

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: Q.B.

Date of Birth: [redacted]

Dates of Hearing: 9/14/2016¹

Closed HEARING

ODR File No. 17927-15-16

Parties to the Hearing:

Representative:

Parent

Parent Attorney

Daniel Cooper Esq.
Law Offices of Kenneth S. Cooper
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Bala Cynwyd, PA 19004
610-608-6185

Local Education Agency

New Media Technology Charter School
8034 Thouron Avenue
Philadelphia, PA 19150

LEA Attorney

Date Record Closed:

December 7, 2016

Date of Decision:

January 6, 2017

Hearing Officer:

Charles W. Jelley Esq. LL.M.

¹ In reviewing the action for publication on the Office for Dispute Resolution website, The hearing officer noted that the Cover Sheet, inadvertently listed all of the dates the action was scheduled for a hearing. The July, 28, 2016, August 18, 2016 and the December 7, 2016, hearing sessions were cancelled at the request of the Parents.

Introduction

During the 2015-2016 school year, the Student,² was a 6th grader in the School District of Philadelphia attending (Charter School). While there, the Parents requested and the school conducted a comprehensive special education evaluation, as the Student received failing grades and was disciplined on numerous occasions for violating the student code of conduct. The evaluation team concluded student did not qualify for specially-designed instruction, notwithstanding its members' knowledge of Student's Intermittent Explosive Disorder diagnosis prior to attending the Charter School. The Parents disagreed, and continue to, and at the end of that school year, the Charter School abruptly closed. Thereafter, Parents filed a due process complaint alleging the Charter School failed to provide FAPE in violating its "child find" obligations or education in the least restrictive environment.

After filing that complaint, the Parents also filed a second due process complaint against the Pennsylvania Department of Education (PDE), alleging as the State Education Agency (SEA) within the meaning of the IDEA, PDE failed to ensure that Charter School complied with the IDEA. They directly allege PDE failed to educate the Student. PDE responded with a Motion to Dismiss, followed by a parental response and PDE reply. PDE concedes if the hearing officer finds as the LEA Charter School failed to provide the Student with an IDEA-required FAPE, as the SEA, it will provide any appropriate relief order by this hearing officer.³ I granted PDE's Motion to Dismiss, after which Parents proceeded with the due process hearing against Charter School.

On September 26, 2016, after taking testimony, the hearing officer granted the Parents' request for an interim Independent Education Evaluation (IEE), prior to a final decision on the merits. On November 22, 2016, the Parents submitted the IEE report. The hearing officer and Parents' counsel participated in a conference call to discuss future proceedings. The Parents, after submitting the IEE, are requesting compensatory education. For the reasons set forth below, I find in favor of the Parents and award the Student compensatory education. As the Charter School is

² The generic "student and gender-neutral pronouns will be utilized throughout the decision to protect the student's confidentiality.

³ Q.B. ODR File #18044-1617 KE (Jelley, September 9, 2016).

closed, though it was provided with notice of the hearing by the Office for Dispute Resolution and Parents' counsel, PDE will apparently provide the compensatory education on its own initiative.

Findings of Fact

1. Notice was provided to Charter School as outlined in the above Introduction. At the time it evaluated the Student, Charter School was aware of the Intermittent Explosive Disorder diagnosis, Student received failing final grades after numerous suspensions, and on numerous occasions, Student's mother was called to the school.
2. The Parents disagreed then and now with Charter School's determination that the Student is not a person with the disability in need of special education.
3. The Complaint states that Charter School abruptly closed at the end of the 2015-2016 school year. The Charter School phone lines are no longer working.
4. The Charter School website states the school is closed <http://www.nmtcs.net/>.
5. At the time of this hearing, the LEA was unable to respond to the Parent's request for an IEE.
6. The IDEA provides when the Parents disagree with the findings of the evaluation and request an IEE the Charter School must either grant the request or file a request for a due process hearing 34 C.F.R. §§300.502(a), (b); 22 PA Code §14.102(a)(2)(xxix).
7. The Charter School did not file a response to the complaint. The Charter School did not respond to the Parents' request for the IEE. Charter School did not request a due process hearing to establish that the Charter School evaluation is appropriate.
8. On September 14, 2016, this hearing officer held a hearing on the Parents' complaint requesting an IEE.
9. On September 26, 2016, after taking testimony, the hearing officer granted the Parents' request for an interim Independent Education Evaluation (IEE), prior to a final decision on the merits⁴.
10. On November 22, 2016, the Parents submitted the IEE report. The hearing officer and Parents' counsel participated in a conference call to discuss future proceedings. The Parents, after submitting the IEE, rested their case and now seek compensatory education.

⁴ Q.B. ODR FILE #18044-1617 KE (Jelley, September 9, 2016).

11. PDE as the SEA has agreed to provide any relief ordered by this hearing officer.⁵
12. In Grade 2, while attending elementary school, the Student was suspended once for one day for misconduct (P#1 pp.3-4).
13. In Grade 3, the Student was suspended again for two days (P#1 pp.3-4). The Charter School's Evaluation Report (ER) notes the Student was suspended in Grade 4 for "failure to follow classroom rules/disruption and profanity/obscene language or gestures" (P#1 pp.3-4).
14. The Charter School's ER also mentions that the Student was suspended on five occasions in Grade 5 (totaling 15 days):

Date	Duration	Reason
November 2014	1 day	Threatening students/staff with aggravated assault, profane/obscene language or gestures, and failure to follow classroom rules/disruption.
December 2014	3 days	Simple assaults (documented unprovoked attack by a student on another), mutual fight with documented serious bodily injury, and mutual fighting without serious bodily injury.
February 2015	3 days	Profane/obscene language or gestures, threatening students/staff with aggravated assault, and dress code violation.
March 2015	3 days	Destruction and/or theft of property (less than \$1000), failure to participate in class/unpreparedness and

⁵ Q.B. ODR FILE #18044-1617 KE (Jelley, September 9, 2016).

failure to follow classroom rules/disruption.

April 2015 5 days Destruction and/or theft of property (less than \$1000), failure to follow classroom rules/disruption, and failure to participate in class/unprepared (P#1 pp.3-4).

15. Upon enrolling at Charter School in October 2015, the Student began demonstrating inappropriate behaviors on the bus. On three different instances, the Student did not stay in the seat, was too loud, and boisterous (P#1 pp.3-4). The bus driver also shared that the Student would initiate fistfights and was often disrespectful. The Student was suspended for one day. The records indicate a similar incident was reported in May 2016 (P#1 pp.3-4).
16. On November 11, 2015, the Charter School agreed to evaluate the Student (P#3). On December 12, 2015, the Charter School completed the evaluation (P#4).
17. The Student's behavior was assessed via parents and teacher ratings on the Behavior Assessment System for Children, Second Edition (BASC-2) (P#1 p.2; pp.11-13). No significant behavior problems were reported in the school setting but for rule breaking. However, the Parents' report rated externalizing behaviors (i.e., hyperactivity, withdrawn, aggression, and conduct problems) in the clinically significant range. (P#1 p.2; pp.11-13).
18. The Parents' input also detailed attention problems that were not reported by the teachers. Adaptive skills, for the most part, were noted to be adequate for the school setting, although there was some evidence of adaptability issues and lower study skills (P#1 p.2; pp.11-13). The Student's ratings suggested only some issues with self-esteem and a somewhat difficult relationship with peers (P#1 p.2; pp.11-13).
19. The Student's Grade 6 report card for each trimester (I) and Final grades were:

Class	T1	T2	T3	Final
Reading/Language Arts	C	F	F	F
Math	A	B	C	B
Science	B	C	C	C
Social Studies	D	F	C	D

(P#1 p.3).

20. During a conversation between the social studies teacher and the evaluator, at the time of the classroom observation, the current social studies teacher shared that the Student does not do work in the classroom. The social studies teacher added that the Student often refuses help and oftentimes engages in rule-breaking behavior and noted that classroom participation is very low, suggesting that the Student enjoys roaming the halls. The evaluator reported that a more formal teacher input questionnaire was provided to the other teachers; however, it was not returned at the time of independent education evaluation (IEE) (P#1 pp.3-4).
21. The Student was evaluated, by the private evaluator, over two days. On the first date, the Student was evaluated in the family home. On the second date, the Student was evaluated at the Aunt's home. The Student had difficulty sharing anything that was exciting about the new school (P#1). The Student oftentimes became discouraged when presented with difficult items but did persist with encouragement (P#1 pp.4-5).
22. The independent evaluator noted the Student has difficulty regulating emotions (P#1 pp.4-5). For example, when the Student is denied access to a preferred activity, the Student slumped on the floor and began to sob (P#1 pp.3-4). The Student struggles to identify emotional triggers. Oftentimes the Student feels angry when there is "a lot of yelling and stuff" (P#1 pp.4-5).
23. When asked what was difficult, the Student became very timid and stopped maintaining eye contact with the examiner. After some time, the Student embarrassed and muttered, "Work at school". The Student has difficulty getting out of bed in the morning, difficulty concentrating, and trouble completing schoolwork. The Student has a short temper and struggles to cope with angry feelings. The Student does not always do homework, but denied any significant academic struggles (P#1 pp.4-5). The Student's effort was good, but at times the Student needed encouragement to continue on with the testing and attending to the task. The Student has a low tolerance for frustration. During the evaluation, the Student reported feeling "all right", but the evaluator noted affect was remarkably incongruent. The evaluator noted the Student seemed angry, annoyed, and irritated during the assessment (P#1 pp.4-5).

24. The evaluator noted the Student's emotional insight was slightly limited, and Student had remarkable difficulty with judgment (i.e., not being able to identify effective and efficient coping skills) (P#1 pp.6-7). The Student struggled to identify multiple areas of strength and became incredibly embarrassed and standoffish when asked to discuss anything that the Student finds difficult. Overall, the Student was described as evidencing a depressed mood (P#1 pp.6- 8).
25. The evaluator administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V). Results suggested that the Student can manipulate abstract conceptual information from visual details and is effective in applying that knowledge to problem solving. Likewise, results suggested that the Student has the capacity to apply spatial reasoning and can analyze visual details. These results were consistent with present testing observations of the Student's pattern of thinking and are considered a valid representation of these abilities (P#1 pp.6-8).
26. The evaluator used the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2) an individually administered test battery designed to assess learning functions in three separate domains: auditory and verbal memory functions, visual and nonverbal memory functions, and attention and concentration skills. Each domain is further subdivided to compare short-term memory, delayed recall, and general recognition skills. Attention and concentration were not assessed using the WRAML2 for the purposes of this evaluation (P#1 pp.6-8).
27. On the Verbal Memory scale, the Student earned a score in the well below average range. However, the Student's performance across different measures was consistent. On Story Memory, Student was read two short stories and asked to recall as many parts of the story that Student can remember. On Verbal Learning, the Student was read a list of simple words followed by an immediate free-recall task. Three additional word presentations/recall trials followed. The Student earned scores in the well below average and below average ranges, respectively (P#1 pp.6-8).
28. The Student's learning over trials suggested difficulty with recall of rote information. The Student's functional performance in the classroom may be masking these significant memory needs because Student can rely on short-term auditory memory. The Student's WRAML2 scores ranged from below average to well below average (P#1 pp.6-8).
29. Throughout the evaluation, the evaluator noted that the Student experiences emotional overreaction when criticized (P#1 pp.6-8). The evaluator also noted the Student uses anger as the most frequent reaction in difficult social situations. The Student's behavior, for the most part, appears to be goal-directed, albeit self-serving and manipulative. The Student is unwilling to

comply with teacher requests and seems to dislike school (P#1 pp.6-8). The Student's use of aggression appears to be a means to an end. The Student's behavioral profile is consistent with diagnoses of Attention Deficit/Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD) (P#1 pp.6-8).

30. The Student avoids tasks that require sustained mental effort and is easily distracted. Often times the Student is reported to be restless, blurts out answers and interrupts others. The Student displays an irritable mood (e.g., losing Student's temper, being easily annoyed, and being angry and resentful) (P#1 pp.13-14). The Student is often argumentative and displays defiant behavior (e.g., arguing with authority figures, being actively defiant, deliberately annoying others, and blaming others for mistakes) (P#1 pp.13-14).
31. The Student's thoughts also appear to be inappropriate to the situation, and at times they are confused, bizarre, tangential, and emotionally overloaded. The Student lacks social awareness (P#1 pp.13-14).
32. The Student's educational performance is marked with uneven achievement, and the Student has difficulty making friends. At times, the Student's perceptions are perceived as bizarre and social skills are poorly developed. The Student struggles to establish and maintain relationships (P#1 pp.13-14).
33. The Student's developmental appropriateness appears immature and regressive at times. These behaviors are indeed persistent, generalized, and inappropriate over time and across situations, indicating a serious problem that occurs in low frequency. These behaviors have resulted in a demonstrable negative educational result in achievement, grades, and academic situations (P#1 pp.13-14).
34. In addition to a clinical presentation that is consistent with diagnoses of ADHD and ODD, the diagnosis of Emotional Disturbance accounts for the Student's emotional distress, behavioral problems, and academic difficulty (P#1 pp.13-15).
35. Evidence offered by Parents indicates the Student should receive a Functional Behavior Assessment (FBA) to help identify the triggers and consequences for problem behaviors in the least restrictive environment., identify antecedent interventions, as well as to inform effective strategies to alter current behavioral contingencies and maintain consequences (P#1 pp.13-15).
36. The Individual Education Program (IEP) team should give due weight to the independent evaluator's recommendations about the Student's need for specially-designed instruction to address the Student's behavioral, academic, emotional, social, and personal skill unique needs (P#1 pp.14-15).

Applicable Legal Principles

Conclusion of law and burden of proof

The burden of proof is composed of two considerations, the burden of going forward, and the burden of persuasion. Of these, an 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. In *Schaffer v. Weast*, 546 U.S. 49, (2005), the court held that the burden of persuasion by a preponderance of the evidence is on the party that requests the hearing in an IDEA case. 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). 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). 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 “equipose”. 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. *Id.*

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). In this matter, I have weighed the evidence with attention to the credibility of the testimony.

After listening to the mother, I accord persuasive weight to Parent’s testimony, for three reasons. Although some of that testimony was based upon personal inactions with the Student, administrators, and teacher reports, some of the testimony is also hearsay. First of all, the hearsay testimony was corroborated by the exhibits. Second, in the previous hearing, I determined the Parent displayed a clear memory of the school year, talking clearly about calls from the Charter School directing her to take the Student home on a number of occasions, which is also corroborated by the documentary record. Third, the Parent’s memory was precise for almost all events; therefore, I conclude the Parent’s testimony for events during the 2015-2016 school year is persuasive.

The Parent’s demeanor and manner of answering questions gave me every reason to find her credible and sincere. On several occasions, due to lack of a precise

memory, she did not answer in a way that supported her position, about which she was forthcoming and acknowledged. Therefore, I accord substantial weight to Parent’s testimony, as reflected in my findings of fact. On balance, I find that Parent’s testimony represents her best recollection of Student’s lengthy and complicated record of educational and behavioral health concerns.

I am watchful that this matter was unopposed at hearing because the Charter School is closed. While this observation affects the weight that I accord to Parent’s testimony, untested by cross-examination, it also establishes a record that is preponderant to the extent that I give weight to Parent’s testimony. Thus, all of the above findings are based upon a preponderance of the evidence. While some of the evidence is circumstantial, none of the testimony was contradicted by documents. I conclude, therefore, that I can derive inferences of fact from Parent’s lengthy restatement of Student’s struggles in school, in the home, and community, combined with evidence in the recent LEA evaluation report; I find that the record supports a finding of a denial of FAPE.

Child Find and Assessment

Under the IDEA child find requirements, the local education agency has a “continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the statut[e]”. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012)(citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010); 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §300.111(a), (c). LEAs are required to fulfill their child find obligation within a reasonable time after notice of behavior that suggests a disability. *Id.* Failure to conduct a sufficiently comprehensive evaluation is a violation of the agency’s “child find” obligations. *D.K.*, 696 F.3d above at 250 (a poorly designed and ineffective evaluation does not satisfy “child find” obligations). An evaluation must be sufficiently comprehensive to address all of the child’s suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6).

Comprehensive assessment in all areas of unique need

When Students are thought to have a disability, the regulations include a requirement that the evaluators “[u]se technically sound instruments that may assess the *relative contribution of cognitive ... factors*” (emphasis added). The US Department of

Education further advises that a disability must be determined “on a case-by-case basis, depending on the unique needs of a particular child.”⁶

The eligibility inquiry must take into account a broad array of measures. The eligibility inquiry must “[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior”.⁷ The evaluation must include “standardized, individualized testing (not just criterion-based testing or functional assessments)”. The comments to the regulations note, “Nothing in the [IDEA] or ... regulations would preclude the eligibility group from considering results from standardized tests when making eligibility determinations”⁸ Stated simply, just as no single assessment or measure could support a finding of a disability, no single assessment or measure may undermine a finding of “in need of special education” where other measures or factors could support such a finding.⁹

The statute specifies that a child must “need []” special education “by reason [of]” the disorder as identified under, 20 U.S.C. §1401(3)(A)(ii), and that special education must be designed “to meet the *unique needs* of [the] child with a disability”, *id.* §1401(29) (emphasis added).

Free Appropriate Public Education

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to children with disabilities. 20 U.S.C. §1412(a)(1). 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 IEP. 20 U.S.C. §1401(9).

⁶ Letter from Alexa Posny to Catherine D. Clarke, Director of Education and Regulatory Advocacy, American Speech and Hearing Association, U.S. Dep't of Educ. (Mar. 8, 2007) <https://www2.ed.gov/policy/speced/guid/idea/letters/2007-1/clarke030807disability1q2007.pdf>

⁷ 34 C.F.R. §300.306(c)(1)(i); *see also id.* §300.304(b)(1) (noting that the evaluation of whether the child is a child with a disability must “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child”)

⁸ Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46540, 46651 (Aug. 14, 2006).

⁹ See generally 34 C.F.R. §300.304(c)(2) (emphasizing “assessments and other evaluation materials [to] include those tailored to assess specific areas of *educational need* and not merely those that are designed to provide a single intelligence quotient).

A Local Education Agency (LEA) must provide FAPE by designing and administering a program of individualized instruction that is set forth in an IEP 20 USC §1414(d). In order to constitute FAPE, 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 (3rd Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3rd Cir. 1988).

“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 FAPE, once determined eligible, the child’s IEP must also describe and provide specially-designed instruction to meet his/her unique needs, and 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 (1982). 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 389, 396 (3rd Cir. 1996).

The LEA is not 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 (3rd Cir. 2012). An IEP is not required to incorporate every program, aide, or service that parents desire for their 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 (3rd Cir. 1995) (appropriateness is not judged prospectively so that lack of progress does not in and of itself render an IEP inappropriate.) The appropriateness of an IEP must be determined as of the time at which it was made, and the reasonableness of the program should be judged only based on 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 (3rd Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Charter School Responsibilities

Charter schools must comply with Pennsylvania and federal regular education, special education, federal civil rights and disability laws. These laws place the Charter school in the position of being the LEA, at least with respect to students it admits who have disabilities. Chapter 711 *et. seq.* of the Pennsylvania School Code, “Charter School and Cyber Charter School Services and Programs for Children with

Disabilities”, contains regulations specific to individuals with disabilities being educated in charter schools and cyber charter schools. Chapter 711 incorporates by reference all of the IDEA regulations at 22 Pa. Code 711.3. Chapter 711 also incorporates relevant antidiscrimination provisions in Section 504 and its implementing regulations. Charter schools and cyber charter schools also must comply with 22 Pa. Code Chapter 4 relating to academic standards and assessment, 22 Pa. Code Chapter 11 relating to pupil attendance, and 22 Pa. Chapter 12 relating to discipline of students 22 Pa. Code §711. et. seq.

<http://education.pasenategop.com/files/2014/03/Summary-Charter-Bill.pdf>.

Charter School’s IDEA Requirements

Under the IDEA, all LEAs must locate, evaluate, and educate children with a disability. 20 U.S.C. §1412(a)(1)(A). If the evaluation identifies a disability, and that the child is in need of specially-designed instruction, the LEA must provide the student with FAPE. IDEA directs the LEA to prepare, develop, and implement an Individualized Education Program (IEP). *Id.* The child's IEP must be developed by a team that includes the child's parents, at least one regular education teacher, at least one special education teacher, a representative of the LEA, and the child himself or herself, if appropriate. *Id.* 20 U.S.C. §1414(d)(1)(B).

The IEP should state the child's present levels of achievement and performance, provide annual goals, and explain how progress will be measured. 20 U.S.C. §1414(d)(1)(A)(i). The IEP should also state “the special education and related services and supplementary aids and services . . . to be provided to the child” and “the anticipated frequency, location, and duration of those services and modifications”. *Id.* § 1414(d)(1)(A)(i)(IV), (VII). The student’s progress must be regularly monitored and reported to the parents. *Id.* Once an IEP is created, it may only be amended by the entire IEP team or by agreement between the parents and the LEA. 20 U.S.C §1414(d)(3)(F).

IDEA also requires the states to provide a dispute resolution system should a parent or LEA disagree whether the child is a person with a disability in need of specially-designed instruction. 20 U.S.C. §§1415(b)(6), (c)(2), (d), (e) and (f). Either party may seek mediation or present a complaint to a hearing officer, who will then adjudicate the parties’ disagreement in a due process hearing. *Id.* The procedural safeguards recognize the LEA and the parent as the parties at the due process hearing. *Id.* Any party aggrieved by the hearing officer’s findings can file an action in a court of competent jurisdiction. *Id.* §1415(g);§ 1415(i)(2).

Compensatory Education

In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) the court endorsed a “complete” make whole remedy favoring relief for the entire period of the violation *G.L.* 802 F.3d at 626. Compensatory education “accrue[s] from the point, that the school district knows or should know of the injury to the child, and the child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem”.¹⁰ One approach to calculate the compensatory education relief is to adopt the *MC* “cookie cutter” approach. The second option is to employ the *Reid* “qualitative” approach. The third compensatory education calculation option is to review the record as a whole, make equitable adjustments and then formulate the remedy. The third approach is grounded in the equitable powers granted to the trier of fact to award appropriate relief.

Compensatory education is appropriate relief that is intended to compensate a student with a disability, who has been denied the individualized education guaranteed by the IDEA.¹¹ Compensatory education should place the child in the position they would have been in but for the violation.¹² The make whole calculation requires some evidence about the type and amount of services needed to place the student in the same position he or she would have occupied but for the LEA’s violations of the IDEA.¹³ Also, after *GL*, following *MC*, the parents must establish when the District either “knew or should have known” the child was not receiving FAPE.¹⁴ Assuming a finding of a denial of FAPE, the LEA, on the other hand, must produce evidence on what they suggest is the length of the reasonable rectification period usually deducted

¹⁰ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

¹¹ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

¹² *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to “conform[] to . . . [a] standard that looks to the child's present abilities”, whereas compensatory education is meant to “make up for prior deficiencies”. *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP “carries no guarantee of undoing damage done by prior violations”, IEPs do not do compensatory education's job.

¹³ *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid, supra.* (the parent, as the moving party, has the burden of “propos[ing] a well-articulated plan that reflects the student’s current education abilities and needs and is supported by the record.”); *Phillips ex rel. T.P. v. District of Columbia*, 736F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciola, Mag. J.); *Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012) (the burden of proof is on the parents to produce sufficient evidence demonstrating the type and quantum of compensatory education that makes the child whole).

¹⁴ . *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

from the compensatory education calculation. *Id.* Whether the evidence follows *Reid* or *MC*, the make whole remedy must be supported by it. *Id.*

In this matter, the evidence is insufficient to apply the *Reid* “make-whole” remedy. The Parents did not offer expert opinion testimony on remedial and special education services needed to bring the Student’s academic, social and behavioral skills to the level which they would have achieved absent the deprivation of FAPE. With the Charter School closed and not responding, it neither produced any evidence of its own on the subject nor contradicted the period of deprivation. PDE as the SEA agreed to provide Student with any relief ordered. 34 C.F.R. §300.227.

Discussion

In August 2015, the Charter School was aware the Student was a person with a disability. Although the Charter School conducted an evaluation, the evaluation was insufficient and inadequate. Such is obvious on the record. This fundamental error denied the Student FAPE.

The record is preponderant; the Student has a long history of a variety of emotional, academic, and behavioral concerns that interfere with learning. The Charter School was aware the Student has ongoing peer and adult social skills issues. The Charter School’s evaluation is insufficient. The evaluation failed to fully assess the Student’s social skills, emotional, and behavioral needs. The evaluation team relied on a single assessment rather than a variety of assessments. The delay in evaluating the Student contributed to the failure to develop a comprehensive behavioral strategy that ultimately led to the Student being suspended and excluded from school, for behaviors that were more likely than not a manifestation of the Student’s disability. All of this is in clear lack of conformity with what is required by law to constitute FAPE.

The Charter School’s failure to identify the Student in Sixth Grade

Parents argue that the Student displayed behaviors that should have alerted the Charter School personnel to the likelihood of the disability of “emotional disturbance,” and/or an “other health impaired,” under the IDEA during Student’s sixth grade year. The evidence is preponderant that Student’s behaviors in sixth grade did, in fact, indicate the possibility of either such disability as defined by the IDEA or by Section 504.

To assure that an eligible child receives FAPE (34 C.F.R. §300.17), a student must undergo an appropriate evaluation which recommends the student is eligible under IDEA. (34 C.F.R. §300.303; 22 PA Code §§14.102(a)(2)(xxv), 14.124).

When the family of a student disagrees with the evaluation process and/or evaluation reports issued by a school district, the family may request an IEE at public expense. (34 C.F.R. §§300.502(a), (b); 22 PA Code §14.102(a)(2)(xxix)). When faced with a request for an IEE at public expense, as an LEA the charter school must either (a) provide the IEE at public expense or (b) file a special education due process complaint in defense of its evaluation. (34 C.F.R. §§300.502(b)(1), (2); 22 PA Code §14.102(a)(2)(xxix)).

The Charter School in this matter has not entered an appearance, responded to any of the hearing notices, nor filed a due process complaint, and thus did not oppose Parents' request. The default rule is when the LEA does not file a due process complaint the Student should receive a publicly funded IEE. After hearing the Parent's testimony and reviewing the exhibits, for these reasons I granted the Student's request for an IEE. 34 C.F.R. §§300.502(a),(b); 22 PA Code §14.102(a)(2)(xxix).

The IDEA's definition of "emotional disturbance" requires a substantial detriment to education. A child, even if diagnosed with a clinical, emotional disturbance, is defined as a "child with a disability" under the IDEA only if the diagnosed condition is "exhibit[ed]" "to a marked degree that adversely affects [the] child's educational performance." 34 C.F.R. §300.8(c)(4)(i). The evidence is preponderant that Student did exhibit anxiety, as well as inappropriate social skills with adults and peers in school, "to a marked degree" in such a way as to adversely affect Student's performance, learning, and school attendance.

The evidence is preponderant that the Charter School was on notice that the Student's intermittent explosive disorder "substantially limit[ed] or prohibit[ed] participation in ... an aspect of the [S]tudent's school program." 22 Pa. Code 15.2. On this record, the Student was not able to function fully both behaviorally and socially in school (FOF## 25-41).

Based on a preponderance of the evidence, which includes contrary interpretations by the private evaluator, and contrary scores in the ability testing on standardized testing, I find that Student did display relative weakness in some elements of the core curriculum requirement. This impeded the Student's learning. It also seriously impacted the Student's achievement in the Charter School's curriculum (FOF## 25-41).

I consequently conclude by a preponderance of the evidence that, during Student's sixth grade year, the Charter School was on notice of behavior that should have raised a suspicion of disability as defined in the IDEA or section 504 (FOF## 25-41). Therefore, I find the Charter School had a duty under the IDEA and Section 504 to provide the Student with FAPE. In sum, after listening to the limited

testimony, reviewing the IEE, and reviewing all of the exhibits, the evidence is preponderant that the Charter School denied the Student FAPE. The evidence is also preponderant that the requested relief of compensatory education can be calculated with sufficient particularity to avoid a windfall.

Compensatory Education

To remedy the denial of FAPE, the Parents initially suggested an hour-for-hour remedy for the entire school year. After review of the IEE, the Parents now request compensatory education from December of 2015, the date of the Charter School's evaluation, until June of 2016 when the school closed. I agree with the Parents, and with the Charter School closed, PDE has agreed to provide the ordered compensatory education.

While the Student will receive compensatory education, the Parents did not meet their burden that the relief should cover hour-for-hour for the entire school year. The record does not establish that the LEA unnecessarily delayed its child find duty (FOF ##20) once the Parents requested the evaluation. Indeed, the LEA completed the assessment within the applicable time line. Therefore, I will not award compensatory education from August 2015 to November 2015.

After reviewing the ER and the IEE, I find that the Charter School, either knew or should have known in December of 2015, the Student was a person with a disability who needs specially-designed instruction. Therefore, I find the compensatory education claim accrued in December 2015. Thus, the eligible period for compensatory education begins at that time.

Compensatory education may take the form of any appropriate developmental, remedial, or instructional services, product, or device, selected at the discretion of Parents, which furthers or supports the Student's education or learning. Services in the amount set forth herein may be provided after school hours, on weekends, or during summer months when convenient for Student or Parents. All compensatory education services shall be provided by appropriately, qualified, certified, or licensed professionals, selected by Parents. The cost of all compensatory education services shall not exceed the rate for a privately retained qualified professionals in the location where the services are delivered.

As the Charter School LEA is unable to provide the services, the Parents are directed to contact the PDE, which has agreed to implement and provide the appropriate relief Ordered below. Accordingly, I find that the Student should be awarded 28 weeks of compensatory education. I take judicial notice that the Student's sibling's IEPs at ODR File #17929-1617 KE and ODR File# 17928-1617 KE provides that the Charter School day is 6.8 hours each day. Therefore, the Student is awarded 952 hours of compensatory education.

Conclusion

In sum, I find that the LEA deprived the Student FAPE from December 2015 through the end of the 2016 school year. Therefore, I find the Student is entitled to an award of compensatory education from December 2015 to the last day of the school year. The Student's social, emotional, behavioral, and academic skills were adversely affected throughout the school day. The Student's behavioral, social, and emotional needs were the contributing factor to repeated removals from school. The Student's behavioral, social, and emotional needs interfered with learning and created peer and adult difficulties. Accordingly, the Student is awarded 952 hours of compensatory education.

By way of dicta, it should also be noted that during the course of this matter, but after I ruled otherwise and proceeded, a federal district court in Pennsylvania held that hearing officers have jurisdiction over PDE when a Charter School closes. On these facts, however, since I found a denial of FAPE by the Charter School, and PDE *agreed* in advance of that to provide the relief awarded, any incongruity between my ruling and the Court's is not outcome determinative. That is if I had exercised jurisdiction over PDE, once finding the Charter School denied FAPE Student would have received precisely the same relief that will now be provided anyway.

ORDER

The Student should receive the following compensatory education services:

1. The Student is awarded 952 hours of compensatory education. The Parents can select the service provider. Pursuant to the Ruling at Q.B. ODR FILE #18044-1617 KE (Jelley, September 9, 2016), PDE is Ordered to pay the actual cost of the services provided to the Student.

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.

Date: January 6, 2017

Charles W. Jelley, Esq. LL.M.
Hearing Officer