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

ODR No. 17689-15-16-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Daniel B. Cooper, Esquire Law Offices of Kenneth S. Cooper 45 East City Avenue, # 400 Bala Cynwyd, PA 19004
Walter D. Palmer Leadership Learning Partners Charter School 910 North 6th Street Philadelphia, PA 19123	Not Appearing
Date of Hearing:	June 17, 2016
Record Closed:	June 18, 2016
Date of Decision:	July 10, 2016
Hearing Officer:	William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)[1] was a student of the charter school (School) named in this matter, for fifth and sixth grades (2013-2014 and 2014-2015 school years); in the middle of Student's sixth grade year, December 2014, the School closed, and Student enrolled in a middle school of the Student's school district of residence (District). When Student began fifth grade at the School, Student had an IEP and was identified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disabilities of Emotional Disturbance and Other Health Impairment.

Student's mother (Parent) filed this due process request, asserting that the School failed to provide Student with a free appropriate public education (FAPE) as required by the IDEA, by failing to implement Student's IEP. Parent seeks full days of compensatory education from the beginning of Student's fifth grade year in 2013 to the date on which the School closed in December 2014.

The respondent School is closed and did not appear for the scheduled hearing, despite the receipt of notice by an individual identified in ODR records as a contact for the School.

The hearing was completed in one session. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the School failed to provide Student with a FAPE and I order that Student is entitled to compensatory education in an amount specified below.

[1] Student, Parent 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.

ISSUES

1. During the relevant period from the first day of school in the School's 2013-2014 school year[2] until the last day of school in December 2014, did the School fail to provide Student with an appropriate placement?

2. Should the hearing officer order the School to provide Student with compensatory education on account of all or any part of the relevant period?

FINDINGS OF FACT

1. Student is diagnosed medically with Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder, with aggression secondary to domestic violence. Student has a history of treatment by the local behavioral health agency for these disorders and their behavioral manifestations. (P 1, 4, 10).

2. Student has a history of in-school behavior including low frustration tolerance, impulsivity, hitting, throwing objects, and kicking peers. (P 1, 5, 7, 8, 9.)

3. Student was identified under the IDEA while in first grade, and classified with Other Health Impairment. (P 12.)

4. When in second grade, Student was re-evaluated by [a] School District, and was found to have cognitive ability in the average range, with academic achievement in the average range. The re-evaluation classified Student as a child with the disabilities of Emotional Disturbance and Other Health Impairment. (P 14.)

5. Student has cognitive ability in the average to below average range. (P 14, 15.)

[2] The IDEA statute of limitations might arguably limit the relevant period to begin on May 2, 2014 (two years prior to the filing date in the present matter), if raised as an affirmative defense, see J.L. v. Ambridge Area School District, 2008 WL 2798306, *9-10 (W.D. Pa. 2008); see also, Sechler v. Ensign-Bickford Co., 322 Pa. Super. 162, 166 (1983); Pa.R.C.P. 1030. Nevertheless, the LEA is defunct and did not appear. Thus, this affirmative defense was not raised in the present matter. In accord with standard legal practice, I do not understand statutes of limitation to be jurisdictional unless so specified, see, e.g., In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig., PNC Bank NA, 795 F.3d 380, 2015 U.S. App. LEXIS 13186 (3d Cir. Pa. 2015); therefore I do not apply the IDEA statute of limitations here. Moreover, in this matter, there is credible evidence that Parent was prevented from pursuing her rights by misrepresentations of LEA personnel that Student's problem was addressed. (NT 14, 45-54, 62-66.) Therefore, an exception to the statute of limitations may apply here, 20 U.S.C. §1415(f)(D)(i). For this reason, and based upon the record as a whole, I deem it equitable to extend relief to this child regardless of the limitation period. See, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625-626 (3d Cir. 2015)(instructing adjudicators to provide nothing less than a complete remedy).

6. The District provided Student with an Individualized Education Program (IEP) in second grade, placing Student in Supplemental Emotional Support. Student continued in this placement for third and fourth grades. (NT 29, 43-44; P 16, 18, 19.)

7. When Parent enrolled Student at the School for the beginning of fifth grade, she met with School personnel and gave them a copy of Student's IEP. School personnel promised to provide Student with special education, but indicated that the School did not offer a smaller classroom or emotional support classroom at that time. They indicated that such a program would be provided to Student soon. (NT 42-51.)

8. Parent repeatedly requested placement in a smaller classroom, and School personnel repeatedly promised to provide such a placement. (NT 51-54, 62-66.)

9. The School provided no special education services to Student while student attended its classes. (NT 51-54, 62-66.)

10. Student's behavior continued to be seriously problematic while Student attended classes at the School. Student was out of class often, and Parent was called to pick up Student before the end of school more than once per week. Student was suspended out of school repeatedly. Student's learning suffered substantially. (NT 54-61.)

11. The School closed abruptly in December 2014, in the middle of Student's sixth grade year. Student returned to a school in [the] School District for sixth grade. (NT 61-68.)

12. At the end of fourth grade, Student had been reading at or slightly below grade level, with Below Basic PSSA scores. When re-assessed in mid-sixth grade, Student was reading two to three years below grade level. (P 15.)

13. In mid-sixth grade assessment of Student's mathematics skills, Student was performing two to three years below grade level. (P 15.)

14. When Student re-enrolled in the School District, the District re-evaluated Student. It identified Student with Emotional Disturbance and Other Health Impairment. (P 15.)

15. The District placed Student in Supplemental Emotional Support. (P 20.)

16. Student's behavior continued to be seriously problematic at Student's new school in the School District, which did not provide an emotional support classroom. (NT 72-75; P 15, 21.)

17. The District transferred Student to another District school, where Student is now in an emotional support classroom, and Student's behavior has improved. (NT 76-77.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward 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.[3] In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[4] that the moving party is entitled to the relief requested in the Complaint Notice. 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 the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance

[3] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[4] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

of the evidence in support of Parent's claim, or if the evidence is in "equipoise", the Parent cannot prevail under the IDEA.

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). In this matter, I have weighed the evidence with attention to the reliability of the testimony.

I accord substantial weight to Parent's testimony, as my findings of fact attest. I find Parent to be honest, and to be sufficiently reliable, despite the expected lapses in memory and understanding that she demonstrated when questioned about details of past events, and transactions that her own learning differences may have made difficult to fully understand.[5] Her demeanor and manner of answering questions gave me every reason to find her credible and sincere. Often, she did not answer in a way that supported her position, due to lack of memory, about which she was forthcoming and frank.

Thus, all of the above findings are based upon a preponderance of the evidence. While some of the material evidence is circumstantial, none of it is contradicted in the record. I conclude that I can derive inferences of fact from Parent's depiction of Student's struggles in school, combined with evidence of the recent District re-evaluation report.

[5] Parent testified that she has a learning difference, in that she is diagnosed with developmental delays and is illiterate, NT 25; nevertheless, I am satisfied without hesitation that she was able to give reliable testimony on the material events giving rise to her claims under the IDEA, and her testimony is consistent with the documentary record.

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). FAPE is "special education and related services", at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts[6] must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an 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 a 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

[6] As a charter school the School in this matter was the child's local education agency under the IDEA, and its legal obligations were fully as extensive as those of a school district. See generally, Pa. Code Chapter 711.

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 program 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 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. 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).

PLACEMENT

Pursuant to its obligation to offer and provide Student with a FAPE, the charter school must provide Student with an appropriate placement. See, P.V. v. Sch. Dist., 2013 U.S. Dist. LEXIS 21913 (E.D. Pa. 2013)(defining placement as an interest protected under the IDEA); R.B. v. Mastery Charter Sch., 762 F. Supp. 2d 745 (E.D.Pa. 2010)(describing change of placement as

fundamental change in educational program that ensures provision of a FAPE). Placement is part of the selection of services that delivers a FAPE through the IEP. P.V. v. Sch. Dist., 2013 U.S. Dist. LEXIS, above. A "placement" is not the same as a "place" or location of the services; rather, "placement" is the level and type of services to be provided to Student, wherever those services are provided. Id. at 19.

In this matter, the evidence is preponderant that the School ignored Student's IEP and failed to place Student in any level of special education services. Student's behaviors secondary to Student's classified Emotional Disturbance continued and, unaddressed, escalated. At the same time – and I conclude, as a result – Student's academic achievement stagnated or regressed. The evidence shows that this child of average intelligence fell up to three years behind Student's peers in academic achievement. I conclude that this constituted a deprivation of meaningful educational benefit that demands nothing less than a complete remedy. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d above at 625-626 (3d Cir. 2015).

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 local educational agency 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).

In this matter, the evidence is insufficient to prescribe a "make-whole" remedy, because there was no expert opinion testimony on what remedial and special education services would be

needed in order to bring Student's academic, social and behavioral skills to the level at which they would have been found in the absence of the deprivation of FAPE discussed above. Therefore I will enter an advisory[7] order for compensatory education to replace the education of which I find that Student was deprived. This amounts to full days of compensatory education for Student's entire tenure at the School.[8]

CONCLUSION

In sum, I find that the School failed to provide Student with a FAPE while Student was enrolled at the School, and I order that the Student is entitled to compensatory education in the amount of a full school day for every school day of Student's enrollment at the School.

ORDER

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

1. The Student is entitled to compensatory education in the amount of one full school day for every school day on which the School was open to students, from the first day of the School's 2013-2014 school year to the last day on which the School was open to students in December 2014.

2. The number of hours per school day for purposes of this order shall equal the number of hours in a school day at the School during the times delineated in this order, at the grades in which the School deprived Student of a free appropriate public education.

[7] As the School is closed and did not respond, Parent's pleading indicates that Parent will seek a remedy through the Pennsylvania Department of Education, pursuant to its IDEA responsibilities as State Educational Agency. See, e.g., 34 C.F.R. §300.227.

[8] Ordinarily, one should accord an agency some reasonable time to identify and correct deficiencies in its provision of special education services. M.C. v. Central Regional School District, 81 F.3d 389, 397 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996)(hour-for-hour remedy must accord reasonable period for discovery and rectification of deficiencies in programming). Yet in this matter, the School knew from day one that Student came with an IEP and two IDEA disability classifications, yet it simply ignored its obligations to this child, while holding Parent off with empty promises. In equity, its own callous neglect militates against any application of the rectification rule in this matter.

3. Compensatory education may take the form of any appropriate developmental, remedial or instructional service, product or device, selected in the discretion of Parent, which furthers or supports the Student's education. Services in the amount set forth above may be provided after school hours, on weekends, or during summer months when convenient for Student or Parent.

4. The service ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.

5. The cost of any such service may be limited to the current average market rate in [the geographic area] for privately retained professionals qualified to provide such service.

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.

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

July 10, 2016