

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

CLOSED HEARING

ODR File Number 20362-17-18

Child's Name: C. B.

Date of Birth: [redacted]

Parent:

[redacted]

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School District:

Mid Valley School District
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Hearing Officer: Michael J. McElligott **Date of Decision:** 12/4/2018

INTRODUCTION

Student (“student”)¹ is a student in the late elementary grades who resides in the Mid Valley School District (“District”). The parties agree that the student currently qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² as a student with health impairments and, potentially, specific learning disabilities.

Parent claims that the student was denied a free appropriate public education (“FAPE”) in the 2016-2017, 2017-2018, and current 2018-2019 school years related to alleged deficiencies in the District’s evaluation process/report and the student’s programming over that period. Parent seeks a compensatory education as a remedy for parts of the 2016-2017 and 2016-2017 school years.³ After unilaterally enrolling the student in a private placement in December 2017, the parent seeks tuition reimbursement for the

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 §§14.101-14.163 (“Chapter 14”).

³ Parent claimed a compensatory education remedy for multiple school years prior to March 2016—namely, the 2013-2014, 2014-2015, and 2015-2016 school years. (Hearing Officer Exhibit [“HO”]-1). Because parent’s claim was based on alleged actions/omissions that arose at a point prior to two years before the filing of parent’s complaint (prior to March 2016), the District sought to limit evidence on those claims based on the holding of *G.L. v. Ligonier Valley School Authority*, 801 F.3d 602 (3d Cir. 2015). (HO-2, HO-3). The hearing officer conducted an evidentiary session at the outset of the hearing to develop evidence related to whether parent knew or should have known (“KOSHK”) of the actions/omissions over the disputed KOSHK period which form the basis of parent’s complaint. (HO-4, HO-5, HO-6, HO-7). The hearing officer issued an interim ruling, based on this KOSHK evidence that the parent, based on the nature of communications with the District and with others, by January 2016 at the latest, knew or should have known of the actions/omissions, which formed the basis of her complaint. (HO-8). Therefore, claims based on actions prior to March 2016 were untimely, and the denial-of-FAPE evidentiary record was limited to a period as of March 2016 and thereafter.

remainder of the 2017-2018 school year and the current 2018-2019 school year. Analogously, parent asserts these claims and request for remedy under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).⁴

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 in favor of parent.

ISSUES

Did the District deny the student FAPE during the 2016-2017, 2017-2018, and/or current 2018-2019 school years?

If so, is remedy owed to the student, and in what form?

Did the District discriminate against the student, acting with deliberate indifference toward the student in light of the student’s disabilities?

FINDINGS OF FACT

Evaluation & Programming Background

1. The student began attending District schools in kindergarten in the 2013-2014 school year. (S-26).
2. In March 2014, in the student’s kindergarten year, the District evaluated the student. The March 2014 evaluation report (“ER”) indicated through parental input that the student was medically diagnosed with [redacted] Syndrome, a chromosomal condition “often characterized with (certain

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”).

physical features), vision and hearing deficits, delayed physical maturation, social and emotional deficits and difficulty with imagining spatial relations between objects, reading social cues, and math problem-solving” as well as a diagnosis from an outside agency of attention deficit hyperactivity disorder (“ADHD”). (S-3; HO-8).

3. The March 2014 ER concluded that the student did not have a disability under the terms of IDEIA. (S-3; HO-8).
4. In October 2014, in the student’s 1st grade year, the student was re-evaluated. The District continued to decline to identify the student as a student with a disability under the terms of IDEIA. (S-6; HO-8).
5. Inexplicably, the District evaluator, however, recommended that the student be considered for Section 504 accommodations as a student with a disability under the terms of Section 504. The evaluator opined that the major life activity of “thinking” was substantially limited. (S-7; HO-8).
6. In November 2014, the District identified the student as having a disability under the terms of Section 504, a disability that required accommodations for “thinking” under Section 504 through a Section 504 plan. (S-7, S-8; HO-8).
7. In December 2015, in the student’s 2nd grade year, the student was re-evaluated. The District continued to decline to identify the student as a student with a disability under the terms of IDEIA. (S-14; HO-8).
8. In January 2016, the student’s Section 504 plan was updated to indicate substantial impairments in “thinking” and “hearing”. (S-15; HO-8).

2015-2016 / 2nd Grade

9. The January 2016 Section 504 plan was the programming in place when the denial-of-FAPE evidentiary inquiry begins as of March 2016. (S-15; HO-8).
10. In January 2016 Section 504 plan recognized the following medical diagnoses with educational components: [redacted] Syndrome, Asperger Syndrome, ADHD, conductive hearing loss, as well as struggles with anxiety. (S-15).
11. The January 2016 Section 504 plan noted longstanding problems, since kindergarten, with elevated scores in “internalizing problems, particularly anxiety”. (S-15 at page 1).

12. The January 2016 Section 504 plan noted that the student was rated as outside age-appropriate expectations for social-emotional understanding, emotional expression/regulation of emotion, and fear & anxiety. (S-15).
13. The January 2016 Section 504 plan noted that while the student's difficulties with anxiety and social understanding "appear to manifest to a larger degree when in the home and community setting, the team agrees with the possibility that some of the frustration experienced by (the student) may be related to (the) school day." The Section 504 plan indicated that there was no perceived problems in the school environment. (S-15).
14. The January 2016 Section 504 plan noted: "(The student's) thinking is the major life activity substantially limited by...anxiety and medical diagnoses. It is reported that (the student) replays the event of (the) day and (the student) perseverates on it. Additionally, (the student) is very literal,...catastrophizes events, and...internalizes...reactions. (The student) can become fixated on a topic and will cause (the student) much worry." (S-15 at page 2).
15. Accommodations/modifications to regular education instruction and services in the January 2016 Section 504 plan include warnings before transitions and schedule changes, regular end-of-day organization check-ins, daily communication log between teacher/parent, further explanation of concepts and directions, difficulty with inferential thinking, difficulty with use of metaphors, notations of stress or anxiety, notations of social difficulties, and "regular work with the school counselor...to discuss the moments of (the) school days that have caused (the student) distress or confusion". (S-15 at page 2).
16. In the 2015-2016 school year, the student was absent for 21 school days. The student had exhibited consistently increasing absences over the years at the District (9 absences in 2013-2014 [kindergarten], 15 absences in 2014-2015 [1st grade]). (S-26 at pages 1-3).
17. The teacher's daily communication with the student's parent indicated generally positive notes, but at various points over the 2015-2016 school year, the student was restricted from playing with a peer during indoor recess, use of a math fact sheet, parental concerns about mathematics, negative peer interaction that needed to be noted, and continual references to listening attentively and being 'chatty' during class. (Parent's Exhibit ["P"]-1 at pages 41, 51, 52, 58, 65, 67).

18. In March 2016, the student was involved in an incident during gym class where the student [redacted] and became locked in [a space]. (P-1 at page 61; Notes of Testimony [“NT”] at 538-540).

2016-2017 / 3rd Grade

19. In October 2016, the student’s Section 504 plan was revised to indicate that the student was now utilizing [redacted sensory equipment]. The student also scored one grade level behind, at the 2nd grade level, on a District math curriculum screening assessment and began to receive Title I math support. (S-17).
20. For the entire 2nd grade year, there was no daily communication from the student’s teacher. The teacher wrote a total of five comments in the communication log: On November 14th, the teacher noted that the student was not listening well, was distracted and required a large degree of re-direction; on February 23rd, the teacher noted that the student drew on another student’s chair during class; and over May 15th – 17th, the teacher commented on the student having difficulty with grammar/spelling but generally positive comments. (P-2, generally and at pages 47, 59, 71).
21. In January 2017, the student’s mother sent a letter to the principal of the student’s school, indicating concerns with multiple struggles of the student, including frequent visits to the school nurse, peer issues, anxiety, and academic struggles, especially in mathematics. The student’s mother asked for an evaluation of the student. (S-18).
22. The District requested permission to evaluate the student and, on February 2, 2017, the District received the parent’s permission to evaluate the student. ((S-19).
23. On May 8, 2017, ninety-five days after the District received permission to evaluate the student, the District issued its ER. (S-20).
24. Parental input in the May 2017 ER indicated, among other things, that the student dislikes school, is easily frustrated with schoolwork, and especially struggles in mathematics. (S-20).
25. Input from the student’s teacher and a school counselor in the May 2017 ER indicated that the student was performing well academically and did not indicate any difficulty with social/emotional/behavioral needs. (S-20).

26. The May 2017 ER repeated the cognitive, achievement, and speech & language results from the December 2015 ER previously performed by the District. None of these assessments were updated. (S-20).
27. At the time the May 2017 ER was issued, the student was in the fourth marking period of 3rd grade. The student's grades were uniformly in the 90s across all academic areas (except for an 89% in grammar in the third marking period). In mathematics, however, the student's grades across the first three marking periods were 84%, 82%, and 78%. The report made note of the decline in the student's grades in mathematics. (S-20 at pages 11, 24).
28. The May 2017 ER indicated that the student qualified for Title I math support at the beginning of the school year, as of September 6, 2016. The student's baseline in computation was 2.3 digits correct per minute. The expected weekly improvement in computation was .5 digits correct per minute. By April 3, 2017 (27 instructional weeks later, accounting for the holiday weeks of Thanksgiving and winter break), the student had fallen short of expected improvement (15.8 digits) and scored only 7.3 digits correct per minute. (S-20 at page 13; P-2 [for week's calculation]).
29. The student's baseline in application was 5 digits correct per minute. The expected weekly improvement in application was .25 digits correct per minute. By April 3, 2017 (27 instructional weeks later, accounting for the holiday weeks of Thanksgiving and winter break), the student had fallen short of expected improvement (11.25 digits) and scored only 9.0 digits correct per minute. (S-20 at page 13; P-2 [for week's calculation]).
30. The District evaluator administered an updated behavioral assessment to the student's mother and the student's teacher. The results were highly divergent, with the student's mother rating the student as clinically significant or at-risk across most scales, and the student's teacher rating the student as average in every scale. (S-20 at pages 16-19).
31. The District evaluator administered a social skills rating scales to the student's mother and the student's teacher. The results were again highly divergent, with the student's mother rating the student as average in many areas, as "below average" in self-control and as "above average" in every sub-scale for problem behaviors (for a composite score of "well above average" in problem behaviors). The student's teacher rated the student as average in every scale. (S-20 at pages 19-22).

32. The May 2017 ER concluded that the student should be identified as a student with a disability related to the health impairment, the student's diagnosis of [redacted] Syndrome, a disability which required special education. (S-20 at page 28).
33. The evaluator made no specific recommendations but did opine that the student should receive "itinerant learning support" in mathematics. (S-20 at page 28).
34. Even though the ER was issued on May 8, 2017, the District did not convene the student's individualized education program ("IEP") team by the end of the 2016-2017 school year. (S-22).
35. The pattern of consistently increasing absences continued in 3rd grade, rising from 21 absences in 2nd grade to 38 absences in 3rd grade. (S-26 at page 3-4).
36. The student's grades in the fourth marking period of 3rd grade were in the 90s, except for math, where the student's grade in the fourth marking period was 79%. (S-26 at page 4).

2017-2018 / 4th Grade

37. In early September 2017, the student's IEP team met for the first time. (S-22).
38. The September 2017 IEP included that the student had special considerations related to the hearing impairment and had communication needs. (S-22 at page 9).
39. The IEP indicated that the student's long-recognized difficulty with inferential thinking and understanding metaphor would need to be addressed as non-verbal communication needs. The IEP also indicated that an independent educational evaluation ("IEE") was anticipated and that the IEP would be potentially revised in light of the results of the IEE. (S-22 at page 10).
40. The IEP contained two mathematics goals, one in computation and one in concepts/applications. Each goal was written for probes and progress at the 4th grade level. (S-22 at page 28).
41. The IEP did not contain any specially-designed instruction in mathematics. The modification related to mathematics were test adaptations and test administration in the learning support classroom.

Specially designed instruction in mathematics was not addressed. (S-22 at page 29-30).

42. The IEP indicated that the student would be instructed entirely in the general education curriculum “except while receiving test support for math and during progress monitoring, which will be provided in the learning support classroom.” (S-22 at page 32).
43. Even though the IEP contained modifications for the student’s auditory needs, it did not contain the required communication plan. (S-22 at pages 9, 29-30).
44. In October 2017, an independent occupational therapist issued a report, finding that the student exhibited “significant delays in the areas of visual motor development, visual perceptual skills, fine motor development, and decreased attention skills”. The evaluator recommended specially designed instruction and modifications to address these needs, including school-based occupational therapy services, and recommended that the student’s IEP contain goals in keyboarding, cursive writing, and organization/accuracy of work in mathematics. (S-21, generally and at pages 20-22).
45. In October 2017, an independent speech and language therapist issued a report, confirming the student’s conductive hearing loss and identifying an auditory processing disorder, with specific deficits in speech perception in noise, and temporal processing. The evaluator recommended specially designed instruction and modifications to address these needs, including school-based speech and language services. (S-23, generally and at pages 10-17).
46. Over September – November 2017, the independent educational evaluator conducted assessments for the IEE. Over the course of those interactions, based on communications with the evaluator, the student’s mother began to investigate the private placement where the parent ultimately undertook a unilateral enrollment. (S-24; NT at 352-353).
47. In December 2017, the independent educational evaluator issued the IEE. (S-24).
48. The December 2017 IEE included observations of the student in the school environment and comprehensive testing across multiple domains (academic, social, emotional, behavioral, executive functioning), including cognitive and achievement assessments. (S-24).
49. The student exhibited marked difficulty in mathematics achievement. Indeed, in the student’s achievement testing, all three

mathematics sub-tests (calculation, math facts fluency, and applied problems) were markedly lower than the sub-test scores in reading and written expression. (S-24 at page 23).

50. The student's achievement in Broad Math was significantly discrepant from the student's cognitive ability, indicating a specific learning disability in mathematics, with especially noted weakness in applied problems. (S-24 at page 23).
51. In addition to noting observations and data consistent with the student's prior diagnosis of ADHD, the independent evaluator concluded that the student met the criteria for a specific learning disability as well as diagnostic criteria for unspecified anxiety disorder. (S-24 at page 17).
52. The independent evaluator made multiple recommendations related to her findings, including detailed recommendations regarding mathematics instruction. (S-24, at pages 17-21).
53. In late November 2017, the student participated in a 3-day trial at the private placement. On December 5, 2017, the student's parent enrolled the student in the private placement. The student's mother emailed the District school counselor to inform him that the student would not be returning to the District. (NT at 433-434).
54. By the time the student had left the District, the student's consistent increase in absences was evident, with the student already missing 12 days by December 4th (accounting for the 3-day trial at the private placement). (S-27 at page 3).
55. In late December 2017, in response to the independent occupational therapy ("OT") evaluation, the District performed an OT evaluation. The District evaluator found no need for any support in OT. (S-25).
56. The private placement serves students with identified special education needs, individualizing instruction for each student in a small teaching environment (5:1 student-to-teacher ratio). (NT at 459-461).
57. At the private placement, the student receives social skills instruction. Occupational and speech & language therapies are available at the private placement, but the student's parent has declined those services so the student can remain with private providers with whom the student has been working. (NT at 359-360, 431-433, 474-476, 481-482).

58. The student has adjusted well at the private placement and is making progress in light of academic and social/emotional needs. (P-4; S-31; NT at 358-359, 458-484, 488-503, 508-526).

WITNESS CREDIBILITY

All testimony was reviewed and weighed in light of the witnesses' participation in the hearing during their testimony and in light of the documentary evidence specifically reviewed by them and, where applicable, in general. All witnesses testified credibly, and no witness was found to have testified dishonestly or disingenuously. Having said that, the testimony of District witnesses was accorded less weight as each seemed to minimize their recollections of/experiences with the student's needs in light of the contemporary documentary evidence.

DISCUSSION AND CONCLUSIONS OF LAW

FAPE

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137

S. Ct. 988, 197 L. Ed. 2d 335, (2017); K.D. v. Downingtown Area School District, F.3d (3d Cir. at No. 17-3605, September 18, 2018)).

Here, the District denied the student FAPE by failing to identify the student as a student with a specific learning disability in mathematics and, thereafter, in failing to program appropriately for that need. First, early on the District knew that the student had a medical diagnosis which, among its numerous particular potential impacts, included the quite specific potential impact in math concepts/problem-solving. Through kindergarten and 1st grade (the 2013-2014 and 2014-2015 school years), when mathematics is much more geared to number sense and calculation, the student's needs in higher-level mathematics thinking may not have been readily apparent. But as the student continued through 2nd grade, the 2015-2016 school year, the daily communication log between the student's mother and teacher indicated the persistent comments about the student's struggles with mathematics. (FF 17).

At the outset of 3rd grade, the student was immediately identified as being still at the 2nd grade level in mathematics and began to receive weekly Title I services in mathematics. Over the course of the three marking periods, the student's expected progress in Title I services at the 2nd grade level was well below pace; at the same time, the student's mathematics grades consistently declined. (FF 27, 28, 29).

The record is bereft of precise data to show how the District understood the student's needs in mathematics, but it is clear that at some point the District knew or should have known that the student was not making adequate

progress in Title I services and that the student's math grades showed steady decline. It is the considered opinion of this hearing officer, however, that by the end of the second marking period of 3rd grade—approximately January 2017—the District should have known that the confluence of these factors (lack of expected progress in Title I services and two consecutive marking periods where mathematics was well below other grades, and declining) placed it on notice that an evaluation was in order.

It would be speculative to wonder how the District might have reacted, or not reacted, at that point because in January 2017, the student's mother requested the evaluation process which ultimately led to an IEP. Given that, it is purely dicta, but this hearing officer is not confident that the District would have moved with alacrity to initiate an evaluation process. Indeed, the overriding theme of the record is a laconic attitude toward the student's needs, and lack of energy on the District's part in terms of evaluating, identifying, and addressing those needs.

Regardless, the District undertook an evaluation process which was substantively and procedurally inappropriate. In substance, the May 2017 ER contained no updated cognitive or achievement testing. This omission is substantively inappropriate given the data at hand regarding the student's slow progress in Title I math support and the student's grades in mathematics, which in the third marking period continued to decline. In short, the District took no steps to assess the student's potential needs in mathematics, even though there was clear evidence that such an inquiry was necessary. In this

way, it failed to identify the student's specific learning disability in mathematics.

Procedurally, the May 2017 ER was 35 days late. An evaluation must be issued within 60 calendar days of the date a school district receives permission from the parents. (22 PA Code §14.123(b)). The District received the parent's permission on February 2, 2017, but the ER was not issued until May 8, 2017. While the September 2017 IEP was, as well, substantively deficient (see below), the IEP contained goals and interventions in mathematics. That programming was delayed in its implementation by the 5-week delay in issuing the May 2017 ER and, thus, the procedural deficiency amounts to a denial of FAPE. (34 C.F.R. §300.513(a)(2); 22 PA Code §14.102(a)(2)(xxx)).

Likewise, this procedural delay led to the District's inability, or lack of interest, in convening the multidisciplinary team's ("MDT's") meeting within 10 days of the May 2018 ER (22 PA Code §14.123(d)) and in convening the student's IEP team within 30 days of the MDT meeting. (34 C.F.R. §300.323(c)(1)). These procedural errors compounded, one into another, such that the District did not have the student's IEP available for programming in the spring of 3rd grade or, as mandated, at the beginning of the 4th grade school year. (34 C.F.R. §300.323(a)).

After the student's 4th grade year began, the student's IEP was developed in early September 2017. This IEP was substantively inappropriate. First, the student had an identified need in hearing, yet the IEP contained no communication plan. Second, even though the student was not formally

identified as a student with a learning disability, the District recognized that the student had needs for mathematics support. Unfortunately, the September 2017 IEP is inappropriate in meeting those needs as the IEP does not contain any specially designed instruction in mathematics.

There are two goals in mathematics, but under the terms of the IEP, the student merely went to the learning support room to take math tests (and take the progress monitoring assessments for the IEP goals) and had those tests adapted in certain ways. Already the District knew, or should have known, that the student had failed over the entirety of 3rd grade to make the expected progress on 2nd grade mathematics with targeted Title I math support. The lack of specially designed instruction to target the student's needs in math concepts/problem-solving is a denial of FAPE. And so one sees how the District's lagging view of the student—failing to appropriately evaluate the student leading to a diminished view of the student's needs leading to a lack of necessary, targeted specially designed instruction—led to a continual process of not understanding the student's needs and, so, not programming appropriately to meet those needs. Accordingly, the September 2017 IEP is inappropriate on its face.

Here, it must be pointed out that the vast amount of evidence in the record geared toward the student's social/emotional/behavioral needs does not amount, in this hearing officer's view, to a finding that the District denied the student FAPE in its evaluation, approaches to, and programming (or lack of programming) for those needs. Granted, the student clearly has needs in those

areas, but it is fair to conclude that the parent's experience with and perception of those needs is far different than the experiences/perceptions of District educators. But the totality of the record does not support a finding that the District failed to understand those needs or inappropriately programmed for those needs. So much of the time and energy of all involved was focused on social/emotional/behavioral needs in the educational setting that were, if manifesting at all, not in any way that significantly impacted the student's education, all the while the student's developing needs in mathematics were given short shrift.

In sum, then, the District denied the student FAPE as the result of a substantively and prejudicially flawed evaluation process in the spring of 2017, and a substantively inappropriate IEP in September 2017. Remedy will be awarded as outlined below.

Section 504/Chapter 15

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁵ The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly

⁵ Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

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 the result of a substantively and prejudicially flawed evaluation process in the spring of 2017, and a substantively inappropriate IEP in September 2017.

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, has been discriminated against 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. (S.H., *infra*). Here, the District has not in any way discriminated against the student, or taken actions against the student with deliberate indifference in light of the student's disabilities.

Accordingly, the District denied the student FAPE under the provisions of Section 504/Chapter 15 as set forth above but did not discriminate against the student under the anti-discrimination provisions of the same statutory/regulatory frameworks.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The award of compensatory education accrues from a point where a school district knows, or should have known, that a student was being denied FAPE, accounting for a reasonable rectification period to remedy the proven denial-of-FAPE. (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999), M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

In this case, the period of chronological deprivation is not long—the end of 3rd grade where the District’s tardy evaluation process led to a delay in having programming developed and in place, and the first approximately three months of 4th grade (September – November 2017), where the IEP developed by the District was inappropriate. Therefore, an exact quantitative calculation of compensatory education is not possible. Given the record as a whole, and especially considering the tenor of that record in terms of the District not showing any energy in its efforts to understand and program for the student, it is the considered opinion of this hearing officer that an equitable award of 200 hours of compensatory education is in order.

As for the nature of the compensatory education award, the parent may decide in her sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching

instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends, and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

Tuition Reimbursement

Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also* 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parent's tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)).

In the three-step analysis, the first step is an examination of the school district's proposed program and whether it was reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Endrew; K.D.). In this case, regarding the tuition reimbursement claim, as outlined above the

District's substantively and prejudicially flawed evaluation process in the spring of 2017, and substantively inappropriate IEP in September 2017, lead to a finding that in understanding, and programming for, the student's needs, the District failed to provide the student with a special education program reasonably calculated to provide meaningful education benefit.

When a school district program is found to be inappropriate at step one of the Burlington-Carter analysis, as is the case here, step two of the analysis is an examination of the appropriateness of the private placement which the parent has selected. Here, the private placement is appropriate. The private placement provides services to students with special education needs and, with this student specifically, provides a full range of instruction and services individualized for the student's needs. The student is making academic progress, including in mathematics, as well as social and emotional progress. The parent has met her burden at step two of the analysis that the private placement is appropriate for the student.

Where the school district has proposed an inappropriate program and parents' unilateral placement in a private setting provides an appropriate program, both being the case here, the third step of the Burlington-Carter analysis involves a balancing of the equities between the parties to see if the equities between the parties should impact the award of tuition reimbursement. Here, the equities do not significantly weigh for, or against, either party.

Accordingly, the parent is entitled to tuition reimbursement.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the District denied the student a free appropriate public education, on the basis of prejudicial procedural and substantive deficiencies in the District's processes and programming, from the spring of 2017 through the current 2018-2019 school year.

The student is a student with a disability under the terms of IDEIA with a health impairment and a specific learning disability in mathematics.

The student is awarded 200 hours of compensatory education in accord with the compensatory education section set forth above.

Additionally, the parent is entitled to tuition reimbursement for the enrollment of the student in the private placement for the 2017-2018 school year and current 2018-2019 school year as follows:

To the extent that the parent has been placed in a position to absorb out-of-pocket payment(s) for tuition and fees at the private placement for the 2017-2018 and/or current 2018-2019 school year(s), the District is ordered to reimburse parent. Upon presentation to the District by the parent of proof(s) of payment, or an outstanding balance due, for either or both of the school years, the exchange of documentation to take place through counsel, reimbursement

shall be made to parents within 60 calendar days of the date that parent's counsel presents the documentation to District counsel.

Additionally, to the extent that the District is not providing transportation to and from the private placement, the District shall reimburse parent for transportation to the private placement, either by receipt showing the parent's out-of-pocket transportation costs and/or by using mileage reimbursement as allowable under Internal Revenue Service mileage reimbursement rates for every day the student attended the private placement in the 2017-2018 school year and the current 2018-2019 school year through the date of this decision. The reimbursement for transportation shall be only for the days the student attended the private placement and shall not include any day(s) the student was absent from the private placement.

The exchange of documentation regarding transportation costs for the 2017-2018 school year and the 2018-2019 school year through the date of this decision shall take place through counsel, and reimbursement shall be made to parent within 60 calendar days of the date(s) that parent's counsel presents the documentation to District counsel. Payment for the costs to transport the student to the private placement for the remainder of the 2018-2019 school year, from the date of this decision through the final day where the private placement is in session for the 2018-2019 school year, shall be identical to the foregoing terms for reimbursement for transportation, except that reimbursement therefor shall be within 60 calendar days of the date(s) parent's

counsel presents documentation to District counsel for these costs after the conclusion of the 2018-2019 school year at the private placement.

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

Nothing in this decision and order shall be read to interfere with the parties' ability to modify any provision of this decision and order to the extent the parties agree thereto in writing.

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

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

December 4, 2018