

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: T. C. **Date of Birth:** [redacted]

CLOSED HEARING

ODR File Number 20925-18-19

Parents:

[redacted]

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Hearing Officer:

Michael J. McElligott, Esquire

Date of Decision:

January 22, 2019

INTRODUCTION

Student (“student”)¹ is an early elementary school student who resides in the School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² as a student with autism.

Parent claims that the student was denied a free appropriate public education (“FAPE”) in the 2016-2017 and 2017-2018 school years related to allegations of deficiencies in programming for behavioral and sensory needs in the school environment. Parent seeks 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”), including allegations that the District discriminated against the student on the basis of disability.³

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

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 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.

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

ISSUES

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

If this question is answered in some way 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. In May 2016, the student's individualized education program ("IEP") team met to transition the student from early intervention services to kindergarten at the District. (School District Exhibit ["S"]-8, S-10, S-11).

2016-2017 – Kindergarten

2. The student began the 2016-2017 school year in kindergarten at the District. (S-10, S-11; Notes of Testimony ["NT"] at 68-218, 221-300).
3. The May 2016 IEP contained four goals (one in social play/turn-taking, one in attention, one in pragmatic language, and one in expressive language). (S-10).
4. In early intervention and in the design of the May 2016 IEP, behavior which impeded the student's learning or that of others was not identified as a need of the student. (S-2, S-10).
5. The May 2016 IEP contained numerous instances of specially designed instruction and program modifications, including sensory needs. The

May 2016 IEP also provided that the student would have a one-to-one paraprofessional. (S-10).

6. As part of community-based mental health support, the student had a therapeutic staff support (“TSS”) worker present in educational settings for multiple hours per day. The District paraprofessional provided behavior support services directly to the student; the TSS worker would observe those interactions and offer suggestions, communicating with the paraprofessional, but the TSS worker did not provide direct support services to the student in the educational environment. (NT at 302-364, 745-797)
7. The student’s placement in the May 2016 IEP called for the student to be in the regular education environment for 84% of the day. (S-10).
8. In October 2016, the student’s IEP was revised to address issues regarding transportation. (S-12).
9. In January 2017, the student’s IEP was revised. The social-play/turn-taking goal remained. The attention goal and both speech and language goals were removed. Two additional goals were added, one in accepting “no” as an answer and one regarding transition between activities. Some elements of specially designed instruction and program modifications were changed. (S-14, S-15).
10. The student’s placement in the January 2017 IEP increased to 90% of the day the time the student spent in the regular education environment. (S-14).
11. The student had regular access to and made use of a sensory room, in the same suite as an autism support classroom. The student would receive time in the sensory room in the morning, during the day around lunch and recess, and at the end of the day. At times, the student would also go to the sensory room to receive sensory input. (NT at 221-300, 302-364, 370-545, 745-797).
12. For most of the kindergarten year, the student did not exhibit problematic behavior, or exhibited behavior that could be addressed with strategies within the kindergarten classroom. (S-65; NT at 221-300, 302-364, 370-545, 745-797).
13. Near the end of the kindergarten year, the student began to exhibit more frequent and increasingly severe behavior in the kindergarten classroom. The autism support teacher would need to be summoned to the classroom and, in one instance, the student needed to be removed

from the kindergarten classroom. (S-65; NT at 221-300, 302-364, 370-545, 745-797).

14. The record is consistent across documentary evidence and testimony that the student's behavior was not overly problematic until the end of the kindergarten year but that the change was pronounced. (S-18, S-19, S-65; NT at 221-300, 302-364, 370-545, 745-797).

2017-2018 – 1st Grade

15. In the first week of September 2017, given the marked change in the student's behavior at the end of the previous school year, the District requested and received from parent permission to perform a functional behavior assessment ("FBA"). (S-24).
16. The student's problematic behaviors continued to intensify and become more frequently exhibited in 1st grade. Just as the record supports that the student did not exhibit overly problematic behaviors throughout kindergarten, the record just as clearly supports that the student's problematic behaviors in 1st grade were consistently interfering with the student's learning and that of others. (S-45, S-48, S-51, S-55, S-60, S-66, S-67, S-68).
17. In the second week of September 2017, at the parent's request, the student was reassigned to a different 1st grade regular education teacher. (S-26; NT at 547-594).
18. In September 2017, prior to the completion of the FBA, a group of District professionals drafted a plan for staff to address problematic behaviors which were, now in 1st grade, being consistently exhibited (including laying on the floor, running around the classroom, defiance of staff, name-calling directed at peers, physical aggression directed at peers and staff). (P-2; NT at 370-445, 597-664).
19. In October 2017, the behaviorist retained by the District to conduct the FBA issued that document. (S-33).
20. The October 2017 FBA identified four behaviors of concern: aggression towards others, property destruction, elopement (both from task and from location, at times suddenly or aggressively), and threatening others. (S-33).
21. The October 2017 FBA identified two antecedents to problematic behaviors that may occur singularly, and often coincide—the removal of

a preferred activity and a demand placed on the student by an adult. (S-33).

22. The October 2017 FBA was the basis for a positive behavior support plan (“PBSP”). (S-39).
23. The October 2017 PBSP included antecedent strategies, replacement behaviors, and behavioral consequences, as well as two behavioral goals (moving from a preferred object/task, and completing academic tasks with reinforcers). (S-39).
24. Following the October 2017 FBA/PBSP, the District issued a re-evaluation report containing the data, assessment, and programming in those documents. (S-34).
25. In October 2017, the student’s mother requested that the student’s District paraprofessional (who had been with the student since the beginning of kindergarten) be reassigned; the District complied with the parent’s request. At the same time, the student’s TSS worker (who had been with the student in early intervention and throughout the student’s time at the District) went out on a medical leave. In effect, nearly contemporaneously, the student’s long-term, day-to-day, direct behavior support changed abruptly. (NT at 302-364, 597-664, 745-797).
26. In November 2017, the District revised the student’s IEP in light of the FBA and the PBSP. The student’s IEP goals, related to peer interaction, were changed, and the November 2017 IEP called for the student to be in the regular education environment for 79% of the day. (S-43, S-44).
27. In its section on “consequences”, the October 2017 PBSP referenced the following: “Teach (the student) the skills of giving up preferred items and accepting when items are not available. See protocol for specific details.” (S-39 at page 6).
28. The protocol referenced in the October 2017 PBSP included a process where, once the student was brought into a calm state, the student was to maintain the calm state for a 10-second interval with finger-counting, followed by a 30-second interval using a timer. Once the student could maintain a calm state for this 40-second interval (with a re-set to the beginning if the student’s behavior became elevated in either interval), the student would be re-engaged in the context of the learning environment. The protocol was implemented not only for moving on from preferred items/tasks but whenever the student “engages in problem behavior that prevents (the student) from engaging in the current activity

or becomes a disruption to...peers, (the student) needs to be removed from the regular education classroom.” (P-5; 973-1043).

29. Outside of the student’s 1st grade classroom was a table in the hallway. The table had a detached chair that could slide under the table for the person seated there. The table/chair are a feature of the 1st grade classroom’s dynamic, functioning as a space where students from the class who require specialized progress monitoring can work outside of the classroom with a special education teacher. (NT at 547-594).
30. The behaviorist retained by the District trained District personnel on the implementation of the October 2017 PBSP, including the 40-second interval protocol. Both the protocol (“the desk outside of [the 1st grade] class”) and the training document (“the desk outside of the classroom”) indicated that the table and chair be utilized for working with the student outside of the classroom. (P-5; S-40; NT at 973-1043).
31. Often, the student did not exhibit problematic behavior. When problematic behavior was exhibited in the classroom, the student’s behavior could be effectively managed in the classroom by the 1st grade teacher and/or paraprofessional. At times, the autism support teacher would be summoned to the classroom to respond effectively to certain behaviors. In short, not every behavioral intervention for elevated behaviors involved removing the student from the classroom and utilizing the table/chair in the hallway. (S-67, S-68; NT at 370-545, 547-594, 863-901).
32. When the significance of the problematic behavior required it, or other interventions within the classroom failed to calm the student, the student would be removed from the classroom and be seated at the table in the hallway. The exact number—or even a rough number— of such removals, however, is not made part of this record. (NT at 370-545, 597-664, 680-744, 745-797, 863-901).
33. At such times, multiple adults were gathered in the hallway, observing and/or implementing the 40-second interval protocol, including (variably) special education administration, building-level administration, the autism support teacher, the District paraprofessional, the TSS worker, and/or the building-level District behavior support worker. (NT at 370-545, 597-664, 680-744, 745-797, 863-901).
34. When the 40-second interval protocol was being implemented, and the student was seated at the table, the building-level District behavior support worker would be seated, or be standing, directly behind the student’s chair. While the student was not ‘pinned’ against the table, the

worker was seated/standing close enough to the student's chair so as to restrict the student's ability to move the chair significantly, or freely move from the table. (NT at 680-744, 745-797).

35. Elopement from non-preferred tasks/situations/locations, or elopement in response to demands, was a problematic behavior for the student; District witnesses testified that seating the student at the table with an individual behind the student was a means to control elopement while the student was in an elevated behavioral state. (S-68; NT at 370-545, 597-664, 863-901).
36. Occasionally, when the student's behavior could not be de-escalated in the hallway outside the classroom, the student would be escorted to an empty classroom in the building which was largely free of items or distractions, in a continued effort to calm the student (although without continuation of the 40-second interval protocol, which was employed only at the table outside the 1st grade classroom). The student's mother referred to this room as an "isolation room". Other witnesses referred to it alternately as a "timeout room", "quiet room", or "calming room". The totality of the testimony related to this room does not support a conclusion that it was an inappropriate or punitive environment. (NT at 68-218, 302-364, 370-545, 597-664, 863-901).
37. In January 2018, the student's IEP team met to discuss the student's educational programming. (NT at 68-218, 597-664).
38. In February 2018, the District proposed, and the parent agreed to, extended school year programming for the student in the summer of 2018. (S-47).
39. In April 2018, parent requested in conjunction with a prescription from a physician that the student be provided with homebound instruction and the student's IEP was revised to accommodate homebound instruction. (S-53, S-54).
40. The student completed the 2017-2018 school year on homebound instruction. The homebound instruction took place at the offices of the community-based mental health agency that provided TSS services. The student's behavior in that environment was escalated and problematic. (P-17; S-61; NT at 1046-1069).
41. Over the course of November 2017 – January 2018, the student's problematic behaviors declined in all categories (aggression, property destruction, elopement, threats). The number of problematic behaviors increased in February 2018 and again in March 2018, markedly surpassing the baseline data from November 2017. In April 2018, the

problematic behaviors—though still elevated from the November 2017 levels—were slightly declining from the March 2018 levels. At that point, the student began homebound instruction. (S-45, S-48, S-51, S-55, S-60, S-61).

42. The student made progress on IEP goals over the first two trimester reporting periods in 1st grade. (S-60).
43. In communications between the parties in the spring and summer of 2018, the District contemplated a recommendation for a more restrictive placement, potentially seeking the consideration of the IEP team for more time in a specialized classroom setting. (NT at 597-664).
44. In September 2018, after the filing of the complaint in this matter, the student’s mother accessed a social media account for the building-level District behavior support worker who was often summoned to help with behavior interventions with the student and who was the individual who sat/stood behind the student when the student was seated at the table outside the 1st grade classroom. (P-6; NT at 68-218).
45. Screenshots of the social media account included a picture of an adult in a macabre Halloween costume of a horror clown escorting a small child, also dressed for Halloween, a child who has an apparently wary/scared look on his face. (P-6 at page 2).
46. The screenshots then also include a message dialog among three individuals—
 - the building-level District behavior support worker who worked with the student in 2017-2018 (an individual no longer employed by the District and who, due to international travel, was unavailable for the hearing)
 - that individual’s father (who, to further the confusion, shared the same name as his son), and
 - the building-level District behavior support worker for the current 2018-2019 school year (in effect, the replacement for the first-identified individual) [“2018-2019 behavior worker”]. (P-6 at pages 1, 3).
47. The student’s mother was alarmed at the content of the message exchanges, and the 3-page exhibit is confusing—it is presented out of order and contains some repetitious social media posts. But the 2018-2019 behavior worker testified credibly and persuasively that (a) the image is a random posted image and is not a picture of any of the three

individuals, and (b) the social media message conversation is a mocking/joking dialog among the three individuals and does not refer in any way to the student in this matter, or any specific student whatsoever. (P-6; 68-218, 850-861).

48. The testimony of the 2018-2019 behavior worker is credited and was accorded heavy weight, such that the social media image and dialog, though on its face startling and open to interpretation, was fully explained as non-malevolent in any regard. (P-6; NT at 850-861).
49. The student did not return to the District in the current 2018-2019 school year and enrolled in another local education agency. (NT at 68-218).

WITNESS CREDIBILITY

All witnesses testified credibly. Heavier weight was accorded to the testimony of the regular education kindergarten teacher, the student's one-on-one District paraprofessional for kindergarten and the early part of 1st grade, the student's autism support teacher, the District building-level behavior support worker, and District occupational therapist.

Also, the nature and tenor of the questioning of the student's special education teacher led this hearing officer to believe that that witness's credentials and experience were being questioned/impeached. It is an explicit finding that there are no grounds to doubt or question the education, training, or experience of the student's special education teacher.

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. (Andrew 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)).

An aspect of the parent’s claim is that the District’s positive behavior support plan included an impermissible restraint from the use of the hallway table/chair and the behavior support room⁴. Positive behavior support in Pennsylvania, and as part of that the cautions over, limits of, and prohibitions on the use of restraints, is governed by 22 PA Code §14.133 (“Section 14.133”). The provisions of Section 14.133 require generally that positive, rather than negative, behavior support be utilized and specifically requires that “(w)hen an intervention is needed to address problem behavior, the types of intervention chosen for a particular student...shall be the least intrusive necessary. The use of restraints is considered a measure of last resort, only to be used after other less restrictive measures, including de-escalation techniques....”. 22 PA Code §14.133(a).

A “restraint” is defined, among other non-applicable situations, as “(t)he application of physical force, with or without the use of any device, for the purpose of restraining the free movement of a student’s...body”. 22 PA Code

⁴ So as not to favor one characterization of the room over any other, the neutral term “behavior support room” will be used for the room described by various witnesses as the isolation/timeout/quiet/calming room.

§14.133(b). Additionally, “(r)estraints to control acute or episodic aggressive or self-injurious behavior may be used only when the student is acting in a manner as to be a clear and present danger to himself, to other students or to employees, and only when less restrictive measures and techniques have proven to be or are less effective”. 22 PA Code §14.133(c). Below, these provisions all play a role in parsing the legal reasoning of this decision.

Here, the first issue, quite straightforward and clear on this record, is that the District provided FAPE to the student in the student’s kindergarten year (2016-2017). The student transitioned easily from early intervention and enjoyed a largely successful kindergarten year in a placement that was nearly a full-time regular education setting. That changed at the end of the kindergarten year, and the District responded appropriately to those changes both in kindergarten and even into the following school year. But the record fully supports a finding that the student was provided with FAPE in kindergarten.

Second, in the following school year, the student’s 1st grade year (2017-2018), the District immediately moved to perform a FBA and put in place behavior programming. In this, the District responded appropriately, recognizing the change in the student’s needs and moving to meet those needs. Once the FBA was issued and the PBSP designed around the results of the FBA, both of those documents provided the student’s educators with effective strategies to manage the student’s behaviors. The behavior data shows that, at least in the medium term over November 2017 – February 2018, the interventions were effective. And when the interventions failed to be as effective

and into the months that followed, the District contemplated a recommendation for a more restrictive placement, with more interventions and instruction taking place outside of regular education and in more specialized classrooms; although the student's IEP never progressed to substantive consideration of such a change in the recommended placement, on this record it was not necessarily inappropriate and arguably the more appropriate course of action. Indeed, absent the issue of restraint, the evidence in the record as a whole weighs in favor of a finding that the District provided FAPE to the student in 1st grade.

Of course, the issue of restraint is a fundamental issue, and here the evidence weighs against the District. In short, the District's use of the table/chair in the hallway outside of the 1st grade classroom amounted to an impermissible restraint of the student.

In terms of Section 14.133, the District's programming was largely less restrictive and included de-escalation techniques—and this programming and these techniques were often effective. 22 PA Code §14.133(a). But the implementation of the 40-second interval protocol at the table in the hallway—critically, with the District behavior support worker directly sitting/standing behind the student's chair “for the purpose of restraining the free movement of a student's...body”—is impermissible. 22 PA Code §14.133(b). In effect, the student was placed at the table and was not allowed freedom of movement from it, albeit perhaps even in defiance of directives to stay at the table, through the

projection of power by an adult in very close proximity to the student. The student was restrained at the table.

It might be argued that physical proximity is not “the application of physical force”. 22 PA Code §14.133(b). The adoption of such an argument, however, would lead to a conclusion that the presence of an adult seated/standing very close behind (out of sight but certainly not out of mind) a 1st grader seated in a chair at a table, and restricting that student’s freedom of movement from the table by that presence, does not act as a restraint on the student in violation of Section 14.133. On this record, it is the considered opinion of this hearing officer that this argument must be rejected.⁵

Another potential argument is that the District was acting to control acute or episodic aggressive behavior where the student was acting in a manner that was a clear and present danger to the student, other students, and/or employees. 22 PA Code §14.133(c). The student’s behavior when the student was removed from the classroom to the table/chair in the hallway was always elevated, although mostly it interfered with the student’s learning and the learning of others and was not a threat and was not dangerous (although in singular instances, it was). But at the hallway table, the student never presented a danger to self or others. Indeed, the 40-second interval protocol

⁵ This is not to say that mere proximity always and everywhere is the basis of a restraint in violation of Section 14.133. Such a conclusion must always be a fact-specific, situation-specific determination, and it may well be that proximity does not amount to a projection of power that restricts a student’s freedom of movement. But that is not the case here, and the proximity of the adult seated behind a 1st grader undergoing the 40-second interval protocol at a table is a restraint under 22 PA Code §14.133(b).

was employed only for calming or to gain compliance—it was never implemented at the table as a response to danger. Credible testimony of the TSS workers indicates, in fact, that the student (understandably) presented as frustrated and non-compliant during the restraint at the table (NT at 680-797) but not dangerous.

To the contrary, the District’s own employees testified consistently that elopement—from the protocol, and potentially down the hall, or to other rooms, or even out of the building—was a major factor for the positioning of the adult directly behind the seated student. This position on elopement especially undercuts any argument that restraining the student at the table was necessary as a matter of clear and present danger because when the student was restrained at the table, at least three and sometimes as many as five adults were in the hallway with the student. By positioning themselves in the hallway, the adults could have contained the student safely in that location without constricting the student’s freedom of movement at the table.

Taken together, then, it is the considered opinion of this hearing officer that, by positioning the District behavior support worker in very close proximity sitting or standing behind the student while the student was seated at the hallway table during the 40-second interval protocol was an impermissible restraint in violation of 22 PA Code §14.133. Accordingly, compensatory education will be awarded.

The District’s use of the behavior support room, however, was not in any way a restraint under Section 14.133. Moving to the behavior support room

was rarely used and was always the result of other de-escalation techniques not working. The student, even in an elevated state, was always escorted to the behavior support room without restraint or incident, and the interventions in the behavior support room did not restrict the student's freedom of movement. The District did not restrain the student in utilizing the behavior support room.

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).⁶ 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 School District*, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis is adopted here—the student was denied FAPE through the impermissible use of a restraint in restricting the student's freedom of movement at the hallway table.

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

⁶ 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.

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's approach to managing the student's behavior involving the hallway table amounted to an impermissible restraint, which resulted in a denial of FAPE to the student, the District did not discriminate against the student, or take actions against the student with deliberate indifference in light of the student's disabilities. In fact, the use of the hallway table—although misguided and a denial of FAPE— was simply a poorly implemented behavioral approach. It did not rise to the level of deliberate indifference or discriminatory animus.

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 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 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 denied the student FAPE by impermissibly restraining the student at the hallway table. Compensatory education is an appropriate remedy.

However, remedying the denial of FAPE in this matter does not lend itself, on this record, to any easy or direct way to calculate a compensatory education award. The student, when removed from the classroom, was not always placed at the hallway table—at times, the student was removed to the sensory room, or calmed without the need for the 40-second interval protocol. The number of times the student was placed at the hallway table, let alone the instances of restraint even when placed there, is not at all clear.

Compensatory education, however, is always an equitable remedy. Therefore, as a matter of equity in light of the District's impermissible restraint of the student, at times, the student is awarded 200 hours of compensatory

education. This award of hours is a substantial remedy for a significant, although, due to a lack of evidentiary precision, somewhat abstracted denial of FAPE. It is a compensatory education award that must be weighed by the District in its councils, one would hope, in an effort to understand the nature of restraint under Section 14.133 and to abide by those provisions. Yet it is not, in the considered view of this hearing officer, an outsized award based on the lack of concrete evidence as to the exact scope of the denial of FAPE.

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 District met its obligations to the student in the 2016-2017 school year.

The District denied the student a free appropriate public education in the 2017-2018 school year through its use of an impermissible restraint, as set forth above, as part of the student's behavior interventions. The student is awarded 200 hours of compensatory education.

The 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

January 22, 2019