

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. 21553-18-19
CLOSED HEARING

Child's Name:
J. S.

Date of Birth:
[redacted]

Parent:
[redacted]

Counsel for Parent:
Andrew Paul Schweizer, Esq.
Montgomery Law, LLC
1420 Locust St., Suite 420
Philadelphia, PA 19102

Local Education Agency:
Khepera Charter School
926 W. Sedgley Avenue
Philadelphia, PA 19132

Counsel for the LEA:
Nigel S. Scott, Esq.
Aegis Law, LLC
1500 Walnut Street, Suite 700
Philadelphia, PA 19102

Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
04/12/2019

Introduction

This special education due process hearing concerns the educational rights of a student with disabilities (the Student).¹ The Student attends a charter school (the Charter School). This hearing was requested by the Student's parent (the Parent). The Parent alleges that the Charter School violated Student's rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

For reasons discussed below, I find in favor of the Student and Parent.

Issues

The issues raised in the Parent's complaint are:

1. Did the Charter School deny the Student a free appropriate public education (FAPE)?
2. Did the Charter School properly identify the Student in accordance with its child find obligations?
3. Did the Charter School properly evaluate Student in accordance with its child find obligations?
4. Was the Student's IEP reasonably calculated to provide a FAPE?

Demanded Relief

The Parent demands the following relief:

1. An independent neuropsychological evaluation by psychologist chosen by the Parent at the Charter School's expense,
2. An independent Reading evaluation by an evaluator chosen by the Parent at the Charter School's expense,
3. An independent Functional Behavioral Assessment by a BCBA chosen by Parent at the Charter School's expense,
4. An IEP meeting convened following receipt of all independent evaluation reports to determine an appropriate program and placement for the Student,
5. An IEP that utilizes the findings, conclusions, and recommendations of the independent evaluation reports and FBA in developing an appropriate IEP and PBSP for the Student.
6. Tuition payment for a prospective placement at an appropriate private placement with requisite supports and transportation. Or, in the alternative, reimbursement for Parent's unilateral placement at an appropriate private school with requisite supports and transportation.
7. Compensatory education for all the time that the Student was denied a FAPE up to and until the time that the Student is in the appropriate program and placement with the appropriate supports and services moving forward.

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

Procedural History

This matter was resolved on a stipulated record without an evidentiary hearing, and so it is particularly important to accurately capture the procedural history.

The Parent filed the complaint on December 15, 2018. ODR assigned the matter to me, and I scheduled an initial hearing session for January 22, 2019. The Charter School did not immediately retain counsel. By January 14, 2019, the Parent felt that the Charter School was not responding to the complaint and sought my leave to amend in order to join the Pennsylvania Department of Education (PDE). The Charter School's attorney confirmed representation very shortly thereafter, and the parties jointly sought a continuance and extension of the decision due date to pursue settlement negotiations. I granted that request and moved the hearing to February 26, 2019. The Parent did not amend the complaint or otherwise join PDE. The hearing was moved again to March 8, 2019, with the parties' consent to accommodate my schedule.

On March 7, 2019, the parties asked to cancel the March 8 hearing session. The parties reported they were near resolution on some issues, and that other issues could be resolved on a stipulated record without an evidentiary hearing. The parties asked for time to draft and file written stipulations and arguments. I granted the parties' request.

On March 15, 2019, the parties filed joint stipulations of fact. By March 21, 2019, the parties had uploaded joint evidence in support of their stipulations. The Parent also uploaded additional evidence. The Charter School did not object to the Parent's additional evidence.

On March 23, 2019, the Parent filed a closing statement, presenting arguments based on the stipulations and evidence. The Charter School confirmed that it "will not be submitting a written closing statement but rest rather on the documents already submitted into evidence."

Stipulations

As indicated to the parties, I adopt their joint stipulations as my own findings of fact. Some of the parties' stipulations are conclusions of law, but I have included them in this section as well. I have edited the text of the joint stipulations to remove identifying information. I have also made minor stylistic edits. All edits are bracketed.² The numbered and bulleted text in the remainder of this section is otherwise a direct quotation from the parties' joint stipulations.

² The parties quote from some exhibits in their joint stipulations, and some of those quotes were edited by the parties within brackets as well.

Some of the stipulations were not presented in chronological order. I have not changed the order of the stipulations so that the text in this section tracks the parties' submission.

The document that the parties filed presenting the stipulations includes one heading: "Background." It appears that the Parties intended to include other headings but did not do so. I have added other headings to (hopefully) improve readability. Other than "Background," the headings are my own.

Stipulations #36 and #37 concern the Charter School's charter revocation and likely closure at the end of the current (2018-19) school year. Stipulation #38 concerns the ways that courts have addressed the problem of the Charter School's financial insolvency. Strictly speaking, those stipulations are not relevant to the issues presented. I have, however, left those stipulations in this decision because they provide valuable context.

I reject only one joint stipulation. Stipulation #2 indicates that the Charter School is bound by 22 Pa. Code § 14 (Chapter 14). Chapter 14 applies to traditional public schools, but not to charter schools. Charter schools are bound by 22 Pa. Code § 711 (Chapter 711) which, for purposes of this case, is substantively identical.³ I changed Stipulation #2 accordingly, and that stipulation is best thought of as my own finding.

The parties stipulate as follows:

Background

1. [Student] is a child with a disability under the [IDEA]; and a "qualified individual with a disability" within the meaning of [Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*].
2. [The Charter School] is a federal funds recipient and local educational agency as defined by IDEA, and section 504, as well as Pennsylvania's [Chapter 711].
3. [Student] is a [teenaged] student residing with ... Parent and is enrolled in the eighth grade at [the Charter School]. [Student] has a specific learning disability in basic reading, reading fluency, reading comprehension, written expression, mathematics calculation, and mathematics problem solving.
4. [Parent] is Student's Parent.
5. [Student] began attending [the] Charter School at the beginning of 5th Grade (2015-2016 school year).
6. Due to [Student's] specific learning disability in reading, writing, and mathematics, [Student] was supposed to receive supplemental learning support

³ That is not true in all cases. The distinction between Chapter 14 and Chapter 711 in this case is in no way outcome determinative.

and specially designed instruction within the special education classroom for reading, writing, science, social studies, and mathematics, as well as accommodations to the general education curriculum, in order to progress through the general education curriculum and make progress towards [Student's] goals.

7. While at [the Charter School], [the Student] did not receive the supplemental learning support and specially designed instruction within the special education classroom for reading, writing, science, social studies, and mathematics, as well as accommodations to the general education curriculum.

The Prior Charter School

8. Prior to arriving at [the Charter School], [the Student] attended [a different charter school (the Prior Charter)].
9. While at [the Prior Charter] between 2012 and 2015, [Student] made the “most notable gain ... in the area of reading comprehension. In the 2012 evaluation [the Student] earned a standard score of 80 with a grade equivalency score of 1.5, while in the [2015] evaluation, [the Student] scored an 87, with a grade equivalent score of 2.8.” J1 at 26. Despite making “some progress in Basic Reading Skills and Reading Fluency, [the Student] remain[ed] in need of significant special education supports to continue to make meaningful progress. [The Student's] decoding weaknesses affect[ed] [the Student's] spelling and [] writing skills, which [were] also in need of support.” *Id.*
10. Underlying [the Student's] progress in reading at [the Prior Charter], [the Student] received “reading instruction in the special education classroom.” J1 at 9.
11. While at [the Prior Charter], “[t]he special education classroom primarily use[d] the Wilson Reading System, and Read Naturally for reading instruction and supplements with additional leveled reading material from the Harcourt Story Town curriculum and rich text materials.” J1 at 9.

Actual Progress or Regression in the Charter School

12. From the time [the Student] left [the Prior Charter] in June of 2015 through September 8, 2017, [the Student] made minimal progress or actually regressed in basic reading skills. *Compare* J1 at 27 (memorializing that in June of 2015, [Student's] overall reading skills were at a grade level equivalency of 2.8, Word Attack skills were at a grade level equivalent of 1.4 and Letter-Word Identification skills were at grade level of 2.7) *with* J7 at 10 (memorializing that in September of 2017, [Student's] overall reading skills were at a grade level equivalency of 3.2, Word Attack skills were at grade level equivalency of 1.1, and Word Identification skills were at grade level equivalency of 3.0).

13. From the time [Student] left [the Prior Charter] in June of 2015 through September 8, 2017, [the Student] made minimal progress or actually regressed in math skills. *Compare* J1 at 27 (memorializing that in June of 2015, [the Student's] broad math skills were at grade level equivalent of 2.4) *with* J7 at 10-12 (memorializing that in September of 2017, [the Student's] broad math skills were at grade level equivalent of 2.7).

No IEP Development in the Charter School

14. To be sure, [the Student] had an IEP during the 2015-2016 school year and 2016-2017 school year.
15. But, during the 2017-2018 school year, [the Student] again qualified for an IEP, but [the Charter School] failed to schedule an IEP meeting, so no IEP team meeting was ever convened, and therefore, no IEP was ever developed to address [the Student's] educational and behavioral needs during the 2017-2018 school year.
16. [The Student] also has complex social, emotional, and behavioral issues, which adversely affect [the Student's] ability to learn in the regular classroom setting.

The Student's Behaviors

17. [The Student's] June 2015 Evaluation Report states: "Results of rating scales, behavioral observations and clinical interviews with [the Student] suggest that [the Student] displays many characteristics of Attention-Deficit/Hyperactivity Disorder. In school, [the Student] is easily distracted, loses focus and displays a general restlessness. [The Student] does not remain attentive to tasks, without outside intervention. [The Student's] acquisition of new material is disrupted by [the Student's] inability to attend consistently during instruction. [The Student] has made progress in managing [the Student's] anger and willingness to attempt work [the Student] perceives as difficult. However, concerns regarding the impact of [the Student's] distractibility and attention span, particularly on [] working memory skills need to be addressed." J1 at 27.
18. As noted in the 2015 Evaluation Report: "[The Student]'s behavior is concerning both at home and at school. [The Student] appears to be a child who needs a lot of support and assistance to manage [] behavior. [The Student]'s behavior is seriously affecting [the Student's] functioning. According to the Conners-3, behavior observations, interactions with [the Student], and school records [the Student]'s behavior difficulties are most consistent with a DSM-IV-TR diagnoses [sic] of Oppositional Defiant Disorder. It will be important to determine if [the Student]'s behavioral difficulties subside, with implementation of interventions to address [the Student]'s academic deficiencies and a behavioral support plan." Exhibit 2 at 8.

19. While at [the Prior Charter], [the Student] had a positive behavior support plan (PBSP) to address [] social, emotional, and behavioral issues. J2 at 8.
20. When [the Student] began attending [the Charter School] in 5th Grade, neither [the] IEP or PBSP from [the Prior Charter] were followed.
21. [The Student] still requires a positive behavior support plan (PBSP) to address [] social, emotional, and behavioral issues.
22. Since attending [the Charter School], an adequate PBSP has not been implemented.
23. Since attending [the Charter School], a PBSP has not been consistently implemented.
24. Ongoing behavioral issues have interfered with [the Student's] learning throughout [the Student's] time at [the Charter School]. See, e.g., J12 at 1-3.
25. Despite indications that [the Student] had Oppositional Defiant Disorder and ongoing behavioral issues that were interfering with [the Student's] learning, interventions were not taken such as conducting an FBA or holding an IEP meeting. See, e.g., J12 at 1-3 (memorializing: "Student rarely attends class. [Student is] continuously out of [Student's] seat, off task. Student refuses to complete any assigned classwork, homework, projects, etc. [Student is] disrespectful to staff @ times; refusing to adhere to directives of authority/staff.").
26. Since attending [the Charter School], [the Student] has not received an FBA.
27. As such, [the Charter School] has not properly addressed [the Student's] behaviors in school. See J8 at 2-3 (memorializing use of suspensions to address behavioral issues).
28. In or around October of 2018, [the Student] was suspended for five days after a physical altercation involving [the Student's] science teacher. See J8 2-3.
29. On October 26, 2018, Parent requested that a one-on-one be with [the Student] all day at school, and [the Charter School's] CEO [...] informed Parent that it could be included in [the Student's] IEP. J8 at 5.

2019 Reevaluation

30. A recent Reevaluation Report was created on 2/26/2019, however, it still has not been reviewed by members of the IEP Team to develop an IEP. The previous Reevaluation Report was dated 6/8/2015. Therefore, the most recent Reevaluation Report was over 8 months overdue.

31. The Reevaluation Report, dated 2/26/2019, consisted of the following assessments and techniques used (J11 at 2):
- Child Information Form
 - Teacher Data/Observation Form
 - Kaufman Brief Intelligence Test, *Second Edition* (KBIT-2)
 - Kaufman Test of Educational Achievement, *Third Edition* Comprehensive Form (KTEA-3)
 - Teacher Referral Information
32. The Reevaluation Report, dated 2/26/2019, does not include an FBA.
33. [The Student's] most recent IEP ran from 1/26/2018 until 1/24/2019. J7 at 1.
34. [The Charter School] has missed [its] deadline to convene an IEP meeting and provide [the Student] with [an] annual IEP.
35. Moreover, "it is imperative that [Student's] educational environment offers the maximum opportunities for structured, small group learning situations to foster stimulation[] and training while also providing some level of individual instruction." J11 at 29.

The Charter School's Charter

36. [The Charter School's] Charter was revoked by the [public school district in which it is located (the District)] in December, 2017.
37. In October of 2018 the Charter Appeals Board upheld the [District's] decision to revoke [the Charter School's] Charter, but allowed for the school to remain open through the end of the current school year, June 30, 2019.
38. In several recent cases, the Charter School has been found unable to afford students the relief granted through settlement or Due Process Order. See, e.g., *Lejeune v. [redacted] Charter School*, 327 F.Supp. 3d 785 at 800 (E.D.Pa. 2018); *J.R. v. [redacted] Charter School*, 19757-1718KE (2017); *J.D. v. [redacted] Charter School*, 19755-1718KE (2017).

The Student's Needs

39. [The Student] qualifies for Extended School Year ("ESY") instruction, but the Charter School's pending closure means that the school is unable to program for [the Student's] ESY needs.
40. There are approximately 30 students in [the Student's] class for Math, English, Global Studies, and Health/PE.

41. In order to receive meaningful educational benefits, [the Student] requires a smaller student to teacher ratio than presently exists at [the Charter School].
42. In order to receive meaningful educational benefits, [the Student] requires more individual interaction with [...] teachers and support staff.
43. [The Student] requires one-on-one instruction in math, reading, and writing, as well as proper behavioral supports in order to receive meaningful educational benefits.
44. [The Charter School's] current financial circumstances and imminent closure prevent it from being able to hire the additional staff necessary to program for [the Student's] needs.
45. Given [that the Student] needs a smaller student-to-teacher ratio and [the Charter School's] inability to offer such a program this year, [the Charter School] is unable to provide [the Student] with a meaningful educational benefit.
46. Given [the Student] requires one-on-one instruction in math, reading, and writing, as well as proper behavioral supports and [the Charter School's] inability to offer such a program this year, [the Charter School] is unable to provide [the Student] with a meaningful educational benefit.
47. Given [the Student] requires more individual interaction with [...] teachers and support staff and [the Charter School's] inability to offer such a program this year, [the Charter School] is unable to provide [the Student] with a meaningful educational benefit.
48. An FBA must be conducted by a BCBA in order to develop a PBSP for [the Student].
49. Based upon a totality of the circumstances, in order to receive a free appropriate public education, [the Student] must be placed at an approved private school or a therapeutic private school, either of which could provide a smaller student-to-teacher ratio and allow for the increased one-on-one instruction that [the Student] so vitally needs.

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 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is 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 charter schools, 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 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

LEAs are not required to maximize a child’s opportunity; they 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.

Child Find

In the parlance of special education law, “child find” is a term of art describing a school’s obligations under 34 U.S.C. § 300.111 and 22 Pa. Code § 14.121. Those regulations require LEAs to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be “advancing from grade to grade.” 34 U.S.C. §300.111(c)(1). Once identified, schools have an obligation to determine if children suspected of having a disability require special education. Schools typically satisfy that obligation by proposing to evaluate children who are suspected of having a disability.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child’s educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the “hour-for-hour” method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be

crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education “should aim to place disabled children in the same position that the child would have occupied but for the school district’s violations of the IDEA.”).

Despite the clearly growing preference for the “same position” method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

“... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district’s deficiencies.”

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student’s school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA’s “failure to provide specialized services permeated the student’s education and resulted in a progressive and widespread decline in [the Student’s] academic and emotional well-being” *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a

LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove what the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Independent Educational Evaluation at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

“If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.” 34 C.F.R. § 300.502(b)(4).

As such, the District was obligated to request this due process hearing because it rejected the Parent’s request for an IEE at public expense. The District must prove that its reevaluation was appropriate.

Tuition Reimbursement

To determine whether parents are entitled to reimbursement from their school district or charter school 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.

Prospective Private Placement

In this case, the Parent does not primarily seek tuition reimbursement, but rather the Parent is seeking a prospective private placement. This type of remedy is extremely rare, but not unheard of. See, e.g. *A.D. v. Young Scholars – Kenderton Charter School*, ODR No. 15202-1415KE (2014). Like Hearing Officer Skidmore in *Young Scholars*, I conclude that prospective placement is a remedy within my jurisdiction to order. As Hearing Officer Skidmore reasoned: hearing officers enjoy broad discretion to fashion an appropriate remedy under the IDEA. See, e.g., *Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009); *Ferren C.*, *supra*, at 718. In a case such as this, there is no reason to forego application of this discretion to an order for a private school placement. See, e.g., *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985); *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285-86 (11th Cir. 2008); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 248-49 (3d Cir. 1999).

I further agree that, while the tuition reimbursement test may not be directly applicable, its prongs do provide concrete guidance for evaluating this type of claim. Additionally, however, the record must, in my estimation, support a conclusion that the LEA is not in a position to make timely and reasonable revisions to its special education program in order to offer and provide FAPE. See, e.g., *Burlington*, *supra*, at 369 (explaining that private placement at public expense is warranted where an appropriate public school program is not possible). This does not mean that the Parent must establish that the LEA cannot “in theory” provide an appropriate program, *Draper*, *supra*, at 1285 (quoting *Ridgewood*, *supra*, at 248-49), but the equitable nature of the requested remedy logically demands something more than a past denial of FAPE.

Discussion

It is difficult to read the parties’ joint stipulations as anything other than an admission of liability by the Charter School. Under the cases cited in the parties’ joint stipulations, it is possible that judgement against the Charter School at the due process level is beneficial to both parties. Under those same cases, it is also likely advantageous to the Parents to not include PDE as a party.

My task, however, is not to determine the mechanism by which the Student will receive remedies. I have no enforcement authority. Rather, my task is to determine liability on the issues presented and, if liability is established, what remedies are owed.

The parties' joint stipulations establish the Charter School's liability for each issue raised. First, the Charter School denied the Student a FAPE. The Student came to the Charter School with an IEP, and the Charter School did not implement that IEP. Then, the Charter School drafted a new IEP which failed to account for the Student's academic and behavioral needs. Next, the Charter school failed to implement its own IEP. All the while, the Student's academics and behaviors deteriorated to the point that both parties now agree that the Student requires a specialized school. The stipulated facts preponderantly establish that the Charter School's actions are inconsistent with the most basic principles of the IDEA's FAPE obligation.

Second, the Charter School violated its child find obligations. There is a preponderance of evidence that the Student's behaviors very seriously interfered with the Student's learning (and likely the learning of other students as well). The Charter School had actual knowledge of the Student's behaviors and actual knowledge that those behaviors were consistent with patterns exhibited by children with emotional and behavioral disabilities like ADHD and ODD. Despite this knowledge, the Charter School never proposed an evaluation (in the form of an FBA or otherwise) to determine if the Student's behaviors were a function of a suspected-but-not-identified disability, or whether the Student required SDI in this domain.

Third, the Charter School did not properly evaluate the Student in accordance with its child find obligations. I reach this conclusion for the same reasons that that I find a broader child find violation above. The Student needed an evaluation to find out if the Student qualified for special education as a child with ED or OHI. That did not happen.

Fourth, the Student's IEP was not reasonably calculated to provide a FAPE. A late IEP is not necessarily an inappropriate IEP. However, the Charter School failed to develop an IEP based on the 2019 RR. The charter school had actual knowledge that the Student's IEP was not working and had actual knowledge of recommendations in the 2019 RR. The Charter school took no action, despite its knowledge. Although the 2019 RR was insufficient, there is no dispute that it provided some accurate, useful information and recommendations. The Charter School's failure to consider the 2019 RR yields my conclusion that the Student's IEP is not calculated to provide a FAPE.

With liability established, I turn to remedies. First, the Parent demands independent neuropsychological and reading evaluations, and an independent FBA. I find that the Student is entitled to an FBA for all of the reasons detailed above. A neuropsychological evaluation is also warranted because a neuropsychological evaluation will give insight as to the neurological bases of the Student's academic and behavioral needs and will provide meaningful data to the IEP team. In my experience, neuropsychological evaluations almost always include reading assessments. I find no flaw in the 2019 RR's assessment of the Student's reading, but I will not deny a neuropsychological evaluation on that basis.

I find no flaw in the 2019 RR in terms of the assessments administered or the conclusions drawn from those assessments. Rather, I find that the 2019 RR was not

comprehensive enough in scope to constitute a complete evaluation of the Student's potential disabilities. The Charter School, therefore, has not established that the 2019 RR is appropriate by preponderant evidence, and the Student is owed an independent neuropsychological evaluation and an independent FBA at the Charter School's expense. The Student is not owed an additional independent reading assessment at the Charter School's expense.

Second, the Parent demands prospective placement at a to-be-named private school selected by the Parent. Simply put, the parties jointly stipulate that the Charter School is not able to provide a FAPE to the Student. While the IEEs ordered in this decision will not be complete for some time, both parties agree that the Student's current needs cannot be accommodated by the Charter School. Under the strict standard described above, the Charter School is not in a position to make timely and reasonable revisions to its special education program because it is in the process of winding down its operations. Similarly, the equitable nature of the requested remedy logically demands something more than a past denial of FAPE because the Student has a current right to FAPE that the Charter School admits it cannot meet.⁴

The Parent is entitled to that relief only for as long as the Charter School is the both the Student's LEA and is at risk of closing. There is no evidence that the Student's needs can only be met in a private school. I make no findings about any future LEA's ability to meet the Student's educational needs. Similarly, I make no findings about the Charter School's future ability to meet the Student's educational needs if it somehow survives into the 2019-20 school year and becomes financially solvent.

Third, the Parent demands compensatory education. As described above, the Charter School violated the Student's right to a FAPE and so compensatory education is owed. The stipulated record establishes that the Student's behaviors were significant, pervasive, and inhibited the Student's learning throughout the school day. The Student either stagnated or regressed in every assessed domain as the Charter School poorly implemented IEPs that were not calculated to offer a FAPE when they were provided. Under the standard above, the Student is entitled to full days of compensatory education for each day that the Student attended the Charter School during the 2015-16 school year (5th grade), 2016-17 school year (6th grade), 2017-18 school year (7th grade), 2018-18 school year (8th grade).⁵

The Parent may decide how the hours of compensatory education are spent. Compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs or educational programs. Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should be provided through the Student's IEP. When purchasing products or services, the cost of compensatory education shall not exceed the market rate within

⁴ I apply the prospective placement standard, not the tuition reimbursement standard, because there is no evidence that the Parent has placed the Student in a private school or has incurred a debt to a private school.

⁵ The IDEA includes a two-year statute of limitations. The Charter School did not raise affirmative defenses.

the Charter School's geographic area. Compensatory education shall not be used for products or services that are primarily for leisure or recreation.

Compensatory education shall continue to accrue at the same rate until the Student is placed at a private school, or the Charter School is no longer the Student's LEA, whichever comes first.

ORDER

Now, April 12, 2019, it is hereby **ORDERED** as follows:

1. The Charter School shall fund an independent neuropsychological evaluation for the Student, to be conducted by a neuropsychologist of the Parent's choice. The Charter School's maximum payment for said evaluation shall not exceed the market rate for such evaluations in the Charter School's geographic area. The Parent may choose a more expensive evaluator but is responsible for the difference.
2. The Charter School shall fund an independent FBA for the Student, to be conducted by a BCBA of the Parent's choice. The Charter School's maximum payment for said evaluation shall not exceed the market rate for such evaluations in the Charter School's geographic area. The Parent may choose a more expensive evaluator but is responsible for the difference.
3. The Student is entitled to one hour of compensatory education for each hour that the Student attended the Charter School from the start of the 2015-16 school year through the present. Compensatory education shall continue to accrue at the same rate until the Student is placed in a private school, or the Charter School is no longer the Student's LEA, whichever is first.
4. The use of compensatory education is limited in accordance with the accompanying Decision.
5. The Student is awarded prospective placement at a parentally-selected private school or approved private school at the Charter School's expense. The Charter School shall send the Student's records to schools identified by the Parent if requested. This order shall constitute the Parent's consent to send requested records.
6. The duration of the Charter School's obligation to fund the Student's placement in a private school or approved private school is defined in the accompanying Decision.

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

/s/ Brian Jason Ford
HEARING OFFICER