

*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

### FINAL DECISION AND ORDER

Student's Name: J.M.

Date of Birth: [redacted]

ODR Nos. 16307-1415KE & 16308-1415KE (consolidated)

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

*Petitioner[s] in 16307 & 16308*

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Dates of Hearing: 07/29/2015 & 08/06/2015

Record Closed: 09/11/2015

Date of Decision: 09/18/2015

Hearing Officer: Brian Jason Ford

## Introduction

This special education due process hearing was requested by [the] Parent, who is the parent of Student, a student with disabilities. The Student attended the Walter D. Palmer Leadership Learning Partners Charter School (Charter) until it went defunct in December of 2014. In May of 2015, the Parent initiated these proceedings, alleging that the Charter violated both the Student's and Parent's rights while the Student attended the Charter. Both the Charter and the Pennsylvania Department of Education (PDE) were named as respondents.<sup>1</sup> Under these circumstances, the Parent demands that PDE remedy any violation that occurred while the Student attended the Charter.

As explained below, I find that the Charter violated the Student and Parent's rights, and those violations must be remedied by an award of compensatory education. The parties have stipulated that PDE must supply any compensatory education awarded.

## Issues

1. Was the Student denied a free appropriate public education and, if so, what remedy is owed?
2. Were the Parent's rights under the IDEA violated and, if so, what remedy is owed?
3. Is PDE responsible for providing whatever remedy is owed, if the Parent establishes a violation?<sup>2</sup>

## Procedural History

On May 18, 2015, the Parent initiated these proceedings by filing a complaint with the Office for Dispute Resolution (ODR). Noting that the complaint named two respondents, which is highly unusual in the context of special education due process hearings, ODR assigned two file numbers to the matter. ODR No. 16307-1415KE concerns claims against the Charter. ODR No. 16308-1415KE concerns claims against PDE. The entire matter was assigned to me, and I consolidated (or reconsolidated) the case.

One of the Charter's former administrators was identified as the individual who could receive service on the Charter's behalf. That person replied to an email early on in the case, and was copied on all correspondence. The Charter did not identify counsel and, with the exception of the email reply, did not participate in these proceedings.

On May 28, 2015, PDE submitted a response to the complaint in the nature of a motion to dismiss. In that motion, PDE argued that the complaint was insufficient because it failed to say where the Student currently went to school, and moved to dismiss on the basis that ODR lacks jurisdiction over PDE.

On June 5, 2015, I issued a sufficiency determination, ordering the Parent to tell PDE where the Student goes to school, but otherwise denying the sufficiency challenge.

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<sup>1</sup> Specifically, the Parent named both the charter and the Commonwealth of Pennsylvania, Department of Education.

<sup>2</sup> This issue was presented throughout the hearing but, as explained below, has been resolved by the parties.

On June 12, 2015, the Parent responded to PDE's motion to dismiss.

On July 8, 2015, I issued a pre-hearing order, denying PDE's motion to dismiss. PDE's motion to dismiss and my pre-hearing order denying that motion are discussed in greater detail below.

Various scheduling motions, including motions to extend the decision due date, were filed. Ultimately, the hearing convened on July 29 and August 6, 2015. Closing statements were received on September 11 and the due date was extended to September 18, 2015. (NT at 192).

### **Findings of Fact**

Some context is necessary in order to understand the findings of fact in this case. As noted above, the Charter did not participate in this hearing. It presented no evidence. Unsurprisingly, all of the evidence presented by the Parent supported the allegations raised in the Complaint. PDE participated in the hearing and presented evidence, but its function was not to defend the Charter. PDE did not present evidence to counter the Parent's evidence, and ultimately agrees that the Charter violated the IDEA. Rather, PDE participated in order to present its own investigation into the matter. PDE argued, at least initially, that its evidence goes to the extent of the violation and what remedy is owed.<sup>3</sup> The resulting findings, therefore, are uncharacteristically one-sided. However, as discussed below, the testimony in this case both from the Parent and from PDE was credible and compelling.

The transcript in its entirety was considered for fact-finding, and all documentary evidence was carefully reviewed, including documents that are not explicitly referenced here.

### **Kindergarten**

1. The Student, though young, has a long history of behavioral problems including aggression, violence, anger, defiance, hyperactivity and poor impulse control. P-12.
2. The Student has been diagnosed with both Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD) since July 8, 2013. P-12.
3. The Student attended the Charter for kindergarten during the 2013-14 school year. NT 23-24.
4. From the start of the 2013-14 school year, the Student exhibited serious, negative, externalizing behaviors in school. NT *passim* (NT at 46 and 57-59 provide examples, but the transcript in its entirety paints the clearest picture). Behaviors included physical aggression towards peers, teachers and property, as well as elopement. *Id.*
5. The Parent sought assistance from the Charter in September of 2013. NT 48-49. In response, representatives from the Charter told the Parent that the Charter "didn't do that," – that it "didn't do IEPs." NT at 49.
6. The Charter developed a Kindergarten Individual Learning Plan for the Student. P-3. This plan is not an IEP, is not intended to be an IEP, and does not comply with the IDEA's

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<sup>3</sup> As discussed below, that argument evolved as the case progressed.

substantive and procedural requirements for IEPs and their development. The Plan is not dated, and there is no evidence that it was ever implemented.

7. The Student was suspended on multiple occasions during the 2013-14 school year. At the peak, the Student was suspended about twice a week. NT at 71-72. More often than not, the suspensions were not documented. Rather, the Parent was simply called to pick up the Student from school and was told to not bring the Student back for a number of days. See, e.g. NT at 72.
8. The Student was sent to the Charter's disciplinarian's office on a regular basis. NT 50, 57. When this happened, the Student was often placed in a room with other children who also committed disciplinary infractions and received no instruction. NT 58-59. The Student began to emulate the behaviors of other children in the disciplinary placement. *Id.*
9. In March of 2014, the Charter told the Parent that it simply could not handle the Student, and demanded that the Parent come to school with the Student. NT at 55-56. The Parent stayed with the Student in school for four hours per day from March through May of 2014.
10. The Student's behaviors continued and worsened despite the Parent's presence. In May of 2014, the Student's behaviors were so extreme that the Charter told the Parent that if the Parent did not "take [the Student] to crisis, they were going to 302 [the Student]." NT at 59-60.<sup>4</sup>
11. The Parent complied with the Charter's demand, and took the Student to a crisis center. The discharge paperwork from the crisis center confirms the prior diagnoses of ADHD and ODD. P-13. The same paperwork also recommended medication, counseling, and 5 hours of TSS services per week. P-13.
12. The Charter evaluated the Student for special education eligibility and issued an Evaluation Report (ER) on May 6, 2014. P-5.
13. As part of the evaluation, the Charter conducted a Psychoeducational Evaluation, which included an observation of the Student, input from the Parent, and standardized testing. P-5. The ER, in substance, is a recitation of that evaluation. P-5.
14. The ER concluded that the Student is a student with disabilities as defined by the IDEA – specifically under the categories of Other Health Impairment and Specific Learning Disability (in Math, based on a discrepancy analysis). P-5.
15. The Charter drafted an IEP for the Student dated May 19, 2014. P-6.
16. The IEP included several reading and writing goals, despite the fact that the ER found that the Student was in the average range in reading, writing, listening and oral expression. P-5, P-6.
17. The IEP includes two Math goals, one for adding and subtracting and another for telling time. Both goals are not baselined, and both have ambiguous mastery criteria ("80% accuracy in 4 out of 5 trials" - does this mean that the Student must get 8 out of 10 problems

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<sup>4</sup> "Crisis" refers to a psychological crisis center and "302" refers to Pennsylvania's laws on involuntary emergency examination and treatment.

correct on 4 out of 5 problem sets, or is 4 out of 5 just another way of saying the 80% target that the Student must reach?). P-6.

18. Not only are the Math goals not baselined, they are only tangentially connected to the findings and recommendations in the ER. P-5, P-6.
19. Despite the overwhelming severity of the Student's behaviors, the IEP included only two, amorphous<sup>5</sup> behavior goals: "[Student] will demonstrate the ability to interact positively with peers and teachers for 8 out of 10 trials." and "[Student] will demonstrate the ability to complete tasks and follow a set of directions for 8 out of 10 trials." P-6.
20. The IEP includes specially designed instruction (SDI), but those are grossly inadequate relative to the Student's presentation at that time. Other than "immediate feedback" and an "individual behavior chart," the IEP says very little about what the Charter will do to address the Student's behaviors. P-6.
21. A Psychological Report Addendum was drafted on June 3, 2014. P-7. It is not clear if or how that document was ever used.
22. A Functional Behavior Assessment (FBA) was completed and reduced to writing on June 4, 2014. PDE-17, P-8. While that document is formatted properly, it is not clear whether it was used. Moreover, the FBA does little other than recite the Student's behaviors and what the Charter had previously done to unsuccessfully address them.
23. A Positive Behavior Support Plan (PBSP) was issued on June 11, 2014. P-9. This was never incorporated in the Student's IEP. The PBSP includes three measurable, objective behavioral goals, but only very basic SDIs. No reasonable person with an accurate understanding of the Student's behavioral presentation at that time could possibly conclude that the SDIs would enable the Student to obtain the behavioral goals in the PBSP, even if that document had been incorporated into the IEP.
24. The Charter issued a Notice of Recommended Educational Placement (NOREP) on June 11, 2014. P-10.
25. The Charter did not implement the IEP or PBSP before the NOREP was issued. NT *passim*.
26. By the time that the Charter issued the NOREP (the document that would enable the Charter to implement the IEP and PBSP), the Charter had already instructed the Parent to remove the Student from school. The Parent complied, and the Student remained at home without services for the remainder of the school year. NT 76-77.

### **First Grade**

27. The Student attended the Charter for first grade during the 2014-15 school year until the Charter closed.
28. The Student's behaviors continued in first grade as they had in kindergarten. NT *passim*.

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<sup>5</sup> "Not objective" is too kind a characterization, given the facts of this case.

29. The Student continued to receive frequent suspensions. Some were documented (P-11) and others were not.
30. The Student had three different teachers in September of 2014. NT at 84.
31. The Charter did not implement the IEP or PBSP during the 2014-15 school year. (There is direct testimony to this point at NT at 84-85 but, as with other findings, the most accurate picture about this finding is best taken from the transcript in its entirety).
32. The Charter closed in December of 2014. NT 23.
33. After the Charter closed, the Student began to attend an elementary school in the Parent's school district of residence.
34. On May 18, 2015, the Parent filed the Complaint.
35. The Parent obtained an independent educational evaluation (IEE) for the Student, which was reported as a Psychoeducational/Psychological Evaluation Report on July 19, 2015. P-2. The IEE includes information from the Parent, Student, and current teachers, and comprehensive standardized assessments. The IEE concludes that the Student's behavioral problems remain a serious issue. Further, because those problems were not addressed, the Student has fallen behind in reading (a previously unaffected domain) and math skills. The evaluator is optimistic, however, that the Student can be remediated with appropriate special education. P-2.
36. After the Complaint was filed, PDE initiated its own investigation into the matter. The investigation was conducted by a PDE Advisor. The Parent did not initiate the investigation.
37. On July 22, 2015, PDE issued a report of the investigations findings (PDE Report). PDE-25.
38. PDE's Advisor, who testified at the hearing, examined many of the documents described above, including the Charter's ER, IEP, and NOREP. The Advisor also spoke with a representative of the Charter and with a special education administrator from the Student's current school district. P-25. The investigator did not speak with the Parent or otherwise solicit information or documents from the Parent.<sup>6</sup> NT at 34. The Advisor did not have, and therefore did not consider, the IEE. P-25.
39. Based on information available to PDE's Advisor, the PDE Report concluded that the Charter's ER was comprehensive and that the resulting IEP was appropriate. The Advisor could not determine that the Charter provided the social work services guaranteed by the IEP. The Advisor concluded that this was an "educational loss" for which 33.75 hours of compensatory education was owed.
40. PDE's Advisor did not know any of the information that was revealed through the Parent's testimony during the hearing. See, e.g. NT at 165-166.
41. Had the Advisor known that information (including the frequent, undocumented suspensions, the Charter's requirement for the Parent to serve as the Student's aide, etc.) or had a clear picture of the nature and extent of the Student's behaviors (symptoms of the

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<sup>6</sup> PDE's Investigator testified that it did not communicate with the Parent during the investigation because the Parent was represented by counsel. NT at 34.

Student's disabilities) the evaluator would have reached different conclusions and would have awarded much more compensatory education. See, e.g. NT at 165-166.

## **Legal Principles**

### ***The Burden of Proof***

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3d Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent the party seeking relief and must bear the burden of persuasion.

### ***Credibility***

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this case, all witnesses testified credibly in that all recalled events or expressed opinions to the best of their abilities. It is noteworthy that, in general, none of the three witnesses in this case directly contradicted each other.<sup>7</sup> The Student's mother and PDE's Advisor both were especially forthright and candid.

The Student's mother testified as to the Student's extreme educational problems, both academic and behavioral, and the Charter's appalling response to them. That the Parent gave this testimony without embellishment or hyperbolic rhetoric amplifies her credibility.

The PDE Advisor's credibility was enhanced by her testimony that she would have drafted PDE's report differently if she had knowledge of the circumstances revealed by the Parent's testimony. This important admission strongly indicates the investigator's candor.

### ***Charter Schools***

Pennsylvania charter schools have the same substantive obligations to students with disabilities under the IDEA as do traditional public schools. 20 U.S.C. § 711 *et seq.* In this case, to a very small degree, both the Parent and PDE addressed the fact that the Parent chose to place the Student in the Charter. Under Pennsylvania law, that the placement is a choice in no way abrogates the Charter's obligations or diminishes the Student's rights.

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<sup>7</sup> Testimony from the Parent's expert witness was used to challenge conclusions in PDE's Fact Finding Report.

### **Child Find**

The IDEA statute and regulations require school districts to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be “advancing from grade to grade.” 34 U.S.C. §300.311(a), (c)(1).

### **Free Appropriate Public Education (FAPE)**

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

### **Compensatory Education**

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the “hour-for-hour” method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the

position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education “should aim to place disabled children in the same position that the[y] would have occupied but for the school district’s violations of the IDEA.”).

Despite the clearly growing preference for the “same position” method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the Student back into that position. Even cases that express a strong preference for the “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

“... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district’s deficiencies.”

*Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student’s school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA’s “failure to provide specialized services permeated the student’s education and resulted in a progressive and widespread decline in [the Student’s] academic and emotional well-being” *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, \*7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, \*9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes

such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

## Discussion

### ***PDE's Responsibility for Compensatory Education***

In this case, the Parent is seeking an order that (1) the Charter denied Student a FAPE and (2) PDE is liable for any compensatory education award because the Charter is now defunct. PDE initially argued that it is not responsible for the Charter's denial of FAPE. This argument was first presented in its motion to dismiss.<sup>8</sup> Ultimately, however, PDE made the following stipulation on the record:

"if there's an order of compensatory education, the Department will honor that order and apply the compensatory education. So whether or not the Charter School has any money, I don't think it's relevant."

NT at 187-188. In context, PDE agreed to supply whatever compensatory education is awarded, regardless of the Charter's ability to provide or fund compensatory services.<sup>9</sup> Since PDE has agreed to provide compensatory education, I will not discuss PDE's obligation to do so in detail. Rather, I will simply order PDE to provide the compensatory education awarded below.

As *dicta*, I note that in the absence of this stipulation, I would have extended the reasoning of the pre-hearing order denying PDE's motion to dismiss into this final decision. Under that reasoning, PDE is responsible for any compensatory education owed as a result of the Charter's denial of FAPE. The pre-hearing order relied primarily upon *Charlene R. v. Solomon Charter Sch., et al.*, 2014 U.S. Dist. LEXIS 164161; 2014 WL 6676575 (E.D. Pa. Nov. 21, 2014). I also note that Hearing Officer McElligott very recently reached the same conclusion in ODR Nos. 15961-1415AS and 15962-1415AS (consolidated, August 11, 2015). To my knowledge, we are the first Pennsylvania Special Education Hearing Officers called upon to address this issue which, unfortunately, is both novel and not addressed in Pennsylvania's charter school laws and regulations. See 22 Pa. Code § 711 *et seq.*

### ***Denial of FAPE***

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<sup>8</sup> More specifically, PDE argued that it is not a proper party to these proceedings and that ODR lacks jurisdiction over PDE. The Parent responded that PDE was a proper party in part because it must remedy any defunct LEA's denial of FAPE. I agreed, and denied PDE's motion both on that basis, and because I read 20 U.S.C. § 1415(b)(6) more broadly than PDE urged.

<sup>9</sup> It is noteworthy that PDE never truly abandoned its argument that it is not a proper party to these proceedings and that ODR does not have jurisdiction over PDE. PDE's stipulation in the hearing, however, makes such arguments irrelevant. My task is to determine whether the Student's right to a FAPE was violated and, if so, what remedy is owed. The question of which entity must provide the remedy is extremely unusual, but the Parent and PDE have resolved that for themselves. The situation would be very different if the Parent was arguing that PDE itself violated the Student's right to a FAPE. That is not the case here. The Parent argues that the Charter violated the Student's rights and that PDE must remedy that violation. See Parent's Closing Brief. All evidence presented during the hearing indicates that PDE agrees.

There can be no doubt that the Student was denied a FAPE and is owed compensatory education. With the LEA not participating, it is not surprising that all of the evidence supports a finding that FAPE was denied. The evidence is best summarized in the opening paragraph of the Parent's written closing brief:

In Kindergarten, Student regularly disrupted class, eloped, and ran around the school. Parent asked for special education services and Charter School refused. Charter School admitted that it could not program for Student's behavior issues for Kindergarten and first grade. Supports and services were so lacking that by March, 2014, Charter School asked Parent to sit in class and serve as Student's one-on-one aide. By June, 2014, Charter School requested Parent to remove Student from Charter School without providing any instruction or services.

There is no question that the Charter breached its child find obligations as described above, and then failed to provide appropriate special education. The more difficult questions in this case are how much compensatory education is the Student owed.

### ***PDE's Fact Finding Report***

PDE's fact finding report is not good evidence of the amount of compensatory education that the Student is owed. This conclusion is based both on an analysis of what the report actually is, and testimony about the report itself.

The report [is] extremely unusual. When a dispute arises between parents and LEAs, there are two formalized paths to dispute resolution: the state complaint process or a due process hearing. The IDEA requires states to have both paths in place. 34 CFR 300.151-153; 22 Pa Code § 14.107. In Pennsylvania, the state complaint process is initiated when a parent files a complaint with PDE's Bureau of Special Education (BSE). When BSE receives a complaint, it conducts an in-depth investigation. As part of the investigation, BSE will interview parents and school personnel, examine records, possibly observe the school program and generally do whatever else is required to either validate or invalidate the parents' claims. At the conclusion of the investigation, PDE issues a Compliance Investigation Report (CIR). The CIR summarizes the parents' complaint, BSE's investigation and findings, and orders corrective action if necessary. CIRs can include an award of compensatory education.

The other path is a due process hearing. At a due process hearing, the hearing officer does not function as an investigator, but rather as an adjudicator. The hearing officer does not seek out evidence; evidence is presented through a formal administrative adjudication. At the conclusion of the hearing, the hearing officer issues a decision that includes findings of fact based on the evidence presented, conclusion of law based on those findings, and remedies (if any) based on those conclusions.

The state complaint process and due process hearings cannot be pursued concurrently. If an issue is presented both as part of a state complaint and a due process hearing, BSE's investigation stops, and the issue must be resolved at the hearing. 34 C.F.R. § 300.152(c)(1). Said differently, BSE may not issue a CIR resolving an issue that is presented in a due process complaint.

In this case, the Parent's due process complaint prompted PDE to investigate the claim and issue the report at exhibit PDE-25. By law, that report cannot be a CIR because the issue was pending in ODR. Moreover, PDE affirmatively stated that the report is not a CIR – not just as a

matter of law, but also as a matter of fact. PDE candidly admitted that its investigations as part of the state complaint process are far more thorough than its inquiry into this case. For example, the investigator did not interview the Parent.

This distinction is important. *Res judicata* applies to CIRs. Parents cannot request a due process hearing as a de facto appeal of a CIR if they are unhappy with the results of the investigation or the corrective action. As such, if PDE's report in this case was a CIR, I would have no authority to hear the case. This is why it is important to understand that PDE's report cannot be a CIR as a matter of law, and was not intended to be a CIR as a matter of fact.

Given that PDE's report is not a CIR, but does offer compensatory education to resolve the Parent's claims, there is a serious question as to whether I should view the report at all. It is reasonable to think of the report as a settlement offer, in which case I should not see it. The Parents objected to the report on this basis. At the hearing, I overruled that objection and accepted the report into evidence, but I cannot give any weight to it. The report does not accurately reflect the extent to which FAPE was denied. PDE's Advisor was (refreshingly) direct when testifying about the final compensatory education number – which would have been higher based on the information that the investigator learned during the hearing. NT at 165-166. I appreciate both the constraints that the Advisor worked under, and her remarkable candor while testifying.

### ***Compensatory Education Calculation***

The standard for “full day” compensatory education articulated above is met. The Student came into kindergarten with ADHD and ODD diagnoses, and immediately began to exhibit extreme behavioral problems. The Parent also immediately asked for help. In response, the Charter did nothing other than rebuff the Parent, compel the Parent to work as the Student's aide, remove the Student from class and, ultimately, remove the Student from school. More than half of the kindergarten year passed before the Charter evaluated the Student, and that evaluation resulted in an inappropriate IEP. That IEP was never implemented. As a result, for the entirety of the Student's kindergarten (2013-14) year and the entirety of the Student's first grade (2014-15) year until the Charter closed, the Student received no special education at all – despite an obvious and overwhelming need.

The Charter's nearly absolute failure to comply with its obligations under the IDEA resulted in a complete denial of the meaningful educational benefit that the Act guarantees. The IEE confirms this. Unfortunately, the Student is in a worse place now than the Student started in. The pervasiveness of the denial is evidenced by the Student's increased needs in previously unaffected domains, as evidenced in the IEE.

Arguably, the Charter should have known about the Student's disabilities and had a plan in place for the start of the kindergarten year. More realistically, and at a minimum, the Charter should have suspected a disability and proposed an evaluation shortly after school started. As required by *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996), I find that compensatory education began to accrue on the 15th day of 2013-14 school year on the Charter's calendar and continued to accrue until the Charter closed in December of 2014.

### ***Additional Compensatory Education***

The Parent argues that the Charter denied the right to meaningfully participate in IEP development, and owes additional compensatory education for that denial. The Parent also

argues that additional compensatory education is owed for the time that the Parent served as the Student's aide.

Regarding parental participation, there is no evidence that the Charter excluded the Parent from IEP development. The Charter certainly ignored the Parent for most of the kindergarten year, but when it began its evaluation and IEP process, the evidence indicates that the Parent was included to the extent required by law. Parental input was part of the ER, and the Parent was invited to IEP team meetings. There is no preponderant evidence to suggest that the Parent was ignored at those meetings, or was denied an opportunity to contribute to the IEP.

Regarding additional compensatory education for the Parent's services as an aide, the Parent cites *Bucks Co. Dept. of Mental Health v. DeMora*, 379 F.3d 61 (3d Cir. 2004), which holds that reimbursement to parent for the time she personally spent working with her disabled daughter, even though parent had no actual out-of-pocket expenses, was an available remedy under the IDEA. *DeMora* and the cases that come after it are complicated when it comes to compensation for parents. *DeMora* has never explicitly been overruled, but it has also been established that monetary relief is not available. See *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266 (3d Cir. Pa. 2014); see also *Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778 (3d Cir. 1994); *W.B. v. Matula*, 67 F.3d 484, 493 (3d Cir. 1995), abrogated on other grounds by *Jersey City Pub. Sch.*, 486 F.3d at 799 (overruling *Matula* insofar as it held that money damages are available in a § 1983 action based on an IDEA violation).

In this case, the Parent is asking for additional compensatory education, not money, to remedy time that the Parent spent providing services that the Charter should have provided. Current case law permits that remedy. The facts of this case support that the Student should have had one-on-one support (this is strongly suggested in the Charter's own IEE, in the Crisis Center's discharge paperwork, and by the fact that a TSS was both recommended and approved). Consequently, I will award an additional 4 hours of compensatory education for each day that the Student attended school from March 1, 2014 through May 31, 2014.

### **Conclusion**

Despite an immediate, obvious, and growing need, the Charter never provided special education to the Student at any time. The Charter ignored the Parent's calls for help, and then forced the Parent to work as the Student's aide. The Charter's only response to the Student's behaviors was a huge amount of completely ineffective discipline. A significant amount of compensatory education is now owed, both to compensate the Student for the denial of FAPE, and to remedy the Charter's demand that the Parent serve as the Student's aide.

### **ORDER**

Now, September 18, 2015, it is hereby **ORDERED** as follows:

1. The Charter violated the Student's rights, as described in the foregoing decision.
2. The Charter compelled the Parent to serve as the Student's aide.
3. The Student is awarded one (1) hour of compensatory education for each hour that the Charter was open and running classes from the fifteenth (15th) day of the 2013-14 school year through the day that the Charter closed in December of 2014.

4. The Student is awarded an additional four (4) hours of compensatory education for each day that the Student attended school from March 1, 2014 through May 31, 2014.
5. The Parents may decide how the hours of compensatory education are used. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device. The compensatory education shall be in addition to, and shall not be used to supplant, any educational and related services to which the Student is currently entitled.
6. PDE shall provide all compensatory education awarded by this Order in a manner consistent with this Order.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER