

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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision And Order

Closed Hearing

ODR No. 28472-23-24

Child's Name:

F.R.

Date of Birth:

[redacted]¹

Parents:

[redacted]

Counsel for Parents:

PRO SE

Local Education Agency:

Aspira Bilingual Cyber Charter School
6301 North Second Street
Philadelphia, PA 19120

Counsel for the LEA:

Jeffrey R. Stacey, Esquire
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Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision:

December 12, 2023

¹ Please note that the Student's birthdate appears as [two different dates] in various places.

INTRODUCTION

F.R. (hereafter “Student”),² resided within the boundaries of the School District of Philadelphia and was enrolled in a private, bilingual cyber-charter school (hereafter the “Charter School”). The Student had been found to be eligible for special education and related services under the primary disability category of Intellectual Disability and the secondary disability category of Speech or Language Impairment. The Student was attending school four days a week, in person. The Student’s educational supports are significant, including Supplemental learning Support (SLS), Speech and Language Therapy, Physical Therapy, Occupational Therapy, a 1:1 aide, and a nurse/personal care assistant who was provided through an outside health services provider.

The Parent filed a Complaint on August 29, 2023 pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*, claiming that the Charter School failed to provide a Free Appropriate Public Education (FAPE) when the Student began to take classes remotely, and seeking as relief compensatory education from December 9, 2022 through February 14, 2023. The Complaint proceeded to a two-day, closed, due process hearing that was convened via video conference on November 13 and December 12, 2023.³ Both hearings were translated from English to Spanish and from Spanish to English by interpreters who have been certified by the Administrative Office of Pennsylvania Courts.

² In the interest of confidentiality and privacy, Student’s name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision’s posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

³ References to the record throughout this decision will be to the Notes of Testimony (NT), Charter School Exhibit (CS-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number, and Hearing Officer Exhibits (HO) followed by the exhibit number.

All evidence including the exhibits admitted to the record and transcripts of the testimony was considered by the Hearing Officer. The only findings of fact cited herein are those needed by the Hearing Officer to explain the ruling and its context. All exhibits and aspects of each witness's testimony are not explicitly referenced below.

For the reasons set forth below, the Parent's claim is denied.

ISSUE

Did the Charter School provide the Student a FAPE from December 9, 2022 through February 14, 2023? If not, what should be the remedy?

FINDINGS OF FACT

1. The Student was enrolled in the Charter School in March 2022 (NT, p. 72). The cyber Charter School has a brick-and-mortar location where it provides services to students with special needs who require in-person specially designed instruction and related services. Between March 2022 and December 2022, the Student attended school on site, four days per week in a self-contained, special education supplemental learning support classroom with a class-size of 12 students (NT, p. 87).
2. The Student's March 21, 2022 Individualized Education Plan (IEP) provided for supplemental life skills support; speech and language therapy; occupational therapy; close adult supervision defined as in a group of two or more students; and special transportation (CS-2). On April 8, 2022, a NOREP adopted the IEP from the Student's previous (CS-3). The family opted out of receiving special transportation.
3. The Student was eligible for a personal care assistant or "nurse," which was provided by an outside health services agency. The Student's older Sister was hired by the outside provider to serve as the Student's "Nurse" (NT, p. 87). The Nurse's role was to monitor the Student's [medical

device] and help the Student physically navigate in the school (NT, p. 82).

4. On November 14, 2022, an Instructional Assistant (IA) assigned to the Student's classroom escorted the Student to the bathroom (CS-5, p.1). The Mother preferred the Nurse to escort the Student to the bathroom (NT, p. 22). The Nurse followed them into the bathroom and took over the responsibility of helping the Student (CS-5, p.1.). Thereafter, the Nurse and the IA argued in front of the children (CS-4, p.1). The Student was not part of the verbal altercation, but was in the vicinity (NT, 92-93). The situation escalated and the IA was asked to leave the area (CS-6, p.1.).
5. On December 9, 2023, a meeting was held in the Principal's office to discuss the incident. At that meeting, the Parent requested that the Student start taking classes online because the relationship between the Nurse and the IA was upsetting the Student (NT, p. 24). The Charter School asked for some time to address the disagreement between the Nurse and the IA.
6. On December 13, 2022, the Principal and the Special Education Coordinator attempted to "mediate" between the Nurse and the IA. No resolution was reached (NT, p. 105). Following the meeting, the Nurse texted her Mother indicating that unless she agreed to work in the same classroom as the IA, the Student would need to attend classes virtually (NT, p. 192). This was the last day that the Student attended the Charter School's physical location (NT, p. 27; P-1, p. 10).
7. The Special Education Supervisor was under the impression that the Student would be attending school on-site until winter break and did not find out until December 19, 2022 that the Student had not attended school since the meeting on December 13, 2022 (NT, p. 107). Once she was informed she intervened and by December 20, 2023 the Student was

linked to Google Classroom so that the Student could receive homework assignments (P-1, p. 9-12).

8. The Special Education Advisor from the PA Department of Education (DOE) Bureau of Special Education (BSE) suggested that (1) a third-party interpreter be found and utilized; (2) that synchronous virtual learning be implemented temporarily with close progress monitoring; and if the Student was not making progress, she encouraged the Mother to reconsider direct instruction on site; and (3) she encouraged Mother to reconsider having the Student receive therapy in person at the Charter School because “to be effective and valuable” PT and OT must be delivered in person. She also explained to the Mother that the Charter School would need some time to implement her recommendations (CS-13, p. 1, NT, p. 111-112).
9. Following winter break, on January 12, 2023, the Charter School issued a Permission to Re-evaluate (PTRE) to conduct a psycho-educational evaluation of the Student (CS-11). The family requested that the assessment be conducted virtually (CS-17; NT, p. 115).
10. On February 10, 2023, the Charter School emailed the family a proposed synchronous online learning and related services schedule developed for the Student, which would begin on February 14, 2023 (NT, p. 121-122; CS-15, p. 1).
11. On March 16, 2023, the IEP team met to discuss a 65-page proposed IEP (CS-23). There was no dispute over the services, however, there was no agreement regarding whether the services would be provided in person or virtually (NT, p. 131).
12. On March 21, 2023, the Principal sent the Parent a letter confirming the Parent’s March 7th request during a Zoom meeting that the therapists who would provide services in the home would not be affiliated with the Charter School. The Charter School was attempting to honor this request

by reaching out to external providers and could not find anyone. The Charter School also was looking into a third location that might work (CS-24, p. 1; NT, p. 125).

13. On April 19, 2023, the Reevaluation Report was issued following an online assessment taken by the Student, with the Father alongside (CS-25, p. 11). Because of the remote testing format, certain subtests could not be administered so a full-scale IQ score could not be determined (CS-25, p. 18).
14. In June 1, 2023, the IEP team met again during which the Charter School offered three NOREPs: (1) one for in-person instruction (CS-27), (2) one for a combination of in-person and virtual services (CS-29), and (3) one for all virtual instruction (CS-28). None were approved by the Parent.
15. On August 10, 2023, the Mother gave consent for an in-person Reevaluation (CS-33).
16. On August 19, 2023, the Charter School offered another NOREP for the 2023-2034 school year recommending direct instruction and related services on site at the Charter School. On August 28, 2023, the Parent signed the NOREP indicating that she did not approve it and requesting a due process hearing (CS-38, p. 4).
17. The Special Education Coordinator thought she had been corresponding with the Mother when she used the email address on file (NT, p. 119, 141-142).
18. On September 5, 2023, the Student transferred to a district public school for the 2023-2024 school year.

Parent's Claims

The Parent alleged that she refused to send her child to school because she believed that the Student was in danger. The Parent argued

that the Charter School failed to offer FAPE during the period from December 9, 2022 through February 14, 2023.

Charter School's Claims

The Charter School maintained that it acted in accordance with the IDEA at all times and recommended appropriate educational programming for the Student. The Charter School contended that it took all the steps that it could to implement services in the virtual setting at the direction of the Bureau of Special Education. The Charter School argued that the only appropriate instruction for the Student would be in person and that the time the Student was out of school was the unilateral decision of the Parent.

GENERAL LEGAL PRINCIPLES

Burden of Proof

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. Here, it should be recognized that the burden of persuasion lies with the party seeking relief: the Parent. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). 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. *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 "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 filed the Complaint. In essence, the Parent must prove by a preponderance of the evidence that the School failed to offer a FAPE during the period in question.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at 28 (2003). One purpose of an explicit credibility determination is to give courts the information they need in the event of judicial review. [See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014. “[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.” See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area School District*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017)].

In this matter, the witnesses provided testimony based on their own perception of the events that took place to the best of their recollection and understanding of the situation. The witnesses’ perceptions are in conflict due to intense feelings, biased information that flowed between the parties’ involved, and the language barrier.

Free Appropriate Public Education

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." IDEA, *supra*. § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29).

The LEA must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

DISCUSSION

The Hearing Officer considered evidence that provided background information from the time of the incident between the IA and the Nurse, and the communication that occurred between the Charter School and the family after the Student's removal from school beyond the time period from

December 9, 2022 through February 14, 2023 in order to make sense of the context surrounding the Parent's Complaint and demand for compensatory education.⁴

During the hearing, the Parent belatedly requested tutoring and enrollment in a private school. The Hearing Officer did not address those demands because they were not included in the original Complaint nor was there any evidence at the hearing to support those remedies.

There is no question that on December 13, 2022, when the Student switched to virtual instruction in the home, the March 21, 2022 IEP in effect was providing the Student with FAPE in the Least Restrictive Environment (LRE). The dispute in this matter was not about the *services* provided by the Charter School, but the *location* where the services would be provided and how long it took for the Charter School to put them in place after the Student left the building to be instructed in the home.

The Parent exercised her prerogative to remove her child from the Charter School because she believed her child was unsafe after the incident that occurred. The Charter School and others recommended that once the dispute that precipitated the incident had been resolved, the child should be returned to in person instruction and direct services, at a minimum for OT, PT and SLT, to ensure that the Student received a FAPE.

The Parent believes that the Student was sent home by the Charter School, and the Charter School believes that the decision to remove the Student from the Charter School was the Mother's unilateral choice. It appears that because the "mediation" between the IA and the Nurse resulted

⁴ There were many email and text messages entered into the record. Because the Mother and the Sister/Nurse share an email account, the actual author of the family's emails and texts is unauthenticated. It is unclear whether the Sister's transcriptions reflected the Mother's dictation exactly or not. Therefore, in rendering this decision the Hearing Officer gave less weight to email responses from the family.

in no resolution,⁵ the family refused to return the Student to the classroom. The Nurse characterized the result of the meeting as the Charter School demanding that if the IA and the Nurse could not work together, the Student would need to leave the Charter School. The Mother found the situation untenable, concerned about how it exacerbated the Student's anxiety and stress and could possibly put the Student in danger. Alternatively, the Charter School indicated that the Student would have been welcomed back to the school building at any time.

The Parent was erroneously under the impression that there was no IEP in place when the change in placement occurred (NT, p. 27). However, the March 2022 IEP remained in effect until a new IEP and NOREP could be developed to document the change in placement. While the Charter School is a cyber school, it is designed for students needing a life skills educational setting to attend school in person and maintains a brick-and-mortar physical school where that can occur. As the BSE Educational Advisor stated in her email, the Charter School would need time to implement her recommendations, including arranging for synchronized instructional learning (CS-13, p. 1). The Charter School was attempting to accommodate the Mother's request for virtual instruction by setting up synchronous learning to provide FAPE because it was clear that Google Classroom would not suffice indefinitely. That, apparently, could not happen instantaneously and it took time to put it in place. Once the Student's synchronous schedule was worked out, an amended IEP and NOREP timeline needed to be agreed upon.

In December, the Charter School began sending homework assignments to the Student using Google Classroom, however, the family

⁵ This meeting between the Charter School, the IA, and the Nurse has been characterized as a "mediation," but I hesitate to refer to it as that because there was no "neutral" mediator present, and it appears as though the Charter School was insisting that the only resolution would be for the IA and the Nurse to resolve their differences and go back to working together. Without a crystal ball, there is no way to determine if the perceived outcome was truly an ultimatum or was due to language barriers, pressure, fear, or something else. Unfortunately, the Student was the pawn who bore the brunt of result.

was not familiar with it. Due to the learning curve faced by the family in understanding how to log-in and implement the Google Classroom instructions, the homework assignments that were being sent virtually were not accessible until December 20, 2022 just prior to winter break (P-1, p. 12). Thereafter, synchronous virtual instruction was not accessible to the Student until February 14, 2023 (P-1, p. 27), which was a reasonable period of time for development of everything involved.

Once the location changed from the school building to the home, a revised IEP and NOREP were necessary to reflect the change in placement. The Charter School offered a variety of options. The Parent declined all attempts to return the Student to the school, even for therapy, or permit anyone from the Charter School to enter her home.

It was clear that providing therapy remotely could not be a permanent solution. FAPE is not complete without the necessary related services, yet the Charter School's options for providing therapy in the home were rebuffed by the family.

The Parent's concerns about the Student's safety fall flat in regard to the refusal to have any school-affiliated therapists enter her home when the only apparent cause of the Student's anxiety was the tension between the Nurse and IA. At no time did the Charter School attempt to send the IA to the home. The Parent failed to provide any evidence to demonstrate how the Student's safety would at risk if school-affiliated therapists provided services in her home.

Unfortunately, by this time the Mother's trust in the Charter School was irreparably broken and she resisted their offers of FAPE other than synchronous remote instruction.

Because of the Student's significant learning challenges, in-person instruction and related services are more appropriate and more conducive to making meaningful progress. While the Charter School was attempting to

create solutions that would appeal to the Parent as well as provide FAPE in the home, the family refused all offers and insisted on keeping the Student at home. The time the Student did not attend school was the unilateral decision of the Parent and the time it took to arrange for synchronous virtual instruction was reasonable.

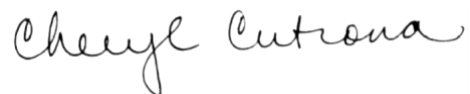
Based on all of the above, the Parent failed to prove by a preponderance of the evidence that the Charter School did not offer the Student FAPE.

CONCLUSION

1. The District did not violate its obligation to offer the Student FAPE from December 9, 2022 through February 14, 2023.
2. The Parent's claim for compensatory education is denied.
3. No legal or equitable relief or remedy is appropriate.

ORDER

AND NOW, this 12th day of December 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parent's claim is DENIED. It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is relinquished.



Cheryl Cutrona, J.D.
Hearing Officer

Date of Decision

December 12, 2023

ODR 28472-23-24