

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: N.M.

Date of Birth: [redacted]

ODR No. 17214-15-16-KE

OPEN HEARING

Parties to the Hearing:

Representative:

Parent[s]

Robert B. Gidding, Esquire
2 Bala Plaza, Suite 300
Bala Cynwyd, PA 19004

Pennsylvania Leadership Charter School
1332 Enterprise Drive
West Chester, PA 19380

Jeffrey F. Champagne, Esquire
McNees, Wallace & Nurick, LLC
100 Pine Street
Harrisburg, PA 17101

Dates of Hearing:

March 17, 2016; April 18, 2016; May
3, 2016

Record Closed:

June 13, 2016

Date of Decision:

June 27, 2016

Hearing Officer:

William F. Culleton, Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ was an eligible enrollee of the Charter School named in this matter (Charter), which provided services to Student as a cyber-charter school. Prior to enrolling in the Charter, Student had been enrolled in a public elementary school in another state. At the time of the hearing, Student was enrolled in a public high school (School) for the 2015-2016 school year. The Student is classified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disability of Serious Emotional Disturbance.

Student's mother (Parent) requests due process, asserting that the Charter failed to evaluate Student and failed to provide Student with special education and related services that Student needed to address Student's school avoidance behaviors and failing grades in sixth, seventh and part of Student's eighth grade year.² Parent filed this due process request, pursuant to the IDEA; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504); and the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. (ADA).³ Parent requests compensatory education.

The Charter asserts that its services were appropriate during the relevant period.

¹ Student, Parent and the respondent Charter are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.

² The parties agreed with regard to the relevant period regarding which the hearing officer would be asked to determine the appropriateness of District services to Student: from January 7, 2014 (two years prior to the date of filing) until January 5, 2016 (the date on which Student started school in the public high school). (NT 20.) This was based upon the IDEA's statute of limitations; however, prior to the third day of the hearing, Parent's attorney moved to reopen the time period in question, asserting an exception to the limitation period. I ruled on this request, declining to change the previously determined two-year relevant period. (NT 648-652.)

³ Parent cited the latter statutes in her complaint, but did not raise them in any way during the hearing or in her written summation. I consider these claims to be abandoned, and to the extent that they are asserted, to be derivative of the IDEA claims and thus subsumed in those claims. See, 22 Pa. Code §14.102(a)(2)(xxx) (expressly incorporating 34 C.F.R. §300.516, including subsection (e) of that regulation); Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. Lexis 44250 (E.D. Pa. 2013); Swope v. Central York Sch. Dist., 796 F.Supp.2d 592, 600-602 (2011) (M.D. Pa. 2011). Therefore, the analysis in this decision will refer only to the IDEA.

The hearing was completed in three sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the Charter failed to provide a FAPE to Student during part of the period at issue, and I order the provision of compensatory educational services.

ISSUES

1. During the relevant period of time, from January 7, 2014 to January 5, 2016, did the Charter provide Student with a FAPE?
2. Should the hearing officer order the Charter to provide Student with compensatory education for or on account of all or any part of the relevant period?

FINDINGS OF FACT

1. The Charter provides educational services as a cyber-charter school. In a cyber-charter school, students access teachers and curriculum through a website offered by the school. Teachers, including certified special education teachers, and counselors, provide instruction, individual assistance and related services through the Charter's website, which is designed for this purpose. Students can both observe and initiate interactions with teachers in real time through this website. (NT 545-547; P 8, 9.)
2. During the 2012-2013 school year and prior to enrolling in the Charter, Student attended a public elementary school in another state, which conveyed Student's April 2013 re-evaluation and subsequent IEP to the Charter some time after Student enrolled at the Charter. (NT 59-63; S 1; P 10.)
3. The out-of-state public school district classified Student under the IDEA as a child with the disability of Serious Emotional Disturbance. (NT 68-69; S 1, S 8; P 9.)
4. The out-of-state public school district determined that the Student's emotional disability led to behaviors including impulsivity, careless mistakes, not following rules, and not turning in class work. (S 1.)
5. The out-of-state public school district determined that Student was struggling with reading below grade level, due to difficulties with decoding and encoding words, as well as difficulties with comprehension skills. In science and social studies, Student utilized texts that were two grades below Student's grade level. The district reported that Student was unable to write in all genres independently, due to poor use of writing conventions; however, Student could write more successfully with teacher supports. The district reported

that, in an emotional support setting, Student was able to maintain average or above average grades. (S 1.)

6. Student's cognitive ability is in the average range, based upon cognitive testing performed by the out-of-state public school district. Student is capable of making average progress with special education supports including small group classes and one-to-one direct, explicit instruction. (NT 588; S 1.)
7. Prior to Student's seventh grade year, Parent moved to Pennsylvania, to a public school district different from the one in which Student now lives. (NT 57-59.)
8. Parent worked outside the home. Because of this and because of safety concerns due to the reputation of the school district to which Parent had just moved, Parent made arrangements with a local social services provider (Center) to supervise Student while Student attended school through the Charter's cyber-school model. Student was required to go to the Center's locations, where staff were available to supervise and support Student in connecting to the cyber-school environment through a computer provided at the Center. (NT 222, 228, 237-238, 547-548.)
9. Student was enrolled in the Charter from September of Student's seventh grade year (2013-2014) until January of Student's ninth grade year (2015-2016). (NT 61-62; S 1, 2, 8; P 8, 10.)
10. Student attended the Charter from the Center's supervisory service from the beginning of seventh grade until the end of eighth grade. (NT 68, 89.)
11. Center staff were not trained or directed to support students' organizational skills. The Center's philosophy was to encourage students to be independent learners. (NT 238, 340-341.)
12. During Student's seventh grade year and for one-half of Student's eighth grade year, the Charter staffed the Center with non-certified learning coaches employed by the Charter. In February 2015, in the middle of Student's eighth grade year, the Charter severed ties with the Center, terminated its presence in the Center's facilities and terminated some of the learning coaches from its employ. After a few weeks, the Center reopened its facility with Center-employed learning coaches. (NT 201-204, 238, 244-246.)

SEVENTH GRADE

13. The Charter accepted Student's IDEA classification of Serious Emotional Disturbance, based upon the out-of-state re-evaluation and IEP, and convened an IEP team to produce an IEP for Student's first year in the Charter. (NT 68-70; S 1.)
14. Student's Individualized Education Program (IEP) for seventh grade recognized significant academic delays. The Charter did not seek to re-evaluate Student. (NT 69; S 1-3, 8.)
15. Student's seventh grade IEP provided specially designed instruction in the form of emotional support, through online counseling as needed and as requested by Student. The

IEP also provided learning support, through co-taught regular education classes staffed by both a regular education teacher and a special education teacher. These were offered online to Student for both language arts and mathematics. Support was offered at the itinerant level. (NT 582; S 1.)

16. Student's IEP did not recognize behaviors that interfered with learning, and there was no Functional Behavioral Assessment or Positive Behavior Support Plan. (S 1.)
17. Student frequently left Student's seat and moved to other parts of the Center's premises where students of other grades were working. This behavior was disruptive to the atmosphere at the Center. (NT 210-212, 236-238, 239.)
18. Student experienced frequent frustration while attending the Center, and Center staff frequently interacted with Student attempting to help Student solve the problems causing Student's frustration with learning through the Charter's online modality. (NT 210-215, 219-221.)
19. Student was unable to function independently in the Center as a cyber-school student. (NT 213.)
20. Student failed all but one subject during the first marking period of Student's seventh grade year, and failed all core subjects during the second marking period. (P 10.)
21. Student's grades were very low in the third and fourth marking periods of seventh grade, and Student received final failing marks in language arts, mathematics and reading. (NT 209; P 10.)
22. In the report cards for the second and third marking periods, teachers reported that Student was in danger of failing; was missing assignments or turning them in late; and was showing minimal effort or inconsistent performance. They also reported that Student was not contacting them for individual support, and was not responding to teachers' efforts to contact Student. (P 10.)
23. Student failed to meet any IEP goals during seventh grade. Charter staff failed to provide progress monitoring on the reading fluency, reading comprehension, writing conventions, and mathematics goals due to Student's failure to participate in online "chat" times with Student's "resource room" teacher, and failure to turn in assignments in mathematics. Nevertheless, Student's mathematics teacher reported "steady progress" based upon average grades on completed assignments. Student's last progress monitoring report indicated that Student was functioning several points below baseline for the mathematics goal. (S 2, 4.)
24. Student's self-awareness goal was to be monitored through observation of Student's use of coping strategies on a measurable number of trials. Progress was reported on this goal based upon the lack of reports of adverse behavioral incidents at the Center. (S 2.)

EIGHTH GRADE

25. Benchmark testing indicated that Student was performing below basic in reading and mathematics. Teachers reported that Student rushed through assignments, failed to follow lesson directions, failed to correct mistakes when prompted to do so, failed to attend all live Virtual Lessons, and failed to seek help from teachers online through teacher “office hours”. (S 2.)
26. Charter staff were unable to establish baselines for Student’s seventh grade reading fluency goal due to a faulty microphone on Student’s equipment. (NT 589-590; S 2, 7.)
27. Student’s October 2014 IEP recognized a secondary classification of Specific Learning Disability. (S 2.)
28. The October 2014 IEP continued Student in itinerant level learning support with counseling online as needed or requested. The IEP did not provide additional supports as compared with the seventh grade IEP in the areas of reading fluency and comprehension, mathematics and writing. The IEP did not provide for modification of science and social studies texts in view of Student’s difficulties with reading fluency and comprehension. (S 2.)
29. Student’s special education teacher made numerous attempts to contact Student from January 2015 through June 2015. While Student did participate in about seven sessions with the teacher on a one-to-one basis during this period, Student missed about eight scheduled sessions. The teacher was aware that Student was tardy arriving at the Center and was leaving early. (NT 561-562, 587, 594-595; S 7.)
30. Because the Charter bases attendance upon at least one second of logging onto the Charter’s website, the Charter did not thoroughly monitor Student’s participation in full days of school. A Charter student can be marked “present” for attendance purposes without attending classes. Consequently, the Charter did not institute a truancy prevention plan or bring legal action for truancy. (NT 419-420; P 10.)
31. The Charter provided Student with ESY instruction during the summer of 2015. Student failed to participate in regular online learning during the summer ESY sessions; however, Student was able to improve Student’s grades to passing in literature, while failing mathematics. (NT 90-91; S 5, 6.)

NINTH GRADE

32. In September 2015, the Center moved from its 2014-2015 location. Student ceased attending the Center to access the Charter’s online services; Student was expected to access the Charter from home on school days. (NT 421-423.)
33. Student was truant on 35 school days from September 2015 to January 2016. (NT 420-421; S 7.)
34. Student failed to participate in scheduled one-to-one “chat room” sessions with the assigned special education teacher from September 2015 through January 2016. (S 7.)

35. Student failed all subjects in the ninth grade first marking period. Student's benchmark scores indicated regression in reading and mathematics. Teachers indicated that Student had withdrawn from learning substantially. (S 8.)
36. In October 2015, at Parent's request, the Charter offered to revise Student's IEP to provide on-to-one direct in-person instruction to Student, two hours per day, four days per week. It also offered one hour per week of one-to-one direct in-person counseling, to be delivered in Student's home. The revised IEP also offered ESY services. (NT 421-423; S 8.)
37. The October 2015 IEP offered to implement a new goal addressing Student's organizational skills. (S 8.)
38. The October 2015 IEP did not change Student's academic goals for reading, mathematics and writing. It maintained Student at an itinerant level of services. (S 2, 8.)
39. The October 2015 baselines for all goals (including reading fluency, reading comprehension, mathematics, and writing conventions) were marked "to be determined by the first progress check of marking period 2". (S 8.)
40. In October 2015 IEP, the Charter offered daily online explicit instruction in phonetic awareness, reading fluency and reading comprehension strategies without a specified number of minutes per day. It also offered extended time for assignments; 30 minutes per day of direct instruction in problem solving strategies, to be delivered online; and 30 minutes per day of direct instruction in language conventions. (S 8.)
41. While Student was enrolled in seventh, eighth and part of ninth grades, Charter professional staff did not recommend that Student be re-evaluated, and did not recommend a functional behavioral assessment of Student's failure to participate consistently in the Charter's online services. (NT 588-589.)
42. While Student was enrolled in seventh, eighth and part of ninth grades, Charter professional staff did not attempt to meet with Student face-to-face in order to teach Student or support Student in accessing Charter's online services consistently. (NT 589.)
43. In December 2015 or January 2016, the family moved to a new school district. (NT 56, 68, 70, 84.)
44. On January 5, 2016, Student began school in a public high school in the new district. (NT 57.)
45. At the new public high school, Student's grades are improved and Student is not posing attendance problems. (NT 70-71, 73.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.⁴ In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁵ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent should fail to produce a preponderance of the evidence in support of Parent’s claim, or if the evidence is in “equipoise”, the Parent cannot prevail under the IDEA.

⁴ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

⁵ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I find that all witnesses were credible.

THE OPERATION OF THE STATUTE OF LIMITATIONS

Although Student was enrolled in the Charter by September 2013, the period for my consideration begins several months later, on January 7, 2014, due to the operation of the IDEA statute of limitations. (NT 28-44.) Thus I reach no conclusion as to the appropriateness of the Charter's decision to accept the Student's identification as reported to it by the out of state public school district. Likewise, I reach no conclusion as to the appropriateness of the IEP that the Charter offered to Student in October 2013, nor as to its implementation prior to January 7, 2014.

However, the statute of limitations does not preclude me from considering whether, beginning January 7, 2014, the Charter offered to provide Student with a FAPE and provided such services. Any failure to offer or provide a FAPE on or after that date is the subject of the Parent's complaint filed within two years on January 7, 2016; thus my consideration of any such failure would not be barred by the IDEA statute of limitations.

The October 2013 IEP was in place on January 7, 2014, and the Charter was obligated to deliver the services described in that IEP, from that date until a new IEP was offered and accepted

in October 2014. In addition, the Charter was obligated to respond to any information about Student's educational needs and progress, beginning on that date, if such information should place it on notice that the Student's program as implemented on that date was no longer reasonably calculated to provide Student with a FAPE going forward. M.C. v. Central Regional School District, 81 F.3d 389, 397 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996)(school district with notice "that a child has an inappropriate IEP or is not receiving [FAPE] must correct the situation.") I conclude that the Charter was on notice of such facts as of January 7, 2014, and that its failure to respond to such facts within a reasonable time constituted a denial of a FAPE.

The Charter argues that I am precluded from considering whether or not the September 2013 IEP was appropriate as of January 7, 2014, or at any time after that until the next IEP was put in place. I agree that the terms of the IEP when written are immune from my consideration. Yet, the Charter was obligated to revisit its terms in light of the Student's behavior and achievement throughout the one year term of the IEP. Nothing in the IDEA suggests that a local education agency is free, during the term of an IEP, to ignore information that comes to its attention indicating that the IEP is failing to address a student's needs. On the contrary, it is the agency's obligation to address such needs, by amending the IEP when new information comes to light showing that the prevailing IEP is inappropriate. This is what the Charter failed to do in the matter at hand.

IDEA OBLIGATION TO PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is "special education and related services", at public expense, that meet state

standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts⁶ must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg’l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide a FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S. Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d above at 396; Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their

⁶ The Charter is a local educational agency under Pennsylvania law, and thus assumes all of the obligations of a local school district. See generally, 34 Pa. Code Chapter 711.

child. Ibid. Rather, an IEP must provide a “basic floor of opportunity” for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the program and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying the above standards, I conclude that the Charter failed to provide Student with a FAPE from the first day of the fourth marking period in Student’s seventh grade year to Student’s enrollment in another local educational agency in January 2016. Accordingly, I will order the Charter to provide Student with compensatory education, according the Charter a reasonable period of time for rectification.

FAILURE TO PROVIDE A FAPE DURING SEVENTH GRADE

By January 7, 2014, Student had been attending the Center for over three months, and the evidence shows that Student was making efforts to log onto the Charter’s website to receive instruction. In progress monitoring reports, Student’s reading teacher had reported that, while Student continued to read at a fourth grade level, Student had made some progress in reading

comprehension for the first two marking periods. (The reading fluency goal had not been implemented for an unstated reason.) The mathematics teacher also reported some progress, apparently based upon class assignments. (For an unstated reason, the teacher was not reporting progress based upon the metrics stated in the mathematics goal.) The writing teacher reported no progress in the goal for editing Student's written work; this was reportedly because Student had not turned in any assignments.

Meanwhile, the Charter was aware that Student failed all major subjects during the first marking period of seventh grade, and failed language arts, reading and mathematics in the second marking period. Although Student was able to pass science and world studies in the second marking period, Student's failures in reading, writing and mathematics were an abrupt departure from Student's educational history; historically, Student had been able to achieve consistent with Student's ability, with special education supports.

In the report cards for both marking periods, teachers reported that Student was in danger of failing; was missing assignments or turning them in late; and was showing minimal effort or inconsistent performance. They also reported that Student was not contacting them for individual support, and was not responding to teachers' efforts to contact Student. Although the Charter's method of recording attendance (any log in to the website, no matter how brief) did not reveal attendance problems, there was evidence that Student was not accessing the online educational services provided.

In the third and fourth marking periods of seventh grade, Student's behavior deteriorated and Student's academic achievement suffered. Student was frequently leaving Student's computer screen and going to areas of the Center that served other children. A learning coach stationed at the Center during the period beginning in February 2014 testified credibly that Student's frequent

off-task behavior was problematic and disruptive. The coach described this behavior as so pervasive that Student could not function in the online environment independently.

I conclude that the Charter was on notice as of February 7, 2014 that the Student's IEP was not being implemented as written, because teachers were not monitoring goals by means of the metrics stated in the IEP. It was aware that Student was not accessing the curriculum consistently, nor was Student seeking or receiving the teachers' individual services. There was no evidence that the Student received any counseling. At the same time, the Charter was on notice that Student was performing well below what Student's history showed to be possible with appropriate special education services, and Student was failing in all core subjects.

While these facts should have raised concern, the record is not preponderant that they demanded immediate intervention. Teachers reported some academic progress in the first and second marking periods, even though they were not monitoring Student's progress on goals as called for in the IEP. Student showed some improvement in grades in the second quarter as well. The evidence is not preponderant that the Center reported Student's concerning off-task behaviors to the Charter at this time. In these circumstances, the Charter would have been justified in giving Student more time to develop the online skills needed to transition to that quite different learning environment.

Unfortunately, the Charter's services continued to be inappropriate during the third marking period. Student did not evidence significant improvement. Teachers continued to be unable to accumulate systematic data based upon the progress monitoring metrics stated in the IEP. By the end of the third marking period, the Charter could have no doubt that its IEP was failing to deliver appropriate services. M.C. v. Central Regional Sch. Dist., 81 F. 3d above at 396 (right to compensatory education accrues "from the point that the school district knows or should

know of the IEP's failure.") I conclude that the Charter was obligated to intervene at that point. M.C. v. Central Regional Sch. Dist., above at 397 (asserting the responsibility of educators to "ascertain the child's needs" and "respond to deficiencies ...").

The Charter failed to intervene at that point. Instead, it allowed Student to continue to fail, continue to be distracted and off task, or to be absent from instruction altogether, for the remainder of Student's tenure at the Charter. The Charter did not seek to reassess Student's behaviors that were interfering with access to the curriculum – indeed, it consistently marked the IEP check box for behaviors impeding learning as "no", despite its knowledge that Student was exhibiting such behaviors – the failure or refusal to participate in online classes; the failure or refusal to respond to teachers' outreach efforts; the failure or refusal to cooperate with progress monitoring probes; the failure to attend the Center on time and stay for the entire day; and, increasingly, outright truancy that was masked only by an attendance system that failed to record Student's level of meaningful attendance. It chose not to re-evaluate, moreover, despite its knowledge that Student was classified with Serious Emotional Disturbance.

Rather than revise its approach to Student's progressive withdrawal from learning in eighth and ninth grade, the Charter continued to apply its online model to Student, a model which relies upon the child to access instruction, when it was apparent that Student was not accessing instruction. When asked whether she ever visited Student face-to-face to address Student's lack of participation, Student's special education teacher stated "No I did not. Our job was to provide curriculum through cyber." (NT 589.)

During Student's eighth and ninth grade years, the Charter failed to address all of Student's learning needs, and failed to implement appropriate progress monitoring. Until October 2015, Student's IEP provided only for counseling online or by telephone, and only if Student should

reach out for it. Until then, there was no intervention to help Student with organizational skills, despite Student's inconsistent behavior regarding accessing the online curriculum, even with the support of the Center. Goals already set forth in the IEP were not monitored according to the metrics stated the IEP; for reading, the Charter was unable to establish a baseline due to the combination of a defective microphone and Student's avoidance or outright refusal to participate in progress monitoring probes.

The Charter finally made substantial changes in its offered IEP in October 2015, during Student's ninth grade year. It provided in-person counseling on a scheduled, rather than contingent basis, and in-person tutoring, one-to-one, to support Student's access to online services. It also added a goal and specially designed instruction to address Student's organization deficiencies, reading deficits and mathematics deficits. Nevertheless, the Charter made these changes without the benefit of a re-evaluation or FBA, with a child who had been failing, in part due to interfering behaviors, for over two years. There was evidence that in-home services would not have been possible, as Parent had moved. Under these circumstances, I cannot conclude that the proposed IEP was reasonably calculated to provide Student a FAPE for ninth grade.

There is substantial evidence that neither Student nor Parent were supportive of the teachers' efforts to get Student to interact with them online. The record shows that neither Student's nor Parent's lack of cooperation absolves the Charter of its obligation to intervene as of the beginning of the fourth marking period of seventh grade.

Regarding Student, the evidence is preponderant that this seventh grade child, whom the Charter recognized as impeded by Serious Emotional Disturbance and Specific Learning Disabilities, was failing to cooperate due to a combination of disabilities and concomitant behaviors that impeded learning. The evidence is preponderant that the very skills needed to

participate in an online environment were lacking in this child. Student's reading was two to three years below grade level. Student's writing was deficient in conventions, and Student was known to have poor ability to write independently. These disabilities also affected Student's ability to solve mathematics problems online. Student struggled to remain on task, even with the supports provided at the Center. Thus, the Charter, having chosen not to re-assess and not to intervene in a different way, cannot be heard to blame the child for the failure of its online modality in the circumstances of this matter.

Parent was a working mother concerned with Student's safety and not knowledgeable regarding special education. Her lack of communication and cooperation did not absolve the Charter of its responsibility to intervene when it became plain that its offered services were not sufficient to provide a FAPE. A local educational agency's obligations are not absolved by a parent's lack of vigilance or cooperation. See M.C. v. Central Reg. Sch. Dist., 81 F.3d above at 397 (child's right to FAPE not dependent upon vigilance of parents).

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order a District to make up such services on an hour-by-hour basis; however, there is support also for a "make whole" approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010). Compensatory education may be ordered for the "period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." M.C. v. Central Reg. Sch. Dist., 81 F.3d above at 397.

Here, the Parents have established that compensatory education is due, but have not provided evidence regarding the amount or form of compensatory education that would make the child whole. Therefore, I will order provision of this remedy on an hour for hour basis.

In this matter, I conclude that the Charter's failure to provide needed special education services impeded Student in all aspects of Student's education. Therefore, I will order compensatory education in the amount of six and one-half hours per day, assuming an ordinary school day of six and one-half hours. (S 8.) Compensatory education will be due from the last day of the third marking period of seventh grade, when I conclude the deprivation began, until the day before the first day on which Student was enrolled in the Student's current public school district, which the record indicates was January 4, 2016. However, I will allow thirty days for the reasonable period of rectification allowed under M.C., cited above.

The parties introduced evidence as to the proper hourly valuation of compensatory services. While I appreciate their efforts, I conclude that neither party proposed the appropriate hourly figure for valuation of such services. Rather, I will order a limit on the cost of any services obtained by Parent, based upon the prevailing average market value of such services.

CONCLUSION

I conclude that the Charter failed to provide Student with a FAPE from the first day of the fourth marking period in seventh grade until the day before Student enrolled in a new school district in 2016. Therefore, I will order the Charter to provide Student with appropriate compensatory education.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The Charter shall provide compensatory education to Student in the amount of six and one half hours for every school day listed in the Charter's academic calendar and posted at its website (or otherwise designated in compliance with Pennsylvania law), from the first day of the fourth marking period in 2014 until January 4, 2016, but subtracting an amount of hours equal to thirty days multiplied by six and one half hours.
2. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parent, and may be provided after school hours, on weekends, or during summer months when convenient for Student or Parent. Such services may be provided to Student until Student reaches twenty-one years of age.
3. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parents.
4. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service, within a fifty mile radius of the Charter's main office.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

DATED: June 27, 2016