

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: S. I.
Date of Birth: [redacted]

Dates of Hearing¹:

June 21, 2016
September 8, 2016
September 26, 2016
October 12, 2016

CLOSED HEARING

ODR Case # 17599-1516AS

Parties to the Hearing:

Parent[s]

Propel Charter Schools
3447 East Carson Street – Suite 200
Pittsburgh, PA 15203

Date of Decision:

Hearing Officer:

Representative:

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October 31, 2016

Michael J. McElligott, Esquire

¹ After the initial June 2016 hearing session, the hearing was scheduled to conclude over hearing dates in August and early September. The parties mutually agreed to reschedule the August dates and hold only the September 8th session in early September. Late September hearing dates were scheduled, but only the September 26th session was necessary to conclude the evidence. Counsel presented oral closing statements at the October 2016 session.

INTRODUCTION

Student (hereinafter “student”)² is a [mid-teen aged] student who attended Propel Charter Schools (“Charter School”). The parties dispute whether or not the student is eligible for special education as a student with a disability under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania charter school special education regulations (“Chapter 711”).³ Parent also brings the complaint under Section 504 of the Rehabilitation Act of 1973 (“Section 504”).⁴ The Charter School has multiple sites, and, for the relevant evidentiary period in this matter, the student attended a Charter School site over the course of the 2013-2014, 2014-2015, and 2015-2016 school years.

Parent claims that the student should have been identified as a student with a disability when she shared with the Charter School a private evaluation report in the spring of 2014. As a result, parent claims the student was denied a free appropriate public education (“FAPE”) for the remainder of the student’s attendance at the Charter School. Parent seeks compensatory education as a remedy.

² To protect confidentiality related to the student, the generic use of “student”, rather than a name and/or gender-specific pronouns, will be employed in this decision.

³ It is this hearing officer’s preference to cite to the implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§711.1-711.62.

⁴ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §711.3(c).

The Charter School counters that, at all times over the course of the school years at issue, the student does not qualify as a student with a disability and therefore that it has no obligations to the student under IDEIA/Chapter 711. Consequently, the Charter School claims that no remedy is owed.

For the reasons set forth below, I find in favor of the student and family in terms of claims made under Section 504.

ISSUES

Should the student have been identified by the Charter School as a student eligible under the terms of IDEIA/Chapter 711?

Has the Charter School failed to comply with its obligations, if any, under Section 504?

If the answer to either, or both, of these questions is answered in the affirmative, is compensatory education owed to the student?

FINDINGS OF FACT

6th Grade

1. In the 2013-2014 school year, the student was in 6th grade at the Charter School. (Parent Exhibit ["P"]-1 at pages 4-5).
2. In December 2013, parent obtained a psychological evaluation report for potential qualification for community-based mental health services. (P-1; Notes of Testimony ["NT"] at 104-106).

3. The December 2013 contains a section called “School/Vocational”.

In pertinent part, it reads as follows:

“(The student) is enrolled in 6th grade at (the Charter School). (The student) participates in the regular education program. (The student) displays some behavioral difficulties including talking in class, not responding to questions, and resisting work. (The student) receives straight As at school. (The student) has reportedly got into trouble at school for writing notes that include cursing language. (The student) functions ‘okay’ in terms of attention. (The student) receives increased amounts of homework but is motivated to do well. (The student) is social and establishes friendships easily. (The student’s) friendships are characterized by drama, at times. There was no report of verbal or physical aggression toward peers.” (P-1 at page 5).

4. Most of the December 2013 report regarding defiance or non-compliance concerns home-based behavior, or behavior with family members. (P-1).
5. The evaluator did not consult anyone at the Charter School for information about behavior in the school environment. (NT at 142-143).
6. Parent testified that she took the student for the evaluation at the suggestion of the Charter School building principal. The evaluator testified that he engaged with the family in terms of community-based mental health. The evaluator’s testimony is credited here, as nothing in the report indicates that the evaluator was sought out by the family at the behest of the Charter School. (P-1; NT at 38-39, 104-106, 310-311).

7. The evaluator diagnosed the student with oppositional defiant disorder. (P-1).
8. By mid-January 2014, the student's parent had shared the report with the Charter School principal. (NT at 38-39, 295-296, 310-311, 321-326).
9. The Charter School did not take any action on the psychological evaluation report. (NT at 38-49, 295-296).
10. In the fall of 2013, the first semester of 6th grade, the student had four discipline reports: one in October for inappropriate use of stickers, one in November for leaving class without permission, and two in December—once for taking candy from a teacher's desk and once for unauthorized use of a cell phone. Three of the four incidents involved talking back to, or ignoring, teachers. None of the incidents resulted in suspension from school. (P-6 at page 7).
11. In the spring of 2014, the second semester of 6th grade, the student had six discipline reports: two in February—once for being out of class without permission and once for class interruption, one in March for disrespect to a teacher, two in May—once for non-compliance with teacher directives and once for disrespect to teachers, and one in June for disrespect to teachers. Aside from the four incidents that involved non-compliance or disrespect, the class interruption incident also involved inappropriate interactions

with a teacher. None of the incidents resulted in suspension from school. (P-6 at pages 6-7).

12. At the very end of the 6th grade year, the student's parents met with the superintendent of the Charter School about the student and perceived inaction on behalf of the building principal. (NT at 43-45, 314-315).
13. The record is not definitive on the student's academic performance in 6th grade. (NT at 315-316).

7th Grade

14. In the fall of 2014, the first semester of 7th grade, the student had ten discipline reports: five in October—twice for non-compliance/disrespect with teachers, once for threats to a peer, once for class disruption, and once for abusive language with a peer; and five in November—four for non-compliance/disrespect with teachers, and once for classroom disruption. None of the incidents resulted in suspension from school. (P-6 at page 6).
15. In the spring of 2015, the second semester of 7th grade, the student had nine discipline reports: two in January— both for non-compliance/disrespect with teachers, five in February—once for leaving class without authorization, once for bullying a peer, and three times for non-compliance/disrespect with teachers; one in May for disrespect with a teacher, and one in June for disruption

- of the educational environment. The February class-leaving incident and the June disruption incident included non-compliance/disrespect with teachers. The February bullying incident resulted in one day of suspension and one of the February teacher-disrespect incidents resulted in assignment to “Saturday school”. (P-6 at page 5).
16. Often, the discipline incidents included teachers calling the student’s mother on the telephone to address the situation, or to speak with the student. These telephone calls were made not only for documented discipline incidents but as a regular Charter School response to the student. (P-6 at pages 5-6; NT at 30-31, 38-39, 42, 46-47, 49-52, 55-56, 384-386, 426-428).
17. In 7th grade, the student received two Bs and two Cs in year-long classes, and As in semester-long art and music classes. (P-9 at page 3).

8th Grade

18. In mid-September 2015, the psychologist who performed the December 2013 evaluation performed a re-evaluation of the student. (P-2).
19. The September 2015 report included formal social/emotional/behavioral assessments. The student rated as “high risk” on a social/emotional assessment. On a behavior

problem assessment, the student rated clinically significant scores in aggression, mood/depression, and social problems. On a youth inventory assessment, the student rated a clinically significant score in depression. (P-2 at page 2).

20. The September 2015 report contains a section called “School/Vocational”. In pertinent part, it reads as follows:

“(The student) continues at (the Charter School), where is enrolled [sic] in the 8th grade. It was reported that last school year was difficult, in regards to defiance and (the student’s mother) receiving numerous calls home about (the student’s) behavior. Thus, the school set up sessions with the guidance counselor, which continue this year. Thus far, there have been no negative reports this year. (The student) has had ongoing issues with not bringing home...homework and/or not turning in assignments, but (the student’s) grades are reportedly ‘good’.” (P-2 at page 6).

21. The evaluator did not consult anyone at the Charter School for information about behavior in the school environment. (NT at 149-150).

22. In late September 2015, prior to receiving a copy of the September 2015 re-evaluation report, the student’s mother contacted the Charter School director of special education, requesting an evaluation. (P-7 at page 1, P-14).

23. Over the first two weeks of October 2015, Charter School personnel scheduled a meeting with the student’s mother to discuss the request for an evaluation. Charter School personnel

shared emails indicating they had decided, unilaterally, that they would deny the parent's request for an evaluation. (P-4, P-7).

24. The Charter School prepared a notice of recommended educational placement ("NOREP") rejecting the parent's request for an evaluation. (P-5; NT at 83-85).

25. In the fall of 2015, the first semester of 8th grade, the student had seven discipline reports: five in October—three for non-compliance/disrespect of teachers or school personnel, one for inappropriate language, one for a verbal altercation with a peer; and two in November—one for non-compliance/disrespect of a teacher and one for leaving class without authorization. The October peer-altercation incident also involved non-compliance with teacher requests and resulted in one day of suspension. The November teacher-disrespect incident resulted in one day of suspension. (P-6 at page 4-5).

26. In the spring of 2016, the second semester of 8th grade, through the end of March, the student had seven discipline reports: two in January— both for non-compliance/disrespect with teachers and administrators, four in February—three for non-compliance/disrespect of teachers and one for being out of class, and one in March for non-compliance with school personnel. The February out-of-class incident also involved disrespect to a teacher. Furthermore, this out-of-class incident and one of the

- non-compliance/disrespect incidents both occurred on the same day, one in the morning and one in the afternoon. (P-15 at pages 2-3).
27. In April 2016, parent filed the due process complaint which led to these proceedings. The complaint was amended in May 2016, and the Charter School filed its response to the amended complaint. (Hearing Officer Exhibit (“HO”)-1, HO-2, HO-3).
28. In 8th grade, the student received two Fs, one D, and one C in year-long classes, and As and Bs in semester-long art and music. (P-16).
29. In August 2016, in the midst of the hearing, the Charter School performed an evaluation of the student, finding that the student did not have a disability. The Charter School found that the student did not have a disability. (P-17).
30. In the 2016-2017 school year, the student did not continue with the Charter School at a Charter School high school site (9th-12th grades). (NT at 209-211, 155-156).

CREDIBILITY FINDINGS

The student's mother was found to be highly credible; her testimony was accorded heavy weight.

The Charter School school psychologist was found to testify credibly, yet this testimony was diminished by the inappropriate conclusions of the August 2016 evaluation report; for that reason, her testimony was accorded little weight.

The Charter School building principal was credible, but his consistent lack of recall led to according his testimony little weight.

The student's classroom teachers were not found to be credible; their testimony was accorded very little weight.

All remaining witnesses were found to have testified credibly, and their testimony was accorded a medium degree of weight.

DISCUSSION AND CONCLUSIONS OF LAW

IDEIA/Chapter 711

Pursuant to the requirements of IDEIA and Chapter 711, Pennsylvania charter schools, as with Pennsylvania school districts, have an obligation to have policies and procedures in place "to ensure that all children with disabilities who are enrolled in the charter school...and who are in need of special education and related services, are identified,

located and evaluated.”⁵ Charter schools are explicitly granted the authority to seek permission from parents to evaluate a student who the charter school feels might qualify as a student with a disability.⁶ This duty is known as a charter school’s child-find obligation.

Once a charter school thinks a student may have a disability and/or require special education, it must seek permission from parents to evaluate the student and cannot proceed with an evaluation until it receives such permission.⁷ Once a charter school has received permission to evaluate, the evaluation report (“ER”) must be issued within 60 calendar days from the date the charter school received permission from parents.⁸ The calculation of the evaluation timeline includes only calendar days when the charter school is in session for the school year and does not include any day over the summer.⁹

The evaluation process “must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent” and must ensure “the child is assessed in all areas related to the suspected disability, including, if appropriate...social and emotional status, general intelligence, (and) academic performance.”¹⁰ Once the ER

⁵ 22 PA Code §711.21; *see also* 34 C.F.R. §300.111.

⁶ 34 C.F.R. §§300.300(a), 300.301(b). *See* 22 PA Code §711.3(b)(21).

⁷ 34 C.F.R. §300.300(a)(1). *See* 22 PA Code §711.3(b)(21).

⁸ 34 C.F.R. §300.301(c); 22 PA Code §711.24(b).

⁹ 34 C.F.R. §300.301(c)(1)(ii); 22 PA Code §711.24(b).

¹⁰ 34 C.F.R. §300.304(b)(1), (c)(4). *See* 22 PA Code §711.3(b)(24).

has been issued, “a group of qualified professionals and the parent(s)” meets to determine whether the child qualifies for special education.¹¹

In making the determination of whether a student is a child with a disability, a charter school must “draw 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”; and “ensure that information obtained from all of these sources is documented and carefully considered.”¹²

Section 504

Section 504 also require that children with disabilities in Pennsylvania schools be provided with FAPE.¹³ It also requires that a student with a disability be appropriately evaluated.¹⁴ The provisions of IDEA and related case law, in regards to providing FAPE, are more voluminous than those under Section 504, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE.¹⁵

¹¹ 34 C.F.R. §300.306(a); 22 PA Code §711.24(b). *See also* 22 PA Code §711.3(b)(24).

¹² 34 C.F.R. §300.306(c)(1). *See* 22 PA Code §711.3(b)(22).

¹³ 34 C.F.R. §104.33. *See* 22 PA Code §711.3(c)(5).

¹⁴ 34 C.F.R. §104.35. *See* 22 PA Code §711.3(c)(5).

¹⁵ *See generally* P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009).

Here, the Charter School denied the student FAPE, but for the reasons set forth below, the finding is made only as to the Charter School's obligations under Section 504.

The record weighs heavily in the favor of the student and family that, over the course of 6th, 7th, and 8th grades, the student's in-school behavior was problematic and interfered with the student's education and the education of others. Indeed, each year saw a larger number of incidents year-to-year (10 in 6th grade, 19 in 7th grade, 14 through March of 8th grade). The aggression and defiance in the student's behaviors also consistently increased from year-to-year.

By mid-January 2014, the student's parent had provided to the Charter School the December 2013 psychological report, with a psychological diagnosis of oppositional defiant disorder. Thereafter, through the spring of 2014, the student had six discipline incidents, almost all involving non-compliance/disrespect of school personnel. By the end of the 6th grade year, the Charter School superintendent met with the student's parents given their concerns and complaints about building-level personnel.

Should the Charter School have requested permission to evaluate the student in the spring of 2014? On one hand, the Charter School had been advised of the student's psychological diagnosis and had seen, or should have seen, escalating non-compliant/disrespectful behaviors over the course of the semester. On the other hand, there were no concerns

by either the Charter School or the family with the student's academic performance and, even though the student's behaviors were increasingly based on non-compliance/disrespect, those were new behaviors, not made part of the behavior incidents earlier in the school year (fall of 2013). On balance, the Charter School will not be found to have failed in its obligations to the student in 6th grade, the 2013-2014 school year.

In 7th grade, the 2014-2015 school year, matters are quite different. In October 2014, the student had five documented disciplinary incidents, including non-compliance/disrespect with teachers, threats to a peer, class disruption, and use of abusive language with a peer. At that point, at the latest, the Charter School knew or should have known that (a) the psychological diagnosis was manifesting itself in the educational environment, (b) the increasingly non-compliant/disrespectful behaviors of the prior spring were continuing, and (c) the student was now exhibiting aggression toward peers. Therefore, by October 31, 2014 (the date of the last October incident), the Charter School knew or should have known that it needed to seek permission to evaluate the student.¹⁶

Accounting for ten days to seek and to receive permission to evaluate¹⁷, then, the Charter School should have begun to evaluate the student no later than November 10, 2014. Therefore, an evaluation

¹⁶ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

¹⁷ M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

report should have been issued within sixty calendar days, or by January 9, 2015. Not to have done so amounts to a denial of FAPE.

Sadly, the spring of 2015, when programming should have been in place to address the student's problematic in-school behavior, the student continued to exhibit the same behaviors which, at this point, could be described as consistent, including non-compliance/disrespect with teachers, leaving class without authorization, bullying a peer, and disruption of the educational environment. The student had nine such documented incidents, and the testimony of the student's mother is credited, and the teachers' testimony discounted, that there were numerous other, non-documented incidents which led to frequent calls to the student's mother.

Then in October 2015, at the outset of 8th grade (the 2015-2016 school year), the Charter School engaged in a pre-determined decision to find the student not eligible for special education programming, even though it should have determined months earlier that some type of programming—whether special education or Section 504 services—needed to be in place for the student. Nearly predictably, in October and November 2015 the student exhibited non-compliance/disrespect of school personnel, used inappropriate language, engaged in a verbal altercation with a peer and left class without authorization. Similar behaviors continued through March 2016, when parent filed the complaint which led to these proceedings.

In sum, the Charter School knew, or should have known, as of January 9, 2015 that the student was eligible for specialized program as the result of the student's disability. This finding, though, is explicitly only for eligibility under Section 504. The reason for this is not that the student does not qualify as a student eligible under IDEIA—that may well be the case. However, the student no longer attends the Charter School and has just begun, for approximately eight weeks, 9th grade at a different local educational agency. It does not seem wise to force upon a local education agency a determination that the student requires special education. What is clear, though, is that the student has a diagnosed disability and requires, at the very least, school-based programming outside of special education; in other words, clearly as of January 9, 2015, the student qualified for a Section 504 plan. The Charter School failed in its obligations to the student under Section 504 from this date until June 17, 2016, the date the student graduated from the 8th grade at the Charter School site.

Accordingly, compensatory education will be awarded.

Compensatory Education

Where a charter school has denied FAPE to a student under the terms of the Section 504, compensatory education is an equitable remedy

that is available to a claimant, again by analogy to claims under IDEIA.¹⁸ The right to compensatory education accrues from a point where a charter school knows or should have known that a student was being denied FAPE, in this case on January 9, 2015.¹⁹

The nature of the denial of FAPE—failure to identify the student as eligible under Section 504— does not lend itself to a precise quantitative calculation of compensatory education; the award must be equitable in nature. How, then, do the equities weigh in this matter? The Charter School had knowledge, in January 2014, of a psychological report which clearly signaled that the student had a disability, which soon thereafter was manifesting itself at the Charter School, and took no action. The Charter School left the student without Section 504 programming for approximately fourteen instructional months (January 9, 2015 – early June 2015 and late August 2015 – June 17, 2016). The Charter School pre-determined that it would not find the student eligible for specialized programming. The student continued to exhibit deeply problematic behavior in school, to the detriment of the student, peers, and Charter School staff. The student’s academic achievement plummeted over the period January 2015 (in year-long classes, one B, two Cs, and a D at approximately the end of the second trimester of 7th grade; P-9 at page 3)

¹⁸ Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)

¹⁹ Ridgewood; M.C..

through June 2016 (in year-long classes, final grades of one C, one D, and two Fs; P-16).

Taken all together, it is the considered opinion of this hearing officer that the student should be awarded 300 hours as an equitable award of compensatory education.

CONCLUSION

As of January 9, 2015, the Charter School should have identified the student as a student with a disability who required, at the least, a Section 504 plan. The student was without specialized programming, necessary as the result of the student's disability, from that date until June 17, 2016, when the student graduated from 8th grade at the Charter School site. As a result, compensatory education was awarded.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is a student with a disability in the form of a psychological diagnosis. Accordingly, the Charter School, as of January 9, 2015, knew or should have known that it needed to evaluate that student and, at least, that the student qualified for a Section 504 plan. The student was without such a plan until June 17, 2016, when the student graduated from 8th grade at the Charter School site which the student attended.

Accordingly, as a matter of equity, the student is awarded 300 hours of compensatory education.

This opinion and order take no position as to whether, because of the student's disability, the student requires specially designed instruction, thereby qualifying the student under the terms of the IDEIA.

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

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

October 31, 2016