

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 Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

23181-1920

Child's Name

B. B.

Date of Birth

[redacted]

Parent(s)/Guardian(s)

[redacted]

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

07/21/2020

Introduction

This special education due process hearing concerns the educational rights of B.B. ("student"), a student who resides in the Peters Township School District ("District").¹ 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 an emotional disturbance. The parties disagree over the placement and programming as the result of persistent school avoidance.

The student's parent claims that the District has denied the student a free appropriate public education ("FAPE") through various acts and omissions related to school avoidance since December 2017. Analogously, the parent asserts these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").³ 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.

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 reasons set forth below, I find that the District has largely met its obligations to the student over the period in question. There is some degree

¹ The generic use of "student", and avoidance of personal pronouns, are 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 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").

of remedy, however, related to a potential identification of the student as a student with autism. The order below will contain directives to the IEP team for procedures to determine a placement for the student.

Issues

1. Has the District denied the student FAPE in its handling of the student's programming/placement over the period January 2018 through the present?⁴
2. Has the District treated the student with deliberate indifference, amounting to discrimination against the student on the basis of disability?
3. If either/both of the questions is/are answered in the affirmative what, if any, remedy is owed to the student?
4. What is the appropriate program/placement for the student in the upcoming 2020-2021 school year?

Findings of Fact

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as

⁴ The first evidentiary hearing was related to fact-finding regarding whether parents "knew or should have known" (KOSHK) of the actions which formed the basis of their complaint at a point prior to December 2017, two years prior to the filing date of their complaint in December 2019. Thereafter, on May 29, 2020, the undersigned hearing officer issued a KOSHK ruling, finding that those events were unfolding for the first time to either party's knowledge in the December 2017/January 2018 and that neither party knew or should have known prior to December 2017 of the actions that led to parents' complaint. Therefore, a denial-of-FAPE evidentiary record was developed as of January 2018 and thereafter.

necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.⁵

2017-2018 / 7th Grade

1. Following a series of mounting absences in the late fall of 2017, in December 2017 the District sought, and parents granted, permission to evaluate the student. (S-14).
2. For a brief span of days, the student dis-enrolled from the District and enrolled in a cyber charter school. Due to lack of engagement with the cyber learning environment, the student re-enrolled at the District. (S-8; Notes of Testimony ["NT"] at 68-69).
3. The student would not come to the District for the evaluation so the District school psychologist went to the student's home. The student would not come out of the student's bedroom. Therefore, the school psychologist was unable to use any assessment instruments as part of the evaluation. (P-1; NT at 296-363).
4. In February 2018, the District issued its evaluation report ("ER"). The ER contained various behavioral and emotional assessments from parents and teachers. The February ER noted that the student had missed school since early December through the date of the report

⁵ Much of the documentary evidence, and testimony, centered on an outsized focus on email exchanges between the parents and various educators. This evidence amounted to hundreds and hundreds of pages of documentary evidence, and hours of testimony where witnesses were simply asked to identify and confirm the content of those emails. (See, e.g., Parents Exhibit ["P"]-12, p-36, P-38, P-39; School District Exhibit ["S"]-4, S-5, S-10, S-13, S-47, S-48, S-80, S-81, S-82, S-83, S-102, S-110, S-111). This decision is focused largely on the more relevant evidence presented in the student's evaluation, programming, and attendance documents.

“due to (the student’s) refusal to leave the family home.” (P-1 generally and at page 27).

5. One teacher who rated the student’s behavior rated the student at clinically significant levels, among others, for atypicality and developmental social disorders. This teacher also rated the student as at-risk, among others, for social skills, functional communication, and bullying. A second teacher rated the student at clinically significant levels, among others, for social skills. This teacher also rated the student as at-risk, among others, for functional communication, bullying, and developmental social disorders. Parents rated the student at clinically significant levels in no sub-scale and as at-risk for depression and emotional self-control. (P-1).
6. The February 2018 ER identified the student with an emotional disturbance and made multiple recommendations for programming in the school environment. (P-1).
7. At the time of the issuance of the February 2018 ER, the student was referred by an outside agency for admission to a mental health short-term residential hospitalization program for “increasing aggression, isolative behaviors, and emotional and behavioral dysregulation along with school refusal”. (S-31 generally and at page 10).
8. The student has been reported to be threatening and aggressive at home. While the student, at times, exhibited defiance in school, threats and aggression were not behaviors that manifested in the school environment. (S-28 at pages 1,3, 4; S-31 at page 10, S-107 at page 3-5, 7, 10-11; P-32 at page 4, P-41 at page 1 *but see* P-3, P-7, P-9, P-16, P-23, S-40, S-70, S-72).

9. The student was provisionally diagnosed with adjustment disorder with anxiety and depression. (S-31 at page 11).
10. The student was making academic and behavioral progress but left the hospitalization placement against the advice of staff. (S-31 at pages 7-11).
11. The hospitalization program recommended an in-depth assessment for autism upon discharge. The District overlooked the recommendation and did not perform the assessment. (S-31 at pages 4-9, 12; NT at 296-363, 365-439).⁶
12. Upon the student's discharge from the partial hospitalization program, the student began to receive services from a truancy-support program. (S-32, S-107).
13. The truancy-support program worked with the student from February – June 2018. The student's attendance at school marginally improved, but the student often barricaded the door to the bedroom each morning and would not come out and/or threatened parents and/or exhibited aggression with the parents. (S-31, S-107; NT at 162-191, 733-757).
14. In March 2018, the student's individualized education program ("IEP") team met. The student was present at the meeting but would not substantively interact with participants. (P-3, P-4; S-107 at page 3).

⁶ The hospitalization recommendation for the in-depth assessment for autism appears at S-31, page 12; the diagnoses appear at S-31, page 11. In the March 2018 IEP (P-3 at page 9), the diagnoses appear as part of the District's understanding of the input from the hospitalization program. Therefore, the content in the discharge paperwork at S-31, pages 11-12, including the recommendation for an autism assessment, was therefore available to the District.

15. Four of the five teachers who provided input for the IEP indicated that the student has difficulty on some level with peer and/or adult interactions. (P-3).
16. The March 2018 IEP recognized the need for the student to improve school attendance, to develop coping skills, and for support for work-completion. The March 2018 IEP contained three goals to address coping skills and work completion. (P-3).
17. The March 2018 IEP also recognized the need for a functional behavior assessment. (P-3).
18. In late March 2018, the District and the family, including the student, collaboratively developed a school-attendance improvement plan. (S-38).
19. In April 2018, the student's attendance at school improved. (S-56).
20. In late April 2018, a functional behavior assessment ("FBA") was performed and members of the IEP team, including the student, met to discuss the FBA. (P-7; S-39, S-40, S-107 at pages 13-14).
21. The April 2018 FBA was focused on in-school behaviors, primarily refusing to attend school, or to attend classes once in attendance at school, or to complete tasks by challenging "why?", or by passively disengaging, most frequently in science class and when presented with a task that involves writing or typing. (P-7; S-40).
22. The April 2018 meeting also included discussion of the potential need for summer school programming to allow for the student to maintain earning credit for promotion to 8th grade. (S-107 at pages 13-14).

23. In May 2018, the student's IEP team met to discuss a re-evaluation report ("RR") that included the results of the FBA, including additional observations. (P-8).
24. In May 2018, the student's IEP team, including the student, met to revise the student's IEP in light of the April 2018 FBA and the May 2018 RR. (P-9).
25. The May 2018 IEP continued to recognize the need for the student to improve school attendance, to develop coping skills, and for support for work-completion and continued the goals in those areas. (P-9).
26. The May 2018 IEP also included results from the April 2018 FBA and May 2018 RR as the background for a positive behavior support plan ("PBSP").
27. In the 2018-2019 school year, the student failed science, social studies, and language arts. (P-34).
28. Over the period January – June 2018, the student was absent without excuse 37 times and tardy for school 19 times. Attendance showed slight improvement, though with extensive tardies, in March and May, and marked improvement across all fronts in April. (S-56).
29. In late June 2018, following a private evaluation the family received a neuropsychological report ("neuropsych evaluation"). (S-28).
30. Parent input, and student self-report, in the June 2018 neuropsych evaluation indicated that the student does not like changes to routine or environment, has experienced peer difficulty, and over time has preferred to be alone, especially in the bedroom which is the student's parent-described "sanctuary". Parents differed on whether

the student effectively picks up social cues, and parental input indicated that the student has certain sensory behaviors related to clothing and food, and wasting when things are not “perfect”. (S-28).

31. The June 2018 neuropsych contained a comprehensive battery of assessments of the student’s cognitive ability, memory and learning abilities, executive functioning, social/emotional/behavioral ratings and assessments, as well as assessments for autism spectrum rating scales. (S-28).
32. The results of the cognitive testing and assessment of memory and learning in the June 2018 neuropsych evaluation were new to any understanding of the student (and at this point in the record) because the student did not engage in such assessment in the District evaluation processes. The results of the social/emotional/behavioral assessments were consistent with the results of similar assessments completed by the student’s teachers the District’s assessments, although parents showed slightly elevated levels of at-risk concerns over those rated in the District evaluations. (S-28).
33. The results of the autism spectrum assessments showed that “with the exception of...slightly elevated behavioral rigidity, the remainder of the scales...were entirely within normal limits.” (S-28 at pages 8-9).
34. The June 2018 neuropsych evaluation diagnosed the student with anxiety disorder, oppositional defiance disorder, and depressive disorder. The evaluation explicitly ruled out a diagnosis of autism spectrum disorder. (S-28 at pages 9-10).
35. The June 2018 neuropsych evaluation made largely mental-health and home-based recommendations. There were some general

recommendations for the school environment, including continued implementation of the student's IEP, although any information about the District's programming was by parent/student report only as no academic records were furnished to the evaluator. (S-28 at pages 3-4, 11-12).

36. Importantly, the June 2018 neuropsych evaluation report was never provided to the District. Here, there is conflicting testimony. The parents claim that the report was hand-delivered by them to a District building and handed to a secretary. The District's position, through the testimony of multiple witnesses, was that this report never came into its possession in the summer of 2018. (S-28; NT at 591-592, 765-766, 912, 917, 941).

37. It is an explicit finding that the District's position is credited, and parents are mis-remembering the provision of the June 2018 neuropsych evaluation to the District. This finding is rooted in the fact that, at all times on this record, the District was communicative with, and responsive to, the parents. On balance, the provision of such a report would likely have been part of the District's understanding of the student at, or about, the time such a report would have been provided. The lack of responsiveness by the District in light of the record weighs in favor of a finding that the June 2018 neuropsych report was not provided to the District.

38. In the summer of 2018, the student attended a summer school program for credit recovery and promotion to 8th grade. (S-46; NT at 162-191).

2018-2019 / 8th Grade

39. The student returned to the District for the 2018-2019 school year, the student's 8th grade year.
40. In the first two weeks of the school year, the student experienced a handful of absences and multiple tardies. Beginning on Friday, September 7th, the student did not attend school. (S-56 at page 4).
41. In late September 2018, the student's treating psychiatrist contacted the District by letter and recommended, due to the student's "marked school refusal and isolation", that the student be educated in a partial hospitalization program. (P-13; S-29).
42. In October 2018, the District recommended a partial hospitalization program. The parents agreed, and on October 5th the student began to attend a partial hospitalization program affiliated with a nearby school district for its educational component. (P-14, P-15 at page 5; NT at 447-557).
43. In early October 2018, as part of the mental health component for the partial hospitalization program, the student was evaluated by a psychiatrist affiliated with the clinic. (P-41 at pages 1-4).
44. The evaluator did not administer any assessments, instead performing a records review. The evaluator diagnosed the student with generalized anxiety disorder, depressive disorder, and autism spectrum disorder. (P-41 at pages 1-4).
45. The psychiatrist shared the results with the parents, who assumed that the clinic and school district were in communication. But the clinic did not share therapeutic information or diagnostic

impressions (the mental health aspect of the student's programming) with the school district (the educational aspect). (NT at 162-291, 447-557, 859-945).

46. The student was re-evaluated in late October 2018 to update initial data (grades and teacher input) from the partial hospitalization program. (P-15).
47. In November 2018, the student's IEP team met to revise the student's IEP. (P-16).
48. The November 2018 IEP included three goals, one for skills in assignment completion, and two for school attendance. The IEP included a PBSP. (P-16).
49. The autism spectrum disorder was not discussed at the November 2018 IEP meeting. (NT at 447-557).
50. Over October 2018, the student had very few absences, all excused. (S-61 at page 9).
51. Over November and December 2018, the student's unexcused absences increased. (S-61 at page 9).
52. In January 2019, the school district implemented a school attendance improvement plan. (S-61 at pages 12-16).
53. In February and March 2019, the student continued to be absent from school without excuse. (S-61 at page 9).
54. In March 2019, the District filed a truancy notice with the local magistrate. (P-18).

55. In April 2019, as part of the truancy proceeding, the school district where the student was being educated provided an update on the student's program, indicating that the student was performing well academically and that attendance was steady, with periods of prolonged attendance. (P-18).
56. Over the 2018-2019 school year at the partial hospitalization program, the student missed 44 days of school and was tardy 22 times. (S-61 at page 11).
57. At the school district, the student received passing grades in language arts, mathematics, music, and art. The student failed science. (S-61 at page 11).
58. Parents were disappointed with the transportation arrangements to transport the student to the partial hospitalization program. Parents also felt that the academic component of the partial hospitalization program was not rigorous. (NT at 162-291).
59. In May and early June 2019, the student's IEP team, including the student, met to discuss the student's programming for the 2019-2020 school year. The IEP meeting included educators from the partial hospitalization program as well as a representative from the therapeutic component of the program. (P-20, P-21).
60. The education-based members of the IEP team recommended that the student continue in the partial hospitalization program, with a view to returning the student to a District-based program as school-attendance might improve. The parents and student declined, feeling that the student should return to a District-based placement. The education-based members of the IEP team then recommended that the student receive a half-day program at the partial hospitalization

program and a half-day at the District. The parents and student again declined, feeling that the student should return to a District-based placement. (P-21; S-69 at page 2; NT at 162-291, 447-557, 859-945).

61. The District formally recommended the partial hospitalization program at the nearby school district. Parents neither approved nor disapproved the recommendation, and another IEP team meeting was scheduled. (P-21).
62. In mid-June 2019, the District issued a RR. (S-69).
63. The June 2019 RR contained updated behavioral ratings from teachers at the partial hospitalization program. The teacher's ratings contained fewer at-risk and clinically significant ratings. The first teacher rated the student as clinically significant in atypicality and at-risk in depression, somatization, withdrawal, adaptability, leadership, and study skills. A second teacher rated the student as clinically significant in withdrawal and at-risk in adaptability, leadership, and social skills. A third teacher did not rate the student as clinically-significant or at-risk in any area. (S-69).⁷
64. The parents did not complete behavioral ratings for the June 2019 RR. The student and parents did not participate in testing sessions as they had been scheduled to. (S-69 at page 10).
65. The June 2019 RR continued to identify the student with an emotional disturbance. (S-69).
66. Following the June 2019 RR and May/June IEP meetings, the student's IEP team revised the student's IEP. (P-23; S-70).

⁷ The ratings in the prior behavioral assessments reported only sub-scales and did not include index or composite scores. For consistency, only sub-scales are cited in the finding.

67. The June 2019 IEP included three goals, one for work-completion, one for school attendance, and one for engagement in sessions with the social worker. The IEP included a PBSP. (P-23; S-70).
68. The June 2019 IEP called for a placement at the District high school in regular education except for learning support in English and mathematics and monthly social work sessions three times per month. The student would be included in regular education for 76% of the school day. (P-23; S-70).
69. Parents approved this IEP and recommended educational placement. (P-24; S-71).

2019-2020 / 9th Grade

70. The student returned to the District for the 2019-2020 school year, the student's 9th grade year.
71. In August 2019, prior to the beginning of the school year, the student's IEP team met to revise the student's IEP, placing the student in regular education settings for English and mathematics and providing for weekly social work sessions. The student would be included in regular education for 90% of the school day. (P-72).
72. The District did not support the reduction of special education support in English and mathematics but acquiesced in the parents' and student's request for academics to be delivered only in regular education settings. (P-72; NT at 760-857, 859-945).

73. This August 2019 IEP is the last agreed-upon IEP and serves as the pendent placement for the student.
74. In August 2019, early in the school year, the student was involved in a bullying incident involving a classmate. Upon investigation, the classmate was found to have bullied the student. (S-89).
75. In September 2019, the IEP team met to see if the bullying incident required any IEP revisions or additional supports. The classmate's schedule was changed to avoid the student and the classmate having a common class. The school-based members of the IEP team also continued to be concerned that the student's mathematics class might be too challenging for the student. (S-85 at pages 2, 10-11).
76. The student's attendance in September 2019 contained a handful of intermittent absences, although the absences became more consistent by the end of the month. (S-84).
77. In early October 2019, the District implemented a school attendance improvement plan. (P-28; S-90).
78. In October 2019, the student's attendance deteriorated, with the student absent on fifteen school days. (S-84).
79. In mid-October 2019, the parents sought a new FBA for the student, and the District requested permission from the parents to perform a FBA. (S-87).
80. In late October 2019, the parents and student engaged with the District about moving from the more advanced mathematics and English classes to less academically-challenging classes. The student

also received an additional period for academic support. (S-85 at page 9; S-86).

81. In early November 2019, the student's treating psychiatrist sent a letter to the District, indicating that he was treating the student for anxiety, depression, and autism spectrum disorder. (S-31).

82. This letter from the psychiatrist was the first notice that the District had that there was a formal diagnosis of autism spectrum disorder. (S-31; S-110 at pages 49-51; NT at 859-945).

83. In November 2019, the student was absent 14 days. (S-84).

84. In December 2019, the District issued an updated FBA, identifying the same concerns: school attendance, work completion, and task avoidance. (P-33; S-92).

85. In December 2019, the District convened an interagency meeting, including the parents, District representatives, county children and youth services staff, and representatives from other educational and community-based agencies. (S-95).

86. Over November and December 2019 (through December 20, 2019), the student attended school on five days, three of which involved tardy arrival. (S-84, S-92 at page 5).

87. As a result of the interagency meeting, the student underwent a comprehensive psychological evaluation. (P-32).

88. In early January 2020, District staff met for a meeting prior to the start of the spring semester. (S-93; NT at 859-945).

89. In mid-January 2020, the psychologist issued an evaluation report. (P-32).

90. In the January 2020 psychological report, the student's parents reported that the student was spending up to 20 hours per day in the bedroom. (P-32).
91. The evaluator in the January 2020 psychological report diagnosed the student with autism spectrum disorder, generalized anxiety disorder, and depressive disorder. (P-32).
92. In mid-January 2020, the District drafted a PBSP. (S-94).
93. In late January 2020, the student's IEP team met to revise the student's IEP. The January 2020 IEP included the January 2020 PBSP and called for a staggered attendance schedule where, over time, the student would attend progressively more classes. (P-37; S-96).
94. The placement in the January 2020 IEP indicated that the student would be in the regular education setting for English, mathematics, and an academic support period, as well as weekly sessions with the District social worker. The IEP called for the student's placement in regular education for 59% of the school day. (P-37; S-96).
95. The social worker testified credibly that parents requested that no mention of autism, or autism support, be mentioned to the student. (NT at 637-723).
96. The parties did not agree on the January 2020 IEP.
97. On March 13, 2020, the Commonwealth closed all schools due to the COVID-19 pandemic, a closure which eventually kept schools closed for the remainder of the 2019-2020 school year.

98. Over the period January – March 13, 2020, the student was largely absent from school. (S-84).
99. On March 31, 2020, the District issued a notice of recommended educational placement for the continuation of the student’s programming utilizing distance learning. (S-98).
100. Over the period of April 2020 through the end of the school year, the student did not meaningfully engage in online learning or sessions with the social worker. (S-98; NT at 637-723, 760-857).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness’s testimony. Where particular emphasis was accorded to a witness’s testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

Discussion

The crux of the parties’ dispute is the point at which a school district’s obligation to address a student’s needs related to school-avoidance behaviors gives way to the therapeutic needs of the student and family, based on the student’s mental health needs, where the student will not leave the house, or engage in distance learning or alternative learning.

IDEIA/Denial-of-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)).

Here, the student's mental health needs overwhelm the District's ability to provide programming in a District-based placement. Indeed, those needs have frustrated most placement options and approaches to the student's learning. Simply put, those needs have made the student unavailable for instruction.

In such a situation, a school district is responsible for diligently and creatively addressing the needs of students with school avoidance behavior. It must work with outside agencies to see how such avoidance behavior might be addressed, or see how varied school schedules may be employed, or explore alternative settings where therapeutic services are available, or employ distance learning or cyber strategies to deliver curriculum. Here, the District, and the parents, have considered, pursued, and attempted all of these learning environments.

Taking these in order, it is clear at this point in the student's educational journey that the student cannot work within the confines of physical attendance at the District. Whether on a regular or modified

schedule, and with any degree of services and support, including the involvement of an expert truancy-avoidance agency, the student was simply unable to engage in learning at the District. Unfortunately, at this point the time has passed for the IEP team to consider any District-based placement (at least at this time). The efforts of parents and the District to bring off a successful District-based placement have been laudable, but the student requires programming and placement options outside of attending the District.

The student was educated in a partial hospitalization program in the 2018-2019 school year—a program with a therapeutic component—and, here, the student found the greatest success in attending school and in academics. The parents and student were dissatisfied on various levels with the academics and logistics of the program. And here is one of the tragic inflection points of this record. Had the parents and student heeded the advice of educators and maintained a placement at the partial hospitalization program for the 2019-2020 school year, or had the educators not acquiesced, against their professional judgment, in the request of the family for the student to return full-time to the District in 2019-2020, the trajectory of subsequent events may have been quite different. But, as set forth in the order below, an educational placement with a therapeutic component, which is absolutely necessary for the student to access instruction, is the program/placement which affords the student the most likely opportunity for significant learning in light of the student's unique needs.

The IEP team also has experience with distance learning in terms of delivering instruction to the student—in December 2017/January 2018, the student had a brief and unsuccessful trial of a few days with distance learning through a cyber charter school and, most recently, due to the COVID-19 school closure, the student did not engage in the District's distance learning programming to deliver instruction and social worker

support to the student. Providing instruction and services utilizing distance learning is not an option at this time. It must be pointed out, too, that such an approach to educating the student may not be advisable given the student's inability to leave the physical space of the bedroom.

The option of distance learning (or instruction in the home, where a District instructor would enter the physical environment of the home to deliver instruction as a permanent placement) opens up the necessary consideration of educating the student in the least restrictive environment ("LRE"). The provision of FAPE also requires that the placement of a student with a disability take into account the LRE for a student. Educating a student in the LRE requires that the placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting as close as possible to regular education, especially affording exposure to non-disabled peers. (34 C.F.R. §300.114(a)(2); 22 PA Code §711(b)(11); Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

Distance learning might be designed to afford the student exposure to non-disabled peers, but not in physical environments. (Instruction in the home—the most restrictive of placements—would not provide exposure to any peers). But these are placements that are far along the spectrum from regular education, creating significant LRE concerns. This is noted especially, as discussed in depth below, where this hearing officer has concerns that the student's potential identification as a student with autism has not been adequately assessed in an educational context. Where the record clearly shows that the student has needs in social skills and coping skills where interactions with others lead to frustration and conflict, and an autism identification and the need for programming are distinct possibilities, overly restrictive placements excluding the student from the presence of others is not appropriate.

Granted, an educational program with a therapeutic component is not entirely free of LRE concerns, especially where it might not be affiliated with or have access to regular-education peers. Still, there is some degree of peer interaction in such a program. This mediates the LRE concerns for this student in such a program.

On balance, then, the record clearly supports a determination that the District throughout the student's programming over the period January 2018 through the date of this record has provided a program reasonably calculated to provide the student with FAPE. The District has engaged the parents at all time, been responsive to their requests and the student's needs, and done all that a school district should do in working with the complex issue of school avoidance. It must be pointed out here that the parents, in the same way, have been collaborative and engaged in meeting the needs of the student, working tirelessly (and with admirable hope) to find solutions to the student's school avoidance.

There is one area, however, where the District has failed to provide FAPE to the student, namely in failing to assess the student's potential identification as a student with autism. Early on, and contemporaneously with the District's initial evaluation process in February 2018, the student was placed in a residential hospitalization program. Upon discharge, the program recommended that the student be given an in-depth autism assessment, using a specifically-named instrument that is widely viewed as the most comprehensive and probing assessment for potential needs related to autism. The District had this document and its recommendation and simply failed to follow up.

This is problematic in itself, to receive such a specific recommendation and not act on it (or at least discuss it and explore the reasons for the recommendation). But the District's February 2018 ER contained behavior rating scales from the student's teachers that were rife with clinically-

significant and at-risk ratings that indicate behaviors that are aligned with behaviors often seen in students with autism (for example, atypicality, social skills, and functional communication). Therefore, the District denied the student FAPE in not moving forward with an assessment for the potential identification of the student as a student with autism, a psychological diagnosis which followed in the months to come. Compensatory education will be awarded as a result.

But even though the District denied the student FAPE, there are significant mitigating factors that will impact the amount of compensatory education awarded to the student. The first of these is that the District did not overlook glaring signals that it was not assessing in all areas of potential disability. Indeed, multiple psychological and psychiatric professionals treated and formally evaluated the student over the period in question, and none of them voiced any indication regarding autism. Even the June 2018 private neuropsychological evaluation found no basis for diagnosing autism, in fact explicitly assessing for it and ruling it out.

Also, there is the confounding fact—and it is a fact—that the assessment recommended by the therapeutic program in February 2018 is an intricate and multi-layered assessment involving elements of testing and observations. This is its strength as an instrument. But the student would have been entirely unavailable to engage in the assessment. This does not discount the denial-of-FAPE finding: The District is faulted because it should have at least brought to the IEP team the notion of testing for autism, if not requesting permission to evaluate for it. Should the parents not provide permission, or should the student not engage in the evaluation (which happened in other areas of assessment), the District would have met its obligations. So while this is a mitigating factor in terms of remedy, and it is deeply mitigating, it does not entirely discount it.

Finally, the District social worker testified that once a formal autism diagnosis had been made, and the IEP team was aware of it, parents were adamant that autism not be mentioned in the presence of the student. Again, where the District is faulted for not pursuing data, it cannot be faulted for a situation where employing that data would be ill-received by the family.

In sum, then, the District's failure, from the earliest stages of planning for the student's programming, to understand comprehensively the student's potential needs lead to a finding that compensatory education is owed to the student. But significant mitigating factors will severely limit the extent of that award.

Section 504/Denial-of-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).⁸ 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 District largely met its FAPE obligations to the student through its approach to the student's programming and placements but denied the student FAPE by not evaluating the student for a potential identification of the student as a student with autism.

⁸ 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.

Section 504/Discrimination

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, the District did not act with deliberate indifference toward the student. Even with the denial of FAPE and the procedurally-flawed misunderstanding of the impeding-behaviors question, both outlined above, the record is clear that the District has always sought to understand and to program effectively for the student. Plainly, there was never any indifference toward the student, deliberate or otherwise, on the part of the District.

Accordingly, the District has not acted with deliberate indifference toward the student.

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)).

In this case, the District failed to act on an explicit recommendation for an in-depth assessment for a potential identification as a student with autism, especially where its own data indicated that such an assessment was

certainly in order. There are, however, significant mitigating factors which limit the award of compensatory education.

Therefore, as a matter of equitable balancing between the denial-of-FAPE and these mitigating factors, it is the considered opinion of this hearing officer that the student should be awarded 100 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, 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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By way of dicta, this hearing officer must acknowledge how consideration of this record leaves one with a heavy heart. The parents are earnest and clearly have worked diligently to find a way forward with their child's education in the face of overbearing mental health needs. And the District has risen to the challenge of providing innovative thinking and largely appropriate programming for a complex constellation of needs that, in many ways, fall well outside educational considerations. Most of all, though, one thinks of the struggles and impediments in the life of this young person.

The order below may appear, in places, to be stringent. It is not meant to be burdensome or complicated for either party. But this hearing officer feels it is necessary to be explicit and detailed in structuring a process to bring the student to an appropriate program/placement that gives the student the best chance at future success, at a critical time in the student's education for credit completion and the transition to adulthood.⁹

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⁹ Indeed, the words of the evaluator writing in October 2018 on the cusp of the student's placement in the partial hospitalization program haunt this record: "(The student) could benefit from placement into a school-based partial program and could utilize the external structure/support/therapeutic intervention of such a program to help...gain the skills and reduce...anxiety and depression necessary to attend school on a consistent basis....I would remain concerned that without such a placement at some future date (the student) could require more intensive levels of intervention such as inpatient hospitalization." Sadly, almost two years later, this reality is nearer rather than farther away. (P-41 at page 4).

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Peters Township School District ("District") denied the student a free appropriate public education by not undertaking, even after an explicit recommendation, an assessment of the student's potential identification as a student with autism. The student is awarded 100 hours of compensatory education.

Regarding the programming and placement of the student in the 2020-2021 school year:

- a. Within 15 days of the date of this order, the District shall identify at least three educational programs with a therapeutic component for the student to attend in the 2020-2021 school year. The District shall communicate and coordinate as necessary to meet the application requirements of the identified programs, including the provision of education-related documents, such as District evaluations/re-evaluations, IEPs, and FBAs. The District shall communicate and coordinate as necessary with community-based agencies, or county children and youth services, or other providers, to obtain any mental health documentation to meet the admission requirements of the therapeutic aspects of the identified programs. The programs shall be made to understand that the District intends to enroll the student in the program for the 2020-2021 school year.
- b. This order shall serve as authorization for release by the District to any potential program any educational

document requested by, and required for, the program's admissions process.

- c. To the extent that parents' and student's authorization is necessary for release of mental health documents requested by, and required for, the program's therapeutic component, and this order is acceptable to any agency or service provider who may have such documents in its possession, this order shall serve as authorization for release of that documentation by that agency/provider. Where this order will not serve that purpose in the eyes of the agency or service provider and the parents' and/or the student's authorization is required for release of these documents, the parents and/or student shall provide the releases forthwith upon being informed through the written exchange of counsel of the need for such releases.
- d. Within 30 days of the date of this order, or as soon as practicable as the admissions procedures of the programs allow, the student's parents shall be informed, in writing by exchanges between counsel for the parties, of the program(s) where the student has been accepted. Within 10 business days of being informed of the program(s) where the student has been accepted, the parents shall inform the District, in writing by exchanges between counsel for the parties, of the program they select for the student.
- e. If, within 10 business days of the date of communication by the District to the parents of the potential program(s), the parents reject all programs, decline to select any

program, or do not communicate their choice through counsel, the District shall select the program for the student.

- f. The entire cost of the program, including transportation to and from the program and any therapeutic component, shall be borne by the District. The District shall bear the cost of the entire program because access to therapeutic services is necessary for the student's access to educational programming, both generally and at the program specifically.
- g. Within 30 days of the student's admission to the selected program, the student's IEP team shall meet to finalize an IEP for educational programming at the program.
- h. Additionally, once the student has been enrolled in a program, the District shall fund a comprehensive independent autism evaluation to be performed in the educational environment at the program. Whether this independent evaluation is performed by a qualified employee of the program or an independent evaluator unaffiliated with the program is left to the discretion of the District. The record review, input, observations, assessments, testing, consultation, scope, details, findings, recommendations, and any other aspect of the independent autism evaluation shall be determined solely by the independent evaluator. Once the independent autism evaluator issues a report, the District shall convene an IEP team meeting to consider the report and any educational recommendations contained therein. The

District shall arrange for the evaluator's participation in that IEP team meeting, in person or by phone as may be convenient for the evaluator, and shall bear the rate or fee for the evaluator's attendance at that meeting.

- i. Furthermore, the District shall be responsible for communicating with the program for daily attendance information for the student. Based on this data, the District shall maintain a 30-school-day rolling average of daily attendance at the program. If the 30-school-day rolling average of daily attendance drops below 66%, the District shall convene an IEP team meeting to consider whether a residential hospitalization program is appropriate for the student.
- j. To the extent that no partial program with a therapeutic employment accepts the student, the District shall undertake a similar process as outlined in paragraphs (a) – (h) above for a residential placement with a therapeutic component.
- k. Where parents and/or the student refuse(s) to provide necessary releases outlined in paragraph (c) above, for the mental health documentation requested by, and required for, the admissions processes of the programs' therapeutic component (whether a partial or residential program), the lack of providing such releases may be considered by the District to be a lack of meaningful participation in the IEP and related special education processes, amounting to a material dis-engagement from those processes. At that point, the District's FAPE obligation will be met by

implementing the January 2020 IEP at the District and, to the extent that truancy or other provisions of the Pennsylvania School Code of 1949, as amended, apply to the student's lack of attendance, another tribunal with competent jurisdiction may consider, at its discretion and due to dis-engagement from the special education process, the student's status as a special education student to lie outside of its considerations as to any issue brought before said tribunal.

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

s/ *Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire
Special Education Hearing Officer

07/21/2020