follows:

- the weekly check-in with a school social worker shall not be part of the May 2017 IEP (as this is addressed in the weekly session with the school counselor outlined in the September 2017 interim ruling);
- the related service of a social worker shall not be part of the May 2017 IEP (for the same reason); and
- the role of a school police officer shall not be part of the IEP (as the issue of a resource for the student in the person of the school counselor should bullying need to be addressed is outlined in the September 2017 interim ruling).

Additionally, within 10 school days of the date of this order, the student's IEP team shall meet to craft again a reading comprehension goal in the May 2017 IEP and to revise the math computation and math applications/concepts goals in the May 2017 IEP. In the design and/or revision of these goals, each shall contain, at least:

- a verified baseline, including the grade-level for the probes used to establish the baseline data;

- a clear goal-level utilizing the same measurement and grade-level probes as utilized for the baseline data; and
- the indication that goal mastery and/or moving the student to different grade-level probes will trigger convening the student's IEP team to consider the goal mastery and/or grade-level probes and any goal revisions based thereon.

Finally, once the IEP team has met and complied with the provision of this order, the student's IEP shall include the date of that final compliance as the "IEP Team Meeting Date" on the first page of the IEP with the "IEP Implementation Date" on the IEP to begin two school days thereafter. The "Anticipated Duration of Services and Programs" shall be one year after the Implementation Date.

Nothing in this decision and order shall be read to interfere with the parties' ability to modify any provision of this decision and order to the extent the parties agree thereto in writing.

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

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

November 30, 2017