

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number:

26544-21-22

Child's Name:

E.M.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Michael J. McElligott, Esquire

Date of Decision:

09/01/2022

Introduction

This special education due process hearing concerns the educational rights of E.M. ("student"), a student who resides in the Philadelphia School District ("District").¹

The parties disagree over the educational programming of the student under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA") and the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504"), specifically as to whether the student was provided with a free, appropriate public education ("FAPE") under the terms of those statutes.² Parents seek a finding that the District denied the student FAPE in the 2021-2022 school year, seeking compensatory education as a remedy for the alleged denial. Parents also seek a prospective placement of the student, via hearing officer order, in a private placement outside of the District.

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the student and parent are not entitled to any remedy.

For reasons set forth below, I find for the parents in part and the District in part.

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818 (*see also* 22 PA Code §§14.101-14.162 ["Chapter 14"]), as well as the federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61 (*see also* 22 PA Code §§15.1-15.11 ["Chapter 15"]).

Procedural History

- A. Parents filed their complaint in May 2022.
- B. A hearing officer (“first hearing officer”), different from the undersigned hearing officer, initially asserted jurisdiction over the matter, managing the prehearing process and presiding over all hearing sessions.
- C. Three hearing sessions were held on July 20, July 21, and July 26, 2022, with the record closed at the final hearing session.
- D. The parties’ written closing statements were to be submitted on or before Monday, August 22, 2022, with the decision due date extended to Monday, August 29, 2022 (pursuant to 34 C.F.R. §§300.511(a), 300.515(a), (c)).
- E. On Friday, August 26, 2022, the first hearing officer took ill and was hospitalized. Information as to the degree of the first hearing officer’s incapacitation, and near-term prognosis, could not be readily ascertained that day or in the days thereafter.
- F. The undersigned hearing officer, by chance, was communicating with the Office for Dispute Resolution (“ODR”) in another matter being handled by the first hearing officer and offered to facilitate communication between counsel in the instant case and ODR regarding the emerging situation with the first hearing officer. (Hearing Officer Exhibit – Email Communications August 26-28, 2022).³
- G. On Friday, August 26th, inquiry was made of counsel to see if either of their clients were interested in requesting a brief extension of the

³ Procedural elements F – K are all set forth in the same exhibit, Hearing Officer Exhibit – Email Communications August 26-28, 2022. To avoid unnecessary duplication of that citation, it is not repeated, but the foundation of each procedural element F – K can be found therein.

August 29th decision due date (“DDD”), or if both parties were mutually interested in making such a request.

- H. On Saturday, August 27th, parents’ counsel indicated that her clients were interested in only a one-day extension of the DDD, to Tuesday, August 30, 2022, and she brought to light the placement issue which, on the cusp of the upcoming school year, her clients felt a need to have decided expeditiously.
- I. On Sunday, August 28th, District counsel indicated that, given the circumstances, his client was requesting an extension of the DDD.
- J. Thereafter, on Sunday, August 28th, in coordination with ODR, the undersigned hearing officer asserted jurisdiction in place of the first hearing officer and granted the District’s request to extend the DDD to allow for review of the record and decision-writing.
- K. Mindful of the parents’ concern that a decision to be issued as soon as feasible, the DDD was extended only to Thursday, September 1st.
- L. In preparing this decision, the undersigned hearing officer reviewed the complaint, the exhibits of record, and the transcripts, as well as the parties’ closing statements.

Issues

1. Did the District provide appropriate educational programming for the student’s needs in the 2021-2022 school year?
2. To the extent that the answer to this question is “no”, is the student entitled to a compensatory education remedy?
3. Should the student be placed, via hearing officer order, in a private placement outside of the District?

Findings of Fact

Exhibits of record and testimony were considered in writing this decision. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Additionally, all transcripts were read by the undersigned hearing officer, but where findings of fact could be established without reference to the transcript, that citation was preferred, given the procedural history outlined above.

1. In May 2019, as part of the initial evaluation process in early intervention when the student was approximately [redacted] years old, the student was assessed as having age-appropriate cognitive development, social-emotional development, physical development (both gross and fine motor skills), and adaptive/self-care development. The student exhibited delayed speech and language ("S&L") development. (Joint Exhibit ["J"]-1).
2. The May 2019 early intervention evaluation report recommended that the student receive early intervention S&L services as a student with S&L impairment. (J-1).
3. In March 2020, as the result of a referral by the early intervention program, a university-based autism institute evaluated the student and diagnosed the student with autism spectrum disorder. (J-2).
4. In July 2020, the student's individualized education program ("IEP") team met to revise the student's IEP. The July 2020 IEP was in place throughout the 2020-2021 school year. (J-3).
5. The July 2020 IEP contained six goals, in the areas of expressive language, receptive language, conservation skills, fine-motor skills/drawing, and attention. The student received support in S&L, occupational therapy ("OT"), and behavior. (J-3).

6. In April 2021, anticipating a potential transition from the early intervention program to school-aged programming at the District, the District requested permission to evaluate the student. Parents granted permission. (J-4).
7. The District proposed a psycho-educational re-evaluation, to include academic achievement, S&L, OT, and behavior. (J-4).
8. In May 2021, an OT assessment concluded that "school-based OT is not deemed educationally necessary at this time". (J-8 at page 2, J-25 at page 1).
9. In June 2021, the District completed its re-evaluation of the student. The District's re-evaluation report ("RR") contained an observation of the student in the early intervention environment, as well as updated cognitive (non-verbal), academic achievement, autism spectrum, and adaptive functioning assessments. (J-7).
10. The June 2021 RR did not contain updated S&L or OT assessments, but the District evaluator recommended potential support in these areas. The District evaluator was apparently not aware of the May 2021 recommendation that the student did not require OT support. (J-7; J-8 at page 2).
11. In June 2021, the District proposed an IEP that contained four goals, one each in attention, expressive language, reading comprehension, and number identification. (J-9 at pages 15-24).
12. The June 2021 IEP did not contain any behavior plan or support or any S&L services (pending the results of a S&L evaluation). (J-9).
13. The June 2021 IEP indicates that the student would receive itinerant autism support and would receive special education services less than 20% of the school day. The calculation of the amount of time that the student would be in regular education indicated that the student would be in regular education settings 100% of the school

day. The location of specially-designed instruction (“SDI”) and modifications, however, indicated that SDI and program modifications would take place “daily” in the “special education classroom”. (J-9 at pages 25, 29-31).

14. In July 2021, parents filed a special education due process complaint, a complaint which was different from the complaint in the instant case. (J-11, J-12, J-13).
15. In August 2021, the parties reached a mediation agreement regarding the following revisions to the June 2021 IEP, in the format of a notice of recommended educational placement (“NOREP”):

“Description of the action proposed or refused by the LEA:

The regular educational environment with supplementary aids and services was considered as an option. At this time, a regular educational environment with the support of and RBT [registered behavior technician], supervised by a BCBA [board-certified behavior analyst], was agreed to by both the parents and the school district. As agreed to with (the student’s) parents, (the student) will receive comparable services to (the) Early Intervention IEP, pending the IEP Team meeting. It is agreed that an Itinerant Level of Autistic Support with 225 minutes per week to address social skills and behavioral needs. (The student) will receive a 1:1 for behavioral support with BCBA consultation with 1:1 and teacher weekly. BCBA consult with related services providers 30 minutes monthly. (The student) will receive 60 minutes of speech therapy once per week group, 60 minutes of speech therapy once per week individual, and 30 minutes of

Occupational Therapy twice per week, pending the IEP Team meeting. (The student) is eligible for curb to curb transportation for safe transport. (The student) will be enrolled to attend (an elementary school different from the student's neighborhood school) for the 21-22 school year."

(J-17; bold text in the original, parenthetical material edited for confidentiality, bracketed material added for clarity of acronyms).

16. The July 2020 early intervention IEP, as revised by the August 2021 mediation agreement between the parties, was the program and placement in place for the student at the outset of the 2021-2022 school year. (J-3, J-17).
17. In early September 2021, the District completed a comprehensive S&L evaluation. The S&L evaluator recommended that the student receive S&L services and made specific instructional and programming recommendations. (J-21).
18. In mid-September 2021, parents voiced concern over proposed changes to the student's IEP and the implementation of the student's programming. The District responded that it was working to find a suitable RBT and to complete evaluations in OT and behavior. (J-56, J-57, J-58).
19. In mid-September 2021, the District requested permission to perform an OT evaluation. (J-23).
20. In late September 2021, the IEP team changed the student's special education placement from autism support to learning support. (J-17, J-24).
21. In early October 2021, the District issued its OT evaluation. The OT evaluator recommended that the student receive school-based OT services and made recommendations as to the areas where the student showed a need for support. (J-25).

22. The RBT to support the student's behavior, which the parties agreed to in mediation, was not identified and hired until late October 2021. (J-29 at page 2, J-35).
23. In early November 2021, the student twice visited a private placement for a 30-minute screening meeting and a 2-hour evaluation. (J-32).
24. In mid-November 2021, the student's IEP team met to revise the student's IEP. (J-27).
25. The November 2021 IEP did not contain a functional behavior assessment ("FBA") or positive behavior support plan ("PBSP"). The IEP indicated that the FBA would be undertaken and a PBSP developed thereafter. (J-27 at pages 10-11).
26. The November 2021 IEP contained twelve goals, four in S&L (receptive and expressive language, articulation), two in reading (letter recognition and phonics, sight words), two in social skills/socialization, one in OT (fine motor – copying), one in attention (task focus), one in self-advocacy (hand-raising), and one in mathematics (counting), (J-27 at pages 25-70).
27. The November 2021 IEP indicated that the student would have the support of a 1:1 aide. The IEP provided for 240 minutes per month in individual S&L therapy, 120 minutes per month in group S&L therapy, and 90 minutes per month in OT. (J-27 at page 71).
28. The placement in the November 2021 IEP would continue to be at the same elementary school where the student had been attending, with supplemental learning support. The student would spend approximately 76% of the school day in regular education settings. (J-27 at pages 77-79).
29. In late November 2021, the District performed the FBA and developed a PBSP. (J-30, J-31).

30. At some point prior to November 26, 2021, the parents retained a private evaluator to perform an evaluation of the student. (J-33).⁴
31. In the final days of November 2021, the private evaluator observed the student at the District. (J-33).
32. In early December 2021, the student engaged in a week-long, in-class trial at the private placement which screened/evaluated the student in November. (J-32).
33. In mid-February 2022, the private evaluator issued her report, and parents provided the private evaluation report to the District.⁵ At that time, the parents also requested placement at the private placement the student had visited over November and December 2021, to be funded by the District. (J-33, J-72; School District Exhibit ("S")-21).
34. Upon receiving the private evaluation report, the District sought permission to review the private evaluation report and, through that records review, make its content part of a formal District RR. (J-34, J-72).
35. Upon receiving the parents' request for a funded private placement, the District declined to support the placement. (J-36).

⁴ Throughout the hearing, the report ultimately issued by the private evaluator was described as an "independent educational evaluation", or "IEE". The record shows that this is a misnomer. The private evaluation was not obtained through the operation of 34 C.F.R. §300.502 and was not funded by the District as the result of a parental request for an IEE. Indeed, the tenor of the record is that the District feels reimbursement for the private evaluation is implicit in parents' claims; this is specifically discounted by the District in its closing statement. (District Closing Statement at pages 39-40). Therefore, this decision will refer to the report of the private evaluator as a private evaluation report rather than an IEE as that more accurately portrays that document given the stance of the parties. Too, in their complaint, parents do not make any claim for reimbursement for the private evaluation. Accordingly, reimbursement for the private evaluation is not presented in this decision as an issue.

⁵ The private evaluation process, begun in November 2021, did not result in a report until February 2022, although the report is not dated as such. Still, the private evaluation report will be referred to as the February 2022 private evaluation report. (J-33).

36. The February 2022 private evaluation report included a number of instructional and programming recommendations. (J-33 at pages 43-52).
37. In late February 2022, the District issued its RR in light of the private evaluation report. The February 2022 RR contained much of the content from the private evaluation report. (J-37).
38. Over the period November 2021 – February 2022, under the terms of the November 2021 IEP, the student made progress in two S&L goals, the attention goal, the self-advocacy goal, the mathematics goal, and one of the reading goals. (J-27 at pages 25-70, J-47 at pages 1, 2, 5, 6, 9, 11-12).
39. Over the period November 2021 – February 2022, under the terms of the November 2021 IEP, the student did not make progress in one S&L goal and one of the reading goals. (J-27 at pages 25-70, J-47 at pages 4, 10).
40. Over the period November 2021 – February 2022, under the terms of the November 2021 IEP, there was no data reported for one of the S&L goals, the OT goal, and the two social skills/socialization goals. (J-27 at pages 25-70, J-47 at pages 3, 7, 8, 13).
41. In early March 2022, the IEP team met to revise the student’s IEP. (J-43).⁶
42. The present levels of academic and functional performance in the March 2022 contain qualitative reflections of educators on the purported progress of the student. While these reflections cannot be entirely discounted, the formal progress monitoring provides a more reliable (and, as compared to the progress reflections in the IEP, more

⁶ There are two IEPs in the record dated within a few days of each other in early March 2022. The parties agree, as they refer to a March 2022 IEP in their closing statements, that J-43 is the relevant IEP to surface out of the IEP team’s March meetings. (J-43; see Parents Closing Statement at proposed finding of fact 111 (page 10), District’s Closing Statement at proposed finding of fact 54 (page 12).

accessible) picture of the student's progress or lack of progress. (J-43 at pages 13-16, J-47 at pages 1-13).

43. The March 2022 IEP contains twelve goals, three S&L goals (expressive and receptive language, articulation), two reading goals (letter recognition/phonics, sight-word recognition), two mathematics goals (counting, number recognition), two social skills/socialization goals, one OT goal (handwriting), one behavior goal (task persistence), and one self-advocacy goal (hand-raising). (J-43 at pages 23-66).
44. The March 2022 IEP indicated that the student would have the support of a 1:1 aide. The IEP provided for 240 minutes per month in individual S&L therapy, 120 minutes per month in group S&L therapy, and 90 minutes per month in OT. (J-43 at page 67).
45. The March 2022 IEP found the student to be eligible for extended school year programming in the summer of 2022. (J-43 at pages 70-72).
46. The placement in the March 2022 IEP would continue to be at the same elementary school where the student had been attending. The District recommended moving the student's educational placement from supplemental learning support to life skills support. The student would spend approximately 51% of the school day in regular education settings. (J-43 at pages 73-75).
47. The District issued a NOREP along with the March 2022 IEP. Parents checked two boxes, one indicating "I approve this recommendation" and one indicating "I do not approve this recommendation". In the section after the second of these indications, in response to the prompt "My reason for disapproval is", the student's father wrote the following:

“I approve this IEP as written. However, the overall plan continues to be a denial of FAPE. I am requesting placement at another school”.

The box requesting a due process hearing was checked. (J-44).

48. Over the period February – June 2022, under the terms of the March 2022 IEP, the student made progress in the self-advocacy goal, both mathematics goals, both reading goals, both social skills/socialization goals, and two S&L goals. (J-43 at pages 23-66, J-47 at pages 28, 29, 30, 31, 32, 33, 35-36, 39-40, 41-42).
49. Over the period February – May 2022, under the terms of the March 2022 IEP, the student did not make progress in the behavior goal, the OT goal, and one S&L goal. (J-43 at pages 23-66, J-47 at pages 27, 34, 37-38).
50. Parents seek a specific private placement for the student outside of the District. (J-32).
51. As indicated above, the student was involved in screening and evaluation processes at the private placement in November 2021 and attended a week-long, in-class trial in December 2021. (J-32).
52. During the December 2021 in-class trial, the student was formally assessed by a S&L therapist and occupational therapist. A special education teacher at the private placement provided anecdotal observational and curriculum-based input. (J-32).
53. The S&L therapist, occupational therapist and special education teacher, along with an administrator from the private placement, authored a report which made a handful of S&L and OT recommendations. There were no academic recommendations. One recommendation was that the student would benefit from schooling in an environment like the private placement; that recommendation

indicated that the student “(had) been offered placement contingent upon...attendance with a 1:1 educational aide”. (J-32).

54. The report issued by the private placement contains no information about the school or its programming. No one from the private placement testified at the hearing. (J-32).

Discussion

IDEIA/Denial-of-FAPE

Each of the issues in this matter will be considered in turn in its own sub-section, with the relevant legal standards provided within each sub-section.

2021-2022 Programming. The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis*, or minimal, or ‘some’ education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Here, there are three distinct periods of educational programming at the District: August – November 2021 (under the comparable services mediation agreement of the parties through mediation, November 2021 – March 2022 (under the terms of the November 2021 IEP), and March – June

2022 (under the terms of the March 2022 IEP). The second and third of these periods—under the terms of the November 2021 and March 2022 IEPs—show that the student made meaningful education progress through the goals in those IEPs. (Findings of Fact [“FF”] 26, 38, 43, 48). In only a handful of goals for each IEP was there a lack of progress in the progress monitoring (FF 39, 49). There were some goals from the November 2021 IEP where there appears to be no data (FF 40). But considered all together, the progress monitoring supports a conclusion that the student was making progress across almost all IEP goals over the period November 2021 – June 2022.

In an encouraging sign, after the student’s placement was moved from learning support to life skills support in the March 2022 IEP, the student’s progress in many goal areas—even those which were carried over from the November 2021 IEP—has markedly strengthened. In that way, it may be that the IEP team has come to a point where it understands the instructional and placement constellation that allows the student to engage in significant learning while still spending approximately half of the school day in regular education environments.

Overall, then, the record supports a finding that the student’s educational programming afforded the student the opportunity for significant learning in light of the student’s unique needs and that meaningful education progress resulted from the District’s efforts over November 2021 – June 2022.

The situation is different for the period August – November 2021. Here, the parties were only able to come to a point of agreement about the broad outlines of the student’s program when on the cusp of the 2021-2022 school year. Even then, it was not an IEP team decision but a mediation agreement that was, in effect, a placeholder program of services comparable to the early intervention programming until the District could complete its

re-evaluation process with the inclusion of S&L evaluation and, shortly into the school year, an OT evaluation. (FF 14, 15, 16, 17, 19, 21). Also, the programming envisioned for the student, including a RBT, was not immediately available as the District interviewed and sought to arrange for a suitably qualified candidate who the District trusted with the duties. (FF 15, 18).

None of this is necessarily problematic on its face. Ultimately, the IEP team did not convene to consider a whole-cloth IEP, outside the constraints of the early intervention programming, until mid-November 2021. The question then, in the mind of this hearing officer, is whether the delay from early October 2021 (when the OT evaluation was issued—FF 19, 21) through mid-November 2021 was a denial-of-FAPE. The conclusion here, in terms of the chronologies, is that there was no denial of FAPE. In short, approximately five weeks passed between the District having the data it was waiting for and the IEP meeting, and the record as a whole over this period, including emails flowing back and forth between the parties, does not amount to a denial of FAPE.

These chronologies, however, are only one issue of potential concern over this period. Another issue of potential concern are substantive flaws in the District's approach to schooling the student over August – November 2021, namely the lack of any FBA/PBSP and the lack of any progress monitoring. As to the FBA/PBSP, the District was waiting on the S&L and OT evaluations, but the need for a FBA—noted in the District's understanding of what it needed to program for the student prior to enrollment in the District—was inappropriately delayed until November 2021. In fact, the observations for the FBA took place in September and October 2021, but the FBA was not issued until November 2021. (J-30). Even then, it was issued two weeks after the November 2021 IEP meeting. That delay, and the fact

that the IEP team did not have the FBA for consideration at its November meeting, amount to a denial of FAPE.

As to the progress monitoring, for two months (September and October 2021) the student was in a District school daily, receiving programming under the early intervention IEP, along with other supports and services outlined in the mediation agreement. To its credit, the provision of S&L services and OT services, once those began, were well-documented over the period of September – November 2021. (J-49, J-50, J-51). But the record is devoid of any data or assessments or formal progress monitoring for any of the other goals in the early intervention IEP. Even if the expectation was that the student would be rotating out of that programming once the student moved into programming outlined in a District IEP, the lack of any documentary evidence about what was happening with the student in those two months amounts to a denial of FAPE.

Accordingly, the student will be awarded compensatory education for these denials of FAPE over the period August – November 2021. The District, however, provided FAPE to the student in the period on this record from the issuance of the November 2021 IEP in mid-November through June 2022.

Private Placement via Hearing Officer Order. Parents had sought after a private placement for the student for many months in the 2021-2022 school year. They asked the District to make that placement and to fund it. The District declined. (FF 23, 32, 33, 35).

In their complaint, parents seek a placement at the private placement via hearing officer order. In arguing for this position, parents urge that the Burlington-Carter framework be used to gauge whether or not the student should be placed, via hearing officer order, in the private placement. (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985);

see also 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). The Burlington-Carter analysis is employed to analyze a parent's claim for tuition reimbursement for the unilateral placement, by parent, in a private placement where the parent claims that a school district's denial of FAPE necessitated that expenditure.

The explicit language in IDEIA that underpins the Burlington-Carter analysis, however, applies in very precise and explicit circumstances: "**Reimbursement for private school placement.** If the parents of a child with a disability, who previously received special education and related services under the authority of a (school district), enroll the child in a private ...school without the consent of or referral by the (school district), a court or a hearing officer may require the (school district) to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." (34 C.F.R. 34 C.F.R. §300.148(c); 22 PA Code §14.102(a)(2)(xvi); underline/italics emphasis added, parentheticals utilized for stylistic consistency with the remainder of the decision).

Clearly, the IDEIA envisions that tuition reimbursement—a very potent remedy in that it requires the expenditure of public monies to reimburse directly the parents of a special needs child—is to be considered only after enrollment and in the nature of reimbursement, where the private placement of a student is concerned. Where a parent seeks a prospective placement, via hearing officer order, of a private placement outside of a school district, the Burlington-Carter analysis is not applicable in weighing such a remedy.

Given the broad remedial framework, grounded almost entirely in equity, which hearing officers or courts can employ under the IDEIA to remedy an ongoing or past denial of FAPE, the concept of a private placement, via an order, cannot be dismissed out of hand. Is it possible?

One can construct scenarios in one's mind where the answer might be 'yes'. But those scenarios, indeed the whole basis of such a remedy, would have as their foundation the notion that the school district is incapable of appropriately educating the student, such that the student must be affirmatively excluded from schooling at the school district. Even in theory, it would be somewhat rare and extraordinary—possible, but rare and extraordinary. Here, it is a non-starter—the District is capable of appropriately educating this student and has done so for most of the 2021-2022 school year.

Accordingly, a private placement for the student will not be ordered.

Section 504/Denial-of-FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁷ The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

As outlined above, the student was largely provided with FAPE in the 2021-2022 school year, although compensatory education will be awarded for certain substantive denials of FAPE over the period of August through mid-November 2021.

⁷ Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, and by analogy under the terms of Section 504, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)).

The evidentiary scope of claims and the nature of compensatory education awards were addressed in G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015) The G.L. court recognized two methods by which a compensatory education remedy may be calculated. One method, the more prevalent method to devise compensatory education, is the quantitative/hour-for-hour calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a quantitative calculation given the period of deprivation. In most cases, it is equitable in nature, but the award is a numeric award of hours as remedy. The second method, a rarer method to devise compensatory education, is the qualitative/make-whole calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a qualitative determination where the compensatory education remedy is gauged to place the student in the place where he/she would have been absent the denial of FAPE. It, too, is equitable in nature, but the award is based on services, or some future accomplishment or goal-mastery by the student, rather than being numeric in nature.

Both calculations are a matter of proof. The quantitative/hour-for-hour approach is normally a matter of evidence based on IEPs or other documentary evidence that provides insight into the quantitative nature of the proven deprivation. The qualitative/make-whole approach normally requires testimony from someone with expertise to provide evidence as to

where the student might have been, or should have been, educationally but for the proven deprivation, often with a sense of what the make-whole services, or future student accomplishment/goal-mastery, might look like from a remedial perspective. In this case, in their complaint, parents seek quantitative compensatory education (“compensatory education for [the student] in an amount equal to the educational deprivation” – Complaint at page 6). Additionally, as an equitable remedy, a number of case-specific factors come into play in the amount and nature of any compensatory education award.

In terms of the compensatory education here, the District knew the student had behavior needs when it encountered the student’s programming in the early intervention program and from the very beginning, its evaluation and programming understandings included the need for a FBA. Now, an FBA needs to be performed in the setting where the behavior is observed so that the antecedents, the behaviors themselves, and the potential consequences can be gauged accurately. Ultimately, the FBA will be the foundation for a PBSP, so that too must be understood in the context of how behavior can be addressed from a planning perspective. The District understood this—its FBA was conducted with observations over September and October 2021. Thus, by the end of October 2021, the District should have issued the FBA for the IEP team’s consideration. It was not available, however, until late November 2021. Therefore, as a matter of equity, the student will be awarded 50 hours of compensatory education for this denial of FAPE.

The District also knew that over the period of September, October and into mid-November 2021, as it awaited the perfection of its understanding of the student through the S&L and OT evaluations (and the FBA as well), it needed to provide schooling to the student under the terms of the early intervention IEP. How did the student do over those months? What was working and what was not working? What insights did the District gain from

getting to know, and working with, the student? This record is silent. If there are data, or assessments, or progress-monitoring—aside from the S&L and OT logs and service records (which must be noted but which must be recognized as exactly the type of documentation that is missing from the rest of the student’s programming over those months)—it played no role in the evidence at the hearing. To be colloquial, it appears the District was content simply to wait until its IEP was in place. But months passed without any notion of how the student was doing in school. That is not tenable on this record. Therefore, as a matter of equity, the student will be awarded 50 hours of compensatory education for this denial of FAPE.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Philadelphia School District provided a free appropriate public education through its programming for the student from the period of mid-November 2021 through June 2022.

The school district, however, failed to provide a free appropriate public education to the student, for the reasons stated above, for the period from the commencement of the 2021-2022 school year in late August 2021 through mid-November 2021 when the November 2021 was put in place. Accordingly, the student is awarded 100 hours of compensatory education.

The student will not be placed, under the terms of this decision and order, in a private educational placement. The March 2022 IEP is reasonably calculated to continue to provide a free appropriate public education to the student.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

09/01/2022