

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

CLOSED HEARING¹

ODR File Number: 19055 17 18

ODR File Number: 19056 17 18

Child's Name: A. H. **Date of Birth:** [redacted]

Date of Hearing: Stipulated Record filed; a hearing was not necessary.

Parent:
[redacted]

Counsel for Parent

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Counsel for the LEA

Unrepresented & Non-Participatory

Hearing Officer: Charles W. Jelley Esquire **Date of Decision:** 01/26/2018

¹ While not made explicit between the Parties, this decision is considered to be the result of a closed hearing process.

Factual and Procedural History

The Parties agreed to adjudicate this dispute on a Stipulated Record.

At all times during this dispute, the Student was enrolled in the school district of residence (District) (Stipulated Facts at 2, 14).² Before attending the District Student was enrolled at the Charter School (Charter School) (Stipulated Fact at 12). The Student attended the Charter School from the beginning of sixth grade, in September 2012, until the Charter School closed on June 30, 2016, at the end of Student's ninth grade year (Stipulated Facts at 2, 12).

The now-closed (Charter School) was Student's Local Education Agency (LEA) from about September 2012, when the Student was in sixth grade, through Charter School's closure in June 2016. (Stip. 3, 10-12).³

The Parties agree the Student has been identified as having an intellectual disability, a specific learning disability in reading, mathematics, and likely writing, and emotional disturbance. The Parties further agree, the Student's disabilities adversely affect the Student's education as defined by the Individuals with Disabilities Education Act (IDEA) making the Student eligible for specially-designed instruction from September 2012 through June 2016, at the Charter School (Stipulated Facts at 8; Stipulated Facts at 9, 23).

On or about April 13, 2017, the parent filed a due process complaint against Charter School and a second due process complaint against the Pennsylvania Department of Education (PDE) seeking compensatory education and "declaratory relief in the form of an adjudication that Student's rights have been violated" (Stip. 20; Due Process Complaint ¶¶ 35, 36).⁴

PDE undertook an extensive fact-finding investigation into the Charter School's provision of special education services to Student (Stipulated Facts at 23, Ex. ##5, 6, 7, 8, 9). PDE concluded that the Charter School failed to provide Student with FAPE and was owed compensatory

² This matter has been submitted on stipulated facts, cited herein as "Stipulated Facts." The findings of fact are entirely drafted by counsel for parent and PDE. This hearing officer, having reviewed the stipulations of those parties and the stipulated exhibits, accepts the Stipulated Findings of Fact as agreed to and drafted by the Parties. For stylistic consistency with his decision-writing, however, certain stylistic or grammatical changes have been made. Finally, so that the parties, or a reviewing body, can be assured that the Stipulated Findings of Fact and multiple Exhibits are adopted here in their entirety, the Parties' submitted Stipulation is included in the record as Hearing Officer (HO) Exhibit #1.

³ "Stip. or "Stipulation" refers to the Stipulations of Fact and "Ex." refers to the exhibits attached to the Stipulations of Fact submitted to the hearing officer in lieu of a fact finding hearing in the above captioned matter.

⁴ The Parent's Complaint also reserved the right to seek, in an appropriate federal forum, damages, reasonable attorney's fees and costs (Due Process Complaint ¶ 37). Because administrative due process hearing officers lack jurisdiction to rule upon claims for damages, attorney's fees and costs, these issues are not before the hearing officer for decision. 20 U.S.C. §§ 1415(f)(3)(E)(i) and 1415(i)(3).

education for the time period from September 15, 2014, through June 22, 2016 (Stipulated Facts at 23; See also Exhibits 1-4 to Stipulated Facts). Parent contends, and PDE does not dispute, that the Charter School is unable to provide any compensatory education to Student (Stipulated Facts at 16, 17).

The Parties now agree that during the time period at issue, from September 2012 through June 2016 Student was denied a FAPE. PDE, as the responsible SEA, in light of the closing of the now-defunct Charter School/LEA, has agreed to provide the funding for the compensatory education that the Charter School otherwise owes to Student due to the Charter School's failure to provide FAPE to Student (Stipulated Facts at 19).

The Parties agree, after the filing of the due process complaint and the state PDE administrative complaint, that the dollar value of the Compensatory Education fund is \$135,200.00 (Stip. at 23, 24; Ex. 3, 5, 6, 7, 8, 9). The Parties further agree that the sum of \$135,200.00 is appropriate relief.

Although the Parties have reached a Stipulation about the denial of a FAPE and the value of the compensatory education fund, the Parent now seeks a Hearing Officer's Order "... that the Hearing Officer enter a compensatory education award in the amount of \$135,200 in favor of Student and against PDE with the aforementioned permissible uses." (Parents' Closing Statement p.6). PDE, on the other hand, contends that since they have agreed to all of the requested relief in the Stipulation "PDE requests that the hearing officer dismiss this matter as moot." (PDE Closing p.4).

For the following reasons, I find that based on the jointly submitted Stipulation, I no longer have jurisdiction as the Parties have reached an agreement as to all of the Student's denial of FAPE claims. Accordingly, I now find that the Stipulation of Facts is a complete settlement of the dispute and request for appropriate relief. Consistent with the Office for Dispute Resolution standard practices and the applicable case law the case is now closed.

Issue

Does the hearing officer have jurisdiction to issue an Order directing PDE to provide to Student \$135,200 in compensatory education?

Agreed Upon Stipulations of Facts

The parties jointly drafted and submitted the following Joint Stipulation of Facts which incorporates by reference the below-listed Exhibits in lieu of an evidentiary hearing and agree as follows:

BACKGROUND

1. Parent [redacted] (Parent) is the mother of [redacted]. (Student).

2. The Student was born on [redacted] and is [redacted] years old.
3. Charter School was a charter school chartered by the School District of Philadelphia until approximately June 30, 2016.
4. The Pennsylvania Department of Education (PDE) is Pennsylvania's State Education Agency (SEA) under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. § 1400 *et seq.* See 20 U.S.C. § 1401(32).
5. PDE receives federal IDEA grant funds.
6. While it operated as a charter school, the Charter School was a Local Education Agency (LEA) under the IDEA. See 20 U.S.C. § 1401(19).
7. While it operated as a charter school, Charter School received federal financial assistance, including in the form of federal IDEA grant funds.
8. The Student was identified with intellectual disability (mild), specific learning disability in reading, mathematics, and likely writing, and emotional disturbance, as those terms are defined in the IDEA.
9. As a result of the Student's disabilities Student was eligible for special education services pursuant to the IDEA.
10. At all times relevant, from September 2013 through June 2016, the Student was enrolled in Charter School.
11. At all times relevant, Charter School was Student's LEA.
12. The Student began attending Charter School in or around September 2012, when the Student was in sixth grade.
13. Student's current LEA is the School District [redacted].
14. On April 13, 2017, after Charter School closed, Parent filed a due process complaint with the Office for Dispute Resolution (ODR) against Charter School and PDE.
15. ODR bifurcated the due process complaint assigning separate docket numbers to Charter School (docketed at 19055-16-17KE) and PDE (docketed at 19056-16-17KE).
16. On May 1, 2017, PDE filed an answer to the due process complaint docketed at 19056-16-17KE.
17. As the SEA, PDE has general supervisory obligations related to an LEA's implementation of the IDEA and is responsible for ensuring that eligible students receive a free and appropriate public education (FAPE). 20 U.S.C. § 1412(a)(11).

18. Parent contends that Charter School is unable to provide any compensatory education remedy to Student due to Charter School's closure.
19. PDE does not dispute that Charter School is unable to provide any compensatory education remedy to Student.
20. Pursuant to the IDEA, PDE, as the SEA, is required to provide educational services owed to a student when it determines that an LEA is unable or unwilling to provide educational services to which a student is entitled. 20 U.S.C. § 1413(g).
21. PDE investigated and determined Charter School failed to provide Student with FAPE for the time period of September 15, 2014, through June 22, 2016, and Student was owed compensatory education. Prior to the closure of Charter School, PDE was unaware of any denial of FAPE by Charter School to Student.
22. In resolution of this matter, the parties agree that Student is owed \$135,200 of compensatory education due to Charter School's violations of the IDEA.
23. PDE will make available to Student compensatory education services Charter School owes to Student due to Charter School's failure to provide FAPE to Student.
24. The Parties agree that the compensatory education may be used by Parent in her sole discretion, so long as: (1) The provider of the services is properly credentialed, licensed, or certified; (2) compensatory education is used for services that occurred on or after October 7, 2016 (the date PDE originally informed Parent of available compensatory education); and (3) The services take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of Student's current or future IEP's, remediate past denials of FAPE, or overcome the effects of Student's disability. If Student is enrolled in a public school, "compensatory education" includes services provided outside of the regular school day which supplement services included in Student's public school IEP.
25. Examples of permissible uses of compensatory education funds include but are not limited to the following:
 - a. Educational or remedial instruction programs, including tutoring, courses, private school, after-school programs, summer and winter break programs;
 - b. Related services as that term is defined by the IDEA and its implementing regulations;
 - c. Evaluations and assessments by appropriately credentialed individuals, including, but not limited to, psychoeducational assessments, functional behavior assessments, vocational assessments, related services assessments, transitional assessments, and neuropsychological assessments as permitted by the IDEA;
 - d. Behavioral therapy, training, or education provided by Board Certified Behavior

Analysts (“BCBA”) or Board Certified Assistant Behavior Analysts (“BCABA”) or providers under the authority and supervision of a BCBA or BCABA, such as an Applied Behavior Specialist, or by qualified behavioral specialists, therapeutic support staff, personal care assistants, or licensed or appropriately accredited providers, schools, or programs;

- e. Transition services and planning, as defined by the IDEA, including services that instruct the Student in skills needed for employment, post-secondary education, or independent living, including but not limited to apprenticeships;
- f. Services of appropriately credentialed professional educators to assist in devising Student’s educational program, and identifying/selecting appropriate assistive technology devices;
- g. Parent training;
- h. Transportation costs to the provider of services for which reimbursement is due, including but not limited to public transportation and transportation at the then-applicable Commonwealth of Pennsylvania’s reimbursement rate when such transportation is provided by the Parent or the Student to travel to and from a provider providing compensatory education services as described herein;
- i. Materials, services, and equipment as that term is defined by the IDEA and its implementing regulations, that further the goals of Student's current or future IEPs or private school education plans or will assist Student in overcoming the effects of Student’s disabilities, as identified in evaluation report(s) prepared by an appropriately credentialed professional, Student’s IEP, or an education plan developed by a private school, including supporting the development of skills in Science, Technology, Engineering, Art, and Math (“STEAM”), improving Student’s social, fine or gross motor, behavioral, adaptive and language skills, or preparing Student for employment or independent living;
- j. Private, parent-selected educational placements and equipment or activity fees for nonacademic and extracurricular services and activities as defined by 34 C.F.R. § 300.107(b);
- k. Assistive technology as that term is defined by the IDEA and its implementing regulations, including computers, printers, tablets, and educational software; and
- l. Nonacademic and extracurricular activities designed to assist Student with improving social skills, behavior, furthering the transitional programming or otherwise overcoming the effects of Student’s disability as related to the provision of FAPE for Student.

26. The Parties agree that compensatory education services do not include any of the following:

- a. Multiple purchases of computers, printers, tablets unless there is at least a three-year lapse in time between purchases or the item to be replaced is antiquated;

- b. activities intended for personal enrichment;
- c. leisure travel;
- d. living expenses;
- e. food;
- f. clothing;
- g. costs incurred for sole purposes of entertainment, including but not limited to, attendance at amusement parks, movies, and vacations;
- h. video game systems such as PlayStation and X-Box;
- i. legal services, attorney's fees, or litigation costs; and,
- j. services which have no educational purpose or which are not permissible under the IDEA.

27. The following documents, now Exhibits, are hereby incorporated by reference and admitted into the record by stipulation:

- Exhibit 1: IEP dated January 4, 2016.
- Exhibit 2: IEP dated February 23, 2016.
- Exhibit 3: Fact-Finding Report (including cover letter) dated June 1, 2017.
- Exhibit 4: Psychoeducational Evaluation Report dated April 12, 2017.
- Exhibit 5: Compensatory Education Letter dated September 21, 2017.
- Exhibit 6: State Complaint Form from Parent dated August 10, 2016
- Exhibit 7: Complaint Investigation Report (including cover letter) dated October 7, 2016
- Exhibit 8: Request for Reconsideration dated October 14, 2016
- Exhibit 9: PDE Response to Request for Reconsideration dated November 7, 2016.

Discussion and Analysis

Jurisdiction

In light of the specificity set forth in the unique set of Stipulated Facts, initially I must determine the authority, if any, of an administrative hearing officer, in Pennsylvania, under the IDEA to enter what amounts to be a stipulated consent order. The Parties, in the Stipulation, reached what is tantamount to a settlement agreement without participating in a fact-finding due process proceeding. It is axiomatic that the parties cannot vest a hearing officer with jurisdiction absent an active dispute.

The IDEA provides that either Party may file a due process complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education” 20 USC §1415(b)(6)(a). The hearing officer has an independent duty and responsibility to raise any question of hearing officer jurisdiction when it arises. *Id.* Moreover, in a subsection entitled “Limitations on Hearings”, the IDEA requires that the decision of a hearing officer “shall be made on substantive grounds based on a determination

of whether the child received a free appropriate public education.” 20 U.S.C. §1415(f)(3)(E)(i). Thus, the IDEA clearly limits the jurisdiction of a hearing officer to substantive matters involving whether or not the Student was deprived of a FAPE. Moreover, the IDEA specifically provides that appeals or action on settlement agreements, reached as a result of alternative dispute methods such as either directed or informal mediation or resolution meetings, lie in state or federal court. 20 U.S.C. §1415(e)(2)(F)(iii), 20 U.S.C. §1415(f)(1)(B)(iii)(II). This language, by not including the administrative mechanism, clearly contemplates that agreements reached between the parties are private agreements, subject to judicially enforceable, rather than administratively enforceable, agreements.

In the present matter, the Parent asks that I enter an Order, directing PDE to fund the Student’s compensatory education award, although the Parties have reached an agreement that was later reduced to writing and then jointly executed by the Parties (Stip. pp.1-28). Recently, in *West Chester Area Sch. Dist. v. A.M.*, 164 A.3d 620 (Pa. Commw. Ct. June 16, 2017) the Commonwealth Court endorsed a two-pronged approach to resolving the denial of FAPE disputes that include settlement agreements. First, the hearing officer is charged with making a determination if the parties reached an agreement. *Id.* Second, the hearing officer must make a factual finding if the agreement impacts the Parents' pending complaint. *A.M.* at 263 n.9 (quoting *J.K.*, 833 F.Supp.2d at 449).⁵ I construe the Court’s holding in *A.W.* now applies to the Parent’s request here for an Order confirming the agreed upon compensatory education relief.

This hearing officer now finds that the Parties reached a “settlement agreement” covering all of the Student’s denial of FAPE claims against the Charter School and/or PDE acting as the SEA. I now find, that the “settlement agreement” addresses all of the alleged substantive violations and includes necessary appropriate relief that resolves the Student’s denial of FAPE claims. Therefore, I find the Stipulation Agreement includes the necessary elements of a make-whole compensatory education plan.

The Stipulation Agreement provides the Parent with the sole discretion to select the compensatory education service provider(s) and clearly provides examples of what type of compensatory education services are necessary to compensate the Student for the past denial of FAPE. The Stipulation provides specific guidance as to what is not included in the compensatory education plan. Therefore, the Stipulation Agreement renders fact-finding by this hearing officer

⁵ "[H]earing officers 'may acknowledge the existence of settlement agreements and consider them in determining whether a child has received a free and appropriate public education.' Thus, a hearing officer could decide that in light of all the circumstances, including the Waiver Agreement, the education provided to Student during the 2015-2016 school year met the requirements of the IDEA. Conversely, a hearing officer could decide that despite the Waiver Agreement, other arrangements for Student were required by the law. Once a hearing officer has resolved all outstanding issues, an aggrieved party may appeal to this Court. As part of an appeal, a party, may seek enforcement from this Court." *AM* at 633-634. *But see, Region 13 Bd. of Educ.*, 64 IDELR 87 (SEA CT 2013) (declining to make a legal determination on a parent's breach-of-contract claim because the IDEA only allows IHOs presiding over due process hearings to decide "matters relating to the identification, evaluation, or educational placement of the child, or the provision of [FAPE] to such child").

regarding the alleged denial of FAPE and appropriate relief a perfunctory advisory opinion. I find that absent a substantive issue; I no longer have jurisdiction over the otherwise resolved dispute. 20 U.S.C. §1415(f)(3)(E)(i).

The Pennsylvania Special Education Dispute Resolution Manual, at Sections 408 provides as follows

408. Settlement by the Parties A. If the parties have reached a settlement of some or all of the issues raised in the due process complaint, the party who filed the complaint should notify the hearing officer, in writing, with a copy to the other party. B. If the parties have reached a settlement of some of the issues raised in the due process complaint, the hearing will proceed on the remaining issues. The hearing officer will ordinarily clarify at the next hearing session what issues remain in dispute. C. If the parties have reached a settlement of all of the issues raised in the due process complaint, and have advised the hearing officer of this, the hearing officer will close the case, notifying the parties and the ODR case manager. D. Hearing officers **do not approve or disapprove settlements between parties**. E. Settlement agreements, like other contracts, are enforceable in a court of competent jurisdiction. (Emphasis added).

After studying the Stipulations, the multiple exhibits, and the Parties' closing statements, in light of Section 408, I now find that consistent with Section 408 of the Pennsylvania Special Education Dispute Resolution Manual, the Parties reached an agreement on all of the substantive and procedural issue(s) in dispute before the hearing officer. The IDEA encourages alternative dispute resolution and recognizes the potential high cost of traditional dispute resolution procedures. *See* 71 Fed. Reg. 46,701 (2006). The IDEA allows the parties to determine the format of the resolution session. 71 Fed. Reg. 46,701 (2006).⁶ Accordingly, I now find that the parties reached an agreement using a variety of formal and informal dispute resolution procedures. I also find that absent a substantive issue I no longer have jurisdiction over the privately resolved dispute.

⁶ *See, T.L. v. Pennsylvania Leadership Charter Sch.*, 69 IDELR 67 (E.D. Pa. 2016) (stating that while settlement agreements finalized within the 30-day resolution period may be enforced in federal court under the IDEA, agreements finalized outside of the 30-day resolution period are considered "private settlements" that may only be enforced through a breach-of-contract claim under state law).

Conclusion

The Parties through the Stipulations have entered into a binding, legally enforceable settlement agreement within the meaning of the IDEA. The agreement does not impact the Student's current program and placement. The agreement resolves all matters in dispute about the Student's FAPE claims. Because the Parties entered into an enforceable agreement, this hearing officer no longer has jurisdiction. Consistent with the guidance found at Section 408, of the Pennsylvania Special Education Dispute Resolution Manual, I am closing the file.

ORDER

And now this 17th day, of January 2018, by entering the final Order, and after finding that the Parties have reached an enforceable agreement, the case is now closed and jurisdiction is relinquished.

Date: January 26, 2018

Charles W. Jelley, Esq.
Charles W. Jelley, Esq.
ODR FILE # 19055-1617 KE
ODR FILE # 19056-1617 KE

Notice of Appeal

The Notice of Appeal of this Decision and Final Order were provided and attached to the email forwarding the Decision to the Parties.