

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

ODR No. 14922-1314AS

Child's Name: M.S.

Date of Birth: [redacted]

Date of Hearing: 5/16/14

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

Representative:

Parent Attorney
None

Local Educational Agency
Mastery Charter School
Shoemaker Campus
5301 Media Street
Philadelphia, PA 19131

LEA Attorney
Lucas J. Repka, Esq.
King, Spry, Herman, Freund & Faul
One West Broad Street Suite 700
Bethlehem, PA 18018

Date Record Closed:

May 22, 2014

Date of Decision:

June 1, 2014

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The IDEA eligible Student who is the subject of this case is enrolled in the Charter School but not currently attending classes. The School filed the due process complaint because it cannot currently provide an appropriate special education placement for Student in any of its existing programs and locations. The School's complaint asked for an order allowing it to apply for Student's admission to an Approved Private School (APS). At the due process hearing, the School presented evidence that because of significant behavior issues, Student cannot make meaningful progress without a therapeutic environment and treatment services that are not available in any of the School's programs or locations.

The due process hearing was convened 30 days after the School's mid-April due process complaint, but Parent did not attend. When she received notice of the hearing, Parent notified the case manager that she did not want to participate without counsel, but did not respond to, or acknowledge, instructions for requesting a change of the hearing date in e-mail communications sent to her from both the hearing officer and the case manager.

The School called three witnesses to testify and offered many educational records and e-mail communications between the parties as exhibits, all of which were admitted into the hearing record. Based upon the evidence of Student's extensive needs which the School cannot meet within its own program, the School is permitted to do whatever is needed to obtain an appropriate placement for Student in an approved private school, or in another type program with a therapeutic component, or to fashion a community-based or other type of non-traditional educational program and placement for Student.

ISSUE

Should [the] Charter School be permitted to take whatever steps may be required, including preparing and sending application packets that include educational records, to approved private schools and/or to other agencies/facilities, for the purpose of obtaining an appropriate educational placement for Student?

FINDINGS OF FACT

1. Student [name and age redacted, a teenaged] child, born [redacted] is enrolled in the Charter School and is currently identified as eligible for special education services in the IDEA disability categories of Emotional Disturbance (ED), Specific Learning Disability (SLD), Speech/Language Impairment and Other Health Impairment (OHI). 34 C.F.R. §300.8(a)(1), (c)(4), (9), (10), (11); 22 Pa. Code §14.102 (2)(ii). (N.T. pp. 21, 22, 90, S-20 pp. 2, 17)
2. Student entered the Charter School in the 2010/2011 school year with IDEA eligibility already determined in the ED and OHI disability categories. At the time of the required three year reevaluation in April 2012, Student was receiving academic instruction primarily in regular education classes with specially designed instruction to address needs in reading, writing, math and behavior. Student also received weekly counseling services. (S-1 p. 1)
3. The primary symptoms of Student's ED disability identified in the 2012 reevaluation report (RR) were work refusal/avoidance. Teachers reported that Student struggled with academic tasks, often withdrew from instruction, completed little or no academic work, engaged in off-task behaviors, such as drawing or putting Student's head down on the desk, and responded poorly to re-direction. Student was also frequently tardy or absent, causing Student to miss academic instruction. (S-1 p. 3, S-2 p. 13)
4. After reviewing the RR at an early May 2012 meeting, the IEP team, including Parent, determined that Student's significant emotional and learning needs required both emotional support and learning support services. Student's educational placement remained supplemental emotional support, with emotional support services provided in the classroom, and some academic instruction moved to a pull-out learning support classroom. Student continued to receive weekly 30 minute counseling sessions and 30 minutes of speech/language therapy each week. (N.T. p. 22, 23; S-2 pp. 10, 11, 31, 33, 34,)
5. By the end of the 2011/2012 school year, Student's work avoidance and work refusal behaviors had not improved, and the behaviors continued as the 2012/2013 school year began in August 2012. The IEP team, including Parent, met again to revise Student's IEP by adding daily 30 minute group counseling sessions. Student's placement was also changed to the School's full time emotional support program, MAPS, in a different school building, where more intensive emotional support services are available. (N.T. pp. 23, 25; S-2 pp. 31, 34)

6. The Charter School MAPS program is a structured, full time emotional support program, staffed primarily by behavior specialists and counselors, which offers small class sizes (no more than 12 students) and a higher level of support for behavior needs than is available at the building Student previously attended. The MAPS program focuses on developing positive coping skills and problem-solving strategies for behavior management. It is not designed to provide comprehensive therapeutic support for students whose behavior problems may be due to mental health issues. (N.T. pp. 24, 25, 127, 128, 145, 146)
7. After Parent signed a NOREP approving the change of placement, Student began attending the MAPS program in September 2012. (N.T. pp. 26, 28; S-2 p. 48)
8. Before Student left the original campus, the IEP team conducted a functional behavioral assessment (FBA) in order to provide the MAPS staff with a more thorough, formal assessment of Student's behaviors. The FBA listed off-task, unresponsive and non-compliant behaviors as the three issues that significantly impacted Student's academic progress. (N.T. pp. 26, 27, 148, 149; S-3 p.1)
9. The FBA noted that the behaviors increased with high academic demand and non-preferred tasks, that Student appeared more distracted by internal thoughts than external stimuli and that Student accepted re-direction only from preferred staff with whom Student had a good rapport. Student's behaviors served the primary function of avoidance and Student was not motivated by or responsive to natural consequence for engaging in the behaviors, such as low grades, demerits, detention. (S-3 pp. 2, 3, 4)
10. The IEP team concluded that Student's positive behavior support plan (PBSP) did not need to be revised based on the FBA because it already addressed the behaviors of concern with goals, specially-designed instruction (SDI) and related services. (N.T. p. 28; S-2 pp. 38—45)
11. In the MAPS program, Student's behaviors and academic performance initially improved, but the avoidance/work refusal and "shut-down" behaviors began again during the second half of the year. Student's response to the behavior interventions that were in place also decreased, leading to a decline in academic and behavioral progress. Student's absences also increased during the second half of the school year. Student missed 19 days due to absences marked "illegal" between January and June 2013. (N.T. pp. 28, 29, 43, 123, 136—140; S-9, S-10, S-34)
12. The School increased Student's supports by providing additional access to behavior specialists and other staff with whom Student had developed a good relationship. Student's counselor also changed the focus of the replacement behaviors the School was trying to help Student develop. (N.T. pp. 29, 142, 144)
13. Although Student generally refused to complete work and was failing most classes during the second half of the 2012/2013 school year, Student continued to participate, and

- succeeded, in a few preferred classes through the end of April, but by the end of the school year, Student was failing all classes except science. (N.T. pp. 143, 144; S-10)
14. In response to a serious behavioral incident in March 2013, when Student was caught with [prohibited items], the School conducted a manifestation determination review, which Parent attended. Parent did not agree with the conclusion that the conduct was not a manifestation of Student's disabilities and with the outcome of the disciplinary hearing that followed. Student received an out of school suspension and was referred to the Student Assistance Program (SAP). (N.T. pp. 32—37; S-6, S-7, S-8)
 15. After assessing Student, the SAP counselor recommended outpatient [redacted] counseling, but Parent did not follow that recommendation and also refused a later offer of group services for students for whom [such] counseling was recommended. (N.T. pp. 38—40, 124, 125; S-7, S-8 p. 10, S-37 p. 1)
 16. In April 2013, the School sent several invitations to Parent to attend Student's annual IEP meeting. Parent did not attend the May 3, 2013 IEP meeting. (N.T. p. 41; S-11 p. 1, S-36 pp. 6—8)
 17. The School members of the IEP team met without Parent to revise Student's IEP and implemented the changes developed at the May 3 IEP meeting, since Parent did not return a signed NOREP accepting or rejecting the School's proposed changes, and did not file a due process complaint or request for mediation. (N.T. pp. 42, 45; S-11 pp. 3—37)
 18. As revised, Student's IEP provided for increased emotional supports in the form of additional counseling, increased access to Student's counselor and behavior specialists throughout the day and different coping strategies, since Student was unwilling to work on the coping strategies for stress and anger that were in place. Student did not respond to the efforts to address the increasingly difficult behaviors and the decline in educational progress resulting from the behavior issues. (N.T. pp. 43, 141, 142; S-11 pp. 15, 28)
 19. At the May 3 IEP team meeting, the School IEP team members also recommended that Student's placement remain in the MAPS full time emotional support program for the 2013/2014 school year. (S-11 pp. 33, 46, 47)
 20. The School offered ESY services, including transportation, which Student did not attend, and Student did not return to MAPS at the beginning of the 2013/2014 school year. (N.T. pp. 45, 46; S-12, S-36 pp. 5, 9)
 21. In late August 2013, Parent sent an e-mail message to the School stating that she disapproved of the MAPS program, would not send Student to school at MAPS and wanted Student to return to the regular education setting. The School tried to schedule an IEP meeting to discuss Parent's concerns, but Parent did not respond to formal IEP meeting invitations or to the School's many e-mail messages telling Parent that Student could not return to the campus Parent wanted without an IEP meeting. Parent continued to insist that the School send a schedule of Student's classes for the regular education

- placement that she wanted, although Student's educational placement was changed in August 2012 when Parent approved the NOREP for Student to attend MAPS. (N.T. pp. 47—56, 59; S-13 pp. 1—10, 15—17)
22. Early in September 2013, the School also attempted to provide instruction for Student at home, through a tutor, until the placement issue was resolved, but although Parent at first agreed to permit a tutor to meet with Student a few days after the school year began, and picked the time and date for the first meeting, neither Parent nor Student were at home when the tutor arrived, and Parent later refused tutoring services for Student. (N.T. pp. 52, 54, 56, 57; S-13 pp. 8, 11—15)
 23. On September 18, Parent identified an advocate, granted permission for the School to contact the advocate directly and agreed to attend an IEP meeting on October 1, 2013. (N.T. p. 60, 62, 63; S-13 pp. 17, 19, 22—25)
 24. Parent and Student, accompanied by the advocate, attended the IEP meeting at the general education School building Student had attended before the MAPS placement. The School presented a draft IEP recommending an approved private school (APS) placement, where Student could receive additional and different emotional support services. The School hoped to obtain Parent's permission to begin the process of exploring and applying to possible APS placements. (N.T. p. 63, 64; S-13 p. 25, S-14 pp. 3, 9)
 25. At the IEP meeting Parent refused the School's APS proposal, denied that Student has a disability and demanded that Student return to the campus Student had attended before MAPS. Student stated that the behaviors which prompted the School to change Student's placement to the full time emotional support program were entirely under Student's control and that Student would drop them if permitted to return to the general education School building. (N.T. pp. 65, 66)
 26. Although School staff was very concerned about Student's chances of succeeding in a less structured school setting, Parent would not agree to anything else. Because the School's primary concern was assuring that Student received academic instruction and emotional support services, the school members of IEP team agreed to return Student to the general education building on a trial basis in a supplemental emotional support placement with 30 minutes/week of individual counseling and a full day 1:1 aide for academic support and to assist Student in behavior regulation and developing positive coping skills. Demands, such as homework completion, were also reduced. Parent signed the NOREP approving the change of placement. (N.T. pp. 66—69, 71, 72 ; S-15)
 27. In addition to the services specified in the NOREP, the School wanted, as much as possible, to re-create the features of the full time emotional support placement it believed were most important for Student. In addition to implementation of the existing behavior support plan, Student was to receive instruction in reading and math in the supplemental learning support small group setting, be provided with daily morning and afternoon check-ins with the special education case manager, and with access to the counselor at

- any time during the school day. Student would also have the option to complete work in a preferred setting, a specific plan was developed for re-directing Student and providing time for compliance. (N.T. pp. 69, 70)
28. At the October 1 IEP meeting, the School also asked, and was granted Parent's permission to conduct a reevaluation of Student to gain a better understanding of Student's social and emotional needs. (N.T. p. 72; S-16)
 29. Another IEP meeting was scheduled for October 7 to revise Student's IEP for the new placement, including the additional supports and services discussed at the October 1 meeting, and to review the transition plan for returning Student to the regular education school setting. Parent attended the second IEP meeting and Student began attending school in the new placement on the same day. (N.T. pp. 72—77; S-17, S-18)
 30. For approximately a week and a half, Student maintained an acceptable level of effort and behavior in the general education School building until a serious disciplinary infraction, including profanity directed toward a school administrator and threats against the School, resulted in a one day suspension. During the incident, Student left the building without permission. Staff unsuccessfully tried to reach Parent to discuss the incident. When Parent contacted School staff by e-mail, she blamed the School because Student's case manager, who had taken time off for a personal matter, was not available. Although the suspension was for only 1 day, Student did not return to school for several days. (N.T. pp. 78—83, 85, 150; S-19 pp. 1—7)
 31. Just before the disciplinary incident, School staff began to notice a return of the work avoidance and refusal behaviors and a decline in Student's efforts to complete school work. After the discipline incident, the School scheduled an IEP meeting to discuss the incident and staff concerns about Student's academic and behavioral progress. Parent and Student attended the IEP meeting on October 28 but Parent was defensive, refused to cooperate with any School requests and left before it was over. (N.T. pp. 83, 84, 86, 88, 89; S-19 pp. 5, 6, 8—17)
 32. From late November 2013, after completing Student's reevaluation, through mid-December, the School attempted to schedule another IEP meeting to address Student's significant emotional support needs and declining academic and behavioral performance, but Parent did not respond to the IEP meeting invitations or to e-mail messages attempting to schedule a meeting, including invitations that offered several dates to give Parent a choice and the chance to select a date/time that would meet her needs. Parent has not attended an IEP meeting or entered the School for any reason since October 28, 2013. (N.T. pp. 91—95, 99, 100, 102; S-20, S-21, S-25 p. 62)
 33. School staff wanted the opportunity to discuss Student's difficulties with Parent and explain why staff believes that Student's needs can best be met in a full-time emotional support placement, preferably in an APS, where Student could receive therapy for significant mental health needs, as well as behavioral services. Parent's refusal to respond to IEP invitations and all other efforts by School staff to schedule a meeting with

her prevented a discussion between School staff and Parent. (N.T. pp. 88—91, 126; S-20, S-21, S-29)

34. The School members of Student's IEP team met on December 19, 2013 and recommended an APS as the appropriate educational placement for Student due to increasing behavior problems, decreasing participation in academic work and Student's lack of response to the emotional and learning supports the School attempted to provide. The School, however, could not complete applications, submit Student's educational records or arrange interviews for Student without Parent's consent. (N.T. pp. 96, 98, 100, 104; S-23, S-25)
35. In the absence of Parent's cooperation, and because of Student's declining behavior control and academic efforts, the School increased Student's services and supports by scheduling daily meetings with Student's counselor and minimizing Student's transitions within the building. (N.T. p. 105)
36. In the winter of 2014, new and more serious behaviors developed and quickly increased in frequency. In addition to a complete refusal to engage in school work, Student began refusing to go to the next designated location when changing classes, and either wandered in the halls or left the building despite constant adult supervision. Student was also disrespectful, non-compliant, unresponsive even to preferred staff and began to show physically threatening behaviors. Student's tardiness and absences also increased. (N.T. p. 105—107, 150, 151, 153, 154)
37. In mid-March, the School issued a NOREP to try a new level of emotional support programming within the building by removing Student from all regular education classes and providing academic instruction in a single classroom, with the opportunity to return to preferred classes with improved behavior and effort in academic instruction. (N.T. pp. 108, 109; S-27 p. 2)
38. Student refused to cooperate with two required safety drills, a fire drill and a shelter in place emergency drill, requiring staff to leave other students with reduced supervision to assure that Student was removed to a safe place. In an actual emergency, the safety of Student, staff and other students would have been compromised due to Student's behavior. (N.T. pp. 112, 113)
39. By the end of March, Student's behaviors were completely uncontrollable by any means, including techniques that Student had suggested, such as allowing a period of time to calm down through drawing. Student was no longer participating in most academic work and was not attending school regularly. On days Student attended school at all, Student arrived at various times, sometimes with only an hour or two left in the school day. (N.T. pp. 105—108, 155, 156; S-10)
40. In an incident on March 31, Student was verbally and physically threatening toward a teacher who gave Student a directive, leading to a disciplinary hearing, which Parent did

not attend. Student received a four day out of school suspension. (N.T. pp. 110, 111 S-31)

41. After the April 3, 2014 disciplinary hearing, the School convened an IEP meeting without Parent, who had not responded to the School's notice of the hearing and IEP meeting invitation. The School IEP team members approved an immediate change of Student's placement back to the MAPS program due to safety concerns. The IEP team again notified Parent that because of Student's mental health needs, application should be made to APS placements that could provide Student with a therapeutic environment and mental health treatment along with academic instruction and behavior support. (N.T. p.112—118; S-28, S-29, S-30, S-32)
42. Since Parent did not return a signed NOREP accepting or rejecting the School's proposed change of placement, and did not file a due process complaint or a request for mediation within 10 days, Student's placement was changed to MAPS as of April 7, 2014. (N.T. pp. 129, 130; S-30 pp. 67—71)
43. Although the Charter School has sent a taxi to Student's home every day since the change of placement became effective, Student attended school at MAPS on only one day since that time. (N.T. pp. 118, 119; S-30 p. 67)
44. The Charter School filed the due process complaint that led to the hearing in order to obtain a hearing officer order permitting the School to proceed with APS applications for Student, which requires sharing school records. (N.T. p. 129)
45. The Charter School has determined that the MAPS program is not currently an appropriate placement for Student due to the absence of a therapeutic component. (N.T. pp. 126—128, 145)
46. After the due process complaint was submitted by the Charter School on April 17, 2014 the case manager from the Office for Dispute Resolution (ODR) sent information to the School and to Parent about the hearing, including a notice that the hearing was scheduled for May 16 at 10:00 a.m. at the Charter School. Parent sent an e-mail to the case manager stating that she did not feel comfortable attending the hearing and that she would let everyone know when she had counsel and was ready. The case manager sent an e-mail message to the hearing officer repeating Parent's statements. (N.T. p. 6; HO-1¹)
47. In keeping with normal procedures, a few days later, on April 28, the hearing officer sent both Parent and counsel for the School an e-mail message that again stated the date of the hearing and attached several documents to explain due process hearing procedures.

¹ The e-mail messages from the hearing officer to Parent and to counsel for the Charter School dated 4/28 and 5/15, and an e-mail message dated 5/16/14 @ 10:49 a.m. from School counsel to the hearing officer, copied to Parent, were admitted into the record during the 5/16 due process hearing as Hearing Officer Exhibits 1, 2 and 3 (HO-1, HO-2 and HO-3). In the 5/16 e-mail message, School counsel forwarded a 5/13 e-mail from Parent to the case manager and the case manager's response to Parent.

Referring to Parent's message to the case manager, the hearing officer's e-mail message also told Parent that the hearing could not be postponed for an unknown amount of time, without a specific date, until Parent said she was ready because hearings must be held within a set and limited amount of time. (HO-1)

48. In the April 28 e-mail message, Parent was also told that she could have more time before the hearing if she asked the hearing officer for a new date by 5:00 p.m. on May 8, and that if she made that request, the hearing would be postponed to a definite date no more than 30 days after the original 5/16 hearing date unless the School agreed to a longer time. Parent was also told that if she did not ask for a change of date, the hearing would be held whether she came or not. Parent did not respond to the e-mail message before the hearing on 5/16. (N.T. p. 7; HO-1)
49. On May 13, a few days after receiving the School's 5 day disclosure of evidence, Parent again sent an e-mail to the case manager stating that she was looking for counsel and would let everyone know when she was ready to attend the hearing. The case manager directed Parent to contact the hearing officer to request a change of hearing date, but Parent did not do so. (N.T. p. 8; HO-3)
50. In an e-mail message dated 5/15, the hearing officer reminded the parties of the due process hearing to be held the next day, 5/16, and noted that Parent had not requested a change of date by May 8. The 5/15 message forwarded the original April 28 message, and so repeated the notice to Parent that if she wanted more than a 30 day postponement of the hearing, she needed to talk to counsel for the School to see whether the School would agree to a longer postponement of the hearing date. The 5/15 e-mail also repeated the warning that without a request to the hearing officer to postpone the hearing, it would be held without her if she did not attend. Parent did not respond to the 5/15 e-mail message. No communication from Parent to the hearing officer occurred at any time before the due process hearing record was opened, or during the hearing. (N.T. p. 7; HO-2)
51. On the afternoon of May 16, after the hearing concluded and after receiving the e-mail message from School counsel to the hearing officer forwarding Parent's May 13 e-mail message to the case manager and the case manager's response, Parent answered an e-mail message from the hearing officer for the first time. (HO-4²)
52. In Parent's May 16 e-mail message, she stated that the e-mail messages between Parent and the case manager forwarded to the hearing officer by School counsel stated that the hearing officer would not be at the hearing on 5/16. Parent's 5/16 e-mail message that included that statement used the subject line from the hearing officer's 4/28 e-mail message, but the body of the message, along with the list of attachments, were deleted. (HO-3, HO-4)

² The e-mail message from Parent to the hearing officer dated 5/16/14 @ 4:04 p.m. is hereby admitted to the record as HO-4.

53. The hearing transcript was sent to Parent, School counsel, the hearing officer and ODR administrative staff via e-mail on May 20. On May 21, Parent sent several e-mail messages to the hearing officer. The first stated that Parent wanted to postpone the hearing until she got an attorney and would let everyone know when she is ready. The next message again forwarded the message Parent had sent to the case manager on 5/13, but did not include the addressees on the original message or the case manager's response. (HO-3, HO-5³)
54. The last 5/21 message from Parent noted, among other matters, that Parent did not understand who to talk to about postponing the hearing and again noted that she did not feel comfortable going to the hearing without assistance. The hearing officer's response informed Parent that her final 5/21 message would be made a part of the record and considered in the decision to be issued by June 1, and that Parent would receive appeal procedures with the decision. (HO-6⁴)⁵

DISCUSSION AND CONCLUSIONS OF LAW

Procedural/Legal Issues

Charter School's Right to a Due Process Hearing

Under Pennsylvania law, a charter school is an independent public school and is a local educational agency (LEA) under state special education law and the IDEA statute and regulations. 22 Pa. Code §§711.1, 711.2, 711.3; 34 C.F.R. §§300.28, 300.209(c). The Charter School, therefore, is required to comply with IDEA requirements to provide a free, appropriate public education (FAPE) to students with disabilities as provided by the federal IDEA regulations and adopted

³ The e-mail messages from Parent to the hearing officer dated 5/21/14 @ 1:08 and 1:09 p.m. are hereby admitted to the record as HO-5.

⁴ The e-mail message from Parent to the hearing officer dated 5/21/14 @ 1:44 p.m. and the hearing officer's response to Parent, copied to School counsel, dated 5/21/14 @ 2:26 p.m. is hereby admitted to the record as HO-6. The response to the parties within HO-6 indicates that the final 5/21 message from Parent would be admitted as HO-4, but because the entire e-mail correspondence from Parent to the hearing officer, dated 5/16 (HO-4) and earlier on 5/21 HO-5) has also been admitted to the record, the designation of the final 5/21 e-mail messages has been changed to HO-6.

⁵ In an e-mail message dated 5/22/14 @ 10:58 a.m., copied to Parent, the Charter School submitted its closing argument and objected to admitting Parent's final 5/21 e-mail message into the record, as well as to any consideration of the message in the decision. Although Parent did not participate in the hearing on 5/16, she was entitled to submit an argument based on the hearing record, as the School did. The School's objection, therefore, is overruled.

by the Pennsylvania Charter School special education regulations found at 22 Pa. Code §711, *et seq.* See also, *R.B. v. Mastery Charter School*, 762 F. Supp. 2d 745, 752—753 (E.D. Pa. 2010); *Aff'd.*, 532 Fed. Appx. 136; 2013 U.S. App. LEXIS 15594 (3rd Cir. 2013).

The IDEA statute and regulations provide procedural safeguards to parents and LEAs, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009). Pennsylvania regulations also specifically provide procedural safeguards, including the opportunity for a due process hearing, for charter schools and parents of IDEA eligible students enrolled in charter schools. 22 Pa. Code §711.62.

The IDEA statute and regulations further provide that

A parent or a public agency may file a due process complaint...[when a public educational agency]... [p]roposes to initiate or change the identification, evaluation, or educational placement of..a child with a disability...or the provision of FAPE to the child; or [r]efuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

34 C.F.R. §§300.507(a)(1), 503(a)(1), based upon 20 U.S.C. §1415(b)(6).

In this case, as allowed by the federal and state IDEA regulations, the Charter School filed a due process complaint because it cannot appropriately provide for Student's educational needs due to the severity of Student's ED disability, which caused worsening behavior problems and Student's complete refusal to engage in the educational process during the current school

year. (FF 31, 33, 34, 35, 36, 37, 39) The School, therefore, is proposing to change Student's educational placement.

Because Parent has refused to meet with the School staff since last October, and Parent refused to consider the School's proposal for Student's placement in an APS at the October 1, 2013 IEP meeting or at any time since then, the only way that the School can apply for and accept an APS placement for Student is by presenting enough persuasive evidence at a due process hearing to convince the hearing officer that placement in an APS is an appropriate way of meeting Student's significant educational needs.

Parent's Decision Not to Attend the Due Process Hearing

The IDEA regulations list the due process hearing rights of the parent and LEA, who are the parties to a due process hearing, including the right to be accompanied and advised by counsel and/or an advocate, to present evidence and to confront and cross examine witnesses. 34 C.F.R. §300.512(a)(1),(2), (3). Those rights, however, are not unlimited, since other due process hearing requirements must also be met, such as the 45 day timeline for completing a hearing and issuing a decision unless the hearing officer grants a specific extension of time. 34 C.F.R. §300.515(a)(c).

In this case, Parent notified only the case manager of her wish to be accompanied by counsel at the due process hearing and that she wanted additional time to find an attorney. (FF 46, 49) The case manager handles only administrative matters relating to due process hearings, such as sending the parties information about the due process hearing, including the hearing officer's name and contact information. The case manager is not a hearing officer, and under the IDEA regulations, the hearing officer is the only person permitted to extend the due process

hearing timeline. Parent, therefore, could not get a change of hearing date from the case manager.

The case manager notified me of Parent's request, however, and I sent Parent instructions for requesting a change of the hearing date and an extension of the decision date in enough time before the hearing to assure that the Charter School did not complete all preparations for the due process hearing only to be told, just before the hearing, that it would not be held as scheduled. (FF 47, 48) I also told Parent that the hearing could not be postponed until some vague time in the future when she notified everyone that she is ready, but offered a 30 day extension, or longer if the School agreed. (FF 47) Parent refused to speak with counsel for the School and did not follow the instructions for requesting an extension of the hearing. (FF 48, 49, 50)

In later e-mail messages, Parent suggested that she didn't know who to contact about a change of the hearing date, but that is plainly false. Parent received my April 28 e-mail message, as indicated by the subject line of her 5/16 e-mail message to me and by a delivery receipt. I use a consistent format in the subject line of my first e-mail message to the parties/counsel in all new cases, and that was preserved in Parent's first e-mail message to me on May 16. (FF 52) Parent, therefore, knew that she could have an additional 30 days to find an attorney, and potentially a longer extension if she or her attorney contacted counsel for the School, and also where to send an extension request. Parent, however, chose to do nothing to properly request an extension of time, and Parent's later e-mail messages suggest that she did nothing to find an attorney in the weeks after she was informed of the School's due process complaint since she later suggested that she expected the hearing to be canceled until she notifies the School and the case manager that she has an attorney and is ready to proceed. (FF 53)

Just as Parent ignored the instructions she received for requesting an extension, she also ignored the warnings sent on both 4/28 and 5/15 that the hearing would be held without her if she did not come to the hearing. Parent had ample opportunity to participate in the due process hearing but chose not to, and in the past, at least, had access to an advocate who might have assisted Parent in understanding the hearing procedures, or to comply with my directives for postponing the hearing.

Parent did respond in writing to the School's position, and that will stand as her participation in the due process hearing. (HO-6) Considering the IDEA requirements for a quick conclusion to due process hearings, Parent's opportunities to either request an extension of the hearing schedule or participate in the due process hearing, proceeding with the hearing in Parent's absence was fully justified.

Substantive Basis for the Charter School's Request for an Override of Parent's Refusal to Consent to a Change of Placement

Student's increasing behavior and academic difficulties described in the Findings of Fact, above, that occurred between the end of the 2011/2012 school year and April of the current school year, when Student stopped attending the Charter School, need little discussion. The substantial evidence provided by the School at the due process hearing provided a strong basis for agreeing with the Charter School's conclusion that Student's emotional and academic support needs are now greater than the School can appropriately address with the services and supports available within its own programs and educational placements.

As Student's school work avoidance "shut down" behaviors got worse in each school year, the School responded with more intensive interventions, but the supports the School added worked for only a brief time before Student's problems increased again. From the time just before Student's educational placement was first changed to full time emotional support in the

School's MAPS program through the end of March 2014, when Student's placement was again changed from supplemental to full time emotional support, Student's avoidance behaviors increased in frequency, new behaviors of concern developed, and Student became ever more resistant to the School's efforts to provide a behavioral program that would effectively allow Student to benefit from academic instruction.

There is a strong and specific preference in the IDEA that,

- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. §300.114(a)(2). The IDEA regulations also recognize, however, that there are circumstances where “the nature and severity” of an eligible student’s disability makes education in a regular school setting unsatisfactory because the LEA does not have access to supports and services that allow it to address the effects of a severe disability, or, as in this case, a combination of severe disabilities. For those situations, the IDEA regulations require an LEA to provide “a continuum of alternative placements,” such as “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 C.F.R. §300.115(a), (b).

This case clearly presents a situation in which Student cannot be “satisfactorily” educated in a regular school placement. The record developed at the due process hearing strongly justifies the School’s request for an order permitting it to apply for admission to an approved private school. The Charter School presented extensive evidence supporting the conclusion that Student

now requires an educational placement that can provide therapeutic supports and mental health treatment for Student's ED disability, which appears to be getting more severe, and could be complicated by [redacted] issues. See FF 14, 15 and S-36 pp.1—3, relating to Parent's accusations that a driver from the taxi company through which the School provided transportation for Student to the MAPS program provided Student with [redacted], and accusations in HO-6 that the School enabled [prohibited behavior]. Parent's accusations admit, in effect, that Student has been [redacted].

The Charter School believes that if it is permitted to complete applications and provide Student's educational records, it can locate an APS that will appropriately meet Student's needs arising from the ED, as well as the LD, speech/language and OHI disabilities. Based on the substantial evidence admitted into the record at the due process hearing, the School is now permitted to fully explore that option. As discussed below, however, the School will also be given broader options and required to make significant efforts to provide an interim placement that can appropriately meet Student's needs in the event it cannot secure Student's admission to an APS by the time school has been in session for 30 days in the 2014/2015 school year.

Parent's Conduct/Lack of Participation

In its closing argument, the Charter School requested that I note that Parent's conduct, particularly within the past school year, interfered with the School's efforts to locate an appropriate private placement for Student and to provide Student with necessary and appropriate services. Although Parent's conduct is not directly relevant to the only identified issue in the case, whether the School should be permitted to search for an appropriate private school placement for Student, it does support the decision to override Parent's refusal to consent to a change of placement.

The evidence presented at the hearing, as well as Parent's statements found in HO-6, show that Parent has been both uncooperative and obstructive during this school year, in particular, and is most strongly interested in blaming the Charter School for all of the problems Student has experienced. Parent seems to suggest that if the School would, essentially, make no demands on Student, the behavior problems could be eliminated. In her final May 21 e-mail message, for example, Parent stated that, School staff "was provoking" Student, implying, it appears, that Student's angry reactions are understandable. (HO-6 p. 2) The evidence, however, particularly the FBA, shows that Student finds academic demands and School staff expectations for appropriate behavior, generally, to be "provoking." (FF 9)

The School cannot allow Student free rein to wander the halls and refuse to complete any school work, as happened before Student's placement was changed to full time emotional support at the MAPS program in early April 2014. If Parent expects the School to allow Student to attend whatever building Parent prefers, to allow Student to go to school only on the days and at the time Student decides, to do whatever Student prefers while at school, and to leave the building whenever Student wants, as it seems Student does, Parent is completely unreasonable. Student cannot learn under such conditions. Even with modifications to the curriculum, such as reduced demands, learning requires effort, and the evidence shows very clearly that Student is unable to make even minimal efforts to complete school work at this time.

In her final email, Parent accused the School of many actions that can only be described as so wildly unlikely as to be completely unbelievable, such as falsifying Student's report cards, and other records. (HO-6) Parent also stated that the School has never provided "valid proof" that Student was doing all the things the School told her about. (HO-6 p.2) It is obvious, however, that there is no proof that would convince Parent that Student needs the type of

placement the School has been proposing, with therapeutic supports and mental health treatment as needed. Parent distorts facts to support her accusations, as shown by Parent's completely fantastic and false statement that she has a letter from School counsel stating that the hearing officer would not attend the hearing on 5/16. (HO-6 p. 2) Parent is apparently referring to the 5/16 e-mail message forwarding correspondence dated 5/13 between the parties and the case manager. (FF 52, HO-6 p. 2) There is absolutely no factual basis for that statement, particularly in light of my message to Parent and School counsel on 5/15, stating that the hearing would be held on 5/16, whether or not Parent attended. (FF 50) Noting how Parent twisted the meaning of e-mail messages with which I am fully familiar supports the conclusion that none of the statements in Parent's final e-mail message can be credited as having any factual basis.

The IDEA statute and regulations are designed to encourage cooperation between parents and school districts. To make the system work as it is intended, both parties must work together to decide on an appropriate educational placement for Student. Parent cannot withdraw from the process but expect the School to provide the placement she prefers, even though the evidence establishes that it cannot meet Student's needs. Parent cannot refuse to engage in the IEP process and refuse to even discuss the School's concerns and then blame the School for not providing an appropriate education for Student. Many court decisions have noted that parents' reasonable cooperation is always required. *See, e.g., K.C., v. Nazareth Area School District*, 806 F. Supp. 2d 806 (E.D. Pa 2011); *Kasenia R. ex rel. M.R. v. Brookline School Dist.*, 588 F.Supp.2d 175, 190 (D.N.H. 2008); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) It is the continuing obligation of both Parents and the School to assure that Student's needs are met, no matter how difficult the relationship becomes, and no matter the reason for the breakdown of the relationship.

Here, the School has continuously tried to engage Parent in a discussion of the benefits of an APS placement for Student, but Parent insisted that nothing can be done until she is ready. The record of this case, however, shows that Parent is unlikely ever to be ready. Because of Parent's lack of cooperation in the process of making a decision concerning Student's placement, the only way to give Student a chance for an appropriate placement that can meet Student's significant needs is to remove Parent's usual right to consent before Student's placement can be changed.

Additional Issues

Appropriateness of the School's Past Placements and Services

The School requested a determination that the services it has provided to Student during the past several school years were appropriate. That issue, however, was not in the complaint, and, therefore, cannot be considered. In addition, the evidence in the record, including the evaluation reports and IEPs were not reviewed for that purpose.

Based on my limited review of the current record, I cannot and do not express an opinion concerning the appropriateness of the School's past placements and services.

Requiring Parent's Cooperation

The School also asks for a directive to Parent to cooperate in the process of obtaining a private school placement for Student. Although Parent certainly should fully cooperate in that process, it is doubtful that a directive from me can make that happen. Parent needs to make that decision, and if Parent truly wants Student to receive an education, which the School has stated it cannot provide within its own locations, Parent will cooperate in the process of finding an appropriate alternative placement for Student. Parent should consider that a fresh start may

benefit Student, and that the Charter School remains responsible for assuring that Student receives appropriate services, even if they are provided by a different school.

Potential Delay/Lack of Success in Finding or Admitting Student to an Appropriate APS

Although the School appears to believe that an APS can meet Student's needs, neither the School nor the hearing officer can guarantee that outcome, especially since Parent's cooperation cannot be forced. The School, therefore, needs more flexible options, since the evidence establishes that Student has extensive needs that must be addressed, and the School cannot provide an appropriate placement for Student at this time. (FF 45) The order that follows is intended to provide the School with the opportunity to take additional steps if an APS placement cannot be made available for Student, or there is a significant delay in securing an APS placement.

The issue of delay in providing an appropriate placement for eligible students who are difficult to place was addressed by a court decision a number of years ago, *Cordero v. Pennsylvania Dep't of Educ.*, 795 F.Supp. 1352 (M.D.Pa. 1992). As a result of that decision, the Pennsylvania Department of Education has required procedures for school districts to assure that eligible students for whom the public schools cannot provide an appropriate placement do not languish without any services because the process of finding an appropriate permanent placement is long and difficult.

Although I leave it to the Charter School and its counsel to determine whether and to what extent it is subject to *Cordero* requirements, the order provides an interim procedure for addressing a potential delay in securing an appropriate placement for Student.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Student's current and pendent educational placement is full time emotional support in the Charter School MAPS program.

It is **FURTHER ORDERED** the Charter School is permitted to take any or all of the following actions:

- 1) Release/provide Student's educational records and/or other required information about Student as required to complete applications to approved private schools and/or other facilities/agencies that the majority of Student's IEP team believes may provide Student with an appropriate educational placement and/or educational services and/or appropriate related services, and/or therapeutic services;
- 2) Take whatever other steps may be necessary to apply for and secure Student's admission to an appropriate approved private school or other appropriate educational placement with a therapeutic component, including a partial hospitalization program;
- 3) Provide a physical and/or psychiatric evaluation of Student if the majority of Student's IEP team determines that medical information is needed to determine the existence, nature and extent of physical and/or mental health conditions, including [redacted], that may be contributing to Student's school behavior issues and other educational problems, and to further identify Student's educational and behavior needs;
- 4) Refer Student to the SAP, or other appropriate counseling/program within the Charter School, or available through another educational agency, or a community agency or a medical facility;
- 5) Suspend door to door transportation for Student to the MAPS program until such time as Parent notifies the Charter School that Student will attend that placement;
- 6) If/when transportation is reinstated, suspend it again after three consecutive days of non-attendance without prior notice to the School or to the transportation provider, until such time as Parent notifies the School that Student will resume attending school;
- 7) If Student reports to the prior Charter School campus to attend school, transport Student to the MAPS pendent placement, provided that at the end of the school day, the Charter School shall also provide transportation to Student's home.

It is **FURTHER ORDERED**, in the event that within thirty (30) days after the 2014/2015 school year begins for the MAPS program,

- 1) Student is not accepted at an approved private school or other facility that the Charter School is considering or that the School has determined can provide an appropriate placement for Student, or
- 2) The Charter School is unable to complete the process of applying to or completing enrollment in an approved private school or other facility due to Parent's lack of cooperation or otherwise, or
- 3) The Charter School is still in the process of locating an appropriate private school or other placement, and/or is still engaged in the application/admissions process,

the Charter School shall take additional steps to provide an appropriate, interim educational placement/services for Student, which may include, but are not limited to, initiating an inter-agency meeting, making appropriate modifications to the MAPS program to meet Student's unique needs, including contracting for therapeutic mental health services if Student returns to MAPS for the 2014/2015 school year, and/or by developing a non-traditional program/placement in cooperation with community-based agencies.

It is **FURTHER ORDERED** that all obligations imposed by the immediately preceding paragraph shall cease as soon as the Charter School procures the admission of Student to an approved private school or other placement that the majority of Student's IEP team determines is appropriate for Student, whether or not Parent permits Student to attend the new placement.

It is **FURTHER ORDERED** that the Charter School's contingent obligation to provide an appropriate interim placement/program of services for Student is limited to offering one such placement/program and shall cease if Parent does not make Student available to attend a placement/program that the majority of Student's IEP team develops.

It is **FURTHER ORDERED** that Parent retains the right to participate in placement and program decisions for Student to the extent provided in the IDEA statute and federal and state implementing regulations, provided that the foregoing paragraphs of this order override Parent's right to give or withhold consent for evaluations, placement, services and releasing Student's educational records.

It is **FURTHER ORDERED** that

- 1) If Parent refuses to cooperate with and/or obstructs the process of obtaining further evaluations of Student,
- 2) If Parent refuses to cooperate with and/or obstructs the process of applying for Student's admission to an approved private school or other appropriate placement identified by the majority of Student's IEP team,
- 3) If Parent refuses to permit Student to attend MAPS, and/or another placement to which Student is admitted and is recommended by the majority of Student's IEP team and offered by the Charter School,

such breach of the obligation of Parent to cooperate in IDEA procedures, including those permitted by this order, should be taken into account in any Parent-initiated due process complaint or other complaint procedure brought against the Charter School in both determining whether any IDEA violations occurred and in fashioning an equitable remedy, if any such remedy is warranted.

It is **FURTHER ORDERED** that any claims or issues not specifically addressed by this decision are **DENIED** and dismissed without prejudice.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

June 1, 2014