

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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order
ODR No. 21167-18-19
CLOSED HEARING

Child's Name:
A. K.

Date of Birth:
[redacted]

Parent:
[redacted]

Counsel for Parent:
David G. C. Arnold, Esq.
2200 Renaissance Blvd.
King of Prussia, PA 19406

Local Education Agency:
Green Woods Charter School
468 Domino Lane
Philadelphia, PA 19128

Counsel for the LEA:
Jeffrey R. Stacey
7945 Germantown Ave.
Philadelphia, PA 19118

Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
03/22/2019

Introduction

This matter concerns the educational rights of a student with disabilities (the Student).¹ The Student attended a Pennsylvania public charter school (the Charter School) during the 2017-18 school year. A dispute arose between the Student's parents (the Parents) and the Charter School concerning the Student's education. The Parents and the Charter School resolved that dispute through a mediation agreement. After the mediation agreement, another dispute arose concerning the special education services that the Student would receive during the 2018-19 school year. Ultimately, the Parents unilaterally placed the Student into a private school (the Private School) and requested this due process hearing, seeking tuition reimbursement from the Charter School.

For reasons discussed below, I find that the Charter School was not the Student's LEA when the complaint was filed and deny the Parents' claims on that basis. In an abundance of caution, I also determine that the Charter School offered appropriate special education to the Student via an Individualized Education Program (IEP). The Parents are not entitled to tuition reimbursement on that basis as well.

Issue

The only issue presented in this matter is: Are the Parents entitled to tuition reimbursement?

Findings of Fact

I commend both parties for their efficient presentation of testimony and evidence in this case. The underlying facts (what happened and when) are not truly in dispute. Rather, the parties disagree about what the Student needs, and whether the program offered by the Charter School satisfies those needs. I carefully considered the entire record in this matter but make findings of fact only as necessary to resolve the issue before me. I find as follows:

Third Grade – Starting IEP, Evaluations, Parental Concerns, New IEP

1. The 2017-18 school year was the Student's 3rd grade year.
2. The Student started 3rd grade under an IEP that was drafted and approved at the end of the prior school year on May 16, 2017. The IEP included one goal, a "Speaking and Listening" goal. P-18. The goal is written as follows:

Given grade level passages or classroom topics, [Student] will respond in clear sentences to questions including main idea, key details, predictions and conclusions with 80%

¹ Except for the cover page, identifying information is omitted to the extent possible.

accuracy, over three consecutive speech and language support sessions by May 2018.

3. The baseline for the 2017-18 IEP goal was 80% at the 2nd grade level. Progress was to be monitored by a speech therapist through “diagnostic data collected weekly.” To enable this, the IEP provided 30 minutes per week of speech and language support outside of the regular education classroom. P-18.
4. The 2017-18 IEP was similar to IEPs that the Student received since the 2014-15 school year in that they were all “speech only” IEPs that provided speech and language support but no other specially designed instruction (SDI).² P-7, P-12, P-14, P-18.
5. On December 14, 2017, the Parents sent an email to the Charter School requesting an IEP team meeting. In the December 2017 email, the Parents asked the District to convene the meeting in January 2018 and expressed unspecified “concerns over [Student’s] academic progress.” P-40.
6. In January 2018, the Parents sent a letter to the Charter School outlining their concerns. Specifically, the Parents expressed concerns about the number of students and noise level in the Student’s classroom,³ the Student’s failing grades in Math,⁴ and the Student’s ability to write with details. The Parents were also concerned about the amount of time and effort that it took the Student to complete homework. The Parents also wrote that they had expressed their concerns previously and, in response, the Charter School encouraged the Parents to retain a tutor. The Parents also expressed some skepticism over the Student’s reported grades in reading, as the Student’s reported progress did not match what the Parents saw at home. P-40.
7. Internal emails sent between Charter School employees around the time of the Parent’s letter confirm that the Parents and Charter School discussed tutors for the Student. The Charter School personnel wrote that the Parents asked about tutors. The Charter School responded that it did not provide tutors but could offer information about tutors. P-40.
8. The Charter School convened the Student’s IEP team on January 31, 2018. The Parents and their non-attorney advocate attended the meeting. P-40.

² There is no such thing as a “speech only” IEP. Any LEA’s reference to “speech only” IEPs is a red flag that the LEA may not understand its obligations under the IDEA. It may be that a child only requires speech and language therapy as a related service in order to receive a FAPE. That child’s substantive rights and procedural protections are no different from any other child with a disability, and that child’s IEP is held to the same standard.

³ The Parents and some private evaluators expressed concern about the noise level in the Student’s classroom, but no preponderant evidence was presented concerning the noise level. A private neuropsychologist who observed the Student in class described the Student as attentive.

⁴ There is no evidence that the Student was ever at risk of failing Math.

9. During the IEP team meeting, the Charter School agreed to fund an independent audiology evaluation and issued a Permission to Re-Evaluate form (PTRE) proposing the audiology evaluation as part of a larger re-evaluation. S-20.
10. The Parents consented to the proposed re-evaluation on February 8, 2018. S-20
11. Around the same time that the Parents agreed to the Charter School's re-evaluation, the Parents also contracted with a private neuropsychologist for private testing. The private neuropsychologist evaluated the Student and administered tests on February 9, 12, and 14, 2018. P-49.
12. The Parents informed the Charter School of the private testing, which included an in-school observation on February 9, 2018. S-20, S-23.
13. On March 19, 2018, the Parents told the Charter School which tests the private neuropsychologist administered but said that the final report was not ready. The Parents shared the list of tests so that the Charter School would not repeat the same tests. S-20.
14. The private neuropsychologist drafted a Neuropsychological Evaluation Report. The report is not dated. P-49. The Neuropsychological Evaluation Report included a report of the evaluator's in-school observations, behavior ratings scales completed by parents and teachers, standardized, normative assessments of the Student's cognitive abilities and academic achievement, and various assessments to gauge the Student's attention and executive functioning skills. P-49.
15. The Student was found to have high-average intellectual ability and earned average scores on academic achievement tests in Mathematics, Basic Reading, Total Reading, and Reading Comprehension and Fluency. Written Expression was tested in the low average range and Math Fluency was in the high average range.⁵ P-49.
16. While noting a historical diagnosis of Autism Spectrum Disorder, the private neuropsychologist found no social or behavioral problems. The private neuropsychologist did find evidence of attention problems and a weakness in reading comprehension. The private neuropsychologist expressed concern that the Student's historic weakness in language processing will likely yield academic difficulties as school work becomes harder. P-49.
17. The private neuropsychologist concluded that the Student no longer met diagnostic criteria for Autism Spectrum Disorder but highlighted the importance of maintaining a record of that historical diagnosis. The private neuropsychologist diagnosed the Student with a Specific Learning Disability (reading

⁵ These are all index scores made from several sub-tests. There was some additional variability between sub-tests, but all were in the high average to low average range.

comprehension and written expression), Language Disorder, and Anxiety Disorder. P-49

18. The private neuropsychologist made several recommendations. In general, the private neuropsychologist recommended a “research validated reading program that is systematic and multisensory in its approach” that “should emphasize decoding skills, reading fluency, and comprehension,” direct instruction in reading comprehension strategies, various strategies to address the Student’s attention, opportunities for oral reading at home and in school, the continuation of speech and language therapy, and school counseling to address the Student’s anxiety. P-49.
19. Regarding the Student’s anxiety, there is no evidence that the Student displayed anxious behavior in school. There is evidence, however, that the Student was becoming resistant to homework at home and exhibited some anxious behaviors at home. There was some discrepancy between parent and teacher ratings on standardized rating scales, particularly in the area of executive functioning. P-49, NT *passim*.
20. The private neuropsychologist also recommended chunking, pre-teaching, and a small class size as “forms of assistance that are useful for most children with learning problems” – as opposed to recommendations particular to the Student. P-49.
21. In the morning of April 11, 2018, the Charter School requested a copy of the private neuropsychologist’s report “to use as part of [the Charter School’s] own evaluation.” S-20. The Parents provided a copy of the Neuropsychological Evaluation Report. The Charter School then incorporated the Neuropsychological Evaluation Report into its own evaluation and issued a Reevaluation Report on April 12, 2018 (2018 RR). P-23.
22. In addition to incorporating the findings of the Neuropsychological Evaluation Report, the 2018 RR included a history of the Student’s medical diagnoses and education, information obtained through a parent interview, a Speech and Language assessment, teacher observations, and an observation from the Charter School’s psychologist. P-23.
23. The 2018 RR concluded that the Student is a child with a Specific Learning Disability (SLD - reading comprehension and written expression) and a Speech and Language Impairment. P-23.
24. The Charter School received the independent audiology report contemplated in the January 2018 PTRE in May 2019. The Parents also had the Student evaluated by private speech and language pathologists, who wrote a private Speech and Language Evaluation Report. P-52.

25. The Charter School revised and re-issued the 2018 RR to include the findings of the independent audiology report (P-47) and private Speech and Language Evaluation Report. P-24.
26. On May 24, 2018, the Parents wrote to the Charter School expressing their dissatisfaction with the 2018 RR. The Parents were dissatisfied that the 2018 RR did not repeat all of the narrative of the Neuropsychological Evaluation Report, and believed that the 2018 RR underestimated the Student's weaknesses. The Parents also expressed concerns about the Charter School's ability to meet the Student's needs. P-40.
27. The Charter School Convened an IEP team meeting on June 7, 2018. The Charter School proposed an IEP during that meeting (the 2018 IEP). P-34.
28. The 2018 IEP includes nearly all of the substantive information provided in the revised 2018 RR. P-34.
29. The 2018 IEP includes four goals: a writing goal, a reading comprehension goal, a listening comprehension goal, and a word retrieval goal. The writing goal targeted focus, style, conventions, and organization as measured by a Pennsylvania standard rubric. The reading comprehension goal called for the Student to correctly respond to reading comprehension questions at the 4th grade level. The listening comprehension goal required the Student to recall information and answer inferential questions. The word retrieval goal called for the Student to demonstrate mastery of strategies recommended in the Neuropsychological Evaluation Report. P-34.
30. All goals in the 2018 IEP were baselined, objective, and measurable. P-34.
31. The 2018 IEP included several SDI and modifications. Most notably, the IEP included "direct reading instruction, using multisensory instruction of phonological awareness and English word structure" for four days per six-day cycle, 45 minutes per session. P-34. That language is often code for the Wilson reading program and the Charter School did, in fact, offer Wilson in addition to the Charter School's regular ELA program through the 2018 IEP. See, e.g. NT 234.
32. The 2018 IEP also provided push-in writing support 3 days per week and direct instruction of the word retrieval strategies to be assessed in the word retrieval goal. P-34.
33. Speech and language therapy were continued. P-34.
34. Chunking and other supports that are consistent with the private Neuropsychological Evaluation Report were also provided. P-34.

35. The Charter School issued the 2018 IEP with a Notice of Recommended Educational Placement (NOREP). On June 20, 2018, the Parents rejected the NOREP and requested mediation. P-35. The outcome of the mediation is discussed further below.

Third Grade – Academics and IEP Progress

36. The Student correctly responded to probes aligned to the 2017 IEP goal with 80% accuracy at the 3rd grade level in March 2018 and continued to do so into June of 2018. S-2.
37. The Student's 3rd grade teacher assessed the Student's reading level during the first trimester of the 2017-18 school year and found that the Student could read at level "O" using a well-known, well-regarded curriculum and assessment system. By the end of 3rd grade, the Student could read at level "P," which corresponds to what is expected of children at the end of 3rd grade. S-1, P-31, NT 466.
38. The Student's cumulative grades in 3rd grade were an A in Reading and Language Arts, a B in Writing, an A- in Math, an A+ in Social Studies, and a B in Science. P-29.
39. On the 3rd grade PSSA, the Student scored in the "Proficient" range in both English Language Arts and Mathematics – albeit in the low end of the Proficient range in both (1008 in English and 1005 in Math).⁶

Mediation Agreement, Demand for Tuition Reimbursement, Revised IEP

40. After the Parents rejected the NOREP in June 2018, they and the Charter School participated in mediation and came to an agreement. The agreement was reduced to writing in the form of a "Confidential Settlement Agreement and General Release" (the Mediation Agreement). S-3.
41. Through the Mediation Agreement, the Parents released and waived all claims, including all special education claims, against the Charter School through the date of the Mediation Agreement. In exchange, the Charter School provided a lump sum payment of \$36,000.00 to a third-party educational trust for the Student's benefit. That money could be used for private school tuition, but was meant to "supplement, rather than supplant, services and programming available

⁶ PSSAs are statewide standardized tests administered to gauge a child's progress towards Pennsylvania's core academic standards. As such, the PSSA does not necessarily measure any student's progress through any school's curriculum and does not necessarily align with IEP goals.

under public programs, including Student's current and future IEP entitlements" S-3.

42. Credible testimony establishes that the Charter School agreed to pay \$36,000.00 because that is the cost of one year of tuition at the Private School. The Charter School believed that the Parents would use the trust to fund the Student's enrollment at the private school during the 2018-19 school year. See, e.g. NT 167-169. That understanding, however, is not reflected in the four corners of the Mediation Agreement. S-3.⁷
43. The Parents signed the Mediation Agreement on July 26, 2018. S-3.
44. On August 10, 2018, the Parents sent a letter to the Charter School providing notice of their intent to place the Student in the Private School and seek tuition reimbursement. In that letter, the Parents expressed their belief that the 2018 IEP was inappropriate.
45. On August 22, 2018, the Charter School invited the Parents to an IEP team meeting. P-37. The IEP team convened on August 23, 2018. The entire IEP team did not attend the August 23, 2018 meeting because several Charter School employees were on vacation. Even so, the Parents attended with their non-attorney advocate. A regular education teacher, a special education teacher, and an LEA representative also attended. P-38.
46. Although the Parents and their advocate attended the August 2018 IEP team meeting, they chose to not substantively participate. See NT 222.
47. The Charter School proposed a revised 2018 IEP during the IEP team meeting (the Revised IEP). P-38.
48. The Revised IEP includes the Student's PSSA scores in the present education levels section (the PSSA scores were not available when the original 2018 IEP was drafted). P-38.
49. The Revised IEP also includes a new reading fluency goal. The goal calls for the Student to increase reading fluency as assessed using curriculum-based measures. The Revised IEP calls for a baseline reading fluency measure to be established in September 2019, and then a target to be established calling for progress from the baseline. P-38.
50. The Revised IEP also calls for weekly individual counseling sessions with the Charter School's School Counselor. P-38.

⁷ The Charter School does not argue that the parents waived the claims raised in this due process hearing. Rather, the Charter School presents the Mediation Agreement both for context and as an equitable consideration.

51. The Charter School issued the Revised IEP with a NOREP on August 26, 2018. The Parents did not sign or return the NOREP. P-39.
52. On August 28, 2018, the Charter School drafted a letter confirming that the Parents were withdrawing the Student from the Charter School. The Parents signed the letter, indicating that they withdrew the Student from the Charter School on August 29, 2018. P-36.
53. The Charter School has not received funding to educate the Student since the Student withdrew on August 29, 2018. NT 172.
54. The Student enrolled in the Private School and has attended the Private School during the 2018-19 school year. NT *passim*.
55. The Parents requested this due process hearing on September 11, 2018.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly. To the extent that witnesses recalled events differently, I find that the testimony of each witness was the individual witness’ honest opinion or recollection of events. Further, although each witness testified credibly, I do not assign equal weight to each witness. When a witness’s honest testimony about what the Student needs does not square with the record, I accord that testimony little weight. The fact that a witness believes what he or she says under oath does not make the statement true.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3d Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court’s first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” *Id* at 3015.

Historically the Third Circuit has interpreted *Rowley* to mean that the “benefits” to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3d Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3d Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3d Cir. 2003).

LEAs are not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than “trivial” or “*de minimis*” benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to

the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than *de minimis*” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id.* at 1000. In terms of academic progress, grade-to-grade advancement may be “appropriately ambitious” for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics.

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student’s circumstances.

Tuition Reimbursement

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

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Discussion

As a threshold matter, there is some ambiguity as to which IEP is in question for the first prong of the *Burlington-Carter* test. The Charter School proposed the 2018 IEP on June 7, 2018. The Parents then sent notice of their intent to seek tuition reimbursement on August 10, 2018. Such notice is commonly referred to as a “10 day letter,” because it gives LEAs 10 days to correct any problems and offer a FAPE. The Charter School responded 12 days later by inviting the Parents to an IEP team meeting and offering the Revised IEP a day after the invitation. Even so, the Student withdrew from the Charter School after the Charter School offered the Revised IEP. I find that the Revised IEP was

the last-offered IEP prior to the Student's enrollment in the Private School and is the IEP in question in this case.

Another threshold matter concerns the Student's enrollment and the Charter School's receipt of funds to educate the Student. In most cases, a withdrawal terminates all of a charter school's special education obligations to a student because the regular, public school district in which the student resides becomes the Student's local educational agency (LEA) in that instant.

The term "local educational agency" is defined in the IDEA at 20 U.S.C. § 1401(19)(a) as follows:

The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

Federal implementing regulations use a substantively identical definition. 34 C.F.R. § 300.28.

The IDEA and its regulations draw a distinction between charter schools that are schools of a LEA and charter schools that are their own LEA. The IDEA at 20 U.S.C. § 1413(a)(5) concerns charter schools that are schools of an LEA. In Pennsylvania, charter schools are not schools *of the LEA*. They are their own LEAs. 22 Pa. Code § 711.3. As such, 20 U.S.C. § 1413 does not directly apply to this case. However, regulations at 34 CFR § 300.209 are on point. Under that regulation:

If the public charter school is an LEA, consistent with § 300.28, that receives funding under § 300.705, that charter school is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity.

There is a slight discrepancy between the federal regulations at 34 CFR §300.209(c) and Pennsylvania's regulations at 22 Pa. Code § 711.3(a), 3(b)(5). Under Pennsylvania's regulations, a charter school's LEA obligations depend upon enrollment, not funding. A charter school's IDEA obligations start when a child with disabilities enrolls. It is striking that 34 CFR §300.209 is one of the very few federal regulations that is *not* incorporated into Pennsylvania's special education regulations for charter schools. See 22 Pa. Code § 711(3)(b)(18)-(19).

Looking beyond Pennsylvania's special education regulations, Pennsylvania's overarching charter school law, 24 Pa. Cons. Stat. § 17-1701-A, *et seq.*, compensates

for the discrepancy noted above. Specifically, 24 Pa. Cons. Stat. § 17-1725(3) specifies that charter schools receive funds for special education students based on enrollment according to a statutory formula.

Under the formula, school districts transfer a portion of their special education funding to charter schools based on the individual enrollment of children with disabilities. That special education funding comes, in part, from IDEA funds. Therefore, under Pennsylvania law, charter schools receive IDEA funds when IDEA-eligible children enroll. It makes sense, therefore, that Pennsylvania's special education regulations for charter schools do not distinguish between enrollment and funding. If a student is enrolled, the charter school receives funding and is obligated to provide a FAPE as the Student's LEA.

In this case, there is no question that the Student disenrolled on August 29, 2018, and the Charter School stopped receiving funding from that point forward. By operation of law, the school district in which the Student resides became the Student's LEA at that moment, and all of the Charter School's FAPE obligations ended.

The entire *Burlington-Carter* test is predicated upon the assumption that the respondent LEA has an obligation to provide a FAPE to the student. In the absence of that obligation, considering whether the LEA offered a FAPE is nonsensical. There are some cases in which a school must offer an IEP to a student in the absence of a FAPE obligation. See *I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 771-73 (M.D. Pa. 2012); *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610 (E.D. Pa. 2018). There are no circumstances under which an LEA with no FAPE obligation can owe tuition reimbursement as a remedy for a failure to offer a FAPE.

I deny the Parents' request for tuition reimbursement because the Charter School was not the Student's LEA when this hearing was requested. If the Parents had requested this hearing before withdrawing the Student, the IDEA's pendency rules would have maintained the Charter School's LEA status – but the facts of this case are the opposite.

In making this determination, I am sensitive to the fact that the Charter School did not clearly raise its LEA status as a defense at any point in these proceedings. While the laws concerning the Charter School's LEA status are clear, the procedural nature of the Charter School's defense is not. During the hearing, the question of withdrawal and funding came up because, were I to order tuition reimbursement, it benefits the Charter School financially to be the Student's LEA. See, NT 171-172. Even so, I reach the conclusions above because the Charter School's LEA status is related to my jurisdiction over this matter. See 20 U.S.C. § 1415 *et seq.* If I am correct, the issue cannot be waived and must be addressed if the Hearing Officer recognizes the issue.

On the other hand, if the Charter School's LEA status is an affirmative defense, it has been waived because it was never raised. If the defense was waived, the analysis above is no basis for me to reject the Parents' claim. There may also be important public policy reasons to prevent the Charter School from effectuating the Student's

disenrollment by having the Parents sign a letter that it drafted in the midst of a brewing tuition reimbursement dispute.

Given the foregoing, in an abundance of caution, I continue my analysis under the *Burlington-Carter* test to determine whether the Charter School would be responsible for tuition reimbursement were it the Student's LEA when the Parents filed their complaint.

I find that the Parents did not establish that the Revised IEP is inappropriate by preponderant evidence. The Parents presented several arguments about the appropriateness of the Revised IEP that merit discussion.

First, the Parents argue that the Charter School's assessment of the Student's academic abilities are suspect. The Parents testified that it took the Student considerable time and effort, even with parental help, to complete homework. According to the Parents, the Student often did not know how to complete homework. NT 29, 95-98. As noted in my credibility determination above, I have no doubt that the Parents shared their honest impressions. Those impressions stand at odds with the Parents' own Neuropsychological Evaluation Report. That report found that the Student was of average intelligence and was, on the whole, performing within the average range as compared to same-age peers. There were certainly fluctuations between the "high average" and "low average" range on various academic tests, but there is no reason to doubt the reports of the Student's academic progress.

Of equal importance, the Charter School recognized the Student's SLD. The Charter School did not take the position that the Student's grade-to-grade progress and performance on standardized tests precluded an SLD finding. Instead, the Charter School accepted the results of the Parents' Neuropsychological Evaluation Report and drafted an IEP to effectuate that report's substantive recommendations. The Neuropsychological Evaluation Report recommended a Wilson-type reading program and (to whatever extent it is not covered by Wilson) a reading comprehension program as well. The District offered that.

Second, the Parents argue that the Charter School's program is not intensive enough. The Revised IEP included 45 minutes of Wilson every four days in the school's six-day cycle, 30 minutes of speech and language therapy per week, 45 minutes of push-in writing instruction in the regular education classroom three times per week, and many other accommodations.

Only two aspects of the record suggest that the amount of special education that the Charter School offered is insufficient: testimony from the private neuropsychologist and testimony from the private speech and language pathologist.

The private neuropsychologist testified that the Student requires two to three hours of small group, special education instruction per day by a special education teacher. NT 307-315. It is impossible to square that testimony with the private neuropsychologist's

report. The Neuropsychological Evaluation Report makes no such claim. Rather, it provides recommendations to the IEP team that were adopted in substance.

The private speech and language pathologist testified that the Student required a full-time special education placement and could only be included with non-disabled peers for lunch. NT 246-247. I have no doubt that the private speech and language pathologist believed what she was saying. That testimony, however, contradicts the entire record of this case. The Student made significant academic progress with minimal special education. Segregating the Student to the extent recommended by the private speech and language pathologist is contraindicated by the other evaluations that the Parents obtained privately, and by the Student's educational history.⁸ Further, the private speech and language pathologist reached conclusions about the type of placement that the Student requires by cherry-picking a single test from the battery of tests that comprised the private Speech and Language Evaluation Report.⁹ The IDEA prohibits the use of any single measure to form the basis of a placement recommendation. See 20 U.S.C. § 1414(b)(2)(B).

The Parents also argue that the Revised IEP does not offer sufficient speech and language therapy. The Parents attribute the Student's progress in this domain to private speech and language therapy that they provided for the Student. There is no dispute that the Parents provided some private speech and language therapy for the Student, and that the Charter School considered private speech and language therapy reports as a source of information in its evaluations. Further, all of the private evaluations in this case except for the Neuropsychological Evaluation Report recommended that the Student receive more speech and language therapy than the 30 minutes per week offered in the Revised IEP. The Neuropsychological Evaluation Report recommended continuation of speech and language therapy without specifying an amount.

None of the reports in this case recommended the same amount of speech and language therapy, and there is no requirement that the Charter School adopt the recommendations in any evaluation report. Rather, it is the Charter School's obligation to craft an IEP that delivers a meaningful educational benefit. The Parents have established that the Charter School did not offer the amount of speech and language therapy recommended in some reports. Their burden, however, is to establish that the offered speech and language therapy is insufficient.

Evidence that the Student's progress in speech and language is attributable to the private therapy that the Student received is not preponderant. Moreover, the question is

⁸ The Parents correctly argue that the comparative restrictiveness of the Charter School and the Private School is not a factor in a tuition reimbursement analysis. See, e.g. *Kruelle v. New Castle City School District*, 642 F.2d 687, 695 (3d Cir. 1981). Even so, for the first prong of the *Burlington-Carter* test, I look to the appropriateness of the Revised IEP and the Parents' argument that the Student required a more restrictive placement than the Charter School offered.

⁹ The Student scored in the average to low-average range on every test administered except for a reading comprehension sub-test (below average) and a Social Language Development Test (below average in two domains and "borderline" in two domains). The private speech and language pathologist formed her opinion about a full-time special education placement from the Social Language Development Test alone.

whether the services offered in the Revised IEP are appropriate – not whether more would be better. I am persuaded that more speech and language therapy might be helpful, but that falls into the realm of what loving parents desire. *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). The record in this case establishes that the Student made meaningful progress with the amount of speech and language therapy that the Charter School offered, and there is no reason to find that would change going forward with a continuation of the same program.

The Parents' final argument, that the Revised IEP does not incorporate all of the recommendations in the Charter School's revised 2018 RR, fails for similar reasons. First, as explained above, the Charter School was under no obligation to incorporate all recommendations from private evaluations, verbatim or otherwise. More importantly, I find that the Revised IEP incorporates the significant, substantive recommendations in the revised 2018 RR. That includes the significant, substantive recommendations in the Parents' Neuropsychological Evaluation Report.

I affirmatively find that the Revised IEP was appropriate for the same reasons. The Revised IEP was based on the 2018 RR. The 2018 RR, in turn, was comprehensive in its scope and, through incorporation of multiple private evaluations, went well beyond the minimum standards found at 20 U.S.C. § 1414. The resulting IEP effectuated many of the recommendations in the 2018 RR in substance and was reasonably calculated to provide a FAPE to the Student at the time it was offered.

The Revised IEP was appropriated and, therefore, the *Burlington-Carter* analysis ends.

Summary and Conclusion

I find that the Charter School was not the Student's LEA when the Parents requested this due process hearing. In doing so, I recognize that determination is mostly *sua sponte* and that the Charter School may have waived LEA status as a defense. While I deny tuition reimbursement on that basis, I found it prudent to proceed with a more typical *Burlington-Carter* analysis because the issue is novel.

At the first prong of the *Burlington-Carter* test, I find that the Charter School offered an appropriate IEP. The Parents did not establish that the Revised IEP was inappropriate. Rather, the record supports a finding that the Revised IEP was appropriate. The Revised IEP was based on a comprehensive evaluation of the Student and was reasonably calculated to provide a FAPE at the time it was offered.

ORDER

Now, March 22, 2019, it is hereby **ORDERED** that the Parents' demand for tuition reimbursement is **DENIED** and **DISMISSED**.

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

/s/ Brian Jason Ford
HEARING OFFICER