

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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR No. 28514-23-24

Child's Name:

I.M.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles W. Jelley Esq.

Decision Date:

March 15, 2024

OVERVIEW OF THE DISPUTE

On September 7, 2023, the Parent filed a special education due process hearing Complaint under the Individuals with Disabilities Education Act (IDEA), 20 USC § 1400 *et seq.*¹ The Parent alleges the Charter school failed to properly locate, evaluate, and educate the Student in the least restrictive environment. Applying IDEA jargon, the Complaint alleges a child find and a denial of a free appropriate public education (FAPE) violation. The Parent first seeks an award of compensatory education for past violations. The Parent next seeks an Order directing the Charter to make a prospective educational placement at the Charter school's expense in another educational setting.

The LEA denies all claims and seeks a declaratory ruling that its evaluation, eligibility determination, and offer of a FAPE were at all times appropriate. After carefully reviewing the record and closing statements, I am now ready to rule. For all the reasons and conclusions that follow, I now find in favor of the Parent and against Lab Charter. Therefore, Lab Charter is now Ordered to remedy all procedural and substantive violations as follows.

ISSUE

¹ Except for the cover page, identifying information is omitted to the extent practicable. The Parent's claims arise under 20 USC §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 CFR §§ 300.1-300.818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 711 (Chapter 711). References to the record throughout this decision will be to the Notes of Testimony (NT p. #), Parent Exhibits (P-) followed by the exhibit number, Charter School Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Except for the cover page, identifying information is omitted to the extent practicable.

1. Did Lab Charter fail to properly evaluate and educate the Student during the 2022-2023 school year? If the answer is yes, is the Student entitled to an award of compensatory education?
2. Did Lab Charter fail to properly educate the Student during the 2023-2024 school year? If the answer is yes, is the Student entitled to an award of compensatory education? Alternatively, does the record support an Order directing Lab Charter to make a prospective placement for the remainder of the 2023-2024 school year and into the 2024-2025 school year?

FINDINGS OF FACT

THE INITIAL EVALUATION

1. The Student is in [redacted] grade at Laboratory Charter School (Lab Charter). (P-1; P-2; S-3).
2. The Student started at Lab Charter at the beginning of the [redacted] grade school year in 2022-2023. (P-1; P-2). At the time of the Student's enrollment at Lab Charter, the Student was not identified as a person with a disability. Shortly after enrollment, the Mother provided Lab Charter with the Student's clinical diagnoses of Attention Deficit Hyperactivity Disorder (ADHD), Post-Traumatic Stress Disorder (PTSD), Oppositional Defiant Disorder (ODD), and Impulse Control Disorder. (P-1; P-2).
3. On August 29, 2022, a meeting was held to develop and review an Individual Student Safety Plan. The record indicates that the Student was fighting in school and walking out of class – eloping. The Parent and the staff agreed that the Student needed a regular education behavioral intervention plan. During the Safety Plan meeting, the Mother stated that the Student also needed social skills instruction. (P-1; P-2; S-9; NT pp.170-175).
4. On September 29, 2022, a Family Intervention Meeting was held. The following concerns were discussed: fighting/aggression towards peers in and out of the classroom, destroying school property, and walking out of class.

Action steps included linking the Parent with community resources and providing the Parent with a copy of the school handbook. Lab Charter staff agreed to create a regular education daily behavior chart to track misconduct. (P-1).

5. A Permission to Evaluate was reportedly completed and returned in October 2022. The form was not included in the record. (P-1; P-2).
6. On December 8, 2022, Lab Charter staff completed the evaluation report (ER). The Student refused to complete the intelligence – IQ assessment - and achievement testing during the evaluation. After reviewing the report, during a Zoom meeting in January 2023, the Mother expressed concerns that the evaluation was incomplete and inaccurate. (P-1).
7. The evaluation report included one behavioral rating scale, the Behavior Assessment System for Children 3rd Edition (BASC-3). Based on the single BASC-3 score, the evaluator concluded that the Student met the eligibility criteria for the primary IDEA diagnosis of a Student with an Emotional Disturbance and a secondary diagnosis of Other Health Impairment (OHI). The evaluator relied on the Student's private evaluation of Attention Deficit Hyperactivity Disorder (ADHD), combined type, for the OHI conclusion. (P-1, P-2). The report does not factor in or discuss the other known disabilities. *Id.*
8. On January 6, 2023, the parties participated in a virtual Individualized Education Program (IEP) meeting. At the meeting, Lab Charter staff prepared a "DRAFT IEP." The "DRAFT IEP" included Reading Comprehension, Counseling, Attention to Task, and Behavior goals. The behavior goal targeted completing assignments. The IEP also stated that the Student would receive the following related services: Counseling – Individual – Twice weekly for 15 minutes and Social Skills – Group – once weekly for 39 minutes. The Student was not determined to be eligible for Extended School Year services. Although the box was checked, indicating the need for a positive behavior support plan and a functional behavioral assessment, the IEP did not include

either. The IEP also omitted specially designed instruction targeting the Emotional Disturbance disability. The IEP also omitted ADHD-related executive functioning, organizational, and concentration deficits mentioned in the BASC-3. (P-10; S-3 pp.26-27; S-9).

9. The present levels in the IEP restate the results of the BASIC-3. The present levels do not include classroom-based assessments or regular education curriculum-based assessment data. (S-3 pp.29-31).

10. The present levels do not include baseline information for fighting or elopement. (NT pp.187-191) The academic and behavioral goal statements are not linked to the present levels of educational performance. The goal statements are vague, overly broad, and not individualized. (P-10).

11. The IEP includes eight generic statements of specially designed instruction. The specially designed instruction statements are not individualized or tailored to the Student's emotional, behavioral, academic, or social disability-related needs or circumstances. (P-1; P-2; P-3; P-9; P-10; S-1; S-2; S-3).

12. Although the team concluded the Student was a person with an Emotional Disturbance who required Emotional Support, the IEP team decided, without explanation, that the Student would receive 45 minutes of Itinerant Learning Support a day. The IEP omitted behavioral supports, goals, and ambitious related services (S-3; P-1; P-2; P-7; P-9; P-10).

13. The IEP team next decided that the Student would participate in regular education for the remaining six and a quarter (6.25) hours a day. (P-10 p.26).

14. Although the Mother disagreed with the Lab Charter school evaluation and IEP, Lab Charter did not offer or provide the Mother a copy of the procedural safeguards, a Notice of Recommended Education Placement (NOREP), or prior written notice explaining Lab Charter's proposed "action(s)" or refusal to act. (P-1; P-2, S-9-P-10; NT pp. 182-194; NT pp. 206-212).

15. Sometime after the IEP meeting, Lab Charter, without the Mother's consent, implemented the "DRAFT IEP." (NT pp.213-216; NT pp. 437-442).
16. Prior to and after the Zoom meeting, Lab Charter did not provide the Mother with a copy of the evaluation report or the "DRAFT IEP." (NT *passim*)
17. On January 12, 2023, Lab Charter scheduled a Family Intervention Meeting. The staff reviewed two behavioral incidents from January 11, 2023, during the Intervention Meeting. The first incident was a disruption in a regular education classroom, and the other was an altercation that caused a head injury to another student. After reviewing the incidents, Lab Charter staff agreed to take the following action steps: 1. the Student could ask for a break when frustrated, or 2. the Student could go to the teacher and ask for an administrator and await help. The "Intervention Meeting" changes are not found in a subsequent updated "DRAFT IEP." Lab Charter did not progress, monitor, or report data about each intervention to the Mother. Lab Charter did not issue prior written notice or a NOREP after the Intervention Meeting. (P-1; P-2; P-3).
18. On January 18, 2023, a letter of legal representation was provided to the Lab Charter administration. The letter noted concerns regarding the timeliness of the IDEA identification and the December 8, 2022, evaluation report. (P-1; P-2).
19. The Parent asked, and the Charter agreed to fund an independent education evaluation (IEE). A Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN) was sent on February 8, 2023, and returned on February 21, 2023. Lab Charter approved the request, and the Mother obtained the independent educational evaluation (IEE) at the public's expense. (S-3).

THE INDEPENDENT EDUCATIONAL EVALUATION

20. The independent evaluator, not Lab Charter, forwarded a copy of the Student's initial December 2022 evaluation report and the January 2023 "DRAFT IEP" to the Parent's counsel and the Parent. (P-; P-2).
21. Throughout the 2022-2023 school year, the Mother frequently contacted the Lab Charter, expressing concerns that other students were bullying the Student during the day. (NT pp.143-147).
22. During the 2022-2023 school year, the Student often walked out of class without permission – eloped. (P-1; P-2; NT pp.150-154).
23. The Mother stated that the alleged bullying – peer-on-peer- disagreements regularly occurred during unstructured times such as recess and lunch. (NT pp.150-154).
24. The Mother believes that elopements happen after peer conflicts. She also believes that elopements and fighting are attention-seeking and escape-related behaviors. (P-1; P-2; S-3; S-9; NT pp.150-153; NT pp.158-161).
25. Lab Charter did not create a plan to separate the Student from the alleged peer bullies. (NT pp.158-161).
26. Despite an uptick in the frequency of fighting and elopements, Lab Charter staff did not issue another Permission to Reevaluate or complete a functional behavior assessment. (P-1; P-2; P-3; P-5; P-7; P-10; S-9; NT pp.182-191).
27. During the 2022-2023 school year, Lab Charter did not update, modify, or change the "DRAFT IEP" goal statements, the specially designed instruction, or the frequency of the related services. (P-1; P-2; P-3; P-7; P-7; P-9; P-10; S-3).
28. The Student's Lab Charter school records do not include IEP-specific progress monitoring data. The Mother reports that although she received quarterly report cards, the Lab Charter did not provide quarterly IEP progress reports. (P-1; P-2; P-3; NT pp.58-61; NT p.64; NT pp.73-74; NT pp.103-106; P-5; P-9; P-10; S-3; S-9)

THE IEE ARRIVED AT THE SCHOOL IN MAY 2023

29. On May 25, 2023, the IEE evaluator forwarded the IEE report to Parent's counsel. Parent counsel then promptly forwarded the report to Lab Charter's attorney. (P-1; S-9).
30. After the Parties received the IEE, they realized another student's name appeared in the report. (P-1; S-9; NT pp.43-44).
31. Despite the naming error, neither Party asked the evaluator to review, correct, or update the conclusions, recommendations, or test scores. (NT pp.40-45-P-2; S-3; S-9).

THE CORRECTED IEE

32. Once contacted, the evaluator corrected the naming error and forwarded a corrected report to Lab Charter on or about June 20, 2023. Parent counsel also sent Lab Charter's attorney a copy of the corrected June 20, 2023, IEE report. (NT p.1).
33. The IEE evaluator concluded that the Student has a primary IDEA classification of Autism, a secondary IDEA classification of Emotional Disturbance, and a tertiary IDEA classification of Other Health Impairment. (S-3). The evaluation included a variety of assessments, checklists, and behavioral rating scales. The report also included Autism and ADHD checklists that assess executive functioning, self-regulation, and emotional skills. *Id.* The report included disability-specific recommendations for specially designed instruction and noted a history of behavioral health diagnoses like Post Traumatic Stress Disorder. (P-1; P-4; S-9).
34. The IEE evaluator recommended that the Student receive Supplemental Autistic, Emotional, and Learning Support. Supplemental support requires the Student to spend 20% to 80% of the school day with special education staff. (P-1; P-3; S-3; S-9; NT pp.202-204).

THE FIRST DAY OF [redacted] GRADE IN 2023

35. August 28, 2023, was the first school day for the 2023-2024 school year. (P-10).
36. When the Student returned home for the first day of school, the Student told the Mother that another Student harassed and assaulted the Student. The Mother reported the incident and commented that the Student had the same problem with the peer during the 2022-2023 school year. (NT pp.143-147).
37. After the August 28, 2023, incident, the Mother told the staff that she did not believe the Student was safe in school. (NT pp.153-156).

THE SEPTEMBER 7, 2023, REVIEW OF THE IEE AND IEP MEETING

38. On August 30, 2023, Lab Charter invited the Parent to attend a September 7, 2023, IEP/IEE review meeting. (P-1; P-9; P-10; P-11; S-). Although the entire IEP team was present, the Lab Charter staff were unprepared to discuss the IEE as neither Party invited the IEE evaluator to the meeting. (NT pp.43-46). Lab Charter staff and the Parent had several unanswered questions about the IEE report. Although the IEE was not considered, Lab Charter administrators agreed that the Student's IEP should include a positive behavioral support plan and the need to complete a functional behavioral assessment (FBA). (NT pp.54-60; P-1; P-3; P-4; S-3). The meeting ended, and the Parent waited for Lab Charter to reschedule. (NT p.86-89). The Parent filed the Due Process Complaint on September 7, 2023. *Id.*

THE SPECIAL EDUCATION DIRECTOR IS HOSPITALIZED

39. Lab Charter invited the Parent to another review IEP meeting on October 7, 2023. The meeting was canceled abruptly when the Director of Special Education was hospitalized. (NT p.149).
40. On or about November 9, 2023, prior to the first hearing, Lab Charter forwarded the Parent another "DRAFT IEP." The November 9, 2023, IEP incorporated selected recommendations and conclusions from the IEE. The "Draft IEP" email package did not include a prior written notice statement, a NOREP, or procedural safeguards. (P-11; S-9).
41. The "DRAFT IEP" provided on November 9, 2023, is dated October 3, 2023, and the start date for all special education and related services was left blank. (P-10; P-11; S-3; S-9).
42. The November 2023 "DRAFT IEP" included goal statements for written expression, counseling, behavior, listening comprehension, and three for math. (P-10). The goal statements lack baseline data or an objective description of the Student's present levels in math calculation, math facts, written expression, and listening comprehension levels. The behavior goal focused on completing assignments, and the counseling goal targeted self-regulation. Although the behavior and counseling goals are carryovers from the January 2023 "DRAFT IEP," the November goal statements omitted baseline measures. (P-10; S-3).
43. Although the box indicating the need for a positive behavior support plan and a functional behavioral assessment was rechecked, the "DRAFT IEP" failed to include either. (P-10; S-3; NT pp.197-191).
44. The "DRAFT IEP" included the same specially designed instruction and related services found in the initial January 2023 "DRAFT IEP." (P-2; P-3; P-9; P-10; S-2; S-3; S-5; S-11).
45. The November 2023 "DRAFT IEP" changed the Student's Level of Support from Itinerant Learning Support to Supplemental Autistic and Learning

Support. Yet when Lab Charter offered Autistic Support, Lab Charter did not operate an Autistic Support class at the Student's school. (S-3; P-9; NT pp.207-217).

46. Although the [redacted] grade report card states that the Student earned passing grades in regular education reading, math, and science, the November [redacted] grade - IEP placed the Student in Learning Support for reading, math, and science. No explanation for the change was provided. (S-3; P-9; NT pp.450-459).

47. In February 2024, after hitting another staffer, the Student was restrained in a face-down position by an aide and another staff person. After the restraint episode, contrary to Chapter 711 regulations, the Charter did not hold an IEP meeting to discuss the restraint. (NT pp.290-296; NT pp.497-503).

48. The last hearing session occurred on February 7, 2024. (NT p.247).

GENERAL LEGAL PRINCIPLES

BURDEN OF PROOF AND CREDIBILITY

Generally, the burden of proof 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. The Party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case, the Parents are the Party seeking relief and must bear the burden of persuasion.²

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."³ Explicit credibility determinations give courts the information that they need in the event of a judicial review. While no one-factor controls, a

² *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

³ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

combination of factors causes me to pause and comment on the particular testimony of several witnesses.⁴

On the Parents' side, I found the Mother open and thoughtful. I also found that the Mother expressed heartfelt and genuine concerns for the Student's safety. The Mother took ownership of her misstatements, inactions, and actions. The Mother was otherwise credible in describing the sequence of events leading up to the filing of the Complaint.

On the other hand, the testimony of Lab Charter staff was choppy, inconsistent, and sometimes incomplete. For example, the Lab Charter witnesses could not explain why they implemented the IEP without consent or prior notice.⁵ Although all agreed that fighting and walking out of class interfered with learning, no one cogently explained why Lab Charter never completed and shared the functional behavioral assessment. Likewise, no one ever explained the lack of a positive behavior support plan. These omissions, and others, affected the persuasive weight of the staff's testimony.

IDEA BASICS

The IDEA is a "comprehensive scheme of federal legislation designed to meet the unique educational needs of children with disabilities."⁶ States pledge to comply with multiple substantive and procedural duties in exchange for federal funding.⁷ In a nutshell, the procedural and substantive standards require school districts and charter schools to locate, identify, evaluate, and educate eligible

⁴ The fact finder's determination of witness credibility is based on many factors. Clearly, the substance of the testimony, including the detailed description of the relevant events, consistency /corroboration with others recollection, the accuracy of recall of past events when contrasted with written documents, played some part in my credibility determination. Furthermore, when the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. Finally, no-verbal observable actions factors like constantly adjusting body movement, eye contact, feigned confusion, and whether the responses are direct or appear to be either evasive, unresponsive or incomplete are important in determining persuasiveness.

⁵ NT pp.182-191; NT pp.198-202.

⁶ *M.A. ex rel E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335, 338 (3d Cir. 2003).

⁷ *T.R. v. Sch. Dist. of Philadelphia*, 4 F.4th 179, 182-83 (3d Cir. 2021).

students across various placements in the least restrictive environment.⁸ These broad procedural elements form the fundamental building blocks of a free appropriate public education (FAPE). Parents, teachers, and agency representatives must collaborate during the identification, evaluation, and educational decision-making. *Id.*

After a child is referred for an evaluation, the school must complete a comprehensive individualized assessment in all areas of suspected disability. Comprehensive evaluations include a variety of assessments. No sole criteria can be used to locate, identify, or evaluate thought to be eligible children.⁹

When the evaluation is completed, a team of knowledgeable people, including the parents, must determine if the child's overall assessment profile matches one of the thirteen (13) IDEA disabilities. Assuming the team identifies an eligible disability, the evaluation team must then decide if, because of the identified disability, the child needs specially designed instruction. *Id.*

After the evaluation is completed, assuming the child is eligible, the parent and the school staff work collaboratively to build an individual education program (IEP). IEPs include descriptive measurable present levels, measurable goal statements, a schedule for reporting progress, specially designed instruction, supplemental services, related services, and accommodations that meet the Student's unique educational needs and circumstances.¹⁰ Once the goals are set, the parties next discuss the child's placement and level of Support.¹¹ Educational placements range from full participation in the regular class with specially

⁸ 20 USC §§1412-1414; 34 CFR §300.300 to §300.328.

⁹ 34 CFR §300.304

¹⁰ *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. V. Rowley*, 458 U.S. 176, 188-89, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017); *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).

¹¹ *Y.B. ex rel. S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196, 198 (3d Cir. 2021).

designed instruction to placement in a full-time classroom of all disabled youngsters.¹² Levels of support vary by unique needs and circumstances.

Once the program and placement are worked out, schools must provide parents with prior written notice and a Notice of Recommended Educational Placement (NOREP). The NOREP describes the agency's commitment of resources and lists the placement options considered and reasons why specific placements were selected and rejected. NOREPs also document the school's refusal to provide requested resources. Finally, the NOREP package includes a multi-page description of the procedural safeguards. Parents have ten (10) days to agree or disagree and return the NOREP. When disagreements arise, either party can file a due process complaint. *Id.* Once a complaint is filed, the IDEA requires that the child stay in the last agreed-upon placement until the dispute is resolved. *Id.* IEPs, when offered, must be reasonably calculated to provide meaningful benefits.¹³ Hearing officers analyze the appropriateness of the IEP – offer of a FAPE - at the time the IEP was offered; this rule of construction is commonly called the "snapshot" rule. *Id.*

THE IDEA AUTHORIZES MULTIPLE FORMS OF APPROPRIATE RELIEF

Parents who establish a substantive violation may seek compensatory education.¹⁴ Parents may also seek prospective injunctive or declaratory relief for procedural violations independent of a substantive deprivation of a FAPE. *Id.* Parents seeking compensatory education are expected to put forward sufficient evidence to explain the underlying claim for relief.¹⁵ No compensatory action is due if parents fail to produce any evidence of harm. *Id.* Stated another way

¹² 20 U.S.C. §§ 1414(d)(1)(A)(i)(I).

¹³ *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564- 65 (3d Cir. 2010).

¹⁴ *G.L. v. Ligonier Valley Sch. Auth.*, 802 F.3d 601, 322 Ed.Law Rep. 633 (3d Cir. 2015).

¹⁵ *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (the parent, as the moving party, has the burden of "propos[ing] a well-articulated plan that reflects the student's current education abilities and needs and is supported by the record."); *Phillips ex rel. T.P. v. District of Columbia*, 736F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciola, Mag. J.)).

hearing officers can conclude that no compensatory education is required even though they find a denial of a FAPE. *Id.* In addition to compensatory education, reimbursement for out-of-pocket and tuition reimbursement costs are other recognized forms of relief. *Id.*

ANALYSIS AND CONCLUSIONS OF LAW

THE DECEMBER 2023 EVALUATION

The December 2023 evaluation report is incomplete, inadequate, and otherwise inappropriate. The Charter school's initial evaluation of the Student failed to include a variety of assessments of potential, ability, behavior, and achievement. Absent measures of ability and achievement, the team cannot determine the Student's potential; absent measures of potential, the team cannot set ambitious goals. While the evaluation includes one quasi-objective measure, the BASC-3, the BASC-3 is not a measure of potential, ability, or achievement. Lab Charter violated IDEA assessment rules when they used a single measure – the BASC-3- to determine eligibility and the need for specially designed instruction.

The record is preponderant that the initial evaluation also lacks executive functioning, concentration, and overall behavioral/mood measures associated with either ADHD or Emotional Disturbance. Finally, absent a variety of assessments, the December 2023 evaluation team failed to consider other qualifying disabilities like Autism or a Specific Learning Disability. Accordingly, I now find that Lab Charter failed to fully evaluate the Student's educational needs in all areas of expected disabilities. I further find that the evaluation substantially interfered with the Parent's participation and the Student's FAPE rights.

THE INITIAL JANUARY 2022 IEP IS FLAWED

Absent a comprehensive evaluation in all areas of suspected disability, Lab Charter cannot offer a FAPE. The January 2023 IEP fails to include adequate

present levels of educational performance with descriptive baseline measures.¹⁶ The goal statements are vague and unrelated to the Student's educational, emotional, or behavioral needs. The Student needed a positive behavior support program, yet the resources were omitted. The Student needed Emotional Support, yet the IEP offered academic Learning Support. In the absence of academic assessment data, the record is unclear as to why the IEP team suggested academic Learning Support given the Student's behavioral profile. The specially designed instruction does not address the Student's fighting or elopement behaviors. Finally, although Lab Charter staff checked the box, agreeing to complete a functional behavioral assessment, that too never happened. Accordingly, applying the "snapshot rule, I now find that this combination of IEP and evaluation defects caused a substantive denial of a FAPE.

THE LAB CHARTER IMPLEMENTED THE IEP WITHOUT CONSENT

It is black letter law that charter schools, like school districts, must obtain parental consent and provide prior written notice and procedural safeguards before testing a student, changing a student's placement, or providing special education services.¹⁷ The record is preponderant that Lab Charter failed to obtain parental consent and also failed to provide prior written notice or issue a NOREP.¹⁸ Lab Charter staff knew in February 2023 that the Parent disagreed with the evaluation and IEP when she asked, and Lab Charter funded the IEE. These fundamental IEP and notice errors substantially interfered with the Student's FAPE rights and the Parent's right to participate in the IEP process. Therefore, I now find that these twin standalone violations denied the Student a FAPE.

¹⁶ See Letter to New, 211 IDELR 464 (OSEP 1987)(present levels are more than a restatement of test scores, instead present levels should be individualized and reflect the student's unique needs, circumstances and abilities).

¹⁷ 34 CFR 300.9. 34 CFR 300.300 (a) through 34 CFR 300.300 (c). 34 CFR 300.504 (c). 34 CFR 300.504 (a) (incorporating 34 CFR 300.530 (h) by reference).

¹⁸ NT pp.185-190; NT pp.186-189;

THE REVIEW OF THE INDEPENDENT EDUCATIONAL EVALUATION

While the delay in completing the independent evaluation is somewhat typical, Lab Charter's delay in reviewing and considering the IEE results here is a procedural violation. The record is clear that Lab Charter never met with the Parent or fully considered the results of an IEE promptly. The Parties agreed to the IEE in February 2023; the first IEE report arrived in May 2023. The corrected IEE report arrived in June 2023. The September and October meetings to review the IEE report and rewrite the IEP were canceled for various reasons. Lab Charter then cherry-picked findings from the IEE and issued another "DRAFT IEP." All of these tasks were done without Parental participation or consent. The failure to consider the IEE report and issue prior written notice interfered with the Parent's participation in the evaluation and IEP process.

The IEE evaluator, unlike the Charter evaluator, completed a comprehensive evaluation. In particular, the IEE included a variety of academic, ability, achievement, social, and behavioral assessments. Based on a variety of assessments, the IEE evaluator concluded that the Student was a person with Autism, Emotional Disturbance, and an Other Health Impairment. The evaluator also stated that the Student had a behavioral health record of Post-Traumatic Stress Disorder (PTSD), Oppositional Defiance Disorder (ODD), and an impulsive control disorder. The failure to hold a meeting to discuss the Autism, Emotional Disturbance, Other Health Impairment, Post-Traumatic Stress Disorder (PTSD), Oppositional Defiance Disorder (ODD), and Impulse Control Disorder further interfered with the Parent's participation. The evaluator's conclusions and recommendations filled in the blanks left open when Lab Charter failed to evaluate the Student.

The record is preponderant that rather than reviewing the IEE report, Lab Charter, without prior written notice, accepted the evaluator's conclusions that the Student was a person with Autism. Then, without Parental participation, Lab Charter drafted and again implemented the November "DRAFT IEP" without

Parental consent. Contrary to Lab Charter's contention, the Special Education Director's abrupt absence does not excuse this series of ongoing procedural and substantive violations. Accordingly, I now conclude that these new violations denied the Student a FAPE and substantially interfered with the Parent's procedural rights.

THE NOVEMBER 2023 IEP IS FUNDAMENTALLY FLAWED

The IDEA and Chapter 711 require that the Parties jointly meet and participate in the development of the IEP.¹⁹ As described above, when the IEP meeting is over, the Charter is expected to issue prior written notice describing the Charter's commitment of resources.²⁰ Absent an IEP meeting, notice, and consent, Lab Charter cannot rely on the argument that the November 2023 IEP is an offer of a FAPE. As the Parties never met and the Parent never consented to the program or placement, I now find by operation of law that the November 2023 "DRAFT IEP" is not a good faith offer of a FAPE.²¹ Assuming that the failure to hold an IEP is a harmless error, I will now review the November 2023 "DRAFT IEP."

THE NOVEMBER IEP IS INADEQUATE AND INSUFFICIENT

While the November 2023 "DRAFT IEP" included multiple goal statements, the IEP did not include a positive behavior support plan or a functional behavior assessment. The persistent failure to complete the functional behavior assessment and develop a positive behavior support plan for this Student is a substantive violation.²² Absent a positive support plan, the Student will never have the chance to learn self-regulation and coping skills.

¹⁹ Districts must afford parents an opportunity to participate in meetings with respect to: 1) the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. 34 CFR §300.501 (b). Next, parents mandatory members of the IEP team. 34 CFR 300.321 (a)(1). Finally, districts must ensure that the parent is a member of any group that makes decisions on the educational placement of the child. 34 CFR 300.501 (c)(1). See also 34 CFR §300.327.

²⁰ 34 CFR §300.504 (a) (incorporating 34 CFR §300.530 (h) by reference).

²¹ NT pp.206-212.

²² NT pp.187-190.

The present levels of educational performance are also flawed. The present levels include a multi-column table of test scores that require the Parents to have the test manual and a measurement background to interpret their meaning. Below the table of achievement test scores the IEP includes a caveat that the Student's scores "were not an accurate measure of ability." When these two facts are combined, I now conclude that without the test manual and "accurate measures of ability," the present levels are not otherwise helpful or measurable ²³

Even assuming the present levels are descriptive, I now find the goal statements overly broad, vague, and unresponsive to the Student's needs or circumstances. For example, although the Student's math concepts, application, and calculation are "Below Average," one math goal calls for the Student "to add and subtract within 1000 orally or on paper." The following math goal states that the Student, "when given 20 items," must learn "how to add and subtract up to 10." The author of the IEP seems to have lost sight of the IEE evaluator's findings that the Student's working memory and process speed, the core skills required for oral and mental computations, are "Well Below Average." Simply put, one goal is overly broad and otherwise unachievable, while the other may be too low. This same pattern of board goal statements is repeated throughout the IEP. Although the IEE report offered multiple pages of suggested forms of specially designed instruction targeting Autism, Emotional Disturbance, and ADHD, the November "DRAFT IEP" repeated the same eight stale forms of specially designed instruction.

The IEP also includes an inconsistent statement about the Student's participation in special and regular education. The IEP states in "Section 1" of the present levels that the Student is a person with Autism, an Other Health Impairment, and Emotional Disturbance. Then, in "Section VII A," the IEP states that the Student

²³ *Utica School District*, 61 IDELR 149 (Michigan State Educational Agency, January 29, 2013)(absent baseline data, and a clear measurement for progress the present levels are not useful).

will receive all special education services in the Learning Support classroom. Curiously, in "Section VII B.2," the "DRAFT IEP" states that the Student will receive Supplemental Autistic and Emotional Support for up to 80% of the day in a special education classroom. These contradictory statements do not track the Student's profile or the surrounding circumstances. The conflicting statements confuse the reader regarding what resources Lab Charter is committing to and how they meet the Students' unique needs. Stated another way the "DRAFT IEP" fails to commit staff time or resources to address the Student's Emotional Disturbance, Other Health Impairment, or Autism learning challenges. Finally, the Lab Charter did not issue prior notice explaining the program or the placement. Therefore, I now find that the November "DRAFT IEP," when sent to the Parent, was not procedurally or substantively appropriate. With these Findings of Fact and Conclusions of Law in mind, I will now move on to what, if any, relief is otherwise appropriate.

APPROPRIATE RELIEF

The Parent seeks a prospective placement and compensatory education. I will address each claim separately. The Parent did not offer any documents or testimony about a suggested prospective placement; therefore, that relief is Denied.

Courts have created two schools of thought to calculate the scope of compensatory education relief. In *G.L.*, the court endorsed the "make whole," also known as the quantitative method. Other courts have endorsed the hour-for-hour theory.²⁴ In her opening statement, Parent's counsel grounded the request for compensatory education on the "make whole" theory.²⁵ In her closing brief, the Parent did not muster, and the record does not include any

²⁴ *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir.1996) ("a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." *Id.* at 397.

²⁵ NT pp.14-17.

facts that support "make whole" relief. Next, Parent's counsel did not argue the hour-for-hour approach in her closing statement or on the record. Absent facts supporting either theory, I now conclude that the Parent did not meet her burden of proof in establishing an entitlement to compensatory education relief.²⁶ Accordingly, the Parent's compensatory education claim under either theory is denied. These conclusions do not end the analysis.

The above procedural and substantive violations require immediate relief. Within fifteen (15) school days of this Order, Lab Charter must invite the Parent to participate in a meeting to review and consider the IEE report. Lab Charter must then prepare an updated reevaluation report ten (10) days after the review and consideration meeting. Ten (10) days after the updated reevaluation report is completed, the Parties are directed to participate in an IEP conference. After the IEP conference, Lab Charter is next directed to provide the Parent with prior written notice, procedural safeguards, and a NOREP describing the proposed action, the placement, and the commitment of FAPE resources. The NOREP must also describe any refusal to commit FAPE resources.

Finally, I now conclude that pursuant to 34 CFR §300.300(a)(3)(i), 34 CFR §300.502(d), and 22 PA Code §14.102(a)(2)(xxix), good cause exists to Order Lab Charter to fund the following independent evaluations: 1. Speech and Language, 2. Occupational Therapy, 3. Assistive Technology, and 4. a Functional Behavioral Assessment.

In January 2023, Lab Charter agreed to complete a functional behavior assessment. In February 2023, Lab Charter agreed to fund the IEE. In June 2023, the evaluator provided Lab Charter with a corrected IEE. It is now March 2024, and Lab Charter has not issued prior written notice refusing to complete the IEE recommended assessments. Additionally, a knowledgeable group of

²⁶ *Cousins v. District of Columbia*, 880 F.Supp.2d 142, 145 n.3 (D.D.C. 2012)) (the burden of proof is on the parents to produce sufficient evidence demonstrating the type and quantum of compensatory education that makes the child whole).

people has not reviewed a functional behavior assessment. The functional behavior assessment delay interfered with the Student's substantive FAPE rights. The behavior assessment delay also caused the staff to restrain the Student. Absent the behavioral assessment data and a positive behavior support program, the Student injured a staff person. This combination of intertwined procedural and substantive violations now requires me to Order Lab Charter to fund the omitted assessments.

The Parent must select the independent evaluators within 10 days of this Order. The functional behavioral assessment must be completed within 25 days of this Order. The functional behavioral assessment data results must be summarized and immediately provided to the IEP team for consideration.

The Speech and Language, Occupational Therapy, and Assistive Technology evaluations must be completed within 60 days of this Order. Once completed, Lab Charter is further directed to convene a group of knowledgeable people to consider the expedited reports and update the IEP as necessary.

Moving forward, I urge the Parties to consider all program and placement options within and outside the Lab Charter school's operations.

FINAL ORDER

And now, on March 15, 2024, it is hereby **ORDERED** as follows:

1. The Parent's IDEA claim that the Lab Charter denied the Student a FAPE during the 2022-2023 and 2023-2024 school year is Granted.
2. The Parent's claim for compensatory education is Denied.
3. The Parent's claim for a prospective placement is Denied.
4. Lab Charter is directed to fund an independent 1. Speech and Language, 2. Occupational Therapy, 3. Assistive Technology, and 4. a Functional Behavioral Assessment. The Parent is free to select the evaluator(s). All evaluations must be completed within the time limits described above.

5. Lab Charter is directed to pay the actual cost of each evaluation within 30 days of billing. Lab Charter is next directed to pay the actual cost of the Student's transportation to and from each evaluation. Each independent evaluator's engagement ends after the Lab Charter and the Parent jointly consider each evaluation, Lab Charter updates the reevaluation report, and Lab Charter provides prior written notice of any action or refusal.
6. Lab Charter's affirmative defense that they complied with the IDEA at all times relevant is Denied.
7. All other claims, demands, and affirmative defenses relating to this dispute are exhausted and otherwise dismissed with prejudice.

March 15, 2024

s/ Charles W. Jelley, Esq. LL.M.

HEARING OFFICER
ODR FILE #28514-23-24