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Pennsylvania Special Education Hearing Officer

Final Decision and Order

OPEN HEARING

ODR File Number: 19160 16 17

Child's Name: C. C.

Date of Birth: [redacted]

Date of Hearing:

8/31/17

Parent(s):

[redacted]

Counsel for the Parents

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Hearing Officer: William F. Culleton, Jr., Esq., CHO

Date of Decision: 10/9/17

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ is enrolled currently in a private school, placed there by the respondent charter school (Charter). Student was enrolled in the Charter for Student's kindergarten, first grade and second grade school terms. In November 2016, the Charter placed Student in a private school, where Student was being educated as of the last day of hearing in this matter.² Student is identified with Speech and Language Impairment and Autism pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA).

Parent requests due process, asserting that the Charter failed to offer or provide Student with a free appropriate public education (FAPE) while Student was enrolled, contrary to the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)³. Parent asserts that the Student was not afforded an Individualized Education Program (IEP) during part of kindergarten; that the Charter offered an inappropriate IEP and failed to implement it appropriately at all relevant times; and that as a result, Parent and family members had to attend Student in the classroom on numerous occasions to deal with Student's behaviors that impeded education. Parent requests an order that the Charter provide Student with compensatory education for the relevant period. The Charter asserts that it has offered and provided a FAPE at all times.

¹ Student, Parent and the respondent Charter are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.

² Based upon the parties' stipulations and the exhibits presented to me and admitted into evidence, I conclude that this will be the relevant period of time for purposes of this matter. Parent's counsel appeared to limit the claims to November 2016 (NT 6), when Student entered the private school. Nevertheless, counsel also argued that the Charter continued to deny Student a FAPE after that because it failed to offer an IEP. Therefore, I have included Student's entire second grade year in the relevant period.

³ The parties stipulate that Student is otherwise qualified within the meaning of section 504 and that the Charter receives federal funds. Stipulated Facts/ CH/ ODR #19160-16-17 (Received August 29, 2017) Nos. 2 and 3 (hereinafter, "Stip. ____"). The parties' stipulations are admitted into evidence as Exhibit CH.

The parties stipulated to the facts and to the documents to be considered as evidence in this matter. (Stip. 1 through 19; Exhibit CH.) The hearing consisted of oral summations by counsel after the stipulations and exhibits were filed. The stipulations and all exhibits are admitted into evidence, and my findings are based upon them. I have considered and weighed all of the evidence of record. I conclude that the Charter failed to offer and provide a FAPE to Student during the relevant period.

ISSUES

1. During the relevant period of time -- from the first day of school in Student's kindergarten year to the last day of school in Student's second grade year -- did the Charter offer and provide a FAPE to Student in compliance with the IDEA and section 504?
2. During the relevant period, did the Charter fail to provide Student with appropriate classroom supports for behavior, making it necessary for Parent and family members to attend Student in the classroom in order to control Student's behavior so as to allow Student an opportunity to access the curriculum?
3. Should the hearing officer order the Charter to provide Student with compensatory education on account of all or any part of the relevant period?

FINDINGS OF FACT

1. Student is enrolled in a private school, placed there by the Charter, which at all relevant times was Student's local education agency for purposes of the IDEA and section 504. Student is in second grade and was placed in full-time autistic support by the Charter in November 2016. (Stip. 1, 16, 17.)

STUDENT'S HISTORY AND CHARTER'S KNOWLEDGE OF IT

2. The Charter has classified Student under the (IDEA) as a child with the disabilities of Speech or Language Impairment and Autism. (Stip. 6.)
3. As of October 2013, Student demonstrated some age-appropriate cognitive, gross motor and adaptive skills. (J 2.)

4. As of October 2013, Student demonstrated some age-appropriate social and emotional skills. However, Student engaged in power struggles with adults to get Student's way, and had problems following multiple-step directions. Student had difficulty transitioning from one activity to another. (J 2.)
5. In the early intervention classroom, Student demonstrated speech or language problems including difficulty expressing wants and saying yes and no. Student also demonstrated significant difficulties maintaining attention, tantrums and frustration in school. (J 1, 2.)
6. Student received early intervention services at least from age three, including special instruction in preschool, occupational therapy and speech and language therapy. (Stip. 7; J 1.)
7. Student received an early intervention IEP in October 2012, and a second annual early intervention IEP in October 2013. (J 2.)
8. Student's early intervention IEPs provided goals and modifications to address Student's adaptive, social, fine motor, and gross motor deficits, as well as Student's inability to follow directions and answer increasingly complex questions. (J 2.)
9. The Charter received Student's early intervention IEP at the time of registering Student for kindergarten. The Charter was aware that Student was a child with a disability and was aware of or on notice of Student's history and behaviors in early intervention classroom settings, as well as the educational needs that had been addressed in early intervention. (Stip. 8.)

STUDENT'S KINDERGARTEN YEAR (2014/2015 SCHOOL YEAR)

10. The Charter implemented at least part of Student's then-current early intervention IEP from the beginning of Student's kindergarten year. The pendent early intervention revised IEP was expected to be implemented until October 10, 2014. Student's annual IEP review was due on that date. (Stip. 8.)
11. Student's transition to kindergarten was difficult and in September 2014, Student developed aggressive behaviors not previously seen, including daily meltdowns or tantrums, as well as hitting and threatening to hit both peers and adults. (J 1, 5.)
12. In kindergarten, Student displayed sensitivity and defensiveness to loud sounds and to choral responses in the classroom. This sensitivity caused increased anxiety. (J 1.)
13. From the beginning of Student's kindergarten year at the Charter, Student demonstrated difficulty in following directions and maintaining attention to task. Student was able to follow directions when Student could take cues from peers to know what to do. (J 1, 3, 5.)
14. From the beginning of kindergarten, Student displayed limited interaction and communication. Student's social skills were not age appropriate. Student demonstrated difficulty initiating and maintaining eye contact, playing cooperatively with peers, and engaging in conversation. (J 3, 5.)

15. In the first six weeks of kindergarten, Student also demonstrated needs for clear expectations, visual supports, social skills development, emotional regulation skills development and a system of positive behavior intervention. Student also could have benefitted from one-to-one attending in the classroom to redirect Student away from distractors. (J 1.)
16. Student benefitted from one-to-one and small group instruction in kindergarten. (J 5.)
17. The Charter failed to conduct an annual IEP review on or before October 10, 2014. (Stip. 10; J 2, 5.)
18. On or before October 28, 2014, Parent provided a private evaluation report to the Charter. The report diagnosed Student with Autism Spectrum Disorder and stated that Student needed modifications including clear expectations, visual supports, social skills development, emotional regulation skills development and a system of positive behavior intervention. Student also could have benefitted from one-to-one attending in the classroom to redirect Student away from distractors. (J 1.)
19. The October 2014 private evaluation report recommended the provision of positive behavioral support; speech and language therapy; occupational therapy both for sensory needs and for handwriting; explicit social skills training; visual supports, checklists and social stories; modified pairing with peers for group classroom assignments; and dependable routine and classroom structure, including picture schedule; and supports for attention during wait time. (J 1.)
20. On October 28, 2014, the Charter referred Student for a speech and language evaluation and an occupational therapy evaluation. Parent consented to these evaluations. (Stip. 9.)
21. On December 3, 2014, the Charter received the report of the occupational therapy evaluation. The evaluator found that Student's strength was normal and Student's fine motor skills were in the average range. Student's visual perceptual skills were in the low range, but the score was provided with caution due to difficulties with attention and the need for frequent prompting to maintain attention to task. The report also noted that Student often looked to peers in order to understand classroom directions, and utilized a stuffed animal for sensory purposes. The report recommended one session of occupational therapy per month, either consultative or direct, to monitor Student's handwriting and sensory needs. (Stip. 9; J 4.)
22. On December 17, 2014, the Charter received the report of the speech and language evaluation. The evaluator found that Student was struggling with a severe language disorder, with deficits in receptive, expressive and pragmatic language. Receptive language deficits impeded Student's ability to understand and follow directions. Expressive deficits included a lack of age-appropriate vocabulary and inability to formulate sentences beyond one word utterances. Student was unable to engage in age-appropriate conversation, or ask and answer questions. (Stip. 9; J 3.)
23. The December 2014 speech and language evaluation report recommended weekly speech and language sessions with repetition, positive reinforcement, simplified directions, visual aids for directions and expectations, breaks and redirection of attention. It recommended

that classroom teaching be modified to help Student generalize skills learned in speech and language sessions. (Stip. 9; J 3.)

24. After the Charter received the December 2014 occupational therapy and speech/language evaluations, the Charter referred Student for an educational evaluation. The Charter produced an initial Evaluation Report on January 21, 2015. (Stip. 10; J 5.)
25. The January 2015 Evaluation Report classified Student with Autism and Speech and Language Impairment. It found Student eligible for special education. It noted wide variation in cognitive skills, with very low overall cognitive scores; however, it noted that Student's scores were significantly impacted by difficulties with attention to task, and concluded that Student's overall cognitive ability may be higher than indicated by the test scores. It also confirmed that Student's verbal skills were very low, with limited receptive and conversational skills. (J 5.)
26. The report identified the need for a placement and specially designed instruction to address Student's significantly limited language and communication abilities, and Student's inability to function independently in the classroom. It recommended specially designed instruction including individualized and small group instruction; individualized directions; preferential seating; pairing with a peer to model appropriate social behavior; instruction in social skills and reciprocal communication; multisensory communication and prompting; breaks and calm-down areas; avoiding distractions; support for transitions; modified instructional techniques using hands-on activities; modified activities to emphasize listening comprehension; chunking of assignments; and acquiring Student's attention before giving directions. (J 5.)
27. The Charter convened an IEP team meeting on January 21, 2015. The team offered an IEP that placed Student in itinerant speech and language support, with all instruction located in the general education classroom, including push-in speech/language and occupational therapy services. It offered speech and language therapy once per week, and occupational therapy once per month. (J 6.)
28. The January 21, 2015 IEP offered the modifications recommended in the December 2014 speech and language evaluation. (J 3, 6.)
29. The January 21, 2015 IEP did not explicitly offer monitoring of Student's handwriting and sensory needs as recommended in the December 2014 occupational therapy evaluation, although it did recommend occupational therapy push-in services. (J 4, 6.)
30. On February 20, 2015, the IEP team modified the January 2015 IEP to add the results and recommended modifications from the January 21, 2015 Evaluation Report, and to offer eight goals to address understanding of words and word relationships; describing actions through sentences; following two-step directions; asking and answering questions; and handwriting. Four of these goals addressed handwriting. Four of the goals were measureable. (J 6.)
31. The revised January 2015 IEP did not provide for teaching by a special education teacher or consultation with a special education teacher by general education teachers. (J 6.)

32. Student's inappropriate behaviors included temper tantrums. Because of these tantrums, Student required close adult supervision in school and in the classroom. These behaviors continued for the remainder of the school year. (Stip.14.)
33. During Student's kindergarten year, the Charter did not provide Student with a Positive Behavior Support Plan, nor did it conduct an evaluation of Student's behaviors through a Functional Behavior Assessment (FBA). (Stip. 13.)

STUDENT'S FIRST GRADE YEAR (2015/2016 SCHOOL YEAR)

34. Student continued to exhibit tantrums throughout Student's first grade year. (Stip. 14.)
35. The Charter was unable to address Student's behaviors appropriately. (Stip. 14, 15.)
36. Student needed a trained para-educator or aide to attend Student one-to-one during the entire school day in order to redirect Student to support Student's attention to task, and in order to help bring Student's behavior under control. The Charter did not provide these services. (Stip. 14, 15; J 5.)
37. Parent and Student's grandparent felt the need to attend Student in the classroom on a substantial number of occasions because the Charter was unable to control Student's behaviors. Neither Parent nor Student's grandparent were compensated for providing this attending service. (Stip. 14, 15.)
38. During Student's first grade year, the Charter did not provide Student with a Positive Behavior Support Plan, nor did it conduct an evaluation of Student's behaviors through a Functional Behavior Assessment. (Stip. 13, 14.)

STUDENT'S SECOND GRADE YEAR (2016-2017 SCHOOL YEAR)

39. At the beginning of Student's second grade year, the Charter recognized that Student needed a private school placement. Parent visited several private schools, finding a placement agreeable to both parties on or before October 10, 2016. (Stip. 16.)
40. On October 17, 2016, the Charter issued a NOREP placing Student in full time autistic support for the remainder of the school year and locating the placement at the agreed-upon private school. Parent approved the NOREP on October 20, 2016, and Student began school at the private school in November 2016. (Stip. 17; J 7.)
41. The Charter did not update Student's IEP during Student's second grade year. Thus, the Charter did not address all of Student's educational needs in second grade through an IEP. (Stip. 18, 19.)
42. Student's placement in the private school is appropriate. (Stip. 19.)

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.⁴ 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 evidence⁵ 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 of the evidence in support of Parent’s claim, or if the evidence is in “equipoise”, the Parent cannot prevail under the IDEA.

⁴ 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).

⁵ 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.

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 Charters 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 appropriate services in light of the child’s individual circumstances. Andrew F. v. Douglas County Sch. Dist., RE-1, ___ U.S. ___, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “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 Charter 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). In appropriate circumstances, a Charter that meets this Third Circuit standard also can satisfy the Andrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

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 LEA] is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Andrew F., 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); 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.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Andrew F., 137 S. Ct. above at 999; 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.) The program's 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 [LEA] 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).

Applying these standards to the above findings and the record as a whole, I conclude that the Charter has failed to offer or provide Student with an educational program that was appropriate in view of Student's circumstances during the relevant period. It failed to offer or provide a program that could be expected to confer meaningful educational benefit upon Student, in view of Student's unique learning style and needs.

STUDENT'S KINDERGARTEN YEAR

As Student entered kindergarten, Student presented as a child with complex learning needs, low cognitive ability according to standardized tests, and significant delays in language

development and social behavior. The evidence is preponderant that these difficulties and the educational need to address them were apparent to the Charter from Student's first day of kindergarten. Student had a history of speech and language impairment, significant attention difficulties, and severe behavioral outbursts. Teachers' experiences with Student in the classroom confirmed that Student's attention, language and behavioral deficits were impeding Student's ability to benefit from the Charter's kindergarten program. By late October, the Charter was on notice (from the private evaluation that Parent had obtained) that Student had been diagnosed medically with Autism and that Student's speech and language impairment was significant. On this record, it is clear that the Charter was obligated to take timely action to increase the supports for Student beyond those that it was already providing.

The evidence is preponderant that the Charter chose to initiate further evaluation of Student, even though Student came to the Charter with an IEP. This in itself was not unreasonable on this record. However, I conclude that the Charter failed to implement this decision appropriately, because it failed to provide a comprehensive evaluation reasonably calculated to address all of Student's suspected disabilities. See 34 C.F.R. §300.304(c)(6).

Instead of initiating a comprehensive psychoeducational evaluation 60 or fewer days after Student's first day of kindergarten, the Charter decided in October to contract for more limited speech and language and occupational therapy evaluations first. Upon receipt of these limited evaluations some weeks later, the Charter contracted for the more complete educational evaluation that it should have initiated much earlier in Student's tenure; this entire process delayed the receipt of a comprehensive evaluation until January 21, 2015. I conclude that, by deciding on this two-step process of evaluation, the Charter extended the period of evaluation unnecessarily and inappropriately.

This two-step process is inconsistent with the practice in most local educational agencies, in this hearing officer's experience. Most agencies initiate a comprehensive psychoeducational evaluation, supplemented with ancillary speech/language and occupational therapy evaluations. There is nothing in this record to indicate why the Charter chose to evaluate in the opposite order, and no appropriate rationale comes to the mind of this hearing officer. Thus, without any attempt by the Charter to explain why it adopted such a facially inappropriate methodology, I conclude by a preponderance of the evidence that this order of assessment was inappropriate.

The evidence is preponderant also that, even with the new IEP that the Charter offered in January 2015, Student's known needs were not addressed adequately or appropriately. First of all, the previous IEP had lapsed by October, and the Charter failed to convene a timely IEP team meeting. Secondly, the services offered were inadequate. While evaluation reports emphasized the need for small group instruction, Student was placed in itinerant learning support with weekly push-in sessions of speech and language therapy. By no reasonable construction of the term can this be considered small group instruction of the kind called for in the evaluation reports.

Student's placement in general education full time with nothing more than an hour per week of push-in services raises an inference that the Student was being instructed by a regular education teacher – not by a certified special education teacher, during all but one hour per week. Nothing in the IEP or the record as a whole suggests otherwise. The IEP eventually was revised in February 2015 to include modifications called for in the various evaluation reports; however, without any suggestion that these were being implemented by a special education teacher, there is no inference that the IEP was implemented with fidelity. Given the plain inadequacy of the placement in light of Student's circumstances of severe language disorder and Autism, the preponderance of the evidence is that the IEP was inappropriate.

STUDENT'S FIRST GRADE YEAR

Similarly, the evidence is preponderant that the Charter continued to fail to address all of Student's educational needs appropriately in first grade. The evidence for this grade is that the inadequate placement continued throughout first grade. Moreover, there is preponderant evidence that Student needed much more intensive supports in view of Student's continuing tantrum behavior, and the Charter's inability to control it. There was no re-assessment of Student in view of this ongoing difficulty; the Charter did not even conduct an FBA. There was no Positive Behavior Intervention Plan. The only intervention came from Student's Parent and Grandparent, who sat in on classes sometimes to try to redirect Student and control Student's behavior. This is preponderant evidence of a denial of FAPE in first grade.

STUDENT'S SECOND GRADE YEAR

Finally, at the outset of second grade, the Charter recognized that Student needed a full time autistic support program that it was not providing. Since it was unable to provide such a program in its facilities and with its staffing, the Charter agreed to place Student in a private school, and it did so in November 2016, after a few weeks during which parent investigated private schools and found one that both parties could agree upon. Yet, the Charter made no revisions to its IEP to reflect the dramatic change in Student's placement and services. I conclude this failure was a procedural failure; however, there is insufficient evidence to support a conclusion that the procedural deficit created a substantive denial of FAPE.

SECTION 504 VIOLATION

I conclude that the Charter, by failing to provide a FAPE as defined in the IDEA, also failed to provide Student with appropriate services and accommodations to meet Student's individual needs as adequately as the needs of non-handicapped children in the Charter are met. 34 C.F.R. §104.33(b)(1). In this case, noncompliance with the IDEA is preponderant evidence that the Charter also failed to comply with section 504. 34 C.F.R. §104.33(b)(2).

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). Recently, the Third Circuit embraced the "make whole" approach in G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015)(child deprived of FAPE entitled to be made whole).

In this matter, the evidence preponderates in favor of the conclusion that the Charter denied Student a FAPE during the relevant period until Student's placement in the private school. However, there is no evidence that would permit a "make-whole" approach to remedy in this matter. Thus, I cannot attempt to devine the educational path that Student would have taken with appropriate supports, nor the Student's present deviation from that path. There is no evidence as to any of those considerations.

I can conclude, nevertheless, that the Charter failed to provide Student with a reasonable opportunity to benefit from the opportunity to learn emotional self-regulation, behavior control, and social skills. There is evidence that these areas were in severe deficit throughout the relevant period. I conclude that the equitable way to address this is to order the Charter to provide Student with compensatory education to address that proportion of educational services that ordinarily constitute the emotional/ behavioral/ social component of education in Pennsylvania. In the first three grades, this proportion varies. Experience shows that the emphasis in kindergarten is primarily on such skills, but in first and second grades, the emphasis shifts to academic skills, with still a significant goal of teaching emotional, behavioral and social skills.

I conclude that an equitable approach would be to order compensatory education in the amount of 75% of the school hours that Student would have received in kindergarten, and 25% of the hours that Student would have received in first and second grade, up to and including Student's last day at the Charter's school building in November 2016⁶. I discount these time periods to account for a reasonable rectification period, which I conclude should end sixty days after the Student's first day of kindergarten.

CONCLUSION

I conclude that the Charter failed to provide Student with a FAPE during the relevant period. Accordingly I order equitable relief in the form of compensatory education services.

⁶ This will be calculated based upon the school hours reported in the Penn Data section of the Student's IEP (7 hours per day). (J 6 p. 41.)

ORDER

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

1. The Charter shall provide compensatory education to Student in the amount of 5.25 hours for every school day during the 2014-2015 school term on which it was open to receive students, beginning sixty days after the first day of school in that school year.
2. The Charter shall provide compensatory education to Student in the amount of 1.75 hours for every school day during the 2015-2016 school term on which it was open to receive students.
3. The Charter shall provide compensatory education to Student in the amount of one 1.75 hours for every school day during the 2016-2017 school term on which it was open to receive students, during the period from the first day of school to the last day on which Student attended school at the Charter.
4. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parent, and may be provided at any time, including after school hours, on weekends, or during summer months when convenient for Student or Parent. Such services may be provided to Student until Student reaches twenty-one years of age.
5. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.
6. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service within any of the following counties in Pennsylvania or New Jersey: Philadelphia, Bucks, Montgomery, Chester, Delaware, Burlington, Camden or Gloucester.

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

William F. Culleton, Jr. Esq.

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

DATED: October 9, 2017