

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

Closed Hearing

Consolidated ODR File Numbers

22285-18-19

22286-18-19

Child's Name

N.M.

Date of Birth

[redacted]

Parent

[redacted]

Counsel for Parent

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Hearing Officer:

Michael J. McElligott, Esquire

Date of Decision:

05/30/2020

Introduction

This special education due process decision concerns the educational rights of N.J.M. ("student"), a student who resides in the Philadelphia School District ("District").¹ For multiple past school years, the student attended Khepera Charter School ("Khepera"), a charter school which had obtained a charter from the District under the terms of the Charter School Law (24 P.S. §§17-1701-A, *et seq*).

In December 2017, the District revoked Khepera's charter. Khepera appealed the revocation, and in December 2018 the Charter School Appeal Board affirmed the revocation. Khepera ceased operations at the conclusion of the 2018-2019 school year.

In May 2019, the parent filed special education due process complaints at these file numbers, one against Khepera and the other against the Pennsylvania Department of Education ("PDE"), the state educational agency ("SEA"), as defined under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")².

These two file numbers were formally consolidated into one hearing process. PDE, through counsel, engaged in communications and collaborative hearing planning with the hearing officer and counsel for the parent. Khepera did not retain counsel and did not engage in

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162 ("Chapter 14") although, as set forth below, the parties have largely stipulated to the record in this matter and certain citations to IDEIA statutory provisions are cited.

communications or hearing planning. Khepera has been absent from these proceedings.

Counsel for PDE and the parent requested that the hearing officer consider disposing of these matters through a stipulated record. The hearing officer agreed to consider the submission of a stipulated record, and stipulated findings of fact, whereupon PDE and the parent, through counsel, began a process of crafting those stipulations. This process took place over a long time, although counsel for the parties continually and diligently worked with each other to fashion a stipulated record. Counsel also regularly updated the undersigned hearing officer so that the status of the matter never languished or grew cold. The stipulated record and stipulated findings of fact were ultimately submitted to the hearing officer and form the basis of this decision and order.

Issues

1. Was the student denied a free appropriate public education ("FAPE")?
2. If so, is the student entitled to compensatory education and who should provide this remedy?

Findings of Fact

The findings of fact are entirely drafted by counsel for parent and PDE. This hearing officer, having reviewed the stipulations of those parties and the stipulated exhibits, accepts the stipulated findings of fact as drafted. Certain non-material aspects of the stipulations have been removed.

Additionally, certain stylistic or grammatical changes have been made. Finally, so that the parties, or a reviewing body, can be assured that the stipulated findings of fact are adopted without material changes, the parties' submitted stipulations are included in the record as Hearing Officer Exhibit

["HO"]-1. The stipulated findings of fact below do not include citations as any such citation would be uniformly to HO-1.

1. The student is [redacted].
2. The parent and PDE agree that, by reason of the student's disabilities, the student is eligible for special education and related services under the IDEIA.
3. The parent and PDE agree that the student is "disabled" under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.
4. The parent and PDE agree that the student is "otherwise qualified" to participate in school activities.
5. The student was enrolled in Khepera from the 2015-2016 school year through the 2018-2019 school year.
6. The student's parent enrolled the student in the District for the 2019-2020 school year, the student's [redacted].
7. At all times relevant to these proceedings, the student's local educational agency ("LEA"), as defined under the terms of the IDEIA, was Khepera.
8. The SEA, as defined under the terms of the IDEIA, is PDE.
9. During the 2017-2018 and 2018-2019 school years, the student was identified, under the terms of the IDEIA, as a student with specific learning disabilities in reading, writing, and mathematics.
10. At all times relevant to these proceedings, Khepera received federal financial assistance.
11. On December 14, 2017, the District revoked Khepera's charter.

12. On March 1, 2018, in response to the District's revocation of Khepera's charter, PDE sent a letter to the parents of students enrolled in Khepera to inform them of the steps that its Bureau of Special Education ("BSE") intended to take to protect their children's right to FAPE, including monitoring and addressing complaints.
13. PDE, as the SEA under the terms of IDEIA at 20 U.S.C. §1412(a)(11), is responsible for overseeing the provision of FAPE for all special education students in the Commonwealth. PDE is required to provide special education and related services directly to eligible students when their LEA is unable to establish and maintain programs of FAPE. 20 U.S.C. §1413(g).
14. On December 17, 2018, in response to Khepera's appeal of the revocation of its charter, the Charter School Appeal Board affirmed the District's revocation of Khepera's charter. Khepera did not appeal the Charter School Appeal Board's decision.
15. Khepera closed at the end of the 2018-2019 school year.
16. On May 29, 2019, the student's parent filed a special education due process complaint against Khepera, at ODR file number 22285-18-19, alleging that Khepera denied the student a FAPE during the 2017-2018 and 2018-2019 school years.
17. On the same date, the parent filed a special education due process complaint against PDE, at ODR file number 22286-18-19, alleging that Khepera denied the student a FAPE during the 2017-2018 and 2018-2019 school years. The parent further alleged that because Khepera could not meet its FAPE obligations, PDE must step in and remediate Khepera's failure to provide FAPE to the student.
18. The undersigned hearing officer consolidated into one hearing process the matters at ODR file numbers 22285-18-19 and 22286-18-19.

19. On August 1, 2019, the complaint against PDE at 22286-18-19 was amended to include additional allegations related to Khepera's denial of FAPE to the student. The two matters at 22285-18-19 and 22286-18-19 remained consolidated in one hearing process.
20. Khepera did not answer the parent's due process complaint or her amended complaint, thereby admitting that it failed to provide FAPE to the student and that it is unable to provide FAPE to the student.
21. On June 13, 2019, PDE sent a letter to the parents of students enrolled in Khepera to inform them of the steps that they must take relating to enrolling their children with a new LEA due to Khepera's closing.
22. On September 19, 2019, PDE issued a letter to the parent to inform her that the BSE at PDE had initiated a record review to determine Khepera's compliance with special education laws and regulations as it related to the student. The letter provided that, based on BSE's review of the student's special education records, BSE had determined that the student was entitled to 612 hours of compensatory education and that PDE was making that remedy available to the student.
23. On September 26, 2019, the parent, through counsel, responded to PDE's letter by contending that, *inter alia*, the student was entitled to more than 612 hours of compensatory education to remedy Khepera's denial of FAPE.

24. On April 30, 2020, PDE issued a letter to parent to inform her that, upon BSE learning new information from parent, BSE determined that the student was owed an additional 54.3 hours of compensatory education and that PDE was making available to the student a total of 666.3 hours of compensatory education. On May 1, 2020, parent, through counsel, responded to PDE's letter by contending, *inter alia*, that the student was entitled to more than 666.3 hours of compensatory education to remedy Khepera's denial of FAPE.
25. Since Khepera is closed, it has no IDEIA funding source to provide any compensatory education remedy.
26. The parent and PDE are unaware of any other funding source from which Khepera could provide any compensatory education remedy.
27. Khepera failed to provide the student with FAPE.
28. Khepera is unable to provide compensatory education to remedy its denial of FAPE to the student.
29. Khepera is unable to provide the student with FAPE.
30. PDE determined that paying for the student's compensatory education is the appropriate manner to satisfy its obligation.
31. The parent and PDE agree that PDE must pay for an independent educational evaluation of the student.
32. The parent and PDE agree that PDE must pay for 1,600 hours of compensatory education for the 2017-2018 and 2018-2019 school years.

33. The parent and PDE incorporate by reference and make part of the stipulated record in these matters, certain documents.³

Discussion

Provision of FAPE

The parent and PDE stipulate to the following conclusions of law, all of which are part of their stipulations at HO-1:

- Khepera failed to provide FAPE to the student.
- Khepera is unable to establish and maintain a program of FAPE.
- As the SEA, PDE must provide special education and related services directly to the student when their LEA is unable to establish and maintain programs for the provision of FAPE. 20 U.S.C. § 1413(g).

Khepera did not participate in the proceedings and offered no defense to the parent's complaint. Nothing in the documentary evidence presented by the parent and PDE contravenes these legal conclusions, namely that Khepera failed to provide FAPE to the student and is no position to remedy that failure. PDE stands ready, as it must under the terms of these legal conclusions, to remedy the denial of FAPE due to the closure, and defunct status, of Khepera.

³ The documents include the following, included in their entirety as part of HO-1 and in the order presented therein: Parent's May 2019 Complaint, Parent's August 2019 Amended Complaint, PDE's March 2018 Letter, PDE's June 2019 Letter, PDE's September 2019 Letter, PDE's April 2020 Letter, January 2016 ER, January 2017 IEP, January 2017 NOREP, February 2018 IEP, February 2018 NOREP, April 2019 RR, May 2019 IEP, and April 2020 private evaluation report.

Accordingly, the undersigned hearing officer finds no reason to oppose the stipulated conclusions of the parent and PDE that the student was denied FAPE by Khepera and is entitled to remedy as provided by PDE.

Compensatory Education

Where a student has been denied FAPE, compensatory education is an equitable remedy that available to the student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The parent and PDE have stipulated that Khepera is unable to provide any compensatory education to remedy the denial of FAPE to the student. PDE has determined that compensatory education is the means by which it will meet its obligations, as the SEA, to provide FAPE to the student.

The parent and PDE stipulate to the following compensatory education remedy, all of which are part of their stipulations at HO-1:

The parent and PDE agree that the student is owed 1,600 hours of compensatory education for the 2017-2018 and 2018-2019 school years. The compensatory education shall be subject to the following terms:

- A. The compensatory education may be used by the parent in her sole discretion, so long as (1) the provider of the services is properly credentialed, licensed, or certified, (2) compensatory education is used for services that occurred after the start of the 2017-2018 school year, and (3) the services take the form of appropriate developmental, remedial, or enriching instruction, or are services or materials that further the goals of the student's current or future IEPs, recommended by the

student's evaluation/reevaluation reports, remediate past denials of FAPE, or overcome the effects of the student's disabilities. If the student is enrolled in a public school, "compensatory education" includes services provided outside of the regular school day which supplement services included in the student's IEP.

- B. Examples of permissible uses of the compensatory education include but are not limited to:
- i. Educational or instructional programs, including but not limited to tutoring, courses, classes, after school programs, summer and winter break programs;
 - ii. Related services, as that term is defined by the IDEIA and its implementing regulations;
 - iii. Evaluations and assessments by appropriately credentialed individuals, including, but not limited to, psychoeducational assessments, functional behavior assessments, vocational assessments, related services assessments, transitional assessments, and neuropsychological assessments as permitted by the IDEIA;
 - iv. Behavioral therapy, training, or education provided by Board Certified Behavior Analysts (BCBA) or Board Certified Assistant Behavior Analysts (BCABA) or providers under the authority and supervision of a BCBA or BCABA, such as an Applied Behavior Specialist, or by qualified behavioral specialists, therapeutic support staff, personal care assistants,

or licensed or appropriately accredited providers, schools, or programs;

- v. Transition services and planning, as defined by the IDEIA, including services that instruct the student in skills needed for employment, post- secondary education, or independent living, including but not limited to apprenticeships;
- vi. Services of appropriately credentialed professional educators to assist in devising the student's educational program, and identifying or selecting appropriate assistive technology devices;
- vii. Parent training;
- viii. Transportation costs to the provider of services for which reimbursement is due, including but not limited to public transportation and transportation at the then-applicable Commonwealth of Pennsylvania's reimbursement rate when such transportation is provided by the parent or the student to travel to and from a provider providing compensatory education services;
- ix. Materials, services, or equipment (as "equipment" is defined by the IDEIA and its implementing regulations) that further the goals of the student's current or future IEPs or private school education or that will assist the student in overcoming the effects of the student's disabilities, as identified in evaluation report(s) prepared by an appropriately

credentialed professional, the student's IEP, or an education plan developed by a private school;

- x. Materials, services, or equipment (as "equipment" is defined by the IDEIA and its implementing regulations) that support the development of skills in Science, Technology, Engineering, Art, and Math (STEAM); improve the student's social, fine or gross motor, behavioral, adaptive and language skills; or prepare the student for employment or independent living;
- xi. Private, parent-selected educational placements and equipment or activity fees for nonacademic and extracurricular services and activities as defined by 34 C.F.R. §300.107(b);
- xii. Assistive technology, as that term is defined by the IDEIA and its implementing regulations, including computers, printers, tablets, and educational software; and
- xiii. Nonacademic and extracurricular activities designed to assist the student with improving the student's social skills, behavior, furthering transitional programming, or otherwise overcoming the effects of the student's disabilities.

C. The compensatory education may not be used for:

- i. Purchasing more than one computer, more than one printer, or more than one tablet during a three-year

period, unless the computer, printer, or tablet to be replaced is antiquated;

- ii. Activities intended for personal enrichment;
- iii. Leisure travel;
- iv. Living expenses;
- v. Food;
- vi. Clothing;
- vii. Entertainment activities, including but not limited to, attendance at amusement parks, movies, and vacations;
- viii. Video game systems such as PlayStation and X-Box;
- ix. Legal services, attorney's fees, or litigation costs;
- x. Services which have no educational purpose or which are not permissible under the IDEIA.

The hearing officer sees no equitable considerations or impediments which would interfere with making part of this decision these stipulated provisions of the compensatory education award.

Accordingly, compensatory education under these terms will be made part of this decision and order.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is awarded 1,600 hours of compensatory education. The compensatory education remedy shall be the responsibility of the Pennsylvania Department of Education and shall be governed by the provisions set forth above.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire

Special Education Hearing Officer

05/30/2020