STATE OF NEVADA DEPARTMENT OF EDUCATION

REVIEW OFFICER DECISION

In the matter of

STUDENT by and through his[1] parent, PARENT

Petitioner-Appellant,

Perry A. Zirkel, State Review Officer

v.

CLARK COUNTY SCHOOL DISTRICT,

Respondent-Appellee.

I. PROCEDURAL BACKGROUND

On September 24, 2018, the Petitioner-Appellant filed the complaint in this matter under the Individuals with Disabilities Education Act (IDEA)[2] and Nevada's corresponding state statute and regulations.[3] The complaint alleged that the Clark County School District (hereinafter referred to as "District") deprived the child (hereinafter referred to as "Student"), a kindergartner with autism, of his right to free appropriate public education (FAPE) both procedurally and substantively. The requested relief was for compensatory education from "September 2016 to the final resolution of this matter" and "any other relief deemed fair and

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[1] The term "his" or "he" is used generically herein and is not intended to designate the actual gender of Student.

[2] 20 U.S.C. 1401 *et seq*. (2017); 34 C.F.R. §§ 300.1 *et seq*. (2018). For a basic framework, this decision cites the applicable federal regulations due to their specificity, only referring to the IDEA legislation or the corollary state statute and administrative code to the extent that they differ in relevant respect from these federal regulations.

[3] NEV. REV. STAT. §§ 388.419 *et seq*. (2017); NEV. ADMIN. CODE §§ 388.460 *et seq*. (2018).

proper."[4]

The hearing officer conducted a series of prehearing conferences (PHCs), granting successive extensions for the decision. At the January 21, 2019 PHC, the hearing officer put the parties' legal counsel on notice that for the requested remedy of compensatory education they needed to provide the basis for the focus and amount of compensatory education. On March 17, 2019, after the District filed a statement of concession of issues, the hearing officer issued a PHC confirming that the only issue for consideration would be the extent, if any, of the remedy. The hearing followed on April 9 and 10, 2019, ending with closing oral arguments.[5] In the Petitioner's closing argument, the requested relief was (1) "585 hours or more, if necessary" of compensatory education based on half of three admitted semesters of denial of FAPE, divided between services to Student and training for District personnel,[6] and (2) the Student's wearing of a device, called AngelSense, that provides for monitoring via a GPS and audio transmission.[7]

On April 22, 2019, the hearing officer issued his decision (hereinafter referred to as "HOD"). In response to the requested relief, (1) he denied compensatory education services to

[4] Hearing Officer Exhibit 1. The record in this matter includes a set of exhibits, referred to herein by number, and a transcript of the hearing, cited herein with a "T" followed by the page number.

[5] Reinforcing the prehearing results, the hearing officer started the hearing by clarifying that the sole issue was the remedy. T at 11. More specifically, he directed the focus on "how do we quantify [the loss of educational benefit" and award relief that is necessary." *Id.* at 12. He further explained that, as part of the record, the District had conceded "the loss set forth in the complaint." He then devoted approximately two hours to helping the parties agree on stipulated factual findings and legal conclusions. *Id*. at 13–44.

[6] T at 277–78. The specifically requested services for Student consisted of "at home instruction by an ABA-trained teacher over a period of two years." *Id*. at 278. The corresponding training consisted of "a full-day, eight-hour session … on the use of aversive interventions, … positive reinforcement, and … [proper record-keeping]" for "each District . . . employee who is going to be involved in educating any student with a disability." *Id*. at 282.

[7] *Id*. at 284–87. The stated purpose of this remote access was for the parents to be able to monitor the Student's movement so that they could identify his elopement and, if off campus, retrieve him. *Id*. at 286. The request did not include the cost associated with the device, which the parents offered to pay. *Id*. During the closing arguments, the District's counsel clarified that "a tracking device that doesn't have sound transmission capability would be acceptable to the District." *Id*. at 270.

the Student due to the purported lack of an evidentiary basis,[8] but granted four hours of compensatory education training to "Student's principal, teachers, and … all other staff … assigned to work with the Student in the present school, as well as in the 2019–2020 school year" in aversive interventions, including "positive behavior plans and supports … in Student's present and future IEPs, in compliance with NRS Chapter 388"[9]; and (2) denied the Student's use of the AngelSense device while at school.[10]

On May 17, 2019, the state superintendent received the Petitioner's appeal, which was dated May 14, 2019. Although incidentally referring to the compensatory education award for training,[11] the focus of the appeal was on the lack of direct compensatory education services to the Student and the denial of an order for use of the AngelSense device. Specifically, the appeal requested "direct 1:1 intensive, home behavioral intervention incorporating ABA and Discrete Trials in the amount of 582 hours to be completed in a partial school day with the other part of a comprehensive campus" and incorporation in the Student's IEP of "Angel Sense, including the listening function."[12]

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[8] HOD, at 19. Without any citation of applicable supporting legal authority, the hearing officer identified the fatally missing basis as "evidence pertaining to the specific areas of Student's alleged educational deprivation, what specific services are needed to remedy the denial of FAPE, and the appropriate amount of compensatory education for Student in each alleged area of educational deprivation." *Id*.

[9] *Id*. The reference to "NRS Chapter 388" in this context inferably is specific to the provisions concerning aversive interventions, including corporal punishment. NEV. REV. STAT. §§ 388.471–388.515 (2017). These provisions include requirements for the state education program to develop a model training program, including "positive behavioral interventions and … supports," and for each school district to provide "appropriate training" specific to physical and mechanical restraints. *Id*. § 388.505.

[10] HOD, at 19.

[11] Appeal, at 16. Although this relief was specifically part of the requested compensatory education (*supra* note 6 and accompanying text), the appeal oddly contends that i is "not deemed compensatory education." *Id*. The only other contention in this brief mention of the training award reinforced the focus on the requested compensatory education services directly to the Student. *Id*. at 19 ("Obviously, this does not directly compensate Student for past educational losses"). *Id*. at 19.

[12] *Id*. at 29. The appeal does not explain the slight discrepancy with the previously requested amount of "585 hours or more" (*supra* text accompanying note 6). Moreover, the appeal only provided a cryptic explanation for the corresponding discrepancy with the "home" location (*supra* note 6). *Id*. at 21

On May 20, 2019, the state superintendent appointed Joyce Eckrem as the state review officer (SRO) in this case. On May 23, 2019, promptly after a telephonic status conference with the legal counsel for the parties, SRO Eckrem issues a summary and order that included a deadline of June 7 for District's brief, June 11 any Petitioner-Appellant reply brief, and June 16 for the SRO decision.

On June 4, 2019, the state superintendent appointed me as the replacement SRO, with the express direction of submitting the decision "by June 16, 2019."

On June 6, 2019, after receiving and conducting an initial review of the record in this case, I notified the parties the original SRO's schedule applied for timely closure by the June 16, 2019 submission date.

Promptly thereafter, the Petitioner-Appellant and Respondent-Appellee submitted their briefs on schedule.

II. STANDARD OF REVIEW

The standard of review for a SRO under the IDEA is for an "independent decision" after examining the entire record.[13] The SRO finds persuasive the interpretation of the Third Circuit in *Carlisle Area School District v. Scott P.,*[14] requiring "plenary review" with one narrow exception: "[the SRO] should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion."[15]

("The hours would be provided in the morning and at home. Student would attend his community school in the afternoon for specials or other activities.").

[13] 34 C.F.R. § 300.514(b)(2)(i) and (v) (2018).

[14] 62 F.3d 520 (3d Cir. 1995).

[15] *Id*. at 529. The Third Circuit explained that "beyond this rather narrow class of record-supported, credibility-based factual findings, we think that, to give the statute's language about 'independent' decisions effect, the [SRO] must have much more leeway in reviewing other non-credibility based findings of the hearing officer." *Id*. at 528–29 (citing Perry A. Zirkel, *The Standard of*

III. ISSUES

Did the hearing officer err in –

1. denying compensatory education services to the Student?
2. denying the Student's use of the AngelSense device at school?

IV. FINDINGS OF FACT

The hearing officer's factual findings, which are numbered 1–38 and which include the stipulations reproduced in the Appendix infra, are incorporated by reference herein, because the record supports them and because the credibility-based judgments warrant deference. However, they are not sufficiently complete to resolve the issues in this case.[16] Thus, this section consists of a summary of the hearing officer's factual findings supplemented within the overall chronological sequence of the school years at issue by specific additional factual findings.

On July 18, 2016, when Student was approximately three and a half years old, the District provided an initial evaluation that determined that Student was eligible for special education under the IDEA classification of autism.[17] The evaluation report assessed Student as nonverbal noted various behaviors of concern, such as repeated head-banging.[18]

The resulting July 18, 2016 IEP provided for placement in a self-contained special

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Review Applicable to Pennsylvania's Special Education Appeal Panel, 3 WIDENER J. PUB. L. 871, 892 (1994). The Ninth Circuit indirectly appeared to approve of this approach. Amanda J. v. Clark Cty. Sch. Dist., 267 F.3d 877, 888–89 (9th Cir. 2001).

[16] For example, the hearing officer did not provide a factual finding with regard to Student progress during the relevant period, instead reciting the opposing testimony of Student's father and school 2's principal. HOD, at 13. The critical problem, aside from any question about the principal's credibility, is the distinction between the respective time periods. The principal's assertions about the Student's was clearly limited to the period at school 2, whereas the requested remedy was for the prior period at school 1, which was encompassed in the father's testimony. The District, which had the burden of production and persuasion, at least for the FAPE issue (NEV. REV. STAT. § 388.467), did not proffer any witness to rebut the cited testimony of Student's father and did not identify any exhibits that provided the requisite "cogent" showing of reasonable progress under the circumstances. Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1002 (2017).

[17] Petitioner's Exhibit 7, at 060–072.

[18] *Id*. at 063 and 066.

education classroom, with various goals (e.g., toilet training), the related service of speech/language therapy (SLT) for 160 minutes per month, and weekly home-school communications.[19] The site was an elementary school, herein designated as "school 1," and both morning and afternoon pre-kindergarten sessions, amounting to a full school day.[20]

At the outset of the 2016–17 school year, the parents made clear to Student's teacher and aides that two of his primary behaviors of concern were head-banging and elopement.[21] During the first semester, the Student's teacher implemented his IEP with effective diligence, including regular school-home communications[22] and reliable delivery to Student of parent-supplied diapers, food, and water.[23] She also was assiduous about keeping the classroom sanitary.[24] However, she died in a car accident in early January, 2017.[25] Student was absent for approximately 10 school days during this semester.[26]

In contrast, the second semester of the 2016–17 year was a "revolving door" of substitute teachers and aides for the Student[27] that resulted in persistent problems with home-school communications; food, water, diapering, and toilet training; classroom cleanliness and Student infections (e.g., strep throat) and despite the parents' earnest efforts,[28] including communications with the principal and emails to the superintendent.[29] Student was absent for approximately 25 school days during this semester.[30] The 5/19/17 IEP was similar to its predecessor, with a

[19] *Id*. at 0168–0188.
[20] *E.g*., T at 162.
[21] *Id*. at 226–27.
[22] *Id*. at 161.
[23] *Id*. at 163–65.
[24] *Id*. at 176.
[25] *Id*. at 163.
[26] District Exhibit-2. Although the exhibit does not explain the abbreviations, this estimate is for equivalent full days, counting the am and pm sessions as half days.
[27] T at 166–67 and 228.
[28] *Id*. at 169–71, 174–75, and 180.
[29] *Id.* at 229–33; Petitioner Exhibit 5.
[30] *See supra* note 26.

reduction of SLT to 120 minutes per month.[31]

The 2017–18 school year continued the problems of the second half of the previous year with exacerbation rather than rectification. For example, at a meeting during the second semester the principal of school 1 disclaimed any further responsibility for toilet training, insisting that it was exclusively the parents' job.[32] Student's did not evidence progress in language skills, toilet training, or problematic behaviors.[33] School communications to the parents about elopement were notably insufficient.[34] Moreover, the new teacher of record repeatedly physically abused Student, culminating in an incident with a wooden pointer in early May 2018 that finally resulted in the teacher's removal.[35] Student was absent for approximately 61 school days during this school year.[36]

The May 18, 2018 IEP for the next school year included a provision for close supervision to avoid elopement.[37] The November 11, 2018 IEP added occupational therapy (OT) for 60 minutes per month.[38]

The parents filed for a due process hearing at the start of the 2018–19 school year, while the Student attended elementary school 2. Also starting early in the school year, elopement continued to be problem behavior of the Student within the school,[39] although not formally documented in the progress reports to the parents.[40] The school developed a safety plan for the

[31] Petitioner's Exhibit 7, at 0132–0148.
[32] T at 183–84 and 237–41.
[33] *Id*. at 242–44 and 251. Indeed, the limited evidence indicated possible regression. *Id*.
[34] *Id*. at 260.
[35] *Id*. at 184–202. As a result of a law enforcement investigation, the teacher was criminally prosecuted for child abuse. *E.g.,* Petitioner Exhibits 2–3.
[36] *See supra* note 26.
[37] Petitioner Exhibit 7, at 096.
[38] Petitioner Exhibit 12, at 0280.
[39] The elopement at school 2 was not beyond the school's campus. T at 112.
[40] *Id*. at 59-60 and 207–08. The only notification to the parents was via phone calls, and in some cases the District did not notify the parents at all. *Id*. at 129–30 and 207.

special education classes based on radio communications,[41] although it was not part of Student's IEP or otherwise formally provided to the Student's parents.[42] The Student's "positive behavior plan" included aversive reinforcers.[43] School communications to the parents decreased to a negligible level by the middle of the second semester.[44]

V. CONCLUSIONS OF LAW

The hearing officer's decision reported five stipulated conclusions of law that, in sum, amounted to inappropriate interventions contrary to the Student's IEPs that resulted in significant interference with the parents' right to meaningful participation and deprivation of benefit to the Student.[45] Whether regarded as partly procedural, these violations ultimately amounted to the requisite substantive denial of FAPE.[46]

1. Did the hearing officer err in denying compensatory education services to Student?

Yes, the hearing officer's denial of compensatory education services to Student was reversible error. The applicable legal authority merits careful analysis.[47]

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[41] *Id*. at 60–61. The school has not repaired the cameras, which are not functioning. *Id*. at 135 and 138.

[42] *Id*. at 207.

[43] *Id*. at 90 and 92. For the prohibition of aversive or negative means, see NEV. ADMIN. CODE §§ 388.24(3)(b)(5) and 388.077.

[44] *Id*. at 208–09. The District did not provide the parents with specific data about the frequency and duration of the Student's elopement. T-80–81.

[45] HOD, at 11. The focus of these five stipulations were the behavioral intervention violations, including the lack of proper training, although they included the resultant substantive losses to the Student and the parents. *Id*.

[46] For procedural violations, the IDEA requires a substantive effect. 34 C.F.R. §§ 300.513(a) (hearing officer's denial of FAPE must ultimately be based on substantive grounds) and 300.513(b) (limiting denial of FAPE for procedural violations to those that signficiantly impeded the parental right to participation or caused a deprivation of benefit to the student).

[47] This analysis need not and does not address the thorny issue of burden of persuasion at the remedy stage. Neither state law, which puts the burden of proof on the district (*supra* note 16), nor the IDEA case law specifically addresses whether the burden of persuasion shifts at the remedy stage, in large part because in the vast majority of states, per *Schaffer* v. Weast, 546 U.S. 46, 62 (2005), the burden is on the party seeking relief, which in most cases is the parent. The other reason is that the burden of

First, it is undisputed that compensatory education is an equitable remedy.[48] Unlike tuition reimbursement, which provides its roots[49] but has been subject to codification in the IDEA,[50] the remedy of compensatory education is entirely a matter of case law. Although the lines are not yet well settled,[51] the three alternate approaches that the courts have developed thus far are (1) quantitative, (2) qualitative, and (3) relaxed or hybrid.[52] The quantitative approach, which the Third Circuit adopted, requires no more foundation than a denial of FAPE, subject to equitable tailoring.[53] The qualitative approach, which the D.C. Circuit adopted and the Sixth Circuit subsequently embraced, requires a much complicated set of factors,[54] which includes the equitable tailoring.[55] Most other jurisdictions, including the Ninth Circuit, appear to fit in the less clearly defined third approach.[56]

More specifically, in its foundational compensatory education decision, the Ninth Circuit denied compensatory education in a case of denial of FAPE but made clear that denial was, in

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persuasion is only a necessary factor in the rare cases where the evidence is in equipoise. Schaffer v. Weast, 546 U.S. 47, 58 (2005). This case is not one of those few.

[48] *E.g*., Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 (9th Cir. 1994).

[49] *E.g.,* Lester H. *ex rel*. Octavia P. v. Gilhool, 916 F.3d 865, 872–73 (3d Cir. 1990) (citing Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985)).

[50] 20 U.S.C. § 1412(a)(10)(C) (2017).

[51] As an example, hybrid examples have emerged within the circuits for each of the first two approaches. *E.g*., Woods v. Northport Pub. Sch., 487 F. App'x 968, 978 (6th Cir. 2012) (affirming a hearing officer compensatory education award based largely on quantitative approach); Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010) (citing *Reid*)

[52] *E.g*., Perry A. Zirkel, *The Competing Approaches for Calculating Compensatory Education under the IDEA: An Update*, 339 EDUC. L. REP. 10 (2018).

[53] *Id*. at 13 (citing M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996)).

[54] *Id*. (citing Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307 (6th Cir. 2007); Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005)). These factors, in logarithmic fashion, are (1) the student's specific deficits, (2) the extent of attribution of these deficits to the denial of FAPE, and (3) the extent of compensatory education needed to offset this extent. *Id*.

[55] *Id*. (citing *Reid*, 401 F.3d at 425, which in turn cited *M.C.,* 81 F.3d at 397)).

[56] *Id*. (citing Park *ex rel*. Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025 (9th Cir. 2006)).

effect, an exception to the general rule.[57] Using the broadly deferential abuse of discretion review standard, which is distinguishable from the de novo standard that applies here to legal conclusions,[58] the Ninth Circuit equitably allowed an exception in factual circumstances also clearly distinguishable from the present case—(1) the student performed on grade level and graduated successfully from high school ,and (2) the parents repeatedly declined additional services.[59] Moreover, the Ninth Circuit's in this case did not reject a quantitative approach, instead calling for a individualized, flexible rather than automatic, absolute application.[60] In this context, the statement that compensatory education need not be "day to day," the court neither required nor prohibited a "day-for-day" approach.[61] Instead, this decision permits such a quantitative calculation as a starting point, just as long as the ending point takes into equitable consideration the individual circumstances.[62].

In its subsequent major compensatory education decision,[63] the Ninth Circuit reinforced the flexible contours of compensatory education.[64] More specifically, again within a broadly deferential abuse-of-discretion standard, the Ninth Circuit upheld the hearing officer's awarding

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[57] *Parents of Student W*., 31 F.3d at 1497 ("It may be a rare case when compensatory education is not appropriate, but it was not an abuse of the district court's discretion to decide that this case was such a rarity").

[58] *See supra* notes 13–15 and accompanying text.

[59] *Parents of Student W*., 31 F.3d at 1497.

[60] *Id*. ("[The quantitative] cases do not contradict a court's power, when considering an equitable remedy, to apply a fact-based analysis, as the district court did here, and decide that a generalized approach is not appropriate.").

[61] *Id*. ("There is no obligation to provide a day-for-day compensation for time missed").

[62] Moreover, reinforcing equitable flexibility, the Ninth Circuit limited the overall guidepost to the core purpose of the IDEA of providing eligible students with FAPE. *Id*. ("Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA.").

[63] In contrast, the Ninth Circuit's subsequent citation to *Reid* did not come close to adoption of the qualitative approach. The issue was "reverse" attorneys' fees (i.e., for the district rather than for the parents), not compensatory education. Moreover, in ruling that the parents' claim was not frivolous, the Ninth Circuit concluded that the lower court erred in denying compensatory education based on lack of an evidentiary foundation. R.P. ex rel. C.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1125 (9th Cir. 2011). Finally, the court cited not only *Reid* but also decisions from quantitative or hybrid circuits and also *Parents of Student W*. and *Park* in support of a flexible, creative approach. *Id*. at 1126.

[64] Park *ex rel*. Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025 (9th Cir. 2006).

and district court's affirming of "individualized instruction for [the child's] teachers that addressed the implementation of the [IEP's] self-help goals and objectives."[65] The equitable factors in this case included that the denial of FAPE was limited to a procedural violation for one summer and failure to implement the IEP for approximately two months[66] and that the evidence was unclear that the child would benefit from direct compensatory education services.[67]

Judicial authority in other jurisdictions confirm that denial of compensatory services to the child in the wake of a substantive denial of FAPE to the child is indeed rare, with each such instance providing equitably reasons to rebut the strong presumption in favor of such relief. This presumption is particularly evident in the jurisdictions that are not clearly in the qualitative camp. For example, the Tenth Circuit Court of Appeals applied the applicable abuse-of-discretion review standard to affirm a denial of compensatory education where (1) the district during the period at issue "ha[d] for the most part made diligent and extensive efforts to provide [this ninth grader] with whatever special services that could help her in progressing towards graduation"[68] and "[she] largely rejected those services"[69] Conversely, the Sixth Circuit upheld the reversal of a hearing officer's denial of compensatory education where "[the child's] need for compensatory education was obvious from the nature of the IDEA violations in the record—which included a lack of measurable goals and [the child's] placement in a secluded room."[70]

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[65] *Id*. at 1034. The specified amount was 30 minutes per week, and the period roughly approximated the period of the denial of FAPE (*infra* text accompanying note 64).

[66] *Id*. at 1030–31.

[67] *Id*. at 1034.

[68] Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 520 F.3d 1116, 1130 (10th Cir. 2008).

[69] *Id*. The rejection was via "serious disciplinary problems," including a suspension for fighting with other students, upon returning from a juvenile delinquency center for assaulting her mother and brother. *Id*. at 1120–21. Further limiting the effect of its affirmance, the court only assumed without deciding that the substantive loss was attributable to the district rather than the student and emphasized that it would not have necessarily reached the same decision in the absence of the broad abuse-of-discretion standard. *Id*. at 1127 and 1130–31.

[70] Somberg v. Utica Cmty. Sch., 908 F.3d 162, 173 (6th Cir. 2018). The court further clarified that the district's violations constituted a substantive denial of FAPE. *Id*.

Applying the applicable plenary review standard, I conclude that the hearing officer's denial of compensatory education services to the student based on a purported lack of evidentiary foundation was contrary to the applicable case law. First, although not specifically challenged by the appellants,[71] the hearing officer's order for training reveals two related problems. First, it is entirely lacking in the purported prerequisite of "evidence . . regarding the focus or amount of compensatory education."[72] The Petitioner-Appellant's request for training was admittedly overbroad in terms of the applicable personnel although focused on the stipulated areas of training deficiencies.[73] However, the hearing officer's order of four hours per Student-related employee was without any commensurately specific and expert evidentiary explanation,[74] with the only inferable rationale being a Solomonic splitting of the baby, i.e., that it was half of the Petitioner's requested per-person amount. Second, in light of the emphatic focus of the stipulated factual findings and legal conclusions,[75] this training order was rather nominal in amount.[76]

In tandem with this limited training component, the denial of compensatory services to the Student in this case was reversible error. Using the applicable approach in the Ninth Circuit, the starting point is the nature and duration of the denial of FAPE, which in this case was flagrant[77] and for 1.5 years.[78] To deny peremptorily any compensatory services to Student in this

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[71] By way of dicta, if the training order had been clearly and distinctly challenged, the issues would have extended beyond the amount to the scope of training (to include school-to-home communications, including progress reporting).

[72] HOD, at 14.

[73] *See supra* note 6 and accompanying text.

[74] *See supra* note 9 and accompanying text.

[75] *See supra* note 45 and *infra* Appendix.

[76] This amount, when calculated on the basis of a 30-week school year, approximates 8 minutes per week. In contrast, for example, the training award in *Park* was 30 minutes per week for a denial of FAPE that was much more limited in severity as well as duration. *See supra* notes 64–65 and accompanying text.

[77] The substantive effect was not limited to the continuing and ascending use of aversive interventions in clear violation of state law overlapping with denial of food, water, and sanitary and safe

circumstance, where the basis was "obvious,"[79] is not justifiable in light of the core purpose of the IDEA.[80]

Instead, according to the Ninth Circuit's approach, the calculation should start with a quantitative calculation, which the Petitioner-Appellant used as a baseline for the requested relief.[81] Using 180 days as the school year and 6 hours per day yields an initial total of 1620 hours for the 1.5-year period.[82] The first semester of 2016–17 allowed for any reasonable rectification period.[83] Similarly, unlike the foregoing examples,[84] the balance of the equities in terms of the conduct of the District and Student or parents did not support a reduction.[85] However, given that Student's absenteeism was excessive, this factor merits equitable consideration.[86] Specifically, the absences amounted to approximately 90 of the 270 days,[87] but they were inferably attributable in significant part to not only the lack of sanitary conditions[88] but also the increasingly aversive interventions, the deprivation of food and water, and the revolving door of teachers and aides, the equitable reduction is tailored to 30 days. For the resulting net of 240 days, in light of limited partial compensatory education in the form of training and the

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conditions, but also what the hearing officer correctly concluded was regression or at least lack of progress in terms of elopement, head banging, motor functions, and speech. HOD, at 15.

[78] Student's first semester during the two school years at issue served as a contrasting baseline for the stipulated denial of FAPE during the next three semesters.

[79] *See supra* text accompanying note 70.

[80] *See supra* note 62.

[81] T at 278 (180 days at 6.5 hours per day).

[82] This calculation uses more careful measure of the duration of the underlying denial of FAPE but a more conservative estimate of the effective length of the school day.

[83] Zirkel, *supra* note 52, at 13 (citing, e.g., Tyler W. v. Perkiomen Sch. Dist., 963 F. Supp. 2d 42 (E.D. Pa. 2013); *see also* Pottsgrove Sch. Dist. v. D.H., 72 IDELR ¶ 271 (E.D. Pa. 2018); Brandywine Heights Area Sch. Dist. v. B.M., 69 IDELR ¶ 212 (E.D. Pa. 2017).

[84] *See supra* text accompanying notes 58 and 68.; see also Zirkel, *supra* note 52, at 13 n.23.

[85] Illustrative of the contrast between the conduct of the parents and the district, see *supra* text accompanying notes 28–29 and text accompanying note 32.

[86] Zirkel, *supra* note 52, at 13 (citing Neena S. v. Sch. Dist. of Phila., 51 IDELR ¶ 210 (E.D. Pa. 2008).

[87] *See supra* text accompanying notes 30 and 36.

[88] *See supra* text accompanying notes 25–26.

Petitioner-Appellant's limited request, calculus and foundation,[89] an average of 3 hours per day would seem to be equitable. Thus, the award is for a total of 3 x 240 = 720 hours. The scope of the compensatory education services are the primary denials in relation to the individual needs of Student[90]—effective positive behavior interventions addressing head-banging and elopement; toilet training; and the related services of SLT and OT.[91]

Although equitably tailored, this award is not perfectly precise. Yet, the case law does not require particularized precision.[92] Moreover, the need to avoid "time-consuming and costly re-litigation" in light of the IDEA goal of promptly providing FAPE[93] and other considerations that countervail remand by SROs[94] weigh heavily in favor of a reasonably definitive resolution in this decision.

Finally, even if the hearing officer had intended a qualitative approach,[95] he should have made requisite specific factors[96] clearer and more compelling during the prehearing process.[97] Even in jurisdictions that follow the qualitative approach, courts have required extra efforts at the

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[89] For the flexibility in determining the partial or full extent of the award per day, see, e.g., Rayna P. v. Campus Cmty. Sch., 72 IDELR ¶ 214 (D. Del. 2018) ("Although there is no formula established by precedent, I conclude that 2.5 hours for each day … represents an average that strikes a balance between necessity and utility").

[90] For support for such boundaries, see, e.g., *Neena S.*, 51 IDELR at *8.

[91] Despite the clear lack of progress in speech and motor skills, the District reduced its insubstantial level of SLT during the 1.5-year period and did not provide any OT until after this period. *See supra* text accompanying notes 31 and 38.

[92] *E.g.*, G.J.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455, 468 (E.D. Pa. 2018).

[93] *E.g.,* Sch. Dist. of Phila. v. Williams *ex re*l. C.H., 66 IDELR ¶ 214, at *10 (E.D. Pa. 2014).

[94] *E.g.*, Muth v. Cent. Bucks Sch. Dist., 839 F.2d 113 (3d Cir. 1988), *rev'd on other grounds sub nom. Dellmuth v. Muth*, 491 U.S. 223 (1989).

[95] *See supra* note 8.

[96] *See supra* note 54.

[97] Although the hearing officer's decision reported instructing the parties at the January 24, 2019 prehearing conference of the need for evidence specific to the focus and amount of compensatory education, the case record's extensive and chronologically sequenced documentation for the prehearing process lacked confirmation of this prehearing order. In these circumstances, it is too late to find the absence of expert testimony on the loss of benefit and present educational levels as fatal. HOD, at 2 and 14.

hearing officer level to obtain any necessary expert evidence.[98] The federal district court in D.C. explained that without first resorting to these extra efforts "choosing . . . to award plaintiff *nothing* does not represent the 'qualitative focus' on [the child's] 'individual needs' that *Reid* requires."[99]

2. Did the hearing officer err denying the Student's use of the AngelSense device at school?

The Petitioner-Appellant argues that AngelSense fits the IDEA definition of supplementary aids and services. This argument misses the decisional fulcrum. Assuming that this device is a related service,[100] supplementary aid and service, [101] and/or assistive technology device,[102] the key is whether it was necessary in terms of the larger substantive issues of FAPE or LRE. The First Circuit's decision in *Pollack v. Regional School Unit 75*[103] is of no legal import for this issue, because the facts were at least partially distinguishable and the court did not address the IDEA issue.[104] Instead, the First Circuit's ruling was limited to affirming that the hearing officer's no demonstrable benefit finding under the IDEA had an issue preclusion effect on the Americans with Disabilities (ADA) reasonable accommodation claim.[105]

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[98] *E.g*., B.D. v. District of Columbia, 817 F. 3d 792, 800 (D.C. Cir. 2016); Lopez-Young v. District of Columbia, 211 F. Supp. 3d 42, 54 (D.D.C. 2016); Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 583 F. Supp. 2d 169, 172 (D.D.C. 2008) (new evaluations at district expense); Banks v. District of Columbia, 720 F. Supp. 2d 83, 92 (D.D.C. 2010) (additional opportunity for requisite evidence); *cf*. Cupertino Union High Sch. Dist. v. K.A., 75 F. Supp. 3d 1088, 1107 (N.D. Cal. 2014) (remand to the hearing officer to develop the requisite qualitative foundation, with recommendation for order of a new IEP meeting for this purpose). In addition to the hearing officer's inherent authority, the IDEA provides express authority to order an evaluation at public expense. 34 C.F.R. § 300.502(d).

[99] Stanton v. District of Columbia, 680 F. Supp. 2d 201, 208 (D.D.C. 2010)

[100] 34 C.F.R. § 300.34(a) (services necessary for benefit from special education).

[101] *Id*. § 300.42 (aids, services and supports to enable the least restrictive environment (LRE)).

[102] *Id*. § 300.105 (necessary for special education, related services, or supplementary aids/services).

[103] 886 F.3d 75 (1st 2018).

[104] The parents did not appeal the hearing officer's IDEA decision. *Id*. at 83.

[105] *Id*. at 83. Necessity is also an essential part of the ADA effective-communications regulation. *Id*. at (citing 28 C.F.R. § 35.160(b)(1)).

In this case, the evidence is preponderant that the AngelSense is not necessary for Student's benefit, the parents' participation, or interaction with nondisabled students. To the extent that elopement is the primary basis of the parents' argument,[106] the proof is insufficient that the audio feature would be necessary and effective, with due consideration of what the IDEA hearing officer in *Pollack* broadly characterized as "interfer[ences] with the learning process."[107] Thus, the hearing officer's denial of this requested remedy was not reversible error in the specific circumstances of this case.

VI. DECISION AND ORDER

The hearing officer erred in denying compensatory education services to the Student. This part of his order is reversed. The District shall provide the Student with 720 hours of compensatory services in the areas of toilet training, elopement, positive behavior modification, SLT, and OT. The District shall develop a plan for the provision of these services after promptly consulting with the parents and Student's current special education teacher as to the allocation, timing, and location of these services. The District shall then implement the plan by providing these services within the following boundaries: (1) the services shall be provided at times beyond the school day[108]; (2) the location shall be no further than the distance between the Student's home and his school of attendance and may include the Student's home or school of attendance;

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[106] *See supra* note 7.

[107] *Pollack*, 886 F.3d at 83. The issues arising from the state's surveillance law, including its possible federal preemption via the IDEA and/or ADA, need not be addressed here. Even without this factor, the potential interferences include privacy concerns of teachers and other students, the technological capacities for two-way voice transmission, and the limitations of both the voice and GPS features in terms of achieving the safety goals regarding elopement or abuse. In contrast, perhaps the alternatives of a non-audio GPS, which the District counsel reported as acceptable (T at 270), and focused training, which the Peititoner-Appellant (*id*. at 293–94) merit IEP team consideration, but their necessity and efficacy are not part of this decision.

[108] "School day" here refers to Student's regularly scheduled instruction, including related services and extracurricular activities specified on his IEP, during the school year and during any extended school year entitlement.

and (3) the plan for the provision of these services shall be completed within two months,[109] and the implementation of these services shall be completed within three years of receipt of this decision, with tolling for any appellate proceedings.[110]

The hearing officer did not err in denying the Student's use of the AngelSense device at school. This part of his order is affirmed.

The hearing officer's order for training, which was not an issue in this appeal, remains as a separate but equally binding component of the compensatory education remedy in this case.

Dated: June 15, 2019

Perry A. Zirkel, State Review Officer

NOTICE OF APPEAL RIGHTS

The decision of this SRO is final unless a party appeals the decision. A party may appeal from the decision of this SRO by initiating a civil action in a court of competent jurisdiction within ninety (90) days after receipt of this decision (NAC § 388.315).

[109] The need for a timely completed plan for implementation is not only a matter of effective dispute resolution but also required assurance of compliance per 34 C.F.R. § 300.601(e); Letter to Zirkel, 68 IDELR ¶ 142 (OSEP 2016).

[110] Other than through appellate proceedings, this compensatory education order for services to the Student, along with the hearing officer's corresponding order for training of the Student's school personnel, is the final enforceable determination unless the parties arrive at a written settlement agreement that is legally binding and enforceable.

Appendix: Stipulated facts

1. On July 18, 2016, Student was enrolled at CCSD with eligibility for special education services based upon Autism Spectrum Disorder.
2. Respondent conducted an IEP on July 18, 2016. Present Levels of Performance were noted and included social/emotional deficits.
3. Student's July 18, 2016, IEP did not document any elopement behavior.
4. On July 18, 2016, Respondent completed Supplementary Aids and Services which included a home/school communication system (setting home/school) and the use of positive behavioral strategies.
5. Student's May 17, 2017, IEP documented that Student was observed spending "...a great deal of time crying and screaming."
6. Respondent failed to adequately train and supervise relevant personnel in the delivery of positive behavioral strategies during the 2016-2017 academic year.
7. During the 2016-2017 academic school year, Student was educated at a CCSD school. The school's principal had a duty to supervise staff associated with the education of Student.
8. During the 2016-2017 academic school year, Student was periodically deprived of water at school in violation of NRS Chapter 388.[111]
9. During the 2016-2017 academic school year, Student was periodically deprived of food at school in violation of NRS Chapter 388.
10. During the 2016-2017 academic school year, Student's parent's notified the CCSD Superintendent concerning issues with food and water.
11. The CCSD failed to take corrective action during the 2016-2017 academic year to address the concerns raised by Student's parents as to food and water.

[111] The parties' stipulated factual findings 8, 9, 14, and 22, are more accurately conclusions of law and will be treated as such by the IHO.

12. During the 2017-2018 academic school year, Student was assigned to a new teacher of record ("TOR").
13. During the 2017-2018 academic school year, the school's principal where Student attended school had a duty to supervise Student's TOR.
14. During the 2017-2018 academic school year, Student's school principal/respondent failed to ensure proper training of relevant staff in Applied Behavioral Analysis, Positive Behavioral Strategies, Proper Restraint Training and Compliance with NRS Chapter 388.
15. During the 2017-2018 academic school year, Student was a victim of repeated corporal punishment by his TOR including, but not limited to, being beaten across the ankles, lower legs and stomach region.
16. On May 2, 2018, Student's TOR beat Student with a wooden pointer stick with such force it caused the wooden stick to break in two. After the pointer broke, Student's TOR was heard stating, "I have more of these."
17. On May 3, 2018, a full day after the beating, respondent reported the beating to Student's parents. Student's principal signed an incomplete CCF 624 Form[112] describing the event.
18. During the 2017-2018 academic school year, Student sustained injuries some of which were a result of corporal punishment, requiring examination by a CCSD school nurse. The April 20, 2018, injury was not reported to Student's parents. The May 2, 2018, injury to Student resulting from corporal punishment was not reported to Student's to the Student's parents until the following day.

[112] [7] This is a form used by CCSD entitled Notice of Use of Physical Restraint, Mechanical Restraint or Aversive Intervention (CCF 624).

19. During the 2017-2018 academic school year, CCSD staff observed, but failed to report until the following day, the use of corporal punishment inflicted upon Student by Student's TOR.
20. During the 2017-2018 academic school year, Respondent had a duty to adequately train and supervise relevant CCSD teachers and staff.
21. During the 2017-2018 academic school year, Student engaged in acts of elopement that were not documented or reported to Student's parents.
22. Respondent is responsible to train all staff in completing the CCF 624 paperwork correctly and in compliance with NRS Chapter 388.
23. On May 3, 2018, respondent contacted CCSD Police to conduct an investigation. The broken pointer was not available for evidence due to the fact that the garbage was already placed in the dumpster the night before and picked up in the morning.
24. On May 3, 2018, CCSD Police discovered three (3) wooden pointer sticks in Student's TOR's room.
25. On May 3, 2018, a Child Protective Services investigator conducted an interview with a peer of the Student's TOR who witnessed the abuse by Student's TOR. The witness said that Student's TOR would routinely hit Student with the pointer stick "when [Student] was mean" or when Student removed Student's socks/shoes.
26. On June 7, 2018, a Criminal Complaint against Student's TOR was issued pursuant to NRS 200.508.1B for the May 2, 2018, beating of Student.