

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

OPEN HEARING

ODR File Number: 18768-16 17 and 19108 16 17¹

Child's Name: J. H.

Date of Birth: [redacted]

Dates of Hearing:²
4/20/17, 5/3/17, 6/6/17, 6/8/17, 6/15/17, 8/18/17

Guardian:
[redacted]
Pro Se

Local Education Agency:
Commonwealth Charter Academy, 4050 Crums Mill Road, Suite 303,
Harrisburg, PA 17112

Counsel for the LEA
Kimberly Colonna, Esquire and Thomas Markey, Esquire
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 J.H.'s guardian for another student (T.R./ODR file #s18809-1617KE & 19109-1617KE-- T.R. is the child of the guardian). This matter involving J.H. was not formally consolidated with the other matter involving T.R., 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 a hearing session on July 6th. Due to the guardian's ill health, that session was cancelled and rescheduled to August 18th.

³ After the close of evidence on August 18th, it had been the hearing officer's intention to issue an interim ruling on J.H.'s program/placement, pending the issuance of this final decision. The size of the record in this matter and the number of issues presented in the complaint (as well as the size of

INTRODUCTION

Student (“student”)⁴ is a late 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, although the student presents with a mosaic of medical diagnoses and consequent needs in the educational environment. The student has long been at the center of disputes between the family and education providers, including a school district where the student formerly attended and the Charter School.

Guardian 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 guardian 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 guardian also asserts that the Charter School failed to identify the student as a gifted student under Pennsylvania’s gifted education regulations.⁷

the record and the number of issues presented in the complaint in the analogous matter at T.R./18809-1617KE & 19109-1617KE) 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”).

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 designed to provide FAPE to the student and, had it had the opportunity to implement the programming, it would have 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 Pennsylvania Public School Code of 1949 ("School Code").⁸ As such, the Charter School argues that the guardian 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. Throughout late elementary school and through middle school (2010 through 2013), the student's home life was tumultuous, involving multiple residences and custody arrangements between the student's mother and father, complaints filed with the Pennsylvania Department of Education Bureau of Special Education ("PDE-BSE"), special education disputes with the school district of residence. Ultimately, in October 2013 the guardian obtained physical custody of the student and, in January 2014, educational custody and decision-making authority. (Hearing Officer Exhibit ["HO"]-1).
- B. As of January 2014, the student had been identified by the school district of residence as a student eligible under IDEIA as a student with a health impairment (attention-deficit/hyperactivity disorder ["ADHD"]). (HO-1)
- C. In April 2014, having received permission from the guardian once educational decision-making authority had been confirmed in her, the school district of residence issued a re-evaluation report. (HO-1).
- D. The April 2014 school district re-evaluation report confirmed the student's eligibility as a student with a health impairment/ADHD and contained educational recommendations. (HO-1).
- E. The guardian disagreed with the April 2014 re-evaluation report, primarily because the guardian felt the student had a specific learning disability but

⁸ 24 P.S. §17-1749-A(b).

the District did not feel, and did not identify, the student with such a disability through its evaluation processes. (HO-1, HO-2).

- F. In May 2014, the student's IEP team met but could not come to an agreement. (HO-1).
- G. At some point in the spring of 2014 (the exact date is unclear), the guardian withdrew the student from the school district and enrolled the student in the Charter School.⁹ (HO-3)
- H. In May 2014, the guardian filed a complaint ("ODR file #15046-1314KE) against the school district of residence, alleging that the student had been denied FAPE by the school district of residence and requesting an independent educational evaluation ("IEE") at public expense. (HO-1, HO-2).
- I. The day after the guardian filed her complaint, the school district filed a special education due process complaint ("ODR file #15047-1314KE") seeking to defend the appropriateness of its evaluation process and report. (HO-1, HO-2).
- J. In July 2014, a Pennsylvania special education due process hearing officer (different from the undersigned hearing officer) issued the decision at 15047-1314KE, finding that the April 2014 re-evaluation report was appropriate except for the functional behavior assessment conducted as part of that re-evaluation. The hearing officer ordered the school district to conduct a second functional behavior assessment, to be completed in the fall of the upcoming 2014-2015 school year. (HO-2).
- K. In September 2014, the hearing sessions for the guardian's complaint at ODR file #15046-1314KE were held, and, in October 2014, the hearing officer issued the decision at ODR file #15046-1314KE. (HO-1).
- L. The guardian's claims in the complaint at ODR file #15046-1314KE centered on the school district's alleged failure to address the "student's purported anxiety...failure to provide appropriate academic support, particularly in math; (and) failure to adequately address student's needs in the areas of behaviors/executive functioning". The hearing officer found that the school district had not denied the student FAPE. (HO-1 at page 11).
- M. Since some point in the spring of 2014, the student had attended the Charter School. (HO-3).
- N. The student attended the Charter School in the 2014-2015 and 2015-2016 school years. (HO-3).

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.

- O. In February 2016, the guardian filed a special education due process complaint (“ODR file #17321-1516KE) alleging that the Charter School had denied the student FAPE in the 2014-2015 school year and, ongoing at that point, 2015-2016 school year. (HO-3).
- P. Over March – August 2016, a multi-session hearing was held. In September 2016, the hearing officer (different from the hearing officer who issued the decisions at ODR file #s 15046-1314KE and 15047-1314KE) issued a decision at ODR file #17321-1516KE and found that the Charter School had denied the student FAPE. (HO-3).¹⁰
- Q. In the September 2016 decision at ODR file #17321-1516KE, the hearing officer found that the Charter School had denied the student FAPE in the implementation of the student’s IEP upon transfer from the school district of residence and, thereafter, in its design and implementation of IEP programming. (HO-3).
- R. In the September 2016 decision at ODR file #17321-1516KE, the hearing officer awarded a “make-whole” compensatory education remedy, ordering the Charter School to pay a third party provider for up to 990 hours of compensatory education per school year until the student achieved the goals in the IEP in place in May 2014 from the school district of residence, the IEP which the student had when the student enrolled in the Charter School. The hearing officer’s order also included directives for the third-party provider to furnish to the parent and the Charter School four progress reports per calendar year to gauge the student’s progress on the IEP goals. (HO-3).
- S. 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.

¹⁰ In April 2016, after hearing sessions had begun for the hearing at ODR file #17321-1516KE, guardian filed a special education due process complaint (ODR file #17636-1516KE) seeking to have the Charter School ordered to amend certain educational records (IEP goal progress reporting). The special education due process hearing officer at ODR file # 17636-1516KE—different from either the first hearing officer at 15046/15047 and different from the hearing officer contemporaneously presiding over the matter at 17321—found that he did not have authority to order an amendment of student records pursuant to the Family Education Rights and Privacy Act of 1974 (“FERPA”), as materially implemented through IDEIA at 34 C.F.R. §300.618-621, and the complaint at ODR file #17636-1516KE was dismissed for lack of jurisdiction. In May 2016, the guardian filed another complaint regarding the Charter School’s invitation for an IEP meeting to discuss the student’s IEP for the 2016-2017 school year. The hearing officer contemporaneously presiding over the matter at 17321 took the testimony of one witness on the issue, and thereafter the guardian withdrew the complaint, so the hearing process on that issue did not result in a final decision. (HO-3).

- T. In mid-February 2017, the guardian filed the complaint which led to these proceedings, alleging specific instances of denial of FAPE (set forth below). (HO-4).¹¹
- U. In response to the guardian's complaint, the Charter School filed a motion for partial dismissal of claims related to certain claims presented in the complaint. (HO-6).
- V. In early March 2017, the guardian 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. (HO-7).
- W. 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-8).¹²
- X. 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 #17321-1516KE for lack of jurisdiction, as implementation issues related to such an order fall under the jurisdiction of 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 #17321-1516KE. (HO-8).
- Y. Specifically, in the March 2017 ruling, the Charter School's motion for partial dismissal was denied, therefore allowing claims to proceed, as to guardian's claim that data/results from reading and mathematics instruction over the period November 2016 – January 2017 from the private third-party provider retained under the provisions of the order at ODR file #17321-1516KE should have been part of the student's December 2016 IEP. (HO-8).
- Z. Specifically, in the March 2017 ruling, the Charter School's motion for partial dismissal was held in abeyance as to (1) guardian's claim that a

¹¹ In mid-February, the guardian submitted a complaint and then, approximately a week later, submitted an amended complaint. The amended complaint forms the basis of this decision. (HO-4). Additionally, a few days after filing the amended complaint that led to these proceedings (HO-4), guardian filed a complaint at ODR file #18811-1617KE 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 #18811-1617KE for lack of jurisdiction based on the claim asserted and the remedy sought. (HO-5).

¹² A ruling on the Charter School's partial motion to dismiss was issued on March 21, 2017. Due to a typographical error in that ruling, a revised ruling, correcting the typographical error, was issued on March 28, 2017. The material substance of the March 21st ruling, however, was not affected. The hearing officer exhibit at HO-8 is the revised ruling of March 28th.

December 2016 IEP did not incorporate aspects of the hearing officer's order from the decision at ODR file #17321-1516KE, subject to an offer of proof as to issues related to the December 2016 IEP—at that point, unexamined as a matter of evidence and (2) guardian's denial-of-FAPE claim related to the May 2016 IEP claim and an order that this IEP should be removed as part of the student's educational record, subject to the guardian's indication as to whether she wished to pursue that claim through FERPA procedures that lie outside of the hearing officer's jurisdiction or whether she wished to maintain the May 2016 IEP as one of the student's records, thereby making it the center of a denial-of-FAPE claim in these proceedings. (HO-8).

- AA. Under the terms of the March 2017 ruling, the guardian indicated that she would seek to have the May 2016 IEP removed as an educational record for the student under FERPA procedures, so the issue of a denial-of-FAPE claim related to the purported circulation of the May 2016 IEP was not made part of these proceedings. (HO-9).
- BB. Under the terms of the March 2017 ruling, the guardian filed an offer of proof related to claims over the intersection of the hearing officer's decision at ODR file #17321-1516KE and the December 2016 IEP, with attachments. The Charter School filed a response to the guardian's offer of proof. The guardian filed a reply to the Charter School's response. (HO-10, HO-11, HO-12).
- CC. The undersigned hearing officer deferred action on the offers of proof until the first session of the hearing, a hearing planning session, on April 20, 2017. The student's access to the private third-party services ordered in ODR file #17321-1516KE 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 #17321-1516KE in mid-September 2016 was not considered for remedy. (Notes of Testimony ["NT"] generally at 4-60, and specifically at 7-10, 14-18).
- DD. On April 23, 2017, the guardian submitted a complaint at ODR file #19108-1617KE, asserting similar denial-of-FAPE issues as asserted in the complaint at ODR file #18768-1617KE although alleged as to programming in an IEP document created and circulated in March/April 2017 after these proceedings had begun. (HO-13).¹³
- EE. On May 3, 2017, at the second session of the hearings in this matter, the undersigned hearing officer explained that it was his intention to include the matters raised in the guardian's complaint at ODR file #19018-1617KE in the course of these proceedings. Whether that was a procedural matter of withdrawing the complaint at ODR file #19108-

¹³ The complaints at 18768-1617KE and 19108-1617KE largely mirror each other, although there is an additional claim related to the student's exact course placement in various academic areas. This issue will be addressed in the decision as to the entirety of the student's educational programming.

1617KE and incorporating those issues into the ODR file #18768-1617KE, or proceeding with consolidated cases at two file numbers, was left to the discretion of the parties. (NT at 91-100).

FF. To protect its interest, the Charter School filed a motion to dismiss the complaint at ODR file #19108-1617KE, asserting that the issues raised in that complaint were already at issue and being adjudicated in these proceedings. The guardian filed a response to the Charter School's motion. (HO-14, HO-15).

GG. Having received the guardian's responsive pleading, the undersigned hearing officer confirmed with her that she was not withdrawing the complaint at 19108-1617KE. By email dated May 9, 2017, the Charter School's motion was denied, and the parties were informed that the complaints at ODR file #18768-1617KE and #19108-1617KE were formally consolidated into one hearing process. (HO-16).

HH. 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 guardian 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-17.

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 services ordered in ODR file #17321-1516KE?
- ii. Was the Charter School programming inappropriate because it did not include specific medical diagnoses?
- iii. Was the guardian 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?
- iv. Was the composition of the December 2016 and March 2017 IEP teams appropriate?
- v. Were the present levels of academic and functional performance in the December 2016 and April 2017 IEPs 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 course placements wrongful?
- viii. Was any exemption of the student from Pennsylvania's Keystone Exams wrongful?
- ix. 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 October 2011, the student was identified by the school district where the student resided as a student with a health impairment (ADHD). At that time, the student was not identified as a student with specific learning disabilities, although the evaluator recommended support in mathematics. The report also noted a medical diagnosis of generalized anxiety disorder. The academic and anxiety issues were difficult to assess given the student's tumultuous family life at the time, including extensive school absence. (Guardian's Exhibit ["P"]-28; HO-1).
2. In June 2013, the student's mother obtained a private neuropsychological evaluation which identified needs related to ADHD, mathematics, executive functioning (attention/organization/task-approach/task-completion), and anxiety. (P-27).
3. In April 2014, the student was re-evaluated by the school district of residence, identifying similar needs. (HO-1, HO-2).
4. In May 2014, the student left the district of residence and enrolled in the Charter School. (P-30; HO-3).
5. In March 2015, the Charter School re-evaluated the student, finding that the student continued to be a student with a health impairment. The re-evaluation noted the student's weaknesses in math problem-solving and math fluency, and attention, organization, and task-completion. (P-30; HO-3).
6. In January 2016, the guardian obtained an in-depth private evaluation. (P-32 at pages 24-65; Charter School Exhibit ["S"]-2 at pages 45-86).

7. In the January 2016 private evaluation, the evaluator medically diagnosed the student with a mixed receptive/expressive language disorder, a reading disorder, a mathematics disorder, ADHD, and anxiety disorder. (P-32 at pages 24-65; S-2 at pages 45-86).

September-October 2016

8. The student participated in Charter School instruction over the period September-October 2016. The student submitted work and made progress in student's classes over this period. (S-27 at pages 8-11; NT at 150-174, 389-447).

Potential Private Placement & Private Third-Party Service Provider

9. In late September 2016, following the issuance of the decision at ODR file #17321-1516KE, the guardian pursued an application process with a local private school for enrollment, an enrollment to be paid by the Charter School. (P-27).
10. 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 to fulfill the hearing officer's order at ODR file # 17321-1516KE. (NT at 579-583, 797-800).
11. 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 guardian sign the enrollment contract. The guardian declined to sign the enrollment contract, and the student did not enroll in the private placement. (P-39).
12. After declining to sign the enrollment contract, the guardian filed an administrative complaint with PDE-BSE, asserting that the Charter School refused to comply with the order at ODR file #17321-1516KE. (P-39; NT at 583-584).
13. In late October/early November 2016, the guardian 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-15; S-7).
14. 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 240 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 and the four goals which were the basis of the hearing

officer's make-whole remedy at ODR file #17321-1516KE (a mathematics goal, and three goals regarding attention, task-approach, and task-completion). The progress-monitoring reporting was the same progress monitoring reporting provided at the same time to the guardian; the student's goals were included as an explicit attachment. (P-14, P-15; S-7, S-9; NT at 587-595, 807-808).

15. The student was to receive services from November 2016 through February 2017, 4-6 hours per day. The guardian requested, and the Charter School agreed, that the student would attend the daily instruction with the third-party services provider. (P-14, P-15; S-7, S-9).
16. The guardian 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-14, P-15; S-7; NT at 584-587, 800-803).
17. In late October 2016, as the guardian 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, P-15; S-8).
18. 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 math computation subtest on the Wide Range Achievement Test-4 (5th percentile), the Lindamood Auditory Conceptualization Test-3 (12th percentile), and the computation (1st percentile) and story problems (16th percentile) subtests of the Test of Mathematical Abilities-2. (P-14, P-15; S-8).
19. The student received near-daily 1-on-1 instruction through the third-party services provider from November 2016 through January 2017. (P-14, P-15; S-11).
20. In December 2016, the third-party services provider crafted academic goals for the student in language comprehension, mathematics, vocabulary, and writing. (P-14, P-15; S-17).
21. By late January 2017, in mathematics the student had moved from partial-progress to proficiency in complex borrow-back, partial-progress to proficiency in simple word problems, pre-goal level to proficiency in complex word problems, introductory goal level to proficiency in multiplication facts, and pre-goal level to proficiency in single-digit multiplication. (P-14, P-15; S-10 at pages 5-6, 21-22).
22. By late January 2017, in mathematics the student moved from no recorded achievement to the following levels in the following areas: partial-progress in double-digit multiplication, proficiency in simple division, partial-progress in complex division, proficiency in decimal point, 10ths, and 100ths, partial-progress in adding, subtracting, multiplying decimals, and

pre-goal level in dividing decimals, and pre-goal level in discovery fractions. (P-14, P-15; S-8 at pages 6, 22).

23. In late January 2017, the guardian learned that the third-party services provider was sharing the same progress data with the Charter School as it was sharing with her. The guardian lodged an objection with the third-party services provider about the practice and withdrew the student from the third-party services provider. (P-14 at page 33; S-22; NT at 598-602, 807-812).
24. Since withdrawing the student from the third-party services provider's programming, the guardian has not pursued any other third-party arrangement for the provision of make-whole compensatory education services under the order at ODR file #17321-1516KE. (NT at 818-819).

December 2016 IEP

25. In December 2016, the Charter School requested that the guardian participate in a facilitated IEP meeting through ODR's facilitated-IEP meeting service. (S-12, S-13, S-15, S-21).
26. The guardian objected to certain details of the IEP team invitation and offered revisions as to the title of an attendee and the nature of the meeting—to assure that the Charter School was complying with the order at ODR file #17321-1516KE, to update the student's IEP in light of the student's then-current programming through the third-party services provider, and to re-visit the evaluation data from the January 2016 private evaluation already made part of the student's programming. (S-2, S-14; NT at 610-614).
27. Based on slightly erroneous information on the facilitated-IEP request form, the guardian filed an administrative complaint with PDE-BSE. (S-21; NT at pages 614-619).
28. The December 2016 IEP meeting was scheduled for December 22, 2016 and was to include the student, the guardian, the Charter School director of special education, a Charter School school psychologist, a Charter School special education manager, a Charter School special education teacher, two representatives from the third-party services provider (for information about the student's then-current academic program), and the counselor contracted by the Charter School who had been providing counseling supports to the student since the student's enrollment in the Charter School. (S-15; NT at 618-621).
29. In the late afternoon of December 20, 2016, the Charter School director of special education emailed the guardian a draft of the IEP to be considered at the December 22nd IEP meeting. Two hours later, the guardian emailed the director to indicate that she wished to postpone the December 22nd IEP meeting. (S-19, S-20; NT at 618-621).

30. The December 2016 IEP meeting was not held. (NT at 618-621).
31. The December 2016 IEP included the special consideration that the student had behaviors that impeded the student's learning. The IEP draft indicates the following: "According to the IEP dated 5/29/2015, (the guardian) stated that (the student) does exhibit behaviors that impede (the student's learning). Therefore, a functional behavior assessment [FBA] was conducted and a positive behavior support plan [PBSP] was created as a result; when (the Charter School) attempted to implement the services, (the guardian) did not respond to the provider. (The Charter School) believes that behaviors [related to executive functioning] still exist. Therefore, these needs have been addressed in sections II, IV, and VI of this IEP." (S-19 at pages-5-6, parentheticals to protect student confidentiality, brackets in the original).
32. The December 2016 IEP included information about the student's executive functioning levels and needs in the sections indicated, including FBA results completed in March 2015 as part of the Charter School re-evaluation process, goals in organization and self-advocacy, program modifications (organization and task-approach), related services (2 hours per week in-person with a board-certified behavior analyst, weekly virtual counseling services, and 5 hours daily in-person with a 1-on-1 instructional aide). (S-19 at pages 9-11, 19, 21, 23-24).
33. The December 2016 IEP indicated that the student would participate in Keystone Exams in algebra, literature, and biology. (S-19 at page 7).
34. The December 2016 IEP contained present levels of academic achievement and functional performance drawn largely from the Charter School's March 2015 re-evaluation. The present levels notes "the IEP team also received information from (the private evaluation) dated 1/8/2016 from (the private evaluator). The information and recommendations were taken into consideration in the review and development of the current IEP." Formal results from the private evaluation, however, were not included in the IEP. (P-32 at pages 24-65; S-2 at pages 45-86, S-19 at pages 7-11; P-30).
35. The December 2016 IEP indicated that, in May 2016, a norm-referenced transition assessment was provided to the student and guardian, an assessment which had not been returned. Therefore, transition information was replicated from the March 2015 IEP, indicating that the student wished to pursue post-secondary education and full-time employment. The student exhibited proficiency in independent living skills and, through a career planning class, indicated that student wished to pursue a career in music. (S-19 at pages 11-12).
36. The December 2016 IEP indicated that the student's needs related to the student's disability included math computation, applied problems, and math fluency, in addition to executive functioning and self-advocacy. The student's reading and writing were identified as areas of strength, although reading comprehension skills were included in a list of needs along with mathematics, self-advocacy, and executive functioning. (S-19 at page 12).

37. The December 2016 IEP included data available to the IEP team regarding transition issues (post-secondary education/training, employment, independent living), although the IEP indicated that the IEP team would need to further determine issues related to transition at the IEP meeting. (S-19 at pages 13-14).
38. The December 2016 IEP indicated that the student would take the Keystone Exams in algebra, literature, and biology with accommodations. (S-19 at pages 15-18).
39. The December 2016 IEP contained seven goals, one in self-advocacy, one in reading comprehension (including organizational components), one in math problem-solving, one in math computation, one in written expression (including organizational components), one in organization/task-approach, and one in auditory and language-processing skills. (S-19 at pages 19-22).
40. The December 2016 IEP contained program modifications, including assignment modification, organization, executive functioning, and specially designed instruction in mathematics. The IEP included weekly in-person support from a board-certified behavior analyst (2 hours weekly), and daily in-person support from an instructional aide (5 hours daily), as well the continuation of weekly virtual counseling (30 minutes weekly). (S-19 at pages 23-24).
41. 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 24-26).
42. The December 2016 IEP indicated that the student’s placement would be “cyber school in the home setting”, participating with non-disabled peers in social studies, science, and electives (82% of instructional time). The student would not participate with regular education peers in reading and mathematics”. (S-19 at page 229).

March/April 2017 IEPs

43. In January 2017, after cancellation of the December 2016 IEP meeting, the Charter School attempted to reschedule a facilitated-IEP meeting. (S-21; NT at 621-623).¹⁴
44. In early February 2017, the guardian 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 guardian about the remedy that the guardian sought. The guardian responded that she wished to see the Charter School held “fully accountable...ideally, without any further involvement from the (Charter

¹⁴ Again, in late January 2017, without notice to the Charter School, the guardian terminated the third-party education services. See Finding of Fact 23.

School)". The guardian then posited the details of a substantial cash settlement as a remedy. (P-37; S-19).

45. In February 2017, the Charter School scheduled a facilitated IEP meeting to be held in March 2017. (S-25, S-26).
46. The attendees at the March 2017 IEP meeting were to be the student, the guardian, the Charter School director of special education, a Charter School school psychologist, a Charter School special education manager, a Charter School special education teacher, a Charter School general education teacher, and the counselor contracted by the Charter School who had been providing counseling supports to the student. (S-26 at page 2).
47. The guardian 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. (NT at 625-626; see the *Procedural History* section at entry V).
48. On March 13, 2017, the student's IEP team gathered for the IEP meeting. The guardian did not attend. The IEP team called the guardian to have her participate by phone; there was no answer, and a voicemail message was left for the guardian. The IEP team members deliberated over the March 2017 IEP. (S-27; NT at 626-627).
49. The March 2017 IEP contained updated present levels of academic achievement and functional performance, including updated input from Charter School teachers, details from the January 2016 private evaluation and other private evaluations/diagnoses, and information from the student's results with the third-party services provider. (S-27 at pages 6-11).
50. The March 2017 IEP also indicated that the guardian's input would be obtained at the IEP meeting. (S-27 at page 15).
51. Aside from these changes, the draft content of the March 2017 IEP was largely the December 2016 IEP. (S-19, S-27).
52. At the March 13, 2017 IEP meeting, the IEP team members considered and updated multiple aspects of the March 2017 IEP.
53. After the IEP team's deliberations at the March 2017 IEP meeting, the April 2017 IEP contained significant revisions from the December 2016/March 2017 IEPs. Those considerations, updates, and changes are subsequently outlined in detail. (S-19, S-27, S-28; NT at 626-655).
54. The April 2017 IEP added the student's current grades to the present levels of academic achievement and functional performance contained in the March 2017 IEP. The April 2017 IEP also included input from the student's counselor, obtained at the March 2017 IEP meeting. (S-27 at pages 6-11, S-28 at pages 7-16; NT at 534-538).

55. The April 2017 IEP added an explicit indication that transition assessments would be administered to update transition data. The transition planning in the IEP also included detailed transition information from the January 2016 private evaluation, as well as detailed assessment results from prior Charter School transition assessments in October/November 2015. The transition plan in the IEP provided explicit indications and contact information to bring the Office for Vocational Rehabilitation and local intermediate unit into the transition planning for the student. Finally, transition goals related to independent living were removed with the indication “the IEP team agrees that an independent living goals is (sic) not needed at this time.” The guardian did not respond to the Charter School’s request to have the student participate in transition assessments. (S-28 at pages 15-16, 18-19; NT at 836-838).
56. The April 2017 IEP amended the student’s needs related to disability from “improvement in executive functioning skills” to “improvement in organizational skills”. (S-19 at page 12, S-27 at page 15, S-28 at page 17).
57. Both the March and April 2017 IEPs called for the student to participate in Keystone Exams in algebra, literature, and biology with accommodations. (S-27 at pages 18-21, S-28 at pages 20-23).
58. The April 2017 IEP contained four goals, one in self-advocacy, one in reading comprehension, one in math computation, and one in written expression. Goals in math problem-solving, organization/task-approach, and auditory and language processing skills were removed. (S-27 at pages 22-25, S-28 at pages 24-26).
59. The self-advocacy goal in the April 2017 IEP is stronger, including an explicit rubric, than the self-advocacy goal in the March 2017 IEP. (S-28 at pages 24, 35).
60. The reading comprehension and math computation goals in the April 2017 IEP are stronger, including—respectively—an explicit curricular level for the text and an assessment-based baseline for the math computation, than those goals in the March 2017 IEP. (S-28 at pages 25-26).
61. The written expression goal in the April 2017 IEP is stronger, including an explicit rubric, than the self-advocacy goal in the March 2017 IEP. (S-28 at pages 26, 36).
62. The April 2017 IEP continued to include weekly in-person support from a board-certified behavior analyst (1 hour weekly), and daily in-person support from an instructional aide (1 hour daily). The reduction in behavior analyst and instructional aide services was made given the guardian’s historic resistance to having individuals work with the student in the family home. The weekly virtual counseling was removed from the IEP as those services were thought to be addressed in the self-advocacy elements of the IEP. (S-28 at page 28; NT at 637-640, 645-648).

63. The April 2017 IEP indicates that the student will continue to participate in the cyber school from the home setting and “is able to be successful in the high school classroom/home environment with appropriate accommodations and modifications alongside typical peers”. The student would “not participate in the general education curriculum for English and math”. (S-28 at pages 31).
64. 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-28 at pages 31-33).
65. The April 2017 IEP indicated that giftedness was “n/a” and that the student was not eligible for extended school year services. (S-2 at pages 28-30).

Course Placement

66. In the summer of 2016, prior to the 2016-2017 school year, the guardian, a Charter School school counselor, and a Charter School manager of special education consulted about the course selection and placement for the student. (NT at 183-186, 768-769).

Charter School Programming after February 2017

67. After being withdrawn from the third-party services provider’s programming in late January 2017, the student returned to the Charter School. The student logged into the Charter School attendance system nearly every day for multiple hours per day over the period February 2017. (S-30).
68. The guardian testified that the student could not access lessons or programming through the Charter School online platform. The Charter School’s webmail system was active, and the student’s teachers were emailing the student and guardian (who served in the role of the student’s learning coach in the Charter School ‘ecosystem’) in every class for which the student was registered. The guardian never communicated to anyone that the student could not access lessons or programming. (S-32; NT at 764-765, 839-845).

Keystone Exams

69. In all three IEP drafts in the record regarding 2016-2017 programming, the student was expected to participate in Keystone Exams. (S-19, S-27, S-28).
70. 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 653-655).

WITNESS CREDIBILITY

All witnesses testified credibly. The student's guardian 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

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.

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 guardian's specific claims regarding denial of FAPE will be considered individually.

Private Third-Party Services. The guardian alleges in the complaint at ODR file #18768-1617KE that the Charter School did not incorporate in the December 2016 IEP, specifically, evaluation results from the intake assessments from the third-party services provider when the student was enrolled with the third-party services provider in October/November 2016. This allegation was mirrored in the complaint at ODR file #19108-1617KE for the April 2017 IEP.

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 related to the intake assessments administered by 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 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.

Role of Medical Diagnoses. The guardian alleges in the complaints at ODR file #18768-1617KE and 19108-1617KE that the Charter School did not incorporate the specific medical diagnoses from the January 2016 private evaluation and that the exclusion of such diagnoses renders those IEPs inappropriate. Here, the December 2016 IEP did not include those diagnoses and indicated that the needs/recommendations in the January 2016 private placement would be addressed implicitly in the IEP. The April 2017 IEP, however, included explicit information from the January 2017 private evaluation in terms of the report's detailed characterization of the student's strengths and challenges.

Are the medical diagnoses contained in these IEPs? The answer is "no". Does that render the IEPs inappropriate? The answer is "no". An IEP, like those here, need not contain formal medical diagnoses to make it operative or

appropriate— appropriateness centers on understanding a student’s needs and fashioning appropriate modifications, accommodations, specially designed instruction, related services, and supports to meet those needs. To state this in reverse, an IEP, even though it might contain certain words or formal diagnoses, is wholly inappropriate where it does not identify needs and/or programming to meet those needs.

One of the strongest themes in this voluminous and far-ranging record-- one might even refer to it as a bedrock of understanding this student— is the consistency of the student’s evaluation profile, across multiple school years and through varied evaluative processes (school district evaluation, private evaluation, Charter School evaluation), all identifying consistent needs: Executive functioning/organization/task-approach/task-completion, building self-advocacy skills, and academic support in mathematics and reading (but clearly and especially in mathematics).

The December 2016 and April 2017 IEPs appropriately identify and address the student’s needs, and, through the modifications, accommodations, specially designed instruction, related services, and supports in those IEPs, provide programming that is reasonably calculated to yield meaningful education benefit based on the student’s unique learning needs. Having said that, there are changes in the April 2017 IEP from the December 2016 IEP that, although explained in the record through the testimony of the Charter School director of special education as to the IEP team’s thinking, will be amended under the terms of the order accompanying this decision.

Notwithstanding the amendments to the student’s IEP set forth below in the order, the handling of the student’s medical diagnoses from the January 2016 private evaluation in the December 2016 and April 2017 IEPs is not inappropriate.

The December 2016 and April 2017 IEPs appropriately identify and address the student's needs through appropriate programming.

Parental Participation. With this issue, this decision encounters the most serious impediment to designing and implementing appropriate educational programming for the student. The guardian alleges in the complaint at ODR file #18768-1617KE that she was denied the opportunity for meaningful participation in the December 2016 IEP team meeting. In the complaint at ODR file #19108-1617KE, the guardian alleges that the Charter School did not share requested records/documents for the student, again interfering with her ability to engage in meaningful participation and, specifically, prepare for these proceedings. These allegations are rejected, and, in fact, the record supports a finding that the guardian has definitively chosen not to engage in the IEP team processes and record-sharing.

For both the December 2016 IEP meeting and the March 2017 IEP meeting, the Charter School made sure the guardian was invited well in advance on a date where the guardian was available, 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 guardian did not attend. The lack of attendance in December 2016 led to the cancellation of the meeting. After guardian failed to obtain a restraining order to stop the March 2017 IEP meeting, it went forward, and the guardian neither attended nor made herself available by telephone at the date/time of the meeting. Sadly, on this record, the guardian has not attended, or participated in, an IEP meeting for nearly two years—September 2015 being the

last time the guardian participated as a member of the student's IEP team. (NT at 832).¹⁶

As for the issue of record-sharing, the guardian claims that the Charter School did not provide records to the family upon her request. At the first day of the hearing, this issue was addressed as a procedural matter. Charter School counsel laid out that the Charter School had, indeed, made records available to the guardian but the guardian refused delivery of the electronic storage device (a flash drive) and, at that session on the record, the guardian refused to accept the flash drive containing the student's educational records gathered at the guardian's request as part of these proceedings. (P-22; S-23; Hearing Officer Exhibit – Flash Drive; NT at 23-50).

Accordingly, for the December 2016 and March 2017 IEP team meetings, the guardian was accorded an opportunity for full and meaningful participation. Likewise, the guardian was afforded an opportunity to take possession 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 guardian alleges in both complaints that the student's IEP team composition was a violation of IDEIA. In the complaint at ODR file #18768-1617KE, guardian asserts that there was no regular education teacher as part of the IEP team at the December 2016 IEP team meeting. In the complaint

¹⁶ The guardian'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 guardian, 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 guardian appears to move directly to objection (and non-engagement) rather than using the IEP team process to engage and collaborate.

at ODR file #19108-1617KE, the guardian asserts that the regular education teacher did not attend the March 2017 IEP team meeting.

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, 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. (NT 607-610.)

The status of the attendance of the regular education teacher invited to the March 2017 IEP team meeting is unclear on this record. The guardian asserts that this person did not attend the meeting. The guardian did not attend the meeting. And the record is silent on the issue. Strictly, then, it could be argued that the guardian did not carry the burden of persuasion on this issue. (Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005)). More substantively, however, the April 2017 IEP contains extensive input from multiple regular education teachers from the Charter School. Therefore, even if one assumes that the invited regular education teacher did not attend the meeting, the insight from a regular education perspective was, on some level, 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. 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 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 based solely on grades and the Charter School's March 2015 re-evaluation. This is potentially more problematic, as the January 2016 private evaluation was available to provide further information, data, and recommendations.

The present levels of educational academic achievement and functional performance in the March 2017 IEP and carried forward into the April 2017 IEP, however, remedy this deficiency. Those levels are comprehensive, including the data from the third-party service provider, detailed information from the January 2016 private evaluation, information from other evaluations, and input from multiple Charter School teachers. The most recent present levels of educational academic achievement and functional performance used to inform the IEP team, then, were appropriate.

Importantly, had the December 2016 IEP team convened, or had those present levels been used to formulate concrete programming, the legal conclusions reached in this sub-section may have been different. But, as indicated, the present levels in the April 2017 IEP remedied any deficiency and rendered appropriate the IEP team's consideration of these levels.

Accordingly, the present levels of educational academic achievement and functional performance in the most recent IEP, the April 2017 IEP, are

comprehensive and appropriate. For that reason, the student has not been denied a FAPE in this regard.

IEP: Transition Planning. The guardian alleges in both complaints that transition planning in both the December 2016 IEP and the April 2017 IEP was deficient. The transition planning in the December 2016 IEP indicated that the guardian had not engaged in the transition planning which the Charter School had formerly requested. It provides some degree of information. While the transition planning in the December 2016 IEP does not render that section or the IEP inappropriate, it leaves much to be desired.

Much like the examination of the present levels of educational academic achievement and functional performance in the sub-section immediately above, however, the transition planning in the April 2017 IEP is comprehensive and detailed. The transition planning section in the April 2017 IEP contains the details of previous Charter School assessments, the details of transition assessments in the January 2015 private evaluation, and information for the inclusion of the Office for Vocational Rehabilitation and the local intermediate unit in transition processes. Whatever “holes” there may have been in the transition planning in the December 2016 IEP were remedied by the planning in the April 2017.

Accordingly, the transition planning in the December 2016 IEP, while marginally appropriate, was supplanted by wholly appropriate transition planning in the most recent IEP, the April 2017 IEP. The student has not been denied a FAPE in this regard.

Course Placement. The guardian alleges in the complaint at ODR file #19108-1617KE that the student’s course placements in the 2016-2017 school

year are fatally flawed. The record contains very little evidence of any sort regarding the student's course placement. What evidence there is confirms only that the guardian and Charter School employees responsible for course placement decisions consulted in the summer of 2016, prior to the start of the school year, and all agreed on the course placements for the school year.

Aside from that fact, the record is silent on the details of course placement. The exact course placement, though, is secondary to whether or not the substance of the Charter School's programming is appropriate. And the goals and specially-designed instruction in the December 2016 and April 2017 IEPs, along with the totality of the Charter School communications from the student's teachers and the testimony of the student's special education teacher and mathematics teacher, all combine to provide a picture that, regardless of the exact course placement, the Charter School's programming was reasonably calculated to yield meaningful education benefit to the student in light of the student's unique needs.

Accordingly, the Charter School did not deny the student FAPE in its course placement decisions for the 2016-2017 school year.

Keystone Exams. The guardian alleges in both complaints that the student did not participate in Keystone Exams for the 2016-2017 school year. Both the December 2016 IEP and the April 2017 IEP show that the student would participate in Keystone Exams, with accommodations, in algebra, literature, and biology. The record shows that the student did not participate in one or more of those Exams. The record contains references to purported reasons for the student not having taken these Exams, particularly related to course placement and course completion. Still, the reasons provided on the record are unconvincing as

to why the student would be wholly excluded from the Exams when the IEPs clearly indicate that the student would participate in the Exams.

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 guardian alleges in both complaint 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, the hearing officer who issued the decisions at ODR file #15046-1314KE and 15047-1314KE offered her own *dicta* in the decision at 15046: "(I)t is sincerely hoped that the adults [the guardian and the personnel of the school district of residence] will be able to put their difference aside and work together in the [the]

¹⁷ The director of special education began her duties on September 13, 2016. (NT at 575).

student's best interest." (HO-1 at page 12, parenthetical information edited, bracketed information added). Alas for paths not taken.

By the time that hearing officer wrote those words and that decision had been issued, the student had already left the school district of residence and been enrolled in the Charter School, and an educational journey which had been sidetracked for months, at that point, sped off on a years-long trajectory which has involved failed Charter School obligations prior to the fall of 2016, micro-management/resistance/refusals on the part of the guardian, and mutual frustration, all regularly punctuated by multiple 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 detailed order which is made part of this decision, the student's education can be reset and 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 guardian to engage in the programming.

It is an explicit finding that the guardian'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, but the stay-put requirements of IDEIA, and lack of IEP team action, have led to a need for updates to that IEP.

Therefore, the following directives apply to the April 2017 IEP, hereinafter referred to as the "HO-ordered IEP":

The HO-ordered IEP shall be re-dated to reflect the details of this order, with the "IEP team meeting date" to be October 3, 2017.

The Charter School is ordered forthwith, but no later than October 10, 2017, to begin gathering data as baselines for the student's four IEP goals in the April 2017 IEP. This data collection shall be completed, and the IEP goals revised to reflect this data as the baselines in the goals, no later than October 24, 2017 ("new baseline data revisions").

Additionally, the HO-ordered IEP shall include a goal in math problem-solving that shall read: "When given mathematics computation word-problems, at the 3rd grade instructional level, the student will solve the computation word-problems with 85% accuracy across 3 consecutive probes." The data collection and baseline directives in the paragraph immediately above shall be implemented as to this goal.

The HO-ordered IEP shall include as a modification in the modifications/SDI section: "The instructional aide will assist (the student) in organizational/task-approach strategies utilizing the school's online organizational and planning tools and platforms" with the location "instructional setting", a

frequency of “daily” with projected beginning date and anticipated duration as set forth below in this order.

The SDI related to mathematics in the HO-ordered IEP shall be revised to read: “(The student will be provided with a supplemental math program such as but not limited to FastMath to practice and increase (the student’s) math fluency and math problem-solving ability.”

The related services portion of the HO-ordered IEP shall be revised to once again include the virtual counseling session, once weekly for 30 minutes.

The related services portion of the HO-ordered IEP shall be revised to increase the frequency of the in-person 1-to-1 aide to two hours per school day while school is in session.

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

No later than October 17, 2017, the HO-ordered IEP shall include an indication of whether or not the student will participate in Keystone Exams. If the student will participate in any Keystone Exam, the IEP will indicate so, along with any accommodation that will be in place for the Exam(s). If the student will not participate in any Keystone Exam, the IEP will indicate so, along with the reason or basis for the student’s non-participation in the Exam(s).

The IEP implementation date on the HO-ordered IEP shall be revised to the day after the date that the new baseline data revisions are completed. The anticipated duration of the HO-ordered IEP shall be one chronological year from the new IEP implementation date. Where any portion of the HO-ordered IEP requires a projected beginning date and/or an anticipated duration, that

date/duration shall be revised to reflect the implementation date and/or anticipated duration set forth in this paragraph.

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 the Keystone Exam(s) in the 2016-2017. To the extent that PDE instructs the Charter School in any way regarding the student’s non-participation in the Keystone Exam(s), the Charter School shall abide by those instructions.

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