

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

24086-20-21

Child's Name

C.H.

Date of Birth

[redacted]

Parent

[redacted]

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

03/15/2021

Introduction

This special education due process hearing concerns the educational rights of C.H. ("student"), a student who resides in the Bangor Area School District ("District").¹ The student is identified as a student who qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student with an intellectual disability as the result of Down syndrome. The parties disagree over the student's programming at the District, particularly regarding the student's behavioral needs in the educational setting.

The student's parent claims in her complaint that the District denied the student a free appropriate public education ("FAPE") through various acts and omissions related to related to the student's behavior-related programming at the District in the 2019-2020 school year and the current 2020-2021 school year, respectively the student's 5th and 6th grade years. 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

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").

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 in favor of the parent.

Issues

1. Has the District provided the student with FAPE over the period of the student's 5th and 6th grade school years?
2. Over this period, 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?

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

General Educational Background

1. Prior to enrollment at the District, the student attended early intervention programming through the local intermediate unit. (Parent Exhibit ["P"]-2; Notes of Testimony ["NT"] at 58-116).
2. In March 2014, the student was enrolled in the District, in anticipation of transitioning to the District in the next school year. (P-5).
3. In March 2014, the District performed a functional behavior assessment ("FBA"). The behaviors of concern were listed as eloping to avoid non-preferred tasks and non-compliance with directives. (P-6; P-10).
4. In May 2014, the District evaluated the student. The evaluation report ("ER") contained information about the student's needs for behavior support for elopement and non-compliance and identified the student as a student with an intellectual disability and speech and language ("S&L") impairment. (P-4).

2018-2019 / 4th Grade⁴

5. In March 2018, in the spring of 3rd grade, the student had been evaluated. (School District Exhibit ["S"]-4; P-26).
6. The March 2018 ER noted that elopement was less of a concern in the student's behaviors of concern but that the student was developing aggressive behaviors toward peers and adults (approximately 2-5 times per week). (P-26).
7. The student continued to be eligible as a student with an intellectual disability and S&L impairment. To address the student's expressive language needs, the District recommended that student was provided with an iPad for communication needs. (P-26; S-33).
8. In the 2018-2019 school year, the student was in 4th grade. (P-9, P-26).
9. In September and October 2018, various iPad-based programs were trialed for the student's communication needs. (P-36; NT at 537-560).
10. In 4th grade, the student exhibited progress in goals for use of the iPad for communication, for decreasing aggression, and for increasing compliance. (S-7).
11. In 4th grade, the student exhibited significant aggressive behaviors toward peers and staff and occasionally eloped/attempted-to-elope. The student also engaged in property destruction [redacted].

⁴ The scope of the parent's claim is for the student's 5th and 6th grade years. Evidence is included here for the 4th grade year for context on the District's knowledge of the student's behaviors as the student entered 5th grade.

Three times, on October 5th, March 20th, and April 12th, the student disrobed, [redacted]. (S-8).

12. In March 2019, the student's individualized education program ("IEP") team met to revise the student's IEP. The IEP included goals in decreasing aggression, decreasing non-compliance, and use of the iPad to request breaks before leaving a designated area (a goal that implicitly addressed elopement). The IEP included a positive behavior support plan ("PBSP") to address the student's aggression, non-compliance, and elopement. (P-34, P-35).
13. In early April, the student engaged in significant acting-out behavior that required a passive restraint to protect the student and classmates. (S-8 at page 133; S-11, S-12).
14. In late April 2019, the student's IEP team met to discuss the student's IEP in light of a transition to a District middle school in the upcoming 2019-2020 school year. (S-13).
15. The April 2019 IEP meeting took place on April 25, 2019. By that time, the student had [disrobed] three times in the school environment. (S-8 at pages 30, 118, 140; S-13).
16. The student's father approved the April 2019 IEP for implementation in 5th grade at the middle school. (S-13).

2019-2020 / 5th Grade

17. In the 2019-2020 school year, the student transitioned to a District middle school for 5th grade. (NT at 58-116, 122-156, 264-343).

18. The student's special education teacher for 5th grade testified that she reviewed the student's progress monitoring and daily behavior sheets (which provided detailed information on the aggression, non-compliance, elopement, and dis-robing incidents) from 4th grade. (NT at 264-343).
19. Through mid-September, the student continued to exhibit the behaviors that had been most prevalent in 4th grade—aggression toward peers and adults, and non-compliance. The student also eloped, or attempted to elope, on multiple occasions. (P-48 at pages 1-19).
20. In late September, the student traveled out of state to attend the funeral of a family member. (P-47; P-48 at pages 20-23; NT at 58-116).
21. Upon returning from the funeral, on the first day again attending the District on September 25th, the student [disrobed]. On September 27th, the student [disrobed]. On October 1st, the student twice disrobed—[redacted]. (P-48 at pages 24, 27, 28).
22. In late September 2019, the District engaged in a restraint to protect the student from eloping. (P-45; S-15; NT at 264-343).
23. In October 2019, the student's IEP team met to discuss the elopement incident and the restraint. A behavior goal to address explicitly the student's elopement was added to the IEP. (S-16, S-17; P-39; NT at 58-116, 264-343).
24. At the October 2019 IEP meeting, the student's IEP team discussed the student's dis-robing at school. The parent testified that the student did not similarly dis-robe at home; a regular education

teacher who attended the IEP meeting testified that the parent shared at the meeting that the student sometimes dis-robbed at home. The teacher's testimony is credited. (NT at 58-116, 232-253).

25. Prior to the IEP meeting, the parent discussed the dis-robing with District employees. Parent suggested that the student should be forcibly re-dressed when dis-robbed; the District employees protested that this was an untenable response. (NT at 58-116, 122-156; P-48 at page 29).
26. Coming out of the October 2019 IE meeting, there was no behavioral intervention, FBA, or goal formulated to address dis-robing. (P-39; S-14, S-16, S-28; NT at 264-343).
27. Over the course of September and October 2019, the student removed shoes and socks on four occasions, on September 9th, September 16th, October 23rd (two incidents), and October 29th. (P-48 at pages 9, 17, 48, 55).
28. Parent's counsel throughout the hearing often presented removal of shoes and socks in the same light as dis-robing. The parent's expert witness on behavior testified that she considered the behaviors to be qualitatively different. (NT at 639-658, 669-726).
29. In November and December 2019, the student did not engage in any removal of shoes and socks, or in dis-robing. (P-48).
30. Throughout the period September – December 2019, the student consistently exhibited aggression toward peers, especially, and adults. The student also occasionally engaged in property destruction and eloped or attempted to elope. (P-48 at pages 1-91).

31. In November 2019, the District contracted with an outside agency for consultation in psychological and behavioral services. (P-55, P-67; NT at 804-831).
32. In December 2019, the agency visited the District to review, generally, the services that might be required across the District and, specifically, to review the potential services to be delivered to the student. The agency representative recommended after one December visit that the District pursue a FBA for the student. (NT at 804-831).
33. In early January 2020, just after returning from the winter break, the District requested permission to re-evaluate the student as part of the student's required biennial evaluation schedule. The student's mother provided permission approximately one month later, returning the executed form in the first week of February. (S-19).
34. In late January 2020, the student's removal of shoes and socks became more frequent. The student removed shoes and socks on five days, January 24th, February 11th, February 12th (two incidents), March 3rd, and March 10th (two incidents). (P-48 at pages 111, 130, 131, 148, 155).
35. In late January 2020, the student's dis-robing became more frequent. The student [redacted] dis-robbed, [redacted], on seventeen occasions: January 28th, February 5th, February 10th, February 12th, February 13th, February 20th (seven incidents), February 21st, February 24th, February 25th (two incidents), February 26th, February 27th, February 28th (attempted dis-robing), March 3rd, March 5th, March 6th, March 9th (attempted dis-robing), March 11th. (P-48 at pages 115, 124, 129, 131-132, 135-138, 140, 142, 144, 148, 151-152, 154, 156).

36. When the student dis-robed in the classroom, the student's teachers or aide immediately moved to shield the student from view with large boards which were kept at hand in the classroom. When the student dis-robed in a hallway or public area, the student was also shielded; the area was cleared, or an announcement was made to keep other students in classes until the student was in a private area. (NT at 122-156, 264-343, 347-384).
37. In the first week of March 2020, the District requested permission to re-evaluate the student in light of the dis-robing behavior. (S-20, S-38).
38. In mid-March 2020, Pennsylvania schools closed as the result of the COVID-19 pandemic, a closure which ultimately kept the District closed for the remainder of the 2019-2020 school year.
39. Parent never provided permission for the District to undertake the behavioral re-evaluation. (S-20; NT at 58-116, 162-192, 264-343).
40. Over the period January – March 2020, the student consistently engaged in aggression most days, was non-compliant on many days, and occasionally eloped. (S-14, S-28, P-48 at pages 93-157).
41. In early April 2020, the District issued its biennial re-evaluation report ("RR"). (P-42).
42. The April 2020 RR recommended that the student continue to be identified as a student with intellectual disability and S&L impairment. (P-42).
43. The April 2020 RR indicated that "removal of clothing", in addition to certain other behaviors including the aggression, non-

compliance, and eloping, were behaviors of concern. (P-42 at pages 13, 18).

44. The April 2020 RR indicated that “the (student’s) functional behavior assessment [FBA] was reviewed for this [RR].” On this record, that was the March 2019 IEP and PBSP, documents which themselves had not been re-visited in some time. (P-42 at page 19—parenthetical added, bracketed material in the original; P-34, P-35).
45. In April 2020, the student’s IEP team met to revise the student’s IEP. (P-41).
46. The current levels of functional performance noted the behaviors of concern but did not include elopement as a behavior of concern and did not include progress monitoring data on the elopement goal. (P-41 at page 12).
47. The student’s behavioral needs in the April 2020 IEP no longer included elopement, even though the student had most recently attempted elopement on February 20th and March 3rd. (P-41 at page 16; P-48 at pages 135, 148).
48. The April 2020 IEP contained numerous S&L goals (including increased use and dexterity of the iPad), and academic goals. The IEP contained behavior goals for aggression and non-compliance. The IEP did not contain goals for elopement or dis-robing. (P-41 at pages 23-28).
49. In 5th grade, the student had a 1:1 aide as part of programming, but this was not indicated on the April 2020 IEP. (P-41; NT at 347-384).

50. The parent was invited to, but did not attend, the April 2020 IEP meeting. (S-23; NT at 58-116, 264-343).
51. The District-based members of the IEP team drafted a PBSP. The PBSP included goals and strategies to address aggression and non-compliance. The PBSP, unlike the IEP, contained goals and strategies to address elopement. (S-35).
52. The PBSP did not include any goals or strategies, or mention, of dis-robing. (S-35).
53. The District emailed the April 2020 IEP to the parent, who returned signature verification and approval of the programming. (S-24, S-25).
54. The student, as with all District students, completed the 2019-2020 school year with distance learning. (P-49).
55. Although the student was eligible for extended school year programming in the summer of 2020, the parent declined to have the student participate. (S-26).

2020-2021 / 6th Grade

56. At the outset of the 2020-2021 school year, the student's 6th grade year, the April 2020 IEP was in place. (P-41).
57. The District returned to in-person instruction for the 2020-2021 school year.
58. In early September 2020, the parent filed the complaint that led to these proceedings. (Hearing Officer Exhibit-1).

59. Over the course of September and October 2020, the student continued to exhibit the behaviors that had been most prevalent in the student's educational history—aggression toward peers and adults, and non-compliance. These behaviors were slightly diminished but were still common, especially aggression. (P-57 at pages 1-44).
60. Over September and October, the student did not elope or attempt to elope, or attempted to elope. (P-57 at pages 1-44).
61. Over the course of September and October 2020, the student removed shoes and socks on three occasions, on September 10th, September 15th, and October 7th. (P-57 at pages 4, 8, 26).
62. In mid-September 2020, the student dis-robbed three times, on September 14th, September 18th, and September 22nd. In October, the student dis-robbed once, on October 30th. (P-57 at pages 7, 11, 14, 44).
63. In October 2020, the parent obtained two expert reports, one from a special education specialist and one from a behaviorist. (P-69, P-70; NT at 471-528 639-658, 689-725).
64. Parent's October 2020 behavior report noted that the student had not had a FBA observation/data-gathering since the student transitioned to the District in kindergarten and most especially for the shoe-removal and dis-robing behaviors. The record in its entirety supports this assertion. (P-4, P-6, P-70; NT at 639-658, 669-726).
65. The student did not remove shoes and socks, or dis-robe, in November 2020. (P-57; Joint Exhibit ["J"]-1).
66. In December 2020, the student removed shoes and socks once, on December 16th. (J-1 at page 29).

67. In December 2020, the student dis-robed six times, December 4th, December 8th, December 9th, December 10th, December 15th, and December 18th (six incidents). The student dis-robed once in January 2021. (P-57 at pages 55, 58, 60, 64; J-1 at pages 17, 28, 42; S-39 at page 3).⁵
68. In early December 2020, the District again sought permission to reevaluate the student for dis-robing behavior, re-issuing the March 2020 permission-to-reevaluate. The student's father granted consent; the student's mother, who brought the complaint in this matter, did not. (S-29; NT at 264-343).
69. In February 2021, as the hearing neared its end in the final sessions, each party undertook a FBA, the parent through the behaviorist who issued a report in October 2020 and the District through the outside agency with whom it had contracted in the winter of 2019/2020. (P-70a; S-39; NT at 639-658, 669-726, 731-794, 804-831).⁶

⁵ The last of the daily behavior sheets in the record is January 20, 2021. The FBA of the behavior specialist retained by the District, however, contained an interview with student's special education teacher, who reported that the student had dis-robed eleven times in January 2021. This appears to be an error, most correctly read "as of January 2021". Also, the December 4th dis-robing came after the student's shirt had become wet. It is included here, although that context is different from the other instances of dis-robing on this record which were unrelated to an external event such as this. (J-1, generally and at page 17; S-39 at page 3).

⁶ Here, the FBAs did not take place on equal footing.

The behavior specialist retained by the District is not a District employee. She had not previously worked with the District in the 2020-2021 school year, and her work in preparing the FBA was the only time she was present on school grounds or working with a District student. She was not asked to provide any pre-attendance medical information or documentation. At the door of the school building on each of the three days she observed the student, she was asked a series of pandemic/health-related questions and was then allowed to access to the building and the student. She conducted her FBA observations live over multiple sessions in the school setting.

The parent's behaviorist was identically situated. She is not a District employee. She had not worked with the District in the 2020-2021 school year, and her work in preparing the FBA would have been the only time she was present on school grounds or working with a

70. Based on her observations and FBA, the behavior specialist retained by the District recommended that the student's PBSP include strategies to address aggression, non-compliance, dis-robing, property destruction, and eloping. (S-39; NT at 731-794).
71. Based on her more limited observations and FBA, the parent's behaviorist included concrete PBSP elements to address non-compliance, elopement, and tantrum. (P-70a, P-70b; NT at 69-658, 669-726).

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.

District student. She was not asked to provide any pre-attendance medical information or documentation. However, unlike the SD evaluator, who was invited to campus and simply asked a series of questions at the door before accessing the building, the parent's evaluator was told she could not enter the building or observe the student in the educational setting due to pandemic-related health concerns. She was denied access to the building and the student, and conducted her FBA observations via video.

On this record, both individuals were identically-situated. In one instance, one individual was entirely barred from live access based on health concerns; in the other instance, one individual was granted live access based on answering a series of health questions at the door. It is incongruous, at the least, and ultimately makes no sense to consider pandemic-related, building-access issues differently where identically-situated individuals are completing the same task. The substance of such differing treatment will be taken up in the Section 504/Discrimination subsection below.

Discussion

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); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Here, the crux of the dispute is whether the District denied the student FAPE in failing to address, or have a plan in place to address, the student's dis-robing. At the outset, it must be pointed out that the District was always cognizant of the student's behavioral needs in terms of aggression, non-compliance, and elopement. The student's PBSP accounted for these things (although the student's elopement appeared to fall off the Districts radar in the April 2020 programming), and the student's IEPs largely contained appropriate goals to allow for monitoring progress in these areas of behavioral concern.

But the District wholly neglected to make part of the student's programming any strategy, goal, monitoring for the student's dis-robing (and, to an extent, the less problematic behavior of shoes-and-socks removal). To be sure, the student's behaviors in these areas are contoured, both in terms of need and chronologies, and that impacted the District's thinking. The record is clear that the student did not exhibit dis-robing in the student's early school years at the District. It appears that the student began to dis-robe only in 4th grade (the 2018-2019 school year). Over the course of the year, the student dis-robed three times—once each in October, March, and April. It is the District's position that these isolated incidents of dis-robing were so non-contiguous in time that programmatic intervention or follow-up was not warranted. This is a defensible argument. As much as there was, obviously, an impact on the educational environment, nothing to that point in the student's education indicated that such behavior would be ongoing or needed to be formally addressed. Yet in the transition to the middle school for the upcoming school year, it was still behavior that was known to the District.

This is not a generalized assertion of knowledge on behalf of the District. The student's special education teacher who began to work with the student in 2019-2020 (the student's 5th grade year) testified that she reviewed the daily behavior sheets from the prior school year, such that she knew definitively that the student had dis-robed multiple times in 4th grade.

Therefore, when the student dis-robbed on three days over the course of a school-week (September 25th, September 27th, and twice on October 1st), the District should have been on notice that dis-robing was a potentially growing concern. But the District cannot be assigned explicit knowledge, or purported knowledge, that it needed to address dis-robing as a behavior of concern. Even though this cluster of behaviors emerged, the District's position again has merit that the impact of the death of a family member right before this period (the student had only just returned from the funeral) played a role in how it gauged the behavior. That explanation is accepted in the weighing of the evidence here.

But 'isolated incidents' and 'stressful family circumstances' fail to explain or justify the District's lack of response when the student dis-robbed once on January 28th, a week later on February 5th, and then three of four school days over February 10th, February 12th, and February 13th. It is at this point that the District had definitive, concrete knowledge that the student was engaging in a pattern of dis-robing behavior, and a FBA was necessary to understand the emergence of this behavior. This process should have been initiated by requesting permission to re-evaluate the student explicitly for this behavior at this point. Indeed, the student went on just after this to dis-robe seven times in one day a week later, on February 20th, and again on February 21st, and then each day over February 24th – February 27th (twice on the 25th), with attempted dis-robing on February 28th. As of mid-

February 2020, then, the District knew that dis-robing was a behavior that needed to be formally investigated and addressed.

And re-evaluation of the student was certainly in the air, as the student was in the midst of the student's biennial re-evaluation process over January and February 2020. The dis-robing continued in early March, with five incidents on March 3rd, March 5th, March 6th, March 9th, and March 11th.

Fortunately, the District finally realized that dis-robing needed to be investigated and, in early March, requested permission to re-evaluate the student specifically for this behavioral need. Therefore, since approximately three weeks lapsed between mid-February when the District was on notice that it needed to re-evaluate this behavior and the request for permission to re-evaluate, the District's request was timely (or, perhaps, more accurately stated as "not untimely").

Parent did not provide permission to re-evaluate the student and, of course, at that point in mid-March pandemic-related events overwhelmed the world and in-person schooling in Pennsylvania ceased for the remainder of the school year.

In sum, all of this is to say that prior to February 2020, the District knew about the student's dis-robing but was not in a position where its FAPE obligation was triggered in that regard. By mid-February 2020, however, the District was definitively on notice that the student's dis-robing behavior required investigation and programming. By the first week of March, it had

requested permission to re-evaluate the student toward that end. But parent did not provide the necessary permission, and by mid-March the COVID-19 pandemic had overtaken events. There is no denial-of-FAPE to this point in the chronology of parent's claim.

But there is a sense of languor in the District's response to the issue of dis-robing. In the April 2020 RR, it is mentioned as a behavior of concern. This is repeated in the April 2020 IEP, but there is no mention of the number or nature of the incidents, or even that permission had been requested and the District was awaiting that permission. The PBSP makes no mention of dis-robing whatsoever. While the District's hands were tied because it had not received permission to re-evaluate the student, and a re-evaluation itself would have been short-circuited by the school closure, a reader of the April 2020 RR, IEP, and PBSP would have no sense that the student had disrobed in twelve of the twenty school days preceding the school closure (seven times on one of those days and twice on another).

This sense of languor carried over to the 2020-2021 school year (the student's current 6th grade year) and lays the foundation for the finding of a denial of FAPE. Coming into the school year, the District was on notice that it needed to assess and to program for the student's dis-robing behavior. It should have re-issued its permission to re-evaluate the student in this regard, to make sure that such programming could be put in place. But it did not, and early on in the school year, on September 14th, September 18th,

and September 22nd, the student was dis-robing. Both of the FBA processes which ultimately unfolded in February 2021 gathered data over multiple observations, as well as interviews with educators, such that by the end of September 2020, the District should have issued a FBA and the IEP team should have been discussing the nature of the dis-robing behavior and strategies to address it. And like aggression and non-compliance, the IEP team should have been discussing the potential inclusion of a goal, or at least data-gathering, regarding dis-robing. And to the District's not-unfounded assertion that the parent did not provide permission to re-evaluate and was often dilatory with communications, or not in attendance at meetings, it could have approached the student's father for the necessary permission (as it did three months later in December 2020).

Overall, then, it is the legal conclusion of this hearing officer that the District denied the student FAPE as of the end of September 2020 by not having performed a FBA and engaged the student's IEP team for consideration of a PBSP and potential goal-based IEP revisions to address dis-robing. Compensatory education will be awarded.

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).⁷ 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 denied the student FAPE as of the end of September 2020 by not having performed a FBA and engaged the student’s IEP team for consideration of a PBSP and potential goal-based IEP revisions to address dis-robing.

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

⁷ 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.

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. Above, the word “languor” was used to describe the nature and pace of the District’s response to the student’s dis-robing behavior. In the view of this hearing officer, this is an accurate description. But at no time was the District indifferent to any of the student’s behavior needs, including dis-robing. Employees of the District were always attentive to the student when the student began to dis-robe, acting decisively to shield the student from view and to move the student to a private area. In that, there is no fault to be found and the record is clear—the District through its employees were attentive to the student’s dis-robing even where they took no steps to formalize their understanding or develop programming.

Also above, it was noted that the District treated the parent’s behaviorist differently than it treated its contracted behavior specialist, employing pandemic-related, health-based restrictions on the former while allowing the latter free access to the building, even though both individuals were identically situated. This marked inconsistency in its own protocols

makes no sense. But it does not amount to deliberate indifference toward the student, or retaliation against the parent, as the behaviorist was still placed in a position to provide probative evidence for the hearing, evidence for which reimbursement is owed. Therefore, in terms of substantive evidence and remedy, neither the student nor the parent are prejudiced by the District's bifurcated stance.

Accordingly, the District has not discriminated against the student on the basis of the student's disability status, or retaliated against the parent for pursuing her interest in due process.

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 has denied the student FAPE as of the end of September 2020 by not having performed a FBA and engaged the student's IEP team for consideration of a PBSP and potential goal-based IEP revisions to address dis-robing. The nature of this denial-of-FAPE, however, is slippery in terms of a compensatory education remedy. Each incident of dis-robing is discrete and does not necessarily align to a per-incident basis for remedy. Too, the chronology of the deprivation is somewhat focused. But the nature

of the behavior is so serious, and of such an intimate nature, that the District's failure to assess the behavior and address it through programming is not a tenable position to excuse without remedy.

Therefore, it is the considered opinion of this hearing officer that 100 hours of compensatory education is an equitable remedy for the denial of FAPE on this record.

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 in writing to vary the amount of and/or the 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 Bangor Area School District denied the student a free appropriate education by failing to timely assess, and to program for, the student's dis-robing behavior in the educational setting.

The student is awarded 100 hours of compensatory education.

Furthermore, given the impact that parent's behaviorist's October 2020 report—the first such report to probe in-depth the student's history of dis-robing and to recognize the concrete need for programming—the school district shall reimburse the parent for the cost of that report, as testified to by the behaviorist, as well as any fee or charge assessed to the parent for that testimony.

Finally, to the extent that the student's IEP team has not met to consider the February 2021 FBA documents in the design and implementation of a PBSP and IEP revisions, the IEP team shall do so within 10 school days of the date of this order. As part of those IEP team deliberations, the student's IEP shall be revised to include, as a related service, an indication that the student shall have a 1:1 aide daily across all settings in the middle school.

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

03/15/2021