

*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**

### **Closed Hearing**

#### **ODR File Number**

25859-21-22

#### **Child's Name**

S.S.

#### **Date of Birth**

[redacted]

#### **Parents**

[redacted]

#### *Counsel for Parents*

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#### **Hearing Officer**

Michael J. McElligott, Esquire

#### **Date of Decision**

07/20/2022

## Introduction

This special education due process hearing concerns the educational rights of S.S. ("student"), a student who attended the City Charter High School ("Charter School").<sup>1</sup> The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA").<sup>2</sup> The parties disagree over whether the Charter School provided an appropriate placement and programming for the student.

The student's parents claim that the Charter School denied the student a free appropriate public education ("FAPE") through various acts and omissions related to the student's enrollment at the Charter School over the period December 2019 through the end of the 2020-2021 school year. Analogously, the parents assert these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").<sup>3</sup> Furthermore, the parents claims that the Charter School acted with deliberate indifference toward the student's needs and, therefore, make a claim for disability discrimination under Section 504.

Parents seek remedies in the form of compensatory education during the student's enrollment at the Charter School, as well as tuition reimbursement for their unilateral enrollment of the student in a wilderness education program in the spring of 2021 and an out-of-state residential placement beginning in the 2021-2022 school year, including an order for a continuing prospective placement in the residential placement for "any

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<sup>1</sup> The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

<sup>2</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *generally* 22 PA Code §§711.1-711.62 ("Chapter 711").

<sup>3</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See *also* 22 PA Code §711.3(c).

additional years required for (the student) to complete (the residential placement's) programs".<sup>4</sup> Additionally, the parents seek certain reimbursements for fees and reports required for attendance at the residential placement.

The Charter School counters that at all times it met its obligations to the student under IDEIA and Section 504, based on its experience with the student and in light of the information it was provided by the family. Accordingly, the Charter School argues that the parent is not entitled to any remedy.

For reasons set forth below, I find that the Charter School met its obligations to the student over the period in question and implemented appropriate programming, in an appropriate placement, for the student.

### **Issues**

1. Did the Charter School deny the student FAPE in its handling of the student's placement/programming over the period August 2019 through the summer of 2021, when the student dis-enrolled from the Charter school?
2. Has the District treated the student with deliberate indifference, amounting to discrimination against the student on the basis of disability?
3. If either/both of the questions is/are answered in the affirmative what, if any, remedy is owed to the student or parents?

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<sup>4</sup> Complaint at page 19.

## **Findings of Fact**

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

### ***Schooling Prior to the Charter School***

1. Prior to enrolling at the Charter School, the student attended a local school district. In June 2014,[redacted] the school district evaluated the student. (Parents Exhibit ["P"]-2).
2. In the June 2014 evaluation report ("ER"), as part of parent input, the following were noted: "Longstanding behaviors for which discipline has been required include screaming, hitting, inappropriate language, throwing things, or knocking things over when (the student) does not get (the student's) way. (The student's) father reported that (the student) can be very demanding when (the student) does not what (the student) wants, and can get very upset. (The student also avoids doing things like taking showers or baths, brushing...teeth, or doing...homework by running around or hiding. (The student) can get very upset when...parents want (the student) to do these thigs and (the student) does not want to. (The student's father) stated that (the student) does not have much patience. (The student) also gets distracted easily, and has trouble focusing." (P-2 at page 2).
3. In the June 2014 ER, as part of teacher input, the student's teachers noted lack of focus, distractibility, task-approach skills, not following directions, assignment completion, and making

irrelevant/inappropriate remarks. Off-task behavior was noted by the school district evaluator. (P-2 at pages 3-4).

4. Only two months prior to the evaluation, in March 2014, the student had been medically diagnosed with attention deficit hyperactivity disorder ("ADHD"). (P-2 at page 5).
5. The most recently available grades in the 2013-2014 school year, showed that the student had perfect attendance all school year, and earned Bs and Cs (with a 3<sup>rd</sup> quarter A in spelling), with qualitative assessments as "performing satisfactorily" or "commendable". (P-2 at page 6).
6. Cognitive testing in the June 2014 ER indicated that the student had a full-scale IQ of 84. The evaluator noted that examination of the index scores that make up the full-scale IQ gave a better indication of the student's cognitive profile where verbal comprehension ability and processing speed indices were relative strengths (95 and 94, respectively), while perceptual reasoning and working memory indices were relatively weak (80 and 82, respectively). The matrix reasoning sub-test within the perceptual reasoning was noted as particularly weak. (P-2 at pages 6-7).
7. The June 2014 ER contained achievement and curriculum-based assessments, which were all commensurate with the student's cognitive profile, although there was a relative weakness in math problem-solving. None of the student's achievement scores were statistically discrepant from the cognitive ability and the student's grade-level and curriculum-based assessments indicated that the student did not have specific learning disabilities. (P-2 at pages 7-15).

8. The June 2014 ER contained assessment for ADHD in the school environment. Both teachers rated the student as displaying behavior consistent with the diagnosis of ADHD/inattentive type. (P-2 at pages 12, 15).
9. The June 2014 ER concluded that the student had a disability (ADHD/inattentive type) but did not require specially-designed instruction to address the disability. Therefore, the student did not qualify for special education and the evaluator recommended that the student be provided with a Section 504 plan/Chapter 15 service agreement for modifications to address the student's ADHD in the regular education environment. (P-2 at pages 13-17).
10. At some point after this June 2014 evaluation process, the student was re-evaluated by the school district in the 2016-2017 school year, [redacted], and was found to be eligible for special education as a student with a health impairment. This re-evaluation report ("RR") was not made part of the record. (P-8 at pages 2-3, 20).
11. In the 2016-2017 school year, [redacted], the student's cognitive ability was assessed with a full-scale IQ of 80, in the low average range. Achievement testing showed scores in the average and low average ranges, except for numeric operations and math reasoning along with the math composite score, all of which were in the low range. In the [2016-2017] RR, the student was not found to be eligible as a student with a specific learning disability. (P-8 at pages 3-4, 20).

***2018-2019 School Year [redacted]***

12. The student enrolled at the Charter School in the 2018-2019 school year, [redacted]. The student would be expected to take a high school diploma in June 2022. (School District Exhibit ["S"]-9 at page 1).
13. The Charter School serves students in 9<sup>th</sup> – 12<sup>th</sup> grades, "looping" each class year so that the students in each class have the same class-level principal and teachers throughout the four years of enrollment. The Charter School also operates on a year-long trimester system, with significant breaks of approximately one month between trimesters. The first trimester in the school year is from late August to early December, the second trimester is from early January to early April, and the third trimester is from early May through late July. (NT at 577-578).
14. In September 2018, the Charter School issued a re-evaluation report ("RR") for the student. (P-8).
15. The September 2018 RR contained updated cognitive testing, yielding a full-scale IQ of 89 with patterns on indices and sub-tests very similar to prior cognitive testing. (P-8 at pages 8, 12-15).
16. The September 2018 RR contained updated achievement testing. The student's achievement testing showed statistically discrepant scores in mathematics, with certain identified weaknesses in reading and written expression. (P-8 at pages 8-10, 15-20).
17. The September 2018 RR contained behavior rating scales completed by two Charter School teachers. Neither teacher rated the student as at-risk or clinically-significant in any area, although the evaluator noted that the teacher had, at the point of the rating and re-

evaluation, worked with the student for only a few weeks. (P-8 at pages 11, 21).

18. The September 2018 RR identified the student as a student with specific learning disabilities in basic reading, reading comprehension, math reasoning, math computation, and written expression. The evaluator recommended that, at least as of the point of the issuance of the RR, the student was not exhibiting needs related to ADHD and did not recommend identifying the student as a student with a health impairment. (P-8 at pages
19. In October 2018, the student's individualized education program ("IEP") team drafted an IEP. In May 2019, the student's IEP was revised. (P-11; S-2).
20. The May 2019 IEP revisions included updated levels of academic and functional performance. The parents reported that the student's behaviors at home were escalating. The Charter School indicated that it was not seeing any behavioral difficulty in educational environments but offered to host in the school environment a private counselor who was providing services to the student through the family's private medical insurance. (P-11 at page 8; S-2 at page 8).
21. Curriculum-based assessment in the 2018-2019 school year in reading showed scattered scores in reading throughout the school year, with significant progress near the end of the year; the assessment in mathematics showed gradual progress throughout the school year, with a dip in scores at the end of the year. (S-4).
22. In the 2018-2019 school year, the student had perfect attendance and was tardy four school days. The student's final grades were an assortment of As, Bs, and Cs. The student had one



disciplinary incident, using profanity on a school field trip, resulting in a verbal reprimand. (S-9 at pages 1-2, S-11 at page 1, S-10 at page 1).

***2019-2020 School Year [redacted]***

23. The October 2018 IEP, with May 2019 revisions, was in place at the outset of the student's [2019-2020 school year]. (P-11; S-2).

24. In October 2019, the student's IEP was revised as part of the annual IEP process. (S-3).<sup>5</sup>

25. The October 2019 IEP included updated levels of present academic and functional performance, including the updated psychological diagnoses. In the run-up to the meeting, the family shared with the Charter School that the student had been clinically diagnosed with, and was receiving therapeutic intervention for, ADHD/inattentive type, disruptive mood dysregulation disorder, and unspecified anxiety disorder. (P-10 at pages 3-4; S-3 at page 13).

26. In the October 2019 IEP, on curriculum-based assessments, the student's reading scores were flat, and mathematics scores showed progress. On the October 2018 IEP goals, the student showed progress over the previous school year, and some goal mastery, on the October 2018 IEP goals. (S-3 at pages 16-19, 21-22).

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<sup>5</sup> P-13 was referenced in the hearing, but the exhibit contains highlighting of certain material throughout the IEP. Therefore, S-3—the same document, also admitted to the record—is cited as it has not been manipulated prior to being offered in the record.

27. The October 2019 IEP contained four goals, one each in mathematics problem-solving, mathematics calculation, reading comprehension, and writing. (S-3 at 36-57).
28. The October 2019 IEP contained specially-designed instruction and program modifications for implementation as of October 2019. (S-3 at pages 58-59).
29. In the 2019-2020 school year, as of December 2019 (roughly the end of the first trimester of the school year), when parents assert their claims, the student had three excused absences, one unexcused absence, and no tardies. The student's first trimester grades were Bs and Cs, with an A in Workforce class. As of December 2019, the student had no disciplinary infractions. (S-9 at pages 3-4, S-11 at page 2, S-10 at page 2).<sup>6</sup>
30. To this point in the student's education at the Charter School, in December 2019 at the end of the first trimester [redacted], Charter School witnesses testified credibly that, while aware of difficulties the student had outside of school and in the home environment, the student's attendance and behavior at the Charter School were not problematic in any way. This testimony is credited and accorded heavy weight. (See *generally* NT at 206-297, 346-415, 568-630).
31. In early February 2020, the student was involved in a significant disciplinary incident at the Charter school. Upon smelling marijuana, school administrators and school safety officials discovered marijuana on the student and a half-smoked marijuana cigarette in the student's

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<sup>6</sup> "Workforce" is a schoolwide class where students work on, and are assessed on, consistent workforce skills such as appearance, rule-following, engagement, and appropriate language.

locker. The student was determined not to be under the influence of marijuana. (S-10 at page 2; NT at 572-574).

32. The student was out of school for twenty school days, until early March 2020, attending an out-of-Charter School disciplinary placement in the interim. (S-9 at page 4, S-10 at page 2; NT at 572-574).
33. In mid-February 2020, in the midst of the student's absence from the Charter School, the October 2019 IEP was revised to include scheduled breaks for longer class periods. (S-3 at page 22).
34. On March 5, 2020, the student returned to the Charter School and attended school for six school days without absence or tardiness through Thursday, March 12, when the Charter School unilaterally closed due to a parent testing positive for COVID-19. The Charter School was closed on Friday, March 13, after which all Pennsylvania schools were closed statewide due to the COVID-19 pandemic. (S-9 at page 4; NT at 575-576).
35. The school closure came near the end of the second trimester, so all students were provided with asynchronous work packets to complete for remaining assignments in the second trimester. (NT at 265-266, 575-577).
36. In April 2020, the October 2019 IEP was revised. This revision was standard across all Charter School IEPs to reflect the impact of the COVID-19 school closure. (S-3 at pages 10-13; NT at 261-262, 270-271).
37. By the end of the second trimester, the student was making measurable progress on the math problem-solving goal, math

calculation goal, reading comprehension goal, and writing goal. (S-3 at pages 38, 44, 49, 56; NT at 261-267).

38. The student's second trimester grades were Cs with two Bs. (S-11 at page 2).
39. In the third trimester, early May through late July 2020, students completed asynchronous work, with daily check-ins, instruction, and support from teachers in a virtual environment. Teachers were available daily, in either a morning session or afternoon session. (NT at 265-267).
40. In the third trimester, the student mastered the mathematics problem-solving goal and the math calculation goal. The student made sizable progress on the reading comprehension goal. Assessment of the writing goal—independent writing— was impacted by the distance-learning environment so progress could not be measured. (S-3 at pages 39, 46, 51, 57).
41. The student's second trimester grades were Bs with one C and one A. The student's final grades [redacted] were mostly B or B-, with three Cs and one A-. (S-11 at page 2).
42. The student was absent two days in the third trimester. (S-9 at page 4).
43. In late June, the student's mother contacted a crisis intervention team regarding at-home behavior. (P-30 at page 43).

***2020-2021 School Year [redacted]***

44. The October 2019 IEP, with February and April 2020 revisions, was in place at the outset of the student's [2020-2021 school year]. (S-3).
45. In the first trimester of the 2020-2021 school year, the Charter School's reopening health-and-safety plan provided continued a distance-learning platform. All instruction was synchronous and presented live by Charter School teachers, with students attending either a morning session or an afternoon session. Each Wednesday was available for live, in-person instruction at the Charter School if a student signed up for that session. (NT at 578-583).
46. Prior to the Labor Day weekend, the student's mother contacted a crisis intervention team regarding at-home behavior. (P-30 at page 34).
47. Over the Labor Day weekend in early September 2020, the student's behaviors led parents to seek [treatment at a mental health unit of a local hospital](P-15; NT at 99).
48. In September 2020, after [seeking treatment] at the local hospital, the student's family began family-based mental health services. (P-16 at pages 11-14).
49. In mid-September 2020, the October 2019 IEP was revised. The IEP team met to consider a return to live instruction. The Charter School had not returned to in-person instruction but offered daily contemporaneous learning support during instruction, daily small group learning support during independent work period, and attendance at the weekly Wednesday in-person session, in addition to the modification of all work. (S-3 at pages 10, 59-60).

50. Shortly after the mid-September 2020 IEP meeting, the student was reportedly having [severe mental health struggles] at home, including carrying a knife with paranoia about self-defense, unsafe behavior and associations in the community, unkempt hygiene, and suicidal ideation. (P-30 at page 23).
51. The student was admitted [redacted] to an in-patient psychiatric hospital from mid-September 2020 through early October 2020. The student was transferred to a partial hospitalization setting from early October 2020 through mid-November 2020. (P-19 at page 12, P-30 at page 23, P-31; S-9 at page 6).
52. In October 2020, the student's IEP was revised as part of the annual IEP process while the student was in the therapeutic-based settings. (P-19; S-5).<sup>7</sup>
53. As part of the October 2020 IEP processes, the Charter School requested permission to re-evaluate the student.
54. In mid-November 2020, the student was discharged from the partial hospitalization program and returned to the Charter School. (P-19 at page 12).
55. In mid-November 2020, the Charter School issued its RR. (P-20; S-6).<sup>8</sup>
56. The November 2020 RR included updated cognitive testing, yielding a full-scale IQ score of 63. Given the results of previous cognitive testing, the evaluator noted that this score is likely not an

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<sup>7</sup> Each party produced a copy of the October 2020 IEP, with subsequent revisions. To reduce duplication in this decision, citation will be made to P-19.

<sup>8</sup> Each party produced a copy of the November 2020 RR. To reduce duplication in this decision, citation will be made to S-6.

accurate indicator of the student's IQ. Using instead a sub-index composite score, the student's intellectual ability was scored at 77. This score, while in the low range, was more in line with the student's previous cognitive testing. (S-6 at pages 12-14; NT at 304-334).

57. The November 2020 RR contained achievement testing, which showed that the student's patterns of achievement remained similar to previous testing. Scores in reading and written expression, in fact, were more in line with age-level expectations in the average or low-average ranges. The evaluator opined that the student no longer qualified as a student with specific learning disabilities in reading or written expression. (S-6 at pages 14-16; NT at 304-334).
58. Behavior rating scales were contained in the November 2020 RR. The student's self-report was clinically significant for personal adjustment composite and the school problems composite and emotional adjustment indices. The student's mother reported clinically significant scores (externalizing problems and internalizing problems composites) and at-risk scores (behavioral symptoms index and adaptive skills composite) across all four composites/indices. A teacher reported a clinically significant scores in the school problems composite. (S-6 at pages 16-21).
59. The evaluator concluded that all of the data in the November 2020 RR indicated "at this time (the student's) mental health symptoms indicate a need for greater support". The evaluator recommended that the mental health diagnoses form the basis for health impairment as the student's primary disability with specific learning disabilities in math problem-solving and math computation as secondary disabilities. (S-6 at page 21).

60. The evaluator recommended that, as soon as in-person instruction was available to the student, that the student return to in-person instruction. (S-6 at page 24).
61. In November 2020, the October 2020 IEP was revised in light of the results of the November 2020 RR. (P-19; S-5).
62. The November 2020 IEP revisions included three goals, one each in organization/assignment-completion, self-advocacy, task engagement, math calculation, and mathematics problem-solving. (P-19 at pages 44-58).
63. The November 2020 IEP revisions included a modification, once in-person instruction resumed, allowing the student to have immediate and unquestioned access to the counseling office/wellness team at the Charter School. (P-19 at page 67).
64. The IEP team discussed possible alternative placements, including specialized programs or a return to the student's school district of residence. Either due to non-qualification, or not being supported by the parents, those placements were not pursued. (NT at 633-718).
65. After returning to virtual learning, and Wednesday live sessions, at the Charter School, the student attended throughout the remainder of the first trimester through November and December 2020. (S-9 at page 6).
66. The student's first trimester grades, through the partial hospitalization program and return to the Charter School were Bs with one A, one C and one D. (S-11 at page 3).



67. In early January 2021, the student received referrals on two different days for exiting the virtual class setting without notifying the teacher. (S-10 at page 3).
68. In January 2021, in the home environment, the student was involved in a threatening incident with a weapon and was admitted to a psychiatric in-patient setting. (NT at 108-110).
69. In January 2021, the October 2021 IEP was revised to reflect new information and concerns from the parents. The student's mental health diagnoses were updated with diagnoses of Bi-Polar Disorder (possibly induced by cannabis), Major Depressive Disorder, Oppositional Defiant Disorder. (P-19; S-5).
70. In mid-February 2021, the student was discharged from the in-patient psychiatric setting. By that time, the Charter School had returned to in-person instruction for certain students, and the student was selected to return to in-person instruction. The student began to attend regularly the Charter School in person. (S-9 at page 6; NT at 110-113, 583-586).
71. In mid-March 2021, the student left an in-person class without permission and cut class. (S-10 at page 3).
72. In mid-March 2021, the student stopped attending at the Charter School. (S-9 at pages 6-7; NT at 112-113, 592-596).
73. The student's second trimester grades, through the mental health setting and return to the Charter School, were Cs with one A, and one D. (S-11 at page 3).
74. Before leaving the fine-grain fact-finding related to the Charter School, it must be noted as a fact that the parents were hesitant to

share with the Charter School certain information about the student's mental health needs and specific home-based incidents related to those needs; even where information was shared, at times it was in a general fashion, without details or documentation. (See generally P-10, P-42; S-12, S-13, S-15, S-16; See generally NT at 206-297, 346-415, 568-630, 633-718, 727-782).

75. Finding of Fact 74 is not meant to cast a shade on parents or to imply that they have acted in bad faith. As difficult as many of these situations were, it is understandable that parents were reticent to share many details. But to read this record, as laid out in the fact-finding, the appearance that all of this information was shared contemporaneously with, or in detail with, the Charter School would not be accurate. (S-18; NT at 633-718).

76. In April 2021, the parents began to investigate specialized placements outside of the Charter School and enrolled the student in an out-of-state wilderness education program. (P-34; NT at 114).

77. By May 2021, as part of registration and participation with the wilderness education program, the student underwent a psychological evaluation. (P-1, P-34, P-35).

78. The May 2021 private evaluation report detailed the student's extensive mental health history, including treatment with a private psychiatrist, family-based therapy, medication, and hospitalizations. The report included self-reported information about the student's marijuana use, which the student characterized as daily and addictive. (P-1 at page 5).

79. The May 2021 private evaluation report included information from the wilderness education program and roughly summarized evaluation results from the Charter School. (P-1 at pages 6-7, 21).
80. The May 2021 private evaluation report included cognitive testing, yielding a full-scale IQ of 72. (P-1 at pages 8-9).
81. The May 2021 private evaluation report included achievement testing, which was largely in line with the student's achievement from the November 2020 RR performed by the Charter School. The student exhibited achievement scores generally above the low cognitive testing, with specific weakness in multiple areas of mathematics. (P-1 at pages 12-14).
82. The May 2021 private evaluation report also included assessment in memory, executive functioning, autism, cognitive style, personality testing, and substance abuse screener. (P-1 at pages 9-11, 14-20).
83. The private evaluator diagnosed the student with an other specified neurodevelopmental disorder, ADHD/combined type, specific learning disorder in mathematics, major depressive disorder, and cannabis use disorder. (P-1 at pages 22-23).<sup>9</sup>
84. The private evaluator made nine recommendations. Of the nine recommendations, only three (#5, #6, and #7) are educational in

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<sup>9</sup> The private evaluator, noting the student's IQ score of 63 from the November 2020 RR, also opined that a borderline intellectual functioning diagnosis might need clinical attention. (P-1 at page 23). Here, the Charter School's school psychologist explanation in the November 2020 RR that this score is unlikely to be a true representation of the student's cognitive ability is credited. The student's consistently higher, and internally consistent, achievement testing, along with the lack of any functional life skills deficits (outside of those grounded in the student's mental health needs and/or cannabis use), support the conclusion that the student does not have an intellectual disability.

nature. The remaining six are therapeutic, mental health, safety in personal settings, or home-based (nutrition and sleep). (P-1 at pages 23-24).

85. Following completion of the wilderness education program, the student was directly enrolled in an out-of-state residential program that provides an intensive therapeutic component [redacted] and an educational component [the school] (P-43; NT 114-116, 171-200).
86. [The residential program] is an umbrella organization with three components—therapeutic services, residential community-based housing, and the [school]. (P-43; NT at 421-514).
87. The student resides in one of a number of community-based residential settings run by [the residential program] (NT at 421-514, 786-837).
88. The student attends [the school] on a daily basis. The student receives 60 minutes weekly of individual mental health therapy along with 60 minutes weekly of family-based therapy. There is frequent interaction between the therapeutic component and the [school](as well as with the student’s residential component), including formal monthly meetings between the therapeutic component and the [school] and the residential component. (P-25, P-26, P-39, P-40; NT at 421-514, 786-837).
89. As in the Charter School, the student exhibits no problematic concerns at the [school] (aside from sleepiness during class) and progressed academically. The student’s problematic behavior is exhibited almost exclusively in the residential component, mainly in the form of elopement from the residence. (P-27, P-41; NT at 421-514, 786-837).

90. The [residential program] administrator who testified opined that the student could not take a high school diploma until 2025. (NT at 421-514).

91. In July 2021, the parents provided a ten-day notice that they intended to seek tuition reimbursement for the out-of-pocket cost of the unilateral enrollment of the student in the wilderness education program, and the residential programming. (P-38).

### ***Stipulations of the Parties***

After notifying the Charter School in July 2021 of their intention to seek tuition reimbursement for the unilateral enrollment of the student in the out-of-state programming, over the course of July 2021, the parties communicated through counsel. The parties have stipulated to the following in this regard:<sup>10</sup>

Stipulation #1. Parents sent an email to the Charter School principal on July 22, 2021 asking, in part, for all further correspondence to be sent through parents' counsel. (P-38 and S-16).

Stipulation #2. As a result, counsel for the parties began communicating regarding this matter via email on July 23, 2021.

Stipulation #3. Charter School counsel communicated with parents' counsel by e-mail on July 26, 2021, inquiring whether the parents intended to withdraw the student or whether to schedule an IEP meeting in the next week.

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<sup>10</sup> The stipulations contain certain stylistic changes, mostly the revision to names, to conform to the rest of the decision. The substance of the stipulations is verbatim. An original of the parties' stipulations is included in the case record as a hearing officer exhibit.

Stipulation #4. Both attorneys exchanged additional e-mails on July 27, 2021 and parents' counsel indicated a willingness by the parents to participate in an IEP meeting, requesting that the meeting be virtual.

Stipulation #5. Charter School counsel communicated by e-mail on July 28, 2021 to parents' counsel, offering an IEP meeting on July 30, 2021 at 2 pm.

Stipulation #6. Parents' counsel responded the same day that parents' counsel was not available on July 30 due to a hearing and was concerned that it would not be over by 2 pm. Parents' counsel proposed a phone call instead on July 30 to schedule an IEP meeting for the next week.

Stipulation #7. Charter School counsel responded and offered to move the IEP meeting to 3 pm to accommodate schedules and advised the Charter School was closed on break after July 30 until August 23, 2021.

Stipulation #8. Parents' counsel responded that she could not attend an IEP meeting in the afternoon of July 30 and inquired when the next school year began.

Stipulation #9. Charter School counsel next reached out to parents' counsel on August 25, 2021 about school starting and advising that the Charter School was available for an IEP team meeting either that Friday, August 27 between 9 AM and 12 PM or at 2:30 PM, or on Monday, August 30 between 9 AM and 11 AM, 1 PM and 2 PM, or between 3 PM and 4 PM. Charter School counsel also shared that the student had not yet been withdrawn from the Charter School, so her client was uncertain as to whether or not the student would be returning.

Stipulation #10. Parents' counsel responded on the same date advising of her unavailability and confirming that the student would not be starting the school year at the Charter School. Parents' counsel shared, though, that her schedule was fairly open the following Friday, and indicated that she

could try to coordinate with the family to determine their availability that day if it worked for Charter School counsel and the Charter School.

Stipulation #11. Following parents' counsel's confirmation that the student was not returning to the Charter School, no further attempts to schedule an IEP team meeting occurred after this email exchange.

Stipulation #12. The IEP invitation prepared by the Charter School and marked S-17 although prepared at the time in July 2021 was not sent to the parents or parents' counsel as the meeting was unable to occur as set out therein.

### **Witness Credibility**

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

### **Discussion**

The crux of the parties' dispute is the point at which the therapeutic mental health needs of a student outside of the educational setting are unrelated to, interfere with, and/or overwhelm, a local education agency's provision of FAPE.

### ***IDEIA/Denial-of-FAPE***

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§711.1-711.62). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Here, the student's mental health needs dominate the record in terms of the student's behavior in the home environment. It is clearly problematic, and one deeply sympathizes with the parents over the struggles of the student and its impact on the family. But it is very clear that in the educational environment, both at the Charter School and at the [school], the student does not exhibit any of those behaviors. It is not a matter of type or degree—the behaviors that dominate this record do not surface for the student in any educational setting.

Taken as a whole, in fact, if one parsed out from the record the educational aspects—understanding the student's learning needs, behavior needs in educational settings, and general educational records—it would be outweighed, both in size and substance, by the remainder of the record, which would focus on aspects of the student's mental health diagnoses and needs, and consequent mental health treatment.

That educational record shows that when the student was available for instruction by the Charter School (either pre-COVID pandemic, virtually as necessitated by the pandemic, in collaboration when the student was



admitted to mental health settings, or in-person again in the spring of 2021), the student made meaningful education progress in the form of significant learning given the student's individual needs.

In light of the student's academic needs, the Charter School comprehensively identified the student's needs and designed IEPs that appropriately addressed those needs, as exhibited by the goal-progress and earned grades within the Charter School curriculum. The student's attendance was not problematic except for those periods where mental health needs led to hospitalizations or mental health placements. Too, the educators testified uniformly, and it is accorded heavy weight, that the student was a respectful learner, authentically seeking to engage learning.<sup>11</sup>

Of course, the impact of the COVID-19 school closure and necessary return-to-instruction planning for the 2020-2021 school year impacted the student, as it did every student. But the record supports a finding that the Charter School appropriately identified how to support the student, made modifications to its planning where necessary and ultimately allowed the student to continue to making goal progress (even goal mastery) over the period of the school closure and virtual learning in the third trimester of 2019-2020 and the first trimester of 2020-2021. The data for the beginning of the second trimester of 2020-2021, interrupted by a mental health episode and hospitalization, is less explicit, but that is a matter of circumstance rather than a lack of Charter School diligence.

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<sup>11</sup> At various points in the record, the student's hygiene or attention to appearance was described as problematic. The Charter School educators also testified that they never saw anything, in person certainly, that made them note such instances, let alone any concerns in that regard. This testimony is credited—it was wholly natural and unscripted. In fact, some Charter School witnesses seemed genuinely confused as to why they would be asked about the issue. Again, this is not to say that the parents' testimony in this regard and that of the private evaluator are disingenuous. But it is the considered opinion of this hearing officer that, indeed, as the student entered acute mental health episodes, the student's hygiene may have deteriorated. But where the student's mental health needs were not overwhelming the student, which was the case when the student attended the Charter School, it was less of an issue, if an issue at all.

In sum, the Charter School provided FAPE to the student over its involvement with student from the period August 2019 through the spring of 2021, when the student left the Charter School. There is no basis to award compensatory education.

This finding also does not support parents' claim for tuition reimbursement for the wilderness education program or the enrollment at [the residential program]. In considering these claims, long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a charter school has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985)). A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148; 22 PA Code §711.3(b)(14)).

In the three-step Burlington-Carter analysis, the first step is an examination of the charter school's proposed program, or last-operative program, and whether it was reasonably calculated to yield meaningful education benefit. As set forth above, both as designed and implemented, the Charter School program was reasonably calculated to provide, and did provide, the student with significant learning.

Step two of the Burlington-Carter analysis involves assessing the appropriateness of the private placement selected by the parents. Here, a residential, out-of-state setting opens up the necessary consideration of educating the student in the least restrictive environment ("LRE"). The provision of FAPE also requires that the placement of a student with a disability take into account the LRE for a student. Educating a student in the LRE requires that the placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting as close as

possible to regular education, especially affording exposure to non-disabled peers. (34 C.F.R. §300.114(a)(2); 22 PA Code §711(b)(11); Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

The residential, out-of-state placement is inappropriate on a number of levels. First, echoing the overarching theme of this record, it is first and foremost a therapeutic mental health placement. The testimony of the two witnesses from [the residential program] sound in how the student's mental health needs are addressed—across settings, in therapy, in residence, and at the school—and only in a secondary way as to how the student is educated.

Second, the LRE concerns above are significant. The student's placement is nearly as restrictive as can be imagined on the placement continuum: a full-time residential placement, thousands of miles from the student's home, in a program which affords no exposure to regular education peers (as all students enrolled [in the residential program] have the need for the heavy therapeutic component offered there). It may be a program that is meeting some of the student's needs, and parents are satisfied with it; but there is no doubt that, educationally, the student's needs can be met in a far less restrictive environment. In fact, those needs were met, and could continue to have been met, at the Charter School.

There is perhaps no better evidence of this than the recommendations of the private evaluator. In her May 2020 report, she makes nine recommendations. Only three of those are educational in nature and all three—functional academics, job coaching/executive functioning strategies, and liaising between the family and state-based vocational rehabilitation services—are things, should the student's IEP team think those were appropriate, that could be made part of the Charter School programming. Nothing about the educational recommendations requires anything near what the student is experiencing in the residential, out-of-state placement.

Third, as an aspect of this LRE concern, the administrator from the [school] testified that she did not envision the student taking a diploma until sometime in 2025. Even given the student's mental health struggles, nothing in this record supports a notion that this student, who began high school at the Charter School [redacted] in the fall of 2018, should take approximately seven years to complete high school. It may be that the mosaic of the student's mental health needs might necessitate that the student stay in the [residential program] to meet mental health treatment goals. But for this student to be in planned-for high school programming for an additional three years from the writing of this opinion is a position which cannot be supported.

Therefore, even if one were inclined to view the student's experience at the Charter School as somehow denying the student the opportunity for, and the experience of, significant learning, parents' claims for tuition reimbursement must fail at step two of the Burlington-Carter analysis.

To the extent that the local education agency's programming is inappropriate, and the unilateral private placement is appropriate—a situation which is not present at either step one or step two, at step three of the Burlington-Carter analysis, the equities must be balanced between the parties. Arguably, no analysis is needed here. But this hearing officer feels the need to point out that both parties have acted honorably, and equitably toward each other, in collaborating over the student's learning.

Taken all together, the Charter School provided FAPE to the student from the period August 2019 through the time the student left the Charter School in the spring of 2021. The record as a whole does not support that compensatory education or reimbursements should be awarded.

### ***Section 504/Denial-of-FAPE***

Section 504 also requires that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §711.3(c)). The provisions of IDEIA/Chapter 711 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See *generally* P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009)).

Therefore, the foregoing analysis is adopted here— the Charter School met its obligations to the student to provide FAPE over the period August 2019 through the time the student left the Charter School in the spring of 2021.

### ***Section 504/Discrimination***

Additionally, the provisions of Section 504 bar a local education entity from discriminating against a student on the basis of disability. (34 C.F.R. §104.4; 22 PA Code §711.3(c)). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against on the basis of disability, has been subject to disability discrimination in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F.3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in its purported acts/omissions. (S.H., *id.*).

Here, the Charter School did not act with deliberate indifference toward the student. On this record, the Charter School has always sought to program effectively for the student. It communicated with the family and responded to the family's requests and the student's needs, as it reasonably could, based on the information that was provided to it by the parents.

Plainly, there was never any indifference toward the student, deliberate or otherwise, on the part of the Charter School.

Accordingly, the Charter School has not acted with deliberate indifference toward the student.

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By way of dicta, this hearing officer must acknowledge how consideration of this record is somewhat deflating. The parents are earnest and clearly have worked diligently to find a way forward with their child's education in the face of overbearing mental health needs. And the Charter School has always striven to provide, and in fact did provide, a free appropriate public education to the student as it knew the student and based on the information provided to it. Both parties are to be commended. One's final thoughts are with the student, who, one hopes, will overcome these mental health challenges and will find future success.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the City Charter High School met its obligations to provide a free appropriate public education for the student at all times over the period August 2019 through the spring of 2021 when the student stopped attending the Charter School.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire  
Special Education Hearing Officer

07/20/2022