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## **Pennsylvania Special Education Hearing Officer Final Decision and Order**

### **Closed Hearing**

#### **ODR File Number**

25185-21-22

#### **Child's Name**

A.M.

#### **Date of Birth**

[redacted]

#### **Parents**

[redacted]

#### *Counsel for Parents*

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#### **Local Educational Agency**

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#### **Hearing Officer**

Michael J. McElligott, Esquire

#### **Date of Decision**

03/15/2022

## Introduction

This special education due process hearing concerns the educational program and placement of A.M. ("student"), a student who resides in the Tunkhannock Area School District ("District").<sup>1</sup> The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")<sup>2</sup> as a student who requires special education.

In April 2021, the student's parents filed the special education due process complaint. The complaint alleged that the District had, over prior school years, denied the student a free appropriate public education ("FAPE"). Parents also alleged that the then-current programming was inappropriate and needed to be addressed through a final decision and order.

With a near-term decision needing to be issued prior to the 2021-2022 school year for the current-programming issue, the complaint was bifurcated into two processes, one for the retrospective claims (at this ODR file number) and one for the current-programming claim (at a separate ODR file number, 24827-2021). In late August 2021, a final decision was issued at

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

<sup>2</sup> 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").

ODR file number 24827-2021 for the student's program and placement for the 2021-2022 school year. The instant decision at this file number addresses the retrospective denial-of-FAPE claims in parents' complaint.

Parents claim that the District denied the student FAPE under the terms of IDEIA, as well as under the terms of Section 504 of the Rehabilitation Act of 1973 ("Section 504"),<sup>3</sup> for a period beginning two years prior to the filing date of parents' complaint (April 2019), as a result of inappropriate understanding and identification of the student's needs, inappropriate programming, and inappropriate placements. The parents' claims, addressed through this decision, end in August 2021 when the affiliated decision at 24827-2021 was issued. Parents seek compensatory education as a remedy for this alleged denial of FAPE.

The District counters that, at all times over the period April 2019 through August 2021, it met its obligations to the student under IDEIA and Section 504 and, therefore, no remedy is owed to the student.

For the reasons set forth below, I find in favor of the parents in some regards and the District in other regards.

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<sup>3</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See *also* 22 PA Code §§15.1-15.11 ("Chapter 15").

## **Issue**

1. Did the District provide FAPE to the student in the 2018-2019 school year (as of April 2019), 2019-2020, and/or 2020-2021 school years?
2. If the District did not provide FAPE to the student over one or more of these periods, is the student entitled to compensatory education?

## **Findings of Fact**

All evidence in the record, both exhibits and testimony, was considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The student attended school at the District in emotional support settings. (Joint Exhibit ["J"]-14, J-15; Notes of Testimony ["NT"] at 54-187, 690-750, 754-787).
2. The student was evaluated by the District in May 2016. (J-21 at pages 2-3).
3. In the fall of 2017, due to behavioral support needs, the student's individualized education program team ("IEP") was considering different placements. The parents had filed for mediation regarding the

District's approach to the student's placement, but the District declined to participate. (J-17, J-69, J-70, J-71; NT at 54-187, 690-750).

4. In the spring of 2018, the student was referred by mental health providers to a partial hospitalization program. (J-20, J-22; NT at 54-187, 690-750, 754-787).
5. In April 2018, the student was re-evaluated for educational purposes by the partial hospitalization provider. (J-21).
6. While the student's cognitive and achievement testing indicated some relative academic weaknesses, the student was not identified as a student with specific learning disabilities. The student's needs were clearly centered on behavior and the need for emotional support. (J-21).
7. In May 2018, the student was discharged from the partial hospitalization program and enrolled in a neighboring school district that had an emotional support classroom affiliated with a partial hospitalization program. (J-22, J-24; NT at 54-187, 690-750, 754-787).
8. In May 2018, the student's individualized education program ("IEP") team met to develop the student's IEP. (J-23; NT at 54-187, 690-750, 754-787).

9. The May 2018 IEP was in place, near the end of the following school year, when parents' claims in their complaint accrued in April 2019. (J-23, J-47).
10. The May 2018 IEP identified needs in behavior, reading, and mathematics. (J-23).
11. The May 2018 IEP contained goals in behavior, reading fluency, reading comprehension, math concepts/applications, and math computation. (J-23).
12. The May 2018 IEP included occupational therapy ("OT") sessions with access to the sensory room. The IEP indicated that the student had been diagnosed with social pragmatic language disorder, but there were no speech and language ("S&L") support or services in the IEP. (J-23).
13. The May 2018 IEP included a positive behavior support plan. Counseling and therapeutic intervention were provided as part of mental health services through the partial hospitalization aspect of the placement. (J-23; NT at 54-187).
14. In the 2018-2019 school year, the student's behaviors intensified in December 2018, with suspensions and significant acting-out and aggressive behaviors through April/May 2019. (J-25).
15. In early May 2019, the student's IEP team met for its annual IEP team meeting to develop the student's IEP. (J-25).

16. The May 2019 IEP continued to identify needs in behavior, emotional regulation, reading, and mathematics. (J-25).
17. The May 2019 IEP contained goals in behavior, reading fluency, and math computation. (J-25).
18. The May 2019 IEP included occupational therapy sessions although, due to the student declining OT services over the course of the 2018-2019 school year, the frequency of OT support was reduced. The student continued to have access to the sensory room. (J-25).
19. The May 2019 IEP continued to indicate that the student had been diagnosed with social pragmatic language disorder, but there was no S&L support or services in the IEP. (J-25).
20. The May 2019 IEP included a revised positive behavior support plan. Counseling and therapeutic intervention continued to be provided as part of mental health services through the partial hospitalization aspect of the placement. (J-25).
21. The May 2019 IEP continued to recommend an emotional support placement in the neighboring school district affiliated with the partial hospitalization program. (J-25, J-26).
22. The parents both approved the program and placement outlined in the May 2019 IEP. (J-26).
23. A few days after the May 2019 IEP meeting, the student was involved in a significant behavior incident which involved twice striking

an adult educator. For the safety of the student, other students, and staff, the student underwent a 10-minute restraint (seated cradle) until calmed. (J-27).

24. In late August 2019, the student returned to the emotional support placement in the neighboring school district. Shortly after returning, in late August 2019, the student was involved in an altercation with a teacher, and the placement informed the IEP team that the student was no longer welcome at the placement. (J-72).

25. There was slightly conflicting testimony as to the circumstances for the student not returning to the placement for the 2019-2020 school year as to whether that decision was a programmatic decision unrelated to the student's behavior or that, because of the student's behavior, the student was no longer welcome at the placement. The record is preponderant that the placement did not consider the student welcome to continue in the 2019-2020 school year. (NT at 54-187, 690-750, 754-787).

26. In September 2019, the student was placed on homebound instruction while a new placement was secured. (J-50 at page 1; J-67a; NT at 54-187, 690-750, 754-787).

27. In October 2019, the student began to attend a partial hospitalization program, affiliated with, and with an educational



component provided by, the local intermediate unit ("IU"). (J-50; NT at 54-187, 363-444, 516-627, 690-750, 754-787).

28. In the new partial hospitalization program, the student's educational component was governed by the May 2019 IEP. (J-25).
29. The IU placement did not conduct a new functional behavior assessment or revise the positive behavior support plan when the student entered the new environment. (J-25).
30. The student's behavior goal in the May 2019, written in terms of the behavior programming at the prior placement, was monitored under the behavior programming at the IU placement, two entirely different behavior programming measures. (J-25, J-29, J-54).
31. In December 2019, the parents requested an independent educational evaluation. The District did not file a special education due process complaint to defend its evaluation process/report from May 2016 but did not move with alacrity to provide an independent evaluation. (J-28).
32. The May 2019 IEP was implemented in the IU placement from August 2019 – early March 2020, when the COVID-19 pandemic led to the closure of all Pennsylvania schools. (J-25).
33. When the student was receiving in-person instruction over the period September 2019 – March 2020, the student was involved in a

number of significant behavior incidents involving defiance, disruption, threats, and physical altercations with staff. (J-50 at page 18).

34. Academically in reading, in the prior placement, in goal-monitoring for the third quarter of 2019, the student was reading 84 words correct per minute with 96% accuracy at the 3<sup>rd</sup> grade level. When the student came to the IU placement in October 2019, goal-monitoring was changed to the 4<sup>th</sup> grade level, where the student's fluency was 56 words correct per minute, with no accuracy indicated. In the third quarter of 2020, the student's fluency was 73 words correct per minute, with no accuracy indicated. (J-25 at page 26; J-29 at page 8).
35. Academically in mathematics, in the prior placement, in goal-monitoring for the third quarter of 2019, the student scored 23 correct math computation questions at the 3<sup>rd</sup> grade level. In the third quarter of 2020, the student scored 29 correct math computation questions at the 4<sup>th</sup> grade level. (J-25 at page 27; J-29 at page 8).
36. Counseling and therapeutic intervention continued to be provided as part of mental health services through the partial hospitalization aspect of the IU placement. (J-25).
37. In March 2020, with the statewide school closure, the student's program was delivered entirely online for the remainder of the 2019-2020 school year.

38. In May 2020, the student's IEP team met for its annual IEP team meeting to develop the student's IEP. (J-29).
39. The May 2020 IEP continued to identify needs in behavior, reading, and mathematics. (J-29).
40. The May 2020 IEP contained goals in reading fluency, math computation, and behavior (written in terms of the IU's behavior programming and measures). (J-29).
41. The May 2020 IEP did not include any occupational therapy support or access to a sensory room, or sensory items in the emotional support classroom. (J-29).
42. The May 2020 IEP did not contain any information about the student's diagnosis with social pragmatic language disorder. The IEP did not contain any provision for S&L support or services in the IEP. (J-29).
43. The May 2020 IEP included a revised positive behavior support plan for implementation at the IU placement, written in terms of its behavior programming and measures. (J-29).
44. By May 2020, the District had still not undertaken a process for the issuance of the independent educational evaluation requested by parent.

45. The May 2020 IEP continued to recommend an emotional support placement in the IU placement affiliated with the partial hospitalization program. (J-29).
46. In August 2020, parents, through their counsel, submitted suggested IEP revisions. (J-30).
47. In early September 2020 certain IEP suggestions provided by the parents were incorporated into the student's IEP. (J-30, J-34 at page 28).
48. In mid-September 2020, the mental health support as part of the partial hospitalization was revised with an updated treatment plan. (J-31).
49. The student returned to the IU placement. The student was in a hybrid schedule, with the student attending in person on certain days and receiving online instruction on other days. (J-50 at pages 16-17, J-64; NT at 258-358, 363-444).
50. In mid-November 2020, the student's IEP was revised to incorporate, as part of the IEP, the counseling and social skills sessions that were part of the student's programming through the partial hospitalization program. (J-34).
51. In the latter half of November 2020, after the IEP meeting, the District issued a re-evaluation report ("RR"). (J-35; NT at 638-676).

52. The November 2020 RR did not include updated cognitive testing but did include updated achievement testing. (J-35).
53. The student continued to show needs in reading fluency, including decoding. The student's achievement scores in written expression reveal needs in that area, including spelling, sentence building, and essay composition. In mathematics, numeric operations were a relative strength but the student's scored revealed a need in math problem-solving. (J-35).
54. The November 2020 RR included assessments in behavior, executive functioning, and attention. (J-35).
55. The November 2020 RR included a functional behavior assessment ("FBA") completed by the District. (J-35).
56. The District continued to recommend that the student be identified as a student with emotional disturbance, with needs in behavior, reading, and reading fluency. (J-35).
57. Academically in reading, the student's baseline for the fluency goal was 73 words correct per minute at the 4<sup>th</sup> grade level. In the first quarter of 2020, the student's goal progress was being measure on the 5<sup>th</sup> grade level at 63 words correct per minute. (J-29 at page 8; J-34 at page 22).
58. Academically in mathematics, the student's goal was to move from 29 correct math computation questions at the 4<sup>th</sup> grade level to

32 correct math computation questions at the 5<sup>th</sup> grade level, with the 4<sup>th</sup> grade level as a baseline. In the first quarter of 2020, the student scored 12 correct math computation questions at the 5<sup>th</sup> grade level. (J-29 at page 8; J-34 at page 23).

59. In the behavior programming and measures process implemented by the IU placement, the student's behavior goal was to demonstrate absence of aggression in 94% of instances, using a baseline of 91%. In the first quarter of 2020, the student demonstrated absence of aggression in 93% of instances. (J-34 at page 24).
60. In December 2020, the District re-issued its RR, finding that the student had specific learning disabilities in oral reading fluency and basic reading. (J-45; NT at 638-676).
61. In December 2020, the student was discharged from partial hospitalization services. (J-36).
62. In December 2020, parents, through their counsel, submitted suggested IEP revisions. (J-38).
63. In January 2021, as a result of the discharge, the student's placement was changed to full-time emotional support at the IU placement, without any involvement from the partial hospitalization providers. (J-36, J-37; NT at 54-187, 455-508, 690-750, 754-787).

64. In January 2021, the student's IEP team met to revise the student's IEP in light of the placement change and the non-involvement of partial hospitalization providers. (J-39).
65. In the January 2021 IEP, the District developed a positive behavior support plan based on the FBA from the November 2020 RR. (J-39).
66. In the January 2021 IEP, the reading fluency goal was revised to use the fall 2020 reading fluency level (63 words correct per minute at the 5<sup>th</sup> grade level) as a baseline. (J-39).
67. In the January 2021 IEP, the student's behavior goal was revised to indicate zero instances of aggressive behavior with a baseline, in the nomenclature of the District, of 2 "red flag" aggressive incidents. (J-39).
68. In the January 2021 IEP, a social work session goal was added for qualitative participation by the student in daily social work sessions. (J-39).
69. The student's math computation goal was removed. (J-39).
70. By February 2021, a mathematics concepts/applications goal was added to the student's IEP. (J-39).
71. At some point, unclear on this record, an independent S&L evaluation was issued. The testing date on the report is early October 2020, but it is not clear when parents received it from the evaluator or

when they provided it to the District, but it was “a while” after October 2020. (J-40; NT at 143).

72. The S&L evaluator identified certain weaknesses in the student’s S&L profile, but did not recommend that the student be identified as a student with a S&L impairment. The most significant weaknesses were phonological deficits (which undergird aspects of the student’s needs in reading decoding) and social-pragmatic speech, which interferes with the student’s ability to take the perspective of others (which undergirds aspects of the student’s social interaction and aggression). (J-40).

73. In April 2021, the parents filed the complaint which led to these proceedings. (J-47; NT at 690-750, 754-787).

74. Over the period January – June 2021, the student experienced a number of “red flag” behaviors, especially after March, April, and May 2021. (J-53, J-54, J-73 at pages 38-39).

75. Academically in reading, the student’s baseline (revised in January 2021) for the fluency goal was 63 words correct per minute at the 5<sup>th</sup> grade level. In the third quarter of 2020, the student’s goal progress averaged 72 words correct per minute. In the fourth quarter of 2020, the student’s goal progress averaged 95 words correct per minute. (J-73 at pages 36-37).



76. Academically in mathematics, the student's baseline (established in February 2021) was 7 correct mathematics concepts problems correct. In the third quarter of 2020, the student's goal progress averaged 7.75 problems correct. In the fourth quarter of 2020, the student's goal progress averaged 6.66 problems correct. (J-73 at pages 41).
77. As a baseline in the January 2021 IEP, the student's behavior goal was 2 "red flag" incidents with a goal of zero incidents. In the third quarter of 2020, one "red flag" incident was reported. In the fourth quarter of 2020, nine "red flag" incidents were reported. (J-73 at pages 38-39).
78. In the third and fourth quarters of 2020, satisfactory progress was reported in the social work groups. (J-73 at page 40).
79. In the summer of 2021, it was decided that the student would not remain in the IU emotional support placement. Various options were considered by the IEP team, including a placement at the District (where the mother resides), a placement in a nearby school district (where the father resides), and a placement outside of a school district. (J-49, J-50; NT at 54-187, 516-627, 690-750, 754-787).
80. In August 2021, as planning for a placement outside of a school district became unavailable, the parties were left in a conundrum, as parents did not agree between themselves what the student's

placement should be. The District was prepared to offer an IEP for implementation at a District placement. (J-47, J-58; NT at 54-187, 690-750, 754-787).

81. The parents' inability, and parties' inability generally, to agree on a placement for the student led to a one-session hearing and hearing officer decision at ODR file number 24827-2021. (J-47, J-58, J-63; Hearing Officer Exhibit – ODR file number 24827-2021).
82. The August 2021 IEP was the basis for the hearing at 24827-2021. (J-58).

### **Witness Credibility**

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

## Discussion

### ***IDEIA/Denial-of-FAPE***

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

Here, the denial of FAPE analysis breaks down in to three categories: the District's evaluation of the student, the District's academic programming, and the District's behavior programming.

#### Evaluation

The District denied the student FAPE by failing to evaluate the student in a timely way. The District evaluated the student in May 2016. Thereafter, it did not evaluate the student until November 2020 and, on this record, one

wonders if the parents had not requested an independent evaluation in December 2019, and persisted thereafter, when the District would have re-evaluated the student. The student's triennial re-evaluation was due in May 2019 but it was nearly a year and a half later that the student was re-evaluated by the District. In fact, it was nearly a year between the parents' request for an independent educational evaluation in December 2019 and the District's re-evaluation in November 2020. And the qualifier "by the District" is important because the April 2018 evaluation was not undertaken by the District.

This delay in evaluating the student amounts to a denial of FAPE. Accordingly, compensatory education will be awarded.

#### Academic Programming

There is a prejudicial flaw in the District's academic programming. This flaw involves appropriate goal writing. The reading and math goals, but most particularly the reading goal, is written with an "apples and oranges" approach to the baselines and the goal-progress. The District starts with a baseline, for example, in reading fluency at the 3<sup>rd</sup> grade level in May 2019 but monitored the student's progress on a 4<sup>th</sup> grade reading level. In the fall of 2020, the District adjusted the baseline for the 4<sup>th</sup> grade level but monitored the student's progress on a 5<sup>th</sup> grade reading level. In August 2021, the student's baseline is at the 5<sup>th</sup> grade level with progress

monitoring to be done at the 6<sup>th</sup> grade reading level. Continually, then, the student—who already a struggling reader—is being gauged with a baseline that is below average for the student’s current grade but is being assessed with materials at grade level...which, by definition as a student with a reading disability, the student struggles.

The ‘apples and oranges’ analogy is used because an appropriate goal would include a baseline at one grade level (say, 3<sup>rd</sup> grade) and instruction at that level; showing progress and hopefully mastery of that grade level material, with a new baseline at the next grade level (say, 4<sup>th</sup> grade) established with a revised goal and instruction at that grade level. This would be an ‘apples to apples’ comparison between where the student is and where the instruction is taking place, with goal progress following. Instead, the student’s goals in the IEPs establish a baseline at one grade level (say, 3<sup>rd</sup> grade) and plunges the student into instruction and progress monitoring at a different, (for the student) more challenging grade level (4<sup>th</sup> grade): apples and oranges.

This goal-writing makes it impossible to gauge how a student has progressed through reading levels as part of the student’s goals and makes goal mastery elusive, if not impossible. This is not to say that every special needs student needs to master every goal in an IEP; but showing consistent progress toward goal mastery is something that an appropriate IEP fosters and on which it delivers. The goals in the student’s IEPs do not allow a

reader to understand the consistency of progress, if any, toward goal mastery.

The same flaw exists in the math goals, although to a lesser degree. Still, taken all together, the academic goal writing in the student's IEPs are prejudicially flawed. Accordingly, compensatory education will be awarded.

### Behavior Programming

Here, the District has provided appropriate behavior programming for the student. It is a difficult route to navigate when a student is in a partial hospitalization program where educational programming is being delivered. Where does behavior programming to access education (the District's responsibility) give way to the therapeutic programming which a student's mental health needs require?

In this matter, the record supports a conclusion that the student's behavior needs were being addressed in the partial hospitalization setting and this programming allowed the student to access educational programming. There is a sense, perhaps, that the District may have "outsourced" the behavior programming to the partial hospitalization setting; but that would be an ungenerous view. The student has significant behavioral needs, so much so that therapeutic approaches, services, and interventions are necessary for the student. As the many education witnesses testified, making sure that part of the student's program was successful, and where

necessary needed to be deferred to, is what allowed the student to be successful in any educational endeavor.

And, importantly, when the student was discharged from the partial hospitalization programming, the District immediately had in place its own positive behavior support plan, based on its own FBA, and with a behavior goal as part of the January 2021 IEP.

The record taken as a whole supports a finding that the District met its FAPE obligation to the student in terms of behavior programming.

### ***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).<sup>4</sup> 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 District denied the student FAPE under the terms of Section 504 in its evaluation history with the student and in the academic goals in the IEPs.

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<sup>4</sup> 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—which does need to be addressed here— were addressed in G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015) here, the scope of the claims is not in dispute—the parents seek remedy from a period beginning in April 2019.

In terms of the nature of the compensatory education, 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, parents seek a qualitative, hour-for-hour compensatory education award.

Having come to the point where the District has been found to have denied the student FAPE, and having found that the student is entitled to compensatory education, it must be pointed out that the student has not been entirely deprived of educational services, nor has the District's programming failed to provide, in certain regards, meaningful education benefit. Thus, an award of compensatory education must be crafted with a view toward equity. Too, the nature of the denials of FAPE (a flawed evaluation history and prejudicial goal-writing) are not easily quantifiable. This also requires that the award of compensatory education be somewhat equitable in nature.

Balancing these compensatory education considerations, it is the opinion of this hearing officer that the student should be awarded 100 hours of compensatory education as a result of the flawed evaluation history and 200 hours of compensatory education as a result of the prejudicial goal-writing in the IEP over the period May 2019 through August 2021.

Given the decision at ODR file number 24827-2021, which was issued in late August 2021, on the cusp of the current school year, this decision and order take no position on the design or implementation of educational programming beyond the date of that decision. Therefore, the compensatory education award provides remedy to the student through the end of August 2021.

## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the Tunkhannock Area School District denied the student a free appropriate public education in its evaluation history of the student and through flawed IEPs, both as outlined above. The student is awarded 300 hours of compensatory education. The School District provided the student with a free appropriate public education through its behavior programming, as outlined above.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire  
Special Education Hearing Officer

03/15/2022