

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

OPEN HEARING

ODR File Number 22425-19-20

Child's Name: J. F. **Date of Birth:** [redacted]

Parent:
[redacted]

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Hearing Officer: Michael J. McElligott

Date of Decision: 10/22/2019

INTRODUCTION

Student (“student”)¹ is a high-school age student who attends 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 who requires special education to address the student’s needs related to autism and a variety of health impairments.

The student’s parent claims that the student’s special education programming since July 2017³ has been inappropriately designed and/or implemented, thereby denying the student a free appropriate public education (“FAPE”). Analogously, the parent asserts these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).⁴ Furthermore, the parent claims that the District acted with deliberate indifference toward the student’s needs and, therefore, makes a claim for disability discrimination under Section 504.

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 §§14.101-14.162 (“Chapter 14”).

³ Hearing Officer Exhibit (“HO”)-1, HO-4; Notes of Testimony at 24-25.

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. Accordingly, the District argues that the parent is not entitled to any remedy.

For the reasons set forth below, I find for the parent.

ISSUES

Was the student denied FAPE in the 2017-2018, 2018-2019, and/or 2019-2020 school year(s)?

Did the District act with deliberate indifference toward the student based on the student's disability?

If the answer to either of these questions is in the affirmative, is parent entitled to any remedy?

FINDINGS OF FACT

2016-2017 – 6th Grade

1. In November 2016, in the midst of the student's 6th grade year, a private evaluator diagnosed the student with autism. This diagnosis was in addition to already-diagnosed attention-deficit hyperactivity disorder ("ADHD") and oppositional defiant disorder. (Parent's Exhibit ["P"]-2; Notes of Testimony ["NT"] at 37-152).
2. The private evaluator also diagnosed the student with specific learning disabilities in reading, written expression, and mathematics. (P-2).⁵
3. The private evaluator indicated in the November 2016 private evaluation that it had been reported that the student exhibited difficulty in peer interactions, lack of respect for authority, and defiance. (P-2).

⁵ These diagnoses were in addition to the student's dietary and medical needs related to severe [medical condition]. (P-2; NT at 37-152).

4. At the time of the private evaluation, the student had an individualized education program (“IEP”) in place for instructional support and occupational therapy. The private evaluator recommended that the parent consult with the District given the autism diagnosis. (P-2).
5. In early December 2016, the parent requested a re-evaluation by the District. In mid-December 2016, the parent provided permission to re-evaluate the student. (P-4; NT at 37-152).⁶
6. In January 2017, the District issued its re-evaluation report (“RR”). (P-10; School District Exhibit [“S”]-1).
7. Parent input in the January 2017 RR referenced the November 2016 private evaluation (“They have made available a report from (the private evaluator), dated 11/2016, which is now included in (the student’s) file.”) No content from the private evaluation was detailed in the RR. (P-2, P-10; S-1; NT at 652-721).
8. The January 2017 RR contained standardized achievement testing from 3rd grade and regular education screening results from 4th and 5th grades. (P-10; S-1).
9. The teacher observations in the January 2017 RR indicated that the student generally rushed through academic work in most classes. In mathematics, the student lacked focus. In other academic areas, the student’s habits were not reported as problematic, and no teacher reported behavioral difficulties. (P-10; S-1).
10. The student’s teachers provided comprehensive and detailed observational/instructional information but the District evaluator significantly condensed/summarized that information for the January 2017 RR. (P-9, P-10; S-1).
11. Teacher recommendations in the January 2017 RR indicated that the student required learning support in reading, mathematics, and language arts/written expression. (P-10; S-1).

⁶ The complaint was brought by the student’s biological mother. For a number of years, including the period covered by this decision, the student’s biological mother lived with, and shared parental duties with, her fiancée. The student’s mother did not testify at the hearing, but the mother’s fiancée did. The mother’s fiancée has been active and informed in terms of the student’s education, had firsthand knowledge as to the matters at issue in the hearing, and testified in the role of a statutorily-defined “parent”. All references to “parent” in these findings of fact, then, refer to the joint efforts and understandings of both the student’s mother and her fiancée. (34 C.F.R. §300.30).

12. The January 2017 RR contained cognitive ability testing. The student's verbal IQ score was 80, perceptual reasoning index was 65, and full-scale IQ was 70. The District evaluator, however, cautioned that the student's lack of focus/attention during testing, and the student rushing through the instrument, likely rendered unreliable the perceptual reasoning and full-scale IQ scores. The evaluator opined that the verbal IQ score was considered the most valid representation of the student's cognitive ability. (P-10; S-1).
13. The January 2017 RR contained achievement testing. Utilizing the verbal IQ score of 80, the student exhibited a significant discrepancy in achievement scores in reading comprehension (49), mathematics (43), mathematics/applied problems (65), calculation (29), writing (66), writing samples (52), and the academic applications composite (47). (P-10; S-1).
14. Although not contained in the January 2017 RR, the evaluator's summary of testing results in reading included the following: "(The student's) performance is average on tasks requiring reading decoding and the ability to identify words. (The student's) performance is negligible on tasks requiring the ability to use syntactic and semantic cues in comprehending written discourse as it is being read." (P-7 at page 1; NT at 652-721).
15. Likewise not contained in the January 2017 RR, the evaluator's summary of testing results in mathematics included the following: "(The student's) mathematics standard score is within the very low range [percentile rank <1...] for (the student's) age. (The student's) mathematics ability is negligible; math tasks above the age 7-5 level will be quite difficult for (the student)". (P-7 at page 1, bracketed material included as a parenthetical in the original; NT at 652-721).
16. Likewise not contained in the January 2017 RR, the evaluator opined: "(The student) will probably gain the most from reading instruction presented within the early to late third grade range. Math instruction presented within the middle to late first grade range will likely produce the greatest gains....Writing instruction that is presented within the early to middle second grade level is appropriate....". (P-7 at page 2; NT at 652-721).
17. In the January 2017 RR, the District evaluator opined that the student's academic skills were "very limited compared to...age level peers". The student's scores in mathematics and writing were "very low" and the student "demonstrated a significant weakness in overall math skills". (P-10 at page 5; S-1 at page 5).

18. There was no assessment of potential deficits related to autism (pragmatic communication, social skills, sensory needs/manifestation, etc.). (P-10; S-1).
19. The District evaluator recommended learning support “to address all areas of the curriculum, not just math”. The District evaluator made no recommendations related to autism support. (P-10; S-1).
20. In January 2017, the student’s IEP team met to draft an IEP based on the January 2017 RR. (P-11; S-3).
21. In the January 2017 IEP, the student’s reading level, established through a regular education curriculum-based assessment, was 2nd grade/1 month (2.1). (P-11 at page 9; S-3 at page 9).
22. The January 2017 IEP indicated needs in focus, organization, mathematics, reading, and written expression. (P-11 at page 11; S-3 at page 11).
23. The January 2017 IEP contained three academic goals, one each in mathematics, reading, and written expression. (P-11; S-3).⁷
24. Notwithstanding the District evaluator’s determination of appropriate levels of instruction that would be far below the student’s current 6th grade curriculum, (see FF 16 above), each of the academic goals were written for performance at grade level, beginning respectively with the phrases “given grade-level math curriculum”, “given grade-level reading material”, “given a grade-level writing prompt”. (P-7, P-11; S-3).
25. The reading goal in the January 2017 IEP was written for 75% reading comprehension accuracy in 2 out of 3 probes. (P-11; S-3).
26. The mathematics goal in the January 2017 IEP was written for 75% accuracy in calculation in 2 out of 3 probes. (P-11; S-3).
27. The written expression goal in the January 2017 IEP was written for a score of 75% in paragraph writing in 2 out of 3 probes. (P-11; S-3).
28. The January 2017 IEP contained modifications to regular education instructional approaches but did not provide specially

⁷ The January 2017 IEP contained multiple occupational therapy goals. Occupational therapy programming was not the basis of parent’s claim, or evidence at the hearing. Therefore, the evidentiary focus was on academic and autism support needs in the evaluations and IEPs in the record, and will be the focus of fact-finding herein.

designed instruction to address the student's needs in reading, mathematics, or written expression. (P-11; S-3).

29. The January 2017 IEP indicated that the student was not eligible for extended school year ("ESY") services. (P-11; S-3).
30. The January 2017 IEP recommended a full-time placement in regular education with support provided in a co-taught classroom. (P-11; S-3).
31. In May 2017, progress monitoring on the January 2017 IEP goals for the student indicated the following: on quizzes and homework in mathematics the student averaged 62% and had met the 75% benchmark on only one of ten probes, was reading on a grade-equivalency of 3.7 (the final administration in May 2017 at grade-equivalency 4.8 yielding a score of 0%) and had met the 75% benchmark on only one of nine probes since January, and was averaging a score of 64% across nine probes in written expression and had met the 75% benchmark three times. (P-15).
32. In June 2017, the parent communicated with the District indicating dissatisfaction with the student's education. (P-16; NT at 37-152).

2017-2018 – 7th Grade

33. The student moved from elementary school to middle school in 7th grade.
34. The January 2017 IEP was in place in July 2017, the point at which parent asserts the claim that serves as the basis of the complaint in this matter. (P-11; S-3).
35. In July 2017, the parent continued to communicate with the District to arrange an IEP meeting for the student's transition to middle school. An IEP meeting was scheduled for August 2017 once the middle school teaching staff had returned for the 2017-2018 school year. (P-17; NT at 37-152).
36. The student's IEP team met in August 2017. (P-20).
37. In late September 2017, the student's IEP team revised the student's IEP. (P-30; S-6).

38. In the September 2017 IEP, the student's reading level, established through a regular education curriculum-based assessment, was 3rd grade/9 months (3.9). (P-30 at page 8; S-6 at page 8).
39. Upon entering 7th grade, a separate regular education curriculum-based assessment indicated that "(the student) scored in the 'red' zone" on an assessment of reading and mathematics indicating that "(the student) has not yet met the expectations of what a student should know at the beginning of (the) seventh grade school year" in both areas. In the January 2017 IEP, the student's reading level, established through a regular education curriculum-based assessment, was 2nd grade/1 month (2.1). (P-30 at page 8; S-6 at page 8).
40. The September 2017 IEP continued to recommend support in reading, mathematics, and written expression. The IEP also noted that while the student's organization skills had improved, the student consistently rushed through work, which was added as an explicit need to be addressed in the IEP. (P-30; S-6).
41. The academic goals in reading and mathematics in the September 2017 IEP remained largely the same, although in each goal the demonstrated goal achievement increased to 3 out of 4 probes (from 2 out of 3 probes) each academic quarter. (P-11, P-30; S-3, S-6).
42. The academic goal in written expression in the September 2017 IEP remained the same. (P-11, P-30; S-3, S-6).
43. The September 2017 IEP was drafted for implementation and progress monitoring for one academic year (through September 2018), but none of the academic goals in the September 2017 IEP contained updated baseline data from the May 2017 progress monitoring, or as collected in September of the 2017-2018 school year. (P-30; S-6).
44. The September 2017 IEP contained modifications to regular education instructional approaches but did not provide specially designed instruction to address the student's needs in reading, mathematics, or written expression. (P-30; S-6).
45. The September 2017 IEP indicated that the student was not eligible for ESY services. (P-30; S-6).
46. The September 2017 IEP recommended a full-time placement in regular education with support provided in a co-taught classroom. (P-30; S-6).

47. The parent approved the recommendation for placement and programming reflected in the September 2017 IEP. (P-25).
48. In mid-October 2017, the parents communicated with the District that they were pleased with the way the student's program was unfolding. (P-32).
49. In March 2018, the student was deemed eligible for ESY programming. (P-33, P-35).
50. In the spring of the 2017-2018 school year, in May 2018, progress monitoring on the September 2017 IEP goals for the student indicated the following: In mathematics, the student had scored at least 75% on every probe across the entire school year; in reading comprehension, the student met the goal in the 1st and 3rd quarters but failed to meet the goal in the 2nd and 4th quarters; across the school year, the student's reading level, established through a regular education curriculum-based assessment, averaged entry to 4th grade (4.0); in written expression, the student met the goal in the 1st and 3rd quarters but failed to meet the goal in the 2nd and 4th quarters. (P-36).
51. On the Pennsylvania Standard School Assessment exam for 7th grade, the student scored below expectations for 7th grade in reading/language arts (basic) and mathematics (below basic). (P-38 at pages 6-7; S-9 at pages 6-7).

2018-2019 – 8th Grade

52. In September 2018, the student's IEP team met for its annual revision of the student's IEP. (P-38; S-9).
53. In early September 2018, the student's grade-equivalency in reading was 3.7. (P-38 at page 7; S-9 at page 7).
54. The September 2018 IEP listed basic reading skills as a strength of the student. (P-38; S-9).
55. The September 2018 IEP listed organization, academic support, homework completion, and focus as the student's needs. (P-38; S-9).
56. Because the student would qualify for transition planning during the implementation of the September 2018 IEP in the 2018-2019 school year, the IEP contained transition planning goals. (P-38; S-9).

57. The post-secondary goal in the student's transition plan in the September 2018 IEP indicated that the student wishes to attend college after graduation from the District. (P-38; S-9).
58. The student's mathematics goal was revised in the September 2018 IEP, calling for 75% accuracy on "randomly selected math problems". The number of probes in each quarter was reduced to three (from four). The grade-level for the math problems was not made part of the goal. (P-38; S-9).
59. The student's reading goal was revised in the September 2018 IEP, calling for 75% accuracy on "randomly selected reading passages". The number of probes in each quarter was reduced to three (from four). The grade-level for the reading passages was not made part of the goal. (P-38; S-9).
60. The student's written expression goal was revised in the September 2018 IEP, moving away from paragraph writing and calling for exhibiting a subject, verb, and "complete thought" in five sentences 75% of the time. (P-38; S-9).
61. The September 2018 IEP contained modifications to regular education instructional approaches but did not provide specially designed instruction to address the student's needs in reading, mathematics, or written expression. (P-38; S-9).
62. The September 2018 IEP recommended a full-time placement in regular education with support provided in a co-taught classroom. (P-38; S-9).
63. The parent approved the recommendation for placement and programming reflected in the September 2018 IEP. (P-39).
64. At the September 2018 IEP meeting, parent requested a speech and language ("S&L") evaluation. (NT at 163-323).
65. In October 2019, the mother's fiancée emailed the District with multiple concerns about the student's programming. (P-51).
66. The student's 8th grade special education teacher testified that she viewed the fiancée's email as "intimidating", "degrading", and "belittling". While the email was addressed to the teacher, and the self-perception about her feelings regarding the email are her own, the email is not offensive to the objective reader. The email is written in an elevated tone, and is pointedly specific, but it is focused entirely on the dissatisfaction

of the family with the student's educational programming and is not personal in any way. (P-51; NT at 163-323).⁸

67. At some point in the fall of 2018, the parent requested, and the District agreed to provide, an independent educational evaluation ("IEE") at public expense. (P-42; S-11).
68. In December 2018, the student's IEP was revised to include S&L services. (P-50).
69. A District S&L therapist determined that the student exhibited distortions and mis-articulations, coupled with rapidity of speech, that interfered with the student's verbal intelligibility. The S&L therapist recommended specially designed instruction in speech for 120-150 minutes per month. (P-50).
70. The S&L services were not delivered in a separate setting, and the student remained in a full-time regular education placement. (P-50).
71. In January 2019, the independent evaluator issued the IEE. (P-42; S-11).
72. As part of the independent evaluation, the independent evaluator did not have the September 2018 IEP, instead reviewing only the January 2017 and September 2017 IEPs. (P-42; S-11).
73. Three of the student's 8th grade teachers responded to a questionnaire provided by the independent evaluator. (P-42; S-11; NT at 561-650).
74. The teacher questionnaires are to be completed in the teacher's own words. (NT at 561-650).
75. On two questions, related to the curriculum that the student receives and how the student's needs in organization are addressed, the teachers gave identical answers, indicated by responses in quotation marks. (P-42; S-11).
76. On other questions, the independent evaluator noted that the teacher's responses were the same. It is unclear whether the answers

⁸ Reference in this finding of fact and the finding of fact immediately preceding it contain specific reference to the mother's fiancée and not to "parent" (see footnote 6) to identify explicitly the author of the email given the nature of the fact-finding.

were identical or merely substantively similar, given the lack of quotation marks around the teachers' like responses. (P-42; S-11).

77. All three teachers declined to provide input regarding any academic difficulties the student might have, any differences between homework, class participation, or test performance. Two of the teachers declined to provide input as to how they thought peers viewed the student; the third teacher responded "happy". (P-42; S-11).
78. The independent evaluator performed two brief observations of the student, both outside of academic instruction (one in the cafeteria, and one during a library experience). (P-42; S-11).
79. The independent evaluator noted that the student was impulsive during testing and rushed through the administration of instruments. (P-42; S-11).
80. The independent evaluator performed cognitive testing. The student's full-scale IQ was 65, with a 95% confidence interval that the student's IQ falls between 61-72. The evaluator found that the student's impulsivity in the assessment likely impacted the student's score and opined that the student's cognitive ability is likely at the higher end of the confidence interval, although still "considerably lower than those of other children (of similar) age". (P-42 at page 11; S-11 at page 11).
81. The independent evaluator performed assessment on the student's receptive language and found that the student understands simple language but struggles with complex language, and especially with social/pragmatic language. (P-42; S-11).
82. On achievement testing in the January 2019 IEE, the student exhibited consistently low or very low scores in multiple areas, including all subtests for mathematics (problem solving, numerical operations, math fluency in addition and subtraction), and subtests in written expression for sentence building and essay composition. (P-42; S-11).
83. On achievement testing in reading, the student achieved low-average scores in word reading and pseudoword decoding. But the student was entirely unable to engage in the reading comprehension subtest—the student took only a few seconds to have claimed to have read a passage and then gave entirely inadequate answers to questions about the passage. The independent evaluator judged the student's scores on the reading comprehension subtest to be entirely unreliable. (P-42; S-11).

84. On further achievement testing in reading, using a different instrument, the independent evaluator generated results in all areas of reading (rate, accuracy, fluency, or comprehension) across two administrations but heavily cautioned about the accuracy of those results given the student's impulsivity and necessary changes to administration protocols. (P-42; S-11).
85. The student's grade-equivalency reading on the stronger of the two administrations ranged were as follows: rate (3.0), accuracy (1.7), fluency (2.2), comprehension (2.7). (P-42; S-11).
86. In sum, the independent evaluator opined that "(the student's) overall performance [in reading] suggests that, while (the student) is quite capable of reading individual words without context, when (the student) has to read contextual information and derive meaning from what [is being read], (the student's) word reading skills decline and...becomes much less accurate." Additionally, the evaluator opined that "the student's ability to comprehend and remember what [is read] is also poor." (P-42 at page 21; S-11 at page 21; bracketed material edited).
87. Only the parents participated in assessments of executive functioning, behavior/emotion, social responsiveness. All instruments, as rated by the parents, indicated elevated scoring. (P-42; S-11).
88. The independent evaluator made a host of recommendations, including placement in a private setting for students with autism, a revised IEP to address the student's academic needs (including specific recommendations for specially designed instruction in reading and mathematics), and programming in social skills and pragmatic language. (P-42; S-11).
89. The student's progress monitoring on IEP goals in the September 2018 IEP showed seeming progress across most randomly selected math problems and reading passages. (P-48).
90. In early September 2018, the student's grade-equivalency in reading was 3.7. (P-38 at page 7; S-9 at page 7).
91. In late September 2018, two and half weeks after the grade-equivalency of 3.7, the student's grade-equivalency in reading was 5.2. In November 2018, the student's grade-equivalency in reading was 5.7. In February 2019, the student's grade-equivalency in reading was 5.9. (P-41).
92. In light of the record as a whole, including the data as it surfaces over the spring of 2017, and the 2017-2018 school year, along with the

data and conclusions in the January 2017 RR and the January 2019 IEE, the progress monitoring and data in all academic areas as generated over the period from late 2018-2019 school year is deemed unreliable. (P-7, P-10, P-11, P-30, P-38, P-41, P-42, P-47, P-48; S-1, S-3, S-6, S-9, S-11).

93. Over February and March 2019, the parties, through counsel, discussed their positions in light of the January 2019 IEE. (P-24).
94. In April 2019, the student's IEP team met to revise the student's IEP in light of the January 2019 IEE. (P-43. S-12).
95. The April 2019 IEP is largely unchanged from the September 2018 IEP. (P-38, P-43; S-9, S-12).
96. In the April 2019 IEP, certain information from the January 2019 IEE was included in present levels of academic and adaptive performance, and the District's data in that section was updated. (P-43; S-12).
97. The goals in the April 2019 IEP remain the same. (P-43; S-12).
98. The specially designed instruction remains the same, although a weekly, regular-education, small-group session (of indeterminate duration) for social skills was added to the student's programming. (P-43; S-12; NT at 163-323).
99. The April 2019 IEP continued to recommend a full-time placement in regular education with support provided in a co-taught classroom. (P-43; S-12).
100. In July 2019, parent filed the special education due process complaint that led to these proceedings. (HO-1).
101. At the hearing, multiple teachers testified that the student did not present any behavioral difficulties in class. This testimony was credited. (NT at 418-449, 458-501, 503-553, 729-767, 768-792, 796-832).
102. The student's parent testified that the student does not have friends and, when the student seeks out socialization, it is with younger children. Teachers testified that the student had friends and peers with whom the student interacted, and that nothing was out of the ordinary regarding the student's socialization with peers. By affect and demeanor, however, each of these teacher witnesses lead this hearing officer not to credit this testimony. The testimony of the parent is credited in this regard. The student's socialization with peers is found to be problematic,

especially in light of the other evidence in the record, namely the November 2016 private evaluation and the January 2019 IEE (especially where the two of the three teachers declined to respond as to their views on how peers view the student). (P-2, P-42; S-11; NT at 37-152, 418-449, 458-501, 503-553, 729-767, 768-792, 796-832).

DISCUSSION AND CONCLUSIONS OF LAW

IDEIA – FAPE

The provision of special education to students with disabilities is governed by federal law, as adopted and implemented through Pennsylvania education regulations. (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 District denied the student FAPE over both the 2017-2018 and 2018-2019 school years. In some cases, the denial-of-FAPE is particular to an

IEP, and in other instances the denial-of-FAPE is evident across all IEPs. Each of these will be addressed in turn.

Before exploring the findings and legal conclusions on the denial-of-FAPE, however, this hearing officer must set forth aspects of the parent's claim which do not require remedy, or at least requested remedy. First, the record supports a finding that the student does not present behavioral challenges in the educational environment. At various points in the hearing, parent's counsel utilized the observation/input of teachers from prior school years to glean whether, and if so how, the student's behavior was not problematic in the 2017-2018 or 2018-2019 school years. The record does not support a finding that the student's behavior needed to be addressed in the student's IEPs. Additionally, the student does not require an out-of-District placement. As set forth below, there are multiple flaws in the student's IEPs, as designed and as implemented, and directives will be provided to the student's IEP team. But the instruction and services that the student requires can be fully provided in a placement within the District.

2017-2018 : September 2017 IEP. The denial of FAPE in the 2017-2018 school year is rooted in the District's January 2017 RR. First, having been provided the November 2016 private evaluation, with its autism diagnosis, the January 2017 RR contained no observation, teacher input, or assessment for the student's potential needs related to autism. Ultimately, as discussed below, the student's need for instruction in social skills/pragmatic language went

unaddressed as a result of this flaw in the RR. Second, the District evaluator made summary notes with very specific recommendations for the appropriate grade-level curriculum for the student's instruction. None of that, however, was included in the January 2017 IEP, and the January 2017 RR contained only general notions that the student required "support" in reading, mathematics, and written expression, but the significance of the deficits in all of those areas is blunted in the RR.

The January 2017 IEP was operative as of July 2017, the point at which the parent based her claims against the District. That IEP, while not involved in an operational denial-of-FAPE was the basis for the September 2017 IEP in 7th grade. This September 2017 IEP is prejudicially flawed in multiple regards. One, the goals in reading, mathematics, and writing were all written in terms of grade-level passages/problems/prompts (FF 24, 41). But only eight months earlier, in the January 2017 RR, the District's school psychologist recommended that the student's reading curriculum be provided at the early-to-late 3rd grade level, mathematics curriculum at the middle-to-late 1st grade level, and writing curriculum at the early-to-middle 2nd grade level. (FF 16). And at that point, at the outset of 7th grade, the student was reading at a grade-equivalency of 3.9. (FF 38). From the outset, then, the student's academic goals were prejudicially flawed, gauging the student on grade-level material when the student clearly was not achieving at that level. Additionally, in September 2017, the goals have no baselines. This is a prejudicial flaw, as IEP goals must contain a baseline against which progress is measured.

2018-2019 : September 2018 & April 2019 IEPs. The goals in the September 2018/April 2019 IEPs are prejudicially flawed for a different reason. Rather than anchoring the goal in any grade-specific curriculum level, the reading and mathematics goals were gauged on “randomly selected” materials. As used in an IEP goal, this hearing officer has no sense what this term means. But, regardless, the goals in these academic areas have no context for the curricular basis on measuring the goals for a student working multiple grade levels behind the student’s then-current 8th grade year.

Also, in the 2018-2019 school year, the progress monitoring/achievement data is also flawed. As indicated above, the record in its entirety leads this hearing officer to find it wholly unreliable. (FF 92). One of the most clear aspects to this finding is the student’s grade-equivalency in reading. On this record, the student’s grade-equivalency in reading on District assessments was consistently at the 3rd grade level. The student’s comprehensive reading ability and grade-equivalencies on standardized assessments in the January 2019 IEE was profoundly lower, almost to the point where it could not be relied upon. Yet as of late September 2018 and thereafter, the student’s reading equivalency was gauged at late 5th grade and rising consistently. These data points, and the data from the 2018-2019 year as a whole, cannot be relied upon.

Finally, and this will be addressed further below in terms of the student’s placement, by April 2019, the student’s IEP called for individualized instruction

in occupational therapy, S&L services for articulation, and regular-education small-group social skills programming. Yet the student was entirely included in regular education for the entire school day. One has trouble conceiving how direct services like these are provided in a full-time regular education setting and must conclude that either the services were not provided appropriately or that the student's placement was mis-characterized in the IEP.

Denial-of-FAPE Across IEPs. There are multiple prejudicial flaws in all of the student's operative IEPs (September 2017, September 2018, and April 2019). First, there is no concrete specially designed instruction to address the student's academic deficits. There are a number of modifications that are exclusively regular education strategies, but these only nibble around the edges of the student's needs—the heart of “what” in special education are the IEP goals, and the “how” is the specially designed instruction that will be employed to address the student's unique learning needs. Here, the student's unique learning needs include significantly delayed achievement and deep learning difficulties in reading, mathematics, and writing, yet there is no concrete specially designed instruction for the student.

Second, the student's educational placement is inappropriate. Again, this is a flaw that exists in all of the student's operative IEPs, namely that, across this entire record, the student has been entirely included in full-time regular education for the entire school day. While school districts are always mindful that a student is not placed in an overly restrictive educational setting—and

this is an absolute necessity in any student's special education programming—the corollary also applies: an appropriate educational placement may require that the student receive instruction or services outside of regular education. That is the situation here— given the student's achievement deficits in reading, mathematics, and writing, the student requires concrete specially designed instruction delivered in a learning support classroom.

Third, the student requires goal-driven specially designed instruction in social skills/pragmatic communication to address those deficits as they relate to the student's autism support needs. As pointed out above (FF 102), the student requires formal programming in helping to communicate and to socialize with peers. In the same vein, and as evident across the entire record (and as noted repeatedly by parent, evaluators, teachers—indeed anyone who has any experience with the student), the student requires goal-driven specially designed instruction in learning how to address task-impulsivity and to work more deliberately through academic tasks.

Accordingly, the student was denied FAPE during the 2017-2018 and 2018-2019 school years.⁹ The order below will address this denial of FAPE by awarding compensatory education and through directives to the student's IEP team.

⁹ The April 2019 IEP is in place as of the outset of the current 2019-2020 school year. The denials of FAPE as laid out herein apply as well to the current 2019-2020 school year, even though evidence was not produced in the August/September 2019 hearing sessions as the school year began.

Section 504/Chapter 15 – FAPE

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 §§15.1-15.8). The provisions of IDEIA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504/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 in the 2017-2018 and 2018-2019 school years.

Section 504/Chapter 15 – Discrimination

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; 22 PA Code §§15.1, 15.10). 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, the District did not act with deliberate indifference toward the student. Clearly, the student was denied FAPE. And while the parent might find fault with how the District provided special education programming to the student, nothing on this record indicates that the District was deliberately indifferent toward the student or the student's needs. While their efforts may have been flawed, it is an explicit finding that the District at all times to provide the student with special education that was designed and implemented in good faith.

Accordingly, there will be an explicit finding that the District did not discriminate against the student under the anti-discrimination provisions of Section 504.

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)). There are two methods by which a compensatory education remedy may be calculated. One method is the quantitative/hour-for-hour calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a quantitative calculation given the period of deprivation. The second method is the qualitative/make-whole calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a qualitative

determination to place the student in the position where he/she would have been absent the denial of FAPE.

Both methods of calculating compensatory education are a matter of proof. In this case, there was no evidence presented by parent regarding qualitative/make-whole compensatory education. Compensatory education is an equitable remedy and here, then, by default an equitable award of quantitative compensatory education will be fashioned.

A student in 7th or 8th grades in the Commonwealth must be provided with a minimum of 990 instructional hours in a school year. (22 PA Code §11.3(a)). Here, the student made seeming progress in 7th grade (2017-2018), although the flaws in the IEP goals in the September 2017 IEP draw into question the reliability of that reported progress. In 8th grade (2018-2019), there are significant questions about how to gauge whether the student made any progress at all. The record taken in its entirety, though, especially the testimony of the student's teachers require that the compensatory education award account for progression through the curriculum and some degree of educational benefit from the instruction provided by the District. Therefore, it is the considered opinion of this hearing officer that an equitable award of compensatory education will provide approximately 25% of the 7th grade instruction (247 hours) and 50% of the 8th grade instruction (495 hours), for a total compensatory education award of 742 hours.¹⁰

¹⁰ Additionally, this decision is issued approximately eight weeks into the 2019-2020 school year. This represents 22.22% of the current school year (approximately 220 of the 990 instructional hours for 9th grade [22 PA Code §11.3(a)].). Therefore, on this

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, or identified educational needs. 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 Big Beaver Falls Area School District ("District") has denied the student a free appropriate public education in the design and implementation of IEPs for the 2017-2018 and 2018-2019 school years, and the 2019-2020 school year through the date of this decision.

The student is awarded 775 hours of compensatory education.

record not knowing how the April 2019 IEP is being implemented, but recognizing the flaws in its design, the compensatory education award for 2019-2020 through the date of this decision will be 15% of those instructional hours, or 33 additional hours of compensatory education.

The student's special education program can be delivered in the District and does not require an out-of-district placement.

Within 10 calendar days of the date of this order, the student's IEP team shall meet to revise the student's IEP. The IEP team shall undertake the following:

- Revisions to the student's academic goals in reading, mathematics, and writing that include current baselines and grade-specific curricular reference for measurement and goal-progress. To the extent that the District must gather data for those baselines and/or curricular reference, such data must be gathered within 20 calendar days of the date of this order.
- Revisions to the specially-designed instruction to address explicitly the student's needs for concrete instruction in reading, mathematics, and writing.
- Goals shall be developed to address the student's needs in socialization/pragmatic communication and task-impulsivity, with concrete specially-designed instruction for these goals. To the extent that the District must gather data for baselines for these goals, such data must be gathered within 20 calendar days of the date of this order.
- The student shall receive instruction in reading, mathematics, and writing in a learning support classroom. The placement of the student for instruction in social skills/pragmatic communication

and task-impulsivity, as well as the delivery of occupational therapy and S&L services, shall be at the discretion of the IEP team.

The District has not been at any time been deliberately indifferent to the student's educational programming.

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

With the issuance of this final decision and order, the undersigned hearing officer releases jurisdiction.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

October 22, 2019