

*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: D.E.  
Date of Birth: [redacted]

### **CLOSED HEARING & STIPULATED RECORD<sup>1</sup>**

ODR Case Numbers:

16022-1415AS  
16023-1415AS

Parties to the Hearing:

Parent[s]

Walter D. Palmer Leadership Learning  
Partners Charter School  
910 North 6<sup>th</sup> Street  
Philadelphia, PA 19123

Pennsylvania Department of Education  
333 Market Street / 9<sup>th</sup> Floor  
Harrisburg, PA 17101

Date of Decision:

Hearing Officer:

Representative:

David J. Berney, Esquire  
Morgen Black-Smith, Esquire  
1628 J.F.K. Boulevard  
Suite 1000  
Philadelphia, PA 19103

Unrepresented &  
Non-Participatory

M. Patricia Fullerton, Esquire  
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333 Market Street / 9<sup>th</sup> Floor  
Harrisburg, PA 17101

March 31, 2017

Michael J. McElligott, Esquire

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<sup>1</sup> Following remand of these matters from the US. District Court for the Eastern District of Pennsylvania to this hearing officer, and as set forth below, the parent and the PA Department of Education submitted a stipulated factual record in February 2017. While not made explicit between the parties, this decision is considered to be the result of a closed hearing process.

## **INTRODUCTION**

[The student] (“student”)<sup>2</sup> is a [late pre-teenaged] student residing in [redacted] school district. The student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)<sup>3</sup> for specially designed instruction/related services as a student with emotional disturbance, the health impairment of attention deficit hyperactivity disorder, and a specific learning disability in reading.

The procedural background in these matters is intricate. As set forth more fully below, the student attended the Walter D. Palmer Leadership Learning Partners Charter School (“[] CS”). In September 2014, the student was placed by CS in a private school. In December 2014, the student’s parent was informed by the CS, along with the families of other students attending the school, that it would cease operations. Since September 2014, and currently, the student has attended the private placement.

In March 2015, the parent filed with the Office of Dispute Resolution (“ODR”) a special education due process complaint against the CS to which ODR assigned the ODR file number 16022-1415AS. The complaint alleged that the CS had denied the student a free appropriate public education (“FAPE”). In the same complaint, parent alleged that,

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<sup>2</sup> The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

<sup>3</sup> 20 U.S.C. §§1400 *et seq.*.

since CS was no longer operational, the Pennsylvania Department of Education (“PDE”) was responsible for remedying the alleged denial of FAPE. ODR assigned ODR file number 16023-1415AS to this complaint against PDE.

Those complaints began a chain of subsequent filings, rulings, and appeals to federal court which, ultimately, culminated in the issuance of this decision at both ODR file numbers, which have been consolidated for purposes of issuing this final decision in both matters.

### **PROCEDURAL BACKGROUND**

- A. The student attended the CS in 2<sup>nd</sup> and 3<sup>rd</sup> grades, in the 2012-2013 and 2013-2014 school years. (Hearing Officer Exhibit [“HO”]-1 – Complaint at 16022-1415AS & 16023-1415AS [“Parent’s Complaint”]; HO-7 – Hearing Officer April 2015 Ruling/16022-1415AS [“Ruling at 16022-1415AS”]; HO-8 – Hearing Officer April 2015 Ruling/16023 [“Ruling at 16023-1415AS”]).
- B. In September 2014, near the beginning of the student’s 4<sup>th</sup> grade year, the student remained enrolled in CS but was placed in a private placement. (HO-1 – Parent’s Complaint).
- C. In October 2014, the parent, through an agreement negotiated by her counsel at the time, entered into an agreement with CS, including the CS undertaking obligations to establish a compensatory education fund, and to seek placement of the

- student in an Approved Private School for students with disabilities. (HO-1 – Parent’s Complaint; HO-7 – Ruling at 16022-1415AS; HO-8 – Ruling at 16023-1415AS).
- D. On or about December 31, 2014, in the midst of the student’s 4<sup>th</sup> grade year, the CS closed its doors, ceased operations, and entered receivership/settlement-of-claims status in the hands of a liquidating trustee. (HO-6 – Email re: Liquidating Trustee; HO-9 – Federal Court October 2016 Opinion/Remand).
- E. Thereafter, the student enrolled in, and continues to be enrolled in, [a school district]. The student has attended the same private placement since September 2014. (HO-1 – Parent’s Complaint; Stipulated Findings of Fact #15, #16, #17).
- F. In March 2015, parent, utilizing her current counsel, on behalf of student filed with ODR a special education due process complaint in one document, containing allegations against CS and PDE. Respectively, the complaints were assigned ODR file numbers 16022-1415AS and 16023-1415AS. (HO-1 – Parent’s Complaint.)
- G. Throughout these proceedings, an individual acting as a former administrator at CS, and utilizing a CS email address, has been intermittently responsive to requests and communications sent to him by this hearing officer. Throughout these proceedings and through the date of this decision, however, CS has not identified

- counsel nor has it responded through counsel in any substantive way. (HO-5 – Email re: CS Contact).<sup>4</sup>
- H. PDE responded to the parent’s March 2015 complaint, including in its filing a motion to dismiss. (HO-2 – PDE’s Response to Complaint/Motion to Dismiss).
- I. The parent filed a response to PDE’s motion to dismiss. Thereafter, PDE filed a reply to the parent’s response to the motion. (HO-3 – Parent’s Response to PDE Motion; HO-4 – PDE Reply to Parent’s Response to PDE Motion).
- J. In April 2015, this hearing officer issued rulings dismissing the complaints at ODR file numbers 16022-1415AS and 16023-1415AS. (HO-7 – Ruling at 16022-1415AS; HO-8 – Ruling at 16023-1415AS).
- K. Parent’s complaint at 16022-1415AS, filed against CS, was dismissed for lack of jurisdiction, finding that the dispute between the parties was contractual in nature—arising out of the October 2014 settlement agreement—a dispute over which special

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<sup>4</sup> Over the period November 2016 – January 2017, counsel for both the parent and PDE, and this hearing officer, were collaborating about the potential for a stipulated factual record (see *Procedural Background* at O). A hearing session was scheduled in the instant case on February 1, 2017, to be convened at the offices of parent’s counsel. Instead, the hearing session was cancelled and the date/time was utilized for counsel and the hearing officer to hold a conference call regarding the potential stipulations in the instant matter and similar companion cases. The CS individual, who has always been copied on communications by this hearing officer, was notified that the February 1<sup>st</sup> hearing session was cancelled. However, that morning he appeared at the offices of parent’s counsel, anticipating that he would be attending the cancelled hearing session. He was informed that the hearing session would not take place and, subsequently, this hearing officer emailed him regarding the stipulation process that was underway. HO-10.

education due process did not have jurisdiction. (HO-7 – Ruling at 16022-1415AS).

- L. Parent’s complaint at 16023-1415AS, filed against PDE, was dismissed for lack of ripeness, finding that any claim against PDE could proceed only after ascertaining the student’s position vis a vis the CS after the receivership/settlement-of-claims process had run its course. (HO-8 – Ruling at 16023-1415AS).
- M. In July 2015, parent filed with the U.S. District Court for the Eastern District of Pennsylvania (“Court”) an appeal of the dismissal of the complaints at 16022-1415AS and 16023-1415AS. (HO-9 – Federal Court October 2016 Opinion/Remand).
- N. In October 2016, the Court issued its opinion, finding that the hearing officer rulings at ODR file numbers 16022-1415AS and 16023-1415AS were issued in error. In its order, the Court vacated those rulings and remanded these matters to this hearing officer “with instructions to hold due process hearings to determine in the first instance whether ([ ] CS) denied (student) a FAPE, and if so, in accordance with the concurrently issued Opinion, what remedy, if any, Plaintiffs are owed by Defendant Commonwealth of Pennsylvania Department of Education.” (HO-9 – Federal Court October 2016 Opinion/Remand, 2016 U.S. Dist. LEXIS 148904 at 9 [parentheticals edited for stylistic consistency]).

- O. Over the course of November and December 2016, and January 2017, counsel for the parent and PDE worked collaboratively with each other and with this hearing officer to see if this matter could be adjudicated on a stipulated factual record. Ultimately, that was the result and, in February 2017, the parent and PDE submitted factual stipulations (including stipulated exhibits) to serve as the factual basis of the decision. (HO-10 – Emails re: Stipulated Record).
- P. While the parties stipulated to the factual record in these matters, set forth in the *Stipulated Findings of Fact* section below, including a compensatory education remedy, they could not reach agreement on one aspect of that remedy. (HO-11 – Parent/PDE Stipulations).
- Q. Specifically, the parent and PDE stipulated to a quantitative amount of compensatory education hours as a remedy but could not stipulate as to an hourly rate for valuing those hours. (HO-11 – Parent/PDE Stipulations).
- R. Each party submitted briefs on the issue of valuing the compensatory education hours. (HO-12 – Parent’s Brief re: Compensatory Education; HO-13 – PDE’s Brief re: Compensatory Education).

S. This hearing officer accepted the stipulations and stipulated exhibits, both of which form the basis for this decision and order.<sup>5</sup>

### **ISSUE**

What should be the value of the compensatory education hours, agreed to between the parent and PDE as a remedy in this matter?

### **STIPULATED FINDINGS OF FACT**

The parent and PDE hereby submit the following stipulations and incorporate by reference the below listed documents in lieu of an evidentiary hearing for the time period March 17, 2013, through December 31, 2014, (the time period at issue in the above-captioned matter) and agree as follows:

#### **Background**

1. Parent, [], is the mother of [the student] (“student”).
2. Student [is late-pre-teenaged].
3. [The] CS was a charter school [] until approximately December 31, 2014.
4. While it operated as a charter school, CS was a local education agency (“LEA”).

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<sup>5</sup> The findings of fact are entirely drafted by counsel for parent and PDE. This hearing officer, having reviewed the stipulations of those parties and the stipulated exhibits, accepts the stipulated findings of fact as drafted. For stylistic consistency with his decision-writing, however, certain stylistic or grammatical changes have been made. Also, given the hearing officer’s use of “[ ] CS”, that designation is used in this decision, even though the parties utilized a different designation in the stipulations; certain other designations in the stipulations are used earlier in the decision and are carried over into the stipulations. Finally, so that the parties, or a reviewing body, can be assured that the stipulated findings of fact are adopted here in their entirety, the parties’ submitted stipulations are included in the record as HO-11.



5. While it operated as a charter school, CS received federal financial assistance.
6. PDE is Pennsylvania's state education agency ("SEA").
7. PDE receives federal financial assistance.
8. At all times relevant, the student was identified with emotional disturbance, other health impairment (ADHD), and/or specific learning disability in reading, as those terms are defined in the IDEA. 20 U.S.C. §1400 *et seq.*
9. As a result of the student's disabilities, at all times relevant, the student was eligible for special education services pursuant to the IDEA.
10. At all times relevant, the student was enrolled in CS.
11. At all times relevant, CS was the student's LEA, as defined by the IDEA. 20 U.S.C. §1401(19).
12. Student began attending CS in or around September 2012 when the student was in 2<sup>nd</sup> grade.
13. On or around September 8, 2014, while still enrolled in CS as a 4<sup>th</sup> grade student, the student was placed at [a Private] School by the student's individualized education program ("IEP") team. (Stipulated Exhibit-1).
14. [Private] School is an Approved Private School ("APS") serving students with autism, neurological impairment, and emotional disturbance.
15. Following the CS's closure in December of 2014, the parent enrolled the student in [a public school district].
16. The student's current LEA is the [school district].
17. The student continues to be placed at the [Private] School by the [school district].
18. PDE is the SEA, as defined by the IDEA. 20 U.S.C. §1401(32).
19. As the SEA, PDE has general supervisory obligations related to a LEA's implementation of the IDEA and is responsible for

- ensuring that eligible students receive a FAPE. 20 U.S.C. §1412(a)(11).
20. Parent contends that the CS is unable to provide any compensatory education remedy to the student due to the CS's closure.
  21. PDE does not dispute that the CS is unable to provide any compensatory education remedy to the student.
  22. Pursuant to the IDEA, PDE, as the SEA, is required to provide educational services to a student when a LEA is unable or unwilling to provide educational services to which a student is entitled. 20 U.S.C. §1413(g).
  23. PDE will make available to the student the compensatory education services that CS owes to the student due to the CS's failure to provide FAPE to the student.
  24. At some point during the 2013-2014 school year, there was a dispute or disagreement between the parent and CS related to the educational services that CS should have provided to the student.
  25. On or about October 20, 2014, parent, with the advice of counsel, entered into a settlement agreement with CS ("settlement agreement").
  26. The settlement agreement provided that the student was owed a certain amount of compensatory education.
  27. The parties do not dispute that CS closed without providing any of the compensatory education identified in the settlement agreement as owed to the student.
  28. On March 17, 2015, after CS closed, parent filed a due process complaint with ODR against CS and PDE.
  29. ODR bifurcated the due process complaint, assigning separate docket numbers as to the CS (docketed at 16022-1415AS) and PDE (docketed at 16023-1415AS).
  30. Parent first notified PDE of concerns or issues associated with the education services CS provided to the student on March 17, 2015, after CS closed, with the filing of the due process complaint in this matter, docketed at 16023-1415AS.

31. On March 26, 2015, PDE sought dismissal of the due process complaint docketed at 16023-1415AS alleging that ODR lacked jurisdiction over PDE, and the parties briefed the issue.
32. On April 27, 2015, the hearing officer issued two rulings related to the student's due process complaint.
33. The April 27, 2015 ruling docketed at 16022-1415AS dismissed the due process complaint as to CS for lack of jurisdiction due to the existence of the settlement agreement, indicating that the parent must seek to enforce the settlement agreement through the CS's liquidation process.
34. The April 27, 2015 ruling docketed at 16023-1415AS denied PDE's motion to dismiss for lack of jurisdiction but dismissed the due process complaint as to PDE for lack of ripeness.
35. Parent appealed to federal court seeking remand to the hearing officer for a due process hearing associated with the time period prior to the October 20, 2014 settlement agreement ("T-1") as well as the time period following the October 20, 2014 settlement agreement through the December 2014 closure of CS ("T-2").
36. The federal court vacated the hearing officer's rulings and remanded the cases for a due process hearing related to T-1 and T-2.

#### PDE's Investigation

37. PDE investigated the claims made in the March 17, 2015 due process complaint. (Stipulated Exhibit-2).
38. On May 6, 2015, PDE issued a fact-finding report regarding the claims set forth in the due process complaint related to the alleged failure of CS to provide the student with FAPE and sent a letter and a copy of the report to the parent on the same day. (Stipulated Exhibit-2).
39. PDE found that CS failed to provide the student with FAPE for the time period from March 17, 2013 (two years prior to the due process complaint) through the end of the 2013-2014 school year on June 19, 2014 and the student was owed 1,832.1 hours of compensatory education. (Stipulated Exhibit-2).

40. Following the federal court's remand to the hearing officer for a due process hearing related to both T-1 and T-2, PDE investigated T-2, the second time period identified in the federal court's decision, and issued an amended fact-finding report on December 14, 2016, and a corrected cover letter on December 20, 2016. (Stipulated Exhibit-3).
41. The amended fact-finding report explains that the student is owed 2,349.6 hours of compensatory education due to CS's failure to provide FAPE to the student for the time period March 17, 2013 (two years prior to the due process complaint) through December 31, 2014 (when the CS closed). (Stipulated Exhibit-3).
42. The amended fact-finding report further explains that the student did not progress while placed at [Private] School between September 8, 2014 (the first day of school for the 2014-2015 school year) through December 31, 2014 (when the CS closed). (Stipulated Exhibit-3).
43. In resolution of this matter, the parties agree that the student is owed 2,349.6 hours of compensatory education due to CS's violations of the IDEA.
44. PDE believes the compensatory education services should be valued at an average of \$65 per hour.
45. Parent believes the compensatory education should be valued at \$78.67 per hour.
46. The parties agree that the compensatory education hours may be used by the parent in her sole discretion, so long as:
  - a. the provider of the services is properly credentialed, licensed, or certified;
  - b. the use of the compensatory education is not intended to relieve the LEA of its obligation to provide the student with FAPE; and
  - c. the services take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs, remediate past denials of FAPE, or overcome the effects of the student's disability. These hours may be used for services, resources, and/or materials such as, but not limited to, tutoring, summer programs, after-school programs, or software.

47. Outside of the procedural Hearing Officer Exhibits developed over the course of these proceedings and incorporated as part of the stipulated record, the parties stipulate that the following documents are hereby incorporated by reference and admitted into the record by stipulation, and that the following documents comprise the entirety of the substantive evidence in this matter:

Stipulated Exhibit-1:	IEP dated May1, 2014
Stipulated Exhibit-2:	Fact-Finding Report dated May 6, 2015
Stipulated Exhibit-3:	Amended Fact-Finding dated December 20, 2016

### **DISCUSSION AND CONCLUSIONS OF LAW**

The sole issue to be decided in this decision, the issue to which parent and PDE could not stipulate, is the value of the 2,349.6 hours of compensatory education which the parties agree is the appropriate compensatory education remedy. Parent asserts that each hour of compensatory education should be valued at \$78.67. PDE asserts that each hour should be valued at \$65.00.

Parent's argument centers on a calculation offered by this hearing officer in the consolidated decisions at *X.J. v. (Palmer CS)/PDE*, 15961-1415AS/15962-1415AS (McElligott, August 11, 2015). There, in a dispute involving a denial-of-FAPE claim by a student against the CS and PDE (under identical theories as in the instant case, although without any prior settlement agreement having been entered into between that

family and CS), this hearing officer awarded compensatory education to the student, compensatory education for which PDE was responsible.

In disputes where compensatory education had been awarded, it had been the long-standing practice of this hearing officer to award compensatory education with a financial limit:

‘The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.’

This standard and language were employed consistently whenever this hearing officer found it necessary to award compensatory education. Uniformly, however, the exact calculation of the value of the compensatory education hours was left in the hands of parties, to be worked out between them based on this standard/language.<sup>6</sup>

In *X.J. v. Palmer CS/PDE*, however, because CS was defunct, and the exact calculation of the value of the compensatory education hours was likely to be impossible under this standard/language, this hearing officer provided an exact amount for the value of the compensatory education hours. The exact amount, \$78.67, was calculated on a salary figure derived for teachers at the [school district]. Subsequently, two

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<sup>6</sup> Because this approach—utilizing hearing officer-determined hourly rates in valuing a compensatory education award (even when utilizing only the general salary and benefits standard/language)—might be viewed as an award of money damages, a remedy unavailable through special education due process, this hearing officer has subsequently moved away from such language.

Pennsylvania special education hearing officers utilized this figure in valuing a compensatory education award for the purposes of a lump-sum to be placed in a compensatory education trust administered by a third party for the benefit of a student. [*I.M. v. School District of Philadelphia*, 16189-1415KE (Skidmore, January 8, 2016); *Q.H. v. School District of Philadelphia*, 16378-1415AS (Culleton, November 9, 2015)].

PDE argues that an hourly rate of \$65.00 in valuing the compensatory education hours is reasonable and equitable. Similar to the hearing officer's calculation derived in *X.J. v. Palmer CS/PDE*, the calculation offered by PDE is based on average salaries for teachers in the [school district of residence of Student]. In many ways, it is a more precise, and arguably more reliable, calculation than the one developed by this hearing officer in *X.J. v. Palmer CS/PDE*.

On balance, as indicated in footnote 6, it would be the preference of this hearing officer, and would be in keeping with his current practice, to avoid any sense of valuing the compensatory education award, whether generally through the former standard/language or specifically through an exact hourly rate. But the parties have developed factual stipulations in every regard of the dispute except for an hourly rate in valuing the compensatory education hours and expect that this decision can break that impasse. Therefore, it is incumbent upon this hearing officer to speak to the issue with specificity.

The hourly rate in valuing the compensatory education award will be \$78.67. The reason for this, however, is not rooted in the argument presented by the parent. Instead, it is rooted in equitable considerations related to the chronological nexus between the instant matter and *X.J. v. (Palmer CS)/PDE*, 15961-1415AS/15962-1415AS. The instant matter was initiated on March 17, 2015 with ODR file numbers 16022-1415AS and 16023-1415AS. The complaint which led to the decision at *X.J. v. (Palmer CS)/PDE*, 15961-1415AS/15962-1415AS was filed approximately two weeks prior to the complaint in the instant case. Therefore, it would be indefensible, in terms of the equities, for the compensatory education award for X.J. to be explicitly valued at \$78.67 per hour and the award for D.E., in a complaint filed nearly contemporaneously—and resolved on the merits in largely the same way albeit some time later based on procedural complexities—, to be valued at some other hourly rate.

Accordingly, the exact value of the compensatory education award stipulated to between the parent and PDE shall be calculated utilizing an hourly rate of \$78.67 per hour.

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## **ORDER**

In accord with the stipulated findings of fact and discussion set forth above, the parties agree that as the result of denial of FAPE by the now-defunct Charter School, the Pennsylvania Department of Education shall provide to D.E. 2,349.6 hours of compensatory education as a remedy. The value of these compensatory education hours shall be \$78.67 per hour. Details related to the access, use, and nature of these compensatory education hours were stipulated between the parent and the Pennsylvania Department of Education at stipulated finding of fact #46 and are adopted verbatim as part of this order.

*Michael J. McElligott*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

March 31, 2017