

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: N.K.

ODR #3293/11-12-KE

Date of Birth:
[redacted]

Date of Hearing:
July 25, 2012, 2:34 pm -8:28 pm

CLOSED HEARING

Parties to the Hearing:

Parent

Representative:

Kenneth Cooper, Esquire
45 E. City Avenue, #400
Bala Cynwyd, PA 19004

Parent

Franklin Towne Charter Elementary
4259 Richmond Street
Philadelphia, PA 19137

Timothy Gilsbach, Esquire
Fox Rothschild
10 Sentry Parkway Suite 200
Blue Bell, PA 19422

Date Record Closed:

July 25, 2012

Decision Due Date:

September 2, 2012

Date of Decision:

August 12, 2012

Hearing Officer:

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

Background

Student¹ is a pre-teen aged pupil attending Franklin Towne Charter Elementary School [Charter School]. Student is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA]² under the classification of Emotional Disturbance, and consequently is a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504],³ as well as the federal and state regulations implementing those statutes.

The IEP team has determined that Student requires placement in an Approved Private School [APS] to receive a free appropriate public education [FAPE]. The Parents⁴ maintain that the Charter School predetermined Student's placement, and further they disagree with the School's choice of the particular APS. They seek placement at another APS which they prefer.

Issues

1. Did the Franklin Towne Charter Elementary School commit a procedural violation by predetermining the proposed placement without offering the Parents meaningful participation in the process?
2. Is the APS placement at Delta offered to Student by the Franklin Towne Charter Elementary School appropriate?

Findings of Fact

1. Student is eligible for special education under the IDEA, having been classified as having an emotional disturbance. Student also has been diagnosed with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and a Learning Disability. [NT 13, 19-20]
2. Student has attended the Charter School since third grade. Because Student's behaviors had been observed to be changing the Charter School completed a reevaluation. The reevaluation report did not recommend removal from the Charter School. [NT 23, 112, 120]
3. On February 23, 2012 an IEP meeting was held and an IEP produced. The IEP called for Student to receive Supplemental Special Education Emotional Support and Learning Support at the Charter School. Student was to be with regular education peers for 77% of the school day. A Positive Behavior Support Plan was developed to aid Student particularly around transitions. [NT 112-113; CS 19]

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.

² 20 U.S.C. §§ 1400 *et seq.*

³ 29 U.S.C. § 794.

⁴ The Parents brought this case jointly and together. [NT 8-9]

4. Student's mental health case worker attended the IEP meeting regarding Student and recalled the discussion was that Student was doing well and that the Charter School had gotten into a routine with Student and staff was starting to gain trust with Student and learn Student's triggers, and were able to work with Student. [NT 69]
5. Student's regular education teacher testified that Student spent over 80% of the school day in the regular education classroom. There are 24 children in the regular education classroom where Student is assigned. The teacher testified that "there were some minor issues in the classroom nothing that I couldn't handle or our administration staff could not handle." Asked if there were issues outside the classroom the regular education teacher testified, "Yes, sometimes such as hallways, gym class, bus things like that" and noted these behaviors to be, "sometimes inappropriate comments to other students, faculty, staff, things of that nature." Student's issues are primarily during transition periods. [NT 107-108, 132]
6. Student spent about 20% of the day in the special education classroom where there are about four children. The special education teacher brings children into the classroom and he also goes into the children's regular education classrooms. Student receives reading support and some math support but Student is fairly strong in math. [NT 132]
7. Student received counseling at the Charter School on an as needed basis. Student can go for weeks with no behavioral issues and then go through a transition period when there are issues. [NT 132-133]
8. Although the Parents offered to make a private behavioral health counselor through family-based services available to come into the Charter School to provide counseling services to Student the Charter School declined because the Principal believed that the school was not the place for family-based services and there was no space for a counselor to see Student. [NT 133]
9. The idea of placing Student in an APS because of increased behavioral issues was first discussed on April 20, 2012 at the Charter School's team-based meeting attended by the Director of Special Education, the Principal, the School Psychologist, the Learning Support Teacher and the Upper Grade Academic Director. The Parents were not present at this meeting or informed of the topic addressed. [NT 144-145, 176-177, 184-185]
10. The Principal testified that "We had seen more of an aggressive tone from [Student]. Student was coming in [to the Principal] more regularly. [Student] would come in for periods of time that everything would be great for a month. Then [Student] would come in and it would be a little bit rougher week. We had seen more of that happening on a daily basis, more of a rougher start at the beginning of the day. [Student] had an incident with [the Upper Grade Academic Director] [redacted]. And the general concern with the team was that Student was progressing in terms of [Student's] aggression". [NT 143]

11. The Charter School Psychologist testified that the team “felt that [Student] would have benefitted from a smaller group setting, more structured environment and a more therapeutic environment to adjust [Student’s] behavioral needs.” [NT 113]
12. As of the April 2012 team-based meeting, Student had had two school bus incidents, both before December 2011. There was a third incident in May 2012. Student’s bus ride from home to school takes about an hour and a half, and the ride from school to home takes about the same amount of time. The bus holds 50 children and there is no bus monitor. [NT 50, 63, 97, 127; CS 13]
13. [Redacted]. [NT 126]
14. The Charter School did not make alternate transportation arrangements for Student. [NT 127]
15. The Principal agreed when testifying that the school bus incidents did not seem very serious. [NT 140]
16. Student was involved in an incident in the spring [with another student]. [NT 126]
17. There were some incidents when Student was openly defiant towards staff. [NT 126]
18. The decision to offer the APS placement specifically at the Delta School was made by the Director of Special Education and the Principal alone. Every other witness working at Charter School testified that although they agreed with the selection of Delta, they were not part of the selection of Delta, and no Charter School staff members, with the exception of the School Psychologist who went onto the Delta School’s website, had any independent knowledge of Delta other than what the Director of Special Education and the Principal provided to them. None of the other school-based IEP team members visited Delta before agreeing with the recommendation for Delta, nor had they visited any other APS. [NT 103-104, 106-109, 110-119, 124, 134-135]
19. On April 25, 2012 the Charter School’s Special Education Director sent an email to the mother asking for a meeting, writing, “We are looking to make a change to [Student]’s IEP to better meet [Student]’s needs”. The mother asked why another meeting was being requested since an IEP had just been completed in February 2012 following a re-evaluation, and asked if they could have a telephone conference instead. [NT 23-24; CS 24⁵]
20. The Charter School would not tell the mother the purpose of the proposed meeting, writing “Due to the confidential nature of [Student]’s IEP, we are requiring a face to face meeting to discuss the recommended changes”. The mother registered her puzzlement at the mention of confidentiality, since the IEP was for her own child. [NT 23-24; CS 24]

⁵ The Exhibits are marked “CS” as they were put together by the Charter School’s counsel. However, the attorneys consider these to be Joint Exhibits, a practice that is encouraged and appreciated by the hearing officers. [NT 10]

21. It was not until the mother informed the Charter School on May 2, 2012 that she had secured legal representation that the Charter School told the mother in a telephone call that day that they were looking to place Student in an APS. [NT 24; CS 24]
22. To the best of the Principal's recollection, in the telephone call he said that the Charter School felt that [Student]'s behaviors in the past couple of months had been increasing in intensity, and they thought [Student] would benefit from a more therapeutic environment, so they would like to discuss as a team a possible placement at an Approved Private School. [NT 188-189]
23. The mother was surprised that the Charter School was recommending an APS since in all other IEP meetings the Charter School was the recommended placement. [NT 33]
24. The Principal believes that the mother was pleased with the idea of a private school for Student. [NT 146]
25. In fact, the Parents did not disagree to a private school placement, and prior to the meeting agreed to requests made by the Charter School on May 3, 2012 and on May 8, 2012 to send a packet to Delta, the APS the Charter School had identified. The mother looked into other APS programs and asked the Charter School to consider those as well. [NT 25, 52; CS 22, CS 23, CS 24]
26. At the IEP meeting on May 11, 2012 the Charter School representatives reiterated the substance of the telephone call on May 2, 2012 saying that they would like to place Student in an APS, and identified Delta as that school. [NT 24-25]
27. To the best of the Director of Special Education's recollection, at the beginning of the IEP meeting on May 11, 2012 she said that "since that last [IEP] meeting in February, we have seen an increase in the amount of behaviors and the intensity of behaviors, and we would like to recommend an Approved Private School in a therapeutic environment." [NT 189]
28. At the IEP meeting on May 11, 2012 the Parents asked that at least four other APS programs be considered; among these was Wordsworth. [NT 26, 91]
29. At the IEP meeting the mental health caseworker voiced her opinion that Delta was not an appropriate placement for Student based upon her having had experiences with two other clients who had been placed at Delta and had not done well there. One of those clients was there three years ago and one is still there. She opined that Delta did not offer an appropriate level of therapeutic intervention and that the use of escorts and restraints would not be good for Student. She also reported that Delta did not seem willing to work with her on her clients' behalf. [NT 70-71, 78-79]
30. The Parents' Advocate had reportedly previously conveyed negative information to the mother about Delta. The father had heard from a Philadelphia public school principal

with whom he was acquainted in the community that a pupil at Delta had been sent there after bringing a gun onto public school property. [NT 30-31, 42, 54-56, 98-100]

31. As of May 14, 2012 the Parents had decided that they did not want Student to attend Delta. The mother reiterated her requests made prior to, during, and after the IEP meeting that other APS programs be contacted and considered. [NT 25-26, 28, 92; CS 24]
32. The mother's and the father's perception was that the Charter School was in agreement with her request that other APS programs be considered and packets sent to them as well. In an email to the mother dated May 14, 2012 the Director of Special Education wrote, "In regards [sic] to the other schools that you have suggested, I will have an update for you regarding the other schools on Thursday." [NT 26, 28, 29; CS 24]
33. Despite their reservations, because Charter School staff was going to visit Delta, the Parents agreed to visit there as well. Both Parents, Student's mental health case worker, Student, the Director of Special Education and the Principal visited Delta on May 17, 2012. At this time the Charter School had not sent packets to any other APS nor had visits to other APS programs been arranged. [NT 37-38]
34. The Parents' impressions of Delta from their hour-long visit and in particular their visit to the classroom to which Student would be assigned, were that although Delta had a friendly staff, it did not offer appropriate academics for Student, it lacked sufficient structure for Student, that the pupils that they observed were lower functioning than Student and possibly autistic, and that the other pupils had behaviors that Student would mimic. The Parents also were concerned about [redacted] at Delta. The Parents and the mental health caseworker spent about two minutes in each of three classrooms. [NT 39-41, 43-44, 59, 61, 84, 92, 94, 98]
35. Staff at Delta encouraged the Parents to look at more than just one school when deciding where they wanted their child placed. [NT 41-42, 78]
36. The mental health worker testified to her observation that aside from the receptionist, a man who worked in the field, and the owner, all the staff at Delta had changed from when she had a client there three years ago. An administrator from Delta acknowledged that there had been some problems in the past but that the school staff had changed. [NT 86, 154]
37. When he visited Delta, the Principal "was not impressed with the first classroom" they visited but "the other two seemed a little bit more focused, little bit better managed". [NT 159, 161]
38. Although Student's primary disability is emotional disturbance, the Principal had a concern about Delta's academic programming following his visit to Delta but was reassured in a phone call to the Delta principal that Delta could program for Student. [NT 158-159]

39. On May 23, 2012 the Principal sent an email to the mother informing her that the Charter School had “consulted with both our lawyers as well as a PA Department of Education Office Official in regards [sic] to our responsibilities in placing [Student] in an Approved Private School. Regarding your request for a placement at Wordsworth, the Franklin Towne team still feels that Delta has the appropriate programming in place for [Student] and has the ability to meet the goals of [Student’s] IEP.” [NT 32; CS 25]
40. Following receipt of this email the mother no longer believed that the Charter School was willing to send packets to other APS programs on behalf of Student. [NT 33]
41. The Charter School prepared a draft IEP dated June 6, 2012 and sent it home with Student for the Parents’ review prior to the IEP meeting to be held on June 11, 2012. The IEP notes that all Student’s Specially Designed Instruction would be delivered in an APS and Delta was identified as the APS. The IEP was put into final form and dated June 11, 2012. [NT 36; CS 27, CS 32]
42. At the IEP meeting on June 11, 2012 the Parents were accompanied by their attorney. The Parents asked the Charter School to send packets out to other APS programs, and Parents’ counsel offered to pay the postage. After meeting privately the Charter School IEP team members came back and said that they would not send out packets to other APS programs. [NT 44-46]
43. Part of the reason the Charter School Principal and Director of Special Education chose Delta for Student was because of the proximity of Delta to Student’s home and the distance of the bus ride. The Principal testified that they looked on the list of APS programs and “considered the closest first”. The Director of Special Education said they took the list of APS programs and looked at the programs and the location. [NT 48-49, 135-137, 188]
44. The Principal testified that the Charter School called a state “official” in the department of education dealing with charter schools to be sure that they were proceeding correctly because this was the school’s first experience in placing a child in an APS. The Principal testified that the official told him that the Charter School only had to send out one packet. [NT 137-138, 166]
45. The Charter School Principal testified that they did not investigate any APS other than Delta and did not send packets to any APS other than Delta. Later the Principal testified that they did “reach out” to Wordsworth and another APS, found that they had programs to meet Student’s needs, but there was not a certain opening for the fall. The Director of Special Education testified that she reached out to Wordsworth and another APS and were told they had no openings for April or May and “could not guarantee a spot” for fall. The Charter School did not re-contact them or send packets because Delta had accepted Student. [NT 141, 157, 179, 186]

46. Although the Director of Special Education told her there was no available space at the other APS programs in which the mother was interested, around the beginning of June the father contacted some APS programs and shortly before the hearing the mother visited Wordsworth and another APS. She learned that Wordsworth and another APS did have availability but needed Student's packet sent to them before they could make a decision about acceptance. [NT 44-45, 64]
47. The mental health case worker believes that Wordsworth would offer Student an appropriate program because of the individual and family therapeutic services offered by the social workers there. She worked at Wordsworth as a counselor in the residential component of the program. The mental health case worker is of the opinion that being at Delta would cause Student's behaviors to escalate. [NT 72, 74-75]
48. When the Parents visited Wordsworth and another APS the father noted that Wordsworth is a much larger school than Delta, and that although there were autistic children there they were in a separate section. He noted that all the children with behavioral issues were together. The father believes that Wordsworth would be a good fit for his child, and that the other APS they visited, Valley Day, would also be a good fit. [NT 93-94]
49. Among other reasons the Parents and the mental health case worker favor Wordsworth because another child in the neighborhood who is friends with Student goes there, is reportedly doing well, and Student would likely ride the bus with that child. [NT 73, 88-90]
50. Although she believes that Delta can meet Student's needs and that more than likely Wordsworth can as well, the Charter School Psychologist also believes that the Charter School has done "everything that we can to help [Student] here" and with the parents in support of what we have been doing in the school, staying at the Charter School would also be effective for Student. She believes that if everyone were working together as a team Student could stay at the Charter School. [NT 116-117]
51. The Charter School Psychologist testified and the Principal confirmed, that the Charter School does not have an emotional support classroom. The Psychologist testified that nevertheless, if a child needed it [an emotional support classroom] the Charter School would program for that child. There are a few other pupils with emotional disturbance at the Charter School. [NT 117-118, 131]
52. The Principal testified, "I think our staff has the ability to meet [Student]'s needs. My biggest concern is that [Student] has been told by the mother to behave in a certain way. If we can't get the parents together with us and work together as a team, we are not going to be successful." [NT 162]

Legal Basis

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 Parents requested this hearing and were therefore assigned the burden of persuasion pursuant to *Schaffer*, and in this matter parents accepted the burden of production even though case law does not clearly assign same to either party.

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).

Charter Schools:

The Individuals with Disabilities Education Act (IDEA) requires states to provide a "free appropriate public education" to all students who qualify for special education services.⁶ Pennsylvania implements IDEA by way of 22 Pa. Code Chapter 14. However, under the enabling Act 22 of June 12, 1997 Pennsylvania charter schools were to be autonomous "independent public schools" free from certain regulations. Thus Pennsylvania charter schools had an exemption from the special education aspects of 22 Pa. Code Chapter 14 and were simply required to comply with federal law. On June 8, 2001, the Charter School Services and Programs for Children with Disabilities Law,⁷ 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 the IDEA and its implementing regulations.⁸ Accordingly, from June 12, 1997, to June 8, 2001, Pennsylvania charter schools were governed in the area of special education under the Federal Laws. Effective June 9, 2001, 22 Pa. Code §711.1 et seq., also governs special education in Pennsylvania Charter Schools. See also, *R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F.Supp.2d 745 (E.D.Pa.2010)

⁶ 20 U.S.C. §1412.

⁷ 22 Pa. Code §711.1 et seq

⁸ 34 CFR Part 300, and Section 504 and its implementing regulations in 34 CFR Part 104

Special Education:

Having been found eligible for special education, Student therefore is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania statute, 22 Pa. Code §711.1 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; and provided in conformity with an Individualized Educational Program (IEP).

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. *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). In determining whether the LEA has offered an appropriate IEP, the proper standard is whether the proposed program is reasonably calculated to confer meaningful educational benefit. *Rowley*. "Meaningful benefit" means that an eligible student's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999).

Procedural Violations:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies:

- (I) Impeded the child's right to a free appropriate public education;
- (II) significantly impeded parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefit. 34 CFR §1415

Parental Participation:

The IDEA properly places prominent value on the role of parents in the education of their children. The introductory statement of its implementing regulations is illustrative:

Purposes.

The purposes of this part are—

- (a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living;
- (b) To ensure that the rights of children with disabilities and their parents are protected. 34 CFR § 300.1

The federal special education regulations return again and again to the matter of parents' rights to participate in decisions regarding their children.

Parent Participation. 34 CFR §300.322

Each public agency must take steps to ensure that one or both of the

parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and scheduling the meeting at a mutually agreed on time and place.

Information provided to parents. The notice required must indicate *the purpose*, time, and location of the meeting and who will be in attendance. [emphasis added]

Educational placements. 34 CFR §300.327

Each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

Parent involvement in placement decisions. 34 CFR §300.501(c)

Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

In addition to its emphasis on parental participation the IDEA through its regulations provides specific protection to a child being considered for placement in private schools:

Private school placements by public agencies. 34 CFR § 300.325

Developing IEPs. *Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child in accordance with §§300.320 and 300.324. The agency must ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls. [emphasis added]*

Impediment to FAPE and Deprivation of Educational Benefit:

Least Restrictive Environment: A plethora of case law supports IDEA's mandate that education must occur in the least restrictive environment appropriate for the individual child. An early landmark Third Circuit case on inclusion, *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993) 19 IDELR 908] counsels that the failure to consider the full range of supplementary aids and services to enable a student to be educated in regular class to the maximum extent appropriate is sufficient to establish liability for violating the mainstreaming requirement of the IDEA. "If the school has given no serious consideration to including the child in a regular class with supplementary aids and services and modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." The expectation of least restrictive environment is so rigorous that the courts have held, for example, that an LEA is prohibited from placing a child with disabilities outside of a regular education classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. If the LEA fails to offer the student a program and placement which occurs in the least restrictive environment, it has failed to offer FAPE. The two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE. *Millersburg Area School District v. Lynda T.*, 707 A.2d 572 (1998).

Pendency Legal Standard:

The language of IDEA’s pendency or “stay put” provision clearly demonstrates Congress’s intent that all handicapped children, regardless of whether their cases are meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved. The IDEA’s implementing regulation at 34 CFR §300.518(a) reads:

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

A student’s current educational placement is not defined in the IDEA or its regulations. Generally, courts have interpreted the term to mean the current education and related services and placement provided in accordance with the most recently approved IEP. *George A. v. Wallingford Swarthmore School District*, 2009 WL 2837717 (E.D. Pa.); *Drinker v. Colonial School Dist.*, 78 F.3d 859, 864 (3d Cir. 1996), The Court in *Drinker*, *supra* stated in pertinent part that the current educational placement is the IEP actually functioning when the dispute arose and “stay put” was invoked. If an IEP has been implemented, then that program’s placement will be the one subject to the stay put provision. *Drinker*, 78 F.3d at 867 (quoting *Thomas v. Cincinnati Bd. Of Ed.*, 918 F. 2d 618, 625-26 (6th Cir. 1999)

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). 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). Moreover, just as courts hearing civil actions brought to challenge a decision of a hearing officer are directed by the IDEA statute to “grant such relief as the court determines is appropriate,” the hearing officer must, at times, fashion an appropriate equitable remedy where FAPE has been denied. *See*, 20 U.S.C. §1415(i)(2)(C); *Simchick v Fairfax County School Board*, 553 F.3d 315 (4th Cir. 2009).

Discussion and Conclusions

Did the Franklin Towne Charter Elementary School commit a procedural violation by predetermining the proposed placement without offering the Parents meaningful participation in the process?

As late as the end of February 2012 following a reevaluation the Charter School issued an IEP to be implemented in the Charter School. The Parents agreed with this IEP. Two months later the school-based team discussed Student’s admittedly recent behavioral difficulties and determined that Student needed to skip two levels of restrictiveness [part time emotional support classroom, full time emotional support classroom] and be placed into an APS to receive FAPE. Charter School personnel then attempted to bring the Parents in for an IEP meeting, the purpose of which they would not disclose, in violation of 34 CFR §300.322. It was only when the mother informed the Charter School that she had retained counsel that the purpose of the meeting was disclosed. The Parents in this case are intelligent, but not conversant with the IDEA and its mandate for a child to be educated in the LRE. They heard the words “approved” and “private”

and thought that an APS would be a good thing for their child. Searching websites of APS programs did not enlighten them to the reality that their child was being considered for a very restrictive placement; neither did they question whether the Charter School had done everything possible to make its program work for Student before deciding on a significantly higher level of restrictiveness. They trusted that the Charter School was offering their child something good and did not disagree. They only asked for a place at the table when it came to decision-making about where their child's APS placement would be. They had a clear right to participate in the placement decision regarding their child, a right clearly afforded them under 34 CFR §300.327 and 34 CFR §300.501(c). The Charter School was obdurate in its refusal to send applications to other APS programs, continuing its refusal at the most recent IEP meeting and up to and including the day of the hearing. There could be no clearer case for a finding of a procedural violation that significantly impeded parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child, consistent with the language of 34 CFR §1415. The Parents have more than met their burden of proving that the Charter School predetermined Student's placement in an APS and in a particular APS. I find that the Charter School's procedural violation constituted a clear denial of FAPE to Student.

Is the APS placement at Delta offered to Student by the Franklin Towne Charter Elementary School appropriate?

The decision to place Student at an APS, and particularly at Delta, was inherently flawed given the denial of parental participation. Hence I conclude that the Delta placement is inappropriate.

However, I also find that Delta is inappropriate on a second ground, the Charter School having committed another procedural violation under 34 CFR §1415 – impeding Student's right to FAPE. The Charter School had the legal responsibility to provide Student with FAPE, and as is well-established in case law, if an LEA fails to offer the student a program and placement which occurs in the least restrictive environment, it has failed to offer FAPE, as the two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE.

There is no evidence that the Charter School made any new efforts to support Student in its program once Student began exhibiting an increase in behavior difficulty. Student is emotionally disturbed, yet the Charter School did not provide regularly scheduled counseling appointments with a qualified counselor. When the Parents offered to have a family-based clinician come into the school to work with Student the Charter School refused. Student had difficulty during transition times, yet the Charter School did not arrange to have a staff member shadow Student during these times. Student had two bus incidents prior to the decision to seek an APS placement, yet the Charter School did not make any other transportation arrangement and Student remained for a total of three hours per day on a bus with 50 children and no bus aide. The record is devoid of any effort on the part of the Charter School to implement a system of rewards and consequences to assist Student to acquire a higher level of emotional regulation.

The placement the Charter School offered to Student at Delta was inappropriate.

Order

It is hereby ordered that:

1. The Franklin Towne Charter Elementary School did commit a procedural violation by predetermining the proposed placement without offering the Parents meaningful participation in the process and by failing to consider the LRE aspect of FAPE for Student when determining that an APS placement was required.
2. The APS placement at Delta School offered to Student by the Franklin Towne Charter Elementary School is not appropriate as it was determined through a process that was significantly flawed and constituted a procedural violation against both the Parents and the Student.
3. Student is to be returned to the Franklin Towne Charter School. Prior to the start of the school year the IEP team must convene and draft an IEP and a Positive Behavior Support Plan for Student that include all the supportive services necessary for Student to make meaningful educational progress in the least restrictive environment.
4. Should the IEP team, with equal input from the Parents, decide at some future time that Student cannot be satisfactorily educated in the regular education environment with appropriate aids and services, and that Student requires a more restrictive setting in order to make meaningful educational progress, the Charter School must send packets to all APS programs in Philadelphia and the surrounding suburbs that serve children with Student's disability. If more than one APS admits Student, as an equitable remedy for the Charter School's significant procedural violation, the Parents shall make the final choice of which placement to accept.

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

August 12, 2012

Date

Linda M. Valentini, Psy.D., CHO

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