

*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 Due Process Hearing Officer Final Decision and Order**

### **Closed Hearing**

#### **ODR File Number**

25335-21-22

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

V.M.

#### **Date of Birth**

[redacted]

#### **Parent**

[redacted]

#### Counsel for Parent

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#### **Hearing Officer**

Michael J. McElligott, Esquire

#### **Date of Decision**

05/18/2022

## Introduction

This special education due process hearing concerns the educational program and placement of V.M. ("student"), a student who resides in the Allentown 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. Parent claims that the District denied the student a free appropriate public education ("FAPE") under the IDEIA. Parent also brings a denial-of-FAPE claim under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").<sup>3</sup>

The student has attended District schools since the 2017-2018 school year and claims that acts and omissions in the District's programming and placement, as well as its evaluation processes and reports, have denied the student FAPE since the student has been enrolled at the District. Parent seeks compensatory education as a remedy, as well as tuition reimbursement for the student's enrollment at a private placement for the current 2021-2022 school year.

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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").

<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").

The District counters that it has provided FAPE to the student at all times. Therefore, the District argues, parent is not entitled to compensatory education or tuition reimbursement.

## **Issues**

Did the District provide the student with FAPE in the school years 2017-2018 through 2021-2022?<sup>4</sup>

If not, is parent entitled to compensatory education, or tuition reimbursement?

## **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.

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<sup>4</sup> To establish the scope of the denial-of-FAPE evidence, the first evidentiary session of the hearing was centered on the issue of whether the parent knew or should have known ("KOSHK") of the basis of her claims at a point prior to January 2019, two years prior to the filing date of a prior complaint and subsequent tolling agreement. As a result of that evidence, an interim KOSHK ruling was issued, finding that the parent did not know, nor should she have known, of the basis of the claims brought forward in her August 2021 complaint, the filing which led to these proceedings. Therefore, the entirety of parent's claims as set forth in the August 2021 complaint was the basis of the denial-of-FAPE evidence. (Hearing Officer Exhibit ["HO"]-6).

## Prior Education Background

1. The student's mother is a non-native speaker of English and has limited English language skills. (Notes of Testimony ["NT"] at 40-159, 170-311).
2. Prior to the 2017-2018 school year, [redacted], the student attended a nearby school district. In May 2017, the nearby school district performed a re-evaluation and issued an individualized education program ("IEP"). (Parent Exhibit ["P"]-1, P-2; School District Exhibit ["S"]-4, S-5; NT at 170-311).
3. Cognitive-ability testing in the May 2017 re-evaluation report ("RR") from the nearby school district yielded a full-scale IQ of 85, with a non-verbal index of 95. (P-1; S-4).
4. The May 2017 RR from the nearby school district contained achievement testing. Utilizing an ability/achievement discrepancy analysis, the student was identified with specific learning disabilities in reading fluency, basic reading, and math calculation. (P-1; S-4).
5. The evaluator in the May 2017 RR utilized the non-verbal index score of 95 in the discrepancy analysis due to the student's identified needs in speech and language ("S&L") and the fact that that the student has limited English language proficiency. (P-1, P-2; S-4, S-5).

6. The May 2017 RR concluded that the student should be identified as student with specific learning disabilities and S&L impairment. (P-1; S-4).
7. Based on the May 2017 RR, the nearby school district developed an IEP in May 2017. (P-2; S-5).
8. The May 2017 IEP contained goals in community-based instruction (navigating and purchasing items in a store), reading comprehension, math computation, occupational therapy ("OT"), and S&L. (P-2; S-5).
9. The student's placement in the nearby school district had been a life skills placement. This placement was continued in the May 2017 IEP, for supplemental life skills support, with the student spending approximately half of the school day in regular education. (P-2, S-5).

[2017 – 2018 School Year]

10. Prior to the 2017-2018 school year, the student and parent moved into the District. (NT at 170-311).
11. The District adopted the May 2017 RR and IEP for the student's education at the District. (NT at 170-311, 328-514).
12. By April 2018, academic progress monitoring in reading comprehension showed that the student did not make progress. The goal was written for questions answered correctly on probes at the 3<sup>rd</sup> grade level but the goal was implemented at a level no higher than 2<sup>nd</sup>

grade for the entire school year. No probes reached the level for goal-attainment. (P-5; NT at 328-514).

13. The District's curriculum-based assessment in reading showed no progress over the course of the school year, with most scores declining month over month. (S-31 at pages 16-17).
14. The student was reading at a 2<sup>nd</sup> grade level when the student entered the District from the nearby school district. The student's reading levels showed no progress. (P-1, P-2, P-5, P-7 at page 7; S-4, S-5, S-7 at page 7; NT at 328-514, 609-657).
15. By April 2018, academic progress monitoring in math computation showed that the student did not make progress. The goal was written for all four arithmetic operations. No operation reached the 90% accuracy for the goal and certain operations were not introduced or probed. (P-5; NT at 328-514).
16. By April 2018, progress monitoring in OT and S&L showed that the student made progress in these areas. (P-5; NT at 518-559).
17. The reporting of progress monitoring in the academic areas was inferior to the reporting of progress monitoring in OT and S&L. (P-5).
18. In spring of 2018, the student began to receive learning support.
19. As outlined in the May 2017 IEP, the student took the Pennsylvania Alternate System of Assessment ("PASA") for students who cannot take the Pennsylvania Standard System of Assessment

("PSSA") exams. The student performed in the advanced range for reading and mathematics, and the novice range for science. (P-6).

20. In May 2018, the student's IEP underwent its annual revision. (P-7; S-8).

21. The May 2018 IEP called for the student to continue in the life skills placement "but begin to spend a greater amount of time in learning support and regular education classrooms for the 2018-2019 school year." (P-7 at page 7; S-8 at page 7).

22. The student's mastery of OT and S&L goals led to a recommendation that the student be exited from OT and S&L services. (P-7; S-7).

#### [2018 – 2019 School Year]

23. The May 2018 IEP was in place for the 2018-2019 school year, [redacted]. (P-7; S-8).

24. The May 2018 IEP contained three goals, one in reading fluency/accuracy, mathematics problem-solving, and one in written expression. (P-7; S-8).

25. The student's placement was in supplemental life skills support, although the student's time in regular education was reduced, with the student spending approximately three-quarters of the school day in special education. (P-7; S-8).

26. By April 2019, progress monitoring in reading fluency/accuracy showed that the student seemingly made intermittent progress. With fluency of 56 words and 3 errors in the spring of 2018, the student averaged fluency of 78 words and 4 errors in the first quarter, 80 words and 0.5 errors in the second quarter, and 60 words and 1.5 errors in the third quarter. (P-8; S-10; NT at 328-514).
27. The District's curriculum-based assessment in reading mitigates against a finding of progress over the course of the school year, with erratic spread across scores, which ranged from 890 – 954 over the course of the year. Probes were taken every two weeks. The first probe in September 2018 was 913, the final probe in May 2019 was 918, with wide variability in between. (S-31 at pages 16-17).
28. In May 2019, the student's IEP at that time indicated that the student was reading fluently at the 2<sup>nd</sup> grade level. This was the student's reading fluency level in May 2017 when the student was being educated in the nearby school district. (P-2, P-9; S-5, S-11)
29. By April 2019, progress monitoring in mathematics computation showed that the student seemingly made intermittent progress. The goal was for 80% mastery at the second grade level on three consecutive probes. While some probes were markedly above the 80% level, some were markedly below 80%. (P-8; S-10; NT at 328-514).

30. The District's curriculum-based assessment in mathematics mitigates against a finding of progress over the course of the school year, with erratic spread across scores, which ranged from 897 – 929 over the course of the year. Probes were taken every two weeks. The first probe in September 2018 was 913, the final probe in May 2019 was 924, with wide variability in between. (S-31 at pages 18-19).
31. The planned-for increase of education in learning support and regular education settings did not take place. (NT at 570-605, 821-865).
32. The testimony of the learning support teacher was layered with lack of recall or lack of knowledge. The learning support teacher did not coordinate with the life skills teacher or maintain progress monitoring data; the learning support teacher did not participate in the student's IEP meeting at the end of [the school year]. The testimony of the learning support teacher was accorded little weight. (NT at 821-865).
33. The level of the student's academic ability resulted in a decision to have the student no longer take the PASA exam. (NT at 328-514).
34. In May 2019, the student's IEP underwent its annual revision. (P-9; S-11).

[2019 – 2020 School Year]

35. The May 2019 IEP was in place for the 2019-2020 school year, [redacted] (P-9; S-11).
36. The student began to attend a District middle school in [the 2019 – 2020 school year].
37. The student's placement continued to be supplemental life skills with approximately 30% of the school day spent in regular education. (P-9; S-11).
38. In October 2019, the May 2019 IEP was revised, once again indicating that the student would take the PASA exam. (P-11; S-12).
39. At the October 2019 IEP meeting, it was decided that the student should not be educated in a life skills setting and should transition into inclusive learning support. (NT at 170-311, 1102-1162, 1167-1240).
40. The May 2019 IEP contained three goals, one in reading, one in mathematics, and one in written expression. (P-9; S-11).
41. In October 2019, the student's parent sent an email to the District, registering concern about the student's progress and requesting a re-evaluation of the student. (P-59; NT at 170-311).
42. A District educator informed the parent that the District would wait until spring 2020, when the student would be due for the triennial

re-evaluation based on the May 2017 re-evaluation undertaken by the nearby school district. (P-1; S-4; NT at 170-311).

43. Early in the school year, the student's life skills teacher left on a medical leave and retired thereafter. For an interim period, the day-to-day substitute teachers taught the student's classroom. Eventually a long-term substitute teacher was hired under an emergency certificate for the remainder of the school year. (P-65; NT 661-722, 1167-1240).
44. Both of these teachers, the initially-assigned teacher and the long-term substitute teacher, were subpoenaed by parent for the hearing but neither witness appeared or made arrangements through counsel for to provide testimony. (P-67, P-68).
45. In December 2019, the student began to receive instruction in social studies in the regular education setting; in January 2020, the student began to receive instruction in science in the regular education setting. (NT at 170-311, 661-722, 1102-1162, 1167-1240).
46. In March 2020, District schools closed as a result of the statewide, COVID-related school closure. (NT at 1102-1162, 1167-1240, 1334-1369).
47. The student's programming moved to an online delivery model for the remainder of the school year. (S-17; NT at 1102-1162).

48. In April 2020, as a result of the school closure, the District requested a waiver of the student's re-evaluation process. (P-12; S-14).
49. Throughout the [school] year, the student participated in a regular education afterschool tutoring program. (NT at 1271-1327).
50. On this record, delivery of special education to the student over the [2019 – 2020] school year was minimal and potentially non-existent. No progress monitoring was produced on the record, and the District did not perform any curriculum-based assessments for the student. No witness could testify to the delivery of special education. (S-31; NT at 170-311, 1102-1162, 1167-1240).
51. In May 2020, the student's IEP underwent its annual revision. (P-13; S-14).

[2020 – 2021 School Year]

52. In the 2020-2021 school year, District schools continued to be closed, with instruction delivered to all students through online learning. (NT at 170-311, 661-772, 873-962, 1334-1369).
53. The May 2020 IEP was in place for the 2020-2021 school year, [redacted]. (P-13; S-14).

54. The present levels of academic performance and goals in the May 2020 IEP are identical to the present levels and goals in the May 2019 IEP. (P-9, P-13; S-11, S-15).
55. The May 2020 IEP contained the same reading, mathematics, and written expression goals as in the May 2019 IEP. (P-14; S-18).
56. In September 2020, the student's IEP was revised to reflect a transition in the student's placement from life skills to itinerant learning support. The student was included with regular peers for nearly 90% of the school day. (P-14; S-18).
57. The September 2020 IEP revisions also indicated that the student would not take the PASA exam but would now take the PSSA exam. (P-14; S-18).
58. In November 2020, the parent was surprised to learn that the student had not yet been re-evaluated. The District sought permission to re-evaluate the student. (P-15; NT at 170-311).
59. Progress monitoring in November 2020 indicated that, on the May 2020 reading goal, the student was not making progress (and declined over every probe); on the May 2020 mathematics goal, progress cannot be determined because the progress monitoring was at the 7<sup>th</sup> grade level while the goal was written for 3<sup>rd</sup> grade work; on the May 2020 written expression goal, gauging progress is

indeterminate, as the data is sometimes reported as fractional and sometimes as percentages. (P-16 at pages 1-6).

60. In January 2021, the District issued its RR. (P-18, S-20).

61. The January 2021 RR did not update the cognitive or achievement testing, relying on the testing from the May 2017 RR. (P-18; S-20).

62. The January 2021 RR included social/emotional/behavior assessments. (P-18; S-20).

63. The January 2021 RR continued to identify the student as a student with specific learning disabilities in reading and mathematics. (P-18; S-20).

64. In January 2021, the student's IEP team met to revise the IEP in light of the January 2021 RR. (P-18, P-19; S-20, S-21).

65. In the January 2021 IEP, the student's present levels of academic performance on the District's curriculum-based assessment, as of September 2020, showed the student's reading at the 4<sup>th</sup> grade level (with a score of 450) and, as of December 2020, at the 4<sup>th</sup> grade/3 months level (with a score of 497). (P-19; S-21) The student's mathematics level, as of September 2020, was 5<sup>th</sup> grade/5 months

(with a score of 697) and, as of December 2020, was 4<sup>th</sup> grade/3 months (with a score of 620).<sup>5</sup> (P-19; S-21).

66. These curriculum-based measures became the basis for progress-monitoring with the January 2021 IEP. (P-19; S-21).
67. The January 2021 IEP contained three goals, one in reading, one in mathematics, and one in written expression. (P-19; S-21).
68. February 2021 progress monitoring for reading and mathematics is not reported in the curriculum-based assessment measurement. Progress monitoring on the written expression goal is indeterminate, as the data is sometimes reported as fractional and sometimes as percentages. (P-21, S-22).
69. In February 2021, the parent was notified that, due to the low-performing status of the District school the student was attending, the student was potentially eligible for a scholarship to attend a private school or another public school in a different school district. This engendered in the parent's mind the possibility that the student might be educated in another school. (P-22; NT at 170-311).
70. In April 2021, progress monitoring was issued. The convoluted nature of reporting progress, without clear connections to the goals in

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<sup>5</sup> The curriculum-based reading and math scores reported in the present levels information in the January 2021 IEP do not correspond to the scoring levels in the same assessment data collected over previous years. Previous scores ranges in the 800s and 900s but the scores reported in the IEP are in the 300s/400s in reading and 500s/600s. (S-31; P-19).

the January 2021 IEP—myriad reporting on goals and short-term objectives using different measures—makes it impossible to decipher whether the student was making progress on the January 2021 IEP goals. The confusion surrounding progress monitoring makes it impossible for the parent to understand how the student was progressing and limited parental participation in her child’s education. (S-23).

71. In April 2021, the District returned to a hybrid model of schooling, online for certain days each week and in-person for the other days in the week. Parents could choose to opt out of hybrid schooling, and the student’s parent opted out. The student completed the school year entirely in the online environment. (NT at 170-311, 661-772, 1334-1369).

72. In April/May 2021, as part of engagement between the parties, two independent educational evaluations (“IEEs”) were undertaken for the student, one a comprehensive psycho-educational and the other in S&L. (P-29, P-30; S-29, S-30).

73. In June 2021, progress monitoring was issued. As in Finding of Fact 70 above, the indecipherability of the progress monitoring did not allow the parent to understand how the student was progressing and limited parental participation in her child’s education. (S-26).

74. In the summer of 2021, the parent began to explore potential alternative school placements for the student. In July 2021, a formal release of District records was provided by the parent for a private placement. (S-28; NT at 170-311).
75. Upon receiving the records release from the private placement, the District unilaterally dis-enrolled the student. (P-33; NT at 170-311).
76. In early August 2021, the IEEs were issued. (P-29, P-30; S-29, S-30).
77. The comprehensive psycho-educational IEE included an exhaustive recitation of past evaluation and educational assessments and data, as well as newly-administered assessments. (P-29; S-29).
78. The August 2021 psycho-educational IEE concluded that the student has specific learning disabilities in listening comprehension, oral expression, reading fluency, reading comprehension, math calculation, and math problem solving. The IEE made multiple recommendations for the student's educational programming, including an explicit recommendation for twice-weekly 30-minute social skills instruction. (P-29; S-29).
79. The August 2021 S&L IEE included a full recitation of past evaluation and educational assessments and data, as well as newly-administered assessments. (P-30; S-30).

80. The August 2021 S&L IEE concluded that the student has a S&L impairment. The IEE made multiple recommendations for S&L support. (P-30; S-30).
81. Shortly after the issuance of the IEEs, the student's parent requested an IEP meeting on August 7<sup>th</sup>. (P-31).
82. Approximately one week after requesting the IEP meeting, on August 13<sup>th</sup>, that meeting had not been held, and the parent provided a 10-day notice that she was seeking a potential private placement for which she would seek tuition reimbursement. (P-32; NT at 170-311).
83. On August 23<sup>rd</sup>, the unilateral dis-enrollment was discovered and rectified, and the student's IEP meeting was scheduled for August 25<sup>th</sup>. (P-33).
84. The student's IEP team met to discuss the IEP. (P-34; S-32).
85. After the meeting, and in response to the District's request for written concerns and requests, the parent shared her concerns and requests in an email sent the evening of August 25<sup>th</sup>. (P-35).
86. By August 30<sup>th</sup>, the parent had not heard from the District regarding finalization of the IEP, so the parent committed to a tuition contract at the private placement for which she had authorized the release of records. (P-37).
87. On September 8<sup>th</sup>, the District provided a revised IEP for the parent's consideration. (P-39).

[2021 – 2022 School Year]

88. The student enrolled in the private placement in the current 2021-2022 school year, [redacted].
89. The programming, and the student's progress, is documented in this record. (P-42).
90. The student receives instruction in all academic areas (including specialized reading as part of language arts instruction), as well as executive functioning (self-regulation, organization, attention/focus, social skills, and self-advocacy), and school guidance curriculum (e.g., disability-awareness, online presence/safety, social skills, self-advocacy, diversity). The private placement also provides S&L services and instruction. (P-42).
91. The student's mother was not provided with special education documentation required to be provided in writing in her native language (prior written notice and procedural safeguards). For most of the student's enrollment in the District, the District had interpreters to work with the student's mother in her native language when discussing IEPs and the January 2021 RR. (NT at 170-311, 661-772, 873-962, 1271-1327).

## **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.

## **Legal Framework**

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 a free appropriate public education ("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. (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)).

The provision of FAPE also requires that the placement of a student with a disability take into account the least restrictive environment ("LRE")

for a student. Educating a student in the LRE requires that the placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting as close as possible to regular education, especially affording exposure to non-disabled peers. (34 C.F.R. §300.114(a)(2); 22 PA Code §§14.145; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

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

## **Discussion**

*Claims for Compensatory Education – [2017 – 2021]*. Taking matters chronologically, the student came to the District from a neighboring school district in [2017]. This former school district had placed the student in a seemingly restrictive environment. A student with a rather straightforward

learning-disabilities and S&L profile—unique to the student, no doubt, but the type of profile which special education programming confronts most frequently—was being educated in a life skills setting with almost no exposure to regular education environments.

The District adopted the RR and IEP from this nearby school district. Without having worked with the student, it is perhaps understandable that the District took this approach, at least in the short-term. But at some point in the [2017 -2018 school] year, and certainly within six months—approximately at the end of the second marking period—the District should have recognized that a life skills placement was overly restrictive. Taking the record as a whole in [2017 – 2018] (and, really, the entire [2017 – 2020] period), nothing indicates that the student could not engage in learning support, with most of the student’s day spent in learning support.

It is perhaps not surprising that the student did not make progress in the [2017 – 2018 school year], as the student’s placement and consequent programming were entirely too restrictive and inappropriate. Life skills programs are simply not structured, nor should they be, for intensive academic instruction with an emphasis on specific learning deficits. Students requiring life skills support are working on very different goal sets and approaches to both academic and functional learning. A student like the student in this matter required very different programming, and the placement was wholly inappropriate to meet those needs. Nothing illustrates

this disconnect [redacted] more than the decision, quite rightly, to have the student take the PSSA thereafter, rather than the PASA.

This overly restrictive, inappropriate placement, and consequent lack of progress, continued in [2018 -2019]. Yet it is in [2019 – 2020] that the student’s programming was, on this record, undocumented at best and arguably not delivered at all.

There is no progress monitoring or curriculum-based assessment in the record. Gauging [the 2019 – 2020 school year] is not a matter of judging progress as a result of programming—there is nothing to judge. And the teachers who could have shed light on questions regarding instruction and assessment in [that school year] did not testify.<sup>6</sup> The May 2019 IEP, drafted prior to [the 2019 – 2020 school year], is identical in material parts to the May 2020 IEP—it is a vanished year in the student’s education.

In [2019 – 2020], too, the District denied the student FAPE by not re-evaluating the student in a timely way. Regardless of the issue above related to a total lack of documentation for [the 2019 - 2020 school year] on this record, when the student came to the middle school, educators who did testify recognized early on—in September 2019—that life skills was not

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<sup>6</sup> This hearing officer does not in any way impute to the District the failure of these witnesses to appear. Neither former teacher was under the control of the District, one having retired and one no longer employed by the District. Parent requested subpoenas for their appearance and those subpoenas were served. The witnesses did not comply with the subpoenas or make arrangements to testify. But this latter fact is not, to the knowledge of this hearing officer, in any way related to the District’s position on the matter.

appropriate and began to work toward addressing some of those flaws in the student's placement and program, including making the PSSA part of the IEP, and working on a transition to a much less restrictive—and more appropriate—placement focused on learning support. In October 2019, however, the student's mother put all of this into sharp relief by making an explicit request for a re-evaluation. In conjunction with the student entering middle school, and shifting views of the appropriateness of the student's placement and program in September 2019, the mother's request was a perfect opportunity to re-evaluate the student.

The District declined to seek permission to evaluate, instead telling the parent to wait seven months for a re-evaluation the student on the triennial schedule. Under these circumstances, this is a denial of FAPE. The moment to understand the student's unique needs, and to place the student on a trajectory for progress in an appropriate placement, had come through the request of a concerned parent; by delaying that request, the District denied the student FAPE.

At the hearing, parent understandably made an issue of the April 2020 waiver of the re-evaluation process as a result of the COVID-related school closure. While not diminishing that issue, it is misplaced in this regard: The re-evaluation should have taken place, and the RR issued, months prior to April 2020. In late October 2019, parent requested a re-evaluation which should have led to a re-evaluation process. Generously, by mid-November,

consent would have been secured, such that the re-evaluation should have been completed, and the RR issued, by mid-January 2020. The fact that, ultimately, the RR wasn't issued for another year, in mid-January 2021, simply drives home the consequence of the District's failure to provide FAPE to the student in the re-evaluation omissions of October 2019.

The District also denied the student FAPE in [the 2020 – 2021 school year]. Here, the denial of FAPE is rooted specifically in the District's failure to provide clear and accessible progress monitoring data. To be blunt, it is a confusing mass of scores and assessments for both annual goals and short-term objectives, pages long, and provided cumulatively over the course of the school year. It is extremely difficult, and at times truly impossible, to track the student's progress across the dozens of pages of progress monitoring (by June 2021); there is simply no way for the parent to review the progress monitoring and have a sense of how the student performed in [the 2020 - 2021 school year]. In fact, one wonders how the document could even be explained to the parent by an experienced educator, let alone having her make sense of it herself. This confusion materially interfered with the parent's ability to engage in the student's educational program in [the 2020 – 2021 school year] and amounts to a denial of FAPE.

Accordingly, the student will be awarded compensatory education, as outlined below.

*Claim for Tuition Reimbursement – [2021 – 2022]* Turning to parent’s tuition reimbursement claim, in the three-step Burlington-Carter analysis, the first step is an examination of the school district’s proposed program, or last-operative program, and whether it was reasonably calculated to yield meaningful education benefit. Step two of the Burlington-Carter analysis involves assessing the appropriateness of the private placement selected by the parents. At step three of the Burlington-Carter analysis, the equities must be balanced between the parties.

Here, the District, through prejudicially vague and confusing progress monitoring in [the 2020 – 2021 school year], did not place the parent in a position to gauge the student’s progress over the school year, or the student’s performance as of June 2021. As the current 2021-2022 school year began, the District did not place the parent in a position to understand what a revised IEP for the student would look like. It was not until September 8<sup>th</sup>, a month after the parent requested an IEP meeting and just as the school year began (P-60 at page 4), that the District proposed an IEP for [the 2021 -2022 school year] Accordingly, the parent has carried her burden of persuasion at step one of the Burlington-Carter test—the District did not place the parent in a position to understand how the student was surfacing in terms of special education programming throughout [the 2020 – 2021 school year] and did not have a program to offer for consideration at the outset of [the 2021 – 2022 school year].

At step two of the Burlington-Carter analysis, all indications on the record are that the private placement understands the student's needs, has provided appropriate programming to meet those needs, and the student has responded with significant learning. Accordingly, the parent has carried her burden of persuasion at step two of the analysis.

Step three of the Burlington-Carter analysis involves balancing the equities between the parties to see if those equities play any role in considering a tuition reimbursement remedy. Here, the equities do not weigh in favor of, or against, either party.

Thus, tuition reimbursement will be awarded to the parent for the current 2021-2022 school year.

### ***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).

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, each school year for which compensatory education will be awarded—[2017 – 2018 through 2020 – 2021]— must be approached differently, with a view toward equity. Too, the nature of the denials of FAPE are not easily quantifiable. And in most cases, an absolute denial of FAPE is rare—there is almost some degree of learning, albeit not always significant, in most educational programs. This also requires that the award of compensatory education be somewhat equitable in nature.

A concrete starting point to begin understanding how an award of compensatory education might be derived is the minimum quantitative education that any student in the Commonwealth is entitled to. For 1<sup>st</sup> – 6<sup>th</sup> grades, this amounts to 900 hours of instruction (roughly 5 hours for 180 school days); for 7<sup>th</sup> – 12<sup>th</sup> grades, this amounts to 990 hours of instruction (roughly 5.5 hours for 180 school days). (22 PA Code §11.3(a)).

In [the 2017 – 2018 school year] the District’s recognition that the student was in an inappropriate, overly restrictive placement could reasonably be excused through March 2018. By that time, both the April 2018 progress monitoring and educator experience with the student should

have indicated to the District that a life skills placement for this student was inappropriate. Because of this approximately remaining quarter of the school year, and taking account of the equitable facets of the compensatory education, it is the opinion of this hearing officer that the student should be awarded 175 hours of compensatory education.

In [the 2018 – 2019 school year], the District’s inappropriate, overly restrictive placement continued and progress monitoring showed that the placement was not allowing the student to engage in significant learning given the student’s unique needs. It is the opinion of this hearing officer that the student should be awarded 500 hours of compensatory education.

Having said above that there is almost some degree of learning in most educational programs, this records belies that assertion for the student’s [2019 -2020 school] year. There was a total denial of FAPE for the entire school year, starkly exhibited in the IEPs in place at the beginning and at the end of that school year, with no evidence of learning in between. The record requires that a full year of compensatory education—900 hours—be awarded for [the 2019 -2020 school year].

In [the 2020 – 2021 school year], the award of compensatory education is grounded not so much in flawed programming but in the parent’s ability to understand the course and results of that programming. Therefore, it is the opinion of this hearing officer that the student should be awarded 200 hours of compensatory education.

Finally, to the extent that the District did not have prior written notices and procedural safeguard notices provided to the parent in her native language, or more rarely did not have a foreign language interpreter available to interpret other special education documents, these awards of compensatory education will remedy any resulting difficulty which the parent may have had in engaging with the District.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the Allentown School District denied the student a free appropriate public education in the student's [2017 – 2018 through 2020 – 2021 school] years. For these denials of a free appropriate public education, and as outlined above, the student is awarded 1,775 hours of compensatory education.

The school district did not place parent in a position to understand the student's learning as the current [redacted] school year approached, and did not have a revised program proposed or in place, prior to the current school year. Therefore, as set forth above, the parent is awarded tuition reimbursement. Because the record is not clear as to whether, and if so how much, tuition has been paid by scholarship, the following framework applies for reimbursement: Within 30 calendar days of the date of this order, the

parent shall present, through counsel, to counsel for the school district proof of any payment which she has made for the 2021-2022 school year. To the extent that there is any remaining balance owed for a portion of the 2021-2022 school year, the parent, in the same way, shall present a tuition statement dated within this 30-day period for any such balance. The District shall arrange for reimbursement of confirmed payment and/or satisfying any balance-due payment.

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

05/18/2022