

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: K. B.

Date of Birth: [redacted]

Dates of Hearing: 9/14/2016

Closed HEARING

ODR File No. 17928-15-16

Parties to the Hearing:

Representative:

Parents
Parent[s]

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Date Record Closed:
Date of Decision:

October 14, 2016
November 8, 2016

Hearing Officer:

Charles W. Jelley Esq. LL.M.

Introduction

During the 2015-2016 school year, the Student¹ was enrolled at the New Media Charter School (Charter School) for sixth grade. In June 2016, the Charter School closed. The Student is now enrolled in the Student's school district of residence. Student's mother (Parent) filed this due process request, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) and Section 504 of the Rehabilitations Act.

Parent asserts that the Charter School failed to comply with the IDEA, by failing to implement the Student's Individualized Education Program (IEP). Parent also asserts that the School failed to provide Student with a free appropriate public education (FAPE) as required by the IDEA. Parent seeks full days of compensatory education for the entire 2015-2016 school year. The Charter School is closed and did not appear for the scheduled hearing. The Office for Dispute Resolution (ODR) and Parent's counsel provided the Charter School advanced notice of the hearing date, to an individual identified in ODR records as a contact for the School. The hearing was completed in one session with testimony from one witness. I have determined the credibility of the single witness and I have considered and weighed all of the written evidence in the record. I conclude that the Charter School failed to appropriately educate the Student.

Issues

1. During the relevant period from the first day of school in the School's 2015-2016 school year until the last day of school in June 2016, did the School fail to implement the Student's Individualized Education Program (IEP)?
2. During the relevant period, did the School fail to provide Student with FAPE as defined by the IDEA?
3. Did the Charter School fail to conduct a complete assessment of the Student in all areas of unique need?
4. Should the hearing officer order the Charter School to provide the Student with compensatory education for all or any part of the relevant period?

¹ The Parent filed six due process complaint notices in 30 days for three children. Three of the complaints were dismissed. The generic use of Student, rather than a name and gender-specific pronoun, is employed to protect the confidentiality of the student.

Findings of Fact

1. The Student and [the siblings] were born premature at 34 weeks by emergency C-section (P#6).
2. At birth, the Student weighed three pounds 12 ounces, required oxygen, and remained in the hospital for three weeks (P#6).
3. All of the Student's developmental milestones were delayed. Previously, in a birth to three early intervention program, the Student received Physical Therapy and Occupational Therapy. Later from 2006 to 2008, the Student received Speech and Language Therapy (P#6).
4. In 3rd Grade, the Student scored Below Basic in Reading on Pennsylvania System State Assessment (PSSA) Reading (P#6).
5. A 2008 Evaluation Report notes the Student has average intelligence (P#6 p.4).
6. In 4th Grade, when the Student was in all regular education classes, the Student's final grades in all subjects were a "C". The comments on the report card states the Student does not complete homework, cannot stay on task, and has problems with the transition from class to class (P#6 p.4).
7. In 5th grade, the Student was absent 19 times, tardy 5 times, and was suspended for three days for fighting (P#6 p.4). At the end of the first semester, in 6th grade at Charter School, the Student earned an "F" in reading and a "D" in Science, Social Studies and Math (P#6 p.4).
8. The Student enrolled at the Charter School for the 2015-2016 school year as a 6th grader (NT p.16).
9. After failing all classes in the first semester of 6th grade, on November 3, 2015, the Charter School agreed to the Parent's request for an evaluation. The Charter School issued a Permission to Evaluate (PTE) on November 3, 2015, and on the same day, the Parent consented to the evaluation (P#7).²
10. In December 2015, as part of the initial evaluation, the Charter School prepared an Evaluation Report (ER). The ER states the Student earned a full scale Intelligence Quotient (IQ) Standard Score (SS) of 88 on the Wechsler Intelligence Scale for Children (WISC) (P#6 pp.5-6). An average score on the WISC is 100 (P#6 pp.5-6).
11. On the Wechsler Individual Achievement Test (WIAT), the Student earned seven Below Average (SS), three Significantly Below Average Scores and five Average SS (P#6 p.6).
12. For example, the Student's SS ranged from 71 on Sentence Building, a Significantly Below Average score to a high of 115 on Sentence Repetition, an Above Average score (P#6 p.6). The Student's WIAT Grade Equivalent (GE)

²The Permission to Evaluate at Exhibit #7 did not include the Parent's signature. I infer she consented as she participated in the Evaluation Report process and did submit the PTE.

scores ranged from a low of 2.3 GE in Sentence Completion to a high of 9.1 GE in Oral Expression (P#6 p.6).³

13. In Listening Comprehension, the Student earned a Below Average SS of 88. The Student's Oral Discourse SS of 77 places the Student in the Significantly Below Average range; this type of SS difference indicates the Student will have difficulty following classroom directions and knowing what to do in class when the directions are oral (P#6 p.7).
14. On the WIAT Math subtest, the Student had difficulty with place values, fractions, and performing word problems (P#6 p.7). On the Sentence Completion subtest when presented with two or three sentences, the Student was not able to write or put together one well-constructed sentence (P#6 p.7).
15. As part of the initial evaluation, the evaluator administered the Behavior Assessment Scale for Children (BASC). The BASC is a measure designed to evaluate various aspects of behavior and personality, including positive (adaptive) as well as negative (clinical) dimensions. The Student scores indicate significant problems with peer and adult relations, expressing self, interacting with others, and staying on task (P#6 p.7).
16. The Parent stated and the teachers agreed the Student often states, "I wish I were dead" or "I wish I could kill myself". (P#6 p.9). The Student displayed multiple signs of depression (P#6 p.7).
17. All assessments were done under standard conditions, and the Student put forth Student's best effort (P#6 pp.8-10).
18. Although the Student's oral reading and spelling SS were in the below average range, the evaluator concluded the Student had a learning disability in written expression, noting weaknesses in math and sentence completion. The evaluator suggested the Student's oral discourse should be accommodated in the classroom (P#6 p.12).
19. At one point on page 12 of the ER, the evaluator notes Math is a weakness and then later on the same page lists Math as a strength (P#6 p.12). The evaluator

³ "A Grade Equivalent (GE) is a norm-referenced estimate of the typical performance of students tested in a given month of the school year. GE scores are reported as a decimal number, the grade-equivalent scale ranges from K.0 (beginning kindergarten) to high school graduation. GE values below K.0 or above 12.9 are designated as PK (pre-kindergarten) or scores above 12th grade are designated as PHS (post high school). The numeral to the left of the decimal point refers to a grade level. The numeral to the right of the decimal point represents one-tenth of the school year, or one school month. For example, a grade equivalent of 5.2 earned by a third-grader means that the student's performance on the third-grade test was typical of the national sample of fifth graders taking the same third-grade test in the third month of the school year. It is important to note, because they cannot be directly compared as with an interval scale, grade equivalents are frequently misinterpreted."

<http://pearsonassessmentsupport.com/support/index.php?View=entry&EntryID=1440>

notes the Parent stated the Student had previously been diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder; the evaluator was not able to verify either diagnosis due to lack of records (P#6 p.12).

20. Based on the Parent's statements and the Student's scores on the BASC, the evaluator recommended the Student met the criteria to be identified as a Student with an Emotional Disturbance and a Specific Learning Disability (P#6 p.12). To clarify how the Student's behaviors and emotions as noted in the BASC were interfering with learning, the evaluator recommended that the Charter School conduct a Functional Behavior Analysis (FBA) (P#6 p.12).
21. The January 14, 2016 IEP notes the IEP team met, then on page 7 the IEP notes the team met again on January 15, 2016, to revise the IEP.
22. The present levels of education (PLEPs) included the SS from the WIAT, a reading score from a fall classroom assessment. The fall assessment placed the Student at the 4th grade level, while the WIAT score placed the Student at the 5th grade level (P#7 p.12).
23. The IEP has two Math Goals and one Writing goal (P#7 p.18). The goal statements are followed by seven specially-designed instruction statements, two of which reference a Positive Behavior Support Plan (PBSP) (P#7 p.18).
24. Neither the FBA nor the April 2016 PBSP were attached to the 27-page IEP (P#7).⁴
25. A standalone behavior support plan dated January 11, 2016 contains three goals statements focusing on staying on task, responding appropriately to adults, and reducing peer-on-peer aggression (P#8).
26. Exhibit 9 describes the results of a March 2016 FBA. The evaluator recommended the Student receive community-based wrap around services along with the support of a Behavioral Specialist who could oversee a consistent home and school-based positive support plan (P#9). To increase the Student's on task time, build social skills, and reduce aggression the evaluator recommended a variety of antecedent, consequence, and reinforcement strategies (P#9 pp.5-9). The records do not note a time when the IEP team met to review and revise the existing PBSP. *Id.*
27. The IEP notes the Student should receive 30 minutes a week of school-based counseling; however, no goals or objectives are linked to the counseling services (P#7 p.18).
28. In response to the IEP team discussion points on the extent of participation with other nondisabled students, the IEP notes the Student will receive 55 minutes a day four (4) times a week in Learning Support for math and writing

⁴ Page 12 of the IEP notes the IEP team implemented a behavior support plan while they awaited the FBA results, this notation conflicts with the other references throughout the IEP (see page 23).

- (P#7 p.18). Next, the IEP states the Student will receive 200 minutes a week of learning support in the regular education classroom and 110 minutes a week of Learning Support outside of the regular education classroom (P#7 p.21). The IEP also states the Student will receive 200 minutes a week of Emotional Support in the regular education classroom and 110 minutes a week of Emotional Support outside of the regular education classroom (P#7 p.21).
29. The IEP provides the Student should receive Itinerant Learning and Emotional Support (P#7 p.21). The IEP states the Student should attend school 6.8 hours per day (P#7 p.23).
 30. The Notice of Recommended Assignment (NORA) is dated January 8, 2016, and stamped received on January 14, 2016 (P#7 pp.23-27).
 31. The monthly teacher progress reports contain statements like the Student “Has too many [missing] assignments to list”, the Student earned a “24%” in Social Studies, and the Student made “No progress” (P#12).
 32. The monthly progress reports conflict with the March Math Special Education Progress Report, which states the Student is making progress (P#13). The March Math Special Education Progress Report failed to mention any progress on the writing or behavioral goal (P#13).
 33. The Charter School closed at the end of the 2015-2016 school year (Parent Complaint).

Applicable Legal Principles

Conclusion of law and 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. In *Schaffer v. Weast*, 546 U.S. 49, (2005), the court held that the burden of persuasion is on the party that requests relief in an IDEA case. 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). 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). 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. *Id.*

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. After listening to the Parent, I accord persuasive weight to Parent's testimony, for three reasons. Although, some of that testimony was based upon personal interactions with the Student, administrators, and teacher reports, some of the testimony is also hearsay. Nevertheless the hearsay testimony was corroborated by the exhibits. Second, the Parent displayed a clear memory of the school year, talking clearly about calls from the Charter School directing her to take the Student home on a number of occasions, which is also corroborated by the documentary record. Third, the Parent's memory was precise for almost all events; therefore, I conclude that for events during the 2015-2016 school year her testimony is persuasive. The Parent's demeanor and manner of answering questions gave me every reason to find her credible and sincere.

On several occasions, due to lack of a precise memory, she did not answer in a way that supported her position, about which she was forthcoming and acknowledged. Therefore, I accord substantial weight to Parent's testimony, as reflected in my findings of fact. On balance, I find that Parent's testimony represents her best recollection of Student's lengthy and complicated record of educational and behavioral health concerns. I note that I am watchful that this matter was unopposed at hearing because the Charter School is closed. While this observation affects the weight that I accord to Parent's testimony, untested by cross-examination, it also establishes a record that is preponderant to the extent that I give weight to Parent's testimony. Thus, all of the above findings are based upon a preponderance of the evidence. While some of the evidence is circumstantial, none of the testimony was contradicted by documents. I conclude therefore, that I can derive inferences of fact from Parent's lengthy restatement of Student's struggles in school, in the home, and community, combined with evidence in the recent LEA evaluation report; I find that the record supports a finding of a denial of FAPE.

Child Find and Assessment

Under the IDEA child find requirement, the local education agency has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the statut[e]". *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012)(citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738

(3d Cir. 2009)); *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010); 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §300.111(a), (c). LEAs are required to fulfill their child find obligation within a reasonable time after notice of behavior that suggests a disability. *Id.* Failure to conduct a sufficiently comprehensive evaluation is a violation of the agency's "child find" obligations. *D.K.*, 696 F.3d above at 250 (a poorly designed and ineffective evaluation does not satisfy "child find" obligations). An evaluation must be sufficiently comprehensive to address all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6).

Comprehensive assessment in all areas of unique need

When Students are thought to have a disability, the regulations included a requirement that the evaluators "[u]se technically sound instruments that may assess the *relative contribution of cognitive ... factors*" (emphasis added). The US Department of Education further advises that a disability must be determined "on a case-by-case basis, depending on the unique needs of a particular."⁵

The eligibility inquiry must take into account a broad array of measures. The eligibility inquiry must "[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior".⁶ The evaluation must include "standardized, individualized testing (not just criterion-based testing or functional assessments)". The comments to the regulations note, "Nothing in the [IDEA] or ... regulations would preclude the eligibility group from considering results from standardized tests when making eligibility determinations."⁷ Stated simply, just as no single assessment or measure could support a finding of a disability, no single assessment or measure may undermine a finding of "in need of special education" where other measures or factors could support such a finding.⁸

⁵ Letter from Alexa Posny to Catherine D. Clarke, Director of Education and Regulatory Advocacy, American Speech and Hearing Association, U.S. Dep't of Educ. (Mar. 8, 2007)

<https://www2.ed.gov/policy/speced/guid/idea/letters/2007-1/clarke030807disability1q2007.pdf>

⁶ 34 C.F.R. §300.306(c)(1)(i); *see also id.* §300.304(b)(1) (noting that the evaluation of whether the child is a child with a disability must "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child")

⁷ Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46540, 46651 (Aug. 14, 2006).

⁸ See generally 34 C.F.R. §300.304(c)(2) (emphasizing "assessments and other evaluation materials [to] include those tailored to assess specific areas of *educational need* and not merely those that are designed to provide a single intelligence quotient).

The statute specifies that a child must “need []” special education “by reason [of]” the disorder as identified under, 20 U.S.C. §1401(3)(A)(ii), and that special education must be designed “to meet the *unique needs* of [the] child with a disability”, *id.* §1401(29) (emphasis added).

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). 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 IEP. 20 USC §1401(9).

A Local Education Agency (LEA) must provide FAPE by designing and administering a program of individualized instruction that is set forth in an IEP 20 USC §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 (3rd Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3rd Cir. 1988).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning”. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must describe specially-designed 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 (1982). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996).

An LEA is not 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 (3rd Cir. 2012). An IEP is not required to incorporate every program, aid, or service 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 (3rd Cir. 1995) (appropriateness is not judged prospectively so that lack of progress does not in and of itself render an IEP inappropriate.) The appropriateness of an IEP must be determined as of the time at which it was made, and the reasonableness of the

program should be judged only based on 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 (3rd Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Charter School Responsibilities

Charter schools must comply with Pennsylvania and federal regular education, special education, federal civil rights and disability laws. Chapter 711 *et. seq.* of the Pennsylvania School Code, “Charter School and Cyber Charter School Services and Programs for Children with Disabilities”, contains regulations specific to individuals with disabilities being educated in charter schools and cyber charter schools. Chapter 711 incorporates by reference all of the IDEA regulations at 22 Pa. Code 711.3. Chapter 711 also incorporates relevant antidiscrimination provisions from Section 504 and its implementing regulations. Charter schools and cyber charter schools also must comply with 22 Pa. Code Chapter 4 relating to academic standards and assessment, 22 Pa. Code Chapter 11 relating to pupil attendance, and 22 Pa. Chapter 12 relating to discipline of students 22 Pa. Code §711. *et. seq.*

<http://education.pasenategop.com/files/2014/03/Summary-Charter-Bill.pdf>.

Charter School’s IDEA Requirements

Under the IDEA, all LEAs must locate, evaluate, and educate children with a disability. 20 U.S.C. §1412(a)(1)(A). If the evaluation identifies a disability and that the child is in need of specially-designed instruction, the LEA must provide the student with a free appropriate public education. The IDEA directs the LEA to prepare, develop, and implement an Individualized Education Program (IEP). *Id.* The child's IEP must be developed by a team that includes the child's parents, at least one regular education teacher, at least one special education teacher, a representative of the LEA, and the child himself or herself, if appropriate. *Id.* 20 U.S.C. §1414(d)(1)(B).

The IEP should state the child's present levels of achievement and performance, provide annual goals, and explain how progress will be measured. 20 U.S.C. §1414(d)(1)(A)(i). The IEP should also state “the special education and related services and supplementary aids and services . . . to be provided to the child” and “the anticipated frequency, location, and duration of those services and modifications”. *Id.* § 1414(d)(1)(A)(i)(IV), (VII). The student’s progress must be regularly monitored and reported to the parents. *Id.* Once an IEP is created, it may only be amended by the entire IEP team or by agreement between the parents and the LEA. 20 U.S.C §1414(d)(3)(F).

IDEA also requires the states to provide a dispute resolution system should a parent or LEA disagree whether the child is a person with a disability in need of specially-designed instruction. 20 U.S.C. §§1415(b)(6), (c)(2), (d), (e) and (f). Either party may seek mediation or present a complaint to a hearing officer, who will then adjudicate the parties' disagreement in a due process hearing. *Id.* The procedural safeguards recognize the LEA and the parent as the parties at the due process hearing. *Id.* Any party aggrieved by the hearing officer's findings can file an action in a court of competent jurisdiction. *Id.* §1415(g);§ 1415(i)(2).

Compensatory Education

In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) the court endorsed a “complete” make whole remedy favoring relief for the entire period of the violation *G.L.* 802 F.3d at 626. Compensatory education “accrue[s] from the point, that the school district knows or should know of the injury to the child, and the child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem”.⁹ One approach to calculate the compensatory education relief is to adopt the *MC* “cookie cutter” approach. The second option is to employ the *Reid* “qualitative” approach. The third compensatory education calculation option is to review the record as a whole, make equitable adjustments and then formulate a make whole remedy, grounded in the pure equitable powers of the fact finder, to grant appropriate relief.

Compensatory education is appropriate relief that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA.¹⁰ Compensatory education should place the child in the position they would have been in but for the violation.¹¹ The make whole calculation requires some evidence about the type and amount of services needed to place the student in the same position he or she would have occupied but for the LEA's violations of the

⁹ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

¹⁰ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)).

¹¹ *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to “conform[] to . . . [a] standard that looks to the child's present abilities”, whereas compensatory education is meant to “make up for prior deficiencies”. *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP “carries no guarantee of undoing damage done by prior violations”, IEPs do not do compensatory education's job.

IDEA.¹² Also after *GL* following *MC*, the parents must establish when the District either “knew or should have known” the child was not receiving FAPE.¹³ Assuming a finding of a denial of FAPE, the LEA, on the other hand, must produce evidence on what they suggest is the length of a reasonable rectification period. *Id.* Whether the parents follow *Reid* or *MC*, the make whole remedy must be supported by the record evidence. *Id.*

Each alternative is acceptable, if the relief granted makes the student whole. Implicit in each alternative is the assumption that the record is properly developed to support the award of the equitable relief ordered.

In this matter, the evidence is insufficient to apply the *Reid* “make-whole” remedy; the Parent did not offer an expert opinion testimony on what remedial and special education services are needed to bring the 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.

As the School is closed and did not respond, the Parent must work with the SEA as described in the Student’s companion action to access the relief ordered herein. The SEA in the companion action agreed to provide the Student with appropriate relief, if ordered. 34 C.F.R. §300.227.

Discussion

In December 2015, the Charter School identified the Student as a person with a disability in need of specially-designed instruction (SDI). The Charter School offered and the Parent agreed on an IEP. The ER noted the Student has math, writing, reading, and spelling deficits; yet the IEP does not address the reading or spelling deficits.

¹² *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid, supra*. (the parent, as the moving party, has the burden of “propos[ing] a well-articulated plan that reflects the student’s current education abilities and needs and is supported by the record.”); *Phillips ex rel. T.P. v. District of Columbia*, 736F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciola, Mag. J.); *Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012). (the burden of proof is on the parents to produce sufficient evidence demonstrating the type and quantum of compensatory education that makes the child whole).

¹³ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

The record is also preponderant; the Student has a long history of a variety of behaviors that interfere with learning. The BASC report described elevated levels of sadness, depression, suicidal statements and self-injurious behavior. After reviewing the BASC scores, the evaluator recommended the Charter School immediately undertake a Functional Behavioral Assessment (FBA). The evaluator noted the Student's overall behavioral health required the support of community-based wrap around services and the support of a Behavioral Specialist who could oversee a consistent home and school-based positive support plan (P#9). The delay in providing the PBSP contributed to the Student's lack of progress and several suspensions.

To increase on task time, build social skills, and reduce aggression, the evaluator recommended a variety of antecedent, consequence, and reinforcement strategies. (P#9 pp.5-9). The IEP does not contain or address the evaluator's PSBP recommendations. The fragmented manner in which the IEP was developed denied the Student the intended FAPE benefits. The delay in developing a comprehensive behavioral strategy, ultimately led to the Student being suspended and completely excluded from school. The SDIs and the PBSP do not include sufficient strategies to teach the Student how to focus, increasing time on task, and transition from class to class or subject to subject.

The partial academic progress reports provided state "Has too many [missing] assignments to list", the Student earned a "24% in Social Studies", and the Student made "No progress". Not to mention the serious behavioral health cries for help like, "I wish I were dead" or "I wish I could kill myself" (P#6 p.9) went unnoticed. In sum, after listening to the limited testimony and reviewing the exhibits, the evidence is preponderant that the Charter School denied the Student FAPE. As to the determination of the form of the appropriate relief, the evidence is also preponderant that relief can be calculated with sufficient particularity to avoid a windfall.

Compensatory Education

To remedy the denial of FAPE, the Parent is suggesting an hour-for-hour remedy for the entire school year. The IEP notes the Student should receive 30 minutes a week of school-based counseling (P#7 p.18). The IEP provides that the Student should receive 55 minutes a day four (4) times a week of Learning Support in Math and Writing (P#7 p.18). Next, the IEP provides that the Student should receive 200 minutes a week of additional Learning Support in the regular class (P#7 p.21). To address the Student's emotional issues, the IEP also states the Student will receive 200 minutes a week of Emotional Support, in the regular class, and 110 minutes a week of

Emotional Support outside of the regular education classroom (P#7 p.21). The record is preponderant that the Student did not receive the agreed-upon support.

The Student should receive compensatory education; however, the Parent did not meet her burden that the relief should cover the entire school year. The record does not establish that the LEA unnecessarily delayed or neglected its child find duty. Therefore, I will not award compensatory education from August 2015 to November 2015. The Student enrolled in August, report cards were issued in the fall, the evaluation was completed in December 2015, and the IEP was offered in January 2016. I find the time to complete the child find process in this instance is not unreasonable.

After reviewing the ER, the IEP, and the FBA, I find that the December ER and the January IEP were legally insufficient at the time each document was written. The ER team and the IEP team did not have the sufficient data to write meaningful academic or behavioral goals. Therefore, the compensatory education claim accrued in December 2015.

Compensatory education may take the form of any appropriate developmental, remedial, or instructional services, product, or device, selected at 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. The services ordered above shall be provided by appropriately qualified, and appropriately, Pennsylvania certified or licensed professionals, selected by Parent. The cost of any such services shall not exceed the rate for privately retained qualified professionals.

CONCLUSION

In sum, I find that the LEA deprived the Student FAPE from December 2015 through the end of the 2016 school year. I also find the Student is entitled to an award of compensatory education from December 2015 to the last day of school. The Student's reading, writing, and spelling needs adversely affected learning throughout the school day. The Student's behavioral needs were the contributing factor to repeated removals from school, interfered with learning, and created peer and adult difficulties. Therefore, I find that the Student should be awarded 28 weeks of compensatory education. The IEP provides that the school day is 6.8 hours each day. Therefore, the Student is awarded 952 hour of compensatory education.

ORDER

The Student should receive the following compensatory education services:

1. The Student should be provided 952 hours of compensatory education. The Parent can select the service provider. The responsible education service agency is Ordered to pay the actual cost for the services provided to the Student.

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

Date: November 8, 2016

Charles W. Jelley, Esq. LL.M.
Hearing Officer