

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: D.M.
ODR #2617/11-12-AS

Date of Birth:
[Redacted]

Dates of Hearing:
February 13, 2012
April 2, 2012

CLOSED HEARING

Parties to the Hearing:
Parent

Representative:
Pamela Berger, Esquire
434 Grace Street
Pittsburgh, PA 15211

Urban Pathways Charter School
914 Penn Avenue
Pittsburgh, PA 15222

Nicole Snyder, Esquire
Latsha Davis Yohe & McKenna
350 Eagleview Boulevard Suite 100
Exton, PA 19341

Date Record Closed:

April 24, 2012

Date of Decision:

May 1, 2012

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a high-school aged eligible child classified as having a specific learning disability in reading. Student attended the Charter School for the 2010-2011 school year and for the 2011-2012 school year until November 22, 2011.

The Parent filed a request for a due process hearing alleging that the Charter School denied Student a free appropriate public education [FAPE] in the areas of reading instruction, behavior management, and assistive technology and failed to follow appropriate disciplinary procedures. The Parent is requesting compensatory education.

The Charter School's position is that Student was at all times afforded FAPE and that it did follow appropriate disciplinary procedures. The Charter School maintains that no compensatory education is due.

Issues

1. Did the Charter School deny Student FAPE, specifically in the areas of reading, assistive technology and/or behavior management during all or part of the 2010-2011 school year and/or for the 2011-2012 school year up to November 22, 2011?
2. Did the Charter School fail to follow appropriate disciplinary procedures?
3. If the Charter School denied Student FAPE through substantive or procedural violations, is Student entitled to compensatory education, in what form and in what amount?

Findings of Fact

Background

1. In 2004 while enrolled in another LEA Student was identified as eligible for special education services under the classification of Specific Learning Disability. [J-1]
2. Student moved to a second school district and was reevaluated in 2007 and 2009. [NT 21; J-1]
3. From December 2009 to June 2010 Student received private one-to-one tutoring for 3 hours per day, 5 days per week; one hour was devoted to math and two hours were devoted to reading. Student's day was split between tutoring and public school. [NT 22-23]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

4. Student enrolled at the Charter School in the beginning of the 2010-2011 school year, Student's eighth grade. [J-9]

Reading

5. An evaluation performed in October 2009 with the Wechsler Intelligence Scale for Children – Fourth Edition [WISC-IV]² yielded the following results [expressed in Standard Scores³ and Percentile Ranks] for cognitive functioning: Verbal Comprehension SS 81/PR 10^{%ile}; Perceptual Reasoning SS 96/PR 39^{%ile}; Working Memory SS 94/PR 34^{%ile}; Processing Speed SS 73/PR 4^{%ile}; Full Scale SS 82/PR 12^{%ile}.⁴ [J-1]
6. In October 2009 Student's literacy achievement scores as assessed by the Woodcock Johnson III Test of Achievement [WJ IIIA] were as follows: Broad Reading SS 57/PR 0.2^{%ile}; Letter Word Identification SS 63; Reading Fluency SS 64; Story Recall SS 89; Spelling SS 77; Writing Samples SS 90; Story Recall Delayed 138. [J-1]
7. In October 2009 Student's achievement scores in reading as assessed by the Wechsler Individual Achievement Test – Second Edition [WIAT II] were: Reading Composite SS 44/PR <0.1^{%ile}; Word Reading SS 49/PR <0.1^{%ile}; Reading Comprehension SS 40/ PR <0.1^{%ile}; Pseudoword Decoding SS 67/PR 1^{%ile}. [J-1]
8. As assessed in October 2009 by the Gray Oral Reading Test for Fluency [GORT] Student's scores were as follows: Rate SS 55/PR <1^{%ile}; Accuracy SS 55/PR <1^{%ile}; Fluency [rate + accuracy] SS 55/PR <1^{%ile}; Comprehension SS 70/PR 2^{%ile}; Oral Reading quotient SS 55/PR <1^{%ile}. [J-1]
9. The evaluator from the previous LEA concluded that IEP goals should focus on, among others, increasing phonemic awareness, increasing sight-word vocabulary, increasing reading fluency skills, and increasing spelling skills. [J-1]
10. Annual goals from the IEP developed in November 2009 by the previous LEA, which the Charter School special education director testified was being implemented included: Following the course outline of a structured reading

² Student was re-administered the WISC-IV in January 2011. Scores were very similar to the previous testing which is an expected outcome for cognitive testing since cognitive ability tends to remain fairly stable. Scores for January 2011 were: Verbal Comprehension SS 83/13^{%ile}; Perceptual Reasoning SS 96/PR 39^{%ile}; Working Memory SS 94/PR 34^{%ile}; Processing Speed SS 80/PR 95^{%ile}; Full Scale SS 85/PR 16^{%ile}. [J-9]

³ Based on a "normal distribution" of scores across the population, an average Standard Score is 100 with the Average Range being 90-109. The range of 80-89 is Low Average; 70-79 is Borderline; scores of 69 and below place test-takers in the range of intellectual disability; scores of 110 to 119 are High Average, 120-129 are Superior and 130 and above are Very Superior.

⁴ Given the significant difference [one standard deviation] between verbal and non-verbal skills and between working memory and processing speed [almost one and a half standard deviations] the Full Scale score is virtually meaningless.

- program [System 44 Reading Intervention System]. Student's related Objectives were: develop phonemic and vowel awareness, increase sight vocabulary, increase fluency rate, recognize and pronounce 44 sounds and 26 letters, and decoding 2 to 3 syllable words, reading 53 words of a 3rd grade reading passage correct per minute with 97% accuracy 5 out of 7 weeks, and spelling 80% of a 20-word list correctly weekly. [J-5]
11. An Interim IEP was developed in November 2010. [NT 24-25, 51-52, 83; J-5, J-7]
 12. Although the November 2010 IEP notes "In reading [Student] continues to struggle in all areas of reading [sic]" the IEP then says "[Student's] IEP goals will focus on reading comprehension and written language". [J-7]
 13. Needs listed in the November 2010 IEP include "reading comprehension", but there are no needs identified for reading decoding, sight word acquisition or fluency. [J-7]
 14. November 2010 IEP reading goals included: "After reading various types of fiction and nonfiction on [Student's] instructional level, [Student] will be able to retell major ideas and themes on an objective assessment with 80% accuracy for 3 out of 4 opportunities during 4 nine-week periods." Progress would be monitored by curriculum based assessment, school wide assessments, class participation and homework and would be reported to the Parent by progress reports, report card and at the annual IEP meeting. [J-7]
 15. November 2010 reading goals included: "After reading various types of fiction and nonfiction on [Student's] instructional level, [Student] will be able to identify and analyze literary elements within a story including describing characters, setting, plot, theme, point of view, tone and style with 80% accuracy for 3 out of 4 opportunities during 4 nine-week periods." Progress monitoring and reporting was the same as for the previously stated goal. [J-7]
 16. Although the Reading Strategies teacher knew Student had a severe weakness in reading decoding, she testified that she did not agree that pupils of Student's age could profit from a phonics program because of embarrassment and frustration. [NT 394]
 17. In January 2011 the Charter School reevaluated Student pursuant to a signed Permission to Evaluate, and revised Student's IEP in February 2011 subsequent to the re-evaluation. [NT 66; J-9, J-16]
 18. In January 2011 the Charter School administered only certain selected subtests from the WJ IIIA. Scores were as follows: Letter-Word Identification SS 57/PR 0.2%ile; Reading Fluency SS 64/PR 1%ile; Passage Comprehension SS 59/PR 0.3%ile; Writing Samples SS 80/PR 9%ile. [J-9]

19. The Charter School did not repeat the WIAT or the GORT. [J-9]
20. The Charter School's evaluator concluded in the January 2011 evaluation:
[Student] is performing significantly below what would be expected of a student of age and grade level in the areas of letter-word identification, passage comprehension and reading fluency [15 points or more difference between overall ability level and achievement scores]." [J-9]
21. The IEP was revised on February 3, 2011. Among the needs included were letter-word identification, passage comprehension and developing reading strategies. [J-16]
22. A February 2011 IEP reading goal is identical to that in the November 2010 IEP: "After reading various types of fiction and nonfiction on [Student's] instructional level, [Student] will be able to retell major ideas and themes on an objective assessment" however the expected accuracy rate was dropped from 80% to 75% . [J-16]
23. Another February 2011 reading goal was identical to a previous goal from November 2010: "After reading various types of fiction and nonfiction on [Student's] instructional level, [Student] will be able to identify and analyze literary elements within a story including describing characters, setting, plot, theme, point of view, tone and style" but again the target accuracy rate was dropped from 80% accuracy to 75% accuracy. [J-16]
24. The director of special education testified that the Charter School was implementing the IEP from the previous LEA, asserting that they were using the reading program in the former IEP, System 44 Reading Intervention Program, but "it's the program that we implemented with [Student] but did not call it the same program". [NT 71, 73]
25. Asked if the Charter School was using a specific reading program, the director of special education replied, "Successful Reader was one of the programs" and later, "We used Plato, which is a computerized program" and later, "And there was a program – I can't remember off the top of my head if it's STAR Reader, but that's how we tested to see if [Student] was growing throughout the class". [NT 71-72]
26. Successful Reader was a regular education intervention. [NT 76-77]
27. In answer to the question of whether there was progress monitoring on Successful Reader, Plato or STAR the director of special education testified, "I do have the MAPP test. MAPP test is what we used. She is not here. I don't have her paperwork to say the growth. There was growth in the classroom but I don't particularly have it right here to show you." [NT 72]

28. Asked if Student was successful at the 70% specified in the IEP, the director of special education replied, "I do know that [Student] was successful but I don't know if that was a consistent 70". [NT 72]
29. The director of special education testified that she didn't have running records for last year, and did not provide precise data of progress. [NT 74-75]
30. The director of education testified that the MAP test was used, among other things, to measure progress, but said that it "narrowed down strengths and weaknesses...where the needs are and where we target". [NT99]
31. The special education teacher who was in charge of progress monitoring testified that she did progress monitoring on areas such as phonics but it was not reflected on the IEP and that she had "purged" Student's progress data. [NT 405]
32. The director of special education testified that to work on Student's basic reading skills, in English the pupils read various novels, that Student had high interest-low level books, that Student had flashcards. She stated, "There is a number of things it involved. It wasn't one particular program that we used". [NT 86]
33. The Charter School purchased a phonics-based program, Reading Horizons, specifically for use with Student in an after school tutoring program to begin in November 2010. [NT 351-355]
34. Student did not participate in the after school Reading Horizons tutoring despite repeated attempts on the Charter School's part to engage Student; Student also did not participate in summer tutoring programs that were offered. The Charter School did not offer to implement Reading Horizons during the school day. [NT 307, 352-353; 425]
35. After school tutoring is not addressed in Student's November 2011 IEP.⁵ [NT30-31; J-7]
36. Although Student was not found eligible for ESY services, Student was offered a regular education summer program. Student went to summer school the first day but because Student did not arrive in uniform Charter School staff sent Student home. Student was discouraged and did not go back. [NT 31-32]
37. Summer school and ESY eligibility is not provided in the IEP.⁶ [J-7]

Assistive Technology

38. The evaluator from the previous LEA recommended that Student have books on tape or CD so that Student could read along with the audio version of the book. [J-1]

⁵ Stipulation by LEA counsel. NT 30-31.

⁶ Stipulation by LEA counsel. NT 31-32

39. Neither the November 2010 IEP nor the February 2011 IEP provides for assistive technology to enable Student to access textbooks and age/grade appropriate literature. There is no specially designed instruction in the form of modified textbooks for science and social studies, audio recordings of textbooks or literature assignments, or any type of “reader pen” or other device to assist with accessing written grade-level materials in the general education curriculum. [J-7, J-16]
40. The director of special education seemed to recall that including an assistive technology evaluation in the re-evaluation was “talked about” but it was decided that it wasn’t necessary. [NT 100]
41. The director of special education testified that the Charter School did have textbooks for computer and there was the “opportunity” to download these, but does not know if the Parent was told about this or not. Students had the opportunity to download if they asked or were asked to do this. There was no testimony about Student specifically. [NT 93-94, 120-121]
42. The possible availability of text books on tape or on the computer was not written into Student’s IEP. [NT 93]
43. The Parent purchased reading materials, CDs and headphones for use on the computer at home, to help Student with reading. These materials did not come from the Charter School or the tutoring center. [NT 41-42]

Behavior Management

44. The IEP from the previous LEA notes that Student’s areas of behavioral needs are “in the area of peer interactions and reading social situations.” [J-1]
45. Upon enrollment in the Charter School Student was placed into regular education classes. [NT 24]
46. At some point between entering the Charter School and the November IEP date, possibly early in the school year, Student was placed into a Learning Support setting but Student regressed behaviorally. Student was throwing tantrums and not following directives. The team subsequently concluded that the LRE for Student would be Full Time Itinerant Learning Support. [NT 27, 78-82, 106-107; J-7]
47. On the IEP of November 2010 the box “No” is checked after the question “Does the student exhibit behaviors that impede his/her learning or that of others?” [J-7]

48. Needs identified in the November 2010 IEP include: “coping skills when angry/frustrated” and the IEP states that Student’s change in behavior needs to be addressed. [J-7]
49. On the IEP of February 2011 the box “No” is again checked after the question “Does the student exhibit behaviors that impede his/her learning or that of others?” [J-7]
50. A Need identified in the February 2011 IEP is “attending school regularly”. [J-16]
51. Student exhibited significant attendance issues during the 2010-2011 school year, accumulating a total of 47 absences, thus missing over 25% of the total school year⁷. The Parent testified that Student “just didn’t want to come [to school]”. [NT 28, 400-401; J-16, S-25]
52. On progress reports the Charter School noted that Student’s absences were affecting the rate of progress. Although attendance issues had an adverse educational impact, the Charter School had no behavior plan for Student, but dealt with the issue only with phone calls and letters home to the Parent. [NT 95-96]
53. The director of special education testified that she did not think a behavior plan was necessary to address absences. [NT 101]
54. Although the Charter School had the Parent sign a release for referral for behavioral health services to be provided by an outside provider, the director of special education did not know that Student had a referral form. [NT 102-103; S-37]

Discipline

55. The Charter School’s Code of Conduct states, “Any offense can receive the suggested consequence, a lesser or a more severe consequence based on the severity and repetition of the offense and the effect that it has on others.” [HO-1]
56. Student engaged in a series of behaviors incurring disciplinary notice in October and November 2011 and reached a violation of Level III rules. [NT 169-170; HO-1]
57. Following several previous incidents of disrespect and cursing, on November 15, 2011 Student [redacted]. [NT 33; S-44, S-66, HO-3]
58. A manifestation determination meeting was convened on or about November 16, 2011. The Parent was in attendance as was the principal and other relevant school staff. The Parent recalled that the manifestation determination form was considered at the meeting. [NT 33, 145-149; S-45]

⁷ Typically a school year is 180 days.

59. The Parent testified that she didn't understand some things being discussed. She thought the meeting was an appeal of a decision to expel Student following 10 days of suspension. The Parent had learned from the principal that expulsion was being considered. [NT 34-36]
60. The conclusion reached at the manifestation determination meeting was that Student's disability, a Specific Learning Disability, did not affect Student's ability to exercise verbal self-control. The Parent signed the manifestation determination form. [S-45]
61. When she signed the manifestation determination form the Parent thought she was signing a request for an appeal of an expulsion. [NT 36-37; S-45]
62. The Parent signed a Notice of Recommended Educational Placement [NOREP] indicating her disapproval of the recommended action and wrote in that she wanted a meeting with the CEO. She understood this was the next step in an appeal process. She was not specifically informed of her right to request a due process hearing. [NT 38-39; J-17]
63. After the manifestation determination meeting, the Parent and Student were invited to a meeting with the Charter School's CEO. This meeting was designed to provide an opportunity for discussion which would then help determine whether or not expulsion would be recommended to the Charter School's Board. [NT 151-152, 182]
64. In most cases an action plan to help the student is created at the meeting with the CEO and a referral to the School's Board for expulsion does not occur since the Charter School prefers to have students remain there if possible. [NT 182-183, 193]
65. At the meeting with the CEO, a withdrawal form was on the desk. The Parent recalled being told that if Student were expelled Student would not be allowed into another school for a year. She became upset and signed the withdrawal form, writing in "I feel this is not the appropriate..." [NT 39-41, 178, 279-280; S-49]
66. The Parent believed the meeting was over, but left while a Procedural Safeguards Notice and a NOREP were being copied for her, so copies were mailed. [NT 40-41, 149, 282; J-17, S-46]
67. The Parent removed Student from the Charter School using the withdrawal form. [S-49]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in “ equipoise,” as otherwise one party’s evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parent requested this hearing and was therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. The evidence was not in equipoise as the Parent’s evidence was preponderant and therefore application of *Schaffer* was not necessary.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to 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); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). The credibility of the witnesses whose testimony was most salient in this matter is addressed as follows:

The Parent’s answers on direct and on cross examination were brief, clear and to the point. She did not embellish her responses to strengthen her case. Her demeanor conveyed candor, a desire to be exact, and respect for the hearing process. Her testimony was credible and given considerable weight.

The principal testified briefly and credibly. She said that student’s behavior was not too different from that of other pupils at the Charter School.

The director of special education presented as a good-hearted person who was interested in Student’s welfare. However, as a witness presenting the Charter School’s programming for Student she was not knowledgeable in the areas one would expect, and was imprecise about the information she did supply. Her account of what small group instruction Student received, and in what classes, and about whether or not the IEP provided for same, was both confused and confusing. [NT 88-92] She did not appear to appreciate that a measurable goal to address an identified need is required. See for example: “Q: [Student’s] needs include letter-word identification, passage comprehension? A: Uh-huh. Q: But you don’t have a goal for those, do you? A: Did not have a goal, but it was incorporated into the reading strategies, and were those being addressed? Absolutely. I’m trying to see the wording of the goals here. The

comprehension was addressed. I think the way it was written it was umbrella-ed into the goal.” [NT 92] Her testimony could be credited with very little weight regarding the Charter School’s providing an appropriate program for Student.

The Reading Strategies teacher who taught Student from February 2011 to June 2011 testified at the end of the day, and being tired may have contributed toward what I perceived as a tendency to be somewhat flippant. She said that although she did probes with Student she “purged” the data when Student left the Charter School. Her credibility was diminished when she first testified that Student’s IEP goals were not changed because Student was not making progress, and then contradicted herself to say that Student was making progress. It was also troubling that despite her having a degree in special education with a concentration in learning disabilities, and being certified as a special education teacher, she evidenced little regard for structured, research-based reading programs and instead relied on her teaching experiences to determine how to instruct Student. I could credit her testimony with little weight.

The CEO presented as being rather hurt that one of her families had requested a due process hearing. In the context of her position as founder and CEO of a school striving for excellence this presentation was understandable. I did find the CEO credible on the point of her likely intent to allow Student to return to the school had the Parent not precipitously withdrawn Student.

Legal Basis

Pennsylvania charter schools are designed to be "independent public schools." Act 22 of 1997 provides charter schools with autonomy from school districts and freedom from certain regulations. On June 8, 2001, the Charter School Services and Programs for Children with Disabilities Law,⁸ was adopted and became effective on June 9, 2001 to specify how the Commonwealth of Pennsylvania would meet its obligations to ensure that charter schools comply with their obligations to children with disabilities. Both Act 22 of 1997 and Chapter 711 require charter schools to comply with federal laws and regulations governing children with disabilities.

Special education issues are governed by the federal law, Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act. 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Once disabled children are identified as being eligible for special education services the IDEA requires the State to provide them with a “free appropriate public education” [FAPE]. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9).

An "appropriate" education "is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met.” 34 C.F.R. § 104.33(b)(1).

⁸ 22 Pa. Code §711.1 *et seq*

Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26.

LEAs provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefit", a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011)

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*.

The Third Circuit explains that while an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). 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). Citing *Carlisle*, Pennsylvania's federal court in the Eastern District noted, [LEAs] "need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit at the time it was created.

Assistive technology is "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability." 20 U.S.C. § 1401(1)(A). An LEA is required to provide a student with assistive technology if the

child's IEP Team determines that the child needs access to those devices in order to receive FAPE. 34 C.F.R. § 300.105(b).

A positive behavior support plan is a plan for students with disabilities who require specific intervention to address behavior that interferes with learning. A positive behavior support plan shall be developed by the IEP team, be based on a functional behavior assessment and become part of the student's IEP. These plans include methods that utilize positive reinforcement and other positive techniques to shape a student's behavior, ranging from the use of positive verbal statements as a reward for good behavior to specific tangible rewards. 22 Pa. Code § 711.46(b).

A manifestation determination is a procedural protection provided by the IDEA such that “within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team ... shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.... If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) ... is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E). Once a determination is made that the child's violation is a manifestation of his or her disability, the child must be returned to his or her prior educational placement unless certain special circumstances exist⁹. See 20 U.S.C. § 1415(k)(1)(F)-(G).

A procedural violation is actionable under the IDEA if it results in a loss of educational opportunity for the student or deprives parents of their right to meaningful participation in their child's education. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26, 127 S.Ct. 1994, 2001, 167 L.Ed.2d 904 (2007); *D.S. v. Bayonne Bd. of Education*, No. 08-4730, 602 F.3d 553, 564-67 (3d Cir. 2010); *C.H. v. Cape Henlopen School Dist.*, 606 F.3d 59 (3rd Cir. 2010).

The IDEA authorizes hearing officers and courts to award “such relief as the Court determines is appropriate” 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy when an LEA has failed to provide a student with FAPE Lester H. v. Gilhool, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the LEA's failure. [*Id.*]

It is the explicit obligation of the hearing officer to base hearing decisions on the substantial evidence of record and upon a determination whether the child in question received FAPE. 20 U.S.C. §1415(f)(3)(E).

⁹ Special circumstances do not exist in this case.

Findings and Discussion

The Charter School staff conveyed a sincere interest in Student and a commitment to providing an appropriate learning environment. However the Charter School failed to offer Student FAPE in several areas of inquiry addressed in this hearing: reading, behavioral intervention, and assistive technology.

Reading

IEP: First and foremost, the Charter School did not construct an appropriate IEP to address Student's significant and longstanding need in the area of reading. Despite having the IEP from the previous LEA and then performing its own testing, the Charter School did not set specific and measurable goals to address reading decoding, sight word acquisition and reading fluency.

Program: Second, in addition to not preparing an appropriate IEP, there was no evidence produced that Student was provided with a scientifically-based, systematic, multisensory reading program. Student was provided with a variety of instructional programs that were not integrated and there was no evidence that any of the programs offered the systematic step-by-step instruction that Student requires. The belief that as an eighth and ninth grader Student would acquire these basic building blocks to reading comprehension through exposure to low level-high interest reading materials as the opportunity arose was not sufficient to ensure that Student actually mastered the basics. If the staff was concerned that teaching reading basics to Student would be embarrassing, then the Charter School should have provided or procured direct one-to-one instruction for Student. Buying a reading program for Student to use after school when Student was a reluctant attendee was not practical, and unfortunately, though well-intentioned, was doomed to fail.

Progress Monitoring: There was no evidence that the Charter School conducted periodic systematic progress monitoring in Student's areas of need – decoding, sight word acquisition and fluency. Had such hard data been collected, and had it shown actual growth in reading, there may have been a reason to mitigate the Charter School's failure to provide an appropriate IEP and appropriate instruction. The Charter School's position that it conducted data collection but then purged the data did not help them establish their case.

Behavior

The Charter School was responsible for addressing Student's attendance issues through a study of the reasons behind the truancy, followed up with a positive behavior support plan to assist Student in achieving expected attendance. The behavior of truancy was affecting Student's learning, as noted in the Charter School's own progress reports. Failure to address this issue was a denial of FAPE.

I do accept the testimony of the Parent and the school staff that generally Student's in-school behaviors did not rise to the level of needing a behavior plan. By all accounts Student was not behaving very differently from the peer group at the school. When

behaviors had become unacceptable in a very short period of time, a behavior plan may have helped had the Parent allowed the Student to remain in school.

Assistive Technology

Student's cognitive testing revealed the ability to be a competent learner, but Student has been hampered by an inability to read. While Student is acquiring reading skills Student must learn material in the general education curriculum. Long before the levels of upper middle school into high school pupils are required to read to learn. Unless a student's course material is modified to the independent reading level and/or books and study materials are put onto an audio format, a pupil who cannot read will have an extraordinarily difficult time learning curriculum content. Additionally, a poor reader will in all likelihood be a poor writer when required to produce term papers; this is the type of pupil for whom speech-to-text software is designed. There are only two possibilities that could work for Student. The Charter School's failure to conduct an Assistive Technology Evaluation and/or to provide basic assistive technology constitutes a denial of FAPE. Accordingly I will order that the Charter School pay for a comprehensive Assistive Technology evaluation for Student.

Disciplinary Procedures

It was clear to me that the Charter School had the intent to allow Student to remain in the program following the meeting with the CEO. I am equally clear that the Parent had no idea that this was the intent. She took "suspension with intent to expel" literally and seriously.

I was not asked to reach a conclusion about whether or not Student's profanity and disrespect at school that culminated in the suspension with intent to expel was a manifestation of Student's disability or not, and therefore will not reach that question here. It does appear that the Parent acted impetuously at the CEO meeting, and withdrew Student from school without reflection, and unfortunately that ended the matter. Although the Parent did not seem to grasp the totality of the situation, I do not consider her a naïve Parent. She had filed for due process against another LEA, represented by her present counsel, and achieved a negotiated settlement. She certainly could have asked her former [now current] attorney to assist in this matter but did not do so.

By way of dicta, Charter Schools such as this one who pride themselves on creating a comfortable and welcoming environment may want to consider reserving "suspension with intent to expel" for only the most serious infractions, especially since the CEO made it clear that most of the time a meeting with her results in reinstatement of a pupil. I understand that it is important for the Charter School to keep standards of behavior high, particularly with regard to respect for staff, and while not completely in agreement that the threatened punishment fit Student's infraction or series of infractions I acknowledge the reasoning behind the administration's stance.

Compensatory Education

Student is entitled to compensatory education for the Charter School's failure to provide an appropriate IEP and hence FAPE in the areas of reading instruction, assistive

technology to enable access to written materials in the general education curriculum and behavior planning around attendance. It is commonly accepted that an LEA is given a 60-day period to assess what may be going wrong in a student's program and make corrections. As Student was new to the Charter School, I will do so in this case, and begin the relevant period for compensatory education on November 1, 2010. The relevant periods then are from November 1, 2010 to the last day of school in June 2011, and from the first day of school in September 2011 to the date in November 2011 that Student was withdrawn from the Charter School.

I calculate that student required 90 minutes [1.5 hours] per day of one-to-one or very small group intensive systematic scientifically-based multi-sensory reading instruction in order to make progress given Student's significant reading disorder. Student also required and was not provided with assistive technology to access written material from the general education curriculum and to express mastery of knowledge in grade-appropriate writing; I estimate that 60 minutes per day [1.0 hour] could have been spent on using assistive technology for reading social studies or science or grade-level literature in class or during homework time and composing responsive written work. Therefore Student is entitled to a total of 2.5 hours per day of compensatory education.

As the Charter School failed to consider and to set up a structured positive behavior plan to promote school attendance, I will compensate Student for this specific denial of FAPE by awarding the two-and-a-half hours [2.5 hours] of compensatory described above for each day the Charter School was in session [excluding holidays, vacation breaks, snow days, staff in-service days, etc.] during the relevant periods as opposed to the usual rubric of each day Student was in attendance. However, days Student was absent because of being suspended, including those days served prior to the Parent's withdrawing Student from the Charter School, will be excluded from the total number of days awarded.

As Student's disability centers on reading, the compensatory education hours must be used for obtaining reading instruction and assistive technology to help Student compensate for Student's significant reading disability including appropriate software for reading and composition, and/or for tutoring in any subject in the secondary school curriculum or post-secondary training program curriculum affected by student's reading disability. Student may use these hours after school in the evening, on weekends or during the summer until Student's 21st birthday. The compensatory education hours are in addition to, and may not be used to substitute for, appropriate services on Student's current and future IEPs.

Order

It is hereby ordered that:

1. The Charter School denied Student FAPE in the areas of reading, assistive technology and behavior management during the 2010-2011 school year from November 1, 2010 to the last day of the school year in June 2011, and for the 2011-2012 school year up to the date the Parent withdrew Student from the Charter School.
2. As the Charter School denied Student FAPE during the periods specified above, Student is entitled to compensatory education in the amount of two-and-one-half [2.5] hours per day for every day the Charter School was in session during these periods only excluding the days Student was absent because of suspensions.
3. As the Charter School failed to provide an assistive technology evaluation to Student, the Charter School must fund a comprehensive Assistive Technology Evaluation.
4. The Charter School did not fail to follow appropriate disciplinary procedures.

Any claims not specifically addressed by this decision and order are denied and dismissed.

May 1, 2012

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official