

*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

### DECISION

Student's Name: T.J.

Date of Birth: [redacted]

ODR No. 13941-1213AS

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent

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Haddonfield, NJ 08033

Education Plus Academy Cyber  
Charter School  
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Dates of Hearing: July 31, 2013; August 1, 2013

Record Closed: August 13, 2013

Date of Decision: August 23, 2013

Hearing Officer: Brian Jason Ford

## **Introduction**

This matter arises under the 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. Except in the cover page, identifying information about the Student has been omitted or redacted.

The Student attended the Education Plus Cyber Charter Academy, a Pennsylvania Cyber Charter School (Charter), during the 2012-13 school year. During the majority of that year, the Student was not identified as IDEA-eligible, had no Individualized Educational Program (IEP), and did not receive special education (specially designed instruction -SDI - and related services). The Parent contends that the Student should have received an IEP before one was provided and that the Student's IEP, once in place, was deficient. The Parent further demands tuition reimbursement for the cost of an Extended School Year (ESY) program that the Student attended in the summer of 2013. Finally, the Parent demands prospective placement at an Approved Private School (APS).

## **Issues**

1. Is the Student entitled to compensatory education from January 30, 2013 to March 5, 2013 to remedy a denial of a free appropriate public education (FAPE) resulting from the Charter's failure to provide special education during this time?
2. Is Student entitled to compensatory education from March 6, 2013 through the end of the 2012-2013 school year to remedy a denial of FAPE after an IEP was put into place?
3. Is Parent entitled to reimbursement for ESY programming that the Student received in the summer of 2013?
4. Is Student entitled to prospective placement at a private school or approved private school for the 2013-14 school year?

## **Stipulated Fact**

At the outset, I note that the attorneys for both parties made obvious, significant, and successful efforts to make this hearing as efficient as possible. Unprompted, the parties submitted written stipulations at the start of the first hearing session. As I write for the parties, I will not re-write the four pages of 31 stipulated facts here. Rather, I incorporate them by reference with the sole exception of Stipulation 17. That stipulation is a mutually-agreeable statement as to an unavailable witness' purported testimony. Although the parties stipulated that the witness would have said what is written in the stipulation, there is no stipulation that the statement is uncontested, or that its contents can be accepted as fact. This renders the statement analogous to an affidavit, which is generally not accepted in this type of administrative proceeding. The remaining stipulations are incorporated as if set forth at length. I summarize some of the stipulated

facts within the findings below, but only as necessary to establish background and context:

### Findings of Fact

As part of their written closing briefs, both parties submitted proposed findings of fact. As with the stipulations, I commend counsel for both parties for their close adherence to my instructions for such submissions. Although I set no specific requirements for closing briefs in general, I did explain that proposed findings of fact should be plain, simple, un-hyperbolic, un-embellished, and with citation to the record. Both parties closely adhered to these guidelines. Consequently, to the extent that the parties have proposed findings of fact that 1) are consistent with my own review of the record, 2) include citation to the record, and 3) are consistent with each other, I adopt the parties' proposals as my own findings. I have also declined to make certain findings proposed by both parties, and have made certain findings that were not proposed by either party.

Special education due process hearings are naturally student-focused. Even so, I begin my findings of fact with facts about the Charter in the fall of 2012. These unusual, remarkable facts are necessary to understand the situation that the Student stepped into upon enrollment in the Charter.

I find as follows:

5. The 2012-13 school year was the Charter's first year of operation.
6. Although the Charter is a Pennsylvania public cyber charter school, it makes learning centers available to its students. Learning centers are physical locations in which students can spend the school day, receiving both online instruction and instruction from teachers in a physical classroom. Throughout the hearing, this approach was referred to as a "hybrid" or "blended" model of online education.
7. In the fall of 2012, one of the Charter's learning centers was housed in [a] Community Cyber Program, a Cyber Learning Center ("[CCP]").
8. The nature of the relationship between the Charter and CCP was not made sufficiently clear during the hearing to make any particular finding of fact. However, it is not disputed that some of the Charter's students spent their school day at CCP. *See Stipulations*, NT throughout.
9. In the fall of 2012, the Charter had physical locations in several learning centers. CCP was just one of those learning centers.
10. Although located at CCP, the Charter's physical classrooms were staffed by the Charter's employees. NT at 260.
11. Participation in learning centers was voluntary. Students attending the Charter also had the option to receive all of their instruction online at home. However, to attend CCP, students had to enroll in the Charter. *See Stipulations*.
12. In the fall of 2012, the Parent believed that the Director of CCP was the director (or otherwise in charge of) the Charter's program; this belief was reasonable. *See Stipulations*; NT at 269-270, 303, 347. The Director of CCP, however, was never an employee of the Charter. *See Stipulations*.

13. At all times, the Charter had its own Director (“Charter’s Director” - as opposed to CCP’s Director). At all times, the Charter also had its own CEO. The Charter’s CEO established the relationship between the Charter and CCP, whatever that relationship was. It is clear from the Charter Director’s testimony that the Charter Director knew nothing about the relationship.
14. The Charter Director’s lack of knowledge about CCP was more than technical. The Charter’s Director *did not know that CCP was one of the Charter’s learning centers*. In the fall of 2012, the Charter’s Director had no knowledge whatsoever of the CCP learning center, or the Charter’s students who attended that learning center. NT at 395-396.
15. The opening of the 2012-13 school year was extremely chaotic for the Charter’s Director. At that time, the Charter’s Director understood that he was the sole individual employed by the Charter who could serve as the Charter’s LEA Representative at IEP meetings, and was the only person responsible for procedural compliance with the IDEA.
16. At the same time, the Charter’s Director was working out of a car, without an office, traveling from learning center to learning center. The testimony leaves no doubt that the Charter’s Director was overwhelmed, under-supported, and not given critical information (e.g. *the existence of an entire learning center*).<sup>1</sup>
17. The Student is a “child with a disability” within the meaning of the IDEA, and a “qualified individual with a disability” within the meaning of Section 504. See *Stipulations*.
18. The Student’s primary disability category is Autism. The Student’s secondary disability categories are Other Health Impairment (OHI) and Speech & Language Impairment (S/L). See *Stipulations*.
19. The Student enrolled in the Charter on October 13, 2012. See *Stipulations*.
20. Prior to attending the charter, the student received Early Intervention (EI) services in 2009. The Student was eligible for EI due to “demonstrated delays in the areas of social/emotional, physical, and cognitive development.” J-4, J-20.
21. As part of the EI program, the Student was evaluated by a doctoral level Certified School Psychologist in 2009. That evaluation concluded that the Student met criteria for Mixed Receptive-Expressive Language Disorder and a Motor Skills Disorder. The evaluator cautioned, however, that the Student’s motor skills disorder “may be secondary to the language problems [Student] experiences, so this diagnosis may change as this child matures and receives behavioral, speech and language interventions.”
22. In March 2011, the Student attended Kindergarten at a private daycare center. While in Kindergarten, the Parent requested an evaluation from the [local] School District. That evaluation concluded that the Student had a Specific Learning disability (SLD) in Reading and Mathematics. J-4.
23. The Student received a second evaluation from the EI evaluator in October, 2012. This evaluation was scheduled before the Student enrolled in the Charter, but was

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<sup>1</sup> Testimony suggests that chaos was the hallmark of the first half of the 2012-13 school year. Some testimony suggests that this chaos was the result of the Pennsylvania Department of Education granting the Charter’s charter before the Charter was truly ready to open. The root cause of the chaos is irrelevant to these proceedings.

completed after the Student enrolled in the charter. In this evaluation, the evaluator concluded that the Student met criteria under IDEA as a student with Autism. J-4. This was the first time that the Student ever received an Autism diagnosis. NT 143, 307.

24. Prior to enrolling the Student in the Charter, the Parent met with CCP's Director at CCP. NT at 303. CCP's Director explained the Charter's program to the Parent. NT 303.
25. The Parent testified, and the Charter does not dispute, that the Student's grandmother discussed the Student's need for further testing and programming with CCP's Director within the first two weeks of the Student's enrollment.
26. On November 8, 2012, the Parent followed up on the grandmother's conversation with CCP's Director. *See Stipulations*, J-1. At this time, CCP's Director did not reveal that she (CCP's Director) was not the Charter's employee.
27. On November 10, 2012, CCP's Director wrote to the Charter's Director, forwarding the Parent's follow-up: "See below and address this parents concerns. I have [sent] emails about testing [Student] before and what the process would be. Please contact this parent as soon as possible. The student is in 2nd grade and we have concerns regarding [Student's] learning disability and would like [Student] tested." J-1; Stip. ¶ 9.
28. As noted above, the Charter's Director did not know that the CCP learning center existed. As such, the Charter's Director did not know who CCP's Director was. The email of November 10, 2012, therefore had no context for the Charter's Director. Even so, the Charter's Director made no effort to follow-up, and made any further inquiry by replying to the email or otherwise. *See Stipulations*; J-1, NT at 389, 395-396.<sup>2</sup>
29. Sometime in November of 2012, the Charter's Director learned that the CCP learning center existed. Although the record does not make it clear exactly when the Charter's Director became aware of CCP (sometimes referred to as "the hub" and sometimes as the "[redacted] center"), the record establishes that this revelation occurred after the email of November 10, 2012.
30. Sometime in November of 2012, the Parent reviewed the Charter's handbook. NT at 309. Based on information in the handbook, on November 15, 2012, the Parent contacted the Charter's Director by email to request an evaluation. J-1. In the November 15 email, the Parent explicitly requested that the Charter accept that email as the Parent's permission to evaluate. The Parent was particularly concerned with the Student's "reading disability" and "the type of services that [Student] might need in order to succeed in reading." J-1.
31. I note that the following finding is taken directly from the Parent's closing. I find it absolutely consistent with the record: As of November 15, 2012, [the Charter's Director] knew that Student was enrolled in the Charter School. He did not respond to Parent's e-mail by providing a Permission to Evaluate. He testified that the Charter School was unable to comply with the requirement to provide a Permission

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<sup>2</sup> Again, testimony makes it abundantly clear that the Charter's Director was overwhelmed and under-supported during this time. These circumstances are important for understanding this case, but the underlying reason for the Charter's disorganization is not relevant to these proceedings in the strictest possible sense.

to Evaluate within the regulatory time frame in November, 2012. (NT 397). He could not do so for the following reasons:

- a. The school had just received its charter in July and had to be operational by September, 2012. (NT 378).
  - b. No one told [the Charter Director] that the Charter School had a site in [redacted] until November. (NT 391).
  - c. The Charter School did not have IEP Writer [a software program that generates and tracks IEPs] in operation until sometime in late November or early December. As a consequence, he could not generate Permissions to Evaluate using that software. "A lot of Permission to Evaluate documents were handwritten or taken from a word document." (NT 379).
  - d. The Charter School had no secretary, no main office, and no intra-school delivery of information. (NT 379).
  - e. In November, 2012, [the Charter Director] was the only LEA employee. The school had four locations and had to accommodate students with IEPs in all four locations. (NT 390).
32. The Charter did not issue a Notice of Procedural Safeguards in response to the Parent's email of November 15. See NT at 319.
33. On December 6, 2012, the Parent wrote to the Charter's Director again to follow-up on the November 16 email. The Charter sent a Permission to Evaluate form to the Parent on December 6, 2012 in response to that email. The Parent returned that form, approving the evaluation and providing additional information, on December 7, 2012.
34. Also on December 6, 2012, the Parent sent a copy of the October 2012 evaluation diagnosing Autism to the Charter. The Charter's Director provided a copy of that evaluation to a different Certified School Psychologist for review (the Charter's CSP). The Charter's CSP is an employee or independent contractor of a third party that was hired by the Charter.
35. As part of the Charter's evaluation, the Parent provided all prior evaluations to the Charter. These included a S/L Evaluation of November 2010, a Speech Evaluation of August 2011, speech progress reporting from June of 2012, and the referenced evaluation of October 2012. The October 2012 evaluation was a psycho-educational evaluation. J-1, J-17, J-18, J-19, J-20, NT 305-306, 314, 325; *Stip.* ¶ 10.
36. The Parent provided releases so that the Charter's CSP could speak with the CSP who completed the October 2012 psycho-educational evaluation. J-1, NT at 86-87.
37. Around the time of the evaluation, the Charter's Director expressed surprise to the Parent that the Parent would have chosen the Charter for a student with Autism. NT 312-313.<sup>3</sup> There is also some evidence that the Charter's Director attempted to influence the outcome of the Charter's evaluation. See J-1 at 35. The Charter's CSP testified credibly that the Charter Director's efforts were not a factor in the evaluation.

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<sup>3</sup> As explained above, the Parent did not know about the Autism diagnosis prior to enrollment, and as discussed below, such knowledge would have been irrelevant. As the Student's LEA, it is the Charter's obligation to provide a FAPE, regardless of the nature the Student's disability.

38. The Charter's CSP completed an Evaluation Report (ER) on February 1, 2013. J-4. The ER incorporated the results of a new S/L Evaluation and a new Occupational Therapy (OT) Evaluation, both of which were completed by outside contractors hired by the Charter. J-4; Stip. ¶ 14.
39. The parties have stipulated that the S/L and OT evaluations are valid measures of the Student's abilities in the assessed areas.
40. Teacher S.P. was the Student's first teacher at the Charter. Teacher S.P. graduated in May of 2012, and received three days of inservice training prior to the start of the 2012-13 school year. NT at 260. Teacher S.P. was terminated during the winter break, and Teacher M.C. took over the Student's classroom for the second half of the 2012-13 school year.
41. As part of the ER, the Charter solicited information from Teacher S.P. Teacher S.P. reported as follows:

[The Student] experiences significant difficulty transitioning.  
[The Student] rarely goes to lunch with ... peers and is afraid to go to the bathroom alone, although [Student] is able to toilet independently. . . [Student] has stated that [Student] wants to "run away" [during recess]. [Teacher S.P.] reports that he has to watch [Student] very closely during recess because [of Student's] verbalizations of wanting to run away are of very serious concern.

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[Student] appears to experience extreme duress when [Student] has to travel to the bathroom alone. [Student] also has difficulty interacting with some ... peers and prefers solitude. [Student] also needs continuous reinforcement and prompting to remain on task.

42. Teacher S.P. also rated the Student as "very unsatisfactory" in a number of domains relating to academic work, attention, peer interactions, and organization. See J-4 at 5. At the same time, the Student showed a "superior" ability to complete homework. J-4 at 6.
43. Classroom observations by the Charter's CSP, conducted as part of the ER, reveal a marked difference in the Student's behaviors during one-to-one (1:1) instruction and online instruction. During 1:1 instruction, the Student was attentive and appeared to be benefiting from instruction. J-4; NT at 51. In contrast, when the Student was directed to do work online, the Student first resisted opening the educational program, required several prompts to start the program, and then sat at the computer but not working until an aide sat beside the Student to provide 1:1 help. J-4, NT at 39.
44. The Charter's CSP could not complete a behavioral interview of the Student because the Student refused to participate, and cried at the prospect of the evaluation. J-4, NT at 40.

45. The Student expressed serious anxiety about using the bathroom in school. On one occasion, this anxiety resulted in a 10 minute disruption in programming - and the Student still did not use the bathroom when the episode resolved. J-4.
46. The ER notes that the Student would not transition to lunch with peers, cried at the prospect of the same, and sat in CCP's office during the lunch period. The Student did not eat. J-4.
47. On behavior rating scales, both Teacher S.P. and the Parent endorsed concerns about the Student's ability to make friends, join groups, and transition. J-4; NT at 45-46.
48. Multiple witnesses, including the Charter's CSP and Teacher M.C., testified as to serious concerns about Teacher S.P.'s classroom management. Although nobody described Teacher S.P.'s classroom as out of control, there is ample testimony that no effective behavior management system was in place during Teacher S.P.'s time in the class, and that class-wide behaviors were interfering with instruction for all students in that classroom, including the Student in this case.
49. During Teacher S.P.'s tenure, the Student was observed to simply "click through" online tests and instruction, thereby diluting the value of any information gleaned from such tests. NT at 43-44.
50. On February 4, 2013, the Charter provided a copy of the ER to the Parent. See *Stipulations*. Based on the ER, the Student's multi-disciplinary team concluded that the Student was IDEA-eligible and in need of an IEP.
51. The Student's IEP team met on March 5, 2013. J-7. The Charter's CSP was present, as was the Parent.
52. As part of the development of the March IEP, the Parent reported to the Charter that the Student was motivated by a rewards system. Such a system was put into place through the IEP. P-3; NT at 182, 332-333.
53. The March 2013 IEP included several annual goals for each identified area of need, including reading, math, speech and language therapy, and occupational therapy, and contained supports to address the Student's social and emotional functioning. See J-7; See NT at 61-63
54. The IEP circulated at the March 5, 2013 meeting was a draft IEP. The draft IEP was modified to include suggestions from the Parent. C/f J-23, J-7.
55. The March 2013 IEP was the first IEP ever developed for the Student as a school-aged child. NT at 125.
56. The Parent signed a Notice of Recommended Educational Placement (NOREP), approving the IEP, but with the understanding that baseline data would be collected for academic goals by the end of March 2013, and that baseline data for therapy goals would be collected by April 30, 2013. J-8.
57. Baseline data was collected in March and April of 2013. See J-7.
58. The March 2013 IEP called for the Student to be educated in the regular education setting for 83% of the day. While the IEP was implemented, the Student's classroom contained thirteen students total. Three of those students,



including the Student in this case, had IEPs. There was also one teacher and one aide in the classroom.<sup>4</sup> J-7, NT at 177, 181-182.

59. The March IEP does not provide for push-in support from a counselor or someone qualified to provide social skills training. NT at 87-88.
60. Implementation of the IEP resulted in changes to the Student's program. S/L and OT therapy was provided. The Student also received 1:1 work on phonics with the classroom aide. NT at 200-201.
61. The classroom assistant is not a certified teacher, special education teacher, or reading specialist. NT at 103.
62. Either the aide or the teacher accompanied the Student during transitions to therapy, lunch, bathroom, or recess. NT at 181-182.
63. On April 17, 2013, Teacher M.C. reported several concerns to the Parent's private evaluator. These concerns included that the Student [exhibited behavior during] transition; refused to go to gym or recess; refused to eat lunch in school; needed adult assistance to use the bathroom; and that the Student "thinks when people look at [Student], it turns [Student's] face ugly." The IEP was in place for less than a month when these behaviors were reported.
64. The Charter's CSP observed the Student again after the IEP was implemented. The Charter's CSP observed that the Student received positive reinforcement for socially desirable behaviors, and that both Teacher M.C. and the aide provided frequent feedback to the Student. NT at 67-69.
65. Progress monitoring data was compiled during the last week of May, 2013, and the first week of June, 2013. J-14. This data compared the Student's progress towards goals and objectives against the baseline data that was taken in March and April of 2013.
66. The Student's progress is reported at J-14. The parties stipulate that J-14 is a true and accurate measure of the Student's progress. Contrary to the Charter's averments, J-14 indicates minimal progress, and regression in some areas. More specifically:
  - a. For sight words, the Student's baseline was 8 out of 12 words at the Kindergarten level (67%). When progress was measured, the teacher determined that 12 words overwhelmed the Student, and reduced the field to 6 words. With a field of 6 words, the Student was able to read 50% of the words presented, and ended with 6 mastered sight words total – 2 less than the baseline.
  - b. For reading fluency, the goal is targeted to the first grade level, but progress was measured at the Kindergarten level. In the baseline, the Student could read 20 words correctly at the first grade level. On the monitoring, the Student could read 25 words correctly at the kindergarten level. Words correct per minute remained essentially stagnant while the level of difficulty was reduced, indicating regression.
  - c. The spelling goal was baselined at 4 words correct out of 10 at the second grade level. Progress monitoring indicates that the Student can spell 7

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<sup>4</sup> The aide provided a great deal of 1:1 support to the Student, but was not specifically assigned to the Student. Of the six hours per day that the Student spent in the classroom, the aide was present for five. NT at 183-184, 220.

words correct out of 10 at the kindergarten level. This does not clearly signal regression, but does not indicate progress.

- d. Progress monitoring towards vocabulary and defining skills generally shows some improvement, but not all baselined areas were monitored, and it is not clear that the monitoring assesses the same skills as the baseline.
  - e. The Student improved listening comprehension skills from a baseline of 60% to 75% on the measure assessed.
  - f. J-14 reports that the Student mastered an expressive social skills goal, but provides no information other than that statement and narrative information (the baseline was quantified).
  - g. Progress monitoring for a speaking volume goal tracks a short term objective, as opposed to the goal itself, but does show improvement in the Student's ability to articulate phonemes.
  - h. J-14 generally indicates that the Student made progress towards vocabulary, sensory processing, time-telling and math goals. In some cases, this progress is minimal (e.g. the Student was able to correctly answer only one additional math problem as compared to the baseline). In other cases, the progress monitoring reports narrative progress that is hard to compare to the baseline.
67. Pursuant to the IEP, the Student was supposed to receive "Hi-Write" paper as a specially designed instruction/modification to the curriculum to help improve the Student's handwriting. S-4. The Parent credibly testified that the Hi-Write paper was not provided, but that she purchased the paper and sent it to the Charter.
68. S/L therapy was provided as specified in the IEP. The Student sometimes had difficulty transitioning to S/L therapy, causing the session to start late. When this happened, the S/L therapist would provide extra time so that the amount of therapy called for in the IEP was provided. NT at 372.
69. The Charter uses the NWEA test to assess the progress and abilities of all enrolled students. The NWEA testing for the Student in this case shows considerable progress, but I assign very little weight to this testing. See J-14. Baseline NWEA testing is not an accurate measure of the Student's abilities because the Student was simply "clicking through" the test. Current NWEA testing was provided with significant accommodations, including a 1:1 aide to help the Student maintain focus. It was also not made clear as to whether the NWEA testing protocol allows for such assistance, or whether the test was designed to measure the progress of students with disabilities.
70. On April 23, 2013, the Parent told the Charter that she would seek reimbursement for private placement at [Private] School for Extended School Year (ESY) services on April 23, 2013. J-21.
71. On April 26, 2013, the Charter's Director instructed the Parent that she could not communicate with Charter School employees regarding the Student's programming. P-5; NT at 323.
72. Regarding ESY, the draft IEP circulated during the March meeting indicated that the Student was not eligible for ESY. Everyone on the team agreed that this was

- an error, and that the Student was eligible. The Charter suggested that Parent find some potential programs and present them. NT at 321.
73. The final version of the IEP indicated that the Student was eligible for ESY, but provided no details other than that the purpose of ESY was for “Reading and Math recoupment and recovery.” Stip. ¶ 22.
74. On May 9, 2013, the Charter, through counsel, provided a written description of the ESY program it would offer. J-11; Stip. ¶ 24. The Charter’s proposed ESY program included eight hours of instruction per week, including S/L and OT. Two hours per week would have been provided via online instruction, where the Student would work on a computer at home, but connected 1:1 with one of the Charter’s teachers. J-10; NT at 234.
75. The Student attended the [Private] ESY program at the Parent’s expense.
76. The [Private] ESY program consisted of 6 hours per day, 5 days per week from July 1, 2013 through August 2, 2013. P-8.
77. A certified special education teacher oversaw the Student’s ESY program. NT 425-426. There were five others in the Student’s class. NT 328, 425.
78. The Parent received daily reports regarding ESY programming, as well as progress reporting from the end of the summer. P-12, P-13, P-14; NT 328.
79. The ESY program addressed IEP goals in math, reading, and language arts. The ESY program also included instruction in communication skills, social skills, and academic skills and work habits. P-12.
80. In May of 2013, the Parent hired a private, doctoral level Neuropsychologist, to conduct an independent educational evaluation of the Student. The Neuropsychologist’s recommendations are contained in an independent educational evaluation (IEE). J-12. The recommendations were the result of two half-day testing sessions, a review of records, and a one-hour observation period at the Charter School on May 14, 2013. NT at 126.
81. On May 14, 2013, the Neuropsychologist observed that the Student had difficulty with transitions, displayed refusal behaviors, and was experiencing significant anxiety in school. NT at 100-101.

### **Legal Principles**

I have set forth the legal principles that apply to the majority of issues in this case before the discussion. The notable exception is the Parent’s demand for prospective placement, which I address in the discussion.

### ***The Burden of Proof***

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

*Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

### ***Free Appropriate Public Education (FAPE)***

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

### ***Compensatory Education***

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted

student); *see also Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education “should aim to place disabled children in the same position that they would have occupied but for the school district’s violations of the IDEA.”))  
Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)

*M.J. v. West Chester Area Sch. District*, ODR No. 01634-1011AS (Skidmore, 2011)

### ***Tuition Reimbursement***

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993).

The first step is to determine whether the program and placement offered by the District is appropriate for the child. Only if that issue is resolved against the District are the second and third steps considered, *i.e.*, is the program proposed by Parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *See also, Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

### ***IDEA and Section 504***

In the Complaint, the Parent asserts causes of action under Section 504. These causes of action arise out of the same allegations as the IDEA claims. Moreover, all of the relief that the Parent demands (compensatory education, reimbursement, and prospective placement) all arise out of the IDEA claims. Consequently, I proceed under IDEA jurisprudence. *See, e.g. Brown ex rel. R.P. v. Sch. Dist. of Phila.*, 2012 U.S. Dist. LEXIS 104855 (E.D. Pa. July 26, 2012)(Parent’s 504 claims survive District’s motion to dismiss because the 504 claims arise out of different allegations and *because relief available only under Section 504 was demanded*).

### **Discussion**

I have broken the Discussion into sections to track the issues.

### ***Enrollment through March 5, 2013***

Although the Student is, and must be, the focus of this decision, I begin with an examination of the Charter and its Director. It is unthinkable that the director of a charter school that distinguishes itself by use of learning centers could be unaware of the existence of one of those learning centers. Yet, this is exactly what happened in this

case. I have no doubt that the Director was placed in an impossible situation, and did the best he could with the resources he had. Titles on documents notwithstanding, in reality, the Director is not *the Charter* in a literal way. That *the Charter* placed the Director in such a remarkably untenable position borders the unconscionable. The only person who worked to guarantee the educational rights of the Charter's students was unaware that many of those students existed, let alone what their educational needs were. The Student in this case was one of those students. The Director's best efforts towards the students about whom he knew is no defense to *the Charter's* actions in this case.

The Charter's argument that it is a school of choice, and that the Parent could have simply removed the Student if services were unsatisfactory is equally unconvincing. That argument, in and of itself, pushes the equities of this case towards the Parent. Every substantive requirement of both Pennsylvania and federal special education laws applies to Pennsylvania's public charter and cyber-charter schools. See 22 Pa. Code § 711. 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 its obligations under the IDEA and Pennsylvania law by encouraging children with disabilities to seek placement elsewhere on their own. As in traditional public schools, parents are always free to find and fund their own placements. Parents of IDEA-eligible students never have an obligation to do so. Rather, it is always the LEA's obligation to provide a FAPE.

The evidence and testimony in this matter leaves no doubt that the Charter made no effort whatsoever to identify, evaluate, and provide programming for the Student. The Director, who was the only person in the Charter who wrote IEPs, did not know that the Charter was the Student's LEA. Even ignoring that the Charter left the entirety of IDEA compliance to one person, the record also clearly demonstrates that neither of the Student's teachers initiated Child Find, proposed IDEA evaluations, or provided the Parent with a notice of procedural safeguards.

In the vast majority of IDEA due process hearings in Pennsylvania, the central question concerns the appropriateness of the special education (i.e. specially designed instruction and related services) that the LEA provided to the Student. In this case, no special education was provided to the Student from the Student's enrollment through March of 2013, when the Charter offered its first IEP. For most of this period of time, the Charter was institutionally blind to the Student's existence. The single person with the power to put services in place did not know that the Charter was the Student's LEA during most of this time. But the Charter *was* the Student's LEA during this period of time and, whatever the Director knew or did not know, *the Charter* was responsible for the provision of FAPE to the Student.

There can also be no doubt that the Student was entitled to, but did not receive a FAPE from enrollment through March 5, 2013. The parties stipulate that the Student is IDEA-eligible as a student with an Autism Spectrum Disorder (ASD). Although the evaluations note that the Student does not have a stereotypically Autistic presentation, the record is equally clear that the Student's academic and behavioral problems remained consistent

from enrollment through the implementation of the first IEP. Said differently, the Student's difficulties did not spontaneously emerge in February of 2013, prompting the Charter's first evaluation. Rather, everything that prompted the evaluation was present and manifest at the time of the Student's enrollment. The same difficulties that prompted the February 2013 evaluation should have triggered Child Find in October of 2012.

Under current jurisprudence, compensatory education does not begin to accrue until the LEA knew or should have known about the denial of FAPE. In this case, the Charter would have had 60 calendar days to evaluate the Student before providing an IEP. Any argument that the Charter should have had more time to realize that an evaluation was necessary is entirely overshadowed by the Charter's obliviousness of the Student. Consequently, compensatory education will accrue from sixty (60) calendar days after the Student's enrollment through the Charter's issuance of the March 2013 IEP on March 5, 2013. During this time, the Student received no special education or related services.

Despite the foregoing, the Parent demands compensatory education from January 18, 2013 through the end of the 2012-13 school year. I have no authority to award that which was not demanded. 20 U.S.C. § 1415(c)(2)(B)(ii). Consequently, for the period from January 18, 2013 through March 5, 2013, I find that the Student was IDEA-eligible and entitled to a FAPE, but received no special education or related services.<sup>5</sup> The Student was entitled to an IEP, and all of the individualized, substantive services that come with one. Instead, at the very best, the Student received (arguably) best practices in regular education. The ineffectiveness of those services, and the resulting substantive harm to the Student, are evidenced by the unambiguously necessary evaluation in February of 2013 and IEP of March 2013. To remedy this denial of FAPE, one hour of compensatory education is awarded for each hour that the Charter was in session between January 18, 2013 and March 5, 2013.

### ***March 6, 2013 Through the End of the 2012-13 School Year***

The Parent argues that FAPE continued to be denied, and that compensatory education continued to accrue, after the Charter issued its first IEP on March 5, 2013 and implemented that IEP from March 6 onward. Although the Student received special education and related services after March 5, 2013, the Parent argues that those services, and the IEP itself, were substantively inappropriate and deficient. The Charter argues that the Student made meaningful progress pursuant to the IEP, and that the IEP itself was appropriate.

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<sup>5</sup> In closing arguments, the Parent identifies the first period of time in question as January 18, 2013 to March 5, 2013. This is technically incorrect. The first IEP was issued on March 5, 2013. At that point, regardless of its appropriateness, the Charter made an IEP available to the Student. As a result, the period of time during which 1) the Student was entitled to a FAPE, and 2) no IEP was offered, and 3) relief is demanded, runs from January 18, 2013 to March 4, 2013. From March 5 onward, an IEP was on the table. The appropriateness of that offer is discussed below.

It is important to note that the IEP was in place for about three months when the progress monitoring at J-14, described above, was collected. The Charter's averments that the progress monitoring clearly indicates meaningful progress are not supported by this data, which the parties have stipulated is an accurate description of the Student's abilities. Rather, taken at face value (as the Stipulation requires me to), the Student demonstrated meaningful progress in some areas, such as vocabulary and - importantly - social skills; remained in place in other areas, and regressed in still others.

Both parties highlight the Student's progress or lack thereof as evidence of the appropriateness or inappropriateness of the IEP; and the substantive provision of FAPE, or the lack thereof. The inquiry at hand, however, first concerns whether the IEP was reasonably calculated to provide a FAPE at the time it was offered. *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *F.C. v. Norristown Area Sch. Dist.*, No. 13322-1213AS, at 28-29 (Ford 2013); *K.S. v. Wallingford-Swarthmore Sch. Dist.*, No. 00579-0910AS, at 10 (Satriale 2010). If it was, the question then becomes whether the Student's actual progress, or lack of progress, should have signaled to the Charter that the IEP was not working as expected and changes were necessary.

A preponderance of evidence in this case compels me to conclude that the IEP was reasonably calculated to provide a FAPE at the time it was offered. The Parents highlight imperfections in the IEP. For example, the nature of counseling services that the Student should receive is not entirely clear on the face of the IEP itself, but perfection is not the standard. More generally, the Parent contends that the IEP did not provide a level of social and emotional supports that would enable the Student to access the curriculum. This claim is supported by testimony from the Parent's evaluator and disputed by the Charter. Again, actual progress is not necessarily evidence of whether an IEP was reasonably calculated to provide a FAPE, but the record shows that the Student did receive a benefit from the behavioral supports that were put into place following the IEP. Clearly, the Student has a long way to go. But there is a meaningful difference between resisting-but-ultimately-accepting anxiety-producing transitions, and the [redacted] and crying behaviors that the Student exhibited in the first weeks that the IEP was implemented.

At an even more basic level, the IEP was based on the ER which, in turn, was based on a significant number of thorough evaluations from multiple sources using multiple testing instruments. The Student's areas of need were clearly and accurately identified, and targeted through goals and objectives. The IEP also provided a clear statement of what SDIs and modifications the Charter would put into place to enable the Student to reach the goals. For these reasons, I find that the IEP was reasonably calculated to provide a meaningful educational benefit at the time it was offered and accepted.

If an IEP is reasonably calculated to offer a meaningful educational benefit at the time it is offered, the question becomes whether progress data should have compelled the Charter to change the IEP if something was not working. The facts of this case make it very difficult to answer that question. The Student's actual progress, as stipulated by the



parties, is variable across domains. It is an oversimplification to say that in its (roughly) three months of implementation, the IEP failed or succeeded at a broad level. Within specific domains, there were clear failures (e.g. sight words) and modest successes (e.g. social skills). Yet even looking at the domains in which the Student regressed, there is no evidence suggesting that the Charter should have made broad changes to the IEP based on a comparison of baseline data taken in March and April of 2013, and May and June of 2013. In this short period of time, not all of the Charter's efforts were successful, but the particular failures do not evidence the broad denial of FAPE that the Parent alleges.

For all of the foregoing reasons, I find that the Parent has not proven a substantive denial of FAPE for the period starting on March 5, 2013 and ending on the final day of the 2012-13 school year.

### ***ESY Reimbursement***

As noted above, the Charter's ESY offer is not contained in the IEP, but was transmitted through the Charter's attorney. In light of the progress described above, the Charter's ESY offer was not appropriate. Although the data did not signal a need to alter the Student's IEP, it did clearly demonstrate the Student's significant needs. Whether the purpose of ESY was to prevent regression or continue the Student's progress, no data - and no evidence or testimony - suggests that a significant reduction in the Student's services was wise. Accepting the Charter's arguments about the short time that the IEP was in place only highlights this concern. As discussed above, the IEP should have been in place much sooner than it was. Had the District complied with the IDEA from the start, the Student would have received IEP services for a longer period of time. Accepting the Charter's argument that the IEP was starting to show good results, it is contrary to reason to remove those supports just as they were becoming effective.

It is striking that the ESY proposal calls for the Student to spend 1/4 of the summer program (2 of 8 hours per week) under a provenly ineffective model. The record clearly establishes that, when left to the Student's own devices, the Student will not attend to online educational programs; even in a classroom with a teacher present. The Student required redirection from an aide at the Student's side. Even if the online work in the summer would be with the assistance of an online teacher, that teacher would be through the monitor, not physically present with the Student.

The ESY program offered by the Charter is inappropriate, and so the first prong of the *Burlington-Carter* test is satisfied. The record in this case substantiates the Parent's claim that the [Private] ESY program was appropriate. The ESY program targeted the Student's needs as described in the IEP. Every description of the ESY program highlights its appropriateness even under IDEA standards, but the appropriateness threshold for the parentally-selected placement is lower under the *Burlington-Carter* standard. Parents need not select a program that would provide the same level of FAPE that the IDEA guarantees. Even ignoring this distinction, evidence of the ESY program's appropriateness is more than preponderant.

With the first and second prongs of the *Burlington-Carter* test satisfied, I turn to the equities. In this case, the equities clearly favor reimbursement. If the Charter's Director can be forgiven for his ignorance before learning of the Student, his behaviors after learning about the Student push the equities to the Parent. The record establishes that the Charter's Director may have attempted to influence the outcome of the Student's evaluations, and then forced the Charter as a whole to cut off communication with the Parent when the Parent asked for reimbursement. The Charter's Director testified that these actions were, somehow, to serve the interests of all students attending the Charter. Ignoring the nonsensical nature of this testimony, such actions are contrary to the mandates of the IDEA. Under the IDEA, the Charter is not to look after the interests of *all students* -- it is to look after the interests of *each student*. Even if the Charter could establish that it would benefit *all* students to restrict the Parent's access to teachers and place the Student into an ESY program featuring demonstrably ineffective programming, that fact would be irrelevant. The Charter's actions in this regard are tantamount to retaliation, and highlight the lack of any equitable bar to the Parent's demand for reimbursement.

With preponderant evidence, the Parent has satisfied all three prongs of the *Burlington-Carter* test. Therefore, the Parent is entitled to reimbursement for the cost of tuition for ESY programming at the [Private] school.

#### ***Private Placement for 2013-14 School Year***

It is important to recognize that the Parent is not claiming tuition reimbursement for the 2013-14 school year. Instead, the Parent is demanding prospective placement at the [Private] school. The analysis, therefore, is quite different.

It is well established 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, because the Charter is the Student's LEA. 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 [Private School] 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 under an IEP that was implemented for only a short time. No evidence was presented to clearly demonstrate that the Student's IEP cannot be changed if, over time, the Student does not make progress. This lack of evidence cannot support a finding that it is impossible

for the Student to receive a FAPE at the Charter.<sup>6</sup> Consequently, the Student is not entitled to prospective placement at [Private School].

### **ORDER**

Now, August 23, 2013, it is hereby **ORDERED** as follows:

1. The Student is awarded one hour of compensatory education for each hour that the Charter was in session between January 18, 2013 and March 5, 2013, to remedy a denial of FAPE resulting from the Charter's failure to provide special education to the Student during this period of time.
2. The Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP to assure meaningful educational progress.
3. The Parent's demand for compensatory education from March 6, 2013 through the end of the 2012-13 school year is denied.
4. The Parent is awarded reimbursement for the actual cost of tuition that the Parent incurred for the ESY program that the Student attended in the summer of 2013.
5. The Parent's demand for prospective placement in a private school or approved private school for the 2013-14 school year is denied.

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

/s/ Brian Jason Ford  
HEARING OFFICER

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<sup>6</sup> I acknowledge that the burden on parents with *prospective placement* demands is quite high. It is also more than theoretically possible to meet that burden. See ODR No. 01716-1011AS (Ford, 2011).