

*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: A.D.

Date of Birth: [redacted]

Dates of Transcribed  
Hearing Sessions:  
June 19, 2015  
October 14, 2015

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

ODR Case Numbers:

16100-1415AS  
16259-1415AS

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 Record Closed:  
Date of Decision:  
Hearing Officer:

Representative:

Michael Connolly, Esquire  
30 Cassatt Avenue  
Berwyn, PA 19312

Unrepresented

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

December 10, 2015  
December 15, 2015  
Jake McElligott, Esquire

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<sup>1</sup> After the filing of the complaints in April and May 2015, opening statements were taken in June 2015. Thereafter, parent and the PA Department of Education submitted a stipulated record in October 2015 and copies of stipulated exhibits in December 2015.

## **INTRODUCTION**

[The Student] (“student”)<sup>2</sup> is a [pre-teenaged] student residing in the City of Philadelphia. The student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>3</sup> for specially designed instruction/related services as a student with autism spectrum disorder and an intellectual disability.

The procedural background in these matters is intricate. As set forth more fully below, the student attended the [Charter School] In December 2014, the student’s parent was informed by the [Charter School], along with the families of other students attending the school, that it would cease operations. Thereafter, the student began to attend the School District of Philadelphia.

In April 2015, the parent filed a special education due process complaint at 16100-1415AS against the Pennsylvania Department of Education (“PDE”), alleging that the [Charter School] had denied the student a free appropriate public education (“FAPE”) and that PDE was responsible for remedying the denial of FAPE. PDE filed a motion to dismiss the complaint, arguing that this special education due process proceeding lacks jurisdiction over PDE. The motion to dismiss was

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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> In the citations prepared as part of the stipulations, the parties cite to 20 U.S.C. §1400 *et seq.* For citations prepared by the hearing officer, however, it is his preference to cite to the IDEIA’s implementing regulations at 34 C.F.R. §§300.1-300.818.

denied, but parent was ordered to file a complaint against the [Charter School], as IDEIA requires special education due process complaints to be brought against the local education agency (“LEA”). In May 2015, parent filed a complaint at 16259-1415AS against the [Charter School], alleging that the charter school had denied the student a FAPE. The two complaints were consolidated for one hearing process.

From the outset, the [Charter School] was not represented by counsel. While a Closing Transition Administrator was involved in these matters as a contact person, was responsive to communications, and participated in two telephonic hearing sessions, no attorney ever entered an appearance on behalf of the [Charter School].

In June 2015, the hearing officer, counsel for the parent and PDE, and the Closing Transition Administrator joined in a telephonic hearing session to set forth the procedural background, and to have opening statements presented on behalf of the parent and PDE. Hearing dates for live sessions were scheduled for the fall of 2015. In the run-up to those sessions, counsel for the parent and PDE indicated that they were working on a stipulated record and stipulated findings of fact.

In October 2015, a second telephonic hearing session was scheduled to finalize the process of stipulation. Since the stipulations would affect only the parent and PDE as parties, the Closing Transition Administrator was included in this session to confirm that counsel had not and would not be retained on behalf of the [Charter School]. The

Closing Transition Administrator was informed that the stipulations would provide the basis for a final ruling since the [Charter School] would not be able to put on any evidence in the proceedings.

In October 2015, the parent and PDE submitted their stipulations. In December 2015, the parties submitted copies of all exhibits as the exhibits of record.

The hearing officer accepted the stipulations and stipulated exhibits, both of which form the bases for this decision and order.<sup>4</sup>

### **FINDINGS OF FACT**

1. The parent and PDE have stipulated to these findings of fact and have stipulated to the exhibits of record, both of which are accepted by this Hearing Officer. These parties' stipulations are provided in the original stipulation document, provided by counsel, at Hearing Officer Exhibit 1. The June 2015 and October 2015 hearing session transcripts were not made part of any stipulation by the parent and PDE. Those transcripts will also be made part of the record.
2. At all times relevant, the student was eligible for special education services pursuant to the IDEIA. 20 U.S.C. §1400 *et seq.*

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<sup>4</sup> The findings of fact are, except for FF #1 and #22, entirely drafted by parent and PDE. The 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, certain stylistic changes, however, have been made. Also, given the Hearing Officer's prehearing ruling, where the use of "PDE" and "[redacted] CS" were used, those designations are repeated here, even though the parties utilized different designations in the stipulations.

3. At all times relevant, the student was enrolled in the [Charter School].
4. At all times relevant, the [Charter School] was the student's LEA, as defined by the IDEIA. 20 U.S.C. § 1401(19).
5. The student's current LEA is the School District.
6. PDE is the State Educational Agency ("SEA"), as defined by the IDEIA. 20 U.S.C. § 1401(32).
7. The [Charter School] closed in December 2014, and the student enrolled in the School District.
8. The student is diagnosed with an intellectual disability ("ID") and autism spectrum disorder ("ASD"). The student's January 24, 2015, Independent Educational Evaluation ("IEE") indicates that "[the student's] ASD carries with it, features of anxiety, hyperactivity and attention/concentration problems. As is also often the case with ASD, [Student] has fine motor deficits that interfere with [Student's] handwriting, cutting, and copying/drawing skills." (Parent's Exhibit ["P"]-2 at page 2).
9. In its November 10, 2010, re-evaluation report ("RR"), the [Charter School] identified the student as a student with a specific learning disability ("SLD").
10. The student's January 24, 2015 IEE indicates that the [Charter School]'s November 10, 2010 RR "misidentified [the student] as a student with a SLD". (P-29 at page 18).

11. On or about November 7, 2013, the [Charter School] issued another RR, which changed the student's identification from SLD to ASD and ID.
12. In regard to the student's education at the [Charter School], the student's January 24, 2015 IEE indicates:
  - "(No) FBA was conducted as there is no indication in the record of such a document. (The student's) IEP indicates that there are behaviors that impede learning, but no behavior support plan is found. Among the IEP's available to this examiner, only the most recent IEP reviewed ... contains a positive behavior support plan." (P-29 at page 4).<sup>5</sup>
  - "Annual goals in (the student's) most current IEP, dated 12/3/2014, lack baselines and/or are not measurable." (P-29 at page 4).
  - "Based on the results from previous evaluations, it appears that (the student) has made almost no progress in reading at least since (the student's) evaluation in 2010." (P-29 at page 12).
  - "(B)ased on results from previous evaluations, it appears that (the student) has not made progress in math since (the student's) 2010 evaluation by the school". (P-29 at page 13).

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<sup>5</sup> The acronym "IEP" is used here for the first time in the decision. "IEP" stands for individualized education plan, and the acronym will be used throughout the decision hereafter. Because the appearance of the acronym is in quoted material, and so as not to intrude upon that quoted material with inserted parentheticals for explanation, the notation for the use of IEP as an acronym designation in the decision is provided here.

- "Until (the student's) final IEP written in December 2014 by (the student's) school, (the student) was educated in a regular education setting with itinerant learning support services. This placement was highly inappropriate for a student with (the student's) ability, achievement and behavioral profile." (P-29 at page 18).
- "Despite an obvious lack of progress over the subsequent few years, and numerous disciplinary referrals, no new school-based evaluation was ordered and no change of placement was considered." (P-29 at page 18).

13. The student's parent requested an IEE by [an independent evaluator], a certified school psychologist, which the [Charter School] granted. Although an IEE was completed by [the independent evaluator] as agreed upon, the [Charter School] failed to pay for the IEE.

14. On or about April 6, 2015, the parent filed a due process complaint with the Office for Dispute Resolution ("ODR") alleging that [Charter School] violated its obligations under the IDEIA in that the [Charter School]'s evaluations of the student were inadequate, the [Charter School] failed to provide Student with a FAPE, and the [Charter School] failed to pay for the student's IEE.

15. PDE first learned of the allegations related to [Charter School]'s failures on April 7, 2015, when it received the due process complaint.

16. PDE contends that ODR does not have jurisdiction over PDE.
17. PDE filed a motion to dismiss the due process complaint as against PDE. The parent filed a response, and on April 27, 2015, the Hearing Officer issued a ruling denying PDE's motion to dismiss. (P-37).
18. As the SEA, PDE has general supervisory obligations related to an LEA's implementation of the IDEIA and is responsible for ensuring that eligible students receive a FAPE. 20 U.S.C. § 1412(a)(11).
19. Following receipt of the April 6, 2015 due process complaint, PDE initiated and conducted a fact-finding investigation, which included a review of available documents related to the student's education and the interview of the [Charter School]'s Closing Transition Administrator. The documents reviewed by PDE are attached hereto and labeled P-26, and Pennsylvania Department of Education exhibit ["PDE"]-1 through PDE-6.
20. Based on its fact-finding investigation, PDE determined that the [Charter School] failed to: (1) fully implement the student's IEP; and/or (2) provide FAPE to the student.
21. On or about May 6, 2015, PDE issued a fact-finding report, determining that the student is eligible for 1,780.3 hours of compensatory education services due to the [Charter School]'s failures. (P-30).
22. During a telephone hearing session on June 19, 2015, counsel for the parent and PDE discussed the May 6<sup>th</sup> PDE fact-finding report,



but, at that time, there was no meeting of the minds between those parties as to the role that any such fact-finding and potential remedy might play in these proceedings. (Notes of Testimony at 24-29).

23. Parent contends that the [Charter School] is unable to provide any compensatory education remedy to the student due to the [Charter School] closure.
24. Pursuant to the IDEIA, PDE, as the SEA, is required to provide FAPE to a student when an LEA is unable or unwilling to provide FAPE to which a student is entitled. 20 U.S.C. § 1413(g).
25. The compensatory education services are available to supplement, not supplant, services that may be provided to the student via an IEP, and may be used for services, resources, and/or materials such as, but not limited to, tutoring, summer programs, after school programs, or software.
26. The compensatory education services are valued at \$60 per hour for a total of no more than \$106,818.
27. The [Charter School] failed to pay for the January 24, 2015 IEE completed by [the independent evaluator].
28. Following receipt of the April 6, 2015 due process hearing complaint, PDE agreed to pay [the independent evaluator] for the IEE due to the [Charter School]'s alleged inability to do so.
29. The following documents are hereby incorporated by reference and admitted into the record by stipulation:

- P-1 Permission to Evaluate, dated September 15, 2010
- P-2 Parent Cover letter with attached Developmental Questionnaire, dated September 15, 2010
- P-3 Psychological Evaluation by [redacted]., dated October 19, 2010
- P-4 Teacher Input Forms, undated
- P-5 Reevaluation Report, dated November 10, 2010
- P-6 Invitation to Participate in the Individualized Education Plan Team Meeting or Other Meeting, dated November 28, 2011
- P-7 Intentionally Left Blank
- P-8 Individualized Education Program, dated December 13, 2011
- P-9 Notice of Recommended Educational Placement, dated December 13, 2011
- P-10 Invitation to Participate in the Individualized Education Plan Team Meeting or Other Meeting, dated November 29, 2012
- P-11 Individualized Education Program, dated December 13, 2012
- P-12 Notice of Recommended Educational Placement, dated December 13, 2012
- P-13 [redacted] Evaluation, dated May 2, 2013
- P-14 Notice of Recommended Educational Placement, dated June 7, 2013

- P-15 Permission to Reevaluate, dated November 11, 2013
- P-16 Reevaluation Report, dated November 7, 2013
- P-17 Invitation to Participate in the Individualized Education Plan Team Meeting or Other Meeting, dated November 26, 2013
- P-18 Invitation to Participate in the Individualized Education Plan Team Meeting or Other Meeting, dated November 26, 2013 (with MA Program billing consent)
- P-19 Individualized Education Program, dated December 9, 2013
- P-20 Notice of Recommended Educational Placement, dated December 9, 2013
- P-21 Notice of Recommended Educational Placement, dated March 28, 2014
- P-22 Amendments to December 9, 2013 IEP, dated April 23, 2014
- P-23 Notice of Recommended Educational Placement, dated April 23, 2014
- P-24 Functional Behavior Assessment, dated October 20, 2014
- P-25 Positive Behavior Support Plan, dated October 20, 2014
- P-26 Individualized Education Program, dated December 3, 2014
- P-27 Notice of Recommended Educational Placement, dated December 3, 2014

- P-28 Correspondence from Charter School to Parents, dated December 26, 2014
- P-29 Independent Educational Evaluation by [the independent evaluator], dated January 24, 2015
- P-30 Correspondence to Parent from the Department, dated May 6, 2015, with attached Fact Finding Report, dated May 6, 2015
- P-31 Charter School Disciplinary Log
- P-32 PSSA testing results, Spring 2014
- P-33 Charter School Progress Reports and Report Cards.
- P-34 Parents' Due Process Complaint as to the Department, dated April 6, 2015
- P-35 Department's Response and Motion to Dismiss, dated April 16, 2015
- P-36 Parents' Amended Complaint as to the Department, dated April 20, 2015
- P-37 Hearing Officer's Ruling on Motion Dismiss, dated April 27, 2015
- P-38 Parents Due Process Complaint as to the Charter School, dated May 6, 2015
  
- PDE-1 Reevaluation Report dated April 14, 2015
- PDE-2 Proposed IEP dated April 17, 2015

- PDE-3 Notice of Recommended Educational Placement dated April 14, 2015
- PDE-4 Reevaluation Report dated November 7, 2013
- PDE-5 IEP dated December 9, 2013
- PDE-6 IEP dated December 3, 2014

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Denial of FAPE

The [Charter School], as the LEA responsible for the student's special education programming, must provide a FAPE for the student. 34 C.F.R. §300.28; 22 PA Code §§14.102(b), 14.103; *see generally* Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). Where a LEA is unable or unwilling to provide FAPE for a student, PDE, as the SEA with general supervisory authority over any LEA in the Commonwealth, must stand ready to provide FAPE to a student. 34 C.F.R. §§300.149(a)(1)-(2), 300.227; Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981), Charlene R. v. Solomon Charter School, 2014 WL 6676575, 64 IDELR 208 (ED Pa. 2014).

In this matter, [Charter School] denied the student a FAPE. The stipulated exhibits, taken in their entirety, fully support such a conclusion. Additionally, the [Charter School] did not provide any argument, defense or evidence throughout the course of the proceedings

that would allow a fact-finder to any other conclusion. With the [Charter School] unable or unwilling to provide any remedy for its denial of FAPE, PDE must provide such a remedy. The parent and PDE recognize this and have stipulated to that effect. (Aspects of remedy will be addressed in the section below.)

Accordingly, the [Charter School] denied the student FAPE. Because [Charter School] cannot or will not provide remedy for this denial of FAPE, PDE must stand ready to provide remedy.

#### Compensatory Education

Where a local education agency has denied a student FAPE under the terms of the IDEIA, compensatory education is an equitable remedy that is available to a claimant. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). Here, the [Charter School] denied the student FAPE. Therefore, compensatory education is owed to the student. Because the [Charter School] will be unable to provide a compensatory education remedy for the student, the parent and PDE have stipulated to a compensatory education remedy to be provided by PDE. This remedy is accepted by the hearing officer, as outlined in the stipulated findings of fact and the stipulated order.

Accordingly, the student is entitled to compensatory education as outlined in the order below.

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**ORDER<sup>6</sup>**

In accord with the foregoing stipulations and stipulated exhibits, it is hereby determined that the [Charter School] denied [student] a free appropriate public education.

Due to the closure of the [Charter School], the Pennsylvania Department of Education (“PDE”) as the state educational agency under the terms of IDEIA shall ensure that the student receives 1,780.3 hours of compensatory education services and to pay for the student's independent education evaluation.

The compensatory education hours shall be valued at \$60.00 per hour for a total amount of \$106,818.00, and the student's parents shall decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the student's educational or special needs, including any related services under the IDEIA.

Payment for compensatory education may be obtained by submitting to [name redacted], one of the following: (1) service provider

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<sup>6</sup> The complaints and ODR file materials, to all appearances, indicate that these proceedings involved only one of the student’s parents. The stipulated findings of fact at Hearing Officer Exhibit 1 are also in the singular for one parent. The stipulated order at Hearing Officer Exhibit 1, however, utilizes the plural “parents”. Not knowing the exact stance of the parent(s) and PDE vis a vis the stipulated-to remedy, the language of the stipulated order is utilized here as provided by the parties.

invoices for payment directly to service providers; or (2) receipts for payments made by parents along with invoices from service providers for reimbursement to the parents.

Payment for compensatory education services shall be made within 50 days of receipt of such documentation. Failure on the part of PDE to pay or reimburse for compensatory education services within 50 days of receipt of substantiating documentation shall result in additional compensatory services equal to the hours of compensatory services sought.

The compensatory education will remain available to the student until the student reaches the age of 30. While the student remains of school-age, the compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by an LEA through an IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, during the summer months, and/or when otherwise convenient for the student and the parents.

Any claim not addressed in this opinion and order is denied.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

December 15, 2015