

*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

ODR No. 14590-1314KE

Child's Name: N.M.

Date of Birth: [redacted]

Dates of Hearing: 4/25/14, 5/23/14, 5/29/14,  
6/2/14, 6/23/14

### CLOSED HEARING

Parties to the Hearing:

Parents  
Parent[s]

School District  
Spring-Ford Area  
857 South Lewis Road  
Royersford, PA 19468

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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September 2, 2014

September 17, 2014

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student in this case is fully included and academically successful in a District elementary school classroom, but has significant behavior needs arising from autism spectrum disorder, the basis for Student's IDEA eligibility.

Midway through second grade (2013/2014 school year), Parents filed a due process complaint because of their dissatisfaction with the District's services to address Student's behavior needs and pragmatic language skills. After delays arising from a serious family illness and completion of an independent functional behavior assessment and analysis, the hearing was convened late in April 2014 and was conducted in five sessions through the end of June. The decision was further delayed at the joint request of the parties after the record closed when it appeared that a settlement of the dispute might be possible, but it was ultimately unsuccessful.

Parents requested compensatory education for an alleged denial of FAPE arising from allegedly inappropriate behavior support plans and implementation of behavior support services for the 2012/2013 and 2013/2014 school years and for denial of sufficient appropriate services to address Student's pragmatic language needs. Parents also requested reimbursement for their independent behavior evaluation and requested that the District be required to implement the recommendations of the independent evaluator.

For the reasons that follow, Parents' requests are granted with respect to the 2012/2013 and 2013/2014 school years, reimbursement for the independent evaluation and implementation of most but not all of the evaluator's recommendations. Parents' claim with respect to speech/language services is denied.

## **ISSUES**

1. Did the School District provide Student with appropriate behavior support plans, including adequate supports and services to address Student's behavior issues during the 2012/2013 and 2013/2014 school years?
2. Were Student's behavior plans appropriately implemented during the 2012/2013 and 2013/2014 school years?
3. Is the School District required to fund the independent functional behavioral assessment and analysis that Parents obtained, in that the District's most recent FBA was not complete, accurate, and appropriate?
4. Should the School District be required to revise Student's behavior plan to incorporate and implement the recommendations of the evaluator who completed an independent FBA on behalf of Parents?
5. Does Student have pragmatic language deficits and needs that should be addressed with speech and language therapy that the District has failed to provide?
6. Is Student entitled to an award of compensatory education, and if so, for what period, in what form, and in what amount?

## **FINDINGS OF FACT**

### Background/ Parent Concerns

1. [Student], [an elementary school][age] child born [redacted] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 14, 15)
2. Student has been identified as IDEA eligible in the Autism disability category, in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 15)
3. Student began receiving services at the age of 14 months under a diagnosis of PDD/NOS, and has also been medically diagnosed with ADHD, as well as milk, gluten and soy allergies. (N.T. pp. 39, 40; S-1 p. 2, S-11 pp. 1, 2)
4. Although academically successful since entering the District in kindergarten, Student has significant needs in the areas of behavior, social skills and pragmatic language. In particular, Student has struggled with impulsivity, frustration tolerance and compliance with demands. Parents are concerned about the social and potential academic consequences of escalating behaviors in the school setting. (N.T. pp. 40—42, 183; S-1 pp. 2, 4, S-5 pp. 6, 8)

5. The District confirmed Student's IDEA eligibility in the autism disability category after an evaluation conducted in the spring of the school year just before Student entered kindergarten. At that time, Student was described as demonstrating cognitive rigidity, perseveration on preferred activities, tasks and conversational topics, difficulty with transitions, and seeking adult attention. Student was motivated to play with peers but wanted them to do what Student was doing and occasionally tried to control peer behavior through whining, pushing or grabbing. (S-1 pp. 3, 4, 8—10, 37)
6. Although Student was cooperative with demands when motivated, problem behaviors such as verbal and physical protest, as well as more intense behaviors that could last as long as thirty minutes, occurred when Student was unable to control the environment or situation, when demands were directly related to denied access, and when demands followed several incidences of denied access. It was sometimes difficult to determine what triggered the problem behaviors, which did not appear to be related to specific demands, but the behaviors could sometimes be predicted by careful observation of multiple interactions before the problem behaviors occurred. Demand-related problem behaviors improved after a differential reinforcement system was added, and were controlled during intensive, 1:1 teaching by a careful balance between demands and reinforcement. (N.T. pp. 42, 43, 536; S-1 p. 9)
7. With respect to language development, Student was reported to have had some difficulty with, but was improving in, the ability to answer open-ended questions about picture book stories; occasionally using language incorrectly and using devices to prolong conversational exchanges, such as asking questions although the answer was known to Student, and sometimes becoming so engrossed in activities that Student became inattentive to verbal and physical expectations, which could present as a language deficit. (N. T. pp. 46, 47; S-1 pp. 4, 8, 9)
8. A formal language assessment (CELF-4 --Clinical Evaluation of Language Fundamentals-Fourth Edition) placed Student in the average to above average developmental ranges in all areas of receptive and expressive language that were tested. A checklist completed by Student's Mother (Descriptive Pragmatics Profile) suggested below average ability with respect to communications in context. Because Student did not have a delay of 25% or greater in any language area tested rather than rated, Student did not qualify for speech/language services at that time. (N.T. pp. 47; S-1 pp. 14—17)
9. Student performed in the average to superior ranges on measures of cognitive ability and academic achievement, with very superior functioning in the area of math concepts, applications and computation. (S-1 pp. 21—27)
10. After two meetings, Student's IEP team finalized Student's initial District IEP, which was to be implemented at the start of the 2011/2012 school year. Parents approved the NOREP dated June 6, 2011 which provided for a half day kindergarten program with itinerant learning support services. (N.T. pp. 43; S-2, S-3)

11. The initial IEP included a Functional Behavior Assessment (FBA) report and an intensive behavior support plan (BSP), both developed in April 2011 by the behavior specialist who had been working with Student from the beginning of early intervention services through the transition to kindergarten. The behavior specialist was provided several hours during the first two months of the school year to assist in Student's transition from early intervention to school age services. (N.T. pp. 44, 45, 49, 536—538; S-2 pp. 9—12)
12. The FBA identified several antecedents that preceded problem behaviors, *i.e.*, demands with low or no reinforcement, demands following denied access, denied access and interruption of preferred activities. Problem behaviors included crying, protesting, hitting others, hitting objects, throwing objects and dropping to the floor. The perceived functions of the behaviors were identified as escape from or delay of undesirable activities, people or demands, and gaining access to preferred items or activities. (S-2 p. 9)
13. The behavior plan included five antecedent strategies, including errorless teaching and “a rich schedule of reinforcement,” *i.e.*, reinforcement for appropriate behavior approximately every trial using primary and secondary reinforcements, and hourly reinforcement with a choice of two reinforcers for no episodes of problem behavior related to demands occurring within the hour. Conversely, the reinforcement protocol provided for no reinforcement for problem behaviors related to escape from demands, with the demand remaining until the task was completed, and no access to preferred activities or attention for at least 30 minutes following problem behaviors for the purpose of gaining attention or items, but reinforcement at a high rate when Student accepted denial of access to items or attention without engaging in negative behaviors. Student was to be removed from the situation if behaviors interfered with the learning environment of others. (S-2 pp. 9—11)
14. The behavior plan provided for a variable schedule of reinforcement and differential reinforcement for task performance, with the “best” reinforcements and shortest intervals between reinforcement reserved for the best responses and the strongest reinforcements for the hardest tasks. In addition, reinforcers were to be assessed regularly for strength and continued effectiveness. Teaching strategies were described for addressing each behavior function. (S-2 pp. 9—12)
15. Progress reports issued at the end of the first quarter indicated that with respect to behavior goals in the IEP, Student engaged in protesting, tantrums and aggressive behavior in response to demands and to denial of access to preferred items and activities was occurring twice/month in the school setting. (S-4 p. 7)
16. By February 2012, Student was engaging in protesting, tantrums and aggressive behavior five times/month in the school setting in response to demands and to denial of access to preferred items and activities, but most of the behaviors were described as “protesting,” with more serious behaviors occurring once/month. (S-4 p. 27)

17. After a January 30, 2012 IEP team meeting, a new IEP was adopted. The new IEP specified that the instructional assistant worked with Student exclusively to monitor, assist and deliver reinforcements throughout the school day. Neither the behavior plan nor the goals relating to problem behaviors and transition between activities were changed from the first IEP. (N.T. pp. 45, 46; S-2 p. 51, S-5 pp. 6, 9—12, 25, 28, 40)
18. Behaviorally, Student did well during kindergarten, although Parents noted an increase in written reports, which were sent home after notable behaviors occurred in school. Initially, Parents received approximately 2/month, but the reports increased to four/month beginning in April. Parents became concerned that the consequences for behaviors Student exhibited in school were not consistent with behavior consequences at home, such as “time-out” used in school for a broader array of behaviors than at home, where it was reserved for aggressive behaviors only. (N.T. pp. 50, 51)
19. At the end of kindergarten, Student demonstrated strong grade level academic skills, including acquiring, retaining and applying information, skills and strategies and acquiring new learning at a superior rate; a reading level that placed Student in the top tier of benchmark skills; writing independently in Student’s “Kid Writing” journal; strong analytical thinking and math computation/problem-solving skills; willing participation and interest in science, social studies and classroom discussions; quick and accurate completion of academic tasks. (S-8 pp. 8—10, 14)

#### 2012-2013 School Year/1<sup>st</sup> Grade

20. The IEP developed at the end of kindergarten for the following school year included the same behavior plan and strategies, but added a strategy for addressing aggressive behaviors and clarifying that time-outs should be used for aggressive behaviors only. (N.T. pp. 57; P-17 pp. 24—27, S-9 p. 13)
21. Due to a behavior escalation in April 2012, Parents requested a behavior support consultant to monitor Student and assure the continued appropriateness of the behavior support plan, which had been in place without substantial changes since April 2011. BSC consultation for 60 minutes per cycle was added to the IEP as a support for school personnel. Specially designed instruction (SDI) were added to the June 2012 IEP for behavior regulation, including allowing Student to request breaks, with monitoring to assure that breaks were not used to escape demands; allowing Student to complete unfilled demands in the learning support room and if still unfinished, to be sent home for completion. (N.T. pp. 55, 56, 67, 202, 208, 209; S-9 pp. 58, 59, 61)
22. Student participated in a research study evaluation at a regional hospital during the summer of 2012, which resulted in a diagnosis of attention deficit/hyperactivity disorder (ADHD)-combined type. The evaluator recommended instruction in emotional regulation skills and a highly individualized frustration tolerance program supervised by a board certified behavior analyst (BCBA), with positive reinforcement for incremental changes in tolerating frustrating situations and self-monitoring of behavior. She also recommended ongoing monitoring of ADHD symptoms, and environmental

modifications such as a reward system, visual schedules and movement breaks during the school day. (N.T. p. 65; S-11p. 4)

23. At the beginning of the 1<sup>st</sup> grade school year, the District's newly contracted behavior support consultant, who is a BCBA, began working with the staff implementing Student's behavior plan. Consistent implementation of a behavior plan is essential to its success. At the beginning of the school year, both the BCBA and Student's special education teacher were responsible for overseeing implementation of the behavior plan. The BCBA was responsible for training the staff who implemented it and who collected data to monitor progress on the behavior goal. (N.T. pp. 66, 67, 205, 211, 218, 219, 221, 284)
24. Early in October, the District convened Student's IEP team to consider the research study report and recommendations. The behavior goal in Student's IEP was revised to focus on frustration tolerance. An SDI was added for daily review of frustration levels. (N.T. pp. 65, 66, 211, 212, 219, 220, 297, 298; S-12, S-13 pp. 9, 28, 64)
25. The purpose of the revised behavior goal was to help student recognize behaviors levels and provide self-calming strategies before the behaviors escalate. (N.T. pp. 220, 221)
26. At the recommendation of the BSC/BCBA, Student's existing behavior plan was revised to add three new antecedents, change in routine, sharing materials and falling behind in games and identified two new observed behaviors, property destruction (ripping, crumpling, stepping on materials) and yelling. Adult attention was added as a consequence of the behaviors. (N.T. pp. 212—215; S-13 p. 7)
27. The BCBA also identified behaviors that should be encouraged as replacements for the problem behaviors, modified teaching and reinforcement strategies for demands related to transitions and interruption of preferred activities, added general consequence strategies and consequence strategies specific to problem behaviors related to the antecedents and functions of Student's problem behaviors, and a time-out crisis plan with strategies. The BCBA acknowledged some confusion with respect to the revised behavior plan because Student could earn reinforcements for good behavior that were specific to the behavior plan and a reward that was part of the classroom behavior management system. (N.T. pp. 215—217; S-9 p. 13, S-13 pp. 65—68)
28. After the October IEP meeting, the BCBA initiated a more detailed recording of incidents that reached the highest level of unacceptable behaviors, those that merited a red card on Student's color chart. The "ABC sheets" included checklists to describe the antecedent(s), the behavior(s), the consequence(s), duration, effect of the consequence and function of the behavior. The ABC sheets also included space for a narrative of the incident. The ABC sheets can determine triggers and maintaining consequences, as well as identify patterns of behavior. After the October IEP meeting, data on the frustration tolerance goal was collected using the ABC sheets. (N.T. pp. 219—225, 237, 238; P-12 pp. 1—36)

29. At the beginning of the first grade year, the color chart was continued as a means to monitor and rate Student's behavior, as well as one means of tracking progress with the behavior plan. Beginning in March 2013 the color chart was modified to assign points to the green (3), yellow (2), orange (1) and red (0) colors. Black (-1) was added during the school year for aggressive behaviors, which were more serious and required a stronger response for even one instance. Since the day was divided into nine intervals, Student could earn a maximum of 27 points each day by remaining on green during each interval. (N.T. pp. 80—82, 226, 229, 230, 238—241, 293—295, 299, 303; P-9 pp.1—67)
30. Due to Student's ADHD, rating the behavior of calling out in class was changed during the school year. Student's color level was not changed for every instance of calling out during class. Student was given three prompts by the instructional assistant to refrain from calling out, and if a fourth incident occurred, the behavior was rated as a "protest." Since protest was also the term given to Student's verbal refusal to comply with a demand, the BCBA acknowledged that it was not clear whether a behavior recorded as protesting was the same in each instance. (N.T. pp. 230—232)
31. Progress reports from the first and second quarters of the 1<sup>st</sup> grade school year noted that Student averaged 4 incidents/month of behaviors in the red zone. During the 1<sup>st</sup> marking period, one incident of throwing an object/property destruction was reported and the rest involved protesting. Of the seven incidents reported during the second marking period, Student had three incidents of hitting/pushing others, two incidents of property destruction and two incidents of throwing objects. By the end of the second marking period, Student could accurately identify levels on the behavior modulation chart, but had difficulty changing/interrupting behaviors that reached level 4. Student had more success in turning behaviors around at levels 2 and 3. (S-24 p. 2)
32. Through most of the 1<sup>st</sup> grade year, Student's behaviors were variable. Although Student met the color chart/point standards on many days, Student did not consistently maintain a satisfactory level of behavior. The duration of Student's behaviors was also a matter of concern, lasting 75 minutes or more on a number of occasions. (N.T. pp. 69, 70, 233—236; P-9, P-12 pp. 1—33, S-15 p. 24, S-19, S-20)
33. Student had considerable difficulty playing board games that were part of the first grade curriculum. Behaviors escalated when Student refused to accept a non-preferred color piece and when Student either won or lost a game. Student's aide generally removed Student from the room before extreme meltdown behaviors occurred. (N.T. pp. 72, 73; S-19 pp. 11, 12)
34. As part of a reevaluation conducted in May 2013, at the end of first grade, the BCBA compiled what she described as an updated FBA, based upon a review and analysis of records, behavior data, staff interviews, experience with and observations of Student throughout her school-year long involvement, but did not conduct a formal observation of Student in any setting. The BCBA believed that in light of the available data, a formal observation was unnecessary. Student's IEP team used the FBA document to make

significant changes to Student's behavior plan for the following school year. (N.T. pp. 71, 91, 92, 223, 224, 250, 304—307; S-20, S-22 pp. 66—70)

35. In the new behavior plan, Student's behaviors were grouped into categories of generally similar behaviors: 1) protesting (grunting, whining, yelling, refusing non completion of a task, not stopping when directed); 2) teacher talk (reprimanding, bossing others); 3) property destruction (isolated incident of tearing, crumbling, throwing items); 4) meltdown (crying, yelling, dropping to the floor, throwing things, aggression, property destruction—often a progression from protesting or other behaviors that resulted in going to red); 5) aggression (isolated incidents of hitting, kicking, spitting, shoving, throwing items at others). (N.T. pp. 91, 92, 228, 229, S-22 p. 70)
36. Intervals for earning points were shortened to 15 minutes to provide reinforcement more frequently for maintaining appropriate behavior and intermittent reinforcement of specific replacement behaviors was added. Data sheets eliminated the color association and recorded either 0 or 1 point for each interval. Visual cues took the form of cards displaying expected or unexpected behaviors or a list of replacement behaviors that Student could choose. There was to be no verbal interaction while Student was engaging in unexpected behaviors. (N.T. pp. 93, 243—246, 248, 249, 251—253, 294—296; S-22 pp. 68, 69; P-10)
37. BCBA support for implementing Student's behavior plan was increased to a minimum of 60 minutes/week, with a potential maximum of three hours/week, if staff fidelity check scores were lower than 85%. The District BCBA was at Student's school at least two to three times/week during the 2013/2014 school year, averaging 2—3 hours/visit. (N.T. pp. 151, 152, 283—285, 318—320; S-22 p. 72)
38. Academically, Student ended 1<sup>st</sup> grade at a level consistent with the kindergarten year. The first grade teacher rated Student as superior with respect to the rate of acquiring new learning, retaining and applying information, skills and strategies. With respect to Student's ability to function relative to peers, the teacher rated Student excellent in reading, math and spelling, satisfactory in writing/English, science and social studies. The teacher noted that Student required prompts and encouragement when writing in his/her journal. (S-19 pp. 6—10)
39. Due to Student's difficulty transitioning back into school from an illness-related absence, the appearance of a new throat-clearing behavior Parents described as a "tic" and an increase in behaviors in late winter, Parents arranged for the behavior specialist who worked with Student during early intervention to observe Student at the end of 1<sup>st</sup> grade, during the summer program and during the first few months of 2<sup>nd</sup> grade. (N.T. pp. 78, 79, 83, 287, 288, 538, 539; P-11)
40. Based upon several school visits and review of data sheets completed by District staff, the behavior consultant noted several instances when Student received attention, escaped from and/or delayed complying with demands following negative behaviors. She also noted concerns with insufficient reinforcement for positive behaviors, the effectiveness of

the reinforcers and a lack of antecedent information. (N.T. pp. 549—557, 560—562 ; P-11 pp. 1—12)

41. After reviewing their behavior specialist’s data at the end of 1<sup>st</sup> grade, Parents became concerned that the reinforcement schedule for positive behaviors was not strong enough, and that Student was receiving more attention for both negative behaviors and for calming down after a behavior incident. Parents also believed a reinforcement assessment was needed to determine if the reinforcements used with Student remained effective. (N.T. pp. 84—86, 113, 263, 264; P-17 pp. 4, 5)
42. No formal reinforcement assessment was conducted, but District staff regularly asked Student what s/he wanted to work for, had Parents’ and staff input concerning things Student likes and observed Student’s preferences during “free time” in the 2<sup>nd</sup> grade classroom. During the early part of 1<sup>st</sup> grade, staff relied on the reinforcement list compiled by the kindergarten teacher. Although a reinforcement assessment can be part of an FBA, the District BCBA included informal reinforcement assessments as part of Student’s IEPs. (N.T. pp. 263—265)
43. The District BCBA agreed with Parents’ assessment that Student was not getting sufficient reinforcement throughout the school day during 1<sup>st</sup> grade, prompting the May 2013 change in the reinforcement intervals to increase the frequency of reinforcement. (N.T. pp. 295, 296; P-10, S-22 pp. 67—70)
44. Parents were also concerned that an apparently improving behavior trend toward the end of the first grade school year reflected too many warnings given before Student lost points, allowing lower level behaviors to continue without consequences rather than a real improvement. Because incidents of behavior that fell into the red and black categories were tracked and reported separately for the FBA, it appeared that the number of serious behaviors had decreased, but the data showed an increase of serious behaviors when the red and black categories were combined. (N.T. pp. 79, 80; P-17 p. 5)
45. The District BCBA acknowledged a worsening of Student’s behaviors during the winter months of 1<sup>st</sup> grade that began a “downhill” trend for the remainder of the school year, with “a little bit” of progress after the new point chart was introduced in March 2013. (N.T. pp. 287—289)
46. During the summer of 2013, Student participated in ESY at a community summer camp, accompanied by a new aide supplied by the District and supervised by the BCBA. Student’s behavior plan as revised in May 2013 was implemented during the summer camp program, but Student’s behaviors worsened, with the addition of eloping to escape from non-preferred activities and locations. Much of the summer program involved playing games, which are difficult for Student. An informal observation by the district BCBA and the ESY progress report, which included behavior data, confirmed an increase in meltdowns and more aggression during the summer camp program. Those behaviors which continued into the new school year. (N.T. pp. 71, 93—95, 292, 293, 326, 327)

2013-2014 School Year/2<sup>nd</sup> Grade

47. After an observation during the ESY camp program, Parents' behavior specialist considered the new instructional assistant to be interacting well with Student and found the new behavior plan effective, but provided eight recommendations for improving reinforcements, including increasing the frequency and moving past difficult moments quickly to avoid engaging Student during protest behaviors, which both delays compliance with the protested demand and gives Student attention during an unacceptable behavior. The District implemented a number of recommendations from Parents' behavior specialist in the 2013/2014 school year. (N.T. pp. 370, 577—579; P-11 pp. 13, 14)
48. At the beginning of second grade, Parents were again concerned that Student was getting a high level of attention for unacceptable behaviors. During second grade, Student's behaviors increased in frequency, intensity and duration and more extreme behaviors emerged, such as eloping, removing clothing and between November and February, several instances of urinating on the floor of the "safe room" when Student was removed from the classroom. (N.T. pp. 95, 96, 101—103, 117, 118, 156,157, 256—258, 278, 327, 328, 357, 358; S-36)
49. When Student engaged in extreme behaviors, the school crisis team intervened on at least two occasions, verbally engaged Student and were successful in interrupting the behaviors and restoring compliance at the time, but the interventions increased the likelihood of an extreme behavior incident in the future. (N.T. pp. 103, 104, 116, 117, 269—271)
50. With implementation of the new behavior plan, an "extinction burst" was expected. The BCBA provided staff training to address the extinction burst. When school staff agreed with Parents that Student was being rewarded for unacceptable behaviors and withdrew attention from lower level behaviors, Student's behaviors further escalated. Observations by Parents' behavior specialist in the fall of 2013 confirmed both the increased behaviors attributable to an extinction burst and that Student was still sometimes receiving reinforcement for negative behaviors (N.T. pp. 104, 105, 265—270, 582, 583,591—593; P-11 pp. 18—27, P-12)
51. Parents were concerned that school staff were missing or misinterpreting and/or inaccurately reporting the antecedents to and functions of Student's behaviors, since the information conveyed through the ABC sheets was often sparse and in at least one instance, contradicted a verbal report to Parent immediately after the incident. (N.T. pp. 106—109, 114, 115, 118; P-18, P-23 pp. 1, 2)
52. A new IEP, including another significantly revised behavior plan, was developed for Student in November 2013 at an IEP meeting Parents had requested because of the escalation of Student's behaviors. To reduce behaviors related to academic demands, Student was provided with several choices for completing work, such as making a deal to choose and alter tasks, with a number of options for completing written work, such as

choosing to complete parts of the assignment on a keyboard and getting assistance after completing part of the work. (N.T. pp. 259—261, 279, 280, 331—338; P-7 pp. 2—20 , S-27 pp. 73—81)

53. The BCBA updated the May 2013 FBA with additional staff interviews and data compilations in December 2013. She also developed an integrity checklist to monitor staff implementation of Student’s behavior plan in January 2014. The BCBA’s recollection was that staff scored well on the checklists, but had difficulty with antecedent strategies, *i.e.*, anticipating when a demand might trigger an unacceptable behavior and offering alternatives to prevent the behavior in response to a demand. After a behavior, including a low level behavior begins, offering alternatives to the demand that prompted the behavior has the effect of reinforcing and thereby perpetuating and increasing behaviors. (N.T. pp. 320—324, 338—340, 361—363; S-21, S-42<sup>1</sup>)
54. By the middle of the 2013/2014 school year, Parents were concerned that Student was permitted to manipulate all school work to avoid behaviors. Work avoidance was identified as a significant behavior for Student, and Student was particularly resistant to writing about non-preferred topics and hand writing rather than typing. (N.T. pp. 188, 252, 260—262)
55. Student’s IEP team met again in late February 2014. The FBA outline incorporated into the IEP added setting events after antecedents to identify underlying “slow triggers” (changes in routine, illness, fatigue, long breaks from school) that can impact Student’s frustration tolerance and lead to increased behaviors when an antecedent event occurs. School refusal was added as a behavior of concern. Student’s behavior goal was updated to include more detail, including specifying that Student’s behaviors were to be reduced by using replacement behaviors and self-calming coping strategies (N.T. pp. pp. 340—345; S-34 pp. 6, 34, 35)
56. The District BCBA acknowledged that Student did not meet the IEP behavior goal during the past school year, that unacceptable behaviors increased and changed and that Student did not make meaningful progress with respect to behavior in either the 2012/2013 or 2013/2014 school years. Although changes have been proposed to Student’s behavior plan, she does not believe that Student’s behavior needs can be met within a regular education classroom because it is too overwhelming for Student, academic demands will increase each year and that no supports and services will be effective when Student’s behaviors escalate to the levels displayed during the 2013/2014 school year. (N.T. pp. 275—278, 353)
57. The District BCBA believes that given the escalated levels of Student’s behaviors, it is not possible to maintain Student in a regular education classroom without reinforcing the negative behaviors due to the need to keep Student and peers safe and to avoid the social consequences of the behaviors with respect to peers. (N.T. pp. 353—355)

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<sup>1</sup> S-42 consists of blank fidelity checklist forms only. No completed forms were entered into evidence by the District.

## Independent FBA

58. Because of the behavior escalation and their concerns that Student's behavior plan was not sufficiently and proactively monitored and was generally too reactive, Parents requested an independent FBA, which they obtained at their own expense when the District refused. (N.T. pp. 119, 275; P-3)
59. In mid-March 2014, Parent's independent BCBA observed Student in the school setting on two occasions for the full day and described behaviors typical of Student and typical of staff responses to Student's behaviors. She was accompanied by another BCBA to assist in data collection in order to assure that Student, the behaviors of others and changes in the environment were fully observed. (N.T. pp. 273, 274, 983, 984, 993, 994; P-3 pp. 2—17)
60. The classroom observations revealed that Student frequently engages in low intensity problem behaviors that staff responds to immediately, which interrupts the behavior at the time but makes it more likely to occur in the future. Effectively addressing the lower level behaviors, however, could have the effect of interrupting the progression to higher intensity behaviors. District staff does not track the low level behaviors, making it difficult to determine whether higher intensity behaviors arising from the same conditions elicit the same responses from staff. (N.T. p. 986, 1024, 1025)
61. The independent evaluator observed staff implementing antecedent strategies after a low level problem behavior occurred. Offering breaks or preferred activities when problem behaviors occurred in response to a demand had the effect of rewarding Student for resisting a demand. In one instance, Student was also given access to a highly preferred reinforcement soon after a lengthy period of problem behavior. (N.T. pp. 997—1000, 1012; S-3 pp. 6, 18, 19, 22)
62. When behaviors escalated, staff implemented some strategies that were included in Student's behavior plan and some that were not, such as verbal discussion and offering sensory activities (deep pressure and wall push-ups). Student often successfully avoided the task that peers were required to complete, and the strategies used by staff were not systematic or consistent. Lack of consistency is a problem because it provides a variable ratio schedule of reinforcement, which increases the difficulty of extinction and promotes more intense behaviors of longer duration. (N.T. pp. 1002—1006; P-3 p. 4)
63. The independent evaluator also observed staff completing data reports about behaviors that had occurred a week before and seeking the assistance of the District BCBA with respect to recording the data. (N.T. p. 1005, 1008, 1009; P-3 p. 5)
64. An effective behavior plan for a child with Student's characteristics requires systematic replacement of unacceptable behaviors by identifying and reinforcing acceptable behaviors that are as functionally equivalent to the unacceptable behaviors as possible. Once replacement behaviors are established, unacceptable behaviors are extinguished

when the child is presented with antecedents that evoke the problem behaviors but the unacceptable behaviors are no longer reinforced. (N.T. p. 987)

65. The independent evaluator noted a thin, unpredictable and nonsystematic delivery of tokens as reinforcers. Although praise is delivered frequently, it may not be serving as a reinforcer since Student moves from one task to another without comment from staff most of the time. (N.T. pp. 1029, 1030; P-3 p. 24)
66. The concept of reinforcement is broader than providing a child with something s/he likes or removing what the child dislikes, but encompasses making environmental changes. Reinforcement is effective when data collection indicates a measurable increase in the replacement behavior. For a behavior plan to be effectively supported, data collection should be done consistently, and preferably by more than one person to allow for continuous data rather than “snapshots” of behavior. (N.T. p. 988, 989)
67. The independent evaluator noted that throughout most of the school days on which she observed Student, Student independently responded to and completed academic task demands without prompting and without unacceptable behaviors, demonstrating little need for assistance with academic demands. (N.T. pp. 1028, 1029; P-3 p. 23)
68. In addition to a functional behavior assessment, the independent evaluator also conducted a functional behavior analysis, which she described as a Level III FBA, and the most precise way to determine behavior functions, since it systematically tests the accuracy of the conclusions derived from a Level II FBA, which is based upon direct observations of behaviors in the natural setting, leading to hypotheses about behavior functions. (N.T. pp. 1032—1035; P-3 pp. 25—27)
69. A functional behavior analysis was conducted for Student primarily because problem behaviors had persisted over a long period of time and District staff appeared unsure of the function of the behaviors. The analysis revealed that problem behaviors could be evoked only in response to demands, leading to the conclusion that the primary function of Student’s negative behaviors is escape. During the analysis, the behaviors increased when breaks were given following behaviors. (N.T. pp. 1038—1042; P-3 pp. 25—28)
70. Although the District FBAs included escape as a function of Student’s behaviors, and included several appropriate strategies, Student’s behavior plan was not implemented as written, and the descriptions of some replacement behaviors were not sufficiently clear to allow consistent data collection. (N.T. pp. 1042, 1043; P-3 pp. 29—35)
71. Based upon her observations and assessment of the implementation of Student’s behavior plan, Parents’ independent evaluator concluded that to effectively address Student’s behavior needs, Student should have a behavior plan that is implemented as written and addresses both high frequency/low intensity problem behaviors (protesting) and lower frequency but higher intensity behaviors (meltdowns). (N.T. pp. 985, 986)

72. The independent evaluator raised a number of concerns with respect to Student's current behavior plan and made a number of specific recommendations for more effectively addressing Student's behavior needs, including future behavior analysis for any new behaviors of concern that may arise; more frequent, improved staff training; plotting behavior data daily; improved data collection and recording; improved self-monitoring strategies; shorter intervals for data collection; improved reinforcement based upon preference and reinforcement assessments; eliminating sensory strategies in response to behaviors; differential reinforcement for good behavior and not increasing reinforcement following problem behaviors; improved behavior progress monitoring; fading staff proximity. (N.T. pp. 1046—1056, 1059—1079; P-3 pp. 31—35, 37—43)
73. Based upon the independent evaluator's interactions with Student, home observation and experience, she believes that an effective behavior plan can be developed for Student. (N.T. pp. 1057—1059, 1087)

#### Pragmatic Language Services

74. Parents have been consistently concerned about Student's pragmatic language skills, noting Student's inappropriate dialogue with both adults and peers, manifested by attempting to take an adult role in conversation and other interactions. In the school setting, Student's attempts to direct and correct peers is described as "teacher talk." (N.T. pp. 45, 46, 229, 721; S-2 p. 17, S-4 p. 19, S-8 p. 14)
75. Since kindergarten, Student's pragmatic language needs, as well as social skills needs, have been addressed through social skills instruction. The District social skills instructor is a former autistic support teacher. (N.T. pp. 47, 719, 721, 807; S-2 pp. 50, 51, S-4 pp. 19, S-5 p. 39, S-9 p. 58)
76. Because Parents were concerned about the absence of a formal verbal behavior program after Student left early intervention, and Student's pragmatic language development, they requested a language reevaluation, which the District completed in the spring of Student's kindergarten year. Specifically, Parents noted that Student used the words "why" and "because" interchangeably; continued to have difficulty relating remote events and including relevant details to share in conversation; continued to repeat the same questions after receiving an answer because Student was actually seeking information different from what the question would elicit; misuse of prepositions; lack of understanding of complex (and/or) choices; insecure understanding of words such as "think," "know," "guess," "decide;" lack of understanding of who is being spoken to; limited ability to identify information used to solve problems; inability to discern when conversational partner is sincere, or is not interested in the topic. (N.T. pp. 55, 60, 61, 801; S-8 pp. 1, 2)
77. The kindergarten teacher also identified pragmatic language skills as an area of concern for Student, along with social interaction skills (initiation of interactions, cooperative play, taking another's perspective), compliance with school routines and teacher requests, attention and class participation, coping skills, tolerance for change in the environment.

She also observed strong conversation skills, but struggles with taking turns and accepting others' ideas. The teacher did not see any negative effect arising from language delays on Student's classroom performance, either academically or with respect to peer interactions. (S-8 pp. 8, 11)

78. The District speech/language pathologist administered several standardized assessments of language development designed to measure understanding of language needed for academics and pragmatic language skills. Student generally scored in the average range with respect to understanding and using language. In the areas of pragmatic social language/social skills, Student's scores were generally in the average to below average range. Student also exhibited some developmentally inappropriate articulation errors. (N.T. pp.801—806 ; S-8 pp. 29—34)
79. The speech/language pathologist concluded that speech/language impairment should be added to Student's eligibility category, with articulation issues addressed through speech/language therapy and pragmatic language needs continuing to be addressed through social skills instruction. (N.T. pp. 59, 807—810; S-8 pp. 35, 36, S-9 p. 61)
80. Parents again raised the issue of Student's pragmatic language deficits at the end of first grade, and requested an independent speech/language evaluation. Parents accepted the District's offer of a speech/language reevaluation, but later obtained an independent observation and review of records. (N.T. pp. 75, 813, 814; S-19 pp. 26—32 )
81. Although Student's scores on the Test of Pragmatic Language, an assessment specifically requested by Parents, were in the below average to poor range, the speech/language pathologist noted that Student was just past the age cut-off for a shorter test, and exhibited fatigue during the test, which she believed negatively impacted Student's scores. Had Student's responses been scored under the earlier age norms, Student would still have been in the below average range but not bordering the "poor" range (N.T. pp.814—817; S-19 pp. 28, 29)
82. Although the speech/language pathologist acknowledges that Student still has pragmatic language needs, Student showed progress on a different measure, the Pragmatic Skills Inventory, which was administered as part of both language evaluations. (N.T. pp. 817, 818)
83. In the IEP that followed the 2013 evaluation, the speech/language articulation goal had been met and was dropped, but speech/language services were increased to address two new goals, for improving semantic skills and for improving language comprehension skills with respect to detail and inference questions. Another goal was added for improving social-cognitive skills and perspective-taking. (N.T. pp. 818—823; S-22 pp. 48, 50, 58, 71)
84. Later in the 2<sup>nd</sup> grade year, Student was moved from small group to individual speech/language services when the IEP was changed to add a "theory of mind" language goal, also to improve social cognition. Student had no difficulty understanding any of the

language concepts that were addressed. (N.T. pp. 819—821, 824—826; S-27 pp. 48, 50, 58, 71)

85. An outside speech/language evaluator who reviewed some of Student's records expressed approval of the District's speech/language services and social skills instruction but made several other recommendations for specific kinds of , including the addition of theory of mind instruction. (N.T. pp. 831, 832; S-35)

## **DISCUSSION AND CONCLUSIONS OF LAW**

Although this case presented an extensive record, including an unusual number of reevaluations and IEPs, the issues are straightforward and there was a remarkable absence of conflict in the evidence, leaving no doubt concerning the outcome of each issue.

### **Behavior Plans/Implementation**

The findings of fact disclose an unfortunate and unabated escalation of problem behaviors through Student's 1<sup>st</sup> and 2<sup>nd</sup> grade school years, attributable primarily to improperly implemented behavior plans. Despite, or possibly because of, behavior plans that became more and more complicated, and frequent changes to the way Student's behaviors were tracked, the evidence establishes that District staff responsible for designing and implementing the behavior plans did not assure fidelity to the most basic principles of behavior management. In effect, unacceptable behaviors were regularly rewarded and there was insufficient attention to encouraging replacement behaviors.

Most tellingly, the BCBA in charge of designing and implementing the behavior plans acknowledged that Student did not make meaningful progress in behavior in either the 2012/2013 or 2013/2014 school years. (FF 56) Although it is true that Student made academic progress in both school years, the District witness was quite correct in the fears she expressed that such progress is unlikely to continue if the Student's unacceptable behaviors continue to

increase at the rate of the past two school years, or even remain at the high levels of the last school year.

The only solution offered by the District, however, is to avoid the problem, much as Student seeks to escape demands, by suggesting that Student's behaviors are too extreme to allow Student to remain in the regular education classroom. (FF57) The record establishes, however, that with sufficient effective supports, there is every reason to believe that although challenges will certainly remain, Student can again be as successful in the regular elementary school classroom as in early intervention and kindergarten. Parents' independent evaluator noted that for most of her two day observations, Student was still able to complete academic work independently. (FF 67)

#### District FBA/Independent Evaluation Reimbursement

Despite the escalation of Student's behaviors that was already becoming evident in the early part of 1<sup>st</sup> grade, the two FBAs completed by the District did not include a formal observation of Student in any school setting. Instead, the District evaluator based the FBAs on teacher interviews and data sheets completed by inadequately trained staff, some of which were likely completed days after the reported behaviors occurred. (FF 63) With respect to conducting an FBA, there is no effective substitute for having trained eyes on the subject of the FBA in the environment in which the unwanted behaviors occur.

Despite continued behavior escalation, the District BCBA did not conduct a more extensive FBA, and was unable to make any long-lasting effective changes to Student's behavior plans based on information she compiled from the two FBAs she completed.

By contrast, Parents' independent evaluator conducted two lengthy observations of Student and provided an extensive analysis of what she observed, as well as recommendations

for addressing the problems with the District's less and less effective efforts to address Student's behavior needs.

Because the District's FBAs were inappropriate, Parents are entitled to reimbursement for the IEE they obtained in accordance with 34 C.F.R. §300.502.

#### Recommendations from the Independent FBA

The record in this case establishes, above all, that the District has no idea how to effectively address Student's increasingly difficult behaviors other than, as noted above, to remove Student to a more restrictive setting. It is surprising, therefore, that the District did not embrace the independent evaluator's recommendations without the need for a due process hearing and order.

The District is required to implement all but two of the independent evaluator's recommendations . The independent evaluator's report, which included a home observation, provides no basis for her recommendation for home-based ABA services. Although Student's behaviors may have become more difficult at home, there is no reason to conclude that Parents are not effectively dealing with the issues without home-based services provided by the District.

In addition, although an additional functional behavior analysis may be needed if new behaviors arise, there is no basis for requiring the District to conduct such an analysis at this time, since it has the benefit of the independent FBA.

#### Pragmatic Language Services

The record establishes that the District has been effectively addressing Student's pragmatic language and social skills needs. Although Parents expressed concerns that language deficits may be impacting Student's behaviors, there is no objective support for that conclusion.

### Compensatory Education

Student is entitled to an award of compensatory education for ineffective behavior support during 1<sup>st</sup> and 2<sup>nd</sup> grades, but as often happens there is virtually no evidence to from which to determine an appropriate amount. Student, therefore, will be awarded an amount that reflects some loss of educational benefit during 1<sup>st</sup> grade and a greater loss during 2<sup>nd</sup> grade.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to take the following actions:

1. Reimburse Parents for the costs associated with the independent functional behavior assessment/analysis provided by [Ms. M].
2. Begin implementing the recommendations found on pp. 37—43 of the [Ms. M] report (P-3) no later than October 1, 2014, provided that
  - a.) A functional behavior analysis need be initiated only if and when new behaviors of concern, not previously observed in the school setting, arise;
  - b.) The District need not provide ABA services to Student in the home/community outside of the typical school day;
  - c.) The District shall seriously consider the need to contract with one or more additional board certified behavior analysts, including but not limited to consultants already known to Parents, to assure full implementation of the recommendations by no later than the end of the first marking period of the current school year.
3. Provide Student with two hours of compensatory education for every day that school was in session and Student attended school during the 2012/2013 school year.
4. Provide Student with compensatory education for the 2013/2014 school year equal to the number of hours Student was to be instructed in the regular education classroom. The compensatory education awarded in this paragraph shall be provided for every day school was in session and Student attended school during the 2013/2014 school year. No hours of compensatory education are awarded for the amount of time Student was provided with pull-out related services, for lunch periods or for “specials.”

It is **FURTHER ORDERED** that the compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that

further the goals of Student's current or future IEPs and/or will otherwise assist him/her in overcoming the effects of his/her disabilities. The compensatory education shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided by the School District through Student's IEP to assure meaningful educational progress. Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parents. The hours of compensatory education/fund for compensatory education services/products/devices created by this provision may be used at any time from the present to Student's high school graduation, and may include home/community based ABA services.

It is **FURTHER ORDERED** that Parents' claim for compensatory education for denial of speech/language services is **DENIED**.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

September 17, 2014