

*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**

DECISION

DUE PROCESS HEARING

Name of Child: D.H.

ODR #18071/16-17 AS

Date of Birth:  
[redacted]

Dates of Hearing:  
November 18, 2016  
December 13, 2016  
January 20, 2017

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Pottsgrove School District  
1301 Kauffman Road  
Pottstown, PA 19464

Date of Decision:

Hearing Officer:

Representative:  
Leah Batchis, Esquire  
Batchis, Nestle & Reimann  
Two Bala Plaza Suite 300  
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Mark Walz, Esquire  
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March 16, 2017

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is an elementary school aged child residing within the boundaries of the District who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the classification of emotional disturbance, with secondary classifications of autism and speech / language impairment. As such, Student is also an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Student began attending an approved private school (APS) upon the recommendation of the District and with the approval of the Parent. The Parent requested this hearing alleging a denial of a free appropriate public education (FAPE) when Student was enrolled in a District school. The District maintains that it provided FAPE to Student.

For the reasons below I find in favor of the Parent.

## Issues

1. Did the District deny Student FAPE during the 2014/2015 school year, the ESY period in summer 2015, and the 2015/2016 school year, by not, in a timely manner, creating and implementing an appropriate program that included behavioral support and a toileting protocol, a means of addressing Student's functional and social communication deficits, and/or goals or SDI addressing Student's sensory needs?
2. If the District denied Student FAPE, what remedy is appropriate?
3. Should the District be ordered to convene an IEP team meeting to develop an appropriate IEP and an appropriate placement for the student?

## Findings of Fact

### Background

1. Student is an elementary school age District resident who is eligible for special education programming under the current classification of emotional disturbance, with secondary categories of autism and speech/language

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

impairment. Student attends an Approved Private School (APS) pursuant to a parentally-approved Notice of Recommended Educational Placement (NOREP). [S-31]

2. Student was diagnosed with Autism Spectrum Disorder (ASD) at age three; initial eligibility classifications were autism and speech/language impairment. [NT 459; S-2]
3. Three months after attaining age three, Student transitioned to a preschool early intervention program which the local Intermediate Unit (IU) operated four half days a week in an elementary school building located in the District. Student's program included speech therapy (S/L), occupational therapy (OT) and physical therapy (PT). [S-3]
4. Student also received weekly wraparound services at home through a community behavioral health agency in the form of Behavior Specialist Consultant (BSC) and Therapeutic Staff Support (TSS). [S-3]

#### Transition Evaluation and May 2, 2013 IEP for Kindergarten

5. In spring 2013, the District conducted a transition evaluation in preparation for the move from preschool early intervention to school-age services in Kindergarten for the coming 2013-2014 school year. [S-2]
6. The District found Student to continue to be eligible for special education, and retained the classifications of autism and speech/language impairment. [S-2]
7. The transition evaluation found that Student's speech/language needs were to expand pragmatic language skills in reciprocal and peer relationships, to formulate questions to ask for information or interact with others, to develop personal narrative, and to retell stories. [S-2]
8. The transition evaluation found that Student's physical therapy needs were to establish an age appropriate grasp, to legibly write name from memory, to improve postural control required for fine motor activities, and to increase level of independence for dressing tasks and feeding skills as pertaining to the school environment. [S-2]
9. The transition evaluation found that Student's occupational therapy needs were to improve core and lower extremity strength to further gross motor and coordination skills. [S-2]
10. The transition evaluation found that Student's behavioral needs were to improve transitions and compliance with non-preferred tasks, to address toileting issues, to develop verbal self-expression, and to improve initiation of peer interactions. [S-2]
11. There were behavioral issues in the preschool early intervention program.

For purposes of the transition evaluation behavioral information was obtained only through interviewing preschool early intervention staff. Student was not observed by a behavior specialist or a board certified behavior analyst (BCBA) and a Functional Behavior Analysis (FBA) was not completed. [NT 273-274, 342-349; S-2]

12. Classroom staff not formally trained in behavior support may not view behaviors in the same way that scientifically trained behaviorists do. [NT 344-349]
13. An FBA is an assessment of behavior that is based on direct observation of the child by a behavior specialist who collects a representative sampling of the problem behavior(s), analyses the data to look for contributory factors and patterns, and generates a hypothesis about the function of the behavior for the purpose of developing a positive behavior support plan that addresses the problem behaviors, primarily through selection and reinforcement of appropriate replacement behaviors. [NT 273-274, 276-279; P-26]
14. Student's May 2, 2013 IEP for the transition from preschool early intervention to Kindergarten contained a socialization (peer interaction) goal, a behavior goal for compliance with staff directives, three physical therapy goals, three occupational therapy goals, and two speech and language goals. [S-3]
15. The May 2, 2013 IEP provided for speech/language therapy for thirty minutes once per cycle, occupational therapy for thirty minutes once per cycle, and physical therapy for thirty minutes once per cycle. [S-3]
16. The May 2, 2013 IEP did not include a goal for toileting, although it did include an item of specially designed instruction (SDI) requiring the "use of shaping (rewarding successive approximations of desired behavior) for aversive tasks such as toileting." [S-3]
17. The May 2, 2013 IEP included a behavior plan; the behavior plan did not address toileting and was not based upon an FBA. [S-3]
18. The May 2, 2013 IEP did not provide for direct services for Student or consultation for teacher(s)/related services staff from a behavior specialist or BCBA. [S-3]
19. Neither a behavior specialist nor a BCBA was present at the May 2, 2013 IEP meeting. [S-3]
20. The District recommended that the May 2, 2013 IEP be implemented through Itinerant Autistic Support and Itinerant Speech & Language Support. Student was therefore to be educated in the regular education setting except for related services (S/L, OT and PT) and "stress management" as needed. [S-3]

2013-2014 School Year: Kindergarten and IEP Revisions in October, March and April

21. Student attended full day Kindergarten during the 2013-2014 school year.
22. On October 16, 2013 the District convened an IEP revision meeting in response to behavioral issues. Changes to the May 2, 2013 IEP were: Adaptive physical education (PE) added; procedures to follow when Student displayed the behaviors of concern added to the behavior plan; the use of passive physical restraints as a last resort when Student presented danger to self or others added to the behavior plan. [S-5]
23. Although the Student received all instruction in the regular education classroom except for related therapy services, and although Student's secondary classification was speech/language impairment, neither the regular education teacher nor the speech/language therapist attended the October 16, 2013 IEP meeting. [S-5]
24. Despite behavioral problems necessitating the need for a provision regarding passive physical restraint in the October 16, 2013 IEP revision, neither a behavior specialist nor a BCBA attended the meeting to discuss restraints with the Parent and obtain her informed consent. [S-5]
25. The October 16, 2013 IEP revision contains no discussion of the reason(s) for the changes to the behavior plan, and the Parent does not recall a discussion about adding restraints to the behavior plan. [NT 426-427; S-5]
26. The Notice of Recommended Educational Placement (NOREP) the District issued on October 16, 2013 included the addition of adaptive PE but did not include notice of the additions to the May 2, 2013 IEP's behavior plan. [S-6]
27. On January 14, 2014 the autistic support teacher began to record brief descriptions of Student's significant behavioral episodes and toileting accidents. [NT 689-690; S-20]
28. Student had a daily behavior chart, but the charts were "wiped clean" at the end of each day making a permanent record not available for review. [NT 584-585, 714]
29. The teacher's records show, and the Parent recalls, that the family was called to pick Student up from school due to behavioral episodes or toileting accidents at least fifteen times between January 14, 2014 and June 2, 2014. The list shows eighteen toileting accidents during this period. [NT 423-424; S-20]
30. On six occasions between February 21, 2014 and the end of the school year Student was restrained by staff trained in CPI after de-escalation techniques were not effective to stop behaviors that posed a danger to self or others. [NT 561, 563, 659, 675; S-14].

31. On February 21, 2014 Student was restrained for thirty minutes in a seated restraint. [S-14]
32. In late February the District engaged a private Board Certified Behavior Analyst (BCBA) who worked on revising Student's behavior plan, including creating a new positive incentive program. An FBA upon which to base the revision was not conducted. [S-7]
33. On March 5, 2014 a seated restraint was again utilized. [S-14]
34. On March 5, 2014 the IEP team convened for, according to the accompanying NOREP, Student's annual IEP meeting, but none of Student's related service providers – S/L, OT, and PT – were in attendance. In addition to the addition of the BCBA's newly revised behavior plan, the previous October 16, 2013 IEP was changed to provide for math instruction at the end of the day to take place in the autistic support classroom rather than the regular education classroom. [S-7]
35. The March 5, 2014 IEP contains no updated present levels or updated behavioral data. The only description of the changes from the October 16, 2013 IEP is the addition of the line: "After discussion with the IEP team it is determined that Student will receive math instruction and finish the day in the autistic support classroom to support [Student's] behavior needs. [S-7]
36. A behavior specialist did attend the meeting. However, the March 5, 2014 IEP does not provide for the supplementary service of teacher consultation by a BCBA. There are no provisions for one-to-one support or for targeted intensive toileting support. An FBA or other formal behavior assessment was not recommended. [S-7]
37. The March 5, 2014 NOREP recommends an increase in restrictiveness of level of service from itinerant autistic support and itinerant speech and language support to supplemental autistic support and supplemental speech and language support. [S-8].
38. On March 7, 2014, Student was twice restrained in seated restraints, once for 8 minutes and once for six minutes. [S-14]
39. The March 7, 2014 restraint report notes that the behavior plan in place was dated October 16, 2013, not late February or early March 2014 when the plan the BCBA was revising should have been in place and being implemented. The report also states, "[Student] was given verbal prompts and a timer was used" although the use of the timer had been removed from the behavior plan back in October 2013. [S-14]
40. On April 16, 2014, the IEP team again reconvened and neither a behavior specialist nor a BCBA attended. Nevertheless, the behavior plan in the April 16, 2014 IEP was changed such that task completion was no longer a replacement behavior, and a new goal of teaching Student to identify and

communicate feelings and to utilize ‘gentle hands’ instead of dropping to the floor was substituted. [S-11]

41. Although the present levels in the April 16, 2014 IEP state that Student had tantrums once per week, and that the behaviors had improved in the past two weeks, the log the autistic support teacher had started on January 14<sup>th</sup> noted significant behavioral episodes on April 4, 10 and 13 and toileting accidents on April 3, 8, 9, 10, 11 and 13. [S-11, S-20]
42. Decreasing bathroom accidents was noted as a need, and a goal for toileting was added to the April 16, 2014 IEP as follows: “When participating in the school day [Student] will increase periods of remaining dry with a decrease from up to 4 incidents per week to 0 incidents per week for 4 consecutive weeks.” [S-11]
43. The April 16, 2014 IEP contained no specific information about how the District would address Student’s toileting needs to help decrease the number of toileting incidents, and toileting was not made part of Student’s behavior plan. [S-11]
44. A Personal Care Assistant (PCA) for 5 hours per day was added to the April 16, 2014 IEP. [S-11]
45. There were still no consultative services for teachers from a behavior specialist or BCBA in the April 16, 2014 IEP and an FBA or other behavioral assessment was not recommended. [S-11]
46. The behavior plan removed from the Prevention Strategies the former directive to coordinate positive behavior support strategies with the Wraparound team to ensure consistency between home and school. [S-5; S-11]
47. An eight-step Crisis Plan was added to the April 16, 2014 IEP. [S-11]
48. On April 24, 2014, Student was restrained; the report noted “multiple restraints – no more than 5 minutes at a time.” [S-14]
49. On May 16, 2014 Student was restrained again. [S-14]
50. On June 2, 2014 Student had a urine accident and refused to get changed, leading to three seated restraints. [S-14]

#### 2014-2015: First Grade and Annual IEP Meeting in April

51. On September 10, 2014, Student was restrained for ten minutes, in a seated restraint. This incident is not included in a list of behavioral episodes. [S-20, S-21]

52. The list of aggressive behavioral episodes notes an additional ten other restraints in first grade on 10/3/14; 10/6/14; 10/9/14; 10/15/14 (attempted restraint); 11/3/14; 11/7/14; 11/18/14; 11/20/14; 12/17/14; 5/24/15 for which there were no restraint report forms available.<sup>2</sup> No IEP meeting invitations were in evidence for these restraints. [S-20]
53. Student's December 1, 2014 progress report on the task completion goal, states "Since the beginning of the school year, [Student] has shown a slight increase in aggressive incidents towards adults. When [Student] is presented with a demand to complete a task or activity [Student] will have an aggressive incident toward adults on average 1 incident per week." [S-16]
54. During the latter half of first grade the use of restraints decreased with the exception of one significant aggressive episode on a day Student reportedly had not taken medication. [NT 675; S-20]
55. The list of behavioral episodes reports multiple toileting accidents in first grade: 9/30/14; 10/3/14; 10/9/14; 10/15/14; 10/16/14; 11/7/14; 11/12/14; 11/20/14; 1/15/15; 1/22/15; 1/28/15; 1/30/15; 2/19/15; 4/17/15; 4/23/15; 5/4/15. [S-20]
56. The December 1, 2014 progress report states that Student has on average one toileting accident per week. The Parent recollects that the family had to pick Student up from school early an average of about one time per week during the first grade year due to behavioral difficulties or toileting accidents. [NT 424; S-16]
57. Logs from the one-to-one PCA show negative classroom behaviors that the aide responded to with re-direction, in contravention of the behavior plan. [P-7]
58. Despite the eleven known restraints, the first on September 10<sup>th</sup>, and the sixteen known toileting accidents, the first on September 30<sup>th</sup>, no IEP meetings were convened during first grade, and the April 16, 2014 IEP remained unchanged until Student's next annual IEP at the end of first grade. No FBA was conducted, and no revisions to the behavior plan were made before April 7, 2015. The District's BCBA did not meet with Student during the first grade year. [NT 594-595; S-20]
59. On April 7, 2015 the IEP team convened to draft the annual IEP. The regular education teacher did not attend the IEP meeting; the Parent was asked to sign a waiver of the regular education teacher's attendance at the meeting on the day of the meeting. [S-17]

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<sup>2</sup> The restraint forms state at the bottom "A copy of this form must be sent to the special education office to be placed in the student's file." See e.g., S-14 at 2, 4, 9. However, no such forms were included in records from Student's entire first grade year, even though teacher notes indicate that restraints occurred.

60. Present levels on the April 7, 2015 IEP indicate that while Student was reading on grade level, Student “could improve on using [Student’s] decoding and phonics skills during Foundations and writing.” [NT 673, 688; S-17]
61. By March 13, 2015, the District was reporting that Student had made no progress on the goal for communicating feelings, even though this was listed as a replacement behavior in the behavior plan. Nevertheless the speech/language therapist telephoned the Parent prior to the April 7, 2015 IEP meeting to discuss the recommendation that Student be exited from speech/language services. [NT 619; S-16, S-19]
62. The box for communication needs on the Special Considerations page of the April 7, 2015 IEP is checked “no.” [S-17]
63. The speech/language therapist did not attend the April 7, 2015 IEP meeting and the team did not have the benefit of discussing Student’s speech/language needs at an IEP meeting before speech/language was discontinued. [S-17]
64. The NOREP accompanying the April 7, 2015 IEP does not state that Student will be exited from speech/language services. [S-18]
65. Although Student was exited from direct speech/language services, a comprehensive speech/language assessment was not done until nearly a year later, in February 2016. At that time standardized assessments showed age appropriate skills in receptive and expressive language, articulation, and pragmatic language, but there were deficits relative to grade level in problem solving and critical thinking skills. The RR recommended that direct speech and language therapy resume. [NT 609-610, 614; S-32]
66. For the April 7, 2015 IEP the occupational therapist provided the information that Student was able to self-regulate emotions and focus during OT sessions with sensory breaks, but if Student was adamant about not completing a particular task, refusal protests occurred and it was very difficult to distract or re-direct Student to the non-preferred task. [S-17]
67. There was no behavior specialist or BCBA at the April 7, 2015 IEP meeting even though the District had hired a new BCBA in January 2015. The new BCBA did not become aware of Student until October 2015, in second grade. [NT 548, 552; S-17, S-52]
68. On the April 7, 2015 IEP, despite the documented incidents requiring restraints and the documented toileting accidents, the only change made to the year-old behavior plan was to eliminate the reinforcement item of allowing Student to add a star and an icon of a portion of soda to the chart. [S-17]
69. Although an addendum to the April 7, 2015 IEP notes that the one-to-one assistant will collect data using observation and anecdotal reporting, the only such “data” was that contained in billing log entries for medical assistance and this information was not kept by the district in a legible or complete format.

The legible entries show frequent inattentive behavior and need for re-direction in the spring of 2015. [NT 309-311, 313-316; P-7]

70. The April 7, 2015 IEP recommended that Student's placement be returned from full time autistic support to the original level of itinerant autistic support, skipping the level of supplemental autistic support. Because the regular education teacher was not present at the meeting, the IEP team did not have her perspective on this lower level of support and since this was the only IEP meeting held in Student's first grade year, the regular education teacher had not been part of the discussion at any first grade IEP team meetings. [S-17]

#### Summer 2015 – ESY Eligibility

71. Although Student was found eligible for ESY for summer 2014 and summer 2016, at Student's annual IEP meeting on April 7, 2015, the IEP team determined that Student did not qualify for ESY for summer 2015. At least part of the determination was based on Student's behavior having "greatly improved" and that Student was making "great progress". [NT 65, 207, 678-679; S-17, S-18, S-19; S-52]

#### 2015-2016 School Year: Second Grade Re-evaluation and IEP Meetings in November, December, March and April

72. At the start of the second grade school year, the School District did not immediately staff the 5 hours per day of PCA as per the April 7, 2015 IEP. [NT 179; S-52]
73. On September 15, 2015 Student was restrained three times, seated, first for 6 minutes, then for 5 minutes, then for 8 minutes. [S-42]
74. On September 24, Student was restrained again in a seated restraint for 5 minutes. [S-42]
75. On September 25, 2015, Student was restrained 3 times, seated, first for 15 minutes, then for 5 minutes, then for 3 minutes. [S-42]
76. The District scheduled an IEP meeting for October 2, 2015 to review the use of restraints given that there had been three incidents of aggressive behavior since the start of second grade. [S-22]
77. On October 2, 2015, because a District participant had a family emergency and could not attend, instead of an IEP meeting an "informal meeting" was held with the autistic support teacher, the principal, the Parent, the grandparent, and Student's aunt in attendance. The Parent and District agreed to Parent-requested revisions to the April 7, 2015 IEP including modified homework, access to a quiet workspace, and the use of noise cancelling headphones. [NT 58-59. 445; S-52]
78. Despite the October 2, 2015 meeting's having been called because of restraints/aggressive behavior, neither a behavior specialist nor a BCBA was

present despite the District's having hired a new BCBA in January 2015. The District made no changes to Student's behavior plan and did not suggest an FBA or re-evaluation at this meeting. [S-22]

79. At this meeting the District did not suggest returning Student to a higher level of support. [S-22]
80. Between October 2, 2015 and November 6, 2015, there was a sharp increase in Student's aggressive and non-compliant behavior, on average three aggressive incidents and three toileting incidents weekly. [S-22]
81. On October 12, 2015, three restraints related to toileting occurred. [S-22]
82. On October 14, 2015, Student was again restrained in an incident that began when Student was brought to the autistic support room for a scheduled time to use the bathroom. Student had a bowel movement at some point during this incident. [S-42]
83. On October 15, 2015 the District's BCBA, hired in January 2015 began working on Student's team for the first time. [N.T. 548-552; S-52]
84. The District's BCBA reviewed records, was in the classroom several times a week observing and modeling interventions for the teacher and the PCA and consulted with the staff around behavior issues including toileting. [NT 552, 555, 557-558]
85. On October 20, 2015, Student refused to get on and then off the bus, and attempted to elope from the bus once on it. It is unclear whether the aide on the bus was trained in Student's behavior plan. [NT 462; S-52, P-6]
86. On October 28, 2015 Student had a toileting accident in physical therapy and became aggressive when the therapist asked Student to change. The family was called to pick Student up. [S-42, S-52]
87. On October 29, 2015 Student responded aggressively when asked to get a social studies book and had also had a toileting accident. The family was called to pick Student up. [S-42, S-52]
88. On October 30, 2015 Student became upset because of not wanting to use the bathroom and had a toileting accident. Student was sent home with grandmother. [S-42, S-52]
89. On November 2, 2015 Student's grandmother requested a change in the PCA assigned to Student. As Student's original PCA had returned from leave she was reassigned to Student. [NT 518-519; S-52]
90. On November 6, 2015 Student put head down in class during a test and was asked several times to take a break, go for a walk or get a drink. Student did not respond verbally, but escalated, ran from the classroom, and ran to the principal's office. Student was sent home with grandfather. [S-42, P-6]

91. On November 6, 2015 the District convened an IEP meeting to address the restraints and to revise the April 7, 2015 IEP (as amended on October 2, 2015) to address Student's escalating aggression. [S-11, S-22]
92. The principal, who had been involved in the restraints, did not attend the November 6, 2015, nor did the S/L therapist, the OT or the PT. [S-22]
93. The family-based wraparound team attended, as did the District's BCBA. [S-22]
94. IEP meeting notes from November 6, 2015 reflect that triggers were largely based around task demand and escape, though there was variability. The notes also state that elopement had become a concern. The behavior plan was not revised to address task completion or prevention of elopement, only to response in the event of elopement. Although the District had been providing the service since October 15, 2015, the team drafting the November 6, 2015 IEP did not write in a consult with a BCBA or other behavior specialist. The District did not suggest an FBA or a re-evaluation at this meeting. [S-22]
95. At the November 6, 2015 IEP meeting the District changed Student's placement back to a higher level of restrictiveness, from itinerant autistic support to supplemental autistic support and emotional support. There was no discussion of the nature of the emotional support. No counseling or instruction in coping or self-regulation strategies were added to the November 6, 2015 IEP. [S-22]
96. The November 6, 2015 IEP provided, at the Parent's request, one hour per day in the learning support classroom but characterized Student's service level as supplemental autistic support and supplemental emotional support. [NT 79, 147; S-22]
97. The team made no changes to Student's toileting or task completion goals on November 6, 2015. [S-22]
98. Although the IEP team determined that Student would be ESY eligible to work on behavior and social skills during summer 2015, social skills support was not added to the November 6, 2015 IEP. [S-22]
99. A reinforcer survey was conducted with Student to find out which rewards should be utilized and, in consultation with the BCBA, a new reward menu with highly motivating reinforcers was introduced to prevent problem behaviors. The new rewards menu was added to an already-existing token economy being implemented by the special education teacher. [NT 553-554]
100. On November 17, 2015, another restraint occurred after Student had an issue with a peer. [S-42]
101. On December 8, 2015, Student was restrained three times, seated, after being prompted to take a break after a toileting accident. [P-6]

102. On December 14, 2015 the IEP team reconvened. The regular education teacher did not attend the meeting. The BCBA did attend the meeting. The crisis plan portion of the behavior plan was revised to create a tiered crisis plan. A provision of the new plan was that staff was directed not to talk to Student when Student was demonstrating non-compliance, refusals, head down on desk, crawling around on the floor, yelling, and/or crying. [S-26, S-42]
103. The December 14, 2015 IEP revision also provided that if Student had a toileting accident and was refusing to change the family would be called to assist with changing clothes after which the Student would then return to class. [S-26]
104. On December 16, 2015 Student was restrained after escaping a task and Parent was called to pick Student up. It is unclear if the revised behavior plan from December 14, 2015 was implemented. [P-6]
105. On December 17, 2015 Student was restrained twice; the incident started with toileting and during the course of the incident, Student had a toileting accident and the Parent was called to pick Student up. It is unclear if the revised behavior plan from December 14, 2015 was implemented. [P-6]
106. On December 18, 2015, Student received a one-day out of school suspension for an incident of aggressive behavior towards staff on December 15<sup>th</sup>. An incident report could not be located in the record. [P-6]
107. On December 22, 2015 the IEP team met again. The BCBA attended the meeting but the OT and PT did not attend, despite the fact that there are several recorded incidents that occurred while Student was receiving these therapies. [S-26]
108. On December 22, 2015 the District revised the December 14, 2015 IEP, changing Student's placement to full time autistic support within a different classroom and added one hour of learning support as per parent request. [S-26]
109. On December 22, 2015 the December 14, 2015 behavior plan was revised to specify the stage of the crisis plan at which the Parent would be notified. [S-26]
110. On January 22, 2016 an incident with a peer included aggression and a toileting accident, and the Parent was called to pick Student up. [S-42]
111. On January 27, 2016 Student refused to transition to an academic task after recess ended and behavior escalated. After the incident Student was allowed to escape the task and draw instead. [S-42].
112. The report of the January 27, 2016 incident, and several subsequent reports, state that "The use of trained CPI techniques were utilized to keep

[Student] and adults involved in the incidents safe.” It is unclear which techniques were used and whether they included restraints. [S-42]

113. On January 28, contrary to the December 14, 2015 behavior plan revision, staff encouraged Student to use words. Student became aggressive and escaped the task. [S-42]
114. On February 1, Student escaped a classroom transition with aggressive behavior and had a toileting accident. [S-42]
115. On February 2, the same type of incident occurred [S-42]
116. There were at least 9 additional incident reports through the end of April 2016: 2/8/16; 2/16/16; 2/17/16; 2/18/16; 2/19/16; 2/22/16; 3/17/16 – police called; 4/20/16; 4/22/16. [S-42]
117. Although there are 20 early pick-up slips from the 2015-2016 school year, when the slips are compared against the incident reports, there were times when Student was picked up early and a slip was not issued and there were early pick-ups noted for days for which there are no incident reports. [S-42, S-43]
118. As one of the programs outside the District under consideration required an updated assessment, the Parent requested a reevaluation at the December 14, 2015 IEP meeting. Although the meeting notes say that a Permission to Re-evaluate (PTRE) would be emailed home, and on December 15, 2015 the director of special education notified the school psychologist and the rest of the team that the Parent had requested a reevaluation, the PTRE was not provided and the re-evaluation was not discussed at the December 22<sup>nd</sup> IEP meeting.
119. After December 22<sup>nd</sup> IEP meeting, the Parent contacted the special education director to see if she had signed everything needed for the re-evaluation. The Parent was assured that she had signed the necessary paperwork; the special education supervisor testified that she was mistaken, and thought the Parent was asking if she had signed a release. The PTRE was not provided for another several weeks. The District received the signed permission form back from the Parent on January 21, 2016. [NT 84, 159-160; S-28, S-42, S-52]
120. Once it received the approved PTRE, the District conducted the reevaluation on an expedited timeline and issued the Reevaluation Report (RR) on February 19, 2016. The RR noted that Student was on grade level in both reading and math, standardized assessments for writing found solidly average writing skills, and Student was meeting current academic goals for second grade. [NT 167; S-31]

121. The RR included a Functional Behavior Assessment conducted by the BCBA using baseline behavior data taken over fourteen days, observation of Student by the BCBA and interviews with teachers. The FBA hypothesized that the function of Student's negative behavior was to gain adult attention and to escape from task demands. [NT 163-164; S-31]
122. The reevaluation found Student eligible for special education under the category of emotional disturbance, with secondary categories of autism and speech/language impairment. Diagnoses of Intermittent Explosive Disorder and Asperger's syndrome had been conferred by Student's psychiatrist. [S-29, S-31]
123. The RR identified three needs: modulating emotional control, improving problem solving & critical thinking (speech), and toileting skills. [S-31]
124. After conducting the FBA the District's BCBA concluded that the District's approach was encouraging the Student's problem behavior. She found that Student was gaining access to desired adult attention when displaying the target behaviors of noncompliance, aggression and elopement. The BCBA noted, "All behaviors appear to be maintained primarily by gaining access to adult attention and escape from task. [Student] most often gains adult attention from preferred adults in the school setting...It is recommended, that in the future, [Student] only gain access to those individuals when [Student] is not displaying the problem behavior and that less preferred individuals are called when [Student] displays the problem behavior." [S-31]
125. The District's psychologist noted that there were seven antecedents to problem behavior and that "having a bathroom accident or being asked to use the bathroom account for 23% of events that directly precede aggression in the school setting." [S-31]
126. On February 23, 2016, the team was convened to review the RR. The OT and PT did not attend this meeting. As the Parent wanted additional time to review the RR, an IEP meeting was scheduled for two weeks later. [S-32]
127. On March 8, 2016, the IEP team reconvened and a new annual IEP was developed. Student's behavior plan was revised, including the antecedent strategies, replacement behavior, and positive consequences for performing the replacement behavior including a token economy. [S-35]
128. The IEP team revised all areas of the plan at the March 8, 2016 meeting. However, replacement behaviors did not include task compliance, which had been a target behavior in the FBA and was recommended as a target behavior by the District's psychologist. [S-31, S-35]

129. On April 14, 2016, the IEP team met again as Student was still exhibiting problem behaviors. Student's schedule was changed to provide for modified recess with a small group of children and for additional adaptive PE due to behavior incidents during and after PE. However, no further changes were made to the behavior plan. [S-38]

APS Placement:

130. On April 14, 2016, the IEP team discussed alternative placements. [S-38]
131. On April 28, 2016, the District recommended a change in educational placement to the APS. [S-38]
132. The Parent and Student toured the APS, after which the Parent approved the NOREP for a change in placement to the APS. [NT 533-534; S-39]
133. Student began attending the APS on May 9, 2016 and also attended ESY at the APS during summer 2016. [NT 625].
134. The APS has provided behavioral consultation by a BCBA since Student began attending there. [NT 634]
135. From May 2016 through October 2016 at the APS Student had only three toileting accidents, a significant reduction from the level of toileting accidents up to the time Student left the District's school. [NT 625-626]
136. According to the Parent, since Student has been at the APS, Student has not had "any major meltdowns," a significant reduction in aggressive behaviors. [NT 432]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parent asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and,

accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014). Although there were various interpretations of events, there were no issues with credibility as each witness appeared to be testifying to the best of her recollection and professional expertise.

FAPE: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). “Special education” is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

The need for emotional and behavioral instruction and support are equally valid reasons for special education eligibility as are academic concerns. *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996), *cert. den.* 117 S. Ct. 176 (1996)(education includes progress in emotional and social domains); *Breanne C. v. Southern York County School District*, 2010 WL 3191851 (M.D. Pa. 2010)(education includes progress in all relevant domains under the IDEA, including behavioral, social and emotional.)

Behavior Plan: A student with a disability, who has behaviors that interfere with his learning or the learning of others, must have a positive behavior support plan. This plan must be developed by the student’s IEP team, based on a functional behavior assessment, and become part of the student’s IEP.... Behavior support plans must include research-based practices that will increase the student’s opportunity for learning and increase replacement behaviors.” PA Dept. of Ed., Bureau of Sp. Ed., Basic Education Circular (BEC), *Use of Restraints for Students with Disabilities* at 2 (June 2016)

An FBA is an assessment of behavior that is based on observation of the child by a behavior specialist and is used to develop a positive behavior support plan. NT 273:6-274:17 (Sweeney); *see also* P-26. An FBA “consists of collecting a representative sampling of the problem behavior, through direct observation, which is then analyzed, to look for: patterns of behavior, environmental factors which are contributing to problem behavior, and most importantly determining the hypothesized function of each problem behavior. The information from the FBA is used to create an individualized, carefully created Positive Behavior Support Plan (PBSP) that addresses the problem behaviors, primarily through selection and reinforcement of appropriate replacement behaviors.

Physical Restraints: In Pennsylvania, restraints are lawful as a last resort only when a child becomes a danger to self or others. 22 Pa. Code Section 14.133 (c). The use of restraints may only be included in a student's IEP if the student's parent(s) agree and when all of the following conditions are met by the IEP team: Restraints are utilized with specific elements of positive behavior support; restraints are used in conjunction with teaching socially acceptable alternative skills to replace the problem behavior; staff are authorized and trained to use restraint; and there is a plan for eliminating the use of restraint through the application of positive behavior support. *BEC, Use of Restraints* at 2; *see also* 34 CFR 300.34; 22 Pa. Code § 14.133 and 22 Pa. Code § 10.25.

When an IEP team, including the parent(s), determines that it is necessary to include the use of restraints in an IEP, the types of physically restrictive procedures used should be fully explained and documented in the IEP or positive behavior support plan in order to enable informed consent by the parent(s). The Parent had no opportunity to reject the use of restraints. Restraints were added to Student's IEP in October of the kindergarten year, without being explained in a NOREP in violation of Pennsylvania law and a denial of FAPE. 22 Pa. Code § 14.133; 22 Pa. Code § 10.25; and 34 CFR §300.34; *BEC, Use of Restraints*.

ESY and FAPE: Acknowledging that some students may require programming beyond the regular school year, the federal legislature deemed that Extended School Year services are to be provided to an eligible child if necessary to assure that the child receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). In *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), our Third Circuit declared unequivocally that school districts must determine ESY services on an *individualized* basis and consider all components of a student's educational needs. The basis upon which an LEA determines an individual child's eligibility is as set forth in the IDEA's implementing regulations at 34 CFR 300.106.

However, Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. 22 Pa. Code § 14.132(a)(2) (i)—(vii) provides in relevant part:

In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors; however, no single factor will be considered determinative:

Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

*The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.*

*The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers. (Emphasis added)*

The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

*Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities. (Emphasis added)*

Compensatory Education: Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d Cir. 1999). Although *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue, I am not calculating a rectification period as it was the District's own failure to complete an appropriate behavioral assessment prior to Student's entrance in Kindergarten that led to predictable negative outcomes as soon as Kindergarten began.

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method ("hour for hour"), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate, more recent method ("same position"), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA."). The "same position" method has been recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The "same position" method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to bring the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default "hour for hour" approach will be used.

## Discussion

It is well established that education must address basic developmental needs in the emotional, behavioral and social domains. The regulations promulgated by the

Pennsylvania Department of Education for public education require local education agencies to “prepar[e] students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens.” 22 Pa. Code § 4.11(b).

I find on this record that Student was denied FAPE during the entire time Student spent in the District’s school building. The FAPE denial began with the Transition Evaluation and continued until the time Student began attending the APS. The two factors below largely contributed to the lack of a coherent plan to address Student’s behaviors in the developmental areas of emotional/behavioral regulation, task completion and toileting.

Factor One: Lack of early and consistent input from a professional specializing in behavioral issues and inconsistent input from other essential IEP team members.

Kindergarten:

*Lack of direct observation and completion of an FBA by a behavior specialist or BCBA for transition evaluation for Kindergarten.*

*Neither a behavior specialist nor a BCBA was present at the May 2, 2013 IEP meeting to assist in crafting a behavior plan for Kindergarten.*

*Neither a behavior specialist nor a BCBA was present at the October 16, 2013 IEP meeting convened to address physical restraints.*

*Neither the regular education teacher nor the speech/language therapist attended the October 16, 2013 IEP meeting even though Student’s secondary classification was speech/language impairment and Student received all instruction in the regular education classroom.*

*Despite escalating behavior problems the BCBA brought on in February did not conduct an FBA to inform revisions to Student’s behavior plan.*

*None of Student’s related service providers – S/L, OT, and PT – were in attendance at the March 5, 2014 IEP meeting.*

*Although a behavior specialist attended the March 5, 2014 IEP meeting the IEP does not provide for the supplementary service of teacher or therapist consultation by a BCBA, and an FBA or other formal behavior assessment was not recommended.*

*Neither a behavior specialist nor a BCBA attended the April 16, 2014 IEP meeting although changes were made to the behavior plan.*

First Grade:

Despite eleven known restraints and sixteen known toileting accidents from September to April *there were no IEP meetings or behavior plan revisions in first grade until the annual IEP meeting in April.*

*There was no behavior specialist or BCBA at the April 7, 2015 IEP meeting even though the District had hired a new BCBA in January 2015.*

*The District's BCBA did not meet with Student during the first grade year.*

*The regular education teacher did not attend the April 7, 2015 IEP meeting even though the District recommended that Student's placement be returned from full time autistic support to the original level of itinerant autistic support*

*The speech/language therapist did not attend the April 7, 2015 IEP meeting even though Speech/language services were discontinued as of this meeting.*

Second Grade:

*Neither a behavior specialist nor a BCBA was present at the October 2, 2015 meeting called because of increasing aggression and numerous restraints during September.*

*The principal, who had been involved in restraining the Student, did not attend the November 6, 2015 IEP meeting.*

*The regular education teacher did not attend the IEP meeting convened on December 14, 2015 even though all academic instruction was delivered in the regular education classroom.*

*Neither the OT nor the PT attended the IEP meeting convened on December 22, 2015 even though there were several recorded incidents that occurred while Student was receiving these therapies.*

*Neither the OT nor the PT attended the IEP meeting convened on February 23, 2016 to review the reevaluation report even though these therapists had contributed to the reevaluation.*

Factor Two: Due in large part to the absence of consistent BCBA evaluative, direct, and consultative services as illustrated above, Student's IEPs, specifically the behavior plans, were inadequate and inappropriate despite numerous revisions. Revisions to the behavior plan were reactive rather than proactive, and at times the behavior plans were not implemented.

### Kindergarten:

*The transition IEP of May 2, 2013 included a behavior plan; the behavior plan did not address toileting and there was no toileting goal even though toileting was described as an aversive task.*

*The behavior plan of October 16, 2013 did not include prevention strategies, but was revised only to include procedures to follow when Student displayed the behaviors of concern and the use of passive physical restraints as a last resort when Student presented danger to self or others.*

*The contracted BCBA did not conduct an FBA when revising Student's behavior plan in February 2014.*

*The District did not utilize the new February 2014 behavior plan when Student was restrained twice on March 7, 2014.*

*The District substantially revised the behavior plan at the April 16, 2014, IEP meeting without a behavior specialist or a BCBA in attendance.*

*The April 16, 2014 IEP contained no specific information about how the District would address Student's toileting needs to help decrease the number of toileting incidents, and toileting was not made part of Student's behavior plan.*

### First Grade:

*Despite a PCA having been assigned the District did not collect behavioral data under the supervision of a BCBA.*

*The District's BCBA did not meet with Student or conduct an FBA during first grade, and no revisions to the behavior plan were made before April 7, 2015 despite documented incidents requiring restraints and documented toileting accidents,.*

*The only change made at the April 7, 2015 IEP meeting to the year-old behavior plan was to eliminate a reinforcement item.*

### Second Grade:

*Despite the October 2, 2015 meeting's having been called because of restraints/aggressive behavior, neither a behavior specialist nor a BCBA was present and there were no changes to the behavior plan.*

*There is no indication in the records that the bus aide was trained in Student's behavior plan.*

*At the November 6, 2015 IEP meeting to address the restraints and Student's escalating aggression around task completion and elopement the behavior plan was not revised to address task completion or prevention of elopement, only to response in the event of elopement.*

*No counseling or instruction in coping or self-regulation strategies were added to the IEP at the November 6, 2015 IEP meeting.*

*Student was demonstrating non-compliance, refusals, head down on desk, crawling around on the floor, yelling, and/or crying. On December 14, 2015 the crisis plan portion of the behavior plan was revised with reactive rather than proactive steps.*

*On December 22, 2015 the IEP team met again and revised the behavior plan by adding another reactive strategy specifying the stage of the crisis plan at which the Parent would be notified.*

*On January 28, contrary to the December 14, 2015 behavior plan revision, staff encouraged Student to use words. Student became aggressive and escaped the task.*

*A reevaluation was conducted in February 2016 and a Functional Behavior Assessment was finally conducted by the BCBA using baseline behavior data taken over fourteen days, observation of Student by the BCBA and interviews with teachers. The FBA hypothesized that the function of Student's negative behavior was to gain adult attention and to escape from task demands.*

*After conducting the FBA the District's BCBA saw that the District's approach was encouraging the Student's problem behavior by providing attention from preferred staff.*

*On March 8, 2016, the IEP team reconvened and the behavior plan was revised in all areas including the antecedent strategies, replacement behavior, and positive consequences for performing the replacement behavior including a token economy.*

*On April 14, 2016, the IEP team met again as Student was still exhibiting problem behaviors but no changes were made to the behavior plan.*

*Student began attending the APS on May 9, 2016 and also attended ESY at the APS during summer 2016. The APS has provided behavioral consultation by a BCBA since Student began attending there. From May 2016 through October 2016 Student had only three toileting accidents, and according to the Parent, since Student has been at the APS, Student has not had "any major meltdowns", a significant reduction in aggressive behaviors.*

Unfortunately for Student, the District's failure to elicit early and consistent input from a professional specializing in behavioral issues and consistent discussion input from other essential IEP team members led to the Student's IEPs, specifically the behavior plans, being inadequate and ineffective despite numerous revisions which in large part were

reactive rather than proactive. Student's problem behaviors surfaced immediately upon entrance into the District's school and continued, increasing in frequency and intensity, until the time that Student began the APS placement. The progression was as follows:

:

#### Kindergarten:

*Behaviors of concern, including behavior that was dangerous to self and others, emerged almost immediately such that the District had to convene an IEP meeting on October 16, 2013 and revise the behavior plan to include use of restraints. A BCBA or behavior specialist was not present.*

*Prior to mid-January of the Kindergarten year careful records regarding behavior and restraints were not kept. However, on January 14, 2014 the autistic support teacher began to record brief descriptions of Student's significant behavioral episodes and toileting accidents.*

*According to the teacher's records that started in January 2014, the family was called to pick Student up from school due to behavioral episodes or toileting accidents at least fifteen times between January 14, 2014 and June 2, 2014. The list shows eighteen toileting accidents during this period.*

*According to the teacher's records that started in January 2014, on six occasions between February 21, 2014 and the end of the Kindergarten year Student was restrained to stop behaviors that posed a danger to self or others. Restraints occurred on 2/21/14 (30 minutes); 3/5/14; 3/7/14 (two restraints, one 8 minutes and one 6 minutes); 4/24/14 (multiple restraints each under 5 minutes); 5/16/14; 6/2/14 (three restraints). Significant behavioral incidents not noted as requiring restraints appear in the teacher's log for 4/4/14; 4/10/14; 4/13/14.*

*According to the teacher's records that started in January 2014, Toileting accidents were recorded on 4/3/14, 4/8/14, 4/9/14, 4/10/14, 4/11/14, and 4/13/14. The IEP contained no specific information about how the District would address Student's toileting needs and toileting was not made part of Student's behavior plan.*

#### First Grade:

*When Student reached first grade restraints resumed. On September 10, 2014, Student was restrained for ten minutes. The list of aggressive behavioral episodes notes an additional ten restraints on 10/3/14; 10/6/14; 10/9/14; 10/15/14 (attempted restraint); 11/3/14; 11/7/14; 11/18/14; 11/20/14; 12/17/14; 5/24/15.*

*As of the December 1, 2014 progress report Student had an aggressive incident toward adults on average one incident per week.*

*The list of behavioral episodes in first grade contains multiple toileting accidents: 9/30/14; 10/3/14; 10/9/14; 10/15/14; 10/16/14; 11/7/14; 11/12/14; 11/20/14; 1/15/15; 1/22/15; 1/28/15; 1/30/15; 2/19/15; 4/17/15; 4/23/15; 5/4/15. As of the*

*December 1, 2014 progress report Student had a toileting incident on average one incident per week.*

**Second Grade:**

*At the start of second grade, on September 15, 2015 Student was restrained three times, first for 6 minutes, then for 5 minutes, then for 8 minutes.*

*On September 24, Student was restrained again for 5 minutes.*

*On September 25, 2015, Student was restrained 3 times, first for 15 minutes, then for 5 minutes, then for 3 minutes.*

*Between October 2, 2015 and November 6, 2015, there was a sharp increase in Student's aggressive and non-compliant behavior, on average three aggressive incidents and three toileting incidents weekly.*

*Three restraints related to toileting occurred on October 12, 2015.*

*On October 14, 2015, Student was again restrained and had a bowel movement at some point during this incident. [S-42]*

*On October 20, 2015, Student refused to get on and then off the bus, and attempted to elope from the bus once on it. There is no indication in the records that aide on the bus was trained in Student's behavior plan.*

*On October 28, 2015 Student had a toileting accident in physical therapy and became aggressive when the therapist asked Student to change. The family was called to pick Student up.*

*On October 29, 2015 Student responded aggressively when asked to get a social studies book and had also had a toileting accident. The family was called to pick Student up.*

*On October 30, 2015 Student became upset because of not wanting to use the bathroom and had a toileting accident. Student was sent home with grandmother.*

*On November 6, 2015 Student put head down in class during a test and was asked several times to take a break, go for a walk or get a drink. Student did not respond verbally, but escalated, ran from the classroom, and ran to the principal's office. Student was sent home with grandfather.*

*On November 17, 2015, another restraint occurred after Student had an issue with a peer.*

*On December 8, 2015, Student was restrained three times, after being prompted to take a break after a toileting accident.*

*On December 16, 2015 Student was restrained after escaping a task and Parent was called to pick Student up.*

*On December 17, 2015 Student was restrained twice; the incident started with toileting and during the course of the incident, Student had a toileting accident and the Parent was called to pick Student up.*

*On December 18, 2015, Student received a one-day out of school suspension for an incident of aggressive behavior towards staff on December 15<sup>th</sup>.*

*On January 22, 2016 an incident with a peer included aggression and a toileting accident, and the Parent was called to pick Student up.*

*On January 27, 2016 Student refused to transition to an academic task after recess ended and behavior escalated.*

*On January 28, contrary to the December 14, 2015 behavior plan revision, staff encouraged Student to use words. Student became aggressive and escaped the task. [S-42]*

*On February 1, Student escaped a classroom transition with aggressive behavior and had a toileting accident. On February 2, this type of incident repeated. [S-42]*

*There were at least 9 additional incident reports through the end of April 2016: 2/8/16; 2/16/16; 2/17/16; 2/18/16; 2/19/16; 2/22/16; 3/17/16 – police called; 4/20/16; 4/22/16. [S-42]*

*On April 14, 2016, the IEP team discussed alternative placements and on April 28, 2016, the District recommended a change in educational placement to the APS.*

As illustrated above, Student was denied FAPE and therefore is entitled to compensatory education for the District's failure to provide a program and placement that was reasonably calculated to provide Student with meaningful educational benefit in the developmental areas of emotional/behavioral regulation, task completion and toileting. Although the denial of appropriate instruction/intervention in the developmental areas of concern affected a great part of the school day, it appears that the Student did make some progress in academics, so full days of compensatory education are not warranted.

The FAPE denial began with the Transition Evaluation, extended into the Kindergarten year and continued through first and second grades until the time Student began attending the APS. Given that the Kindergarten year is outside the relevant period, compensatory education will be ordered for first grade, and the summer following first grade, through the last day Student attended the District school prior to starting the APS placement. I decline to adjust the award to account for a reasonable rectification period because the District had the entire Kindergarten year to develop an appropriate program for Student. I conclude that an equitable remedy is four hours per day for every day Student was present in school for the first and second grades, and an additional number of hours equal to the hours Student should have been in an ESY program.

The compensatory education hours are to be used exclusively for educational, developmental and therapeutic services, products or devices that further the Student's IEP goals. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county where the District is located and geographically adjacent Pennsylvania counties. The compensatory services may be used after school, on weekends and in the summers until Student's 21<sup>st</sup> birthday. The services are meant to supplement, and not be used in place of, services that are in Student's IEPs.

### Conclusion

The District failed to offer Student FAPE and compensatory education is the appropriate remedy.

I decline to issue an order that the IEP team meet to convene and design an appropriate program and placement, as crafting an IEP and determining an appropriate placement is an IEP team responsibility of which the District is fully aware.

The Parent has requested an independent FBA. Given that as of the last hearing session Student was reportedly doing well at the APS I will not order an independent FBA at this time. I will order, however, that a BCBA be present at all meetings of the IEP team, and that the BCBA conduct an FBA whenever he/she deems it necessary to inform an appropriate positive behavior support plan for Student.

### Order

It is hereby ordered that:

1. The District failed to offer Student FAPE for the relevant period, the 2014-2015 school year, summer 2015, and the 2015-2016 school year until the date Student began attending the APS.
2. As compensatory education is the appropriate remedy for the denial of FAPE, the District is ordered to provide Student with four (4) hours per day of compensatory education for every day Student was present in school from the first day of first grade through the last day in second grade before the Student moved to the APS. Student is also awarded an additional number of hours equal to the number that should have been delivered in an ESY program during summer 2015. The compensatory education is to be used in accord with the description above.
3. A BCBA must be present at all meetings of Student's IEP team, and the BCBA shall conduct an FBA whenever he/she deems it necessary to inform an appropriate positive behavior support plan for Student.

4. The LEA shall complete an Assurance Form in accord with the directions concerning timelines that have been transmitted along with this Order.

Any claims not specifically addressed by this decision and order are denied and dismissed.

*Linda M. Valentini, Psy.D., CHO*

March 16, 2017

Linda M. Valentini, Psy.D., CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official