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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 26862-22-23

CLOSED HEARING

Child's Name:
L.R.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
02/22/2023

Introduction

This special education due process hearing concerns the rights of a child with disabilities (the Student). The matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

There are three parties to this hearing, which is unusual for special education due process hearings. The parties are the Student's parent (the Parent), the Daroff Charter School (Daroff), and the Universal Companies (Universal).

Except for the Student, the parties to this matter are the same as the parties to a decision issued several days ago. *See* ODR No. 26851-22-23. Procedurally, the cases are nearly identical and, as discussed below, are resolved on nearly identical bases. Differences between the cases are explicitly noted.

The hearing was requested by the Parent. The Student is a former student of Daroff, which is now closed. There is no dispute that the Student was a "child with a disability" as defined by the IDEA while attending Daroff from August 12, 2020, through April 7, 2022. The start of the time in question is one day after the start in ODR No. 26851-22-23. There is no dispute that, as a child with a disability, the Student was entitled to a free appropriate public education (FAPE) during the time in question. The Parent alleges that the Student did not receive a FAPE during the time in question and demands compensatory education as a remedy.

The Daroff Charter School (Daroff) was a Renaissance Charter School in the School District of Philadelphia (SDP).[1] Under SDP's Renaissance Charter Initiative, several public schools with long-term academic and climate challenges were converted into charter schools. Renaissance Charter Schools operate in buildings that used to be SDP buildings. For special education purposes, there is no legal distinction between a Renaissance Charter School and any other Pennsylvania charter schools. At all times, Daroff was subject to Pennsylvania's special education regulations for charter schools, 22 Pa. Code § 711.

The Universal Companies (Universal) is a charter school management company or an "educational management service provider," which is a term that is used but not defined in Pennsylvania's Charter School Law. *See* 24 Pa. Stat. §§ 17-1703-A (definitions), 17-1715-A (concerning the separation between a charter school's administrator and "a company that provides

[1] SDP is not a party to these proceedings.

management or other services to another charter school"), 17-1729.1-A(c)(4) (requiring "multiple charter school organization applicants" to include organization charts showing the relationship between charter schools and educational management service providers within applications). Under Pennsylvania's Charter School Law, Daroff was managed by its own board of trustees. *See generally,* 24 P.S. § 17-1716-A. Documents submitted in this case, however, indicate that Universal was deeply connected to and integrated with Daroff, perhaps as contemplated by 24 P.S. § 17-1729.1-A(c)(4). Other documents submitted in this case indicate that Universal and Daroff separated from each other as Daroff was closing.

The Parties' Positions

The Parent's core allegation is that the Student was entitled to, but did not receive, a FAPE. The Parent alleges that the denial of FAPE resulted in substantive harm, and compensatory education is an appropriate remedy to redress that harm. The Parent also alleges that the Student's Local Educational Agency (LEA) was obligated to provide a FAPE and is responsible for any remedy. The Parent takes the unusual position that Daroff, Universal, or both were the Student's LEA during the time in question and named both entities as respondents. Terms like 'joint and several liability' are rarely if ever used in special education due process hearings. Avoiding legal terms of art that may not apply in this proceeding, the Parent avers that Daroff, Universal, or both are responsible for providing a remedy for any violation of the Student's right to a FAPE during the time in question.

Daroff takes a highly unusual position by joining the Parent in a stipulation that the Student did not receive a FAPE during the time in question. Daroff not only agrees with the Parent concerning liability (the FAPE violation), Daroff also agrees with the Parent concerning remedy. Discussed below, Daroff agrees with the Parent's calculation of compensatory education. Daroff's does not, however, join the Parent's argument about what entity owes compensatory education to the Student.[2] Daroff argues Universal acted as the Student's LEA by directing Daroff's actions, and that many of the people who developed the Student's special education program were employed by Universal, not Daroff. As such, Daroff argues that Universal is responsible for the FAPE violation and must provide any remedy.

Universal takes no position at all concerning the FAPE violation or what remedy is appropriate if the Student's rights were violated. Rather, as a

[2] Discussed below, the process by which Daroff joins the Parent's argument concerning compensatory education is somewhat different from the process it used in ODR No. 26851-22-23.

charter school management company, Universal argues that it never was – and cannot be – the Student's LEA. Consistent with that stance, Universal argues that it cannot take a position as to whether the Student received a FAPE because it was never responsible for the Student's FAPE. Universal takes no position as to the form of remedies for the same reason. However, Universal disagrees with both the Parent and Daroff concerning its LEA status and responsibility to provide a remedy. Universal disputes Daroff's characterization both of the relationship between itself and Daroff, and of the employment status of several of the individuals involved in the Student's education. Universal has consistently taken the position that it should not be a party to these proceedings and is not responsible for remedying any violation of the Student's IDEA rights.

The Dispute between Daroff and Universal

As indicated above, there is a dispute between Daroff and Universal about which entity was the Student's LEA during the time in question. Universal argues that, as a matter of law, it cannot be an LEA. Daroff disputes this and argues that Universal was the Student's LEA during the time in question. The dispute between Daroff and Universal became apparent when Universal moved to dismiss the Parent's complaint and Daroff opposed the motion.

This matter was originally assigned to Hearing Officer McElligott, who denied Universal's motion before the matter transferred to me. While Hearing Officer McElligott's order speaks for itself, I must note that I denied a nearly identical motion from Universal in ODR No. 26851-22-23. A copy of that pre-hearing order can be found as an appendix to ODR No. 26851-22-23.

In addition to equitable bases for denying Universal's motion, I do not have authority to resolve disputes between educational entities. *See* ODR No. 26851-22-23 at Appendix A. Any determination about whether Universal, Daroff, or both are responsible for remediating any violation of the Student's right to a FAPE also resolves the dispute between Universal and Daroff – a dispute that exists beyond my jurisdiction.

Given the posture of this case and the limits of my jurisdiction, I will determine what remedy is owed to the Student but will make no determination as to what entity or entities must provide the remedy.

Stipulations

On January 27, 2023, during the hearing session, all three parties agreed to admit the Parent's exhibits (P-1 through P-19). All three parties also agreed

to admit Universal's exhibits (UC-1 through UC-4).[3] Daroff introduced no exhibits.

Also, during the hearing, the Parent and Daroff jointly stipulated that the Student was denied a FAPE for 328 school days at a rate of 3.5 hours per school day for a total of 1,148 hours. *N.T.* at 34. Universal did not join this stipulation. Both the Parent and Daroff agree that compensatory education is an appropriate remedy. Their stipulation, however, did not extend to the calculation of compensatory education.

Also, during the hearing, Universal explicitly took no position as to whether the Student's right to a FAPE was violated during the time in question. As such, Universal does not deny that the Student's right to a FAPE was violated. *Passim*.

On February 10, 2023, the Parent filed a written closing statement in which the Parent argued that compensatory education should be calculated at the same rate as the denial of FAPE stipulation: 3.5 hours per school day for 328 school days resulting in 1,148 hours.

There are two notable differences between the stipulations in this case and in ODR No. 26851-22-23. First, the Parent argues that the calculation of compensatory education is identical to the denial of FAPE stipulation (1,148 hours of compensatory education for 1,148 hours of denial). Second, Daroff did not file a supplemental stipulation in this case joining the Parent's compensatory education calculation.

Issue

Considering the above-referenced stipulations and pre-hearing order, there is only one issue to resolve: Is the Student owed 1,148 hours of compensatory education?

Findings of Fact

With a stipulation as to liability in place, findings of fact are somewhat superfluous. Even so, both the IDEA and Pennsylvania's IDEA implementing regulations require hearing officers to include findings of fact in their decisions. *See, e.g.* 20 U.S.C. § 1415(h); 22 Pa. Code § 14.162(f).

My independent review of the documents entered into evidence via stipulation of all three parties reveals the following:

[3] UC-4 was uploaded after the hearing session, consistent with the parties' agreement.

1. Prior to the time in question, progress reporting establishes that the Student made minimal progress towards IEP goals, little was done in response to that lack of progress, and a reevaluation report dated February 21, 2020, was deficient in several ways.[4] P-3, P-4, P-5, P-6, P-7.

2. I take judicial notice that, on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools in response to the COVID-19 pandemic. On April 9, 2020, that order was extended through the end of the 2019-20 school year.

3. During the 2020-21 school year, the Student continued to receive remote instruction pursuant to an IEP dated February 3, 2020. P-6. That IEP was not revised in response to the Reevaluation Report or the school closure. P-9.

4. During the entire time in question, the Student's disability significantly impeded the Student's ability to derive any benefit from remote instruction. P-9, P-12.

5. On January 21, 2021, the Student's IEP was revised. The resulting IEP failed to address the Student's needs and failed to provide SDI and related services that were reasonably calculated to enable the Student to achieve IEP goals, regardless of the appropriateness of those goals. P-10.

6. The Student returned to in-person instruction for the 2021-22 school year. The Student's IEP was not revised at that time.

7. On January 19, 2022, a new reevaluation report was completed for the Student. While the report included new standardized, normative testing, it failed to make actionable recommendations to the Student's IEP team beyond cookie cutter suggestions that are beneficial to all children. P-14.

8. On January 19, 2022, – the same day as the new reevaluation report – the Student's IEP was revised again. The revision was replete with errors concerning the nature of the Student's disability and the Student's progress under the prior IEP. P-15.

[4] This evaluation happened as schools in and around SDP were closing in response to COVID-19, but before the mandatory, statewide school closure. The appropriateness or inappropriateness of the reevaluation under those circumstances is not outcome determinative.

Applicable Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parent is the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

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

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

Third Circuit consistently interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational

benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

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

In *Endrew F.,* the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

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

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to

remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

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

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. Reid is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or Reid method.

The more nuanced Reid method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

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

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he

> or she would have occupied absent the school district's deficiencies."

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

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

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

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

During the hearing, I explained to Daroff and Universal that I would hold that the Student's right to a FAPE was violated unless either of them took a contrary position. Universal did not take a contrary position but rather took no position at all. Daroff did not take a contrary position but rather joined the Parent's position, turning the Parent's averment into a two-party stipulation. Nothing in my independent review of the evidence runs contrary to the Parent and Daroff's stipulations. Therefore, I accept the stipulation as to liability: whatever entity was responsible for the Student's special education violated the Student's right to a FAPE during the time in question.

Discussed above, compensatory education is an appropriate remedy for a denial of FAPE. The Parent argues in favor of the hour-for-hour standard, demanding one hour of compensatory education for each hour that FAPE was denied. The Parent and Daroff agree about the number of hours: 1,148. Daroff does not explicitly join the Parent's argument that 1,148 hours is an appropriate amount of compensatory education, but Daroff does not oppose this argument either. Universal takes no position at all.

Nothing in my independent review of the evidence runs contrary to the Parent and Daroff's stipulations as to the FAPE violation. There is no opposition to the Parent's argument concerning compensatory education. Further, with no evidence as to what would constitute a make whole remedy, I must default to an hour-for-hour calculation. Therefore, I award 1,148 hours of compensatory education to remedy the FAPE violation.

The Parent may decide how the compensatory education is used. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related service needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost of providing the awarded hours of compensatory services shall be limited to the average market rate

for private providers of those services in the county where the District is located.

ORDER

Now, February 22, 2023, it is hereby **ORDERED** as follows:

1. The Student is awarded 1,148 hours of compensatory education.

2. The Parent shall direct the use of compensatory education, subject to the limitations stated above.

3. Nothing herein determines whether Daroff, Universal, or both are responsible for providing or funding the compensatory education awarded herein.

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

/s/ Brian Jason Ford
HEARING OFFICER