

**Pennsylvania Special Education Due Process Hearing Officer  
Final Decision and Order**

**Closed Hearing**

**ODR File Number**

23701-1920AS

**Child's Name**

[REDACTED]

**Date of Birth**

[REDACTED]

**Parent**

[REDACTED]

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**Hearing Officer**

Michael J. McElligott, Esquire

**Date of Decision**

12/15/2020

## Introduction

This special education due process hearing concerns the educational rights of M.T. ("student"), a student who attends the West Oak Lane Charter School ("Charter School").<sup>1</sup> The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")<sup>2</sup> as a student who requires special education to address the student's needs related to emotional disturbance and a health impairment.

The student's parent claims that the Charter School has failed to identify the student with a specific learning disability in reading. Furthermore, the student's parent claims that the Charter School has failed to provide appropriate programming in the student individualized education program (IEP), thereby denying the student a free appropriate public education ("FAPE"). Analogously, the parent asserts a denial-of-FAPE claim under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").<sup>3</sup> The parent claims that the Charter School acted with deliberate indifference toward the student's needs and, therefore, makes a claim for disability discrimination under Section 504.<sup>4</sup> Parent seeks, among other remedies, compensatory education.

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<sup>1</sup> The generic use of "student" and avoidance of personal pronouns are employed to protect the confidentiality of the student.

<sup>2</sup> 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 §§711.1-711.62 ("Chapter 711").

<sup>3</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§711.3(c) ("Charter School Section 504 Regs").

<sup>4</sup> In addition to the claims under IDEIA and Section 504, in her complaint parent presents a claim under Title II of the Americans with Disabilities Act ("ADA"). This special education due process hearing has no jurisdiction over such claims. Accordingly, claims under ADA are dismissed for lack of jurisdiction.

The Charter School counters that at all times it met its obligations to the student under IDEIA and Section 504, both in terms of its evaluation process and IEP. The Charter School argues that it did not discriminate against the student. Accordingly, the Charter School argues that the parent is not entitled to any remedy.

For reasons set forth below, I find in favor of the parent.

### **Issues**

1. Did the Charter School fail to timely identify the student appropriately?
2. Is the student's IEP appropriate?
3. If so, is the student entitled to remedy?
4. Did the Charter School discriminate against the student on the basis of disability, acting with deliberate indifference in the education of the student?

### **Findings of Fact**

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The student has attended the Charter School since kindergarten, the 2017-2018 school year. (Notes of Testimony ["NT"] at 74-187).
2. In kindergarten, Charter School records indicate that the student did not exhibit any problematic behaviors, although in January 2018 the

Charter School informed the student's mother about an incident of inappropriate interaction with classmates. (Parent Exhibit ["P"]-4, P-9 at page 2, P-5).

3. Over the course of kindergarten, the student's reading level and target level, on the Charter School's reading assessment were as follows:

	<u>Reading Level</u>	<u>Target Level</u>
September 2017	.10	.01
February 2018	.41	.50
March 2018	.60	.60
June 2018	.71	.90

(P-8).

4. In 1<sup>st</sup> grade, the 2018-2019 school year, the student's behaviors in school escalated dramatically. (NT at 74-187, 314-392, 526-575; P-3, P-4, P-5, P-6).
5. Over the course of the student's 1<sup>st</sup> grade year, the student had dozens of disciplinary referrals, including multiple instances of aggression with peers, disrupting class, work refusal, defiance with teachers and staff, inappropriate cafeteria behavior, inappropriate classroom behavior, property destruction, self-harm, and elopement from class. The student was suspended twice, and on multiple occasions the student's mother retrieved the student from school. (NT at 74-187, 516-575; P-3 at pages 10-18, P-4, P-5, P-6 at pages 1-11, P-12).
6. By March 2019, the Charter School indicated that it would be pursuing a mental health evaluation of the student. In April 2019, the student underwent a cursory physical examination by a nurse. No mental health evaluation was ever performed. (P-11).

7. In March 2019, the Charter School implemented a number of regular education strategies to address the student's behavior. (P-10).
8. In May 2019, the Charter School held a family support meeting. The Charter School provided a list of community mental health resources and requested permission to evaluate the student. (NT 74-187, 203-294, 314-392; P-12, P-13).
9. In late May 2019, the student's mother sent a letter to the Charter School regarding incidents in school where the student was bullied by others. (P-15).
10. In June 2019, the student's mother made an oral report to the Charter School that classmates had used inappropriate language and slurs toward the student. (NT at 74-187, 516-575; P-3 at pages 9-10).
11. Over the course of 1<sup>st</sup> grade, the student's reading level and target level, on the Charter School's reading assessment were as follows:

	<u>Reading Level</u>	<u>Target Level</u>
September 2018	.25	1.00
November 2018	.62	1.20
December 2018	.64	1.30
January 2019	.64	1.40
February 2019	.72	1.50
March 2019	.73	1.60
April 2019	.78	1.70
May 7, 2019	.81	1.80
May 8, 2019	.82	1.80
May 9, 2019	.83	1.80
June 12, 2019	.86	1.90
June 13, 2019	1.07	1.90

(P-8).

12. The student received “proficient” and “advanced” grades in all classes except reading, where the student received a “below basic” grade at the lowest numeric value assigned by the Charter School. (NT at 314-392, 516-575; P-9 at pages 3-4).
13. In July 2019, the Charter School issued its evaluation report (“ER”). (NT at 591-689; P-16).
14. The ER included parental input, where the student’s mother indicated concern with the student’s reading ability. She did not indicate concerns regarding peer relationships. (P-16).
15. The ER did not contain qualitative teacher input, merely listing the discipline infractions over the prior school year. (P-16).
16. The ER contained evaluator observations of the student, where she noted that the student displayed appropriate classroom behavior although the student attempted to elope during a bathroom break. During discussion with the evaluator, the student shared information about enjoying violent aspects of video games. (P-16).
17. The ER contained cognitive testing with a full-scale IQ of 76, a general ability index of 86 (accounting for an extremely low score on the processing speed subtest), and a nonverbal IQ of 90. The cognitive testing showed wide scatter in the composite scores, from 66 (processing speed) and 73 (verbal comprehension) to 92 (visual spatial) and 106 (fluid reasoning). (P-16).
18. The ER contained achievement testing. The student did not exhibit significantly discrepant scores from cognitive testing, utilizing the full-scale IQ of 76, but there were marked weaknesses in the pseudoword decoding subtest (73), early reading skills (76) and expressive vocabulary (78) subtests when compared to other subtests; the basic reading composite (80) was markedly lower than other composites. (P-16).

19. The ER contained social/emotional/behavioral assessments. (P-16).
20. On behavior ratings, the student's mother rated the student as clinically significant in only one subscale (attention problems). The student's teacher rated the student as clinically significant in multiple subscales (hyperactivity, aggression, conduct problems, anxiety, depression, learning problems, and adaptability) and in multiple indices (externalizing problems, internalizing problems, behavioral symptoms index, and adaptive skills). (P-16).
21. On executive functioning indices, the student's mother rated the student as extremely-elevated in the attentional control index; the student's teacher rated the student as extremely-elevated in the problem-solving, behavioral control, and emotional control indices, as well as the overall executive functioning index. (P-16).
22. On comprehensive behavior ratings, the student's mother rated the student as "very elevated" in emotional distress, worrying, aggressive/defiant behavior, math difficulties, language difficulties, separation fears, perfectionist/compulsive behavior, and physical symptoms. (P-16).
23. On an assessment for social-emotional functioning, the student's teacher rated the student as "highly indicative" of emotional disturbance for inappropriate behaviors and "indicative" for inability to learn, relationship problems, and unhappiness/depression. (P-16).
24. The ER contained a comprehensive speech and language ("S&L") assessment. The S&L evaluator found that the student did not require S&L services for articulation or expressive/receptive language. (P-16).
25. The ER identified the student as qualifying for special education as a student with an emotional disturbance and a health impairment.

The ER did not identify any need for special education in reading. (P-16).

26. In the July 2019 ER, the evaluator opined that: "It is **highly recommended** for (the student) to be referred to community behavioral health for a comprehensive evaluation to provide additional clarity to (the student's) symptoms, recommendations given (the student's) history of suicidal/homicidal ideations, conduct behaviors, elopements, and physical assaults toward classmates throughout the year." (P-16 at page 27, emphasis in the original).
27. In September 2019, as the student began 2<sup>nd</sup> grade, the student's individualized education program ("IEP") team met to craft the student's IEP. (NT at 74-187, 400-510; P-17).
28. The September 2019 IEP indicated that the student exhibited behavior that impeded the student's learning or that of others, but the IEP contained no functional behavior assessment ("FBA") or positive behavior support plan ("PBSP"). (P-17).
29. The present levels of academic and functional performance in the IEP were exclusively the results and content of the July 2019 ER. (P-17).
30. The IEP identified needs in reading support, focus and attention, and emotional regulation. (P-17).
31. The IEP contained two reading goals in basic reading (primer-level sight word identification and phonemic identification/decoding for consonant/vowel/consonant words). (P-17).
32. The IEP contained no organization, attention, task-approach, or behavior goals. (P-17).
33. The IEP contained specially-designed instruction and modifications in reading and classroom-based approaches to behavior-regulation. (P-17).

34. The IEP recommended approximately two 30-minute reading support classes per week (76 sessions through the 36 school-weeks duration of the IEP). (P-17).
35. The IEP recommended approximately one-and-a-half 30-minute psychological services sessions per week (60 sessions through the 36 school-weeks duration of the IEP). (P-17).
36. In October 2019, the Charter School performed an occupational therapy ("OT") screening for handwriting, as had been recommended in the July 2019 ER. (P-16, P-25).
37. The October 2019 OT screening did not recommend that the student qualify for OT services but recommended that the student receive certain regular education interventions and be monitored for improved performance. (P-25).
38. In November 2019, the student's IEP was revised to include a FBA. There is no PBSP (that is, no explicit, concrete plan based on the FBA for interventions to address the student's behavior). (P-18).
39. As part of the FBA, the November 2019 IEP noted that the student's deficits in reading played a role in the student's problematic classroom behavior ("Task requirements as presented are not at the student's instructional level. [The student] struggles in the area of basic reading (decoding)"). (P-18 at page 32).
40. Neither party made part of the record the student's progress monitoring from in the 2019-2020 school year. A private S&L evaluator issued a report in August 2020 (see below) and, as part of her record review, included progress monitoring data in her report. This progress monitoring data is adopted in the finding of fact immediately below. (NT at 996-997, regarding P-27, an exhibit not entered into the record; P-31).

41. The student made progress over the first and second quarter on the sight-word goal, improving sight-word accuracy from 40% to 50%. The student's scores on phoneme recognition/blending in CVC words remained the same, at 40%, across both quarters. (P-31 at page 4).
42. Over the course of 2<sup>nd</sup> grade, the student's reading level and target level, on the Charter School's reading assessment were as follows:

	Reading Level	Target Level
September 11, 2019	.25	2.00
September 13, 2019	.26	2.00
September 24, 2019	.28	2.00
October 1, 2019	.30	2.00
October 10, 2019	.33	2.10
October 17, 2019	.35	2.10
October 18, 2019	.37	2.10
October 28, 2019	.40	2.10
October 29, 2019	.61	2.10
November 1, 2019	.61	2.10
November 8, 2019	.62	2.20
November 13, 2019	.62	2.20
November 18, 2019	.63	2.20
November 22, 2019	.63	2.20
November 25, 2019	.64	2.20
December 5, 2019	.81	2.30
December 12, 2019	.83	2.30
December 19, 2019	.88	2.30
January 2, 2020	.93	2.40
January 10, 2020	.94	2.40
January 16, 2020	1.01	2.40

January 17, 2020	1.05	2.40
January 21, 2020	1.07	2.40
January 30, 2020	1.09	2.40
February 18, 2020	1.10	2.40
February 24, 2020	1.17	2.40
February 27, 2020	1.18	2.50
March 9, 2020	1.19	2.60
March 12, 2020	1.20	2.60

(P-8).

43. Over the course of the student's 2<sup>nd</sup> grade year, the student had multiple disciplinary referrals, including inappropriate bathroom behavior, aggression with peers, aggression toward staff, significant classroom disruption, work refusal, defiance with teachers and staff, self-harm, and elopement from class. The student's behavior caused the student to be removed from the classroom multiple times and, once, caused the classroom to be cleared of other students. The student was not suspended in 2<sup>nd</sup> grade. (NT at 74-187, 400-510; P-3 at pages 2-10, P-5, P-6 at pages 12-32).
44. The student's behavior did not improve from 1<sup>st</sup> grade to 2<sup>nd</sup> grade, or over the course of 2<sup>nd</sup> grade after implementation of the PBSP in November 2019. (P-3, P-18).
45. Over the course of November 2019 – January 2020, the student underwent a private, comprehensive psychoeducational evaluation. (NT at 790-876; P-30).
46. Due to the COVID-19 pandemic, the last day of in-person instruction in Pennsylvania schools was Friday, March 13, 2020. As of Monday, March 16, 2020, schools in Pennsylvania were temporarily closed for in-person instruction; this closure was extended such that

Pennsylvania schools were closed for the remainder of the 2019-2020 school year.

47. On March 23, 2020, the private psychoeducational evaluation was issued. (P-30).
48. The psychoeducational evaluation included record-review, input from the family, the student, and the school, and a comprehensive battery of assessments, as well as a FBA. (NT at 790-876; P-30).
49. The cognitive testing in the psychoeducational evaluation yielded an IQ equivalent of 106. (P-30).
50. The achievement testing in the psychoeducational evaluation indicated significant discrepancies between the student's cognitive ability and all composite scores for reading achievement, including basic reading, fluency, reading comprehension, and total reading. (P-30).
51. The private evaluator adopted the Charter School's social/emotional/behavioral assessments from the July 2019 ER. (P-30).
52. Assessments for autism in the psychoeducational evaluation did not indicate that the student exhibited autism spectrum disorder. (P-30).
53. Assessment of the student's executive functioning in the psychoeducational evaluation mirrored the executive functioning assessment from the July 2019 ER, namely the mother's results showed few areas of clinically significant/elevated scoring whereas the student's teacher showed multiple areas of clinically significant elevated scoring. (P-16, P-30).
54. The private evaluator observed the student at the Charter School in December 2019, prior to the school closure. (P-30).

55. The psychoeducational evaluation recommended that the student be identified as a student with specific learning disabilities in reading (basic reading, reading fluency, and reading comprehension) and as a student with an emotional disturbance. (P-30).
56. Given the evaluator's view that the July 2019 ER underestimated the student's cognitive ability and concerns about the student's pragmatic language and social communication, the evaluator recommended that the student be further evaluated in S&L. (P-30).
57. The private evaluator also performed a FBA. The evaluator made multiple behavioral recommendations, most significantly recommendations that the IEP team consider a more restrictive placement (outside of the regular education classroom) and a 1:1 aide. (P-30).
58. After the statewide school closure in March 2020 and for the remainder of the school year, the student was provided lessons and access to online learning environments. The student had 30 minutes of live instruction, weekly, from the special education teacher. (NT at 463-464; P-21).
59. In August 2020, a private S&L evaluator issued a comprehensive S&L report. (P-31).
60. The private S&L evaluation included a battery of assessments. (P-31).
61. The private S&L evaluator recommended that the student be identified with a S&L impairment and receive 30 minutes, twice weekly, of individual S&L services addressing listening comprehension and expressive language, and 30 minutes weekly of group S&L services to address pragmatic language and social communication. (P-31).

62. In the current 2020-2021 school year, the student's 3<sup>rd</sup> grade year, the Charter School has remained in online learning and has not returned to in-person instruction. (NT at 400-510).
63. The student receives live instruction each day, including pullout services for reading support twice per week. When possible, the student attends a neighborhood learning center when accessing the online learning environment. (NT at 74-187, 464-465, 790-876; P-22, P-30A).
64. The Parent requested a negative inference be drawn from the fact that a FBA was performed by the Charter School, but the FBA was never produced as evidence as part of the hearing. This inference cannot be drawn, as the November 2019 IEP contained a FBA. (P-25; NT at 249-250).

## **Discussion**

### ***IDEIA/Denial-of-FAPE***

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§711.1-711.62). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student or, as implemented, yielded meaningful educational benefit. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

In terms of the evaluation of a student, the evaluation process must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining” an understanding of the student’s disability and the content of the student’s IEP. (34 C.F.R. 300.304(b)(1); 22 PA Code §711.3(b)(11)).

Here, there are multiple components of FAPE which must be examined, each in turn.

*Child-Find.* First, the Charter School waited entirely too long to evaluate the student in 1<sup>st</sup> grade, the 2018-2019 school year. In terms of the student’s behavior, the first entry in the student’s discipline log is December 6, 2018. Over the eight school days from December 6<sup>th</sup> – 17<sup>th</sup>, the student was involved in multiple incidents, many on the same day, including choking and pushing a student, disrupting class, pushing students to the ground, stabbing a classmate with pencil, slapping another student, and inappropriate touching. On December 17<sup>th</sup>, the student’s teacher spoke with a Charter School administrator about the teacher’s “growing concern about the number of physical incidents that have occurred over the last week.” (P-3 at page 17). On December 18<sup>th</sup>, the student elbowed another student and, on January 7<sup>th</sup>, after the return to school from the winter break, the student attempted to stab a student with a pencil and, in the attempt, elbowed another student. Clearly, by January 7<sup>th</sup>, at the latest, the Charter School should have been consulting diligently with the student’s parents and seeking permission to evaluate the student for these sudden, dramatic, and outsized changes in the student’s behavior.

In terms of the student’s needs in reading, the student exited kindergarten with a reading score (on the Charter School’s reading benchmark system) of .71, slightly below the student’s target level of .90. It is the considered opinion of this hearing officer that the student’s reading

level at the end kindergarten may have been overstated. There was no evidence presented as to the kindergarten programming, but while ostensibly achieving this level, the student scored .25 in late September 2018, which was nearly where the student was approximately a year earlier, in October 2017. The student made very slow progress in reading in the fall and early winter of 1<sup>st</sup> grade. Having had four-and-a-half months of instruction by mid-January 2019, when the student's reading achievement had stagnated (November - .62, December - .64, January - .64), the Charter School should have, in mid-January 2019, moved to evaluate the student.

In sum, then, the Charter School should have been requesting permission to evaluate the student in January 2019 for both behavior-support and reading needs.

*Evaluation.* Second, the Charter School's July 2019 ER, although dramatically overdue, was not wholly inappropriate. The evaluator identified the student's profound need for behavior support, and appropriately identified the student with an emotional disturbance. The evaluator also accurately characterized the student as needing highly structured counseling and behavior interventions. While the evaluator did not explicitly identify the student with a specific learning disability, this is not necessarily inappropriate so long as the services are in place to address the student's needs. The July 2019 ER minimizes, in a sense, the depth of the student's needs in reading (based on cognitive testing which underestimated the student's cognitive ability, thereby skewing the significant-discrepancy model employed by the evaluator). But, at the end of the day, the evaluator recommended intervention in reading. The July 2019 ER is imperfect, but it does not rise to the level of a denial-of-FAPE.

*IEP.* The same cannot be said for the September 2019 IEP. The IEP signally fails to address appropriately the student's needs in reading. There are two reading goals, both at the most basic levels of reading instruction—

primer-level sight words and letter-sound recognition/phoneme-blending with CVC words. On the cusp of 3<sup>rd</sup> grade, the student's reading instruction would be guided by pre-primer concepts. The Charter School's own reading benchmarks ostensibly bear this out, with the student achieving .25, .26, .28, and .30 by the end of September 2019.<sup>5</sup> The student was to receive approximately two 30-minute reading support sessions per week. This is clearly not enough instruction, given the student's needs.

The September 2019 IEP could not include a FBA because the student was not in school in July 2019 when the student was identified with an emotional disturbance. As pointed out above, this is a failure to provide FAPE because the evaluation process was not undertaken when it should have been. Still, by November 2019, the Charter School had performed a FBA. The FBA in the November 2019 is not very robust, but it is adequate on its face. More concerning is that multiple Charter School witnesses testified to preparing a FBA—yet no witness at the hearing indicated that the FBA in the IEP was prepared by that witness. Who conducted the FBA? The record is silent on this point, and the affect and demeanor of Charter School witnesses make it seem that no one wanted to take ownership for having produced that document. But sloppy procedure aside, the denial-of-FAPE in this regard is grounded in the fact that the FBA did not lead to a PBSP. For a student exhibiting this level of problematic behavior in the school environment, where even the Charter School evaluator emphatically recommends the potential intervention of mental health professionals, not to have a PBSP as part of the IEP is, on its face, a denial-of-FAPE. And, sadly,

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<sup>5</sup> Much of the testimony from multiple witnesses centered on these reading benchmarks. Taken as a whole, again this hearing officer calls into question the validity of these scores. By the end of kindergarten, the student was at “.71”, yet at the outset of 3<sup>rd</sup> grade, the student was at roughly “.25”, a level the student had ostensibly displayed at the outset of kindergarten. What is not contra-indicated by this data over the years, however, is the student's deep deficits in basic reading skills.

the student's behavior continued to be deeply problematic throughout the remainder of 2<sup>nd</sup> grade.

*Progress.* Both parties failed to include as evidence any progress monitoring on the goals in the September 2019 IEP. This hearing officer is fortunate that the private S&L evaluator included that data as part of her report. The progress monitoring shows a degree of progress on the sight-word goal and no progress on the phoneme-blending CVC words. Still, the denial-of-FAPE determination is rooted more in wholly tardy identification of the student's need in reading, and lack of appropriate goals and necessary robust instruction to meet those needs, rather than progress considerations.

*School Closure.* As of March 2020, and continuing into the current school year, the Charter School has been unable to return to in-person instruction. For the spring of 2020, the period from March – June 2020, there is no denial-of-FAPE. Put simply, this hearing officer does not feel that an explicit finding of denial-of-FAPE can be parsed out when societal circumstances across the board were upset by the COVID-19 pandemic, schooling no less than every other aspect of society. Below, there will be an award of compensatory education, and that award will take into account the equitable considerations of the various aspects of the Charter School's denial-of-FAPE. But the footing of the Charter School's instruction over the period of the school closure as the result of the school-closure will not be one of those considerations.

As of September 2020, however, the Charter School, like most educational entities, had time to better understand how it would educate students and time to put in place online instructional strategies. That happened in the education with this student. The record is sparse in terms of the student's education over the 2020-2021, to the extent that this hearing finds he cannot find that the Charter School denied the student FAPE solely as a result of the continuing school closure. Having said that, again the

Charter School's denial-of-FAPE is not a matter of implementation during school closure as much as a failure to timely evaluate the student and to craft an appropriate IEP.

S&L. Finally, the S&L evaluator in the July 2019 ER found that the student did not have S&L needs. Here, the evidence presented through the private S&L evaluator in the August 2020 report and her testimony outweighs the content and conclusions of the Charter School's S&L evaluation. The recommendations for S&L services are appropriate in light of this record as a whole, especially in light of the student's needs in written language and pragmatic language/social communication.

In sum and accordingly, the Charter School has denied the student a FAPE in its failure to timely identify the student and to program for the student through an appropriate IEP.

### ***Section 504/Denial-of-FAPE***

Section 504 and Charter School Section 504 Regs also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §711.3(c)). The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Charter School Section 504 Regs, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

Therefore, the foregoing analysis is adopted here— the Charter School denied the student FAPE for the reasons set forth above. Compensatory education will be awarded as set forth below.

### ***Section 504/Discrimination***

The provisions of Section 504 also bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4; 22 PA Code §711.3(c)(2)). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against on the basis of disability, has been subject to disability discrimination in violation of Section 504 protections. (34 C.F.R. §104.4; 22 PA Code §711.3(c)(2); S.H. v. Lower Merion School District, 729 F. 3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of a school entity in its purported acts/omissions. (S.H., *id.*).

Here, the Charter School has denied the student FAPE. In various ways over 1<sup>st</sup> and 2<sup>nd</sup> grade, it has ill-served this student. But it has not treated the student with deliberate indifference as, even when the student had not yet been identified, as the Charter School was attempting regular education interventions. And while the Charter School's IEP is fatally flawed, the Charter School identified needs and attempted to respond to those needs.

Accordingly, the Charter School has not discriminated against the student on the basis of the student's disabilities.

### ***Compensatory Education***

Where a school entity has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a 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)).

In this case, the Charter School has denied the student a FAPE by not recognizing in January 2019 that it needed to evaluate and identify the

student as requiring special education. The September 2019 IEP is inappropriate as to the student's needs in behavior and reading. The denial of FAPE has taken place over an entire school year (roughly March 2019—when the evaluation process, appropriately undertaken, would have been concluded—through March 2020). But the nature of the denial-of-FAPE—inappropriately programming for behavior which is profoundly problematic and permeated the entire school environment and school day along with inappropriately programming for reading, where the student moves through 3<sup>rd</sup> grade with deficits in basic reading—ripples across the student's entire education.

Therefore, it is the considered opinion of this hearing officer that 800 hours of compensatory education is an equitable remedy for the denial of FAPE on this record.

As for the nature of the compensatory education award, the parent may decide in her sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs, or identified educational needs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the West Oak Lane Charter School has denied the student a free

appropriate public education. The student is awarded 800 hours of compensatory education.

The student's identification status going forward shall be specific learning disability in reading (primary) and emotional disturbance (secondary).

The West Oak Lane Charter School did not act with deliberate indifference in the education of the student and did not discriminate against the student on the basis of disability.

Given the impact that lack of an inappropriate evaluation and identification of the student, the Charter School shall reimburse the parent for the costs of the private psychoeducational report and the private S&L report, as testified to by the evaluators at the hearing.

Within 28 days of the date of this order, or as soon as practicable given the schedule of the parent's private psychoeducational evaluator and S&L evaluator, the student's IEP team—including the psychoeducational evaluator and the S&L evaluator—shall meet to devise reading and S&L goals in line with those respective evaluations and/or the input of the evaluators at the IEP meeting. The IEP team shall explicitly consider the student's potential need for a more restrictive placement, including emotional-support and learning-support settings.

The parent's psychoeducational evaluator and/or S&L evaluator may participate by telephone if that provides for a more expeditious convening of the IEP team. The Charter School shall bear any cost, rate, or fee for the participation of the psychoeducational evaluator and the S&L evaluator in the IEP meeting. In the likely event that the evaluators' schedules do not exactly coincide to allow for their participation in the same IEP meeting, the

IEP team shall engage in separate meetings to accommodate the schedules of the evaluators.

Within 20 school days of the resumption of live instruction at West Oak Lane Charter School, whether in the current 2020-2021 school year or in the upcoming 2021-2022, the Charter School shall incorporate into the student's IEP the functional behavior assessment in the March 2020 psychoeducational report and shall include in the IEP an explicit, concrete positive behavior support plan based on that assessment.

Finally, nothing in this order should be read to interfere with or limit the ability of the parties to agree otherwise, so long as such agreement is in writing and specifically references this order.

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

12/15/2020