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

Child's Name: C. V.

Date of Birth: [redacted]

ODR File No. 15477-14-15AS
Dates of Hearing: 3/31/15, 5/12/15

OPEN HEARING

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Jeffrey J. Ruder, Esq. Michelle Kline, Esq. 429 Forbes Avenue, Suite 450 Pittsburgh, PA 15219
Local Education Agency City Charter High School 201 Stanwix Street Pittsburgh, PA 15222	LEA Attorney Teresa O. Sirianni, Esq. Gregory P. Graham, Esq. Marshall, Dennehay, Warner, Coleman, & Goggin 600 Grant Street, Suite 2900 Pittsburgh, PA 15219
Date Record Closed:	May 29, 2015
Date of Decision:	June 10, 2015
Hearing Officer:	Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)[1] is a middle-teenaged student who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).[2] Student's Parents filed a due process complaint against the City Charter High School (hereafter School) asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,[3] as well as the federal and state regulations implementing those statutes. They also claimed that the School discriminated against Student on the basis of Student's disability.

The School's Motion to Dismiss on the basis that it was not the Local Education Agency (LEA) for Student was denied on November 30, 2014, and the case proceeded to a due process hearing that was bifurcated by agreement of the parties and the hearing officer. The parties agreed that this case presents a novel issue. At the initial hearing session, the parties presented evidence in support of their respective positions on the questions of whether the School was under any obligation to Student under the IDEA or Section 504, and whether it violated either of those statutes, in what we referred to loosely as the liability phase. On May 4, 2015, following receipt of the transcript of the first hearing session, the parties' closing arguments, and the parties' responses to the closing arguments of the other party, this hearing officer issued an Interim Ruling in favor of the Parents on the issues of the School's violation of the IDEA and Section 504 in failing to offer a special education program to Student for the 2014-15 school year. The Interim Ruling is attached to this decision as an Appendix.

[1] Despite the fact that this was an open hearing, in the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.
[2] 20 U.S.C. §§ 1400-1482.
[3] 29 U.S.C. § 794.

The case proceeded to a second hearing session where the parties presented evidence on the remedy to be awarded, if any. Following review of the entire record, and for the reasons set forth below that incorporate the findings and conclusions of the Interim Ruling, I find in favor of the Parents in part.

ISSUES

1. Whether the School had any obligation to Student under the IDEA and/or Section 504;

2. Whether the School violated the IDEA and/or Section 504, procedurally or substantively, with respect to Student;

3. If the School did violate IDEA and/or Section 504, are the Parents and Student entitled to tuition reimbursement and, if so, for what time periods?[4]

FINDINGS OF FACT

1. Student is a teenaged child who is eligible for special education on the basis of an Intellectual Disability and a Speech/Language Impairment. Student currently attends a local private parochial school. (Notes of Testimony (N.T.) 59, 86-88, 131; School Exhibit (S-) 18)

2. Student attended a regular preschool and kindergarten, then a parochial school for first and second grade. (N.T. 90-91)

3. Student's school district of residence, the local public school district, offers funding to students for post-secondary education. Students must meet certain requirements such as school attendance and attaining a minimum grade point average to qualify. (N.T. 287, 319-21)

4. Beginning in third grade, Student attended a local charter school (CS) that focuses on environmental education serving students from kindergarten through eighth grade. The CS has an integrated multidisciplinary curriculum taught in three 90-minute instructional blocks during the day: mathematics, literacy, and cultural literacy (science, social studies, and English). (N.T. 57-58, 74, 91)

5. The CS provided instruction through co-teaching of classes by certified regular and

[4] The first two issues were decided by the Interim Ruling attached as the Appendix. It should further be noted that in their closing argument, the Parents also sought compensatory education for the 2014-15 and subsequent school years until such time as Student turns age 21. This issue was not raised in their opening statement at either hearing session nor in their due process complaint, but will be discussed further *infra*.

special education teachers. An inclusion facilitator provided support for the special education teacher in those classes through modifications of content and accommodations to the curriculum, as well as by providing redirection when needed. (N.T. 61-66, 72)

6. Student's third grade year was the first year of operation for the CS. Student was provided supplemental learning support at the CS throughout the time Student attended there, with the level of support gradually decreasing over the years. (N.T. 59-60, 93, 97)

7. In eighth grade, Student was included in regular education classes for approximately 97% of the school day, with pullout for speech/language therapy. Student also participated in community based instruction (work study) several days a week. Student's behavior did not impede Student's learning or that of others. (N.T. 59, 62-63, 67-68, 71, 135; S-18 p. 5)

8. At the beginning of Student's eighth grade year, the Parents[5] began to consider where Student would attend high school. Staff at the CS recommended several options for where Student might attend high school, including the School. The School was recommended because it had a focus similar to that of the CS and also provided three core instructional blocks as did the CS. (N.T. 74-75, 98-100, 290-91)

9. In late October 2013, the Parents completed and submitted an application for Student to attend the School. They also attended the School's Open House with Student, and spoke with the School's Education Manager who mentioned the possibility of students being placed at a special education school. (N.T. 101, 104-05, 217-19)

10. Approximately 625 students attend the School, which has a rigorous curriculum. All of its special education students are fully included; and classes are co-taught by regular and special education teachers. There are a few students who are placed in private schools because they need an alternate curriculum and the School is not able to provide for that. (N.T. 174-77, 189-92, 194-96, 202-03, 219, 252)

11. After the Open House, the Parents felt discouraged about continuing to consider the School because they wanted Student to be fully included in its program within its building as Student had been at the CS. Based on the CS staff's continued recommendation of School, however, they agreed to meet again with the School along with the CS staff who worked with Student. (N.T. 105-06, 108, 153-54)

12. The School's enrollment process is that a parent completes an application and submits it to the School along with proof of residency. Through a computer program, a staff person processes the application and the student is assigned an enrollment number. A letter is sent to the family advising of the enrollment number and states that the first 180 students who take all of the other steps necessary to complete enrollment may attend the first day of school. There is also a lottery process in the event that the School receives more than 180 applications from students residing in the local school district by December 1, but

[5] Student's mother was the more active participant in pursuing Student's enrollment in the School, but the plural Parents is used when it appears that she was acting on behalf of both parents. (N.T. 154-55)

that procedure had never been necessary as of the due process hearing. Typically there is no further communication from the School until May, and the initial letter states that more details about orientation will be provided to "prospective students" (S-1) in May. (N.T. 158-63; S-1; 24 P.S. § 17-1723-A(a))

13. By letter of November 7, 2013, the School notified Student and the Parents that it had accepted Student's application, and Student was given an enrollment number of 96. The Parents believed that Student would be enrolled at the School if they decided that Student would attend there, and that it was an "option" for Student at that time (N.T. 149). (N.T. 106-07, 148-50, 162-63; S-1)

14. The Parents considered several other options for Student to attend high school, including the local public school district. They toured several schools and applied to two other charter schools. (N.T. 98, 135-40, 143, 149-50)

15. In mid-February 2014, the School's Education Manager contacted the Parents to schedule a tour when classes were in session. The Parents expressed interest in visiting the School with Student, and also asked to meet to review and discuss implementation of Student's IEP in its building. (S-2, S-3)

16. The meeting with School and CS staff, Student's mother, and Student was held on March 20, 2014. The group talked briefly before touring the School, which was in session. The tour included a visit to several classrooms. By the end of the tour, Student was upset and asked to leave; Student's father picked Student up. (N.T. 108-10, 112-13, 115-16, 141, 143, 230-34)

17. After Student left, the group met again and discussed the ninth grade schedule as well as Student's IEP, which had been provided to the Education Manager prior to the meeting. The School Education Manager expressed concerns with its ability to adapt its curriculum content to meet Student's needs but asked for time to think it over. (N.T. 116-23, 177-82, 223, 226-28, 234-39; S-9, S-18)

18. The Parents asked for the School to provide a prompt response to their request for a program of full inclusion for Student. (N.T. 123-24)

19. The School requested a copy of Student's most recent evaluation from both the Parents and the CS, but never received one. (N.T. 179, 205, 223-24, 226, 247-48; S-4, S-5, S-7, S-10, S-15)

20. By email message dated March 27, 2014, the School's Education Manager advised the Parents that because Student required a "non-traditional academic program and schedule …, [it] would research and recommend a life-skills based approved private school." (N.T. 124-26, 239-42; S-13)

21. The Parents responded to the March 27, 2014 email message by asking what programs it had researched and ended with, "We look forward to hearing from you in the near future." (S-13)

22. The School did not research other programs or follow up with the Parents. (N.T. 243-45)

23. On May 28, 2014, two months after the email exchange about private schools, the Parents wrote a letter to the School and advised of their intention to enroll Student in a private parochial school and seek tuition reimbursement from the School. The School did not respond to this letter. The Parents made this request because the School indicated it would send Student to a private school, and they wanted Student to attend a private school where Student could be fully included. (N.T. 128, 183, 186-87; S-16)

24. The Parents do not believe that Student could ever attend the School in the future. (N.T. 295-97, 345-47)

25. Sometime in May 2014, the School sent a form letter to the family advising them of the requirements for completing enrollment: completion of eighth grade, attendance at a June 28, 2014 orientation, provision of immunization records, and completion of paperwork at orientation (a form required by the state that is used to bill resident school districts for each child's tuition). This letter stated, "You will **not** be accepted or enrolled unless we have all the documentation that is required, and you have attended the orientation with your parent or guardian." (Parent Exhibit (P-) 2 p. 2 (emphasis in original)) The Parents and Student did not attend orientation or provide the immunization records. (N.T. 129-30, 164-69, 174-75; P-2)

26. Among other things, the School determines at the orientation whether a student has an IEP, and requests information about those students from the prior school district or charter school. No meeting is held prior to the end of August for those students, many of whom the School will first evaluate. (N.T. 168, 185-86, 198, 202-03, 204-05, 210-11, 213-14)

27. On July 3, 2014, the School sent a letter to the Parents explaining that because they did not attend the June 28, 2014 orientation, Student "lost [his/her] spot, and [his/her] name will now be moved to the end of the wait list." (S-17) The Parents did not respond to this letter. (N.T. 130-31, 169; S-17)

28. Student was eligible for extended school year (ESY) services for the summer of 2014, where needs were identified for academic skills, social skills, speech/language, and gross and fine motor skills. Student's 2014 ESY program focused on social skills, self-advocacy skills, and speech/language needs (speech intelligibility) in a 7-week camp program. S-18 pp. 28-30)

29. Student enrolled in a private parochial school (Private School) for the 2014-15 school year. (N.T. 131, 298)

30. The Private School provides regular and special education programming for its students and has two high school programs. Students are taught by certified regular and special education teachers. The Private School also provides vocational training at the high school level. (N.T. 277-79, 281-82)

31. Student had an individualized education program (called an Individual Education Program) at the Private School. This document contained instructional objectives for functional reading, handwriting and computer skills, functional mathematics, social skills, organizational skills, community living skills, and vocational skills. (N.T. 323-24; P-1)

32. Student was included in regular education classes for many subjects and was provided reading and mathematics instruction in a resource room setting. A special education teacher modified and adapted the curriculum for the content area classes as needed for Student. Student also participated in extracurricular activities at the Private School. (N.T. 132, 279-80, 298; P-1)

33. Student participated in vocational training at a local business and now is a paid employee at the site. (N.T. 133, 298-99, 305-06; P-4)

34. Through the end of the second quarter at the Private School, Student had attained A and B grades in all classes. (P-10)

35. Student was provided with speech/language therapy at the Private School by the local public school district. (N.T. 302-03, 324-25; P-5)

36. The local public school district provided transportation for Student to the Private School. (N.T. 285; P-1 p. 1)

37. The Private School does not provide ESY services. (N.T. 325-26)

38. The School is a recipient of federal funds. (N.T. 46-47)

39. Students who are enrolled at the School are able to meet the attendance requirements for the local school district post-secondary education funding program. (N.T. 287)

40. The School does not offer ESY programming but does arrange for those services for students who are eligible. (N.T. 287-88)

41. The Parents made arrangements for Student to attend several camps over the summer of 2015. These programs would provide opportunities to use leadership skills and work on activities of daily living, group projects, and vocational skills. The Parents will provide the transportation for all of the camps, but some of the weeks are residential. (N.T. 308-18, 329-32; P-7, P-8, P-9)

DISCUSSION AND CONCLUSIONS OF LAW

The Discussion set forth in the Interim Ruling contained in the Appendix is considered to be part of this decision. Although many are repeated here, it is helpful to keep the following principles in mind with respect to the remaining issue of remedies.

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution* (*Quakertown Community School District*), 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying in a forthright manner to the best of their respective recollections. In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

IDEA and Section 504 Principles

Under the IDEA, children who are eligible for special education on the basis of a disability are entitled to a free, appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.28, 300.101; 22 Pa. Code § 711.3. In Pennsylvania, the school district of residence is generally responsible for educating students residing within its boundaries, including

children with disabilities. 24 P.S. §§ 13-1302, 13-1372; 22 Pa. Code § 11.11.

Like school districts, charter schools are public schools. 24 P.S. § 17-1703-A. And, a charter school may be an LEA and thereby "assume the duty to ensure that a FAPE is available to a child with a disability in compliance with the IDEA … and section 504." 22 Pa. Code § 711.3; *see also* 34 C.F.R. §§ 300.28, 300.209; *R.B. v. Mastery Charter School*, 532 Fed. Appx. 136 (3d Cir. 2013). There is also no question that the School, as a charter school, is required to comply with the federal regulations implementing the IDEA and Section 504. 22 Pa. Code §§ 711.1 – 711.62. "When a child with an IEP transfers to a charter school or cyber charter school, the charter school or cyber charter school is responsible upon enrollment for ensuring that the child receives special education and related services in conformity with the IEP, either by adopting the existing IEP or by developing a new IEP for the child in accordance with the requirements of IDEA." 22 Pa. Code § 711.41(a).

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The School's Preliminary Legal Issue

It is necessary at the outset to address an issue that was first raised by the School on the day before the second hearing session, namely whether the Parents failed to join an indispensable

party, the local public school district. The School did acknowledge that the timeliness of this contention may have been problematic, and indicated that it was prepared to go forward with evidence on May 12, 2015. (N.T. 270-71) Both parties provided arguments on this issue in their final closing arguments. The School contends that, because it is funded through the various public school districts of residence for its enrolled students, and since Student is a resident of his/her local public school district, that entity must be joined as an indispensable party. (School's Closing Argument at 2-9) It also contends that the local school district is financially responsible because Student never completed the enrollment process at the School, as discussed in the Appendix. *Id.* In response, the Parents assert that they filed a due process complaint solely against the entity that they considered to be Student's LEA, here the School, and absent any allegations against the local public school district, it is not an indispensable party. (Parents' Closing Argument at 15-17)

The School's reliance on the funding scheme in the Charter School Law is misplaced. Whether or not another entity may in the future bear some or all of the financial responsibility for the denial of FAPE in this case, this hearing officer concluded in her Interim Ruling that the School had an obligation, outside of the enrollment and funding provisions in the Charter School Law, to develop and offer FAPE to Student for the 2014-15 school year, and that it did not. *See* Appendix. Thus, the School must comply with applicable law, including the IDEA and Section 504, independent of the local public school district. Tellingly, the School concedes that "it has the authority to 'decide matters related to the operation of the school, including, but not limited to, budgeting, curriculum, and operating procedures[.]" School's Closing Argument at 4-5 (quoting 24 P.S. § 17-1716(A)(a)). Even if the financial responsibility for the School's compliance may at some time in the future be borne by another entity, that possibility is

irrelevant to the issues presented to this hearing officer involving the Parents and the School. *See Interboro School District*, 29 IDELR 838 (Pa. SEA 1998) (stating that, "special education hearing officers [may not] consider or resolve questions of financial responsibility that may arise between school districts and other public agencies.") The School is not without recourse, as it may choose to pursue whatever claims it believes it has against another public agency in another forum. *See, e.g., Jeremy M. v. Central Bucks School District*, 2001 U.S. Dist. LEXIS 1863 (E. D. Pa. 2001). Moreover, this contention was not presented until the day before the final hearing session and, thus, acceptance of this argument would have caused undue delay to the process that was subject to strict timelines under the IDEA.

The Parents' Claims

Having determined that the School denied Student FAPE in failing to develop and offer a special education program for the 2014-15 school year under both the IDEA and Section 504, the remaining issue is what relief should be awarded to rectify this FAPE violation.[6] The IDEA and case law interpreting it permit two specific remedies for a District's denial of FAPE.

Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996); *see also Ferren C. v. School 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). Further, parents who believe that a public school is not providing FAPE may unilaterally remove their child from that school and place him or her in a private

[6] The discussion of remedy applies equally to the IDEA and Section 504 claims, as the denial of FAPE was the same under both statutes. There is no need to address them separately.

school, and also seek tuition reimbursement for the cost of the alternate placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Mary Courtney T.*, 575 F.3d at 242. Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Carter, supra; see also*. *See Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice).[7] In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating parents' unilateral placements. *Ridgewood, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

The first prong of the tuition reimbursement analysis was met as set forth in the Interim Ruling. The next question is whether the Private School was appropriate for Student. The Private School provided regular and special education programming for Student in regular and special education classes taught by certified teachers. Student had an individualized program that addresses Student's unique needs, academically, socially, and vocationally. Student was included in the regular education environment for a significant part of Student's program, with

[7] The decision of the U.S. Supreme Court in *Forest Grove* also undermines the School's reliance on 34 C.F.R. § 300.148. (School's Closing at 10-11)

modification and adaptations as needed for Student. As of the end of the second quarter, Student had all A and B grades, reflecting success at the Private School. For all of these reasons, the record supports a conclusion that the Private School program was reasonably calculated to provide Student with educational benefit, and the second step has therefore been met.

The related question of ESY will be addressed before moving on to the third consideration in the analysis. Entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives FAPE. 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Those factors are:

> (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
>
> (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
>
> (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
>
> (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
>
> (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.
>
> (vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.
>
> (vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

In this case, Student was eligible for ESY in 2014, and there is no evidence in the record suggesting that Student's needs changed to any significant degree such that the same eligibility would not follow for 2015. Had the School developed and offered an appropriate special education program, it would have had to consider Student's eligibility at the initial and any subsequent IEP meeting. 22 Pa. Code § 14.132(a)(1) (stating that, "[a]t each IEP meeting for a student with disabilities, the school entity shall determine whether the student is eligible for ESY services[.]"). Thus, the School's obligation to develop an offer a program necessarily also included a determination of ESY services for Student. Further, while ESY is commonly provided in the summer, the Pennsylvania Department of Education has made clear that consideration for ESY services is not limited to time of year or type of programming.[8] Accordingly, the School's denial of FAPE to Student for the 2014-15 school year extends to ESY services for 2015. As for the appropriateness of the Parents' chosen programming, the camping programs identified by the Parents are similar to those set forth in the previous year's IEP, and address Student's needs for, among other things, socialization and vocational skills. Taken together, the Parents' choice of ESY programming is reasonably calculated to provide Student with educational benefit, and, thus, similarly meets the second prong.

The final question on this issue is whether equitable considerations should operate to reduce the award of tuition reimbursement. This case presents a situation where the parties had widely divergent perspectives on programming for Student. The Parents presented as passionate and devoted advocates for Student, and wholeheartedly believe in full inclusion. The School, for its part, did not appear to the Parents to reflect that same enthusiasm, and they were clearly disillusioned with its determination that it could not provide Student with a fully inclusive

[8] Basic Education Circular, Extended School Year Eligibility (April 15, 2013).

program. Nevertheless, the difference in the parties' opinions about Student's programming did not, in this hearing officer's estimation, provide any reason for making any adjustment to the award for tuition reimbursement based on equitable considerations.

The above discussion, however, relates solely to the 2014-15 school year and the summer of 2015. Although the Parents seek to have the School financially obligated to fund Student's tuition at the Private School until Student turns 21 years of age, this claim is akin to a request for prospective private placement rather than continuing tuition reimbursement. Hearing officers do enjoy broad discretion to fashion an appropriate remedy under the IDEA. *See, e.g., Forest Grove, supra*, at 240 n. 11 (2009); *Ferren C., supra*, at 718. This hearing officer is not convinced that application of this discretion may never extend to an order for a private school placement. *See, e.g., School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985); *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285-86 (11th Cir. 2008); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 248-49 (3d Cir. 1999).

While the tuition reimbursement test may not be directly applicable to this prospective claim, its prongs do provide concrete guidance for evaluating this type of claim. Additionally, however, the record must, in this hearing officer's view, support a conclusion that the LEA is not, and likely cannot be, in a position to offer and provide FAPE. *See, e.g., Burlington, supra*, at 369 (explaining that private placement at public expense is warranted where an appropriate public school program is not possible). This does not mean that the Parents must establish that the LEA cannot "in theory" provide an appropriate program, *Draper, supra*, at 1285 (quoting *Ridgewood, supra*, at 248-49), but the equitable nature of the requested remedy logically demands something more than a past denial of FAPE.

Here, however, having concluded that the School had an obligation to create an

appropriate program for Student prior to the beginning of the 2014-15 school year, there is no evidence to support a conclusion that it could not reasonably do so in the future. Again, a past denial of FAPE, without more, simply is insufficient to form the basis for a prospective placement, particularly one that extends far into the future, should the Parents again seek to have Student attend the School. Thus, the tuition reimbursement award will be limited to the 2014-15 school year and summer ESY services, together with transportation costs. There will be no award for prospective placement at the School's expense.

Finally, the Parents seek compensatory education for the 2014-15 school year and beyond. (Parents' Closing Argument at 13-15) This remedy was not previously requested; and, in any event, is not available in this case where the Student has been parentally placed at the Private School.

> "[T]uition reimbursement and compensatory education are two distinct remedies. They are not interchangeable. Tuition reimbursement is a remedy to parents who have unilaterally placed their child in a private school when a district offers their child an inappropriate educational placement and the proposed IEP was inappropriate under the IDEA thereby failing to give the child FAPE. In contrast, compensatory education is a retrospective and in kind remedy for failure to provide an appropriate education for a period of time."

P.P. ex rel. Michael P. v. West Chester Area School Dist. 585 F.3d 727, 739-740 (3rd. Cir. 2009). Having found that the Private School was appropriate for the 2014-15 school year, and that the ESY program proposed by the Parents is also appropriate, there is no past denial of FAPE to rectify through an award of compensatory education. Moreover, to the extent that Student is not likely to ever attend the School, any obligation that it had toward Student with respect to special education programming ended upon its failure to offer a program for the 2014-15 school year including the summer of 2015.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the School denied FAPE to Student for the 2014-15 school year and continuing into the summer of 2015 for ESY services. The School will be ordered to reimburse the Parents for the costs of tuition and similar enrollment fees, together with transportation costs provided by the Parents. All other relief requested will be denied.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The School shall reimburse the Parents for the full cost of the Private School tuition for the 2014-15 school year, and for the full cost of tuition/fees for the three summer camps for 2015 described at the due process hearing, together with costs incurred by the Parents for transportation to those summer camps.

2. The School is not obligated to fund Student's placement at the Private School beyond the 2014-15 school year.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

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Cathy A. Skidmore
HEARING OFFICER

Dated: June 10, 2015

APPENDIX – Text of Ruling of May 4, 2015

BACKGROUND and PROCEDURAL HISTORY

The student (hereafter Student)[9] is a middle-teenaged student who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).[10] Student's Parents filed a due process complaint against the City Charter High School (hereafter School) asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,[11] as well as the federal and state regulations implementing those statutes. They also claimed discrimination on the part of the School based on Student's disability.

The School's Motion to Dismiss on the basis that it was not the Local Education Agency (LEA) for Student was denied, and the case proceeded to a due process hearing that was bifurcated by agreement of the parties and the hearing officer.[12] The parties agree that this case presents a novel issue. At the initial hearing session, the parties presented evidence in support of their respective positions on the question of whether the School was under any obligation to Student under the IDEA and/or Section 504, and whether it violated either of those statutes, in what we referred to loosely as the liability phase. Both parties provided written closing arguments that included responses to the opposing party's closing arguments. Following review of the record, and for the reasons set forth below, I find in favor of the Parents, in part, on the preliminary, liability issue.

[9] Despite the fact that this was an open hearing, in the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this Ruling.
[10] 20 U.S.C. §§ 1400-1482.
[11] 29 U.S.C. § 794.
[12] *See* N.T. 42-44, 255; Hearing Officer Exhibit (HO-) 1).

ISSUES

1. Whether the School had any obligation to Student under the IDEA and/or Section 504; and

2. Whether the School violated the IDEA and/or Section 504, procedurally or substantively, with respect to Student.

[FINDINGS OF FACT Omitted as incorporated into Final Decision]

DISCUSSION

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution* (*Quakertown Community School District*), 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying in a forthright manner to the best of their recollections. In reviewing the record, the testimony of every witness, and the content of each

exhibit, were thoroughly considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

IDEA Principles

Under the IDEA, children who are eligible for special education on the basis of a disability are entitled to a free, appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.28, 300.101; 22 Pa. Code § 711.3. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed.

In Pennsylvania, the school district of residence is generally responsible for educating students residing within its boundaries, including children with disabilities, with some exceptions. 24 P.S. §§ 13-1302, 13-1372; 22 Pa. Code § 11.11. Like school districts, charter schools are public schools. 24 P.S. § 17-1703-A. And, a charter school may be an LEA and thereby "assume the duty to ensure that a FAPE is available to a child with a disability in compliance with the IDEA … and section 504." 22 Pa. Code § 711.3; *see also* 34 C.F.R. §§ 300.28, 300.209; *R.B. v. Mastery Charter School*, 532 Fed. Appx. 136 (3d Cir. 2013). There is also no question that the School, as a charter school, is required to comply with the federal regulations implementing the IDEA and Section 504. 22 Pa. Code §§ 711.1 – 711.62. "When a child with an IEP transfers to a charter school or cyber charter school, the charter school or cyber charter school is responsible upon enrollment for ensuring that the child receives special education and related services in conformity with the IEP, either by adopting the existing IEP or

by developing a new IEP for the child in accordance with the requirements of IDEA." 22 Pa. Code § 711.41(a).

Also relevant in this case is the IDEA obligation for eligible students to be educated in the "least restrictive environment" which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment (LRE) as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Id*.

Section 504 Principles

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii).

> In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is "disabled" as defined by the Act; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of

> education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood at 253. Intentional discrimination requires a showing of deliberate indifference, which may be met by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated … and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013).

Application to this Case

The first issue to be decided is whether the School had any legal obligation to Student. In a previous ruling, this hearing officer rejected the School's argument that Student had not actually enrolled in its program and it therefore had no responsibilities toward Student under the IDEA or Section 504, concluding that genuine issues of material fact existed. *See James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000) (holding that a school district's obligation toward a child with a disability arises from his or her residence within the district and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011) (concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop and IEP); *I.H. v. Cumberland Valley School District*, 842 F. Supp. 762 (E.D. Pa. 2012) (denying the school district's motion to dismiss the claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the district). Following completion of the initial hearing session, this issue is now fully developed and may be addressed on the merits.

Unlike in *James*, *Moorestown*, and *I.H.*, the Parents were not asking the resident public school district to fulfill IDEA obligations so that they could decide whether to enroll Student there. However, in the fall of 2013 and spring of 2014, the record demonstrates that the Parents were considering the School, a public charter school, as an option for Student's high school

program; and, they were engaged in communications with CS and School staff to help them make that decision. By December 2, 2013 when there was no need for a lottery, it was the Parents' sole choice on whether Student would complete enrollment at, with entitlement to appropriate programming from, the School. Although the School argues that the parties did not go beyond preliminary discussions of the School's programming, the above case law reflects that a public school's obligations under the IDEA and Section 504 are not necessarily dependent upon an existing enrollment. Here, any questions about the Parents' intentions were answered by their May 28, 2014 correspondence. This hearing officer concludes that letter was tantamount to a request for an appropriate special education program by the School, just as in *Moorestown* and *James*, triggering its obligations to Student under the IDEA and Section 504.

There was testimony by the School that a student cannot be enrolled without completing all of the paperwork, including the state-required form. (N.T 171) However, the requirement of completing the enrollment form appears to be nothing more than a procedural vehicle for securing funding for charter schools through resident school districts, rather than a condition for a student's acceptance into a charter school. This hearing officer also finds unpersuasive the approach taken by the Court in *E.G. v. Lakeland Regional High School Board of Education*, 2007 U.S. Dist. LEXIS 4274 (D.N.J. 2007) and urged by the School in its Closing Argument in this particular case under the unique facts presented here.

There was also testimony from the School that the recommendation of a private school for life skills was not a placement determination. (N.T. 198-99, 250) As discussed *infra*, I do not disagree, but the characterization of the parties' spring 2014 communications is not the basis for finding that the School did have an obligation to Student under the IDEA and Section 504. At the time the Parents advised the School of their intention to seek tuition reimbursement from

the School, its staff was still attempting to secure records for Student in preparation for development of an IEP. The lack of any response to the Parents' May 2014 letter is puzzling; certainly it conveyed a need for the School to take some action.

The School further contends that significant policy considerations are a factor. There can be no doubt that assigning to a charter school the responsibility of developing a program for a special education student who has not enrolled there may appear to be burdensome. Nevertheless, as the *I.H.* Court explained, offering a proposed program to a student who is requesting one is not the same as providing FAPE to a child who is enrolled elsewhere. As discussed above, the records supports such an assignment in this case.

Having determined that the School had an obligation under the IDEA and Section 504 upon receipt of the Parents' May 2014 letter, it follows that the School substantively denied Student FAPE by failing to then offer an appropriate program.[13] *See id*.; *Moorestown*, *supra* (citing *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009)). For purposes of this ruling, the same action that constituted a denial of FAPE is a violation of Section 504 on identical grounds and need not be separately discussed. This conclusion does not end the inquiry, however, as the Parents specifically claim that the School violated the LRE principles in the IDEA and *Oberti*, that it predetermined Student's placement, and that its actions were deliberately indifferent toward Student.

With respect to LRE and predetermination, based on this record I accept the School's argument that its discussions with the Parents did not result in an actual placement decision for

[13] This conclusion necessarily encompasses the substantive and procedural sub-issues raised in the Parents' Complaint and in their opening statement. It merits mention that LRE and parental participation/predetermination are two of many considerations for whether a special education program provides FAPE substantively and procedurally.

Student that would require consideration of the *Oberti* prongs, [14] or mandate compliance with the procedural protections afforded to parents in making programming decisions. Having found that the School denied FAPE to Student, the specific LRE and predetermination/parental participation claims are subsumed within that determination by the absence of a proposed program. Accordingly, this matter may proceed to the second phase of this bifurcated proceeding without further discussion of these specific issues.

Finally, this hearing officer cannot conclude that the School acted intentionally, with the knowledge that a federally protected right was substantially likely to be violated and a failure to act despite that knowledge, in conveying its recommendation for Student's future placement. Again, I do not conclude that the School made a placement decision through that communication. While there are some troublesome aspects to this case, and the parties clearly have a difference in opinion on whether and how Student might be fully included in the School's program, the spring 2014 recommendation made by the School does not, in this hearing officer's estimation, suffice to establish that the School acted with deliberate indifference toward Student.

ORDER

In accordance with the foregoing, it is hereby ORDERED as follows:

1. The School violated the IDEA and Section 504 in failing to offer a special education program to Student for the 2014-15 school year, and thereby denied Student FAPE under both statutes.

2. The School did not make a placement determination for Student in the spring of 2014.

3. The School did not act with deliberate indifference toward Student.

[14] The Parents' reliance on two cases suggesting that any continued efforts to work with the School would have been futile is unpersuasive as those cases are clearly distinguishable.

4. The second phase of this bifurcated hearing will proceed as scheduled on May 12, 2015 unless resolved by the parties or rescheduled.

Cathy A. Skidmore

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Cathy A. Skidmore
Hearing Officer
Dated: May 4, 2015