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 HEARING
ODR File Number: 19204 16 17

Child's Name: K. L.

Date of Birth: [redacted]

Dates of Hearing:
09/01/17

Parent:
[redacted]

Counsel for Parent
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Hearing Officer:
Cathy A. Skidmore, M.Ed., J.D., Certified Hearing Official

Date of Decision:
09/18/17

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)[1] is a mid-teenaged student who formerly attended the Propel Charter Schools (School). During the relevant time period, Student was eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)[2] as a child with Specific Learning Disabilities. The parties previously litigated a Due Process Complaint filed by the Parent against the School that resulted in a decision in May 2015. The hearing officer at that time concluded that Student was denied a free appropriate public education (FAPE), but no relief was requested or ordered. The Parent now seeks compensatory education as a remedy for the School's denial of FAPE from the date of that decision through the end of the 2014-15 school year when Student dis-enrolled from the School. The School denies that any relief is warranted. A brief single session hearing convened at which two witnesses testified and several documents were submitted.[3]

For the reasons set forth below, the Parent's claim will be granted in part and denied in part.

[1] In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.
[2] 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 711.1 – 711.62.
[3] References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

ISSUES

1. Whether the School had any obligation to revise Student's IEP following the issuance of the May 2015 hearing officer's decision;

2. Whether the School denied Student FAPE from May 13, 2015 to the end of the 2014-15 school year; and

3. If Student was denied FAPE, whether Student is entitled to compensatory education?

FINDINGS OF FACT

1. Student is a mid-teenaged student who was enrolled in the School for the entire 2014-15 school year. Student was not enrolled in the School after the 2014-15 school year ended. (N.T. 25-26, 53; S-3)

2. Student was eligible for special education during the 2014-15 school year, seventh grade, under the IDEA classification of specific learning disabilities. (P-1 p. 11, P-2 p. 8)

3. An Individualized Education Program (IEP) was developed in July 2014 for the upcoming school year, with a Positive Behavior Support Plan (PBSP) developed in August 2014. (P-1, P-2 pp. 7-8, P-3)

4. Student engaged in problematic behaviors during the 2014-15 school year. (N.T. 55-59; P-2)

5. Student was placed in an alternative education setting (AES) in December 2014, and the parties agreed that Student would remain in the AES through the end of the 2014-15 school year. (N.T. 32, 64-65, 69-70; P-2 p. 11)

6. No new evaluation of Student, including a Functional Behavioral Assessment (FBA), occurred after the removal to the AES. (N.T. 33, 38-39, 66)

7. In May 2015, Hearing Officer McElligott issued a decision that found that the School did not offer Student an appropriate program with respect to behavioral and social skill needs, and that the IEP and PBSP were flawed in those respects. (P-2)[4]

8. Hearing Officer McElligott did not order any remedy for the FAPE denial because the parties had stipulated that no relief was requested. (P-2 p. 14; S-2)

[4] *K.L. v. Propel Charter Schools*, 15604-1415AS (McElligott, May 12, 2015).

9. The School did not convene Student's IEP team or revise the IEP or PBSP after the May 2015 decision. The School understood that the Parent intended to withdraw Student from the School; in addition, the May 2015 decision was issued shortly before the end of the 2014-15 school year, and Student was still attending the AES. (N.T. 30, 40-41, 48-49, 67)

10. Counsel for the School contacted counsel for the Parent approximately one week after the May 12, 2015 decision to ascertain whether Student would be returning to the School in the fall of 2015. (S-3)

11. The 2014-15 school year at the AES ended on June 4, 2015. (N.T. 70)

12. Counsel for the Parent confirmed in late June that Student would withdraw from the school, and Student did withdraw. (N.T. 42; S-3)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution* (*Quakertown*

Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found both witnesses to be credible, and their testimony was essentially consistent with respect to the actions not taken following the May 2015 decision. All of the testimony and the content of each admitted exhibit were considered in issuing this decision, as were the parties' closing arguments.

IDEA PRINCIPLES

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to students who qualify for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE through implementation of a program that is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). The U.S. Supreme Court recently explained that, "the IDEA demands … an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 1001, 197 L.Ed.2d 335, 352 (2017). This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.

Charter schools in Pennsylvania are public schools, and required to comply with applicable laws including the IDEA. 24 P.S. § 17-1703-A; 22 Pa. Code §§ 711.1 – 711.62. The School fully acknowledged its special education obligations to Student.

THE PARTIES' CLAIMS

The preliminary issue presented here is whether the School should have taken any action following receipt of the May 2015 decision. As noted, Hearing Officer McElligott concluded that Student's July 2014 IEP and August 2014 PBSP were not appropriate for Student at the time they were created. Regardless of whether the School was required to take steps to convene a meeting of Student's IEP team to revise those documents at that time, it is clear that the flawed IEP and PBSP remained in effect and that the denial of FAPE found by Hearing Officer McElligott continued from May 13, 2015 to June 4, 2015. This hearing officer cannot conclude, as a matter of law, that the School must be excused from its obligation to provide FAPE to Student merely because the timeline for appealing the decision extended beyond the end of the 2014-15 school year.[5]

Turning to the requested remedy, it is important to note that the denial of FAPE was not merely procedural. "The content of an IEP as such does not implicate the IDEA's procedural requirements for content is concerned with the IEP's substance, i.e., whether the IEP 'reasonably [is] calculated to enable to enable the child to receive educational benefits.'" *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010). However, relevant case law also provides that,

> a [local educational agency (LEA)] that knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis* educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but

[5] The School's Motion to Dismiss on this basis was denied. (HO-1)

> excluding the time reasonably required for the [LEA] to rectify the problem. We believe that this formula harmonizes the interests of the child, who is entitled to a free appropriate education under IDEA, with those of the [LEA], to whom special education and compensatory education is quite costly.

M.C. ex rel. J.C. v. Central Regional School District, 81 F.3d 389, 397 (3d Cir. 1996). Such an award typically compensates the child for the period of time of deprivation of educational services. *Id*. Application of *M.C.* has typically been viewed as an hour for hour remedy. The Third Circuit has recently endorsed a different approach, sometimes described as a "make whole" remedy, where the award of compensatory education is designed "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

One major difficulty in this case is the brevity of the record that lacks any evidence from which one may ascertain whether and how the AES was implementing the inappropriate IEP and PBSP for the final, at most sixteen, school days of the 2014-15 school year.[6] There was no testimony or documentary evidence of Student's behaviors, nor any indication if and when Student might have been provided with social skills interventions, during the short time period in question. (*See* P-2 pp. 12-14 (describing the flaws in the IEP and PBSP.)) Thus, it is impossible to determine the extent to which, if at all, Student's program was substantively impacted for that short time period such that any compensatory education could be equitably determined under

[6] This hearing officer takes notice of the weekdays and federal holidays during the relevant timeframe in May and June of 2015.

either the hour for hour or make whole approach. The claim for compensatory education has therefore not been established.

In any event, the School was entitled to a reasonable period of time after the May 2015 decision to convene a meeting of Student's IEP team, including the Parent; indeed, the School could not have simply begun implementing revisions to the IEP and PBSP without participation of the Parent at a meeting that was scheduled at a time that was reasonably convenient for her to attend. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.321, 300.322. The School was not even able to confirm whether Student would return in the fall of 2015 until several weeks after the 2014-15 school year ended at the AES, suggesting that communication between the parties was strained and not ongoing. Thus, even if one determined that no period of reasonable rectification was necessary since the School had opportunities throughout the 2014-15 school year to recognize flaws in Student's program and to correct them, this hearing officer concludes that there was simply an insufficient amount of time to convene a team meeting after the May 12, 2015 decision and reach a consensus on necessary revisions to the IEP and PBSP for implementation through the few days remaining in the 2014-15 school year.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that Student's FAPE denial continued through the end of the 2014-15 school year, but that no compensatory education is due.

ORDER

AND NOW, this 18th day of September, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the School's program for the end of the 2014-15 school year remained inappropriate for Student, but the School is not ordered to take any action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

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Cathy A. Skidmore
HEARING OFFICER
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