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

Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: S.F.

Date of Birth: [redacted]

ODR No. 13460-1213KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent	David Arnold, Esq. Suite 106 920 Matsonford Road West Conshohocken, PA 19428
Collegium Charter School 535 James Hance Court Exton, PA 19341	Megan Grossman, Esq. 1818 Market Street, Suite 2600 Philadelphia, PA 19103

Date of Hearing: July 24, 25, 26, 2013; August 3, 2013

Record Closed: August 9, 2013[1]

Date of Decision: August 16, 2013

Hearing Officer: Brian Jason Ford

[1] The record closed upon the Hearing Officer's receipt of the parties closing briefs.

Introduction and Issues

This matter arises under Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4. The Parent claims that the Student was denied a free appropriate public education (FAPE) from the Charter during the 2011-12 and 2012-13 school years. The Parent also demands placement at [a Private] School, at the Charter's expense, for the 2013-14 school year.

The issues are:

1. Is the Student entitled to compensatory education to remedy any denial of FAPE during the years in question?
2. Must the Charter place the Student at [Private School] to ensure the provision of FAPE during the 2013-14 school year?

Findings of Fact

I have broken the findings of fact into various sub-parts, separated by issue and date. I have numbered each finding consecutively, regardless of which sub-part the finding falls into. Typically, special education decisions are written to obfuscate students' identities, to the point that students' ages and genders are not always discussed. In this case, the Student's age and gender are relevant, and so I note the Student's birthday and ages at various times. [Redacted].

School Years, Schools, Student's Age

1. The Student's date of birth is [redacted; the Student is pre-teenaged].
2. The Student attended a private kindergarten. The Student started 1st grade at a parochial school, but transferred to a public school towards the beginning of the first grade year. The Student then remained in the public school for the remainder of first grade.
3. The 2011-12 school year was the Student's 2nd grade year. [Redacted].
4. The 2011-12 school year was the Student's first year in the Charter. The Student attended the Charter for the entirety of the 2011-12 school year.
5. The 2012-13 school year was the Student's 3rd grade year. [Redacted].
6. The 2012-13 school year was the Student's second year in the Charter. The Student attended the Charter for the entirety of the 2012-13 school year.

Moving [and] Religion Changes

7. Towards the end of the 2010-11 school year, the Parent and Student changed their religious beliefs. [Redacted].

8. Between kindergarten and the end of 1st grade, the Parent and Student moved several times. At times, the Parent and Student were living with [a family member].
9. The Parent and Student have lived with each other at all times, and have not moved since before the start of the 2011-12 school year.

Student-to-Student Inappropriate Touching

10. At the start of the 2011-12 school year, the Student was inappropriately touched by one of [the Student's] classmates. The Student reported the incident to the Parent on September 8, 2011. The Parent reported the incident to the police on September 14, 2011. The police investigated the incident and drafted a report of the incident. The parties stipulate that, for purposes of this hearing, the facts reported in the police report (entered into the record of this hearing as P-86) constitute my findings of fact concerning the incident. These facts are well-known to the parties, and so I will not recount the particular details of the incident in this decision. Rather, I will only set forth those facts that are necessary to give context to this decision. All facts in this section are derived from the police report.
11. [Redacted].
12. [Redacted].
13. The incident occurred in the Student's classroom.
14. The Student's teacher was present at the time of the incident, but did not know that the incident occurred at the time it occurred.
15. The Student reported to the police that inappropriate touching occurred on four separate occasions.
16. The other student admitted to the inappropriate touching, but the police report is ambiguous as to whether the other student admitted to four separate incidents, or just one incident. The police made no explicit finding as to the number of incidents.
17. The police did not pursue criminal charges because of the age of the subjects.

Student's History of ADHD, Enrollment in the Charter

18. On October 22, 2010, the Parent had the Student evaluated by [the Student's] pediatrician for ADHD. As part of that evaluation, the Parent completed a Diagnostic Checklist for ADHD and a SNAP-IV-C Rating Scale. (P-93 at 102-103). Results of those evaluations, if completed, were not made part of the record in this case.
19. On August 5, 2011, the Parent completed a Heath Questionnaire as part of the Charter's enrollment process. (P-7 at 12). The Heath Questionnaire is a form drafted by the Charter. On that form, the Parent indicated that the Student had no health problems, and was not on medication.
20. On August 21, 2011, the Student's pediatrician completed a Child Health Report. The Child Health Report is a form from the pediatrician's office (not drafted by the Charter). On the Child Health Report, the pediatrician states that the Student has "probable ADHD" and "just started Ritalin." (P-7 at 16).
21. The Student's immunization records were attached to the Child Health Report, and were referenced on the Child Health Report. (P-7 at 16, 18-19).

22. As part of the Student's enrollment, the Charter completed an Enrollment Checklist. (P-7 at 21). On its face, the Enrollment Checklist was completed by the Charter, not by the Parent. On the Enrollment Checklist, the Charter acknowledged receipt of the Heath Questionnaire and the Student's immunization record.
23. Conflicting testimony notwithstanding, I find that the Parent, or the pediatrician acting on the Parent's direction, sent the Child Health Report to the Charter at the time of the Student's enrollment in August of 2011.[2] Consequently, I find that at the time of enrollment, the Charter was presented with conflicting information: the Heath Questionnaire, completed by the Parent, indicating no diagnoses or medications; and the Child Health Report, submitted by the pediatrician, indicating "probable ADHD" and a Ritalin prescription.
24. The Parent did not disclose the Student's "probable ADHD" and medication on the Health Questionnaire because she did not want the Student to be labeled. (NT at 549-550).
25. The Parent did not provide the Student's public school records from 1st grade. The Enrollment Checklist notes that this information was not provided. Further, on some forms, the Parent indicated that the Student was attending the parochial school immediately prior to enrollment.

Start of 2011-12 School Year – December 2011

26. At the start of the 2011-12 school year, the Charter administered placement testing and determined that the Student was eligible for Title I reading support, instructed though a Reading Assistance Program (RAP). The Parent gave consent for the Student to participate in the Charter's Title I RAP on September 7, 2011. (P-2).
27. Based on the same placement testing, the Charter recommended placement in 1st grade. The Parent insisted on placement in 2nd grade, and the Charter acquiesced to the Parent's request.
28. As part of the RAP, the Student was assessed using the Developmental Reading Assessment, Second Edition (DRA2). (P-13). Based on DRA2 testing, on August 25, 2011, the Student's independent reading level was "Level 4." On November 19, 2011, the Students independent reading level was "Level 14". On May 25, 2012, the Student's independent reading level was "Level 20". The Level 4 corresponds to the expected benchmark for September of a typical student's first grade year. The Level 20 benchmark corresponds to the expected benchmark for September of a Student's 2nd grade year. Consequently, I find that the Student (according to the DRA2) made one year's worth of academic progress in reading from August 25, 2011 to May 25, 2012. However, the Student was still performing one year below grade expectations. (P-13).

[2] During the hearing, conflicting testimony was presented as to when the Charter received the Child Health Report indicating possible ADHD. The Parent contends that the Child Health Report was first submitted just prior to the Student's enrollment in the Charter, and submitted a second time in May of 2012 (after the Charter told the Parent that it did not have the form). The Charter contends that the Child Health Report was submitted for the first time in May of 2012. Careful examination of the documents, however, reveals that the Student's immunization records were attached to the Child Health Report, and the Charter acknowledged receipt of the immunization records when the Student enrolled.

29. Had the Student been placed in 1st grade at the start of the 2011-12 school year, as the Charter recommended, the Student would have been above grade level expected benchmarks in reading, based on the DRA2, in May of 2012. (P-13).
30. On September 20, 2011, the Charter "invited" the Student to "take part in a group on classroom behavior." (P-3). The group was "open to children who are experiencing difficulties in social settings, behaving, or following directions." The group met once per six-day cycle, and covered issues such as "proper school behavior, interrupting, bothering, and ways to handle situations appropriately." The Parent gave consent for the student to participate in the group on October 18, 2011.
31. On September 28, 2011, the Charter referred the Student to its Instructional Support Team (IST). (P-9). The IST met and, with the Parent's participation, an Individual Student Action Plan was drafted on October 18, 2011. (P-9). IST supports are regular education interventions.
32. At the time that the Action Plan was drafted, the IST noted that the Student "is willing to help others and works well with a partner... [but] gets confused by directions and prefers to stand while working." (P-9). At that time, the Student was failing Math (60%) and Social Studies (53%) , and had "difficulty following classroom expectations."
33. Regarding classroom expectations, the Student's behaviors were monitored using a class-wide behavior chart. At the time that the Action plan was drafted, the Student was receiving "an average of 68% on [the Student's] daily charts." As the Action Plan was implemented, the Student's behaviors were monitored and data was compiled on a weekly basis. The results were variable, but generally showed improvement, with most scores between 80% to 90%. (P-22).
34. Regarding Math, data was collected three times in November of 2011. By November 30, 2011, the Student's Math progress monitoring had fallen to 58%, despite IST interventions. (P-22).
35. Regarding Social Studies, data was collected three times in November of 2011. By November 30, 2011, the Student's Social Studies progress monitoring had risen, but only to 64%, despite IST interventions. The IST was concerned about the Student's writing ability in Social Studies. (P-22).

January 2012 – End of 2011-12 School Year

36. The Charter, with the Parent's consent, conducted an IDEA evaluation of the Student in late February of 2012 and prepared an Evaluation Report (ER) dated March 3, 2012. (P-22). The ER was presented to the Parent at a Multi-disciplinary Team (MDT) meeting on the same day.
37. On its face, the reason for referral for a ER was that the Student "was referred through IST to determine [the Student's] academic strengths and needs, and rule out ADHD as a factor to [the Student's] variable performance." The Charter contends that it was made aware of the Student's "probable ADHD" diagnosis and medication roughly 15 school days prior to the completion of the ER. (*See* P-22 at 1).
38. Regarding the touching incident, the ER reports as follows: "There was an alleged incident in September where another student was accused of inappropriate contact, which is currently under investigation." (P-22 at 1).

39. Roughly 15 school days prior to the ER meeting, the Parent reported to the Charter, via a phone call, that the Student has an Adjustment Disorder, was medicated for anxiety, and was receiving private counseling.
40. The ER includes information gathered through the IST process. (P-22).
41. The ER includes "Time on Task Observations" completed on November 29, 2011, December 13, 2011 and January 6, 2012. Although these observations were variable, they show that the Student was frequently off task, calling out, and out of [the Student's] seat. (P-22)
42. The ER also includes teacher input. According the Student's teacher, at the time of the ER, the Student "is struggling academically and with staying focused. [The Student] is constantly out of [the Student's] seat and talks most of the time, which affects [the Student's] progress. [Student's] strength [is] spelling." (P-22)
43. The Student's teacher also completed an Observation form, endorsing the following characteristics in the Student: "hyperactive, disorganized/forgetful, inattentive/impulsive, easily distracted, immature, class clown, cheats/lies/steals, does not resolve conflict well, easily frustrated, stubborn." (P-22)
44. On the same form, the teacher did *not* endorse the following: "difficulty finishing tasks, unmotivated in school, often late for school/class, tired/lethargic/apathetic, seems withdrawn/depressed, clumsy, hard to understand verbally, literal translation of language, insensitive to the feelings of others, cannot generalize information, has few or no friends, ridiculed/teased by peers, subject to temper tantrums, verbally aggressive, physically aggressive." (P-22).
45. As part of the ER, the Student received a cognitive assessment using the Weschsler Intelligence Scale for Children - Fourth Edition (WISC-IV). This assessment placed the Student in the average range of intellectual functioning with an FS IQ of 99. The Student's Verbal Comprehension Index (assessing the Student's verbal reasoning abilities) was also in the average range, assessed at 93. The Student's Perceptual Reasoning Index (assessing the Student's nonverbal reasoning abilities) was also in the average range, assessed at 100.
46. As part of the ER, the Student underwent achievement testing using the Wechsler Individual Achievement Test - Third Edition (WIAT-III). The WIAT-III is comprised of several subtests, each of which go into three composite scores. In the Basic Reading composite, the Student was assessed to be in the average range with a standard score of 90 and a percentile rank of 25. In the Reading Comprehension and Fluency composite, the Student was assessed to be in the average range with a standard score of 94 and a percentile rank of 34. In the mathematics composite the student was assessed to be in the average range with a standard score of 97 and a percentile rank of 42.[3]
47. As part of the ER, the Student's teacher, the Parent and the Student all completed their respective forms of the Connors 3rd Edition (Connors) ratings scale. The Connors is a

[3] Scrutiny of individual subtest scores reveals that the Student was performing roughly at expected grade equivalence in most subtests, below grade equivalence in some subtests and well above grade equivalence on one subtest. On normative, standardized tests like the WAIT-III, grade equivalencies are the least meaningful metric. The assessment is primarily designed to determine the Student's academic abilities relative to the normative sample - which is best expressed through standard scores and percentile ranks. The "average" descriptor on composite scores is relative to deviation from expected performance.

standardized assessment used to assess ADHD symptomatology. The Student's teacher rated the Student in the "High Average" or "Very Elevated" range for all indicators. The Parent rated the Student in the "Average" range for all indicators. The Student's ratings of [the Student's] self were variable.

48. The ER concluded that the Student had a disability, specifically ADHD, but did not need specially designed instruction, and therefore was not eligible for special education. (P-22 at 13). The ER further concluded that the Student was eligible for a Section 504 plan as a result of [the Student's] ADHD diagnosis. The ER also noted that the Student could be eligible for a Section 504 plan due to the reported Adjustment Disorder, but that documentation of the same would be necessary.
49. All members of the MDT agreed with the ER except for the Parent. The Parent disagreed because she felt that the Student should be found eligible, and that the Student should receive an IEP. (P-22 at 14).
50. On March 20, 2012, the Charter met with the Parent and proposed a Section 504 Service Agreement (504 Plan). The 504 Plan offers preferential seating, behavioral redirection, chunking of long tasks and multi-step directions, breaks, behavioral charting and strategies to minimize distractions. (P-29). The Parent never approved nor disapproved the 504 Plan.
51. After the initial MDT meeting, the Parent submitted additional documentation from the pediatrician, indicating that the student carries an ADHD diagnosis and was taking medication for ADHD. The Parent submitted additional documentation from a psychiatrist indicating that the Student was under treatment for Adjustment Disorder, depression, anxiety, and stress; and was medicated for those disorders as well. (P-23 at 2).
52. At some point after the ER, the Charter obtained the Student's records from the 1st grade public school. These records indicate that the Student would have been promoted to 2nd grade at the start of the 2011-12 school year, had the Student remained in the public school.
53. The Charter completed a Revaluation Report (RR) on May 4, 2012 to incorporate the documentation from the pediatrician and the psychiatrist. The MDT presented the RR to the Parent the same day. (P-23). The Charter sought the Parent's consent to conduct the RR on March 29, 2012 and received consent on April 20, 2012. (*See* P-17, P-19).
54. The RR reports all of the same testing and observational data collected for the ER, and includes the same statement concerning the touching incident.
55. The RR concluded that there was a need for additional information, and proposed a Functional Behavior Analysis (FBA). (P-23 at 9).[4] The FBA was then completed in April of 2012. The FBA, along with a description of the Student's discipline and behavior record were then incorporated into the RR in a section titled "Interpretation of Additional Data." (P-23 at 10).
56. The Discipline Record incorporated into the RR lists three relatively minor infractions. Disciplinary consequences are not reported in the RR.

[4] The RR states that the FBA was proposed by the Student's IEP team. This is incorrect. The Student did not have an IEP at this time, and the Charter did not agree that the Student was IDEA-eligible. Rather, the recommendation came from the MDT that reviewed the RR with the Parent.

57. The Behavioral Record incorporated into the RR notes several concerns about the Student's use of a cell phone in school. The Behavioral Record focuses on an incident on September 12, 2011 in which the Student's cell phone was confiscated [redacted]. The inappropriate touching incident is also mentioned briefly in the Behavioral Record.
58. The FBA includes a summary of the Student's academic progression since enrollment in the Charter. Each of the Student's teachers completed FBA worksheets. It is not clear whether any additional observations were conducted as part of the FBA. The FBA reports input from individual teachers, but teacher input is summarized as follows: "Based on [FBA] worksheets completed by [Student's] teachers, it appears as though [the Student] is struggling most in the areas of participation skills, social skills, self-regulation skills, organizational skills, study skills and academics."
59. The FBA a lists antecedents to the behaviors of concern, the behaviors of concern, consequences, and perceived function of the behavior. Antecedents included "math class, issued a directive or correction by teacher, full class instruction, unstructured times." The behaviors of concern were "invading other people other personal space, call[ing] out, talkative, goofing off, staring into space." The consequences were "adult attention, postponement of assignments." The perceived functions of the behavior were "to gain adult/peer attention, [and/or] to avoid, escape, or postpone class or an assignment."
60. As a result of the additional data, the RR concludes that the Student has a disability and requires specially designed instruction. (P-23 at 14). The Student's primary disability category was listed as Serious Emotional Disturbance, and the Students' secondary disciplinary disability category was listed as Other Health Impairment (OHI) based on the ADHD diagnosis.
61. All members of the MDT checked boxes on the ER agreeing with that document except for the Parent, who did not check boxes to either agree or disagree.
62. With the Student's IDEA eligibility now established, an IEP team met on May 8, 2012 to develop an initial IEP for the Student. (P-30).
63. The IEP included seven (7) goals. Three of those goals aimed to improve the Student's behaviors and interactions with peers. The measurability of those goals are borderline.[5] The other goals target particular reading, writing, and math skills, and are based on Pennsylvania state standards. (P-30 at 12-13).
64. Program modifications and Specially Designed Instruction (SDI) called for placement in a small group for Language Arts, inclusion in a 3rd grade math class that was co-taught with a Learning Support teacher, the option of 1.5x time on tests, pre-planning of unstructured events, counseling with the school guidance counselor (1x 20 min sessions per 6 day cycle), and all of the supports offered in the 504 Plan. The counseling was also listed as a Related Service, as was participation in "Social Group Instruction using the Social Thinking Program." (P-30 at 15).

[5] For example, one goal is: "in the regular education classroom, student will attend for 75% of a 20 minute lesson looking at the teacher and listen quietly, raising [the Student's] hand to speak and following along with no more than 2 teacher redirections". In general, the desired behavior is clear, but the specific measurability is questionable. If the Student attends (meaning pays attention) for 15 minutes, but does not raise [the Student's] hand, and required two redirections, is the goal met? Also, does meeting all criteria on a single occasion satisfy the goal? These questions cannot be answered on the face of the IEP.

65. The FBA, a resulting Positive Behavior Support Plan (PBSP) and their goals were also put into place. (P-30, P-44).
66. The Parent left the IEP meeting without approving or disapproving the IEP. A Notice of Recommended Educational Placement (NOREP) for this IEP was sent on May 8, 2012 but was not returned. Instead, a letter from the Parent's former attorney to the Charter was made part of the record. (S-17). The letter states that the Parent ("Family" in the letter) "does not approve of this IEP because it does not fully and appropriately address [Student's] global needs. Because it is near the end of the school year, and [Student] needs time to decompress from the stressors of the current year, the Family is not requesting a resolution session for a due process hearing at this time. Instead, the family requests that the IEP team reconvene in August to discuss appropriate placement program for student for the next school year."
67. In light of the attorney's letter, the Charter did not implement the Student's IEP, or PBSP, during the remainder of the 2011-12 school year.
68. At the end of the 2011-12 school year, on a 100 point scale, the Student received a 57 in Mathematics, a 70 in Language Arts, an 80 in Science, a 68 in Social Studies, an 81 in Spanish, and a 85 in Health. Although ungraded, the Student received "satisfactory" or "excellent" marks in Music, Art, Technology, and Physical Education (although the Student received a "needs improvement" in the "Uniform" subcategory in P.E.).

The 2012-13 School Year
Relationship Between Parent and Charter

69. A vast amount of testimony in this case concerned the deterioration of the relationship between the Parent and the Charter during this period of time.[6]
70. It is not disputed that the Student engaged in a number of behavioral infractions during the 2012-13 school year. In general, the Student would commit relatively minor disciplinary infractions, and would be "written up" for those infractions. In most cases, the writeup itself constituted the discipline (i.e the Student was not given detentions, suspensions or the like).
71. Upon receipt of the writeup, the Parent would contest the discipline, accepting the Student's version of events whenever they differed from the events in the writeup. This yielded a significant number of increasingly hostile interactions between the Charter and the Parent.
72. Not all of the Student's negative behaviors during the 2012-13 school year were written up. Further, write-ups were not the extent of the Student's discipline during the 2012-13 school year. The Student was suspended for one (1) day in December of 2012 for

[6] Given the amount of time that was spent during the hearing discussing the various, and often quite serious clashes between the Parent and the Charter, it is quite telling that both parties all but ignore this testimony in their written summations and arguments. Perhaps this decision reflects reality that the relationship between the Parent and the Charter does not alter the Student's rights under the IDEA. The questionable behavior of both the Parent and the Charter at various points in time has almost no probative value in this case, absent the establishment of a connection between their behavior and the Student's receipt of a FAPE. By way of example, testimony concerning an incident in which the Parent called the police when the Charter refused to release the Student for an early pickup is troubling for many reasons, but is ultimately not relevant to the issues at hand. However, to whatever extent that the Parent and Charter's hostile attitudes towards each other have any bearing to this case, facts are found.

striking another student, and was suspended for three (3) days following an elopement incident discussed below. The Student was also reported for bullying other students. (*See* P-47, P-48, P-49, P-50, P-51, P-53).

73. The interaction between the Parent and the Charter concerning the one day suspension in December of 2012 warrants findings of fact: The Student struck another student, and was given a suspension. The Student claimed, both to the Charter and to the Parent, that [the Student] did not strike the other student. According to the Parent, at home, the Student wrote a note saying that [the Student] did not strike the other student, and that the other student agreed with this. According to the Parent, the Student brought the hand-written note to the Parent, the Parent then typed up the note, and sent the typed note back to school with the Student.[7] The Student was then caught handing the typed note to the other student, and the note was confiscated. The parents of the other student were informed, were very upset by the *Parent's* actions and, with some encouragement from the Charter, filed a bullying report *against the Parent*. (P-50; S-27; NT at 1059-1061).
74. In response to the bullying report against the Parent, the Parent was barred from the Charter's campus unless an appointment was made in advance. The Parent was still allowed on campus to drop off and pick up the Student.

2012-13 School Year
Educational Interventions

75. The Charter recommended retention in 2nd grade for the 2012-13 school year. As in the prior year, the Parent objected and the Charter acquiesced. As a result, the Student was placed into third grade at the start of the 2012-13 school year.
76. With very little contact between the Charter and the Parent (or their respective attorneys) over the summer of 2012,[8] the Student started the 2012-13 school year in the same position [the Student] was in at the end of the 2011-12 school year with an offered-but-rejected IEP.
77. Although testimony on this point was not completely explicit, the testimony regarding the 2012-13 school year, taken as a whole and in light of the arguments made by the Charter in its closing statement, compel me to conclude that the Charter both viewed and treated the Student as a regular education student at the start of the 2012-13 school year.
78. At the start of the 2012-13 school year, the Student was placed in a 3rd grade classroom taught by a different teacher than the Student had in 2nd grade. Testimony from the Parent indicates that the teacher change is contrary to the Charter's typical practice of keeping students with the same teacher for 2nd and 3rd grade. (NT at 173-175). Testimony from the Charter's employees, taken as a whole, suggests that the Charter thought it was unwise to keep the Student with the teacher who was present during, but unaware of, the touching incident.

[7] The Parent's testimony of these events strain credulity. Regardless of whether the Student wrote the note at first, it is not disputed that the Parent typed the note and instructed the Student to give the note to the other student for the other student's signature.
[8] Or, at least none that was evidenced at the hearing.

79. Generally, the teachers working with the Student during the 2012-13 school year reported the same or increased levels of off task and inappropriate behaviors in school, as compared to the 2011-12 school year.
80. Although the Student's IEP was not approved, the Student's third grade teacher attempted to implement the strategies recommended in the IEP and PBSP from the start of the 2012-13 school year. (*See, e.g.* NT at 771).
81. Without formalized special education services or an IEP, as of November 12, 2012, the Student was earning the following grades: Reading - 77%, Writing and Grammar - 78%, Math 56%, Science - 81%, Social Studies - 75%, Spelling - 93%, Spanish - 68%, Health - 81%. (P-33 at 4). The Student's Math grade is deflated as a result of the Student's failure to turn in assignments, despite requests from the Math teacher directly to the Parent. (*See* NT at 594, 600-605; P-48).
82. On November 14, 2012, the IEP team reconvened and revised the IEP of May 8, 2013. (P-33). The IEP was revised to reflect the Student's current levels of academic and functional performance. Current grades and behaviors (similar to the behaviors during the 2011-12 school year) were reported. (P-33 at 4-5). More specifically, at the time of the revision, the Student was "frequently off task in class and struggles to pay attention during instruction," and was only able to keep [the Student's] hands to [the Student's] self and participate in 85% of instruction time. *Id*. Inappropriate behaviors reported in the IEP include an incident in which the student [redacted].[9]
83. On November 14, 2012, the Charter issued the NOREP for the November 14, 2012 Revised IEP. The Parent signed and returned the NOREP on December 20, 2012, approving parts of the IEP, and disapproving other parts of the IEP. More specifically, the Parent checked a box approving the IEP in part, and wrote: "I agree with [Student's] identification as an eligible student under [the] IDEA, and agree that [Student] requires an appropriate program and placement." The Parent also checked a box disapproving the IEP, and wrote: "I disagree that the IEP offers [Student] an appropriate program and placement. Placement at [the Charter] is inappropriate and [Student] requires an alternate placement and program that appropriately addresses [Student's] educational needs." The Parent also checked a box indicating that she (the Parent) would request a due process hearing.
84. Although it is not reflected in the NOREP, both parties agreed to implement (or continue to implement) many of the SDIs in the IEP. NT at 1446-1453. The parties also agreed to some placement changes, including the Parent's request to move the Student into the 2nd grade teacher's room for language arts.
85. In response to the NOREP, the Charter suggested that the Parent investigate two approved private schools. The Parent toured the schools recommended by the Charter. The Parent testified as to her belief that neither school would be appropriate for the Student. It is not clear when the Parent reached that conclusion.
86. The Parent also investigated and toured the [Private] School, another approved private school (APS). After the Parent toured [the APS], the Parent applied to [the APS] for the Student's admission.
87. The instant due process hearing was requested on January 24, 2013. *See Complaint.*

[9] Despite some ambiguity, it appears that the Student was spoken to about the incident, and (for obvious reasons) the staff member was very troubled by the incident. But the Student did not face discipline beyond a writeup.

88. On April 19, 2013, the Student eloped from the Charter [redacted]. The Charter went into "lockdown" when it realized that the Student was missing, and remained that way until the Student was found. The Student received a three (3) day suspension as a result of the incident.
89. The elopement prompted another IEP team meeting on April 29, 2013. Additional SDIs were discussed (the prior conditional approval notwithstanding).
90. The Parent took the Student for a "Pre-Enrollment Interview" at [the APS] on April 30, 2013. (P-99). As a result of that interview, [the APS] determined that it could be an appropriate placement for the Student. *Id*.
91. On April 29, 2013 (coincidentally) the Charter offered a NOREP placing the Student in one of the two APSs it suggested that the Student should investigate. (P-40). The APS in question previously determined that it could be an appropriate placement for the Student. (S-31).
92. In May of 2013, another FBA was conducted by a third party at the Charter. (P-42). This FBA resulted in a report dated June 10, 2013. The FBA report included a review of records and a detailed reporting of five hours of observations in the school setting. The third party evaluator did not contact or communicate with the Parent as part of the evaluation.
93. The third party FBA was more formalized than the Charter's prior FBA and, in some ways, relative to the prior FBA, indicates some behavioral improvement. Even so, during the five hours of observation, the third party evaluator observed 146 instances of non-participation, 17 instances of teasing, 4 instances of verbal arguing, 17 instances of calling out, 8 instances of refusal, 13 instances of inappropriate/silly behavior, and (perhaps most concerning) 5 instances of inappropriate physical contact.[10]
94. On a 100 point scale, the Student received the following grades at the end of the 2012-13 school year: Mathematics - 64, Language Arts - 76, Science - 67, Social Studies - 71, Spanish - 79, Health - 79. Although not graded, the Student received "excellent" or "satisfactory" marks in Music, Technology, Art and P.E. (P-62).
95. To date, the Parent has not paid tuition to [the APS] or signed any contract under which the Parent undertook any obligation to pay tuition to [the APS]. [The APS] has offered a tuition contract to the Parent, but the Parent has not signed the contract, and has not incurred any debt to [the APS]. (P-98, NT at 488-489).

Discussion

As with the findings of fact, I have broken the Discussion into separate segments. Applicable laws and jurisprudence is discussed in each section.

The Parent's Expert Report

The Parents obtained an expert report specifically and explicitly for purposes of this litigation. The Parent's Expert's CV was entered into the record of these proceedings as P-100 and the Expert Report was entered as P-101. During the hearing, I admitted the

[10] All of those terms are defined in the third party FBA report.

Expert Report over the Charter's objection and, by necessity, prior to reading it. The Parents' Expert was also allowed to testify. Having listened to the Expert's testimony, and having carefully read the Expert Report, I conclude that the report has nearly no probative value and I accord both the report and the Expert's testimony very little weight.

For context, independent educational evaluations (IEEs) are regularly entered as evidence in special education due process hearings. IEEs are often treated similarly to expert reports (as are ERs and RRs conducted by LEAs), and the authors of IEEs are frequently called by parents to provide expert testimony relative to the IEEs. Indeed, the right to an IEE is codified in the IDEA and its regulations and, in the context of litigation, has been recognized by the Supreme Court as parent's "firepower to match the opposition." *Schaffer v. Weast*, 546 U.S. 49, 61 (U.S. 2005).

The Expert Report in this case is not an IEE. It is a review of the Student's records (albeit an extensive review), a recitation of information provided by the Parent, and a critique of the Charter's program, placement, and response to the inappropriate touching incident. Regarding the latter, the Expert Report is based in part on an interview with the Parent and an observation of the Student in school. Remarkably, the Expert did not interview the Student or assess the Student at all. Rather, the Expert relied exclusively upon information provided by the Parent to reach conclusions about the extent to which the Student was traumatized by the incident. Relying on that same single source of information, the Expert also concluded that the Charter's actions subsequent to the incident re-traumatized the Student. These determinations are conclusory and are not supported by the evidence presented in this hearing.

The Expert Report is useful to the extent that it provides a description of the behaviors that children may exhibit after [an] assault. The Expert's familiarity with the [APS] was also helpful, given the Expert's knowledge of the Student based on a records review. In the context of tuition reimbursement, such testimony can be probative. In this case, the Expert Report contributed very little other than a characterization of records that came in on their own, and a recitation of the Parent's opinions - which the Parent ably testified to on her own.

Although the context is clearly different, I am struck by the similarities between the Expert Report in this case and the Expert Report submitted to the District Court in *Lebron v. N. Penn Sch. Dist*., 769 F. Supp. 2d 788, 794-795 (E.D. Pa. 2011). In *Lebron*, the parents were not permitted to submit an expert report as evidence because the report was, for the most part, simply a critique of the Hearing Officer's decision; and the parts that were not were conclusory. *Id*. The Expert Report in this case is not a legal brief by a different name but, as in *Lebron*, it provides almost no information about the Student that cannot be obtained more reliably from other sources, and what new information it contains is conclusory.

The Inappropriate Touching Incident, ADHD

There can be no doubt that the touching incident was traumatic for both the Student and the Parent. The Charter's response to the incident ranged from blasé (as evidenced by the 3rd grade IEP team's general ignorance of the incident) to overly-defensive (as evidence by a repeated comment in various documents that the incident was "under investigation" long after all investigations had concluded). At the same time, the Parent ascribes virtually all of the Student's behaviors to the incident despite the fact that none of the evidence and testimony in this case, including the Expert Report, draw a definitive, causal connection between the incident and the Student's behaviors.

Even taking the Expert Report at face value, one could expect the Student to act out [redacted] in response to the incident. This did not happen. The Student's inappropriate behaviors (e.g. off-task, acting out, non-compliance) occurred on a near-constant basis [redacted]. This is not to understate the importance or severity of either incident, especially given the Student's age, but it does underscore the nature of the vast majority of the Student's behaviors. Even more importantly, even if the Expert conclusively linked the Student's behaviors to the touching incident, for reasons discussed below, that fact would be irrelevant for purposes of these proceedings.

Similarly, no causal connection was established between the Student's behaviors and the changes in the Student's religion or frequent moves before second grade. The Charter implied such a connection in some documents, but did not press this point during the hearing.

The Student's behaviors are completely in line with ADHD symptomatology. In fact, the Connors evaluation used to assess ADHD calls for raters to endorse or reject the very behaviors that the Student exhibited throughout 2nd and 3rd grade. It seems plainly obvious that the Student's behaviors are the direct result of the Student's ADHD, and it is remarkable that no evidence or testimony was presented in an effort to link the two.

Even so, for purposes of this hearing, the causal connection between the Student's behaviors and either ADHD or the touching incident is not relevant, and the parties' excessive focus on establishing causality is an unfortunate distraction from the issues *sub judice.*

The IDEA does not require the establishment of a causal connection between a Student's behaviors and any particular diagnosis in order to obtain appropriate services. Once IDEA eligibility is established, the question becomes whether a student exhibits behaviors that impede his or her learning or that of others. If a student exhibits such behaviors, an FBA must be conducted and a PBSP must be put into place. *See* 22 Pa. Code § 711.46. It makes no difference why a student is exhibiting such behaviors. For example, if a Student has a Specific Learning Disability and is exhibiting such behaviors, an FBA and BPSP must be put into place even if there is no direct

connection between the disability and the behaviors.[11] In this case, all of the Student's teachers, and the Charter itself, agreed that the Student's behaviors impeded the Student's learning. Causality (relative either to ADHD or the touching incident) is not relevant.

Compensatory Education

Through the enrollment process, the Charter was presented conflicting information regarding the Student's history of ADHD. The Parent obfuscated this issue either intentionally (to avoid labeling) or through carelessness. Even so, under the IDEA, it is the Student's right to be identified and the Charter's obligation to identify the Student. The Charter's exclusive reliance upon information provided by the Parent suggesting that the Student had no history of ADHD does not diminish the Charter's Child Find obligations once the Student enrolled. *See* 34 CFR 300.111; 22 Pa Code § 711.21.

Under the IDEA's Child Find obligation, which is imposed upon charter schools through 22 Pa Code § 711.21, the Charter is obligated to locate and identify IDEA-eligible students, regardless of the severity of the disability and even if the student is advancing from grade to grade. *See* 34 CFR 300.111.

The Child Find obligation does not, however, compel schools to immediately offer a special education evaluation (as described at 20 USC § 1414) to every child who could potentially have a disability. Rather, in the majority of cases, it is reasonable for schools to consider regular education interventions, including the IST process.

In this case, there is no dispute that, academically, the Student was nearly one year below grade level upon enrollment in the Charter for 2nd grade. Similarly, there is no dispute that the Student exhibited behaviors consistent with ADHD immediately upon enrollment and consistently thereafter. In response, the Charter put Title I reading into place immediately upon enrollment and started the IST process on September 28, 2011. Through this work, an IST plan was in place in an effort to address the Student's academics and behaviors by October 18, 2011. No evidence or testimony suggests that the Charter's decision to attempt IST before an IDEA evaluation were inappropriate, and these decisions are consistent with Child Find.

The Charter concedes that IST interventions were not successful. Upon reaching this conclusion, under the facts of this case, Child Find was triggered. It is concerning that the Student remained in an unsuccessful IST program for four months, but no evidence or testimony suggests that the Charter used the IST process to delay a special education evaluation. That evaluation was conducted throughout February of 2012, and an ER was finished in March of 2012.

[11] In a different context, specifically manifestation determinations and appeals under 20 USC § 1415(k), the connection between the disability and the behavior is quite important. In the context of establishing the right to behavioral interventions, it is not.

I find that the Charter's actions prior to the issuance of the initial ER were appropriate and consistent with Child Find. I find no violation of the IDEA during this time.

The foregoing situation changes substantially after the ER was issued. The District argues that the initial ER should not be the focus of this decision because it was "incomplete" due to the fact that the Charter received notice of the Student's ADHD diagnosis only 15 days before the ER was completed. This argument is not persuasive. An ER must assess all areas of a student's suspected disability. 20 USC § 1414(b)(3)(B). At the time of the ER, the Charter had significant, first hand experience with the Student's presentation. The purpose of the ER was to "rule out" ADHD ("rule out" being a term of art used to mean that evaluation is necessary to confirm a diagnosis). Regardless of when the Parent told the Charter of the Student's ADHD history, the Charter suspected ADHD, per the face of the ER, when it started the evaluation. Consistently, testing for ADHD was administered as part of the evaluation.

Notably, ADHD is not one of the 14 categories of disability defined by the IDEA. Rather, certain students with ADHD will fall into the category of OHI. Pertinent to this case, OHI applies to students who have limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that— (i) Is due to chronic or acute health problems such as ... attention deficit hyperactivity disorder ... and (ii) Adversely affects a child's educational performance. 34 CFR §300.8(c)(9).

In sum, the Charter had its own suspicions that the Student had ADHD, both formal observations of the Student and standardized assessments of the Student evidenced rather severe ADHD symptoms in school, the Charter recognized that these symptoms interfered with the Student's learning, and before the ER was completed (albeit shortly before the ER was completed) the Charter acknowledged input from the Parent that the Student had been diagnosed with ADHD (consistent with some of, but not all of the enrollment documentation). Despite all of this, the Charter concluded that the Student had ADHD but was not IDEA eligible.

The Charter's ineligibility determination was inappropriate. On the face of the ER, the only explanation for the determination is a single sentence that ADHD behaviors are not observed *at home*. (P-22 at 13.) Some testimony suggests that ADHD must be present in multiple settings (e.g. home and school) before an ADHD diagnosis can be made. This is irrelevant because the initial ER concludes that the Student had ADHD. Whatever the diagnostic criteria for ADHD are, at the time of the ER the Charter agreed that the diagnosis was in place. Therefore, by definition, the Student satisfied OHI criteria if [the Student] had a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that adversely affected [the Student's] educational performance. *See* 34 CFR §300.8(c)(9).

As noted on the ER itself, and as codified in the IDEA at 20 USC § 1401(3)(A), the test for eligibility has two parts. First, a student must have a qualifying disability. The Student in this case satisfied that prong of the test by unambiguously meeting the OHI criteria.

Second, “by reason thereof” the Student must need special education and related services. The second part of the test is also satisfied in this case. At the time of the ER, the Charter had already tried intensive regular education interventions (the IST process). The Charter conducted the ER, in part, because those regular education interventions failed. The Student’s disability was – according to the Charter – adversely affecting the Student’s learning and intensive regular education interventions were not successful. The Student, therefore, required specially designed instruction, was IDEA-eligible and should have received an IEP.

The Charter’s offer of a 504 Plan is not a defense against the Charter’s failure to provide an IEP. 504 interventions are regular education interventions, not specially designed instruction. The IDEA required the Charter to develop and offer an IEP to the Student. The development and offering of a 504 plan does not satisfy that requirement.

About two months after the ER was issued, the Charter reversed itself with the RR of May 4, 2012 and actually offered an IEP on May 8, 2012. The Parent first offered no response to the IEP and, ultimately, rejected it via a letter from her former attorney. Because of this, regardless of the appropriateness of the IEP, the Parent cannot claim a denial of FAPE due to the IEP’s non-implementation. The May 2012 IEP would have constituted the Student’s initial special education placement. When a parent rejects an initial placement, schools must take no for an answer. More specifically, if a parent refuses to consent to initial services for a child found eligible, schools may not pursue initiation of special education services through due process, and may not provide special education services to that child. 20 U.S.C. § 1414(a)(1)(D)(ii)(II). Consistently, when a parent refuses initial services, a “local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent.” 20 U.S.C. § 1414(a)(1)(D)(ii)(III)(aa). In sum, upon the Parent’s rejection of the initial IEP, the Charter could not request a hearing or provide special education; and statutorily is held harmless for abiding with those requirements.

It is worth noting that the letter from the Parent’s former counsel rejects the May 2012 IEP *in toto*. The blanket rejection of the initial IEP triggered both the prohibitions and protections of 20 U.S.C. § 1414(a)(1)(D). At the same time, the record offers no explanation as to why the Charter did not convene another IEP team meeting in August of 2012, as requested by the Parent via her former attorney. Given the frequent communications between home and school, the Parent’s nearly-continuous representation by counsel, and the protections afforded to the Charter by 20 U.S.C. § 1414(a)(1)(D), I find that the lack of an IEP meeting in August of 2012 does not violate any IDEA mandate.

I find that the Charter is protected from IDEA-based liability through December 20, 2012 for the same reasons. Despite nearly constant contact between home and school, the Charter was legally prohibited from pursuing special education, and was legally insulated from not providing special education. The Charter deserves some credit for

continuing to convene IEP team meetings, revising the IEP, and proposing NOREPs during this time.

The first time that the Parent ever approved any part of an IEP was on December 20, 2012 via a NOREP. On that NOREP, the Parent approved the part of the IEP that recounts the eligibility determination, but otherwise rejected the IEP. In essence, the Parent agreed that the Student needed *something*, but not the offered IEP. Instead, the Parent stated that the Student required a placement other than the Charter, and a program other than what the Charter offered.

Under these circumstances, application of 20 U.S.C. § 1414(a)(1)(D) is not so straightforward. When a parent agrees that an IEP is necessary, but contends that an offered, initial IEP is inappropriate, 20 U.S.C. § 1414(a)(1)(D) cannot be an absolute defense. It would run contrary to the purposes of the IDEA for a school to avoid all IDEA liability simply by offering inappropriate initial IEPs, and waiting for parental rejection. Analysis of the offered IEP is, therefore, necessary.

In this hearing, the Parent had the burden to establish the substantive inappropriateness of the offered IEP. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In her closing argument, the Parent claims entitlement to compensatory education primarily on the basis that no IEP was in place. That argument does not address the substantive appropriateness of the IEP itself. The Parent also argues that the Charter's decision to bar the Parent from campus renders placement at the Charter inappropriate. Ignoring the fact that the ban was neither blanket nor absolute (the Parent could schedule appointments to come to campus) this argument does not address the substantive appropriateness of the IEP.

What is more compelling is the significant testimony that the IEP and BPSP, although never approved, were implemented to a large extent during the 2012-13 school year. NT at 769-771, 910-912, 948, 1441-1454, 1120, 1187-1189. As a result, comparing classroom grades, the Student passed the majority of [the Student's] classes despite the lack of a formal IEP. This does not necessarily mean that the Student made one year's worth of academic progress in one year's time, but does indicate that the Student derived a meaningful educational benefit from the majority of [the Student's] classes. Behaviorally, no compelling evidence suggests significant progress or regression, despite informal implementation of the PBSP.

In a literal sense, it is not possible to say with certainty that the Student would have done better had similar services been provided under an approved IEP. It is reasonable to conclude, however, that the Student would not have done worse. The Student would have received similar services had the IEP been approved, but those services would have been provided with greater consistency and fidelity, and – importantly – progress would have been closely monitored. To whatever extent the offered services would

have been unsuccessful, the Charter would have had a legal duty to know about it and respond if the IEP had been approved.

In sum, the evidence and testimony shows that partial, informal implementation of an unapproved IEP resulted in some educational benefit for the Student. This evidence does not imply that the IEP would have failed if it had been approved, or that the IEP was not reasonably calculated to provide a meaningful educational benefit at the time it was offered. This, in light of the Parent's burden of proof and the Parent's nearly-complete rejection of the revised IEP, compel me to conclude that the Charter was protected by 20 U.S.C. § 1414(a)(1)(D) after the Parent returned the NOREP on December 20, 2012. The Parent's subsequent rejection of a NOREP offering placement at an APS does not alter this analysis.

For all of the foregoing reasons, I find that the Charter did not violate its Child Find obligations; that Parent never approved the Student's initial special education placement; and that the Parent did not prove by preponderant evidence that the rejected IEPs were inappropriate. Consequently, the Charter is protected by 20 U.S.C. § 1414(a)(1)(D) and the Student is not entitled to compensatory education.

Tuition Reimbursement

Throughout these proceedings, both parties have characterized the Parent's demand for tuition at [the APS] as a claim for tuition reimbursement. This characterization is incorrect. The Parent is not demanding tuition *reimbursement*. The Parent has incurred no debt to [the APS]. A parent's risk of financial loss is a prerequisite condition to any claim for tuition reimbursement. The cases that establish the well-known, three part test for tuition reimbursement recognize this factor. *See Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 374 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 15 (1993) (citing *Burlington*).

The Parent is not seeking *reimbursement*. The Parent is seeking *placement* at [the APS] at the Charter's expense. The *Burlington-Carter* test, therefore, does not apply. It is well established, however, that when an LEA cannot provide a FAPE to a Student by itself, it must consider a range of options including private placement. *See, e.g.* 34 CFR § 300.104. At the same time, the Student must be placed in the least restrictive environment (LRE) with appropriate services and supports. *See* 34 C.F.R. § 300.114(a)(2); *see also Oberti v. Bd. of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204 (3d Cir. 1993). In this case, the Student's LRE is the Charter. Consequently, the Parent must prove by preponderant evidence that: 1) the Charter is not an appropriate placement, 2) the Charter cannot be made into an appropriate placement with the addition of necessary services and supports, and 3) that [the APS] is an appropriate placement.

No compelling evidence suggests that the Charter is an inappropriate placement for the Student *per se*. No compelling evidence suggests that the Student cannot receive a FAPE at the Charter with the provision of appropriate services and supports. To the

contrary, the evidence shows that the Student made some progress with only the informal implementation of parts of an unapproved IEP. This cannot support a finding that it is impossible for the Student to receive a FAPE at the Charter.[12] Consequently, the Student is not entitled to placement at [the APS].

School of Choice

Throughout these proceedings, with varying degrees of intensity, the Charter has argued that it is a school of choice. As such, the Charter argues that if the Parent truly believes that it is an inappropriate placement, the Parent may remove the Student and find placement elsewhere. Given the age of the Student and the strong likelihood of an ongoing relationship between the Student and the Charter, this argument must be addressed.

Every substantive requirement of both Pennsylvania and federal special education laws applies to the Pennsylvania's public charter schools. The Charter is the Student's LEA. It is the Charter's obligation to provide a FAPE to the Student. The Charter may not satisfy this obligation by encouraging children with disabilities to seek placement elsewhere on their own.

ORDER

And now, August 16, 2013, it is hereby **ORDERED** as follows:

1. For reasons stated in the accompanying Decision, the Student is not entitled to compensatory education to remedy a denial of FAPE in either the 2011-12 or 2012-13 school year.

2. The Student is not entitled to placement at the [APS] at the Charter's expense during the 2013-14 school year.

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

/s/ Brian Jason Ford
HEARING OFFICER

[12] I acknowledge that the burden on Parents with *placement* demands is quite high. It is also more than theoretically possible to meet that burden. *See* ODR No. 01716-1011AS (Ford, 2011).