

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: M.F.
Date of Birth: [redacted]

Dates of Hearing: 2/26/2015 and 3/10/2015

CLOSED HEARING

ODR File No. 15777-14-15-KE

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney
David Arnold Esq.
Suite 106
920 Matsonford Road
West Conshohocken, PA 19428
610-397-0722

Local Education Agency
Green Woods Charter School
468 Domino Lane
Philadelphia, PA 19128

LEA Attorney
David Annecharico Esq.
113 South 21st Street
Philadelphia, PA 19103
215-851-0200

Date Record Closed:
Date of Decision:

March 31, 2015
April 18, 2015

Hearing Officer:

William Culleton Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is an eligible child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and a qualified individual with a disability protected by the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). (NT 24-26, 203-210.) Student is identified under the IDEA as a child with a disability of autism, 34 C.F.R. §300.8(c)(1). (NT 25, 48.) Student is qualified and eligible to be enrolled at the Charter School (Charter), and remains enrolled at the Charter, which placed Student in an approved private school (APS) for third grade pursuant to an Individualized Education Program (IEP). (NT 26, 49, 210.)

Parents assert that the Charter failed to offer or provide a free appropriate public education (FAPE) to Student for third and fourth grades by failing to offer an appropriate placement when the APS was unable to meet Student's educational needs in third grade. Parents removed Student from the APS and placed Student unilaterally in a private school (School) of Parents' choice for fourth grade; however, Parents did not disenroll Student from the Charter, which remains Student's local education authority (LEA) responsible for Student's placement and IEP. Parents seek compensatory education for Student's third grade year (2013-2014 school year), and reimbursement of the School's tuition for Student's fourth grade year (2014-2015 school year), until the end of that year or until the Charter provides an appropriate placement. The Charter denies the Parents' allegations, and asserts that it has provided an appropriate placement at a different private school (referred to here as Alternate). It also asserts that Parents should not be reimbursed

¹ Student, Parents and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality. Because the Student's mother engaged in many transactions with the School, she is referred to below as "Parent" in the singular.

for the School's tuition because Parents did not provide the Charter with notice of their unilateral placement as required by the IDEA.

The hearing was completed in two sessions. I conclude that the Charter failed to offer or provide Student with a FAPE from February 1, 2014 to the closing of the record in this matter. I order the Charter to provide Student with compensatory education and tuition reimbursement for services provided by the School.

ISSUES

1. Did the Charter provide a FAPE to Student during the relevant period from the first day of school until the last day of school in the 2013-2014 school year at the APS?
2. Did the Charter offer an appropriate placement and a FAPE to Student from the first day of school in the 2014-2015 school year until the last hearing date?
3. Was the School an appropriate placement for Student in the 2014-2015 school year?
4. Considering the equities, should the hearing officer order the Charter to reimburse Parents for the School's tuition for the 2014-2015 school year, or until the Charter should offer an appropriate placement to Student?
5. Should the hearing officer order the Charter to convene an IEP team meeting to review the latest re-evaluation report and offer an appropriate placement to Student along with any other educational services?
6. Should the hearing officer order the Charter to provide Student with compensatory education for or on account of all or any part of the 2013-2014 school year?

FINDINGS OF FACT

1. Student has a history of diagnosis with Autism, which substantially interferes with Student's ability to learn, by interfering with Student's ability to maintain attention to task without teacher prompts, Student's ability to control Student's impulses, leading to classroom disruption, and Student's ability to follow school rules. (P 4, 6.)
2. Student's academic needs for third and fourth grades included reading comprehension, vocabulary development, writing conventions and sentences, and comprehension and expression of verbal language. Student also needed to improve Student's social skills, in the areas of social pragmatics and interaction, and Student also had organizational needs.

Student's academic needs for fourth grade also included mathematics computation and problem solving, and written expression topic focus skills. (P 4.)

3. Student has emotional and social impairments requiring a modified curriculum and a therapeutic environment. Student has a history of tantrum behaviors including loud vocalizations, throwing items in the classroom, aggression toward others, destruction of property, hitting, biting, scratching, and defiant behavior. Student requires a structured environment and specially designed instruction to address Student's significant distractibility and behaviors. Student also requires special environmental modifications to address Student's sensory needs. (P 4.)
4. For third grade, in the 2013-2014 school year, the Charter placed Student in full-time emotional support at the APS, and Student attended that placement. (NT 53-55; P 4, 5.)
5. For the first and second marking periods, prior to January 2014, Student was able to achieve some academic progress; however, Student was exhibiting behavior problems that raised concerns among Student's teachers and Parents. (NT 86-90 115-117; P 9; S 14.)
6. Student's behavior in third grade appeared to improve for part of the year, but regressed substantially overall, especially in the last two marking periods. Student continued to display significant difficulties with attention to task and distractibility. Student refused work. Student's physically aggressive behaviors increased substantially; Student failed to meet IEP goals for such behaviors. Student did not learn pro-social replacement behaviors. Student did not learn to implement self-calming strategies independently. Student was frequently withdrawn socially. Student's organizational difficulties continued. Student remained highly prompt-dependent. (NT 55-59, 63-64, 293-294; P 6, 8; S 14.)
7. By the end of January 2014, Student's classroom performance showed that Student was regressing in most areas of school performance. (NT 58-59; P 9; S 5, 6.)
8. On November 19, 2013, May 1, 2014 and May 7, 2014, Parent asked the Charter to find a different school for Student, asserting that the APS was not an appropriate placement and could not meet Student's needs. The Charter declined to change Student's placement at the APS. (NT 59-66, 325-326; S 14.)
9. The Charter did not change the IEP in response to Student's worsening behavior. The Charter and the APS did not provide a behavior assessment or an individualized positive behavior support plan to Student. (NT 60-65, 296-298; S 14.)
10. Student experienced less academic success in third grade as contrasted with second grade. Student fell behind peers in reading comprehension, mathematics calculation and problem solving, and written expression and conventions. Student did not make adequate progress in reading or mathematics. (NT 86-87, 125; P 4, 6, 8, 9.)
11. Student required more teacher assistance and prompting for most academic tasks in third grade. (NT 114-116; P 4, 6, 8, 9.)

12. Student's third grade benchmark test scores and standardized achievement scores showed that Student regressed in reading (including vocabulary and comprehension) and mathematics (including solving word problems). Student made little or no progress in listening comprehension from second to third grade. (NT 249-251; P 4, 6, 8, 9, 11.)
13. Student failed to meet third grade IEP goals for reading (retelling details of a story); vocabulary; written expression and conventions; and mathematics (operations and fluency). (P 6, 8.)
14. Student's academic achievement in third grade was less than what could have been expected based upon Student's intellectual potential. (NT 191-195; P11.)
15. The Charter provided a bi-annual re-evaluation in May 2014. The evaluation classified Student with Autism and Intellectual Disability. It noted a need for placement in a highly structured setting with educational and behavioral supports; it recommended an autistic support setting with speech and language therapy, one-to-one assistant, and a social skills group. It noted needs in the areas of processing time; attention; multi-step direction; money values; identifying people in the environment; telling time; matching and assembly tasks; cleanup routines; work acceptance; appropriate attention seeking; prompt dependence; expressing wants and needs; impulse control; reading comprehension; mathematics application; and receptive and expressive language skills. (P 10.)
16. Parents disagreed with the May 2014 re-evaluation, specifically because they disagreed with the identification category of Intellectual Impairment. Parents signed a permission to re-evaluate and the Charter provided another re-evaluation in October 2014. (NT 67-69; P 11.)
17. In June 2014, the Student's IEP team, the APS and the Charter agreed that the APS was no longer able to meet Student's needs, and the Charter agreed to seek a change in placement to full time autistic support in a different school. (NT 90-92, 94, 294; P 6.; S 14)
18. The Charter suggested four private schools; the Charter referred Student only to placements that could serve children with both autism and intellectual disability. This reduced the number of possible referrals. (NT 308-314, 317, 347-348.)
19. Parents rejected one of the suggested schools. Two of the schools rejected Student's application. The remaining APS (Alternate) accepted Student. (NT 70-72, 92, 97, 347-349; S 11, 15, 18.)
20. In September 2014, after two visits to Alternate and discussions about Parents' concerns over its academic program and combined-grade classrooms, Parents decided to accept placement at Alternate. (NT 72-75, 132-137.)
21. Parents agreed to Alternate on or about the first day of school, and there was no other choice for Student at that point. (NT 75, 139-140, 353.)

22. On or about September 4, 2014, Alternate provided an admissions forms packet. When Parents reviewed the forms, they discovered that Student would be required by Alternate's policies to provide a blood sample for Hepatitis B testing as a prerequisite to admission. Also, Parents would be required to sign a consent for Student to be in classes with peers who were several years older than Student. (NT 139-147, 157-158; S 15.)
23. Parents declined to have the required blood work done, because (based on their experience with blood work done for Student in the past) it would require anesthesia, would require a costly hospital appointment some weeks or months in advance, and would be traumatic to Student. (NT 75-78; S 15.)
24. Alternate offered to take the blood itself, but Parents declined because Alternate is not properly staffed or equipped to administer anesthesia. (NT 78, 103-105, 155-156.)
25. Alternate required Parents to sign a waiver of rights that would allow Student to be grouped in classrooms with students much older than Student. Although Alternate indicated that it would limit the age range in the classroom to which Student would be assigned, Parents declined to sign the requested consent, which would have authorized Alternate to exceed the promised age range. (NT 78-79, 107, 134-140, 150-155.)
26. Alternate accepted Student on September 9, 2014. (S 13, 15.)
27. On September 5 and 9, 2014, Parents notified the Charter that they were not accepting placement at Alternate because of the blood work and age range/waiver issues. Parents requested another school for Student. (NT 78-79, 119; S 15.)
28. On September 9, 2014, by email message to Parents, the Charter declined to place Student at another school, and asserted that Alternate was Student's placement. (NT 120, 318-321; S 15.)
29. In September, through counsel, Parents repeatedly requested an IEP meeting with the Charter in order to discuss Student's placement, but the Charter refused to meet. (NT 79-80; P 12, 13.)
30. The Charter received the second re-evaluation report in October 2014. The Charter provided this report to Parents on October 10, 2014. (NT 312-314; P 11.)
31. The October 2014 re-evaluation report removed the classification of intellectual disability, primarily based upon standardized testing of cognitive ability, utilizing a test which does not require verbal processing, in which Student scored within the average range. (P 11.)
32. The October 2014 re-evaluation report noted severe deficits in language processing for both expressive and receptive language tasks, and severe attention difficulties. These difficulties caused Student to perform in the extremely low range for reading comprehension, and to have difficulty with applying mathematics skills. (P 11.)

33. The October 2014 re-evaluation report recommended placement in a highly structured program with opportunities for individualized, intensive skills training addressing deficits in the areas of socialization, language, behavior and attention, along with sensory breaks, positive behavior support plan, social skills group, speech and language therapy and evaluation for occupational therapy. (P 11.)
34. There was no meeting to discuss the October 2014 re-evaluation report with Parents. (NT 70.)
35. Student had been attending the School after school hours, two hours per day. Parents increased Student's hours in the School to a full-time basis on or about September 15, 2014, some days after the start of school in both the Charter and the APS. (NT 81, 108, 226, 281; P 14, 16.)
36. On September 16, 2014, Parents notified the Charter through counsel that they considered the placement offered by the Charter to be inappropriate, and that they intended to seek reimbursement for tuition at the School, in which Parents had already enrolled Student. (P 12.)
37. The Charter did not schedule an IEP meeting as requested by Parents on September 16, 2014. (P 13.)
38. The Parents did not disenroll Student from the Charter, which remains the Student's Local Educational Agency (LEA). (NT 210.)
39. Through utilization of applied behavior analysis techniques, School was able to help Student make significant progress in reducing behaviors that interfered with Student's learning. (NT 226-227, 237- 241, 251-254, 256-259, 265-267; P 14, P 15.)
40. The School provided and continues to provide comprehensive educational services to Student that address all of Student's current educational needs. (NT 177-178, 227-237, 243-248, 251-254, 256-263; P 6, 10, 11, 14, 15, 17.)
41. While participating at the School full-time, Student made academic progress in following three-step directions, setting a timer, answering social questions, telling time, utilizing verbs and increasing vocabulary of verbs, reading and utilizing a calendar, comparing objects, learning mathematics facts, responding to "why" questions, using past tense verbs, using pronouns, predicting what happens next in a sentence with an incomplete ending, formulating grammatically correct sentences of 4 to 6 words in length, and answering questions with sentences. Some of the above skills represented recoupment of previously learned skills; some were new skills. Most of the skills were taught to independence, representing progress over previous achievement. (NT 237-241; P 14, 17.)
42. Parents are responsible for the full cost of tuition and services at the School. (NT 82, 273-277; P 16.)

DISCUSSION

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer). In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), an IDEA case. The United States Supreme Court held that the burden of persuasion is on the party that requests relief. Thus, the moving party must produce a preponderance of evidence that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

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

In this matter, the Parents requested due process and the burden of proof is allocated to the Parents. The Parents bear the burden of persuasion that the Parents' claims are true. If the Parents fail to produce a preponderance of evidence in support of their claims, or if the evidence is in “equipoise”, then the Parents cannot prevail.

FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. §1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S. Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a "basic floor of opportunity" for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

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

DISTRICT PROVISION OF FAPE DURING STUDENT'S THIRD GRADE YEAR

Applying the above standards, I conclude that the District provided Student with a FAPE for part, but not all, of Student's third grade year. The record is preponderant that, going into third grade, the IEP and placement were reasonably calculated to provide Student with meaningful educational benefit, based upon what the Charter knew at the time. However, in third grade, Student manifested behaviors that interfered with learning. These behaviors escalated in the third and fourth quarters of the APS school year, and Student did not make meaningful progress for the

year. While the APS and Parents met and the APS staff intervened during the first two quarters, the interventions failed to control Student's behaviors. Despite Parent's request to consider moving Student to another school, the Charter did nothing, and the APS was unable to bring Student's behavior under control. Thus, for the third and fourth quarters of third grade, the Charter failed to provide Student with a FAPE.

Although Student's behavior was inappropriate and problematic during the first marking period of third grade, neither party suggests that this was other than an expected regression in Student's ability to cope with transition. Student had developed a close and dependent relationship with Student's second grade teacher, who had also been Student's first grade teacher. However, for third grade, Student was moved into a different classroom, and was given a different teacher. Student's inappropriate behaviors escalated; nevertheless, Parent and Student's third grade teachers viewed this as a reaction to the transition and took steps to address the behaviors, hopeful that they would be able to bring Student's behaviors under control. Indeed, the evidence is preponderant that Student's behavior improved for several weeks in the first half of third grade.

Unfortunately, this progress did not continue. By November 2013, Student's behaviors were so problematic that Parent and the teachers called an interagency meeting to plan further interventions. At the same time, the record shows that Parent gave notice to the Charter on November 26, 2013, by email message, that third grade was not going well. In this email, Parent asked the Charter to consider changing Student's school placement. From this point until about February 1, 2014, the record shows that the teachers attempted without success to bring Student's behavior under control.

The evidence is preponderant that, starting in the third marking period, Student became far more prompt dependent in both behavioral and academic performance. Rate of gain in academics

was significantly below IEP goals. Behavioral incidents escalated dramatically. I conclude that the Student did not receive meaningful educational benefit during the period between November 2013 and June 2014.

The Charter was on notice that Student needed intervention as of November 2013. Judicial authority in the Third Circuit has long held that, from the date of notice that its education program is not meeting a student's needs, an LEA is to be accorded a reasonable period of time in which to correct or improve its educational program for the student. M.C. ex rel. J.C. v. Central Regional Sch. Dist., 81 F.3d 389, 1996 U.S. App. LEXIS 8717 (3d Cir. N.J. 1996), cert. denied, Cent. Reg'l Sch. Dist. v. M.C. ex rel. J.C., 1996 U.S. LEXIS 5452, 519 U.S. 866, 117 S. Ct. 176, 136 L. Ed. 2d 116, 65 U.S.L.W. 3261 (U.S. 1996); I.H. v. Cumberland Valley Sch. Dist., 2012 U.S. Dist. LEXIS 101056. I conclude that the period from November 26, 2013 to February 1, 2014 was a reasonable period for this purpose.

When these efforts failed, the Charter was obligated to continue to seek a solution, including new intervention strategies, or a change of placement. The Charter failed to face up to this obligation from February 1, 2014 to the end of the Student's third grade year at the APS. There is no evidence in this record that either the APS or the Charter continued to address Student's decline from February 2014 through June, 2014. The Charter remained Student's LEA during this period, yet there is no evidence of correspondence between Parent and the Charter from the end of November until May, when Student continued to escalate in behavior, and to decline in academic achievement. I conclude that this inaction denied a FAPE to Student.

The Charter implies that its inaction during this period is attributable to Parent's failure to communicate with it concerning Student's continuing educational decline. I do not accept this argument. The Charter's obligations under the IDEA are based upon its legal responsibilities as the

child's LEA. Its obligations are not dependent upon parental vigilance. M.C. ex rel. J.C. v. Central Regional Sch. Dist., 81 F.3d 389, 1996 U.S. App. LEXIS 8717 (3d Cir. N.J. 1996), cert. denied, Cent. Reg'l Sch. Dist. v. M.C. ex rel. J.C., 1996 U.S. LEXIS 5452, 519 U.S. 866, 117 S. Ct. 176, 136 L. Ed. 2d 116, 65 U.S.L.W. 3261 (U.S. 1996); David G. v. Council Rock Sch. Dist., 2009 U.S. Dist. LEXIS 96338, 2009 WL 3064732 (E.D. Pa. Apr. 7, 2009).

The Charter implies that Parent's failure to notify it again concerning Student's struggles during the third and fourth quarters of third grade implies that these struggles were not as serious as Parent contends. Weighing this evidence, I conclude on the contrary that the evidence is preponderant that Student did not receive meaningful educational benefit during this period. Parent had placed the Charter on notice of a problem, and had asked for a new placement, in November 2013. It was reasonable for Parent to believe that the Charter would continue to communicate with the APS, as it had indicated in its response to the Parent's November 2013 message.

TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three-part test to determine whether or not a school district is obligated to fund such a private placement. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate (that is, did it provide a FAPE as discussed above)? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County

School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007).

FIRST TEST: PROVISION OF A FAPE

As noted above, going into June 2014, the record is preponderant that the Charter was not providing an appropriate program or placement. However, on May 27, 2014, the District provided Parents with a re-evaluation report and, at a subsequent IEP team meeting in June 2014, offered to seek a different placement at a different school. Placement was changed to full-time autistic support. The Charter suggested four possible new schools to the Parents. Parents rejected one of the suggestions out of hand, based on their belief that the suggested school was inappropriate. Two of the suggested schools decided that they could not provide appropriate programming for Student, and declined Student admission. One of the suggested schools invited Parents to visit their facility, indicating that they believed that they could meet Student's needs.

Parents agreed to visit the remaining suggested school, referred to here as Alternate. Although they had misgivings with regard to the age span of students within a single classroom that they observed, Parents discussed this with Alternate, and eventually agreed to apply for admission, having been assured that Alternate would reduce the age span of peers in Student's assigned classroom. This search for a new placement took up the entire summer, and it was not until some days after the beginning of the school year at both the APS and the Charter that Parents received and reviewed the application documents.

Reviewing these documents, Parents discovered that Alternate, based on its own policy that was not required by law, would require Student to undergo the drawing of blood for a blood test. Based on their experience, Parents knew that the process of drawing blood would be traumatizing

to Student. In previous instances, blood draws were taken under sedation, and Student nevertheless became so traumatized that Student was unwilling to return to the site of the blood draw. Parents also knew that complete anesthesia would require a hospital visit and an anesthesiologist, all at great expense, and all engendering many weeks of delay. Although Alternate offered to do the blood draw, it did not offer to do so under general anesthesia. Under these circumstances, Parents believed that it was impossible to comply with Alternate's policy requirement. They notified the Charter on September 5, 2014 and again on September 9, 2014 that they could not fulfill Alternate's admission requirements²; therefore, the Charter was on notice as of September 5 that Student was without a placement. I conclude that, as of September 5, 2014, the Charter had failed to offer an appropriate placement to Student for the 2014-2015 school year.

When Parents, through counsel, requested a meeting to discuss the situation, the Charter did not respond. The Charter did not offer any other placements to Parents. I conclude that the Charter has failed to offer to place Student in an appropriate placement from September 5, 2014 to the closing of the record in this matter.

The Charter's failure to continue searching for an appropriate placement for Student is particularly troubling, because there is every reason to believe that there may be more placement options than the parties originally believed. This is because the search for new placement in the summer of 2014 was based upon an inappropriate re-evaluation report. The report provided to Parents in May 2014 was inappropriate; the parties and the witnesses in this matter all agreed on that point. The report was inappropriate because it identified Student with an intellectual disability in addition to Student's longstanding identification as a child with autism; this additional

² Parents also objected to signing a consent form that would have authorized Alternate to place Student in a classroom with a larger age range than had been promised by Alternate. The record does not prove preponderantly that this was an absolute bar to admission to Alternate; however, Parents' testimony about the blood draw requirement demonstrates preponderantly that Alternate was not a reasonable or appropriate offered placement for Student.

identification of intellectual disability was a mistake, as demonstrated by a subsequent re-evaluation. At the hearing, Parent showed that applications to private schools were based upon the inappropriate identification. It is likely that more placement options would have been available to Student without the classification of intellectual disability.

Based upon this record, I conclude that the Charter has failed to offer Student a FAPE. The first Burlington-Carter test is met.

SECOND TEST: APPROPRIATE PARENTAL PLACEMENT

Student had been attending an additional program at a private agency for two hours per day after school. The agency provided both a therapeutic program and a school program; the school program was distinct from the therapeutic program, although the agency provided both services to children attending its programs. Student had been attending the school portion of the agency's services, and had been receiving speech and language therapy through its therapeutic program.

On or about September 15, 2014, Parent asked the agency to increase the amount of time that Student was attending the agency's school, to provide a full time education to Student. This was not a typical unilateral parental placement. Parents did not withdraw Student from the Charter; Student remains enrolled in the Charter to this day. Parents did not ask the School to enroll Student there on a permanent basis; rather, with no placement forthcoming from the Charter, Parents simply asked the School to provide full-time educational programming on a temporary basis, until a permanent placement could be found through the Charter. The School agreed to provide such full-time educational services to Student on a temporary basis. Parents paid the full cost of these educational services, including the cost of speech and language therapy.

The evidence is preponderant that this placement was appropriate. The School was staffed with qualified educators. Student's teacher utilized research-based applied behavior analysis techniques to bring Student's problematic behaviors under control within weeks. By October 2014, the teacher was re-introducing academic material to Student, based upon appropriate curricula for a third grade student. The teacher reasonably implemented Student's existing IEP; the teacher modified some of the goals in the IEP, based upon the data from Student's performance in the School, but the teacher implemented most of the goals. School produced progress data indicating that Student made significant progress. Therefore, I conclude that the second Burlington Carter test is met.³

THIRD TEST: STATUTORY AND EQUITABLE CONSIDERATIONS

The IDEA and its implementing regulation provide guidance for the exercise of the hearing officer's discretion in applying the third Burlington-Carter test, the application of equitable considerations. The IDEA and its regulations provide that parents ordinarily have a responsibility to provide fair notice to the public educational agency before removing the student to a parentally selected placement and seeking reimbursement of the cost from the public entity. 34 C.F.R. §300.148. Specifically, the law provides that reimbursement, otherwise appropriate, "may be reduced or denied" if the parent fails to provide reasonable notice to the district prior to removal of the child, either at an IEP meeting or through written notice given at least 10 business days prior to removal of the child. 34 C.F.R. §300.148(d)(1). The law provides exceptions to this "notice

³ The Charter cites cases deciding the issue of public agency responsibility for parental unilateral residential placements for purposes of emotional and behavioral treatment, arguing that the Parents' private placement was not appropriate because it offered non-educational services. Munir v. Pottsville Area Sch. Dist., 723 F.3d 423 (3d Cir. 2013). I find these cases to be inapposite. The record is preponderant that the School provided only educational services to Student.

rule"; one of these is where waiting for the statutory notice period would create a likelihood of either physical or emotional harm to the child. 34 C.F.R. §300.148(d)(e)(1),(2).

As noted above, in this matter, Parents did not disenroll Student from the Charter. Rather, they asked the Charter to provide a new placement, and they continue to seek a FAPE from the Charter. The Charter has been on notice since September 5, 2014 that the Student was in need of a new placement. Thus, the Charter has had a continuing opportunity since September 5, 2014 to fulfill its legal responsibilities to Student. The Parents' purchase of educational services from the School did not in any way interfere with the Charter's opportunity to fulfill that legal responsibility. Therefore, I conclude that the Parents have not treated the Charter inequitably by providing educational services to Student in the interim while the Charter either failed or refused to do so.

The IDEA's statutory requirements for notice prior to "removal of the child from the public school", 34 C.F.R. §300.148(d)(d)(1),(3), do not preclude this conclusion. The record in this matter is preponderant that the Parents did not "remove" Student from the Charter. Student remains enrolled; Parents continue to seek replacement from the Charter.

The Charter argues that the Parents' refusal to submit Student to a potentially traumatic blood draw, as required by the proposed Alternate placement's internal school policies, and their subsequent placement of Student in the School, constitutes "withdrawal" Student from the Charter, triggering the ten-day notice requirement. As noted above, this argument does not square with Student's continuing enrollment at the Charter. Moreover, I conclude that Parents' position with regard to the blood draw at the Alternate was not unreasonable. This was not an arbitrary rejection of an offered placement, as the Charter attempted to depict in this matter.

The evidence is preponderant that, based upon what Parents knew, the Alternate was demanding an action that would have caused immediate harm to Student by traumatizing Student.

Parents reasonably believed that, to avoid such harm, it would not have been sufficient to sedate Student or to apply any other approaches short of general anesthesia. General anesthesia would have required a hospital visit, and the use of highly specialized and expensive medical personnel. The Charter introduced no evidence to the contrary. Based upon this record, I conclude that Parents' refusal to permit the blood draw, necessitating their placement of Student at the School on a temporary basis, did not constitute "removal" of Student from the Charter.

Therefore, I conclude that Parents' refusal did not give rise to a duty to provide notice as required by the IDEA regulation, 34 C.F.R. §300.148(d)(d)(1). I further conclude that the Parents' actions in this regard were not unreasonable. 34 C.F.R. §300.148(d)(d)(3). Further, I note that the statutory notice requirement does not compel the hearing officer to deny tuition reimbursement; it merely permits denial of reimbursement, thus leaving the decision to the hearing officer's discretion. 34 C.F.R. §300.148(c), (d). On the unusual facts of this case, and in view of the equitable considerations discussed in this decision, I exercise my discretion in favor of reimbursement.

SECTION 504 CLAIMS

Parent argues that the equitable considerations set for in the IDEA's notice requirements do not apply to section 504 claims. In light of my decision in this matter based upon the IDEA, I need not consider this argument, which is solely a matter of law. Whether considered under the IDEA or under section 504, my findings and conclusions as to the equities here are equally pertinent, and point to the same ultimate decision.

CREDIBILITY

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

I gave full weight to Parent's testimony, because I found her both credible and reliable. In her testimony, Parent freely admitted facts appearing to favor the Charter, and demonstrated an effort to answer questions accurately. Most of Parent's assertions were corroborated by contemporaneous correspondence, the testimony of other witnesses, and exhibits admitted into evidence. Parent did engage in some arguing during the Charter's first round of questioning, but on balance I did not find that this detracted from Parent's credibility or reliability.

I gave particular weight to the testimony of the school psychologist who produced the second re-evaluation report. This professional demonstrated great care in rendering both factual information and opinions. The psychologist did not readily assent to assertions inherent in the questioning by the attorneys. The witness' responses were carefully balanced and objective. The witness demonstrated a depth of understanding of the testing instruments and a carefully designed strategy for the re-evaluation.

Similarly, I found the testimony of Student's teacher at the School to be particularly credible and reliable. Like the psychologist, this witness did not always answer favorably to the party doing the questioning; on the other hand, the witness often added facts to assure that her answer did not give an incomplete picture. When asked to render testimony about a particular document or portion of an IEP, the witness read it carefully before answering. The witness demonstrated good experience in teaching children diagnosed with autism. The witness also

demonstrated a sound understanding of the principles of applied behavior analysis, and showed very persuasive data indicating that the witness had applied those principles with fidelity.

I also found the Charter's special education coordinator to be credible and sincere. I found all of the other witnesses to be credible.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a “make whole” approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

As discussed above, I conclude that the Charter failed to offer or provide a FAPE to Student from February 1, 2014 to the closing of the record in this matter. I further conclude that the Student's behavior interfered with Student's education pervasively throughout Student's school day. Consequently, I conclude that it is equitably appropriate to order the Charter to provide compensatory education to Student on a full day basis.

On or about September 15, 2014, Parents obtained educational services for Student at their own expense. As discussed above, I have concluded that I will order the Charter to reimburse Parents for the costs of tuition and speech and language pathology sessions, starting on that date. Therefore, I will not order compensatory education to cover the same period of time. Thus, the order for compensatory education will be for full days, starting February 1, 2014 and ending September 14, 2014.

CONCLUSION

I conclude that the Charter failed to provide a FAPE to Student during the periods discussed above. I order the Charter to provide compensatory education for a portion of the period of time during which Student was attending the APS, as placed by the Charter. I also order the Charter to reimburse Parents for tuition and the cost of related services at the School.

ORDER

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

1. The Charter shall provide compensatory education to Student in the amount of one full school day for every day on which the APS was open for students from February 1, 2014 to the last day of school in June 2014, and from the first day of school in the 2014/2015 school year through September 14, 2014.
2. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parents, and may be provided after school hours, on weekends, or during summer months when convenient for Student or Parent.
3. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parents.
4. The cost of any compensatory educational service may be limited to the current average market rate in Pennsylvania for privately retained professionals qualified to provide such service.
5. The Charter shall reimburse Parents for the cost of tuition for full day educational services at the School, and for the cost of additional speech and language therapy sessions provided by the School on and after September 15, 2014 pursuant to Student's IEP.
6. The Charter shall provide such reimbursement until Student is admitted to a new placement at a school other than the APS, referred by the Charter pursuant to Student's IEP.
7. Within ten days of this decision, the Charter shall convene an IEP meeting to review the latest re-evaluation report and offer an appropriate placement to Student.

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

William F. Culleton, Jr. Esq.

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

DATED: April 18, 2015