

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 & Order

Child's Name: C.L. **Date of Birth:** [redacted]

CLOSED HEARING

ODR File Number 20604-17-18

Parents:

[redacted]

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School District:

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Hearing Officer:

Michael J. McElligott, Esquire

Date of Decision:

December 12, 2018

INTRODUCTION

The student (“student”)¹ is a middle school 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 an emotional disturbance.

Parents claim that the student was denied a free appropriate public education (“FAPE”) for the 2016-2017 school year, the 2017-2018 school year, and the current 2018-2019 school year primarily related to allegations of deficiencies in programming for the student’s behavioral needs in the school environment. Parents seek compensatory education as a remedy.³ Analogously, parents assert these claims and request for remedy under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”), including allegations that the District discriminated against the student on the basis of disability.⁴

The District counters that it responded to the student’s needs in the educational environment and at all times provided FAPE to the student, and

¹ The generic use of “student”, rather than a name or 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 Hearing Officer Exhibit (“HO”)-1, Notes of Testimony (“NT”) at 12-13. Parents seek a compensatory education remedy on a qualitative/hour-for-hour basis.

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”). *See* NT at 10-11.

met all of its obligations to the student under both IDEIA and Section 504. As such, the District argues that the parents are not entitled remedy.

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

ISSUES

Did the District meet its obligations to provide FAPE to the student over the 2016-2017, 2017-2018, and 2018-2019 school years?

If this question is answered in the negative, is the student entitled to compensatory education?

Did the District discriminate against the student on the basis of disability?

FINDINGS OF FACT

1. As a preschooler in early intervention, the student participated in speech and language therapy. (Parents' Exhibit ["P"]-1; Joint Exhibit ["J"]-1).
2. In October 2011, as a kindergarten student, the District evaluated the student and recommended that the student continue to receive speech and language therapy for articulation. (J-1).
3. Over the 2011-2012 and 2012-2013 school years, the student's kindergarten and 1st grade years, the student was involved in various, isolated behavioral incidents, including inappropriate peer interactions and fighting. (J-17).
4. In the spring of 2014, the student exhibited a spike in problematic behaviors involving inappropriate peer interactions and fighting. (J-17).

5. In June 2014, at the end of the student's 2nd grade year, the District re-evaluated the student. (J-3).
6. In the June 2014 re-evaluation report ("RR"), academically, the student did not exhibit any difficulties. Behaviorally, however, on an instrument to assess attention deficit hyperactivity disorder ("ADHD"), the student's teacher endorsed witnessing numerous problematic behaviors in the school environment, including inattention/carelessness, lack of sustaining attention, not listening, easily distracted, leaving seat, losing temper, active defiance/refusal of adult requests, exhibits anger and resentment, exhibits spitefulness and vindictiveness, bullies/threatens/intimidates others, initiates fights, lies to obtain objects or advantage, and cruelty to others. (J-3).
7. In parent input for the June 2014 RR, parents indicated that the student exhibits numerous problematic behaviors in the home environment. On a parent assessment for ADHD, the parent also endorsed many of the same types of behaviors as had the teacher. (J-3).
8. The June 2014 RR identified the student as a student with an emotional disturbance in addition to continuing needs in speech and language. (J-3).
9. The student did not appear to exhibit problematic behaviors in the 2014-2015 and 2015-2016 school years, the student's 3rd grade and 4th grade years. (J-17).
10. The evidentiary record for individualized education programs ("IEPs") of the student began with an IEP crafted in May 2016, near the end of the 4th grade year, although the evidence developed at the hearing was uniformly about the implementation of the May 2016 IEP in the 2016-2017 school year, the student's 5th grade year. (J-7; NT at 656-706, 798-828).
11. The May 2016 IEP indicated that the student did not exhibit behaviors that impeded the student's learning or that of others. (J-7).
12. The student did not exhibit academic difficulty at the time the May 2016 IEP was developed and continuing into the 2016-2017 school year. (P-13; NT at 656-706).
13. The May 2016 IEP indicated that the student continued to receive speech and language therapy for articulation and required assistance when feeling frustrated or anxious, and taking time with tasks/assignments. (J-7).

14. The May 2016 IEP contained one goal for speech and one goal for task/assignment completion. (J-7).
15. Progress monitoring on the May 2016 task/assignment completion noted that the student would usually take time with assignments, although sometimes the student would rush through work. However, there was intermittent success in following directions. (J-7).
16. In the progress monitoring notes for March 2017, in the spring of 5th grade, indicated that the student was exhibiting “a lack of effort and cooperation during this nine weeks”. (J-7 at page 17).
17. The May 2016 IEP contained multiple modifications and specially designed instruction to address the student’s behavior needs, including cueing, preferential seating, planning for transitions, a calming area outside of the classroom, and breaking down tasks sequentially. (J-17).
18. The 2016-2017 school year was largely uneventful in terms of problematic behaviors until the late winter/early spring of 2017. (J-17, J-25; NT at 656-706, 798-828).
19. In February, April, and early May 2017, the student was involved in multiple incidents involving insubordination/disrespect, fighting, and inappropriate peer interactions (including sexualized behavior/comments). Aside from these documented incidents, the educators who worked with the student testified consistently that the student’s behaviors in the late winter/early spring 2017 changed markedly. (J-17; NT at 656-706, 798-828).
20. In early May 2017, the student’s IEP team met for the student’s annual IEP meeting. The student’s triennial re-evaluation process was due in the spring of 2017, but the parent waived that process. (J-8, J-22).
21. The May 2017 IEP continued to indicate that the student did not exhibit behaviors that impeded the student’s learning or that of others. (J-8).
22. At the time the May 2017 IEP was developed, the student did not exhibit academic difficulty over the 2016-2017 school year. (J-8; NT at 832-853).
23. Some teacher input in the May 2017 IEP endorsed the following as behaviors that the student exhibited “very much”: temper outbursts/unpredictability, disturbs other students, quick/drastic mood changes, excitable, impulsive, excessive demands for adult attention,

appears to be unaccepted by peers, easily led by peers, lack of sense of fair play, lack of leadership, childish/immature, blames others, uncooperative/difficulties with peers, easily frustrated. (J-8 at page 5).

24. Other teacher input indicated that the student participated, was cooperative, and not disruptive and showed compassion to others who were sad or upset. This input came from a 5th grade teacher with whom the student had, in a singular way, never had a problematic or defiant interaction. (J-8 at pages 5-6; P-2 at page 9).
25. The parental input in the May 2017 IEP indicated continuing problematic behavior at home. The parent also indicated that the student had been diagnosed with an autism spectrum disorder. (J-8).
26. The mother testified that she had shared with District personnel information about a potential autism diagnosis. The District director of special education testified that the District has received no documentation of any autism diagnosis, nor any firm information about an autism diagnosis. The testimony of the director is credited. (NT at 43-175, 176-270).
27. The student's needs in the May 2017 IEP were noted as assignment completion, increasing positive interactions with peers and staff, increasing skills to manage stressors, and continued support for articulation in speech and language therapy. (J-8).
28. The May 2017 IEP contained four goals, one each in the identified areas of need: assignment completion, positive peer/adult interaction, managing stressors in the educational environment, and speech articulation. (J-8).
29. In mid-May 2017, the student was involved in a serious behavior incident [redacted], an incident that ultimately resulted in calling the school crisis team and summoning the student's mother to the school. After the incident, the student continued to be in an elevated behavioral state in a meeting room with the principal, a school counselor and the student's mother. The student left the school accompanied by the mother. (J-17; P-2 at page 10; NT at 43-175, 798-828).
30. The student was admitted by parents to a community-based therapeutic mental health facility. (P-9 at pages 86-101; NT at 43-175).
31. The day of the behavior incident, the District sought permission to perform a re-evaluation, including a functional behavior assessment ("FBA"), permission which was granted by the student's parents. Two

days after the behavior incident, the District convened an IEP meeting at the mental health facility. (J-9, J-10).

32. In May 2017, having waived the re-evaluation process only a few weeks before, the District issued a RR which included behavioral observations, although most of the observations were recollections/documentation of the recent behavioral incidents. (P-2).
33. The student did not return to the District after the incident and over the period May – August 2017, the student received therapeutic programming at a community-based mental health facility. (P-9 at pages 86-101).
34. The student returned to the District at the outset of the 2017-2018 school year, the student's 6th grade year. (J-14; NT at 43-175, 318-383, 564-609).
35. The parent did not share with the District details or documentation from the community-based therapeutic mental health facility. (NT at 43-175, 393-521).
36. In September 2017, the District drafted a proposed IEP. The special education case manager did not have documentation from the community-based therapeutic mental health facility when she drafted the IEP but was aware of the May 2017 behavior incident from reviewing the May 2017 IEP. (J-14; NT at 393-521).
37. The September 2017 IEP indicated that the student did not exhibit behaviors that impeded the student's learning or that of others. (J-14).
38. The September 2017 IEP noted the increase in the student's problematic behaviors at the end of the previous school year based on review of prior IEPs, but the special education case manager did not review past behavior records. (J-14; NT at 393-521).
39. Using a "quick assessment" of curriculum-based material, the student was instructional at the 2nd grade reading level and exhibited frustration at the 4th grade reading level. (J-14 at page 7).
40. The September 2017 IEP recognized four needs for the student—positive communication with peers and adults, managing stressors in the educational environment, assignment completion, and improving anger management skills. (J-14).
41. The September 2014 IEP contains no content, present levels of performance, goals, or programming in speech articulation. (J-14).

42. The September 2014 IEP contains one goal in each of these areas of need. (J-14).
43. Of particular note is the goal for positive communication with peers/adults: “Given the school setting, (the student) will use positive communication skills to effectively interact with others 90% of the time on 4 out of 5 times during each 9-week period.” (J-14 at page 18).
44. The September 2014 IEP contained modifications of the student’s programming, including “positive reinforcement” and “access to emotional support room to calm down when exhibiting inappropriate behaviors”. (J-14 at page 21).
45. The District began to implement a pattern of addressing the student’s problematic in-class behavior by having the student leave the classroom, sometimes to the emotional support room, sometimes to the principal’s office. (P-16, generally, and at pages 15, 23, 24, 28, 33, 35, 36, 39, 45, 52, 55, 62, 72, 91; NT at 318-383, 530-561, 564-609, 718-795).
46. Over the period of October 2017 – January 2018, the student exhibited inappropriate behaviors with peers, inappropriate comments to peers, teasing peers, touching other students, defiance with teachers, and being loud and/or disruptive in class. Over this period, one teacher described the student as a “constant disruption” in class. District educators shared multiple emails and letters with the student’s mother about problematic behaviors. (J-17, J-18; P-5; S-11).
47. In November 2017, one educator noted that, upon speaking with the student regarding the problematic behavior, the student recognized that the student “needs help” and “that (the student) knows something is wrong...that (the student) cannot help it.” (J-17).
48. In early January 2018, the building principal, the District director of special education, the student’s special education teacher, and the student’s mother met to discuss the student’s behavior. The principal indicated that a FBA would be undertaken, including input from the student’s teachers. The strategy of having the student leave the classroom was reiterated. No FBA was undertaken after the meeting. (J-17).
49. The progress monitoring over the 1st and 2nd marking periods of the 2017-2018 school year indicate progress on the four goals. The progress reported on the “positive interaction” goal is inaccurate in light

of other evidence in the record as to behavior over this period. (J-17; S-8; NT at 318-383, 530-561).

50. In late January 2018, the student was involved in a serious behavioral incident. [redacted]. The student's mother was summoned and left the school with the student. The student was given a 3-day suspension, and no FBA was undertaken. (J-17; NT at 43-175, 318-383, 393-521).
51. Following the serious behavior incident, a team of educators and the student's mother met to discuss behavior interventions for the student, including receiving permission to perform a FBA. No FBA was ever performed. (J-18 at pages 22-23).
52. In January 2018, the student began to attend a study skills session in the emotional support classroom. Teachers or the student could request that the student be removed from class to the emotional support classroom when misbehavior occurred. (J-17).
53. In early February 2018, an intermediate unit social worker undertook one observation of the student, ostensibly for a FBA, although there was no follow-up or further observations. (J-19 at pages 4-5).
54. By February 2018, the student would not leave the classroom when the teacher requested it, so a signaling system utilizing the display of a card was initiated—if either a teacher or the student felt the need for the student to leave class, that individual would display the card, and the student would be allowed to go to the emotional support classroom. The card system was seldom utilized by the student but teachers did have the student removed from the class when problematic behaviors were exhibited by the student. (J-17; NT at 43-175, 176-270, 530-561, 564-609, 718-795).
55. In early March 2018, the student engaged in defiant/disrespectful conduct with multiple educators. (J-17).
56. In mid-March 2018, the District undertook observations for a FBA. (J-19).
57. The March 2018 FBA identified the classroom-based behaviors of concern (disruption, defiance, work refusal, disrespecting adults, being out of seat). The FBA did not identify negative peer interactions as a behaviors of concern. (J-19).
58. Following completion of the FBA, the student's IEP team met in March 2018. (J-16).

59. The March 2018 IEP indicated that the student exhibited behaviors that impeded the student's learning and that of others. (J-16).
60. The teachers' input in the March 2018 IEP indicated that at times the student continued to talk out in class, been disrespectful, been impulsive, and rushes through classwork. (J-16 at page 9).
61. The four goals from the September 2017 IEP remained in the March 2018 IEP. No new goals were added. (J-16).
62. The March 2018 IEP contained a positive behavior support plan based on the FBA. (J-16 at pages 12-14, 25).
63. The March 2018 IEP contained additional modifications to address the student's behavior. (J-16).
64. After the March 2018 FBA/behavior support plan were put in place, the student had only one documented behavioral incident, [redacted]. Inappropriate classroom behavior, however, continued. (J-17, J-18 at pages 42-51; S-11 at pages 40-48; NT at 293-383)
65. The progress monitoring over the 3rd and 4th marking periods of the 2017-2018 school year indicate progress on the four goals. (P-10; S-9).
66. The March 2018 IEP was is the student's operative program at the time of the hearing. (J-16).
67. In the fall of the current 2018-2019 school year, the student's 7th grade year, the student has exhibited some problematic behaviors, with both peer and teacher interactions, but those behaviors, on this record, have not risen to the level of behaviors seen over the 2017-2018 school year. (P-15; NT at 43-175).

WITNESS CREDIBILITY

All witnesses testified credibly, and no one witness's testimony was accorded materially more or less weight than any other witness.

DISCUSSION AND CONCLUSIONS OF LAW

FAPE

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); K.D. v. Downingtown Area School District, F.3d (3d Cir. at No. 17-3605, September 18, 2018)).

Here, the record supports a finding that the District denied the student FAPE for most of the 2017-2018 school year from a number of perspectives: (1) by not timely or appropriately addressing the student’s problematic behaviors, (2) the inappropriate “positive interaction” goal in the September 2017 IEP, and (3) an inappropriate FBA that did not account for problematic peer interactions.

Before examining these instances of denial-of-FAPE in the 2017-2018 school year, it must be stated explicitly that the District did not deny the student FAPE in the 2016-2017 school year. Certainly, there is a history of the

student exhibiting problematic behaviors in the educational environment throughout the student's enrollment at the District, even early on. But that behavior seems to wax and wane and, significantly, seems to exhibit itself more with some individuals than with others. All of that is to say that the record is preponderant that in the 2016-2017 school year, the student's 5th grade year, the student was not exhibiting overly problematic behaviors in school. As the spring semester went on, through the late winter and early spring, there were increased instances of problematic behaviors, but given the context of the entire school year, the record does not support a finding that the District knew or should have known that it needed to address the student's behavior any differently than it had been doing.

That obviously changed in May 2017, at the end of the school year, when the student engaged in the serious behavioral incident [redacted]. With that incident, everything about the District's approach to understanding the student should have changed, especially in the context of slowly increasing problematic behaviors in the months preceding the incident. And, indeed, the student did not return to school for the end of that school year, receiving therapeutic services in the months thereafter in a community-based mental health facility.

The District, if not specifically at least generally—having reviewed the student's behavior at the time of the incident and convening an IEP meeting at the facility in the days after the incident—, was aware of that admission to the facility. And in September 2017, as the student returned to the District, it

should have sought to understand the student's behavioral support needs on a deeper level and, most likely, to have changed its approach to the student.

Unfortunately, it did not.

As the 2017-2018 school year unfolded, the student, from the beginning of the school year, engaged in continually challenging, inappropriate behaviors, both with peers and adults. Indeed, in November 2017, the student almost pleadingly, at least as relayed by the reporting educator, recognized that the problematic behaviors were things [the student] recognized were wrong but could not control, and asked for help. That information, documented by the District, went unaddressed.

By January 2018, following another serious behavior incident, the District recognized that a systematic approach was necessary and a FBA was required. Yet it did not conduct a FBA and so could not develop a positive behavior support plan based on a FBA. The student continued to struggle behaviorally and not until March 2018 did the District undertake a FBA.

The District's approach to the student was to remove the student when problematic behaviors emerged. Instead of developing programming to help manage those behaviors, the District simply had the student removed from class, or left it up to the student when the student wanted to leave class. Those approaches, in themselves, are not a denial of FAPE. But when those are the only options in the absence of any structured behavioral assessment or explicit behavior plan, it is exiting the student from the classroom without providing supports or strategies, and that amounts to a denial of FAPE.

In the same vein, the student's September 2017 IEP is fatally flawed in its approach to addressing the student's behavior. First, the "positive interaction" goal is unmeasurable and cannot provide the basis for any student's behavior to be gauged for appropriateness or improvement, let alone this student who has exhibited a need for goal-based programming for consistently problematic behaviors. Second, the positive-reinforcement modification in the September 2017 IEP is nothing more than a regular education best practice and is placed in the IEP without the context of a behavior support plan based on a FBA; and the modification allowing for the removal of the student simply makes explicit the practice that the District employed, absenting the student from the classroom.

Finally, even when the FBA was developed in March 2018, it addressed only the defiance of adults and disruption of class but did not address the inappropriate peer-interactions which are, again, consistent across this record. This does not render inappropriate the FBA/behavior support plan, but it led to an incomplete FBA and a behavior support plan that has holes in it.

By the time the student's IEP team met to revise the student's IEP, the behavior support plan appears to have improved the student's behavior at the end of the 2017-2018 school year and into the current 2018-2019 school year. There are still problematic aspects to those behaviors and, as set forth below, the student's IEP team will be directed to account for revising the student's IEP. Likewise, the inappropriate "positive interaction" goal from the September

2017 IEP persists in the March 2018 IEP. Compensatory education will be awarded and these findings/remedies will apply through the date of this order.

None of this should be read, however, to imply that the District ignored the student's behavior after January 2018. Following the serious behavior incident in January 2018, the District attempted to address the behaviors (although in the fall of 2017, the District entirely failed to understand or to address the student's behavior in any meaningful way). Those efforts continued and continue into this school year. It may be that the student's placement needs to become more restrictive to educate the student appropriately, with more instruction delivered in the emotional support classroom. But certainly that is not the case now, as the District continues to implement programming and to refine its approaches to the student. And part of the order below will contain provisions for a comprehensive independent educational evaluation ("IEE"), which will deepen everyone's understanding of the student.

In that regard, there are two issues that need to be addressed here in terms of the student's needs from an evaluation/identification perspective. One is that there has been an implicit, unsubstantiated assertion by parent that the student may be on the autism spectrum. While that has never been any part of a District evaluation process, nothing in this record— taken either uniquely or as a whole—supports that assertion. This student and the student's needs do not bear any of the hallmarks of autism. The other, though, is that on the curriculum-based "quick assessment" the student was significantly below grade-level in reading in September 2017. While not a large part of either

party's evidentiary record, there are consistent occurrences in the mother's communication with the District that the student struggles with reading (although whether that is a matter of ability/achievement or lack of interest is unknown). And in the September 2017 IEP, the student's PSSA scores from the prior school year in both reading and mathematics were "below basic". Part of the reason for ordering the comprehensive IEE is not only that the student has not been comprehensively evaluated since 2014 but that the relatively average academic ability that the student exhibits through District grading may still be masking potential learning disabilities.

Accordingly, compensatory education will be awarded and a comprehensive IEE will be ordered.

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).⁵ 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 identical for claims of denial-of-FAPE. (*See generally* P.P. v. West Chester Area

⁵ 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.

School District, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis is adopted here— the District’s programming for the 2017-2018 school year and continuing through the date of this order is inappropriate.

Additionally, the provisions of Section 504 bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against on the basis of disability, has been subject to disability discrimination in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F. 3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in its purported acts/omissions. (S.H., id.). Here, while the District may have failed to provide FAPE to the student in certain aspects of educational programming, the District 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 as set forth above 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 IDEA, 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 Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999), M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

In this case, the District knew or should have known at the very outset of the 2017-2018 school year that the student's problematic behavior needed to be addressed in a wholly different way and that a FBA needed to be undertaken immediately, in order to develop a behavior support plan. The September 2017 IEP, then, is wholly inappropriate and should have been drafted with very different understandings and interventions. Therefore, the compensatory education remedy will be calculated as of the beginning of the 2017-2018 school year.

Having found that as of September 2017 the District knew or should have known that its approach to the student exhibited in the September 2017 IEP was inappropriate, that it continued to program for the student until March 2018 without any explicit behavioral assessment or plan, and that even through the date of this decision, the District's "positive interaction" goal is

fundamentally flawed, a precise calculation of compensatory education in light of the District's denial-of-FAPE is difficult. Parents' claim for compensatory education is grounded, generally, in the District's failure to address appropriately the student's problematic behaviors in the school environment. But the 'failure to address behavior' does not lend itself, on this record, to any explicit way to calculate a quantitative calculation of compensatory education, as requested by parents.

Compensatory education, however, is always an equitable remedy. Therefore, as a matter of equity in light of the District's inappropriate programming to address the student's behavioral needs from September 2017 onward, blatant omissions in that regard from September 2017 – through January 2018, and a flawed FBA even when it did undertake that necessary process in March 2018, the student will be awarded 150 hours of compensatory education.

As for the nature of the compensatory education award, the parents may decide in their 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 for the educational period from September 2017 through the date of this decision. The student is awarded 150 hours of compensatory education.

Forthwith, but no later than December 21, 2018, the student's IEP team shall meet to revise the student's IEP goal(s) in behavior and, where necessary, revise the program modifications and specially designed instruction in the student's IEP.

Within 45 calendar days of the date of this decision, the District shall undertake a functional behavior assessment related to understanding the student's inappropriate/negative interactions with peers.

Pursuant to the authority granted to a hearing officer under 34 CFR Section 300.502(d), as adopted at 22 PA Code Section 14.102(a)(2)(xxix), an independent evaluation at public expense shall take place under the following conditions:

On or before January 11, 2019, the parents shall provide, through e-mail communication through their counsel to District counsel, the names, contact information, and if possible, curricula vitae, of at least three, but no maximum number, of independent evaluators experienced in conducting comprehensive psychoeducational evaluations for educational programming (“independent evaluators”) who will make themselves available to conduct a comprehensive independent educational evaluation of the student.

On or before January 22, 2019, the District, to the extent it wishes, may select one of the independent evaluators identified by the parents to conduct the comprehensive psychoeducational independent evaluation (“selected independent evaluator”). As the District considers which independent evaluator it might choose to conduct the independent evaluation, there shall be no contact with the potential evaluators.

If the District selects one of the independent evaluators, the cost of the independent evaluation shall be at the selected independent evaluator's rate or fee and shall be borne by the District at public expense. As those arrangements are made, the selected independent evaluator shall be made to understand that it is hoped, but not required or ordered, that the independent evaluation report can be issued no later than March 23, 2019, sixty calendar days beyond January 22, 2019, the deadline for the District to identify the selected independent evaluator. Any record review, input, assessments, testing, consultation, scope, details, proposed observations, findings,

recommendations, and any other content in the independent evaluation report, shall be determined solely by the selected independent evaluator.

The terms of the order shall serve as an order and authority, and shall be read and received and considered to provide consent to communicate, to share documents or any other information, between and amongst medical providers, counselors, therapists and/or educational providers, which communications, document sharing and/or information sharing the selected independent evaluator feels is necessary to conduct the independent evaluation, and which said medical provider, counselor, therapist and/or educational provider feels comfortable communicating and/or sharing.

After the selected independent evaluator has issued the independent evaluation report for the student, the student's IEP team shall meet to consider the findings of the independent evaluation in light of the student's IEP and educational programming ("independent evaluation IEP meeting"). At the independent evaluation IEP meeting, the IEP team shall invite and include the selected independent evaluator as a participant in the IEP meeting, making scheduling accommodations for his or her participation, in person or by telephone, as necessary. The District shall bear any cost or rate for the participation of the selected independent evaluator at the independent evaluation IEP meeting.

The terms of this order regarding the involvement of the selected independent evaluator shall cease after attendance at the independent evaluation IEP meeting, although nothing in the order should be read to limit

or interfere with the continued involvement of the selected independent evaluator, as both parties may mutually agree, or as one party may make arrangements therefor.

If by January 22, 2019, the District does not wish to select one of the independent evaluators identified by the parents, or has not indicated to parents' counsel through its counsel a selection of one of the independent evaluators, as of that point, the parents may select the independent evaluator to conduct the independent evaluation. Should that be the case, all other aspects of the order remain in place and operative.

The School District did not discriminate against the student on the basis of the student's disability.

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.

The undersigned hearing officer hereby relinquishes jurisdiction in this matter.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

December 12, 2018