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PENNSYLVANIA  
**SPECIAL EDUCATION HEARING OFFICER**

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ODR File Number: 7385/06-07 KE  
Student: TS  
School District: Germantown Settlement Charter School  
Type of Hearing: Open

For the Student: (Parent Pro Se)

For the Charter School: Jeffrey Williams, Interim Principal  
Germantown Settlement Charter School  
4811 Germantown Avenue  
Philadelphia, PA 19144

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Hearing Dates: March 20, April 2, May 23, June 5, 2007  
Date of Receipt of Transcript: June 13, 2007  
Decision Date: June 25, 2007  
Hearing Officer: Daniel J. Myers

## BACKGROUND

Student is a xx year old former student of the Charter School who attended the Charter School's 5<sup>th</sup> and 6<sup>th</sup> grades during the 2004-2005 and 2005-2006 school years. Student seeks compensatory education for the Charter School's alleged failure to provide a free and appropriate public education (FAPE) while he attended the Charter School. Student's parent also seeks payment of private school tuition for the 2006-2007 and 2007-2008 school years. For the reasons described below, I conclude that the Student was denied FAPE, and I award compensatory education, but I do not award payment of private school tuition.

## ISSUE

Whether or not the Charter School failed to identify, evaluate and program for student appropriately while he was enrolled at the Charter School.

## FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a thirteen year old former student of the Charter School. (CS24, p.5; CS99)<sup>1</sup>
2. Student attended public schools in [state redacted] and Philadelphia from kindergarten through 4<sup>th</sup> grades.
  - a. His kindergarten and first grade report cards indicate average academic skills but behavioral difficulties in cooperation, self-control and following classroom rules. (CS103; CS105)
  - b. In October of third grade (2002-2003), Student received two 2-day suspensions for disruption, offensive language, attempt to do injury, and repeated school violations. (CS101)
  - c. In November 2002, Student's family<sup>2</sup> apparently moved to a different residence, resulting in a transfer to another Philadelphia elementary school. (469, 253; CS112) Student's first quarter report card indicated that his poor math and reading grades placed him in danger of failing 3<sup>rd</sup> grade. (P Ex.T; CS111; CS112, p.2; N.T. 103, 473)
  - d. Within two weeks of the transfer, Student's behavior triggered an automatic school district procedure recommending immediate, professional outside help. (P Ex.S; N.T. 483-485) Student began receiving

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<sup>1</sup> References to "CS," "P Ex.," and "HO" are to the Charter School, Parent, and hearing officer exhibits, respectively. References to "N.T." are to the transcripts of the March 20, April 2, and May 23, and June 5, 2007 hearing sessions.

<sup>2</sup> Student's birth father is not involved in his life. Although Student's birth mother refers to her same-sex partner as Student's "co-parent" (N.T. 285, 298, 304, 340, 426), for purposes of this decision all references to "parent" refer only to Student's birth mother.

private counseling, which consisted of 14 individual therapy sessions between October 2003 and April 2004. (P Ex.Q; 92-93, 102-103, 181, 309, 499-500, 511)

3. In January 2003, the Philadelphia school district evaluated Student. (CS112; N.T. 473-474)
  - a. At that time, Student's teachers reported explosive temper, impulsiveness, low self-image, failure to follow directions, failure to get along with others, and one year delay in reading. (CS112, p.2)
  - b. Student's Wechsler Intelligence Scale for Children 3<sup>rd</sup> Edition (WISC-III) Verbal IQ standard score was 105, his Performance IQ was 90, and he produced a full scale IQ standard score of 97. Wechsler Individual Achievement Test (WIAT) scores were in the average range. (CS112, p.3)
  - c. Apparently because Student's academic achievement was consistent with his cognitive ability, as measured by the WISC-III and WIAT, the school district's evaluation report (ER) recommended that Student be considered non-exceptional. (N.T. 476)
  - d. The ER also recommended much structure and redirection. (CS112, p.4; CS113)
  
4. Following the January 2003 ER, Student was suspended at least once more during that school year for viciously kicking another student. (CS114) Student's end of year report card indicates that he barely passed the standards for promotion to 4<sup>th</sup> grade, and his teacher wrote that she "hope[s] he receives the supports he will need to be successful in fourth grade." (CS115)
  
5. In fourth grade (2003-2004), Student was suspended at least 6 times (17 days total) for disruption, fighting, attempting to do injury, assault on school personnel, offensive language, and repeated school violations. (CS118; CS130; CS135, CS143, CS147, CS149) On January 7, 2004 Student was hit by a car after leaving his school's extended day program. (P Ex.U; CS122; N.T. 503-504) The record also indicates disciplinary referrals for disruptive, aggressive, argumentative and fighting behaviors on January 16, 20, 28, February 2, 3, 11, 12, 13, 24, 25, March 10, 19, 30, 31, May 6, 11, and June 7, 2004. (CS119-CS121, CS123-125, CS127-129; CS131-134, CS138-CS142, CS145-CS146, CS148)
  
6. At the beginning of fifth grade, in September 2004, the Philadelphia School District ordered Student's transfer to a disciplinary school, in reaction to Student's behavior during summer school in which he threatened to hit the principal with a tree branch. (N.T. 477-480; CS155) Before the transfer became effective, Student's parent enrolled him in the Charter School. (N.T. 42, 55) Student's parent did not inform the Charter School that Student had been transferred to a disciplinary school. (N.T. 379, 526; CS24) She did inform the Charter School that Student had been suspended or expelled for fighting or disruptive behavior. (CS24, p.1; N.T. 525)

7. Not surprisingly, Student exhibited behavioral difficulties at the Charter School almost immediately. (CS29; CS32; N.T. 42, 57-58, 64, 376) By November 9, 2004, Student had already been suspended twice for 5 days total. (CS32; CS34; N.T. 70, 74)
8. On March 9, 2005, the Charter School requested permission to evaluate Student. (N.T. 339, 372, 404; CS98)
  - a. The June 1, 2005 evaluation report (ER) reported a low average range WISC-IV overall IQ standard score of 88. (CS10; N.T. 412) WIAT-II scores for reading, spelling and written expression were all either 97 or 99, which is in the average range. (CS10, p.3) The WIAT-II numerical operations standard score was 80. (CS10, p.3) Finding no discrepancy between ability and achievement, the ER concluded that Student did not have a learning disability. (N.T. 414-415)
  - b. The school psychologist conducted a classroom observation, during which Student did not respond to any discussions, seemed inattentive, and just put his head on his desk. (N.T. 411) In contrast, Student was attentive during one-to-one psychoeducational testing. (N.T. 411)
  - c. Because the March 2005 evaluation request simply listed academic concerns, and because the school psychologist did not check Student's absence or suspension records, he did not believe that there was a need for a behavioral assessment. (N.T. 407, 431, 433, 436, 440, 442)
  - d. The ER concluded that Student did not have a regulatory disability because his achievement results were commensurate with his intellectual potential. The psychologist attributed Student's failure to perform in the classroom at the level expected to some factor other than a disability. He concluded that Student was immature and needed constant attention. (N.T. 79, 300-301, 405; CS10) He recommended that Student's parent discuss with her family physician what intervention would help Student develop a more positive attitude towards school. (N.T. 416-417) At the hearing, the school psychologist acknowledged that an emotional disturbance could have affected Student's academic motivation. (N.T. 441-442)
  - e. Ultimately, the ER concluded that Student was not exceptional and that there was no need for either an IEP or Section 504 accommodation. (N.T. 416, 523-524; CS10)
9. Student's grades for fifth grade (2004-2005) were almost all 65s, which are variously characterized as either Unsatisfactory or Needs Improvement. Only 4 of 17 grades were not 65s. Teacher comments in all classes consistently indicated that Student did not complete assignments, was disruptive to others, talked in class, and hurried through work. (CS29; N.T. 389)
10. In sixth grade (2005-2006), the Charter School hired a retired state police trooper as school disciplinarian, and attempted various disciplinary strategies with all of its students. (N.T. 592, 589, 596, 630) Student developed a positive relationship with the disciplinarian. (N.T. 634) Student's constant behavior problems included

anger outbursts, flipping over furniture, banging his head on the wall, tantrumming on the floor, fighting and name-calling with other students. (N.T. 607, 630) Redirection and disciplinary strategies included removing Student to the library, meeting with the disciplinarian, referrals to the guidance counselor, sitting in a quiet chair in the library, deep breaths, and even manual labor with the disciplinarian in the teachers' lavatory while Student and the disciplinarian talked about Student's anger management problems. (N.T.106-107, 315, 599-600, 602-607, 609, 635, 640-644) Sometimes Student was sent to the classroom of the vice-principal, who has 26 years teaching experience and maintained a very structured classroom. (N.T. 660, 665)

11. During the 2005-2006 school year, Student was suspended as follows:
  - a. Two days on October 6 for disruption, misbehaving, screaming and being out of control. (CS33; CS 50)
  - b. Two days on November 1 for disruption during a fire drill and chronic disruption and defiance. (CS54)
  - c. Four days on November 29 for defiance and disrespect to a teacher and the principal. (CS14; CS61)
  - d. One day on December 14 for chronic disruption and disrespect. (CS656)
  - e. Three days on January 3, 2006, for disrespect and disrupting class. (CS68)
  - f. Ten days on January 19 for not responding to redirection and classroom disruption. (CS73)
  - g. Five days on February 23 for disrespect and classroom disruption. (CS78; CS40, p.22; N.T. 683-684)
  - h. Two days on March 29 for disruption and disrespect. (CS85)
  
12. For the same school year, Student received non-suspension disciplinary referrals as follows:
  - a. September 12, 15, 22, and 23 for fighting on the bus and disruption in computer class. (CS 43; CS44; CS46; CS47)
  - b. October 17, 25, and 26, for talking in class and not following directions. (CS51; CS52; CS53)
  - c. November 4, 15, 16, 17, 21, 23, and 29 for class disruption. (CS55-CS61)
  - d. December 5, 7, 12, and 14 for class disruption. (CS62; CS63; CS64)
  - e. January 19, 2006, for class disruption, failure to respond to redirection, and bothering female peers. (CS71; CS72)
  - f. February 9, 10 and 14 for misbehavior on bus, calling out in class, fighting with students, and disruption in lunch room. (CS74; CS75; CS77)
  - g. March 10, 14, 16, 27 and 29 for constant class disruption by calling out, screaming, not following instructions, refusing to do classwork and constant arguing with classmates. (CS79; CS80; CS81; CS82; CS83; CS84)
  - h. April 3, 4, 24, 25, 26 and 28 for class disruption, loud noises, and being rude and disrespectful to teachers. (CS86; CS87; CS88; CS89; CS90; CS91)

- i. May 1 and 15 for disrespect to staff, conflict with a student and loud disruption in class. (CS92; CS96)
- 13. On May 10, 2006 Student was beaten up at the bus stop by a non-Charter School student. (N.T. 105-106, 323-328, 343; CS94; CS95)
- 14. Student's final grades for 6<sup>th</sup> grade were Fs in math and computers, Ds in language arts, social studies, and drama, and a C in science. (CS15)
- 15. Student did not reenroll at the Charter School for his 7<sup>th</sup> grade, 2006-2007, school year. (N.T. 532-534) Instead, Student began attending the private [redacted] School. (N.T. 98; CS38)
  - a. Private School has 16 students in its combined 7<sup>th</sup>/8<sup>th</sup> grade. (N.T. 228, 264) It offers small class sizes of 6-12 students. (N.T. 195-196, 202, 211) It has social workers on staff to meet students' social and emotional needs. (N.T. 202) Every three weeks, Student's progress is formally discussed at a staff meeting. (N.T. 204)
  - b. Annual tuition at Private School is \$19,750. (N.T. 209) Student is on scholarship, which appears to mean that he pays less than \$19,750, if anything at all. (N.T. 211)
  - c. Student does not have an IEP at Private School. (N.T. 98) Instead, he has a student learning profile that notes his inconsistent academic performance, history of physical conflict with peers, provocative and rambunctious behavior, tendency toward anger escalation and resistance to verbal redirection. (P Ex. D) Private School has observed that Student's difficulties decrease with less unstructured, unsupervised time, and that Student needs firm limits on behavior and firm, consistent organizational help to improve his academic performance. (P ex D, p.2)
  - d. Student had a difficult first couple of months at Private School, with negative peer interactions. (N.T. 225, 239) After a couple of months, however, Student's behavior has improved. (N.T. 225) Student has received social worker services at Private School, as well as homework support and extended learning periods. (N.T. 202, 221, 265; P Ex.D, p.2) After the first semester, he also started using a behavior tracking sheet that he takes to each class. (N.T. 227, 234; P Ex.R) One of Student's Private School teachers suspects that Student has Tourette's Syndrome, although he equivocated during the due process hearing. (N.T. 238, 248, 257)
- 16. On August 28 and November 27, 2006, Student's parent requested the Philadelphia School District and the State Department of Education, respectively, to pay Student's Private School tuition. (P Ex.R, p.2; P Ex.F)
- 17. On September 14, 2006, Student's parent requested the Charter School to pay for Student's Private School tuition, which request was refused on September 21, 2006. (P Ex.J; CS9; CS 11; N.T. 534)

18. On November 16, 2006, the State Department of Education's Bureau of Special Education issued a Complaint Investigation Report (CIR) finding that the Charter School had violated child find requirements with respect to Student. (P Ex.E; CS12; N.T. 45, 537) The CIR noted that the Charter School's June 1, 2005 ER assessed only Student's academic needs but did not contain any discussion or analysis of the educational impact of Student's behavior, despite his numerous behavioral incidents. It further noted that the Charter School invested much more effort into tracking Student's behavior than in actual interventions, supports and assistance to address Student's behavioral needs. The CIR ordered the Charter School to revise its child find polices, to provide in-house training regarding the entire IEP process, and to conduct a comprehensive evaluation of Student if he is re-enrolled back into the Charter School. (P Ex.E; CS12; N.T. 537, 581)
19. Leadership at the Charter School has been in flux lately, with at least three different principals, during the two years of Student's attendance. (N.T. 50-51, 354, 573, 582, 627; P Ex.H) Apparently, the principal who received the November 16, 2006 CIR did not distribute it to anyone else at the Charter School. (N.T. 575-578)
20. On February 12, 2007 Student's parent requested this due process hearing. (P Ex.C; CS4; N.T. 44, 542) I denied the Charter School's February 22, 2007 sufficiency challenge. (CS6; CS8) Mandatory resolution sessions were conducted in February and March 2007. (P Ex.A; CS36; CS37; N.T. 539, 557) Due process hearings were conducted on March 20, April 2, May 23, and June 5, 2007. Parent Exhibits A-L, N, O, R-U were admitted into the record without objection. (N.T. 692) Parent Exhibit M was left blank. (N.T. 689) Parent Exhibit P was not admitted because it was not timely disclosed. (N.T. 296, 689) Parent Exhibit Q was admitted over objection. (N.T. 691) Charter School exhibits 1-162 were admitted without objection. (N.T. 692)
21. The Charter School's position in this case is that a child, and in particular this Student, can act out in a classroom and still not have any disability or need for specially designed instruction/accommodations. (N.T. 444) Both the Charter School's current principal and one of its former principals, however, credibly acknowledged that Student's large number of behavior incidences should have resulted in an evaluation of Student's social and emotional needs to determine whether he required special education and/or accommodations. (N.T. 357, 395, 500, 569)

## **DISCUSSION**

Charter schools assume the duty to ensure that a free appropriate public education (FAPE) is available to a child with a disability in compliance with both the Individuals with Disabilities Education Improvement Act (IDEIA) and Section 504, along with their respective implementing regulations. 22 Pa. Code §711.3 This duty includes child find, evaluation, and educational programming. 22 Pa. Code §§711.21, 711.41, 711.62 A

charter school will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.) Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

An evaluation report (ER) is inadequate if it fails to address emotional needs that are reported to be interfering with learning, or utilizes incomplete or inadequate instruments for this purpose. In re the Educational Assignment of M.P., Special Education Opinion No. 1350 (2003)

The United States Supreme Court has held that the burden of persuasion in an administrative hearing such as this is upon the party seeking relief, whether that party is the disabled child or the charter school. Schaffer v. Weast, \_\_\_ U.S. \_\_\_, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) Schaffer discusses only the burden of persuasion aspect of the burden of proof, making it clear that the burden of persuasion does not come into play unless the evidence is evenly balanced, or in equipoise, since in that situation neither party has introduced preponderant evidence. “In truth, however, very few cases will be in evidentiary equipoise.” Schaffer v. Weast, supra. Of course, where one party has produced more persuasive evidence than the other party, the evidence is not in equipoise. Because Student’s parent seeks relief in this administrative hearing, she bears the burden of persuasion in this matter.

**Student’s claim is limited to the period of February 12, 2005  
to the end of the 2005- 2006 school year**

Section 615(f)(3)(C) of the IDEIA expressly establishes a two-year limitation period within which to file a due process hearing request, i.e., two years from the date when the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. 20 USC §1415(f)(3)(c) Thus, it is the intent of Congress to limit such claims and to require parents to file such claims in a timely manner. In Re P.P. and the West Chester Area School District, Special Education Opinion No. 1757 (2006) This two-year limitations period provides no exception for child-find claims. In Re D.H. and the Kiski Area School District, Special Education Opinion No. 1672 (2005)

In this case, Student enrolled into the Charter School in September 2004. He began exhibiting behavioral difficulties at the Charter School almost immediately. (CS29; CS32; N.T. 42, 57-58, 64, 376) By November 9, 2004, Student had already been suspended twice for 5 days total. (CS32; CS34; N.T. 70, 74) Certainly, by November 9, 2004, Student’s parent was aware of Student’s behavior problems at school. Consequently, for purposes of IDEIA’s 2 year statute of limitations, the time clock for filing a due process hearing request had started ticking at least by November 9, 2004.<sup>3</sup>

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<sup>3</sup> Of course, because IDEIA did not become effective until July 1, 2005 (118 STAT. 2803), Student’s parent arguably would not have known in November 2004 of



Accordingly, at least by November 9, 2004, Student's parent knew, or should have known, of the actions forming the basis of this due process hearing complaint. For each day of alleged FAPE denial after November 9, 2004, she had two years within which to file a due process hearing request to complain of that day's FAPE denial. Thus, on February 12, 2005, she had two years within which to file a due process complaint regarding FAPE denial for that day forward. On February 12, 2007, Student's parent did, indeed, file a timely due process hearing complaint for February 12, 2005 forward. (P Ex.C; CS4) Thus, I conclude that the maximum time period for which Student might obtain a remedy in this matter is from February 12, 2005, until the date that he was no longer enrolled in the Charter School, i.e., the last school day of the 2005-2006 school year.

**Student was denied FAPE from February 12, 2005  
through the end of the 2005-2006 school year**

When a child's behavior impedes his or her own learning or that of others, the IEP team must consider what behavioral interventions are appropriate. 34 CFR 300.324(a)(2) Behavior support programs should include a variety of techniques which permit a student to develop and maintain skills which address problem behaviors. Cf. 22 Pa. Code 14.133 A behavioral intervention plan can include, when appropriate: (1) strategies, including positive behavioral interventions, strategies, and supports; (2) program modifications; and (3) supplementary aids and services that may be required to address the behavior. Admittedly, it is a fuzzy line between regular education interventions and the need for special education. In Re J.S. and the Southeastern School District, Special Education Opinion No. 1804 (2007)

The Charter School contends that, despite this Student's acting out in the classroom, he did not have any disability or need for specially designed instruction/accommodations. (N.T. 444) It points to its June 1, 2005 ER, finding that Student did not have a disability and was not in need of either specially designed instruction or accommodations. (CS 10) I disagree. The June 2005 ER failed to address social/emotional issues because the evaluation request simply listed academic concerns, and the school psychologist did not bother to check Student's absence or suspension records. (N.T. 407, 431, 433, 436, 440, 442)

It cannot seriously be disputed that, for the entire time that Student attended the Charter School, his behavior impeded his own learning and that of others. The State Department of Education's November 16, 2006 CIR recognized that the Charter School had violated child find requirements by assessing only Student's academic needs without any discussion or analysis of the educational impact of Student's behavior, despite his numerous behavioral incidents. (P Ex.E; CS12; N.T. 45, 537) Because the school psychologist did not check Student's absence or suspension records, he did not believe

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any statute of limitations. She must be considered to have known of the two year statute of limitations, however, by the effective date of IDEIA, i.e., by July 1, 2005.

that there was a need for a behavioral assessment. (N.T. 407, 431, 433, 436, 440, 442) In addition, both the Charter School's current principal and one of its former principals credibly acknowledged that Student's large number of behavior incidences should have resulted in an evaluation of Student's social and emotional needs to determine whether he required special education and/or accommodations. (N.T. 357, 395, 500, 569)

Thus, I do not accept the Charter School's contention that Student's behavioral problems had not negatively impacted his ability to access the curriculum, and that Student was not in need of specially designed instruction. I conclude that the Charter School inappropriately evaluated Student on June 1, 2005 and remained in noncompliance with its child find responsibilities afterward. This constitutes a denial of FAPE for the entire time that Student attended the Charter School.<sup>4</sup>

The Charter School is entitled to a reduction of any compensatory education award for a period of reasonable rectification. M.C v. Cent. Regional School District, 81 F.3d 389 (3d Cir. 1999) In this case, the evaluation process was begun on March 9, 2006. (CS98) An ER was issued on June 1, 2005. (CS10) I conclude that, if the June 2005 ER been more thorough, either an IEP or a Section 504 plan could have been developed by the first day of the 2005-2006 school year to address Student's behavioral problems. Thus, I will award six hours of compensatory education for every day that Student attended school during the 2005-2006 school year.<sup>5</sup>

### **No private school tuition is awarded**

Charter schools are only responsible to pay for educational placements at locations outside the charter schools when a child's parents choose to keep their child enrolled in the charter school. 22 Pa. Code §711.43 In this case, Student's parent did not re-enroll Student into the Charter School for the 2006-2007 school year, preferring instead to enroll Student into private school. (N.T. 98, 532-534; CS38) Thus, the Charter School has no obligation to pay for private school tuition, and I have no jurisdiction to order it. Accordingly, no private school tuition is awarded in this case.

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<sup>4</sup> As noted earlier, however, the statute of limitations limits Student's recovery period to the time period starting February 12, 2005.

<sup>5</sup> Days of suspension will be assumed to be days of attendance. Student will be assumed to have attended school unless the Charter School has specific documentation of non-suspension absence on particular days.

## CONCLUSION

Student is a xx year old former student of the Charter School who attended the Charter School's 5<sup>th</sup> and 6<sup>th</sup> grades during the 2004-2005 and 2005-2006 school years. Student seeks compensatory education for the Charter School's alleged failure to provide a free and appropriate public education (FAPE) while he attended the Charter School. Student's parent also seeks payment of private school tuition for the 2006-2007 and 2007-2008 school years. For the reasons described above, I conclude that the Student was denied FAPE, and I award compensatory education, but I do not award payment of private school tuition.

## ORDER

- The Charter School denied a free and appropriate public education to Student from February 12, 2005 through the last day of the Charter School's 2005-2006 school year.
- The Charter School shall provide to Student 6 hours of compensatory education for every day that Student attended school during the Charter School's 2005-2006 school year.
- Student's days of suspension will be considered days of attendance. Student will be assumed to have attended school unless the Charter School has documentation of his non-suspension absence on specific days.
- The Charter School is not required to pay any private school tuition.

*Daniel J. Myers*

Hearing Officer  
June 25, 2007

Re:	Due Process Hearing
File Number:	7385/06-07 KE
Student:	Student
School District:	Germantown Settlement Charter School