

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

Pennsylvania Special Education Hearing Officer Final Decision and Order

ODR File Number

25632-21-22

CLOSED HEARING

Child's Name:

T.R.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for the Parent:

Pro Se

Local Education Agency:

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

04/01/2021

Introduction and Procedural History

This special education due process hearing concerns the rights of a student with disabilities (the Student). The hearing was requested by the Student's parent (the Parent) against the Commonwealth Charter Academy (the Charter). The Parent's claims arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*

The Parent alleges that the Charter violated the Student's rights under the IDEA and Section 504, and the Parent's rights under the IDEA. The Parent's particular claims and demands are discussed below.

For reasons discussed below, I find in favor of the Charter.

Prior Litigation

This special education due process hearing is the ninth due process hearing between the Parent and the Charter. Four prior hearings concern the Student who is the subject of this case. The other five concern the Student's sibling. Those numbers do not count other litigation between the parties in court. The prior due process hearings concerning this Student and one court case capture the history between the parties and, more importantly, are relevant to the issues raised in this due process hearing. Those cases are:

- ODR No. 17322-1516 (09/17/2016)
- ODR Nos. 18809-1617 and 19109-1617 (consolidated, 09/30/2017)
- *Price v. Commonwealth Charter Acad.*, No. 17-5790, 2019 WL 4346014, 2019 U.S. Dist. LEXIS 155704 (E.D. Pa. September 12, 2019)¹
- ODR No. 23710-1920 (10/30/2020)

In the first due process hearing, the Hearing Officer Jelley found that the Charter violated the Student's right to a free appropriate public education (FAPE) during the 2013-14 through 2015-16 school years and awarded compensatory education. See ODR No. 17322-1516 (09/17/2016).

After the first due process hearing, the Parent claimed that the Charter violated the Student's right to a FAPE during the during the 2016-17 and

¹ The Eastern District case also concerns the Student's sibling.

2017-18 school years. The Parent presented those disputes in the second and third due process complaints, which were heard on a consolidated record. See ODR Nos. 18809-1617 and 19109-1617 (consolidated, 09/30/2017). Hearing Officer McElligott found no violation of the IDEA or Section 504 during those school years. The Parent appealed the Hearing Officer McElligott's decision to the U.S. District Court for the Eastern District of Pennsylvania.

The Parent's appeal to court resulted in a decision from Judge Quiñones Alejandro that includes a comprehensive factual background, detailing the Student's educational history and the prior due process decisions. *Price v. Commonwealth Charter Acad.*, No. 17-5790, 2019 U.S. Dist. LEXIS 155704 at *12-23. Judge Quiñones Alejandro affirmed the Hearing Officer McElligott, finding no violation of the Student's rights during the 2016-17 and 2017-18 school years. The Parent did not appeal the court's decision.

After the Eastern District case, the Parent requested another due process hearing alleging that the Charter violated the Student's right to a FAPE during the 2018-19 and 2019-20 school years. Hearing Officer Jelley found no violation of the Student's right to a FAPE during the 2018-19 school year and part of the 2019-20 school year. However, Hearing Officer Jelley found substantive deficiencies in an Individualized Education Plan (IEP) that the Charter offered to the Student in February 2020. Those deficiencies amounted to a violation of the Student's right to a FAPE. To remedy that violation, Hearing Officer Jelley ordered the Charter to take certain actions to ensure the provision of a FAPE to the Student but denied the Parent's demand for compensatory education. See ODR No. 23710-1920 (10/30/2020).

Specifically, Hearing Officer Jelley found that certain aspects of the IEP were vague and or not appropriately ambitious. Hearing Officer Jelley ordered the District to update the February 2019 IEP by correcting the vague parts and explicitly stating what specially designed instruction the Charter would provide to the Student. Hearing Officer Jelley also ordered the Charter to conduct an updated speech evaluation, share the results of that evaluation with the parent, and use those results and other information to rewrite sections of the Student's IEP. *Id* at 49.

Regarding the updated speech evaluation, Hearing Officer Jelley ordered the Charter to complete the evaluation within 20 days of the final due process order, instructed that the "results should be shared with the Parents and discussed as part of the rewrite of the IEP." *Id*.

Regarding the IEP rewrite, Hearing Officer Jelley ordered as follows: "The Charter has 20 school days [from the completion of the updated speech evaluation] to rewrite the present levels, goal statements, progress monitoring and specially designed instruction." *Id.*

Neither party appealed the Hearing Officer's decision in ODR No. 23710-1920 (10/30/2020). The entirety of the Student's education within the Charter, from the 2013-14 school year through October 2020, has been thoroughly litigated.

Current Claims and Procedural History of This Due Process Hearing

On October 26, 2021, the Parent filed a Complaint initiating this due process hearing. Some of the Parent's allegations concern the Charter's compliance with Hearing Officer Jelley's most recent decision at ODR No. 23710-1920 (10/30/2020).

In addition to claims about compliance with prior orders, the Parent alleges that the Charter violated the Student's right to a FAPE during 2020-21 and 2021-22 school years by failing to provide appropriate special education to address the Student's math needs, speech/language needs, and behavioral needs. The Parent alleges that these failures constitute a substantive violation of the Student's right to a FAPE under the IDEA and the Student's right to participate in the Charter's programs under Section 504.

The Parent alleges that the same actions and inactions resulted in a violation of the Parent's IDEA right to participate in IEP development.

To remedy these alleged violations, the Parent demands compensatory education and that the Charter fund an independent educational evaluation (IEE) to evaluate the Student's speech/language needs. The Parent also demands that the Charter fund the independent evaluator's participation at IEP team meetings (including transportation and lodging costs).

Issues Presented

The issues presented are:

1. Did the Charter violate the Student's right to a FAPE during the 2020-21 and 2021-22 school years by failing to provide appropriate special education related to the Student's math, speech/language, and behavioral needs?

2. Did the Charter violate the Parent's right to participate in the Student's IEP development during the 2020-21 and 2021-22 school years?

Findings of Fact

I reviewed the entire record of this case but make findings of fact only as necessary to resolve the issues before me. I find as follows:

Background

1. The Student has been continuously enrolled in the charter since the 2012-13 school year, which was the Student's 5th grade year.
2. The Parent had the Student privately evaluated in 2014, resulting in an independent educational evaluation (the 2014 IEE). P-34.
3. The Parent had the Student privately evaluated by the same private evaluation organization again in 2019, resulting in another IEE (the 2019 IEE). P-53.

The 2019-20 School Year²

4. The Charter evaluated the Student and drafted a reevaluation report dated January 14, 2020 (the 2020 RR). P-2.
5. The Student's IEP team met on February 4, 2020, to revise the Student's IEP (the February 2020 IEP). P-3 at 3.
6. The February 2020 IEP went into effect shortly after the February 4, 2020, IEP team meeting and was in place for the remainder of the 2019-20 school year. *Passim*.
7. The February 2020 IEP was the subject of a prior due process hearing. See ODR No. 23710-1920 (10/30/2020). Hearing Officer Jelley's findings of fact and legal analysis of the February 2020 IEP have not been disturbed by subsequent proceeding. I incorporate those facts by reference. Moreover, to extent an IEP's appropriateness is a mixed question of fact and law, I adopt Hearing Officer Jelley's findings concerning the appropriateness of the February 2020 IEP.
8. I take judicial notice that Governor Wolf closed all Pennsylvania school on March 13, 2020, to mitigate the spread of COVID-19. The Governor

² The 2019-20 school year has already been litigated. I provide these facts for context.

extended the school closure order through the end of the 2019-20 school year.

The 2020-21 School Year

9. On October 30, 2020, Hearing Officer Jelley issued his final decision and order in ODR No. 23710-1920.
10. As ordered, the Parties met at an IEP team meeting on November 12, 2020. S-2. During that meeting, the Charter revised the present levels, goals statements, progress monitoring and specially designed instruction the Student's IEP (the November 2020 IEP). S-2.
11. During the November 2020 meeting, the parties agreed to conduct a speech-language evaluation of the Student. During the hearing, the parties describe this evaluation differently. The Charter takes the position that this was an agreement to proceed with the evaluation that Hearing Officer Jelley ordered, even though the Charter still had time to appeal that decision.³ The Parent takes the position that this was an agreement to proceed with a different type of speech-language evaluation, and so it is not the evaluation that Hearing Officer Jelley ordered. Emails that the Parent sent at the time establish that the Charter's characterization (that the evaluation is the one that Hearing Officer Jelley ordered) is correct. *See, e.g.* P-8 at 5.
12. Regardless of how it is characterized, there is no dispute that the parties agreed to proceed with a speech-language evaluation during the November 2020 meeting. *Passim (see, e.g. S-2 at 49, S-22).*
13. On November 18, 2020, the Charter began its search to retain an evaluator to conduct an in-person speech-language evaluation. S-22. The Charter undertook this work with a reasonable understanding that the speech-language evaluation must be conducted in person. *See id; see also* NT at 270.

³ The parties agreed to move forward with the evaluation that Hearing Officer Jelley ordered within the timeline that Hearing Officer Jelley set. The Charter takes the position that it acted faster than required, because the 90-day appeals period for the prior decision had not expired. The Charter emphasized that position through the proceedings. There is no basis in the law for the Charter's position that it did not have to comply with Hearing Officer Jelley's order because it still had time to appeal that order to court. When a hearing officer orders an LEA to take an action by a specific date, the LEA must either comply with the order or seek an injunction.

14. Multiple agencies responded to the Charter's inquiries saying that they were either unable or unwilling to conduct an in-person speech-language evaluation during the height of the COVID-19 pandemic. Some agencies did not reply at all. S-22.
15. On November 12, 2020, the Student's IEP team convened to draft a new IEP. S-3. While this was the first annual IEP team meeting for the Student since November 2019, the parties were in constant communication with each other at all times. Much of that was by email. *See, e.g.* S-5, P-6, P-17, P-21, P-32, P-33.
16. On November 16, 2020, the IEP team proposed an IEP with a Notice of Recommended Educational Placement (NOREP). The Parent rejected the NOREP, stating that the IEP did not conform to the parties' agreements made during the November 12, 2020, IEP team meeting. S-4.⁴
17. In December 2020, the Parent allowed the Student to participate in the Charter's math baseline assessments.⁵ Once baselines were established, the Charter was able to draft IEP goals for math computation and math applications. Subsequent IEPs continued to include math goals. Math goals were progress monitored using a computer program. S-5, S-10, S-14.
18. The IEP team met again on December 21, 2020, to discuss the Parent's concerns about the goals, related services, and assistive technology. The team did not complete its work during that meeting, but the parties continued to communicate with each other. *See, e.g.* S-5.
19. Prior to December 2020, the Charter had offered an Instructional Assistant (IA) to work one-to-one (1:1) with the Student for four hours per school day. The IA would be supervised by a Board Certified Behavioral Analyst (BCBA). At that time, the Student's attendance and work completion were problematic. The Parent never permitted the IA to work with the Student and the service was never provided. Regardless, by December 2020, the Student's attendance and work completion had improved. The Charter no longer saw the need for an IA or BCBA, and removed those services. S-1, S-3, S-5; P-13; NT 274-275, 299.

⁴ As used in this case, NOREPs are forms by which the Charter can explain its proposal and seek the Parent's consent to implement the IEP.

⁵ See the prior decisions concerning the Parent's prior refusals to permit the Student to participate in the Charter's various programs.

20. As part of the parties' ongoing communication, the Parent gave the Charter permission to revise the IEP outside of a meeting to make changes based on the parties' discussion. The District revised the IEP on January 19, 2021. The District sent a revised IEP with a NOREP to the Parent the same day. *See, e.g.* S-5, S-6.
21. On January 21, 2021, the Parent approved the implementation of the revised January 2021 IEP (the January 2021 IEP) without conceding that the IEP was appropriate. In essence, the Parent communicated that the January 2021 IEP was necessary but insufficient. More specifically, the Parent wrote that she does not agree with the absence of a reading goal. The Parent also stated her position that the Student requires one-to-one (1:1) assistance from a Speech-Language Therapist for all writing assignments. S-6.
22. On February 15, 2021, the Charter revised the IEP again with the Parent's permission outside of a meeting. This revision was to bring the IEP in better conformity with the prior due process decision. The record does not reveal a substantive change in the Student's program as a result of this revision. S-5.
23. The IEP team convened again on March 18, 2021. The charter agreed to update the parental input section of the IEP based on input that the Parent provided and request that the Parent made during that meeting. S-5.
24. As the parties continued to engage with each other and revise the Student's IEP, the Charter continued to work to retain an evaluator for the speech-language evaluation. Ultimately, the Charter retained an evaluator and completed the speech-language evaluation on March 26, 2021. S-8.
25. On April 9, 2021, the Charter issued an updated reevaluation report that incorporated the new speech-language evaluation (the April 2021 RR). S-9.
26. During the entire time at issue, the Student's IEPs included speech-language goals targeting written expression (generating ideas, drafting first three paragraph and then five paragraph essays, and self-editing). S-3, S-5, S-10, S-14. The IEPs included modifications and specially designed instruction related to those goals. *Id.*

27. The April 2021 RR recommended that the Student's IEP continue to have writing-focused speech-language goals. The April 2021 RR did not include a recommendation for an oral expression goal. S-9.
28. On April 14, 2021, the Charter issued a new IEP for the Student based on the April 2021 RR (the April 2021 IEP). S-10.
29. When the Charter first took math baseline data for the Student in December 2020, the Student was found to be at the 6th grade instructional level. By April 2021, the Student had advanced to the 7th grade instructional level. The Charter recommended increasing the Student's math goals to the 8th grade level in some domains. S-5, S-10.
30. The Parent argues that the Charter's benchmarking and progress monitoring did not conform to the software publisher's standard guidelines. The Charter concedes this point: it set the proficiency line for the software at the 75th percentile instead of the 50th percentile. As a result, the Student was required to have better mastery of math concepts before advancing to new skills. This variation also enabled the Charter to collect more accurate, Student-specific information. *See, e.g.* NT 262-267.
31. The Student had difficulty with math problem solving (word problems and applications). The Parent was concerned that the Student's speech-language difficulties were interfering with the Student's ability to complete word problems. The Charter assessed this concern and ruled it out, finding that the Student's errors on word problems resulted from calculation errors, not an inability to understand the word problems. Consequently, the Charter added a math problem solving goal, but declined to add a goal specific to word problems. S-5, S-10; NT 143-144, 174-175
32. On April 16, 2021, the Charter issued a NOREP seeking the Parent's consent to implement the April 2021 IEP. S-11.
33. On April 20, 2021, as in the past, the Parent consented to the implementation of the April 2021 IEP without agreeing that it was appropriate. *See, e.g.* S-11.
34. The parties continued their dialogue and, in response to the Parent's concerns, the Charter sought the Parent's consent to evaluate the Student again, this time with a focus on the Student's reading ability.

The Charter sought the Parent's consent on June 2, 2021, and the Parent provided consent the next day. S-12.

35. On August 4, 2021, the Charter issued another reevaluation report, reporting the results of the reading assessments (the August 2021 RR). S-13.
36. On August 14, 2021, the Charter issued a new IEP for the Student (the August 2021 IEP), revised in response to the August 2021 RR. S-10.

Extended School Year (ESY) – Summer 2021

37. The Charter offered and the Parent accepted ESY programming for the Student in the summer of 2021. During this time, the Charter provided instruction related to the writing-focused speech-language goals in the Student's IEP. S-14.
38. During the ESY program, the Student demonstrated significant progress towards the writing goals. The speech therapist implementing that instruction recommended updated goals, and the Charter accepted the updates. S-14.

The 2021-22 School Year

39. On October 25, 2021, the Parent filed a due process complaint initiating these proceedings.

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 in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the contradictions.

This does not mean that I assign equal weight to all testimony. For example, hearsay, no matter how fervently believed by the witness, cannot form the basis of this decision. To the extent that my findings of fact are derived from testimony alone (as opposed to documentary evidence or a combination of both), the weight that I assign to each witnesses' testimony is reflected in my findings above.

General 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 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 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* 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.

Third Circuit consistently 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). In substance, the *Endrew* decision is no different.

A school district is 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 requires 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 or 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*, 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. Grade-to-grade progression, therefore, is not an absolute

indication of progress. Rather, I must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

In sum, 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.

Evaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

In substance, evaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is a child with a disability and, if so, what must be provided through the child's IEP for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" and must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, at 20 U.S.C. § 1414(b)(3)(A), the LEA must ensure that:

assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

Finally, evaluations must assess "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B).

Discussion

The IDEA contemplates a cooperative, collaborative, flexible process to develop a child's special education program – and provides a dispute resolution mechanism should that process fail. For this Student, that process has been turned upside down. The IDEA's dispute resolution mechanism has become the primary mechanism to develop the Student's special education program while collaboration and flexibility have gone out the window. The entirety of the Student's education has been dissected and scrutinized through litigation from enrollment in 2013 through the present. This is the opposite of the IDEA contemplates.

The history of how IEP development for the Student became the opposite of what the IDEA contemplates is exceedingly well-documented elsewhere. I need not repeat the thoughtful work of my colleagues and the Court, and so I constrain myself to the relatively narrow issues before me. Even so, the prior decisions directly impact upon this case for two reasons: First, the Parent cannot re-litigate issues that have already been decided. Second, issues concerning enforcement of prior decisions fall outside of my jurisdiction.

Regarding re-litigation, the Parent does not directly challenge prior decisions through this proceeding. Rather, the Parent presents nearly identical facts in support of nearly identical issues and hopes for a different result. I do not question the Parent's feelings of aggrievement but, for issues like the meaningful parental participation claim, it is impossible to distinguish this case from those that came before it.

Regarding enforcement, the Office for Dispute Resolution has no jurisdiction to hear enforcement matters. If an LEA fails to comply with a hearing officer's order, parents must turn either to the Pennsylvania Department of Education or to the courts. Portions of the Parent's claims concern the Charter's compliance with Hearing Officer Jelley's decision in ODR No. 23710-1920 (10/30/2020). I may not determine if the Charter's actions constitute a substantive violation of another hearing officer's order, and I cannot provide a remedy for such violations.⁶

Within this context, my issue-specific analysis is as follows:

⁶ Arguably, noncompliance with a prior due process order could violate a child's right to a FAPE. Reasonable minds could differ as to whether an ODR hearing officer has jurisdiction to hear such denial of FAPE claims (a claim seeking remedies for the educational harms of non-compliance as opposed to remedies for non-compliance itself). But the Parent raises no such claims and makes no such demands.

The Charter Provided Appropriate Special Education in Math

There is no evidence that the Charter's math programming was inappropriate for the Student. Rather, all evidence indicates that the special education math programming offered through the Student's various IEPs were appropriate at the time that they were offered. The Student was subjected to multiple comprehensive assessments, which included assessments of the Student's math skills and abilities. Most of those assessments have been litigated already. To the extent that the previously litigated assessments were deficient, those deficiencies had nothing to do with math. The Parent raises no challenge to math assessments that have not been already litigated.⁷ The math programming in the Student's IEPs follows directly from the appropriate and unchallenged math assessments. This is what the IDEA requires.

The Parent challenges the way in which the Charter deviated from the math software-maker's proscribed testing format. The Parent is correct that those deviations impacted upon the Student's benchmark testing, progress monitoring, and progression through the Charter's math curriculum. The Parent, however, makes no argument as to how those changes resulted in a violation of the Student's right to a FAPE. More importantly, the Charter's evidence is more than preponderant that its mistake was a happy accident, yielding positive results for the Student. As described in the findings above, the Charter set a higher threshold for the Student to reach, thereby forcing a higher level of skill mastery and generating more robust data.

Finally, evidence of actual progress is not evidence of whether an IEP was reasonably calculated to provide a FAPE when it was offered – but evidence of actual progress is evidence of whether an LEA satisfied its ongoing FAPE obligations after an IEP is drafted and implemented. The Student's actual progress in math shows an acceleration from the 6th grade level to the 8th grade level in less than five months. The prior cases shed light upon factors contributing to the Student's math progress before December 2020. The Student's participation in the Charter's math program from December 2020 onward resulted in an inarguably meaningful educational benefit.

For the foregoing reasons, I find that the Charter did not violate the Student's right to a FAPE regarding math programming.

The Charter Provided Appropriate Speech-Language Programming

⁷ Some of the more recent math assessments also related to the Parent's meaningful participation claim, discussed below.

There is no evidence that the Charter's speech-language programming was inappropriate for the Student. Rather, all evidence indicates that the speech-language programming offered through the Student's various IEPs were appropriate at the time that they were offered. Even so, the impact of the prior due process decision compels a more granular, time-specific analysis.

In October 2020, Hearing Officer Jelley reviewed the February 2020 IEP and the evaluations used to craft that document. Hearing Officer Jelley said:

As the [Independent Educational Evaluation] report did not include updated speech and language assessment data, the team included the 2016 IEE speech data and the speech therapist's limited data from the 2018 school year. ... After reviewing the reevaluation report, along with the applicable IDEA and Pennsylvania standards, putting aside the stale data and the multiple copies of the reports, I now find the academic, behavioral, cognitive and executive functioning, OT, behavioral, social, emotional data in the January 4, 2020 reevaluation represents a comprehensive evaluation of the Student's needs. At the same time, I seriously doubt the accuracy of the 2016 four (4) year old IEE speech data's instructional relevance. Given that the Student has not been involved in ongoing speech therapy for more than one school year, I now find the speech 2016 speech data stale and needs to be updated. Therefore, I will now Order the Charter school to complete an updated speech evaluation.

From there, Hearing Officer Jelley went on to examine the February 2020 IEP, found that it was deficient in several ways, ordered corrections, and denied the Parent's demand for compensatory education.

In the instant case, the Parent alleges that the District violated the Student's right to a FAPE in relation to speech-language programming in the 2020-21 and 2021-22 school years. The portion of the 2020-21 school year from the start of the school year through October 30, 2020, has been previously litigated. I will not address that portion. Going forward, the February 2020 IEP was in place through November 12, 2020. Hearing Officer Jelley found that the Parent was not entitled to a remedy for deficiencies in the February 2020 IEP, and so the Parent is not entitled to remedies for the period from October 30, 2020, through November 12, 2020.

On November 12, 2020, the parties agreed to secure the speech-language evaluation that Hearing Officer Jelley ordered. While I disagree with the Charter's analysis concerning its obligations to execute a due process order

during the appeals period, the issue is moot. The parties agreed to move forward with the ordered evaluation within the timeline that Hearing Officer Jelley set. The Charter's efforts to move the evaluation forward while COVID-19 created health, logistical, and staffing nightmares is nothing but laudable.⁸ The Charter-retained evaluator ultimately completed the speech-language evaluation and issued a report on March 26, 2021.

By necessary implication, the defects in the February 2020 IEP related to speech-language programming carried forward into the period from November 12, 2020 through March 26, 2021. Hearing Officer Jelley found that the speech-language information used to develop the February 2020 IEP was stale. With no evaluation complete until March 26, 2021, any contrary holding would make this process a *de facto* appeal of a prior decision. However, nothing in the record of this hearing establishes that the Parent or Student have a greater right to a remedy now than they did when this issue was first adjudicated. I do not (and arguably cannot) award any remedy arising out of speech-language based FAPE violations during the period from November 12, 2020 through March 26, 2021.

I am not bound by prior decisions from the period from March 26, 2021, onward. I find that the speech-language evaluation satisfied all IDEA standards. See 20 U.S.C. § 1414. The evaluation concluded that the Student had no oral expression needs requiring special education (consistent with the clinicians who worked with the Student) but rather that the Student's language needs fell within the domain of written expression. The speech-language evaluation did not include a recommendation to change the level of service that the Student received. Rather, the evaluation suggested writing goals and continuation of writing supports. The Parent does not challenge the appropriateness of the speech-language evaluation (NT 194-195) and, by April 2021, the Charter incorporated the speech-language recommendations into the Student's IEP. The Charter then worked with the Student to make meaningful progress towards those goals in the summer 2021 ESY program, and then revised the goals for the 2021-22 school year in relation to the Student's progress. All of this is consistent with IDEA mandates and none of this is evidence of a violation of the Student's right to a FAPE.

In sum, regarding the Parent's alleged denial of FAPE in relation to speech-language programming, my holdings are divided by time as follows:

⁸ The timing of the speech-language evaluation is not an issue in this case. Were it, the extreme difficulties of completing an in-person speech-language evaluation during a pandemic would surely be a factor.

- From the start of the 2020-21 school year through October 30, 2020, the matter is the subject of prior proceedings.
- From October 31, 2020, through November 12, 2020, I lack authority to determine whether the Charter's actions comply with prior orders. I am also bound by prior orders resolving the same issue, and therefore award no remedy for this period of time.
- From November 13, 2020, through the present, a preponderance of evidence supports a finding that the Charter provided a FAPE to the Student in the area of speech-language programming.

For the foregoing reasons, I find that the Charter did not violate the Student's right to a FAPE regarding speech-language programming.

The Charter Provided Appropriate Behavioral Programming

There is very little evidence in the record concerning the Student's behavioral needs. The Parent takes the position that the Student requires 1:1 support to complete written work. There is no preponderance of evidence in the record to support this claim.

In deference to the Parent's *pro se* status, I accept the Parent's alleged violation of the Student's right to a FAPE relative to the Student's behavior as an alleged failure by the Charter to provide appropriate programming to support the Student's executive functioning needs. The record concerning the Student's executive functioning needs and the executive functioning supports that the Charter provided is small in absolute terms, but is more developed than the record concerning the Student's behavioral needs.

The Charter's past efforts to provide 1:1 IA support and BCBA support, and the Parent's refusal to accept those services for the Student, is well-documented in prior decisions. After the Parent permitted the Charter to collect benchmarking data and more fully participate in the Charter's programs, both assignment completion and school grades improved significantly. I agree with the Charter: the Student's improved abilities evidence a reduced need for support. It is not as if the Charter proposed to remove supports that enable the Student to attend school and complete work. Those supports were never implemented, and so the Charter did nothing more than respond to the behaviors it observed.

I find that the Parent did not satisfy her burden to show that the Charter violated the Student's right to a FAPE in relation to the Student's behavioral needs by a preponderance of evidence.

The Charter Did Not Violate the Parent's Right to Meaningfully Participate in the Student's IEP Development

The Parent's allegation that the Charter violated her right to meaningfully participate in the Student's IEP development is broadline frivolous.⁹ At every step, the Parent was deeply involved in the IEP development process for the Student. The Charter invited the Parent to IEP team meetings, communicated with the Parent between IEP team meetings, accepted and incorporated the Parent's feedback both from meetings and in writing, revised and amended documents to conform with the Parent's preferences, and granted the Parent's evaluation requests.

The Charter agrees that it did not accept the Parent's every request. Refusing to do everything that a parent requests is not evidence of a denial of meaningful parental participation.

The math evaluations provide a good example of the Charter's responsiveness to the Parent's input. The Parent was concerned that the Student's speech-language abilities were interfering with the Student's ability to complete word problems. The Charter promptly agreed to examine the concern. The Charter's analysis supported its conclusion that the Student had difficulty with word problems, but that difficulty was not the result of a speech-language problem. The Charter's analysis was thoughtful and considered and resulted in changes to the Student's IEP. The Charter's disagreement about the speech-language bases of the Student's problem with word problems does not suggest a lack of parental participation. Rather, it suggests that the Charter took the Parent's concerns seriously, worked to validate or rule out those concerns, and developed the Student's IEP consistently with that work.

I find that the Charter did not violate the Parent's right to meaningfully participate in the Student's IEP development.

Remedies

The Parent's demands for compensatory education are addressed and denied above. The only other remedy that the Parent demands is an IEE at the Charter's expense. Hearing officers have authority to award IEEs under two circumstances. First, hearing officers may order IEEs when parents establish that an LEA's evaluation or reevaluation is inappropriate. See 34 C.F.R. § 300.502(b). Second, hearing officers may, at their own discretion, order

⁹ Determinations of frivolity are not mine to make.

LEAs to fund IEEs "as part of a hearing on a due process complaint." See 34 C.F.R. § 300.502(d).

As discussed above, there is no preponderant evidence that the Charter's reevaluations during the time in question fell short of IDEA standards. The evidence is to the contrary. There is also no evidence suggesting that I should exercise my discretion to compel an IEE. Subjecting the Student to more testing now is legally unnecessary and, perhaps, educationally contraindicated.

An appropriate order follows.

ORDER

Now, April 1, 2022, it is hereby **ORDERED** as follows:

1. The Charter did not violate the Student's right to a FAPE during the 2020-21 and 2021-22 school years by failing to provide appropriate special education related to the Student's math, speech-language, and behavioral needs.
2. The Charter did not violate the Parent's right to participate in the Student's IEP development during the 2020-21 and 2021-22 school years.
3. The Parent's demands for relief are **DENIED**.

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

/s/ Brian Jason Ford
HEARING OFFICER