

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer

Final Decision and Order

Child's Name:

T. R.

OPEN HEARING

ODR File Numbers: 18809 16 17 and 19109 16 17¹

Child's Name: T. R.

Date of Birth: [redacted]

Dates of Hearing:²

5/4/17, 8/18/17, 8/23/17, 8/24/17

Parent:

[redacted]

Pro Se

Local Education Agency:

Commonwealth Charter Academy, 4050 Crums Mill Road, Suite 303,
Harrisburg, PA 17112

Counsel for the LEA

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100 Pine Street, P.O. Box 1166, Harrisburg, PA 17108

Hearing Officer: Michael J. McElligott, Esquire

Date of Decision:³ 9/30/17

¹ All references in the decision to "ODR" is a reference to the Office for Dispute Resolution, the agency responsible for administering special education due process in the Commonwealth.

² This matter coincides with a matter contemporaneously filed by T.R.'s parent for another student (J.H./ODR file #s18768-1617KE & 19108-1617KE— parent serves as J.H.'s guardian and education decision-maker). This matter involving T.R. was not formally consolidated with the other matter involving J.H., but both were handled under an analogous timeline for disposition due to the similarity of issues presented across both cases and the overlap of certain witnesses and events. Additionally, the hearing in this matter was set to conclude at hearing sessions over July 6th, 7th, and 11th. Due to the guardian's ill health, those sessions were cancelled and rescheduled to the August sessions.

³ After the close of evidence on August 24th, it had been the hearing officer's intention to issue an interim ruling on T.R.'s program/placement, pending the issuance of this final decision. The size of

INTRODUCTION

Student (“student”)⁴ is an early-teen aged student who attends the Commonwealth Charter Academy (“Charter School”), a Pennsylvania cyber charter school. The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)⁵ as a student formally identified with a health impairment and a specific learning disability in written expression, among multiple other identified needs.

Parent claims that the student was denied a free appropriate public education (“FAPE”) for the 2016-2017 school year, an alleged denial that continues through the date of this decision in the early part of the 2017-2018 school year. The parent claims that the student was denied FAPE, and discriminated against on the basis of disability, under the terms of the Rehabilitation Act of 1973, particularly in Section 504 of that Act (“Section 504”).⁶ The parent also asserts that the Charter School failed to identify the student as a gifted student under Pennsylvania’s gifted education regulations.⁷

The Charter School counters that at all times it met its obligations to the student under IDEIA/Chapter 711 and Section 504 as its programming was

the record in this matter and the number of issues presented in the complaint (as well as the size of the record and the number of issues presented in the complaint in the analogous matter at J.H./18768-1617KE & 19108-1617KE) did not allow the hearing officer to marshal the information necessary to issue that interim ruling.

⁴ The generic use of “student”, rather than a name or gender-specific pronouns, is employed to protect the confidentiality of the student.

⁵ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§711.1-711.62 (“Chapter 711”).

⁶ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11.

⁷ 22 PA Code §§16.1-16.65 (“Chapter 16”).

designed to provide FAPE to the student and, as implemented, delivered FAPE to the student. As to Chapter 16, the Charter School argues that Pennsylvania's Chapter 16 gifted regulations do not apply to it, or to any student enrolled in the Charter School, under the provisions of the Pennsylvania Public School Code of 1949 ("School Code").⁸ As such, the Charter School argues that the parent is not entitled to remedy.

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

PROCEDURAL HISTORY

This matter has an intricate procedural history:

- A. Since May 2011, the student has received services to address behaviors rooted in attention-deficit/hyperactivity disorder ["ADHD"], first under a Section 504 plan drafted by the student's school district of residence at that time. In December 2012, the student was identified as a student eligible under the terms of the IDEIA as a student with a health impairment (ADHD) and a specific learning disability in written expression. (Parent Exhibit ["P"]-28)
- B. In August 2013, the parent withdrew the student from the school district of residence and enrolled the student in the Charter School.⁹ (P-33; Hearing Officer Exhibit ["HO"]-1)
- C. The student attended the Charter School in the 2013-2014, 2014-2015, and 2015-2016 school years. (HO-1).
- D. In February 2016, the parent filed a special education due process complaint ("ODR file #17322-1516KE) alleging that the Charter School had denied the student FAPE in the 2013-2014 and 2014-2015 school years, and, ongoing at that point, the 2015-2016 school year. (HO-1).
- E. Over March – August 2016, a multi-session hearing was held. In September 2016, the hearing officer (different from the undersigned hearing officer) issued a decision at ODR file #17322-1516KE and found that the Charter School had denied the student FAPE. (HO-1).

⁸ 24 P.S. §17-1749-A(b).

⁹ At the time of the student's initial enrollment, the Charter School was known [under a different name,] an entity of a cyber schooling organization that operated cyber schools in multiple states. In 2016, the Charter School removed itself from the umbrella of that organization and began to operate as an independent cyber schooling entity, changing its name.

- F. In the September 2016 decision at ODR file #17322-1516KE, the hearing officer awarded an “hour-for-hour” compensatory education remedy, ordering the Charter School to pay a third party provider for up to 990 hours of compensatory education per school year for each year of deprivation. The hearing officer’s order also included directives for the third-party provider to furnish to the parent four progress reports per calendar year to gauge the student’s progress on the IEP goals. (HO-1).
- G. As set forth below, the procedural history at this point in the chronology of events and legal proceedings involving the student’s education intersects with fact-finding in this matter. Certain procedural matters, however, will be continued here for clarity in understanding this decision and because those matters impact the scope of the claims addressed in this decision.
- H. In late February 2017, the parent filed the complaint which led to these proceedings, alleging specific instances of denial of FAPE (set forth below). (HO-2).¹⁰
- I. In response to the parent’s complaint, the Charter School filed a motion for partial dismissal of claims related to certain claims presented in the complaint. (HO-4).
- J. In early March 2017, the parent filed a motion with the federal District Court for the Eastern District of Pennsylvania (“Court”) (Civil Action 17-1026) for a temporary restraining order, seeking to halt an IEP meeting for the student scheduled to be held later in March. The Court declined to issue the injunction. (School District Exhibit [“S”]-29; HO-5).
- K. In March 2017, the undersigned hearing officer issued a ruling on the Charter School’s motion for partial dismissal, granting it in part, denying it in part, and holding in abeyance certain issues which were not ripe for disposal on motion. (HO-6).
- L. Specifically, in the March 2017 ruling, the Charter School’s motion for partial dismissal was granted, therefore dismissing claims, as to (1) claims related to the implementation of the order contained in the decision at ODR file #17322-1516KE for lack of jurisdiction, as implementation issues related to such an order fall under the jurisdiction of the Pennsylvania Department of Education – Bureau of Special Education (“PDE-BSE”) and, (2) claims related to purported systemic violations by the Charter School for the 2014-2015 and 2015-2016 school years as a matter of *res judicata* based on the final decision and remedy for those school years at ODR file #17322-1516KE. (HO-6).

¹⁰ Contemporaneously with the filing of the complaint that led to these proceedings (HO-2), the parent filed a complaint at ODR file #18810-1617KE asserting claims of, and remedy for (including requesting an order for an investigation), alleged invasion of privacy by the Charter School for allegedly activating the microphone and/or utilizing microphone settings on the family’s home computer and the laptop computer supplied by the Charter School. In March 2017, the undersigned hearing officer dismissed the complaint ODR file #18810-1617KE for lack of jurisdiction based on the claim asserted and the remedy sought. (HO-3).

- M. Specifically, in the March 2017 ruling, the Charter School's motion for partial dismissal was denied, therefore allowing claims to proceed, as to parent's claim that data/results from instruction over the period November 2016 – January 2017 from a private third-party provider retained under the compensatory education award of the order at ODR file #17322-1516KE should have been part of the student's December 2016 IEP. (HO-6).
- N. Specifically, in the March 2017 ruling, the Charter School's motion for partial dismissal was held in abeyance as to parent's claim that a December 2016 IEP did not incorporate aspects of the hearing officer's order from the decision at ODR file #17322-1516KE, subject to an offer of proof as to issues related to the December 2016 IEP—at that point, unexamined as a matter of evidence. (HO-6).
- O. Under the terms of the March 2017 ruling, the parent filed an offer of proof related to claims over the intersection of the hearing officer's decision at ODR file #17322-1516KE and the December 2016 IEP, with accompanying documents. The Charter School filed a response to the parent's offer of proof. The parent filed a reply to the Charter School's response. (HO-7, HO-8, HO-9).
- P. The undersigned hearing officer deferred action on the offers of proof until the first session of the hearing on May 4, 2017.¹¹ The student's access to the private third-party services obtained through the compensatory education award in the order at ODR file #17322-1516KE in light of the student's needs as that access/those services might intersect with the December 2016 IEP was determined to be at issue in the hearing, but any substantive denial-of-FAPE issue prior to the issuance of the decision at ODR file #17322-1516KE in mid-September 2016 was not considered for remedy. (Notes of Testimony ["NT"] at 5-18).
- Q. On April 24, 2017, the parent submitted a complaint at ODR file #19109-1617KE, asserting similar denial-of-FAPE issues as asserted in the complaint at ODR file #18809-1617KE, with certain new allegations and revised allegations related to an IEP document created and circulated in March/April 2017 after the initial complaint had been filed. (HO-11).¹²
- R. At the May 4, 2017 hearing session, the undersigned hearing officer explained that it was his intention to include the matters raised in the parent's complaint at ODR file #19019-1617KE in the course of these

¹¹ A hearing planning session was held on April 20, 2017 in the analogous cases at J.H./ODR file #s18768-1617KE & 19108-1617KE. Some of that hearing planning impacted the parties' and hearing officer's understanding of how matters would proceed in those cases as well as in the instant cases. Therefore, the transcript of the April 20th session at J.H./ODR file #s18768-1617KE & 19108-1617KE is included as a hearing officer exhibit in this matter at HO-10.

¹² The complaints at 18809-1617KE and 19109-1617KE largely mirror each other, although there are additional claims related to the student's enrollment status at the Charter School and meaningful parental participation. These issues will all be addressed in the decision as to the entirety of the student's educational programming.

proceedings. Whether that was a procedural matter of withdrawing the complaint at ODR file #19109-1617KE and incorporating those issues into the ODR file #18809-1617KE, or proceeding with consolidated cases at two file numbers, was left to the discretion of the parties. (NT at 100-101).

- S. To protect its interest, the Charter School filed a motion to dismiss the complaint at ODR file #19109-1617KE, asserting that the issues raised in that complaint were already at issue and being adjudicated in these proceedings. The parent filed a response to the Charter School's motion. (HO-12, HO-13).
- T. Having received the parent's responsive pleading, the undersigned hearing officer confirmed with her that she was not withdrawing the complaint at 19109-1617KE. By email dated May 9, 2017, the Charter School's motion was denied, and the parties were informed that the complaints at ODR file #18809-1617KE and #19109-1617KE were formally consolidated into one hearing process. (HO-14).
- U. There were a myriad of other procedural issues, hearing-planning issues, and hearing officer indications/directives over the course of the hearing which involved substantial communication with the parent and counsel for the Charter School. Where those matters are material, or where the parties had substantially differing views with each other and/or with the hearing officer, the communications and relevant documentation are included in further hearing officer exhibits, itemized in a table of contents at HO-15.

ISSUES

Did the Charter School deny the student FAPE in any of the following particulars?

- i. Did the Charter School err in its handling of data results from the private third-party provider of education services retained utilizing the compensatory education award under the terms of the order at ODR file #17322-1516KE?
- ii. Was the parent denied meaningful participation in the December 2016 IEP meeting, the March 2017 IEP meeting, and/or through a lack of record-sharing by the Charter School?
- iii. Was the composition of the December 2016 and March 2017 IEP teams appropriate?
- iv. Were the special considerations and/or present levels of academic and functional performance in the December 2016 and April 2017 IEPs prejudicially deficient?

- v. Was the educational placement and/or calculation of hours-in-regular-education prejudicially deficient?
- vi. Was the post-secondary transition planning in the December 2016 and April 2017 IEPs appropriate?
- vii. Was any aspect of the student's enrollment information wrongful?
- viii. Should the Charter School have requested permission to evaluate the student for occupational therapy ("OT") needs?
- ix. Was any exemption of the student from the Pennsylvania's System of School Assessment ("PSSA") testing wrongful?
- x. Did the Charter School fail in any obligation to the student under Chapter 16?

Did the District discriminate against the student
on the basis of disability?

FINDINGS OF FACT

Evaluation History

1. In December 2012, the student was identified by the student's school district of residence as a student with a health impairment (ADHD) and a specific learning disability in written expression. (P-28; HO-1).
2. In August 2014, the student's parent obtained an in-depth private neuropsychological evaluation which identified needs related to ADHD, written expression, expressive language, and executive functioning (attention/organization/task-approach/task-completion). (S-2; HO-1).
3. In November 2014, the Charter School re-evaluated the student. The November 2014 re-evaluation included details from the August 2014 private evaluation and continued to identify the student as a student with a health impairment (ADHD) and a specific learning disability in written expression. (P-30; HO-1).
4. In September 2015, the Charter School re-evaluated the student. The September 2015 included a speech and language evaluation and a functional behavior assessment. The September 2015 re-evaluation continued to identify the student as a student with ADHD and a specific learning disability. The re-evaluation also identified the student with needs in expressive language and social cognition. (P-31; HO-1).

5. In January 2016, the parent arranged for a private speech and language evaluation. (S-5).

September-October 2016

6. The student participated in Charter School instruction over the period September-October 2016. The student submitted work and made progress in classes over this period. (S-31 at pages 11-12).

Potential Private Placement & Private Third-Party Service Provider

7. In late September 2016, following the issuance of the decision at ODR file #17322-1516KE, the parent pursued an application process with a local private school for enrollment, an enrollment to be paid by the Charter School. (S-8).
8. The Charter School coordinated with the private placement, providing records and communicating with admissions staff at the private placement. The Charter School was prepared to fund the private placement as part of the use of compensatory education ordered at ODR file # 17322-1516KE. (P-36, P-37; S-34; NT at 264-266).
9. By mid-October 2016, the private placement was prepared to enroll the student. As part of its standard practice with the funding of enrollment by local education agencies, the private placement required that the parent sign the enrollment contract. The parent declined to sign the enrollment contract, and the student did not enroll in the private placement. (P-37; NT at 268).
10. In late October/early November 2016, the parent sought to enroll the student with a local educational services provider specializing in addressing struggling learners and learners with identified learning needs ("third-party services provider"). (P-14, P-18; S-8; NT at 269-271).
11. The Charter School, through counsel, entered into a services contract with the third-party services provider. The contract provided that the third-party services provider would provide 360 hours of 1-to-1 instruction to the student. Included in the contract, among other provisions, were provisions for the sharing of progress updates by the third-party services provider with the Charter School. (P-14, P-18; S-8, S-10; NT at 587-595, 807-808).
12. The student was to receive services from November 2016 through February 2017, 4-6 hours per day. The parent requested, and the Charter School agreed, that the student would attend the daily instruction with the third-party services provider. (P-14, P-18; S-8, S-10; NT at 271-272).

13. The parent and Charter School agreed that, given the intensity of the program, the student's instruction with the third-party services provider would substitute for the student's attendance and instruction at the Charter School. (P-18; S-8, S-10, S-12; NT at 271-272).
14. In late October 2016, as the parent began to arrange for services through the third-party services provider, the student was administered a battery of assessments by the third-party services provider. (P-14; S-9).
15. On standardized testing in the battery of assessments, the student scored at the 25th percentile or higher in all measures except for the oral directions subtest on the Detroit Tests of Learning Aptitude-2 (9th percentile), the word attack subtest of the Woodcock Reading Mastery Tests-III (10th percentile), the math computation subtest on the Wide Range Achievement Test-4 (9th percentile), spelling subtest on the Wide Range Achievement Test-4 (23rd percentile), the rate, accuracy, and fluency subtests of the Gray Oral Reading Tests-4 (respectively, 16th percentile, 9th percentile, and 5th percentile) the Lindamood Auditory Conceptualization Test-3 (4th percentile), and the computation (5th percentile) and story problems (9th percentile) subtests of the Test of Mathematical Abilities-2. (P-14; S-9).
16. The student received near-daily 1-on-1 instruction through the third-party services provider from November 2016 through January 2017. (S-12).
17. In December 2016, the third-party services provider crafted academic goals for the student in reading, spelling, writing, language comprehension, and mathematics. (P-14; S-18).
18. By late January 2017, in the areas of reading/language, the student had moved from partial-progress to proficiency, and at higher grade level work, in multiple areas. (S-11 at pages 1-2, 19-20).
19. By late January 2017, in mathematics the student had moved from partial-progress to proficiency in addition, "doubles plus one", subtraction, "aunts and uncles", and simple word problems. (S-11 at pages 5-6, 21-22).
20. By late January 2017, in mathematics the student moved from no recorded achievement to the following achievement levels in the following areas:
 - to proficiency in place value, "jumping", simple and complex carrying, simple and complex borrowing, complex word problems, multiplication facts, single-digit multiplication computation, and simple division computation;
 - to partial-progress in double-digit multiplication;
 - and to introducing complex division computation. (S-11 at pages 5-6, 21-22).

21. In late January 2017, the parent learned that the third-party services provider was sharing the same progress data with the Charter School as it was sharing with her. The parent lodged an objection with the third-party services provider about the practice and withdrew the student from the third-party services provider. (P-14; S-24; NT at 277-283).
22. Since withdrawing the student from the third-party services provider's programming, the parent has not pursued any other third-party arrangement for the provision of services utilizing the compensatory education awarded in the order at ODR file #17322-1516KE. (NT at 283; HO-1).

December 2016 IEP

23. In December 2016, the Charter School requested that the parent participate in a facilitated IEP meeting through ODR's facilitated-IEP-meeting service. (S-13, S-14, S-15, S-16, S-21).
24. The parent objected to certain details of the IEP team invitation. (S-13, S-14, S-15, S-16, S-21; NT at 285-286).
25. Based on slightly erroneous information on the facilitated-IEP request form, the parent filed an administrative complaint with PDE-BSE. (S-21 at pages 14-15; NT at pages 283).
26. The IEP team invitation was revised by the Charter School to reflect parent's concerns about the original invitation. (S-15, S-16; NT at 289-291).
27. The December 2016 IEP meeting was scheduled for December 22, 2016 and was to include the student, the parent, the Charter School director of special education, a Charter School school psychologist, a Charter School special education manager, a Charter School special education teacher, and two representatives from the third-party services provider (for information about the student's then-current academic program). (S-16).
28. In the late afternoon of December 20, 2016, the Charter School director of special education emailed the parent a draft of the IEP to be considered at the December 22nd IEP meeting. Two hours later, the parent emailed the director to indicate that she wished to postpone the December 22nd IEP meeting. (S-21 at page 16, S-19, S-20; NT at 618-621).
29. The December 2016 IEP meeting was not held. (NT at 294-295).
30. The December 2016 IEP included the special consideration that the student required assistive technology. The special consideration as to whether the student had behaviors that impeded the student's learning was not endorsed. (S-19 at page 5).

31. The December 2016 IEP contained present levels of academic achievement and functional performance, including prior evaluation data, details from the August 2014 private evaluation input from the student's Charter School teachers, the January 2016 speech and language evaluation, and informal OT assessment. (S-19 at pages 6-14).
32. The December 2016 IEP indicated that the student's special education teacher had begun to discuss transition planning since, over the course of the 2016-2017 school year, the student [redacted] would require such planning as part of the student's IEP. (S-19 at pages 5, 14).
33. The December 2016 IEP included parental concerns. (S-19 at page 15).
34. The December 2016 IEP indicated that the student's needs related to ADHD, the specific learning disability in written expression, and speech and language impairment, specifically in reading comprehension, written expression, math computation and math problem-solving, oral expression and expressive language, the student's disability included math computation, applied problems, and math fluency, in addition to executive functioning (memory) and OT needs. (S-19 at page 16).
35. The December 2016 IEP included, for the first time, goals regarding transition issues, namely post-secondary education/training and employment in the field of "astrology".¹³ The IEP team did not feel that the student needed any transition goals in independent living. (S-19 at pages 5, 17-18).
36. The December 2016 IEP indicated that the student would take the PSSA tests in math, science, reading, and writing, with accommodations. (S-19 at pages 19).
37. The December 2016 IEP contained three goals, one in reading comprehension, one in math problem-solving, and one in written expression. (S-19 at pages 23-24).
38. The December 2016 IEP contained program modifications, including assignment modification, organization, executive functioning, and specially designed instruction. The IEP included speech-to-text software as an accommodation. The IEP also included weekly in-person related services in speech and language, and OT (45 minutes each, weekly). (S-19 at pages 25-26).
39. The December 2016 IEP indicated that giftedness was "n/a" and that the student was not eligible for extended school year services. (S-19 at pages 26-28).
40. The December 2016 IEP indicated that the student would not participate with non-disabled peers in any academic class (language arts, math, science, social studies, and transition). The student was in regular

¹³ An erroneous substitution for "astronomy".

education settings for certain lessons, specials (physical education, art), clubs, activities, and field trips, for approximately 27% of the school day. (S-19 at pages 29-31).

April 2017 IEP

41. In January 2017, after cancellation of the December 2016 IEP meeting, the Charter School attempted to reschedule a facilitated-IEP meeting. (S-21 at pages 19-28, S-27, S-28; NT at 295-297).¹⁴
42. In early February 2017, the parent filed an administrative complaint with PDE-BSE related to the December 2016 IEP. The PDE-BSE special education advisor assigned to the administrative complaint inquired with the parent about the remedy that the parent sought. The parent responded that she wished to see the Charter School held “fully accountable...ideally, without any further involvement from the (Charter School)”. The parent then posited the details of a substantial cash settlement as a remedy. (P-34; NT at 283).
43. In February 2017, the Charter School scheduled a facilitated IEP meeting to be held in March 2017. (S-27, S-28).
44. The attendees at the March 2017 IEP meeting were to be the student, the parent, the Charter School director of special education, a Charter School school psychologist, a Charter School special education manager, a Charter School special education teacher, and a Charter School general education teacher. (S-28 at page 2).
45. The parent filed an action in federal court for a temporary restraining order to stop the March 2017 IEP meeting. The Court declined to issue a temporary restraining order. (S-29; NT at 299-302; see the *Procedural History* section at entry J).
46. On March 13, 2017, the student’s IEP team gathered for the IEP meeting. The parent did not attend. The IEP team called the parent to have her participate by phone; there was no answer, and a voicemail message was left for the parent. The IEP team members deliberated over a draft March 2017 IEP that had been circulated to the parent prior to the March 13th IEP meeting. (S-30; NT at 302-304).
47. At the March 13, 2017 IEP meeting, the IEP team members considered and updated multiple aspects of the student’s IEP.

¹⁴ Again, in late January 2017, without notice to the Charter School, the parent terminated the third-party education services. See Finding of Fact 21.

48. After the IEP team's deliberations at the March 2017 IEP meeting, the student's IEP was revised and, in April 2017, sent to the parent. ("April 2017 IEP"). (S-31).
49. The April 2017 IEP contained the same special considerations. (S-31 page 5).
50. The April 2017 IEP contained the student's current grades and teacher input as of March 2017 in the present levels of academic achievement and functional performance. The present levels also included data and results from the student's achievement at the third-party service provider. (S-31 at pages 9-11).
51. The transition section in the April 2017 IEP remained the same, and the IEP indicated that the student would still participate in the PSSA tests with accommodations. (S-31 at pages 19-25).
52. The student's reading comprehension, written expression, and math problem-solving goals remained in the April 2017 IEP. The reading comprehension goal in the April 2017 IEP is stronger, including an explicit reference to an assessment-based baseline (to be updated shortly after implementation of goal-based instruction). The written expression goal in the April 2017 IEP is stronger, including an explicit rubric. The math problem-solving goal in the April 2017 IEP is stronger, calling explicitly for instructional level math probes. (S-31 at pages 26-27, 39).
53. The April 2017 IEP added an OT goal related to fine motor skills, and two speech and language goals (word meaning and narrative discourse). (S-31 at pages 28-30).
54. The April 2017 IEP added specially-designed instruction in social skills. (S-31 at pages 31-33).
55. The April 2017 IEP maintained the weekly in-person sessions in speech and language, and OT. The April 2017 IEP added weekly in-person support from a board-certified behavior analyst (1.5 hours weekly), and daily in-person support from an instructional aide (3 hours daily). (S-31 at page 33).
56. The April 2017 IEP indicated that giftedness was "n/a" and that the student was not eligible for extended school year services. (S-31 at pages 33-35).
57. The April 2017 IEP does not indicate the nature of the educational placement as to when the student will/will not participate with students without disabilities (1) in non-academic activities, (2) in a regular education classroom, and (3) in the general education curriculum. (S-31 at page 36).
58. The April 2017 IEP contains no explicit calculation of the percentage of the instructional day in which the student will participate in regular education. (S-31 at page 38).

PSSA Testing

59. In all IEP drafts in the record regarding 2016-2017 programming, the student was expected to participate in PSSA testing. (S-19, S-31).
60. The testimony of the Charter School director of special education was not convincing that the student should not have participated in that testing. (NT at 323-324).

Record-Sharing

61. Parent disputes the Charter School's good-faith engagement in sharing the student's educational records as part of these proceedings. (P-19, P-25; S-23; Hearing Officer Exhibit – Flash Drive; NT at 23-50; HO-10 at pages 7-14).

WITNESS CREDIBILITY

All witnesses testified credibly. The student's parent and the Charter School director of special education were accorded heavier weight than other witnesses. Between the two, the testimony of Charter School director of special education was credited where the testimonies diverged or where the testimonies needed to be weighed one against the other. The testimony of other witnesses was accorded a medium degree of weight.

DISCUSSION AND CONCLUSIONS OF LAW

Denial of FAPE

To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful

benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her unique needs (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 197 L. Ed. 2d 335 (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis*, or minimal, education progress. (Endrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).¹⁵

Section 504 also requires that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1). The provisions of IDEIA/Chapter 711 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally* P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009)). This analogous consideration is employed here and so any finding that the student was, or was not, denied FAPE is made as to denial-of-FAPE claims under both IDEIA/Chapter 711 and Section 504.

Here, each of the parent's specific claims regarding denial of FAPE will be considered individually.

Private Third-Party Services. The parent alleges in the complaint at ODR file #18809-1617KE that the Charter School did not incorporate in the December 2016 IEP, specifically, evaluation results from the intake assessments from the

¹⁵ While in some parts of the United States the recent U.S. Supreme Court decision in Endrew F. presented a new and higher standard to gauge the appropriateness of special education programming in terms of the understanding of "meaningful benefit", the standard laid out in Endrew F. has been the longstanding standard enunciated by the Third Circuit Court of Appeals and has been the applicable standard to judge the appropriateness of special education programming in Pennsylvania.

third-party services provider when the student was enrolled with the third-party services provider in October/November 2016.

While it is true that the December 2016 IEP did not include any information in the present levels of educational academic achievement and functional performance about the initial assessments at the third-party services provider, the student was in the early stages of the third-party service provider's programming and, ostensibly, the evaluation results and data collected to the point when the December 2016 IEP was drafted was still coalescing. The absence of any such results or data did not render the December 2016 IEP, as a draft for consideration by the team, inappropriate.

By the time the April 2017 IEP was drafted, the student had completed nearly two hundred hours of instruction in the third-party services provider's programming and had been withdrawn from that programming. While the initial evaluation results were not included in the present levels of academic achievement and functional performance in the April 2017 IEP, detailed data was included on the work/level that the student had accomplished in the programming, and the work/level that was anticipated when the student was withdrawn. The April 2017 IEP, then, contained appropriate data to reflect how the third-party services provider's programming contributed to an understanding of the student's present levels of academic achievement and functional performance.

Accordingly, the Charter School's handling and inclusion of the results/data from the third-party services provider's programming was appropriate as to both the December 2016 and the April 2017 IEPs.

Parental Participation. The parent alleges in the complaint at ODR file #19109-1617KE that the Charter School did not share requested

records/documents for the student, interfering with her ability to engage in meaningful participation at the hearing and, specifically, her ability to prepare for these proceedings. This allegation is rejected. On April 20, 2017, at the first day of the hearing in the analogous cases at ODR file #s 18768-1516KE and 19108-1617KE, this issue was addressed as a procedural matter. Charter School counsel laid out that the Charter School had, indeed, made records available to the parent, but the parent refused delivery of the electronic storage device (a flash drive) and, at that session on the record, the parent refused to accept the flash drive containing the student's educational records gathered at the parent's request as part of these proceedings. (P-19, P-25; S-23; Hearing Officer Exhibit – Flash Drive; NT at 23-50; HO-10 at pages 7-14). This was reiterated at the August 23, 2017 hearing session in these proceedings, and, as a formality for consistency across the records in both analogous cases, the parent took the same stance, refusing to accept the flash drive. (NT at 204-211).

Moreover, the record in this matter, as well as the record in the analogous cases at ODR file #s 18768-1617KE and 19109-1617KE, supports a finding that the parent has definitively chosen not to engage in the IEP team processes.

For both the December 2016 IEP meeting and the March 2017 IEP meeting, the Charter School made sure the parent was invited well in advance on a date that worked for the parent's availability, had a copy of the draft IEPs in advance, addressed concerns about attendees at the December 2016 IEP meeting, and arranged through ODR for a neutral IEP-team facilitator to be present at both meetings. In both cases, the parent did not attend. The lack of attendance in December 2016 led to the cancellation of the meeting. After the parent failed to obtain a restraining order to stop the March 2017 IEP meeting, it went forward, and the parent neither attended nor made herself available by telephone at the

date/time of the meeting. Sadly, as of August 2017, despite voluminous email and document exchanges between the parent and the Charter School director of special education, and despite requests by the director to speak and/or to meet with the parent, the first time the Charter School director of special education met or “heard (the parent’s) voice” was at the April 20, 2017 hearing session when the analogous hearing at ODR file #s 18768-1617KE and 19108-1617KE convened—the first session across all complaints as to J.H. and T.R..¹⁶

Accordingly, for the December 2016 and March 2017 IEP team meetings, the parent was accorded an opportunity for full and meaningful participation. Likewise, the parent was afforded an opportunity prior to any hearing session to take delivery of the records/documents gathered and provided by the Charter School in anticipation of these proceedings and chose not to receive those records/documents. There has been no denial of parental participation.

IEP Team Composition. The parent alleges in both complaints that the student’s IEP team composition was a violation of IDEIA. In the complaint at ODR file #18809-1617KE, parent asserts that there was no regular education teacher as part of the IEP team at the December 2016 IEP team meeting. In the complaint at ODR file #19109-1617KE, the parent asserts that the regular education teacher invited to the March 2017 IEP team meeting was not appropriate.

The December 2016 IEP team included as invitees two individuals from the third-party service provider who were, at that time by agreement of the parties,

¹⁶ NT at 262-263. The parent’s complaints, communications in the record, and testimony all point potentially to a flawed understanding of the IEP documents shared with her. Those are draft documents, prepared by the Charter School as the basis for the IEP team’s consultations—the starting point of the IEP team process. But the parent, instead of engaging in the IEP team process to share views, make requests, and collaborate on changes, apparently assumes that the documents are in final form. In other words, the parent appears to move directly to objection (and non-engagement) rather than using the IEP team process to engage and collaborate.

providing the only instruction to the student. The explanation of the Charter School's director of special education on the role of those educators is accepted and understandable—they had the contemporaneous insight into the entirety of the student's learning.

The regular education teacher invited to the March 2017 IEP team meeting was the student's art teacher. The parent asserts that a different regular education teacher should have been invited to the meeting. The IDEIA requires only that "not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment)" be an attendee at the IEP meeting. (34 C.F.R. §300.321). Therefore, procedurally, there is no violation of IDEIA. More substantively, however, the April 2017 IEP contains extensive and, as of March 2017, quite recent input from multiple Charter School regular education teachers of the student. Therefore, the insight from a regular education perspective was both procedurally and substantively part of the IEP team's deliberations.

Accordingly, the composition of the IEP teams, as planned for in December 2016 and in actuality in March 2017, was appropriate.

IEP: Present Levels of Performance & Special Considerations. The complaints at ODR file #s 18768-1617KE and 19108-1617KE each allege that the present levels of educational academic achievement and functional performance in the, respectively, December 2016 IEP and April 2017 IEP are flawed to the point that the student was denied FAPE. The complaint also allege that an indication that the student's behavior does not impede the student's learning has denied the student FAPE.

The present levels of educational academic achievement and functional performance in the December 2016 IEP do not include information from the third-party service provider programming. For the reasons stated above related to the inclusion of the third-party service provider data in those levels, the lack of inclusion of that data at that time is not inappropriate. The remaining information in those levels is garnered from past evaluation results for the student from past evaluations, including the August 2014 private evaluation and the January 2016 speech and language evaluation.

The present levels of educational academic achievement and functional performance in the April 2017 IEP includes the data from the third-party service provider. In this section in both IEPs, the most recent present levels of educational academic achievement and functional performance were used to inform the IEP team and, consequently, were appropriate.

Accordingly, the present levels of educational academic achievement and functional performance in the December 2016 IEP and April 2017 IEP are comprehensive and appropriate. For that reason, the student has not been denied a FAPE in this regard.

In terms of the indication in the special considerations section that the student does not exhibit behaviors that impede the student's learning, there is less assurance that this is appropriate. The Charter School takes the position that, even though the student has been identified with the health impairment ADHD, any manifestation of that impairment has not appeared in the recent Charter School instructional environments. The record in its entirety would seem to support this, although the issue was not deeply explored through testimony. The terms of the IEPs themselves, however, reveal that the student has needs in organization/attention/task-approach, and social skills. Weekly in-person services

from a board-certified behavior analyst are part of the student's related services in the April 2017 IEP. Therefore, even if the Charter School's position on the matter is adopted, it is clear that the student's behaviors in the learning environment is, at least, a need and a focus in the IEPs.

Accordingly, the April 2017 IEP will not be revised by hearing officer order. But the order that follows will address the need for continuing monitoring, with explicit directives to the Charter School.

IEP: Placement Information. Missing from the April 2017 IEP is a description of the nature of the educational placement as to when the student will/will not participate with students without disabilities in non-academic activities, in a regular education classroom, and in the general education curriculum. Also missing is the explicit PennData calculation of the percentage of the instructional day in which the student will participate in regular education.

The Charter School will be directed to indicate this placement information/calculation in the student's IEP.

IEP: Transition Planning. The parent alleges in both complaints that transition planning in both the December 2016 IEP and the April 2017 IEP was deficient. The transition planning in both IEPs indicates that the Charter School was just at the outset of the student's transition planning, as the student only qualified for such programming in the 2016-2017 school year.

The student's post-secondary education and employment goals were listed, along with activities related to each. And in the 2016-2017 school year the student worked with teachers in the Charter School's middle school transition-planning curriculum. (NT at 34-76).

Accordingly, the transition planning in the December 2016 IEP and the April 2017 IEP were appropriate. The student has not been denied a FAPE in this regard.

Charter School Enrollment Information. In the complaint at 19109-1617KE, the parent alleges that the enrollment date for the student at the Charter School is erroneously listed in the December 2016 and April 2017 IEPs as the 2012-2013 school year. The parent goes on to allege that this is purposeful so as to skew a reader's view of reported PSSA testing in the present levels of academic achievement and functional performance sections of those IEPs. It is erroneous information—the student enrolled in the Charter School in August 2013 for the 2013-2014 school year. (P-33). But the error is viewed as administrative and harmless, in no way placed in the IEPs in bad faith. Still, the Charter School will be directed to correct the information.

OT Needs. In both complaints, parent implicitly claims that the Charter School should have requested permission to evaluate the student for needs in OT. Both the December 2016 IEP and the April 2017 IEP contain, in the present levels of academic achievement and functional performance section of the IEPs, OT assessment data. Both IEPs contain specially designed instruction and modifications to address OT needs and weekly in-person OT therapy for the student. The April 2017 IEP contains an explicit OT goal. Therefore, both IEPs, and the April 2017 IEP with its OT goal even more so, are appropriate, reasonably calculated to yield meaningful education benefit given the student's unique OT needs.

Should an OT evaluation have been requested by the Charter School? The record in its entirety, when considered in terms of the Charter School's understanding of the student's OT needs and in terms of the OT programming contained in the December 2016 and April 2017 IEPs, does not warrant that such an evaluation should have taken place. To the extent that the occupational therapist will work weekly with the student, that person's insights and progress monitoring on the OT goal may support such a course of action in the future. But there is no reason to fault the Charter School for not pursuing an OT evaluation, and such an evaluation will not be ordered.

Accordingly, the Charter School has not denied the student FAPE in its handling of the student's OT needs, or by not pursuing an OT evaluation.

PSSA Testing. The parent alleges in both complaints that the student did not participate in PSSA testing for the 2016-2017 school year. Both the December 2016 IEP and the April 2017 IEP show that the student would participate in PSSA testing, with accommodations, in math, science, reading, and writing. The record shows that the student did not participate in that testing. The reasons provided on the record are unconvincing as to why the student would be wholly excluded from PSSA testing when the IEPs clearly indicate that the student would participate in the testing.

Accordingly, the order will address the rectification of this seeming inconsistency, both in terms of the 2016-2017 school year and going forward.

Gifted Education. The parent alleges in both complaints that the Charter School failed to identify the student as gifted under Pennsylvania's Chapter 16 gifted education regulations. Here, the Charter School argues that, as a matter of

law, it is exempted from those regulations under the School Code at 24 P.S. §17-1749-A(b). This is, indeed, the case. The School Code at this provision lists the explicit provisions of the Pennsylvania Code to which cyber charter schools are subject; while Chapter 711 is one of those provisions (related to charter school programs/services for students with disabilities), Chapter 16 is not one of those provisions. As a matter of Pennsylvania law, then, the Charter School need not provide gifted education to students.

Going further, however, there is no reason why a cyber charter school could not, on its own, provide gifted education, or voluntarily adopt all of some of Chapter 16 as part of its charter, or simply in its offerings to students. Even if that was an argument to be made here, though, the record does not support a finding that the student would qualify as an erstwhile gifted student under 22 PA Code §16.21(d)-(e). The record does not support any finding that the student possesses an IQ of 130 or higher (22 PA Code §16.21(d)), or that the student has met, or would meet, any of the multiple criteria outside of IQ testing that qualifies a student for gifted education. (22 PA Code §16.21(e)).

Accordingly, the Charter School has not wrongfully denied the student gifted education services.

Compensatory Education

Compensatory education is an equitable remedy that is available to a student where a local education agency has failed in its obligations to provide FAPE to the student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). Given all of the foregoing, there is no basis for any compensatory education remedy in this matter.

The April 2017 IEP is an appropriate program, reasonably calculated to yield meaningful education benefit to the student given the student's unique needs and circumstances. Certain aspects of the IEP will be amended under the terms of the order below, however, and certain directives will be given the Charter School.

Section 504/Discrimination

In addition to the denial-of-FAPE provisions of Section 504, its provisions also bar a school entity from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against, has been discriminated against in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F. 3d 248 (3d Cir. 2013)). To prevail on such a claim, however, the student who claims discrimination in violation of the obligations of Section 504 must show that the school entity acted, or failed to act, with deliberate indifference on the part of the school entity. (S.H., *infra*).

Here, any claim that the Charter School acted, or failed to act, with deliberate indifference regarding the student must be denied. On this record, in fact, regardless of how one might cast the Charter School's acts or omissions regarding the special education programming of the student, or how the Charter School engaged the student as a child with a disability, the Charter School has been communicative, responsive, and active in meeting, or attempting to meet, the student's needs. Whether or not this was the case in school years prior to 2016-2017, it is certainly the case since then and on this record. It is purely a matter of *dicta*, but here the undersigned hearing officer credits the professionalism and

experience of the Charter School's director of special education, hired in September 2016,¹⁷ who testified at the hearing and, throughout the communications in the record and in affect and demeanor at the hearing, showed herself to be concerned and engaged in the student's education and in attempting to meet the student's needs.

Accordingly, any claim of discrimination on the basis of disability under Section 504 is denied.

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Here again, the undersigned hearing officer engages in *dicta*. In October 2014, a hearing officer who issued prior decisions related to the student J.H., who is the subject of the analogous matters at ODR file #s 18768-1617KE and 19108-1617KE, offered her own *dicta* in one of those decisions: "(I)t is sincerely hoped that the adults [the parent and the personnel of the school district of residence at that time] will be able to put their difference aside and work together in the [the] student's best interest."¹⁸ Alas for paths not taken.

By the time that hearing officer wrote those words and that decision had been issued, the student in this matter had already been enrolled in the Charter School on a flawed educational journey involving failed Charter School obligations prior to the fall of 2016, micro-management/resistance/refusals on the part of the parent, and mutual frustration, punctuated by rounds of complex special education litigation at the hearing level and in federal court. Like my colleague, the undersigned hearing officer also hopes that, through the order which is made

¹⁷ The director of special education began her duties on September 13, 2016. (NT at 262).

¹⁸ *In re: the Educational Assignment of J.H.*, ODR file# 15046-1314KE (October 2014).

part of this decision, the student's education can be placed on a trajectory where the student, the student's needs, and the student's progress can be everyone's focus.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Charter School did not deny the student a free appropriate public education in the 2016-2017 school year and the 2017-2018 school year through the date of this decision. At all times over this period, its programming was calculated to yield meaningful education benefit to the student in light of the student's unique circumstances or, as implemented, provided such benefit, to the extent the student was afforded the opportunity by the parent to engage in the programming.

It is an explicit finding that the parent's lack of engagement in the IEP team process in the late winter of 2016 through the spring of 2017 stalled the IEP team's ability to consider changes to that program. Accordingly, no compensatory education or other remedy is owed.

The student's program as reflected in the April 2017 IEP is reasonably calculated to yield meaningful education benefit. Its implementation shall begin forthwith.

Forthwith, but no later than October 6, 2017, the educational placement section of the April 2017 IEP (section VII) shall be entirely completed and the PennData reporting calculation (section VIII) based on the student's placement shall be completed.

If the student will not participate in any PSSA testing, the IEP will indicate so, along with the reason or basis for the student's non-participation in the testing.

The April 2017 IEP, at page 5 of the document at the outset of the present levels of academic achievement and functional performance (section II), shall be revised in its first paragraph to indicate that "...became a student at [Charter School] during the 2013-2014 school year."

Within one week of the date of this order, the Charter School shall communicate with the Pennsylvania Department of Education ("PDE") on the matter of the student's non-participation in PSSA testing in the 2016-2017 school year. To the extent that PDE instructs the Charter School in any way regarding the student's non-participation in the PSSA testing, the Charter School shall abide by those instructions.

Within four weeks of beginning to provide in-person weekly services to the student under the terms of the April 2017 IEP, the board-certified behavior analyst shall indicate by email, sent at the same time to the Charter School director of special education and the parent, whether the student's behavior impedes the student's learning. If so, the special consideration indication in this regard shall be amended, and the board-certified behavior analyst shall undertake a functional behavior assessment. Even if the board-certified behavior analyst does not so indicate, every four weeks thereafter, the board-certified behavior analyst shall issue a similar email indication so that the parent and the Charter School can be informed about the impact on the student's learning, if any, from the student's behavior.

The student was not discriminated against on the basis of disability.

Any claim not specifically addressed in this decision and order is denied.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

September 30, 2017