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 Due Process Hearing Officer

Final Decision and Order
ODR No. 21128-18-19
OPEN HEARING

Child's Name:
Z.G.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
June 3, 2019

Introduction

This matter comes in the aftermath of an abusive, sexual relationship between a student (the Student) [1] and an employee of a Pennsylvania public charter school. The Student's parent (the Parent) discovered the relationship and ended it. After the Parent's discovery, three legal proceedings commenced: criminal proceedings against the employee, civil claims brought by the Parent and Student arising from the abuse, and this special education due process hearing.

After several pre-hearing orders and motions, the scope of this case was limited to disputes concerning the Student's special education rights from September 3, 2016 to August 23, 2018. More specifically, for the period from September 3, 2016 through the end of the 2016-17 school year (8th grade), the student was enrolled in a Pennsylvania public charter school (Charter School 1). For the period from the start of the 2017-18 school year (9th grade) through August 23, 2018, the Student was enrolled in a different Pennsylvania public charter school that is connected to the same company (the Charter School 2). [2]

For the entire period of time in question, the Parent alleges that Charter School 1 and Charter School 2 denied the Student a free, appropriate public education (FAPE) by failing to provide appropriate special education and related services through the Student's individualized education program (IEP). The Parent seeks compensatory education to remedy the denial of FAPE. The Parent also seeks a finding that the charter schools intentionally discriminated against the Student in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*.

Issues

The issues before me are:

1. Did Charter School 1 and Charter School 2 deny the Student a FAPE and, if so, do Charter School 1 and Charter School 2 owe the Student compensatory education?
2. Did Charter School 1 and Charter School 2 intentionally discriminate against the Student?

In their written closing statement, the Parent raises the issue of pendency, arguing that the Student must be placed at a private school at Charter School 2's expense to satisfy the IDEA's "stay put" rule. This pendency argument was raised at the outset of the hearing. I issued a pre-hearing order denying the Parent's pendency motion as moot. The Parent then moved for reconsideration. I denied the motion for reconsideration. Functionally, a portion of the Parent's

[1] I have avoided identifying information to the extent possible. [I]t is impossible to discuss those incidents without giving some clue as to the Student's identity. I advised the parties of this problem well in advance of this decision. Neither party moved to address the issue.

[2] Charter School 1 and Charter School 2 are incorporated separately, and each has its own charter. Strictly speaking, the relationship between the charter schools is not a factor in this case.

written closing statement is a second motion for reconsideration. For reasons stated below, I deny the Parent's second motion for reconsideration.

The Parent's Second Motion for Reconsideration

The Parent asks me to reconsider my pendency order, arguing that evidence submitted during the hearing compels a different result. I disagree.

The Parent's argument that Charter School 2 was the Student's local educational agency (LEA) at the time that Parent requested this hearing is not supported by preponderant evidence. The record supports a finding that personnel provided information about other charter schools at the Parent's request. However, by operation of law, Charter School 2 could not terminate its LEA status through any action of its own. Rather, Charter School 2's LEA status was terminated by the Parent's actions. The record does not support a conclusion that Charter School 2 misled the Parent and, even if it did, the law does not take intent into account when transferring LEA status upon enrolling in a different public charter school.

In addition, the Parent provided no information or argument about what specific placement or complement of services is pendent. As addressed in my pendency order, the operative placement at the time the hearing was requested will no longer accept the Student. Consequently, I deny the Parent's second motion for reconsideration.

Findings of Fact

I carefully considered the record in its entirety but make findings only as necessary to resolve the issue before me. I find as follows:

Events Prior to September 23, 2016

1. Charter School 1 is a middle school that goes through 8th grade.

2. The 2015-16 school year was the Student's 7th grade year. The Student attended Charter School 1 in 7th grade.

3. The Student received special education and related services pursuant to an IEP in 7th grade.

4. Charter School 1 reevaluated the Student and issued a re-evaluation report on April 4, 2016 (the 2016 RR). S-26.

5. Through the 2016 RR, Charter School 1 found that the Student remained IDEA-eligible as a child with Other Health Impairment (OHI). The 2016 RR recognized the Student's

medical diagnoses of Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). S-26.

6. Through the 2016 RR, Charter School 1 found that the Student exhibited externalizing behaviors including hyperactivity, aggression, and conduct problems. The 2016 RR recommends completion of a Functional Behavior Analysis (FBA). S-26.

7. Through the 2016 RR, Charter School 1 found that the Student had deficits in both reading and math. S-26.

8. While noting deficits in reading and math, through the 2016 RR, Charter School 1 found that the Student did not qualify as a student with a Specific Learning Disability (SLD).

9. On May 4, 2016, Charter School 1 offered an IEP for the Student (the 2016 IEP).

10. The 2016 IEP included reading and math goals, despite the conclusion in the 2016 RR that the Student did not qualify as a student with SLD.

11. The 2016 IEP included behavioral goals and incorporated a positive behavior support plan (PBSP).

12. Charter School 1 offered the 2016 IEP through a Notice of Recommended Educational Placement (NOREP), also dated May 4, 2016. S-27.

13. The NOREP called for the Student's placement in Itinerant Learning Support with math intervention, consistent with the 2016 IEP.

14. The Student completed the 2015-16 school year under the 2016 IEP.

15. On May 31, 2016, Charter School 1 completed an FBA of the Student. S-27.

16. The FBA noted that the Student engaged in several types of problematic behaviors, including inappropriate interactions with peers and adults, making inappropriate sexual references. The Student was rude and confrontational. The evaluator hypothesized that these behaviors were attention-seeking in nature and recommended behavioral interventions. S-27.

17. Charter School 1 did not update the Student's PBSP upon completion of the FBA. S-26.

18. The Student started the 2016-17 school year in 8th grade at Charter School 1 under the 2016 IEP, including the PBSP.

September 23, 2016 Through the End of the 2016-17 School Year (8th Grade) – Academic and Behavioral Progress

19. Charter School 1 assessed the Student's progress on IEP goals in October 2016. The assessment shows the Student's progress between the 2016 RR (April 2016) and October 2016, which includes the summer recess. S-37.

20. Based on the October 2016 assessment, the Student moved from grade level 6.0 to 6.33 on a measure of the Student's reading ability aligned to the 2016 IEP reading goal. The Student also moved from a 4.6 to 5.6 grade level on a math assessment aligned to the Student's math goal. Behaviorally, the Student had filled four (4) demerit cards and two (2) merit cards by October 2016. S-37.[3]

21. The Student's demerit cards were predominantly filled with minor but numerous infractions of Charter School 1's code of conduct. S-37.

22. Charter School 1 assessed the Student again at the end of the second marking period. At that time, the Student's math score fell from a 5.6 to a 5.2 grade level. S-37.

23. Charter School 1 assessed the Student again at the end of the third marking period (of three). At that time, the Student's math score improved from grade level 5.2 to 6.3. The Student also moved in reading from grade level 6.33 to 6.67. S-37. The Student also filled six (6) merit cards. S-37.

24. The Student received credit for all classes during the 2016-17 school year, earning all Bs and one C. S-39.

25. The Student received counseling from Charter School 1, but the Parent terminated in-school counseling services. S-26.

26. The Student was permitted to take breaks to manage emotionality and attention. These breaks were frequent but short and appeared to make the Student more amenable to instruction. *See, e.g.* NT 737.[4]

[3] I am hesitant to rely upon grade equivalency scores as a measure of progress or regression. On most standardized, normative assessments, grade equivalency scores are the least reliable metric generated by the test. In this case, however, I must rely upon the record as presented by the parties.

[4] The Student testified that Charter School 1 permitted the Student to take long breaks, during which the Student missed half of all instruction. This testimony was contradicted by the Student's teacher and contemporaneously drafted documentation. Additionally, no evidence suggests that the Student's grades were anything but earned, and those grades are not compatible with missing half of all instruction. More likely than not, the Student conflated periods of time while testifying. In this instance, I give greater weight to the teacher's testimony – even though the Student was credible overall.

27. The Student's ability to regulate the Student's own behavior improved throughout the 2016-17 school year. NT 47-48, 77, 99-100, 115-116.

28. The Student's behaviors improved during the 2016-17 school year as compared to the 2015-16 school year. During the 2016-17 school year, the Student went for longer periods of time without negative behaviors and had fewer negative behaviors overall. S-40. That improvement, however, is relative. In 7th grade, the Student had 84 disciplinary infractions. That number reduced to 76 in 8th grade. S-40. It is noteworthy that the severity of the infractions was variable both years, and so the absolute numbers say little about the type of behavior that the student exhibited. *Id*.

September 23, 2016 Through the End of the 2016-17 School Year (8th Grade) – Abuse

29. During the 2016-17 school year, Charter School 1 used a system where school deans were called (often by text message) to manage student behaviors when teachers were not able to accomplish that on their own. The same procedure was used in 7th grade.

30. One of Charter School 1's Deans (the Dean) frequently reported to the Student's classroom when the teacher would call for a dean.

31. The Student would also go to the Dean's office when taking the breaks described above, as the Student's IEP permitted the Student to seek out a "trusted adult."

32. Through this process the Dean began "grooming" the Student and ultimately initiated a sexually inappropriate relationship with the Student. *See* NT 516.[5]

33. The discovery and reporting of the relationship is detailed below. Ultimately, I take judicial notice that the Dean was found guilty of statutory sexual assault, institutional sexual assault, indecent assault against a child less than 16 years old, corruption of minors and two counts of involuntary deviate sexual intercourse of an individual less than 16 years of age.

September 23, 2016 Through the End of the 2016-17 School Year (8th Grade) – IEP Development

34. The Parent did not request, and Charter School 1 did not propose new academic or behavioral evaluations during the 2016-17 school year.

35. On February 6, 2017, Charter School 1 invited the Parent to an IEP team meeting. S-28.

[5] Broadly, "grooming" describes a process by which an abuser makes a child amiable to sexual abuse.

36. On March 10, 2017, the IEP team met. During the meeting, Charter School 1 proposed a new annual IEP for the Student (the 2017 IEP). Functionally, the 2017 IEP was a continuation of the 2016 IEP. S-30.

37. Charter School 1 proposed the 2017 IEP with a NOREP. The Parent approved the NOREP and returned it to Charter School 1 on March 30, 2017. S-29.[6]

The 2017-18 School Year (9th Grade) – Start to October 23, 2017

38. The Parent enrolled the Student in Charter School 2, which is a high school, for the 2017-18 school year (9th grade). S-39.

39. Charter School 2 received the 2017 IEP from Charter School 1 and implemented the 2017 IEP from the start of the 2017-18 school year. *See, e.g.* NT 795-798.

40. Charter School 2 assessed the Student's math and reading levels at the start of the 2017-18 school year. NT 797-798.

41. Based the assessment, Charter School 2 placed the Student in the same math intervention program that the Student received in 8th grade, and two new reading interventions (primarily targeting reading comprehension). Both reading interventions were delivered in classes with both regular education students and students with disabilities. *See, e.g.* NT 798.

42. Charter School 2 did not revise the Student's IEP when the Student was rostered into two reading intervention programs. NT *passim*.

43. As in 7th grade, the Student was permitted to take breaks, and that strategy appeared to be effective.

The 2017-18 School Year (9th Grade) – October 23, 2017 to November 2017

44. October 23, 2017 was a Monday. Either on October 23, 2017 or the preceding weekend, the Parent discovered inappropriate text messages between the Student and a Charter School 1's Dean of Students (the Dean). *See, e.g.* NT 804.

45. On October 23, 2017, the Parent came to Charter School 1 to confront the Dean, arriving at Charter School 1 with a baseball bat. NT 600-601.

46. Charter School 1 staff intervened, preventing the Parent from reaching the Dean and attempting to deescalate the situation. NT 601-602.

[6] The NOREP is dated March 3, 2017, indicating that the document was created before the IEP team meeting. The Parent's signature is not dated. Charter School 1 wrote March 20, 2017 as the receipt date on the NOREP.

47. Charter School 1 staff also called the police, and the police started an investigation into the relationship between the Dean and the Student. *See, e.g.* NT 380-381.

48. The Parent's expert, a leading psychiatrist with many years of experience, testified credibly that the abrupt end of the Student and Dean's relationship, followed by behavior on the Dean's part that the Student perceived as betrayal, was traumatic for the Student. *See* NT 502-540.

49. The Parent's expert also testified that the Student's improved behavior during 8th grade was likely a function of the Student trying to please the Dean. For clarity, the Parent's expert did not say or imply that the Dean's abuse was in any way good or helpful to the Student, but rather rendered a credible opinion concerning the Student's contemporaneous view of the relationship and its impact upon the Student's behaviors. *See* NT 502-540.

50. Immediately after the Parent alerted Charter School 1 to the Dean's actions, the company that connects Charter School 1 and Charter School 2 (the Charter School Company or the Company) offered specialized social work services to the Parent and Student. Shortly thereafter, the Charter School Company learned that the Student was receiving counseling from a non-profit Public Health Management Corporation (the PHMC). NT 901.

51. From this point forward, it is not clear if some communications are properly considered to be from Charter School 1, Charter School 2, or the Charter School Company. I refer to the Charter School Company whenever there is doubt. For purposes of this due process hearing, the distinction makes no difference.

52. Very shortly after October 23, 2017, the Charter School Company told the Parent that it would fund any private school placement that would accept the Student. NT 252-253, 264, 808. The Company was clear, however, that its offer to fund a private school placement was a function of [non education related matters] and not related to the Student's educational needs. *See, e.g.* NT 846-853. This process is detailed further, below.

53. At the same time, the Parent also requested Homebound Instruction for four (4) to six (6) hours per day. This request was also related to the Student's interactions with the local community after the incidents with the Dean were publicized. Charter School 2 agreed to that request on or around November 1, 2017. H-7.

The 2017-18 School Year (9th Grade) – Homebound Instruction – November 2017

54. The Student started receiving Homebound Instruction on or around November 1, 2017. H-7. Although the Parent and Charter School 2 agreed that the Student should receive four (4) to six (6) hours of instruction per day, Charter School 2 could not immediately

find an instructor to provide that amount of time, but identified an instructor who could provide two (2) to three (3) hours of instruction per day. H-7.

55. By November 3, 2017, Charter School 2 had identified an instructor who could provide four (4) to six (6) hours of instruction per day. H-6.

56. The Student began to receive four (4) to six (6) hours per day of Homebound Instruction shortly thereafter. Charter School 2 made an effort to coordinate instruction between the Student's teachers and the homebound instructor. *See* H-10.

57. The Parent and Charter School 2 met again in late November 2017. At that time, the Parent and Charter School agreed that the Student would attend another campus affiliated with the Charter School Company. This agreement halted the Student's Homebound Instruction. H-10; NT 813.

58. The Parent toured the other campus and decided against sending the Student to that campus. Thereafter, Homebound Instruction resumed for four (4) to six (6) hours per day.[7]

59. Shortly thereafter, the Parent requested that Charter School 2 terminate all Homebound Instruction. NT 819-820. This prompted another meeting between the Parent and Charter School 2. During that meeting, the Parent and Charter School 2 agreed that the Student should receive one-to-one (1:1) instruction apart from other students, but within Charter School 2. Charter School 2 immediately offered this program with door-to-door transportation.

The 2017-18 School Year (9th Grade) – 1:1 Instruction –December 2017 to February 2018

60. From December 2017 through early February 2018, the Student received 1:1 instruction in Charter School 2. The instructor coordinated with the Student's teachers to provide similar instruction to what the Student would have received in class. The Student's teachers, not the instructor, graded the Student's work. NT 825-826, 878-879.[8]

The 2017-18 School Year (9th Grade) – Return to Class and IEEs – February 2018 to May 23, 2018

61. In early February 2018, the Parent asked Charter School 2 to terminate the 1:1 instruction and return the Student to regular classes. The Parent and Charter School 2

[7] The timeline is a bit confusing, but it appears that the Parent toured the campus on November 28, 2017, and that Homebound Instruction resumed on November 29, 2017. *See,* H-8, H-10.

[8] The Student testified that the 1:1 instruction was not a productive use of time, as the instructor would direct the Student to work on a computer but would not help. I believe that this period was frustrating for the Student. The Student was back in school but was not learning with peers. At the same time, evidence of the Student's strong academic performance during this period of time was not challenged. *See, e.g.* NT 879.

agreed to return the Student but with an early dismissal, continue door-to-door transportation, and provided a 1:1 paraprofessional aide NT 827-829.

62. No changes were made to the 2017 IEP when the Student received Homebound Instruction or 1:1 instruction at school. Similarly, the 2017 IEP was not changed when the Student returned to class with the accommodations described above. Rather, Charter School 2 implemented the 2017 IEP upon the Student's return to class. NT 829.

63. On February 21, 2018, Charter School 2 sought the Parent's consent to reevaluate the Student. S-31. At this point, both parties were represented by attorneys and, via counsel, the parties agreed to an independent educational evaluation (IEE) at Charter School 2's expense in lieu of an evaluation by Charter School 2.

64. The 2017 IEP was set to expire on March 10, 2017. Via counsel, the parties agreed to extend the IEP minimally until the IEE was complete. Charter School 2 issued a NOREP to effectuate the extension on February 22, 2018. S-32.

65. The Student received an independent neuropsychological evaluation (S-34) and an independent reading and writing assessment (S-33). Charter School 2 received the neuropsychological evaluation in April 2018 (the report is dated April 1, 2018), but did not receive the reading and writing assessment until June 2018. H-14.

66. As part of the neuropsychological evaluation, the evaluator conducted an in-school observation, used standardized, normative testes to evaluate the Student's intellectual ability and academic achievement across several domains, and had adults complete rating scales to determine the Student's behavioral and executive functioning needs. S-34.

67. The neuropsychological evaluator found that the Student's intellectual ability was in the low-average range and that many of the Student's academic abilities fell below grade level expectations. However, the evaluator concluded that the Student had an "Academic Dysfluency," as opposed to any Specific Learning Disability. To address the Student's academic weaknesses, the evaluator recommended extra support and remediation in basic reading, writing, and math. The evaluator recommended that academic interventions should be provided in a small group setting with particular strategies and goals listed in the report. S-34.

68. The neuropsychological evaluator also concluded that the Student is properly diagnosed with ADHD combined type and ODD with symptoms of depression. The evaluator recommended that the Student's depression should be monitored and made recommendations to address the Student's distractibility (preferential seating, direct instruction in study skills, use of a planner, redirection, positive reinforcement, extended test time with 1:1 test administration). S-34.

69. The neuropsychological evaluator also made several recommendations to address the Student's ODD. All of those concern ways to avoid power struggles, addressing concerns in private, establishing clear classroom rules, and planning transitions. S-34.

70. The neuropsychological evaluator also recommended outside therapy and an updated psychiatric assessment to determine if the Student would benefit from medication. The neuropsychological evaluator did not recommend a new FBA in the report.

71. According to the reading and writing assessment, the Student can read independently at the 6th grade level, provided that the Student has background knowledge of the text subject. The evaluator did not draw any conclusions about a reading or writing disability, but recommended reading practice, specific strategies that may help reading compression (but not methodologies or programs), frequent writing, and keyboarding instruction. S-33.

The 2017-18 School Year (9th Grade) – DHS Involvement – May 23, 2018 Through the End of the 2017-18 School Year

72. On May 24, 2018, a DHS liaison informed Charter School 2 that the Student was placed in an emergency shelter. DHS coordinated with Charter School 2 to continue the Student's transportation to and from the shelter. H-3

73. Between May 24, 2018 and June 5, 2018, Charter School 2 and DHS exchanged emails. In that exchange, DHS instructed Charter School 2 to not share information about the Student's whereabouts with the Parent. H-3. Charter School 2 continued to provide other information to the Parent during this time. NT 292.

74. The record does not reveal when the Student left the emergency shelter and reunited with the Parent.

The 2017-18 School Year (9th Grade) – Private Placement Options

75. In November and December 2017, the Charter School Company and the Parent investigated private school options for reasons indicated above.

76. During November 2017, the Charter School Company identified four (4) private placements that it thought could be appropriate for the Student. The Parent identified an additional three (3) private placements. With the Parent's consent, the Charter School Company sent application materials including some of the Student's records to the private schools. NT 243-251.

77. On November 30, 2017, one school identified by the Charter School Company reported a positive response to the Student's application and requested additional information. S-50.

78. By December 2017, two other schools identified by the Charter School Company also sent positive responses and asked the Parent to finish the application process. The remaining private school identified by the Charter School Company sent a similar response shortly thereafter. *See, e.g.* NT 267.

79. In the same timeframe, two of the three private schools identified by the Parent refused admission to the Student. The third private school identified by the Parent ultimately refused admission as well. NT 270-271, 278.

80. The Parent took no action to complete the admission process at any of the private schools identified by the Charter School Company, thereby preventing the Student's admission to any of those schools. *See, e.g.* NT 290.

81. By February 2018, communications concerning private schools went primarily through counsel. By February 16, Charter School 2 had proposed seven (7) additional schools and sought the Parent's input. On February 22, the Parent provided a list of additional schools, and by March 5, 2018, Charter School 2 had agreed to send applications to fourteen (14) different private schools. S-50.

82. On March 16, 2018, the Parent revoked consent for Charter School 2 to communicate with or send applications to any of the private schools. Consequently, the process was never completed, and it is unknown if any of the schools would have offered admission to the Student. S-50.

83. Between March 16 and August 15, 2018, Charter School 2 approached the Parent several times to restart the private school application process. All such efforts were rejected, either because the Parent wanted to wait for the IEE or because the Parent was not ready to consider private schools. S-50.

84. On August 15, 2018, the Parent, via counsel, asked Charter School 2 to consider placing the Student at a New Jersey public school as a tuition student. As described in pre-hearing orders, Charter School 2 was amenable to the Parent's request, but only as part of a global settlement. The parties could not come to terms, the New Jersey public school was not paid, and now the New Jersey public school will not accept the Student.

The 2017-18 School Year (9th Grade) – Behavioral and Academic Progress

85. Charter School 2 issues report cards with numeric grades with a maximum of 100. The Student's lowest final grade in any subject was an 83 in 9th Grade Writing. The student earned credits to advance from 9th to 10th grade.

86. For the entire 2017-18 school year, there were nine (9) entries in the Student's discipline log including two incidents of the Student requesting peer mediation.

87. Regarding IEP goals, progress was not assessed in the first marking period, which was the time that the Parent reported the Dean. By the second marking period, the Student had reached a 7.0 (up from 6.67) grade level equivalent on reading benchmarks and a 6.3 grade level equivalent in math testing (the same as it was at the end of 8th grade).

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this case, there is no material dispute about the chronology of the underlying events, and witnesses called by both parties were consistent with each other for the most part (questions about the ultimate appropriateness of the Student's placement notwithstanding). There were a small number of instances where the testimony of one witness contradicted the testimony of another. Those conflicts are addressed above. I do not find that any witness was intentionally misleading. Rather, I find that some witnesses simply remember events differently.

Legal Principles

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'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). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Historically the Third Circuit has interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

LEAs are not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. Id. Education, however, encompasses much more than academics — as is clearly evident in this case.

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist*., 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila*., Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist*., ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist*., ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

8th Grade – Charter School 1

Charter School 1 denied the Student a FAPE from September 23, 2016 through the end of the 2016-17 School Year. That denial flows from events occurring at the end of the 2015-16 school year that were carried into the 2016-17 school year.

Charter School 1 knew during the 2015-16 school year that the Student exhibited sexually inappropriate behavior in school. The Student's behaviors were not controlled and interfered with the Student's learning and the learning of others. An FBA was necessary because the ultimate purpose of an FBA is to generate information that can be used to develop a PBSP. In this case, Charter School 1 developed a PBSP for the Student with the 2016 IEP – before 2016 FBA was complete. The PBSP did not change when the 2016 FBA was completed. Further, it is

not clear what interventions were put into place as a result of the PBSP that were not already in place before the 2016 IEP was drafted. In sum, the PBSP changed nothing in terms of what Charter School 1 was doing for the Student and was not based on an FBA.

Charter School 1 points to the Student's actual behavioral progress as evidence that its behavioral interventions were appropriate. The Student did earn more merit cards in 8th grade than in 7th grade. I also accept the testimony from the Student's teacher that the Student appeared to be more in control during 8th grade as compared to 7th grade. Looking at absolute totals, the number of behavioral incidents fell by roughly 9.5% in 8th grade. None of that constitutes meaningful progress. The Student still accrued 76 behavioral incidents. Charter School 1's responses to those incidents were "dean calls" and imposition of discipline. Setting aside that the Dean who abused the Student often answered the dean calls, Charter School 1 knew dean calls and punishments were not effective behavioral interventions for the Student. They did not work in 7th grade and they continued to not work in 8th grade. A 9.5% drop in behaviors may be meaningful for a student who acts out a few times per year. Moving from 84 incidents to 76 incidents is little more than luck, especially in the absence of an appropriate PBSP.[9]

Charter School 1 also denied the Student a FAPE by failing to address the Student's reading difficulties. The Student has never been diagnosed with a reading disability. Even so, through its own evaluation, Charter School 1 recognized that the Student was performing below expectations in both reading and math. Upon that realization, Charter School 1 put reading and math goals into the Student's IEP. To enable the Student to meet the math goal, Charter School 1 offered the Student a research-based math intervention program. Charter School 1 offered no reading program to enable the Student to meet the reading goal. It is not surprising, therefore, that the Student moved from the 5.2 to 6.3 grade level in math (more than a year's progress in a year's time) while moving from the 6.33 to 6.67 in reading (three months progress in a year's time). Charter School 1's failure to implement reading interventions after establishing a reading goal constitutes a denial of FAPE.

Charter School 1 owes the Student compensatory education to remedy the denials of FAPE. There is no preponderance of evidence in the record concerning what is required to place the Student in the position that the Student would be in but for the denial of FAPE in 8th grade. I default, therefore, to the hour-for-hour method. For reading, the calculation is straightforward. The Student should have been in a reading intervention program. Using the 8th grade math intervention program and 9th grade reading intervention programs as guides, I award the Student one hour of compensatory education for each day that Charter School 1

[9] It is chilling to consider the possibility that the Student's behavioral improvement, while not "meaningful" as that term is used in IDEA jurisprudence, may have been tied to the Student's abuse. It is also deeply troubling that Charter School 1's primary response to the Student's behaviors, both in terms of prevention (breaks) and reaction (dean calls) was to place the Student with the Dean. However, I make no finding concerning Charter School 1, Charter School 2, or the Charter School Company's knowledge of the abuse. That is an element of claims that are properly in court.

was in session during the 2016-17 school year from September 23, 2016 through the end of the 2016-17 school year.

For behavioral interventions, the calculation is complicated. I recognize that the Parent withdrew consent for in-school counseling during the 2016-17 school year, but the Student's behaviors after counseling ended are not distinguishable from the Student's behaviors while counseling was in place. Therefore, the Parent's revocation of consent for counseling is not a factor in my analysis. Moreover, the PBSP was inappropriate and ineffectual, and the actual behavioral interventions were also ineffectual on the whole. But no evidence was presented to establish what behavioral interventions would have been appropriate for the Student in 8th grade, or the amount of time those interventions would have required. With no better evidence in the records, I look to the recommendations in the independent neuropsychological evaluation as a guide, and I consider the extent to which the Student's behaviors detracted from the Student's education (going beyond academics). Given the equitable nature of compensatory education, I award an additional 1.5 hours of compensatory education for each day that Charter School 1 was in session during the 2016-17 school year from September 23, 2016 through the end of the 2016-17 school year.

9th Grade – Charter School 2

Charter School 2 denied the Student a FAPE for the entirety of the 2017-18 school year, but only in limited domains.

Functionally, the 8th grade IEP followed the Student to 9th grade. That includes the inappropriate PBSP. However, for the brief period of time that the Student attended classes with other students during 9th grade, the Student's behaviors were significantly improved.

I reject the Parent's argument that the 2017-18 behavior log is incomplete. I attribute the absence of behavioral incidents to the fact that the Student was not in school, or not in class with other students, from October 23, 2017 through early February 2018. In February 2018, the Student returned with a 1:1 paraprofessional and was dismissed early every day, giving the Student less time to commit infractions, but also greater resources to avoid infractions. The circumstances resulting in the sharp reduction of negative behaviors is tragic, but I must conclude that the Student's negative behaviors decreased.

Looking at the Student's total negative behaviors year over year gives Charter School 2 credit for something that it did not do. For the most part, the Student did not have negative behaviors in school because the Student was not in school. However, I must conclude not only that total negative behaviors decreased, but that the rate of negative behaviors while the Student was attending class with other students also sharply decreased.[10] That is the closest thing to an "apples to apples" comparison in this case, and that comparison does not

[10] There is limited but credible testimony that the Student was more reserved when coming back to class in February 2018. There is conflicting testimony about the efficacy of the 1:1 paraprofessional.

substantiate the Parent's allegation. Given that metric, I have no choice but to conclude that Charter School 2 provided appropriate behavioral interventions during the period of time in question. There is no preponderant evidence to the contrary.

Providing a 1:1 paraprofessional aide for the Student's return to class in February 2018 without revising the Student's IEP is a procedural violation of the IDEA. I reject Charter School 2's argument that providing the aide was strictly a response to the Student's community, which punished the Student for being a victim. As I have noted several times, education encompasses more than academics. If Charter School 2 concluded that Student required 1:1 paraprofessional support to successfully participate in class, that service should have been reflected in the Student's IEP.[11] No evidence establishes that Charter School 2's failure to change (or offer to change) the Student's IEP resulted in substantive harm, and so I will not award compensatory education for this procedural violation.

Regarding math, I must assess Charter School 2's offer at the time it was made. The Student was successful using the math intervention provided during 8th grade. It was reasonable for Charter School 2 to conclude that the Student would continue to be successful by continuing that intervention. The Student's ultimate stagnation in Math during 9th grade is the type of Monday morning quarterbacking that the case law above prohibits. Under more typical circumstances, regular progress monitoring might have alerted Charter School 2 to the Student's lack of progress. That, in turn, would compel Charter School 2 to reassess the calculation made when the IEP was offered. There were no such alerts in this case, likely due to the extreme circumstances and the Student's ever-changing placement. There is no preponderant evidence that the 9th grade math intervention was inappropriate at the time it was offered, or that Charter School 2 should have proposed changes to the math intervention during 9th grade.

Regarding reading, I find that Charter School 2 denied the Student a FAPE in 9th grade for reasons similar to those in 8th grade. Charter School 2 administered benchmark testing at the start of 9th grade and identified reading problems. At this point, the Student already had an IEP goal for reading. In response to the problems, Charter School 2 placed the Student into two reading intervention programs but did not update the Student's IEP. Because the reading intervention programs were not reflected in the Student's IEP, and because students without disabilities also participated in those interventions, I find that both reading interventions were regular education interventions, not specially designed instruction (SDI). Following Charter School 1's pattern in 8th grade, Charter School 2 identified a reading problem, drafted an IEP goal targeting that problem, and then provided no SDIs to enable the Student to make progress in reading. That failure is a substantive denial of FAPE.

I award the Student one hour of compensatory education for each day that Charter School 2 was in session during the 2017-18 school year to remedy Charter School 2's failure to offer an

[11] Assuming, *arguendo*, that the Parent would reject any change to the IEP at this point does not absolve Charter School 2 from offering the change.

appropriate reading program for the Student. I include the period of time that the Student received Homebound Instruction and the period of time that the Student received 1:1 instruction in school. All of the Student's other academic programs, including the math intervention, were carried over during those periods as a result of the close coordination between the Student's classroom teachers and 1:1 instructor. The record establishes that reading was not (and would not have been) any different.

Section 504 Intentional Discrimination

There is some question as to whether ODR hearing officers have authority to decide Section 504 intentional discrimination claims. ODR hearing officers have no direct authority to hear claims arising under Section 504 itself. Rather, ODR hearing officers have authority to hear claims arising under Chapter 15. For example, if a child is a protected handicapped student but not IDEA-eligible, an ODR hearing officer can resolve disputes concerning the child's Service Agreement (the plan through which regular education accommodations are provided to ensure access to the curriculum).

Having considered the issue, other Hearing Officers have concluded that ODR hearing officers have authority to hear intentional discrimination claims arising under Section 504. *See e.g. C.L. v. Mars Area Sch. Dist.,* ODR No. 16696 (2016); *C.B. v. Boyertown Area Sch. Dist.,* ODR No. 16749 (2016); *J.C. v. Greensburg Salem Sch. Dist.,* ODR 19230-1617AS (2018). There is support for this conclusion in Chapter 15 itself, which is intended to ensure complacence with Section 504. *See, e.g.* 22 Pa. Code § 15.1, relating to 34 C.F.R. Part 104. I reach the same conclusion as my colleagues.

Intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated … and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). However, "deliberate choice, rather than negligence or bureaucratic inaction" is necessary to support such a claim. *Id.* at 263.

The knowledge element was absent in *S.H.* Consequently, the Court did not go on to discuss the alleged failure to act. *Id.* More recently, the Third Circuit addressed the failure to act element in *School District of Philadelphia v. Kirsch*, 71 IDELR 123, 722 F. App'x 215 (3d Cir. 2018). In *Kirsch*, a school district did not inform parents that it had a policy of not holding IEP meetings or responding to email in the summer. Parents claimed that the school district's failure to inform them of the policy constituted deliberate indifference. The *Kirsch* court found no evidence that the failure to inform was a deliberate choice, and so it rejected the claims.[12]

As such, I must determine if Charter School 1 or Charter School 2 discriminated against the Student on the basis of the Student's disability in violation of Section 504. I must also

[12] Technically, the District Court found that there was evidence of negligence, not a deliberate choice. The Circuit Court affirmed this.

determine if the Charter School 1 or Charter School 2 acted with deliberate indifference under the standards set forth in *S.H.* and *Kirsch.*

Extreme caution is warranted here. The existence of concurrent litigation does not alter my analysis, but I am not blind to the circumstances. To my knowledge, the fact that related claims are concurrently pending in court does not divest my jurisdiction to resolve this issue. Such divestment would be completely logical, but I find no law or case on point. Consequently, I am obligated to resolve the issue before me.

The Parent's only argument concerning intentional discrimination appears in a single sentence in the Parent's written closing: "As a result of the failures to appropriately and timely program for [Student] in the least restrictive environment, [Student] was denied a FAPE and intentionally discriminated against in the response to serious sexual assault and related PTSD, bullying and harrassment [*sic*]."

The Parent's argument is misguided. Intentional discrimination is established by proof of deliberate indifference. Substantiating a FAPE claim does not, by itself, prove deliberate indifference. Rather, it is the Parent's burden to prove that Charter School 2's actions both constitute discrimination against the Student on the basis of the Student's disability and that those actions were a deliberate choice. The Parent has established neither of those elements.

Under a more generous reading, the Parent argues that Charter School 2's actions after October 23, 2017, were cruel to the Student. Setting aside the fact that cruelness (however despicable) is not the standard, the record is contrary to the Parent's argument. Upon learning of the Dean's actions, Charter School 2 demonstrated a willingness to instruct the Student in whatever placement the Parent preferred while private school applications were pending: Homebound Instruction, a different charter school campus, 1:1 instruction at school, and ultimately a return to class with a shortened day at 1:1 support. The record preponderantly establishes that all of these placements were either proposed by the Parent, or through a collaboration between the Parent and Charter School 2. More importantly, none of these placements were IEP team decisions – none had anything to do with the Student's special education needs. Rather, all of these placements represent a cooperative effort between the Parent and Charter School 2 to shield the Student from the community's reprehensible reaction to media reports about the Student and the Dean.

Further, when the Parent reported the incidents, the Charter School Company immediately offered counseling and placement in any *private* school of the Parent's choice. As with the other placements, the offer of a private school had nothing to do with the Student's special education needs. Nothing in the record establishes that the Student requires a private school placement in order to receive a FAPE. Rather, the Parent and Charter School 2 (or the Charter School Company) agreed that it would be best for the Student to have a fresh start in a school that is not connected to Charter School 1 or Charter School 2. Ultimately, Charter School 2's unwillingness to fund the Student's placement in another *public* school, proposed by the

Parent in the eleventh hour, after the Parent unilaterally prevented Charter School 2 from pursuing applications at fourteen (14) potential private schools, does not constitute discrimination – intentional or otherwise.

The Parent did not establish that Charter School 2 (or the Charter School Company) intentionally discriminated against the Student on the basis of the Student's disability.

ORDER

Now, June 3, 2019, it is hereby **ORDERED** as follows:

1. As described in the accompanying decision, Charter School 1 violated the Student's right to a FAPE from September 23, 2016 through the end of the 2016-17 school year.
2. The Student is awarded 2.5 hours of compensatory education for each day that Charter School 1 was in session during the 2016-17 school year from September 23, 2016 through the end of the 2016-17 school year.
3. As described in the accompanying decision, Charter School 2 violated the Student's right to a FAPE during the entirety of the 2017-18 school year.
4. The Student is awarded 1 hour of compensatory education for each day that Charter School 2 was in session during the 2017-18 school year.
5. The Parent may decide how the hours of compensatory education are spent within the following limitations: Compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device, purchased at or below prevailing market rates in the District's geographical area. Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP. Compensatory education shall not be used to purchase vehicles. Compensatory education shall not be used to purchase products or services that are primarily recreational in nature, or products or services that are used by persons other than the Student except for group or family therapies.
6. The Parent did not present preponderant evidence that Charter School 2 or the Charter School Company intentionally discriminated against the Student on the basis of the Student's disability.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER