

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:

23710-19-20

Child's Name:

T.R.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for the Parent or Guardian

Pro se

Local Education Agency:

Commonwealth Charter Academy Charter School
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Harrisburg, PA 17110

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Hearing Officer:

Charles W. Jelley Esq

Date of Decision:

10/30/2020

STATEMENT OF THE CLAIMS AND DEFENSES

The Parent filed the instant complaint against Cyber Charter School (Charter) seeking equitable relief for alleged continued substantive and procedural violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1401 *et seq.*, (IDEA) and Section 504.¹ Parent filed her due process complaint on May 15, 2020. The complaint alleges the Charter failed to offer the Student a free appropriate public education (FAPE) during the 2017-18, 2018-19, and 2019-20 school years. The complaint also alleges the Charter failed to afford Parent a meaningful opportunity to participate in the educational process. The Charter contends that the evidence conclusively shows that the Charter offered and was ready to implement and provide a FAPE when the Student was allowed to attend school. Next, the Charter argues that the mother obstructed the Charter's efforts to provide the Student with a FAPE. Finally, the Charter contends specific school year claims are otherwise barred.

STATEMENT OF THE ISSUES²

1. Did the charter school fail to offer the Student a free appropriate public education during the 2017-2018 school year? If not, is the Student is entitled to compensatory education?
2. Did the charter school fail to offer the Student a free appropriate public education during the 2018-2019 school year? If not, is the Student is entitled to compensatory education?

¹ The Parent claims arise under 20 U.S.C. §§ 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 §§ 14.101-14.163 (Chapter 14). The Decision Due Date was extended for a good cause, upon written motion of the Parties. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

² At the beginning of the hearing, the issues were clarified consistent with *J.W. v. Fresno Unified School Dist.*, 626 F.3d 431, 442-443 (9th Cir. 2010), *Ford v. Long Beach Unified School Dist.* 291 F.3d 1086, 1090 (9th Cir. 2002). While on the record Parent conceded that she was not seeking any relief for the time when the Charter was closed due to the Governor's Executive Order in March, May and June 2020.

3. Did the charter school fail to offer the Student a free appropriate public education during the 2019-2020 school year? If not, is the Student is entitled to compensatory education?
4. Did the charter school interfere with the Parent's participation in developing the 2017-2018 individual education program? If yes, what remedy, if any, should be provided to correct any violation?
5. Did the charter school interfere with the Parent's participation in developing the 2018-2019 individual education program? If yes, what remedy, if any, should be provided to correct any violation?
6. Did the charter school interfere with the Parent's participation in developing the 2019-2020 individual education program? If yes, what remedy, if any, should be provided to correct any violation?³

DISMISSAL OF THE 2017-2018 DENIAL OF FAPE CLAIMS

This case's disposition requires me to place in the context of prior litigation and the Final Order in favor of the Charter between the parties. In April 2017, the Parent file a due process hearing; while the hearing against the Cyber Charter School was pending, the Parent filed another due process complaint against the Charter for the 2017-2018 school year. Ultimately, the due process complaints against the Charter school were consolidated. See ODR Nos. 18768-1617KE and 19108-1617KE (consolidated). After all procedural issues and preliminary motions were resolved, two issues remained: (1) did the Charter deny a FAPE to the Student (nine specific FAPE violations were alleged), and (2) did the Charter School discriminate against the Student based on disability. Ultimately, Hearing Officer McElligott found that the Charter did not discriminate against the Student based on disability and did not deny the Student a FAPE during the 2017-2018 school

³ The Parent's initial statement of the issues in dispute appears at Volume 1, pages 2 through 19. While on the record and in writing the Parent, at the second session, withdrew the Student's Section 504 discrimination claims and at the same time the Parent withdrew her associational discrimination claims. N.T. pp.92- 97. The Student's denial of a FAPE claim arises under the IDEA and Section 504. Therefore, my analysis will include Findings of Fact and Conclusion of Law under both Acts.

year. The Hearing Officer did, however, Order the Charter to make several non-substantive revisions to the Student's IEP. A Final Order was issued on September 30, 2017, in favor of the Charter school. See ODR Nos. 18768-1617KE and 19108-1617KE (consolidated). The Parent appealed the Hearing Officer's Decision to federal court and the federal court affirmed the Decision. In affirming Hearing Officer's Decision, the court concluded the April 2017 IEP offered the Student a FAPE for the 2017-2018 school year. *Price v. Commonwealth Charter Acad.*, No. 17-5790, 2019 U.S. Dist. LEXIS 155704 (E.D. Pa. September 12, 2019). The Parent did not appeal the District Court Order.

Accordingly, I will deny the 2017-2018 denial of the FAPE claim for all the reasons that follow. Hearing Officer McElligott's Decision at ODR Nos. 18768-1617KE and 19108-1617KE (consolidated cases) are now incorporated by reference herein and I also adopt in full the Findings of Fact and Conclusions of Law at the Final Order, between the Parties, in favor of the Charter. An appropriate Order follows dismissing the 2017-2018 claims here.

FINDINGS OF FACT

THE MARCH 2018 IEP MEETING AND THE IEP GOALS

1. On March 8, 2018, the Student individual education program (IEP) team met by phone to develop a new annual IEP. Shortly after the meeting began, the Parent exited the call. (S-12, p. 29; S-17, p. 48). (S- 12, p. 1). The IEP team, without the Parent, reviewed the updated information from the regular education teacher, the special education teacher, the speech therapist and the occupational therapist (OT). (S-12, p. 20-22, S-12, p. 26-27).
2. The present levels note the Student was making progress in the pre-algebra class (S-12, p. 20-21). On March 7, 2018, at the Parent's request, the Charter further revised the IEP; this revision includes a

series of documents that the Parent requested be added as parent input. (S-11, p. 3).

3. After the revision, the IEP and the Notice of Recommended Educational Placement (NOREP) became a 133-page document. The Parental input included a "Declaration" from the 2014 independent evaluator in a federal action reviewing a hearing officer 2016 Decision, the evaluator's curriculum vitae, a 2016 independent speech report, and the 2014 report prepared by an independent educational evaluator. (S-11). The additional documents did not change the goals, the SDIs, the related services, the progress monitoring schedule, or the present levels. (S-11).
4. The math goal noted the Student scored 44% on three (3) consecutive probes. The Student's baseline was 16 correct of 76 problems (21% correct). (S-12, pp.116-118).
5. The speech goal called for the Student to increase narrative speaking skills by providing an initial background statement, including referents, including essential pieces of relational information, and leaving out irrelevant details as measured by a rubric, with 80% accuracy over three trials measured monthly. The second speech goal called for the Student to during speech therapy sessions, for each essay assignment, to write at least three (3) paragraphs that contain well developed main ideas and give at least three (3) details in each paragraph, with 80% accuracy in 3 out of 4 monthly trials. (S-12, pp.119).
6. The third goal called for the Student to During speech therapy sessions, Student will show understanding of a story utilizing inferential comprehension skills as demonstrated when he answers questions about: why characters behaved as they did, stating the

character's goals and motivations, explain the feelings of characters at specific points of the story, predicting outcomes, and drawing conclusions with 90% accuracy in 3 out of 4 bi-weekly trials. (S-12 p.120).

7. The Occupational therapy (OT) goal called for the Student when copying or composing to print legibility. (S-12 p.121). The second OT goal called for the Student to use cursive writing. (S-12 p.121).
8. The IEP includes 26 forms of specially-designed instruction (SDI). One SDI called for the Student to use "Write out Loud," an assistive technology application. (S-12 pp.123-128). The PENNDATA table noted the Student was in regular education class 86% of the time for 4.75 hours a day. (S-12 p.132).
9. The present levels note the Student is passing all regular education classes. The present levels also include data from Aimsweb like Reading Comprehension. The baseline for reading comprehension was started with Aimsweb probes at the 3rd-grade level and moving up to the 8th-grade level. Listed below is a breakdown of each level given along with the results for the levels. Based on the data, the Student top out at the 8th grade level with a score of 73.3%. (S-12 pp.23-24)
10. Based on the math computation baseline shows that the Student top out at the 5th grade. The Student needs to continue to work on multi-digit multiplication and division, as well as work on fractions with unlike denominators. The IEP calls for the Student to be progress monitored at the 5th-grade level through a math computation goal reflecting these areas of weakness. (S-12 p.25). The assessment also demonstrated the need for direct instruction in skills of multi-digit multiplication, division, and fractions. (S-12

pp.24-25).

11. The Parent declined the offer of an instructional assistant (IA) and Board Certified Behavior Analyst (BCBA) and the Charter withdrew the offer of the services. (S-12 p.25).
12. The IEP noted the following academic, developmental, and functional deficits, weaknesses, and needs related to Student's disability:
 - Math Computation fractions, multi-digit multiplication, and decimals
 - Oral Expression Skills
 - Specific memory components
 - Active working memory (mentally suspending information while using or manipulating it)
 - paired-associate memory (linking and storing two related data bits, then retrieving one piece of information when presented with the other piece)
 - Aspects of expressive language (communicating thoughts)
 - Sentence formulation (expressing thoughts in complete, grammatically correct sentences)
 - Discourse production (communicating information in cohesive chains of sentences, such as paragraphs and essays)
 - Aspects of three attention control systems: *mental energy* (set of controls for initiating and maintaining the cognitive fuel needed for work); *processing* (controls that oversee the use of incoming information); and *production* (system that regulates academic and behavioral output)
 - Support in written communication.(S-12 p.16).

50 No significant changes were made to the December 2017 IEP goals. (S-12, p. 117-122).

51 The Student's math goal focused on division, fractions, and multi-digit multiplication. (S-12, p. 117).

52 The speech and OT goals remained the same, as did the frequency of

OT and speech therapy level of services. (S-12, p. 127). The IEP again noted that the Parent had declined the services of the IA and the BCBA and stated that the Charter would check with the Parent quarterly about whether she wanted the services. (S-12, p. 25).

THE MAY 2018 IEP AND REVISIONS

- 53 The March 2018 IEP was revised with Parent's consent. (S-15, p. 1; S-17, p. 32). On May 3, 2018, because the Student made progress on the occupational therapy goals, the OT recommended that the Student be dismissed from OT services. (S-15, p.17). When asked about the dismissal, the Parent agreed that the Student no longer needed OT services. (S-15, p. 17, p.132).
- 54 At the Parent's request, the Charter added one (1) additional 30-minute session per week of direct math instruction. (S-15, p. 18, S-15, p. 136).

THE JUNE 2018 IEP

- 55 On June 6, 2018, the Charter and the Parent participated in an IEP meeting. (S-16, p. 3; S-17, p. 30).
- 56 The IEP team considered the reevaluation report, reviewed updated information from the teachers, the Parent input, including progress monitoring data on the math goal and speech. (S-16, p. 14-17, 20-21). The IEP team also considered the results of the AIR Self-Determination Student Scale that the Student had completed in May 2018. (S-16, p. 23-24, S-16, p. 25-105).
- 57 The June 2018 IEP included a new writing goal to build The Student skills in using proper writing expression conventions. (S-16, p. 116). The progress monitoring notes the Student did not make progress in the 4th marking period. *Id.* The speech therapist also included a written expression goal. (S-16 p.118).

- 58 The IEP team added SDIs in the IEP to assist with the Student with written expression. The SDIs included rubrics, visual organizers, templates, and word banks. (S-16, p. 124).
- 59 The IEP team added new courses needed for graduation and activities to the transition plan based on the Student's post-high school interests and goals. (S-16, p. 108-09). The Student's transition activities called for the Student to review and list the courses that supported enrolling in college and researching training programs, job opportunities, and wage compensation. (S-16, p. 108-09). The transition portion of the IEP cross-referenced the math goal. (S-16, p. 108-09).
- 60 The speech therapist recommended and the team agreed the Student should develop and use memory strategies and aids. (S-16, p. 125). Consistent with previous IEP's, the Parent did not agree to the IA and BCBA; therefore, the support services were not included in the June 2018 IEP. (S-16, p. 19).
- 61 The June 2018 IEP called for the Student to receive two 60-minute speech therapy sessions per week and three 30-minute direct math instruction sessions. (S-16, p.124-25).
- 62 The IEP called for the Student to remain in an itinerant level of support under the June 2018 IEP. (S-16, p.128-29). The PENNDATA table notes the Student is in regular education 93% of the school day and spends 40-minutes a day with the special education teacher. (S-16 p.129).
- 63 The Student completed the 2017-18 school year with passing grades in all of [Student's] courses, except Health and Physical Education. (S-41, p.1).

**THE STUDENT'S 2018-19 SCHOOL YEAR AND
THE STUDENT'S PART-TIME ATTENDANCE**

- 64 During the first marking period, the Student attended only three of the 13 scheduled sessions. (S-20, p. 36).
- 65 In October 2018, the Parent emailed the Charter school staff to say she was arranging for the Student to receive private math tutoring. (PE-11, p. 35). On October 20, 2018, Parent advised the Charter that she intended to use compensatory education hours from a prior due process to have the Student receive tutoring services at a private agency. (S-23, p. 1).
- 66 On October 25, 2018, the Charter responded with confirmation that it would pay for the tutoring provided by a private provider using the Student's compensatory education hours. (S-23, p. 5). The Charter also offered to pre-pay for 40 hours of tutoring. (S-23, p. 5).
- 67 The Charter also noted that if the Parent wanted the Student to receive further tutoring after those 40 hours were used, the Charter could pre-pay for additional tutoring hours. (S-23, p. 5).
- 68 On November 2, 2018, the Parent notified teachers that the Student would be missing afternoon classes as the Student would be attending tutoring at a private provider during the afternoons, Monday through Thursday. (PE-11, p. 36). In the same message, the Parent noted that she intended to have the tutors work with the Student on the Charter school course content for all regular education classes. (PE-11, p. 36).
- 69 In early November, the Student informed the teacher that the Student would miss all of the Charter classes. (S-23, p. 51).
- 70 As of November 14, 2018, the Parent discontinued the direct Charter sponsored math instruction included in the Student's IEP. (S-20, p. 37; S-23, p. 52; PE-11, p. 42-43).

- 71 Rather than have the Student participate in tutoring after school hours or during times when the Student did not have on-line classes, the Student went to tutoring during daytime hours, Monday through Thursday. (S-23, p. 8, 52).
- 72 The Student's teacher regularly reached out to the Student to provide the program outlined in IEP. (PE-13, PE-14; PE-15; S-23).
- 73 Over the school year, the Parent expressly stated that she had no complaints about the Student teachers (S-23, p.7), yet she refused to allow the Student to engage with those teachers and arranged to have all of the academic work. (S-23, p. 14-15; PE-12, p. 1, 99, 121, 127, 139, 147, 160, 165). As the year progressed, the Director of Special Education frequently communicated with the Parent about the Student missing school. Yet, no action was taken to get the Student back in the classroom. (Tr. 278-79).
- 74 On November 2, 2018, the Parent sent an email to the Director of Special Education that included a request to schedule an IEP meeting. (PE-11, p. 37). The Charter school failed to schedule an IEP meeting. (PE-39, p. 37).
- 75 On December 5, 2018, the Parent filed a complaint with the Bureau of Special Education (BSE), complaining that the Charter failed to provide the Parent with the information she had requested about Charter school's graduation requirements, course selection, course materials, and the Charter's accreditation. (PE- 39, p. 4). The Parent's complaint specifically raised a concern that the on-line "Edio courses did not rely on textbooks. (PE-39, p. 4). At the beginning of the 2018 school year, the Charter made the administrative Decision that all course books would now be on-line. *Id.*
- 76 Based upon a phone conversation with Parent, BSE investigated two issues: (1) whether the Charter responded to Parent's concerns about the

Student's schedule; and (2) whether the Charter failed to respond to Parent's request for an IEP meeting. (PE-39, p. 37).

- 77 BSE found that the Charter failed to respond to Parent's request for an IEP meeting, and BSE directed the Charter to hold an IEP meeting by April 17, 2019. (PE-39, p. 48). The Charter scheduled an IEP meeting, but the Parent did not attend.

IN 2018 THE STUDENT DID NOT ATTEND ON-LINE CLASSES

- 78 The June 2018 IEP called for the Student to receive direct math instruction three times per week for 30 minutes and speech therapy two times per week for 60 minutes. (S-16.)
- 79 In September 2018, the Student did not receive speech therapy as the Parent did not respond to the speech therapist's scheduling request. (S-24, p. 10).
- 80 In October 2018, rather than attend two speech sessions, the Student went to private tutoring. (S-24, p. 11).
- 81 Parent declined speech therapy services during the second and third quarters of the 2018-19 school year. (S-24, p. 5-10). The Charter made clear to Parent that the speech therapy services that she declined would not be made up and reaffirmed the Charter's commitment to providing the two hours of speech therapy listed in the IEP. (S-23, p. 16). The Parent declined to schedule the speech therapy services because the Student was working on the end of year assignments. (S-24, p. 16; Tr. 145- 46).
- 82 During the 2018-19 school year, the Charter made twenty-three attempts to conduct progress monitoring of The Student math and written expression goals and the Student did not participate. (S-20, p. 36-39; S-24).
- 83 The Student participated in two speech sessions during the first quarter

of the 2018-19 school year. (S-20, p. 42).

THE MARCH 2019 OFFER OF A FAPE AND THE IEP

- 84 On March 13, 2019, the Charter invited the Parent to attend an April 1, 2019, IEP meeting to discuss the Student's needs and transition services. (S-21). The IEP meeting was scheduled in response to the Parent's BSE Complaint Investigation Report directing Charter to hold an IEP meeting, as requested by the Parent, before April 17, 2019. (S- 21; PE-39, p. 48). The Parent responded that she would not attend the meeting. (S-21). The IEP meeting was held, as scheduled, on April 1, 2019. (S-21; S-22).
- 85 The IEP team met and developed a new annual IEP for the 2019-2020 school year. (S-22).
- 86 Due to the limited Student participation during the 2018-19 school year, the IEP team had very little new data. The IEP team then decided it could not make any changes or propose new goals to the IEP. (S-22, p. 22). The IEP goals, therefore, remained the same. (S-22, p. 115-122).
- 87 The IEP team updated the transition information to include projected courses needed for the 2019-2020 school year. (S-22, p. 108-109).
- 88 The IEP continued to offer two 60-minute sessions of speech therapy per week. (S-22, p. 129). Since the Parent had not responded to the Charter's calls, the previously declined IA and BCBA services were not included in the IEP. (S-22, p. 22).
- 89 The Student completed the 2018-19 school year with passing grades in all of the courses except Astronomy, a course the Student withdrew from, and Health and Physical Education. (S-41, p. 1).

THE 2019-20 SCHOOL YEAR AND THE STRUGGLE TO COMPLETE THE MANDATED REEVALUATION

- 90 In July 2019, the Charter issued a permission to reevaluate. (S-25). The Parent then requested a sensory processing assessment. (S-25). The OT that previously worked with the Student recommended a battery of three different OT assessments. (PE-22, p. 5, PE- 24). The OT recommended the Adolescent/Adult Sensory Profile to determine the Student's basic strengths and needs in the sensory processing area. (PE-22, p. 5).
- 91 On July 3, 2019, the Charter issued a Prior Written Notice for a Reevaluation and Request for Consent Form. (S-25, p. 1; Tr. 215). The Prior Written Notice specifically listed that an evaluation was necessary "to determine appropriate transition" support and to determine "the impact of sensory processing concerns on this education." (S-25, p. 2). The Parent responded to the Prior Written Notice by giving consent to the proposed evaluation and requested an informal meeting. (S-25, p. 3). The Parent stated that she checked the "informal meeting" box on the form because she wanted to speak with the psychologist about the proposed assessment tools. (S-39, p. 5; Tr. 216).
- 92 The Parent then requested that she be provided a copy of the proposed assessments before it being scored, along with all test protocols. (S-39, p. 5).
- 93 In early August, the Charter identified a school psychologist willing to proceed as the Parent had requested. Still, that school psychologist declined to proceed after the Parent copied her on a message where she referenced calling other school psychologists as witnesses in her federal cases against the Charter. (S-39, p. 11-12; Tr. 217). By the end of August, the Charter had not identified a school psychologist who was comfortable proceeding with the reevaluation under Parent's terms.

Therefore, as a compromise, the Charter proposed that the school psychologist mail a copy of the Student's results to a parent's school psychologist. The Parent disagreed. (S-39, p. 18). The Charter could not identify a school psychologist who would conduct the reevaluation under Parent's terms. (S-39, p. 18, 23; Tr. 217).

- 94 On September 6, 2019, when the Charter could not complete the reevaluation, the Charter agreed to fund an independent TR's independent educational evaluation. (S-27, p. 1; Tr. 217-18).
- 95 During October 2019, the Student completed the transition assessments, including the American Institutes for Research (AIR) Self-Determination Student Scale and the O*NET Short Form Interest Profiler. (S-28).
- 96 The AIR data demonstrated that the Student needed to build skills in setting goals, planning to meet goals, and working on [Student's] plans to meet goals. (S-28, p. 1-9). The AIR suggested that the Student could benefit from instruction on self-determination and self-advocacy. (S-28, p. 1).
- 97 The O*NET survey results suggest the Student has a strong interest in Artistic, Investigative, and Realistic work. (S-28, p. 10-12). The assessment results were consistent with the Student's expressed career interests in the sciences. (S-28; S-22, p. 108-09).

THE START OF THE 2019-2020 SCHOOL YEAR

- 100 On September 6, 2019, the new teacher reached out to Parent and TR to set up a time to meet to discuss the progress monitoring schedule and sure up what type the elements of the IEP. (S-39, p. 117).
- 101 The teacher scheduled time to meet with the Student virtually once a week on Mondays, and although she called each week, the Student worked with the teacher on three other occasions during the entire

school year. (Tr. 154).

- 102 The Parent informed the teacher that she disagreed with the way progress monitoring probes were being administered. The Parent also stated rather than follow the IEP, the Student would work with the tutor 4 to 5 hours per day of tutoring. (Tr. 155, S-39, p. 67). The Parent arranged for the Student to work with the private tutors for 4-5 hours per day using the Charter's curriculum. (S-39, p. 34-35).
- 103 Initially, the Student was receiving ten hours per week of tutoring. (S-39, p. 36). By November 2019, the Student would spend the entire school day Monday through Thursday and for one half of the school day on Friday with the tutors. (S-39, p. 36, PE-33).
- 104 The Charter worked with the Parent to facilitate having the compensatory education awarded in a previous hearing pay for the tutoring, as well as for the costs of transportation and meals. (S-39, p. 40). One of the five tutors is certified to teach in Pennsylvania. (S-42, p. 1, Tr. 281-82, S-36, p. 196-237, Tr. 281-82).

THE SEPTEMBER- NOVEMBER 2019 IEP MEETINGS

- 105 On September 27, 2019, the Student's IEP team, including the Parent, and her advocate, participated in an IEP meeting. (S-2, p. 1, S-30, p. 2). As the school year had just begun, the teachers were still getting to know the Student. (Tr. 219).
- 106 During the IEP meeting, the Parent, for the first time, stated that the Student would require a paper copy to work on for all of the on-line materials. (Tr. 220-21). The request was discussed as the cyber-school no longer used hardbound books or paper worksheets to complete assignments. The Charter team members reached a consensus that the Charter would consider the request and respond

to it after reviewing the data. (Tr. 221).

- 107 After meeting for two hours, the meeting adjourned and the parties agreed to meet again to complete the IEP. (S-30, p. 3). The IEP meeting resumed on November 1, 2019; however, the Parent canceled that meeting. (S-30, p. 2). The team reconvened on November 15, 2019, and the Parent participated. (S-29; S-30, p. 2).
- 108 After reviewing the Student's records, the team's Charter school members determined that providing printed materials in advance would be problematic because teachers make changes and modifications to class materials in response to how students are progressing or struggling with a skill. (Tr. 222).
- 109 The Charter school staff believed that printed lessons would not allow the Student to take advantage of the class materials' interactive portions, such as educational videos and links to external content, embedded in the on-line materials. (Tr. 222). At the November 2019 meeting, the Charter denied the request for paper copies of materials. The Charter advised the Parent that the Charter determined that the Student did not require hard copies of the on-line course materials to access the curriculum. (S-39, p. 23, 33).
- 110 At the time of the September and November 2019 IEP meetings, the Charter had not yet received the publicly funded IEE report. (S-30, p. 2).

THE NOVEMBER 2019 IEP AND THE INDEPENDENT EDUCATIONAL EVALUATION

- 111 On November 15, 2019, after reviewing the then existing data, the Charter school issued a 145-page IEP. (S-30). The Charter recommended and the Parent refused to allow the Student to receive in-person supports from an IA and a BCBA. (S-30, p, 26; Tr. 164). The IA and/or the BCBA

services would support the SDIs targeting attention, concentration, use of rubrics, organizational skills, review of old/new material and develop new time management skills like the use of checklists. (Tr. 163-64; S-30, p. 131- 34).

- 112 The IEP included a new speech and language goal targeting divergent thinking skills and writing skills. (S-30, p. 127).
- 113 The IEP included a new goal targeting executive functioning skills like learning how to follow 2-step directions and self-advocacy skills (S-30, p. 129, S-30 p. 130). The two behavior new goals were offered, declined and therefore unable to be implemented, as the Parent continued to decline the BCBA and IA services. *Id.*

**THE INDEPENDENT EDUCATIONAL EVALUATION REPORT
AND THE SUGGESTED CHANGES TO THE DELIVERY OF THE
STUDENT'S INSTRUCTION**

- 114 The Parent chose an evaluator who had previously evaluated the Student in 2014. (S-30, p. 51-93).
- 115 On December 3, 2019, the Charter received the independent evaluation (IEE) report. (S-31. p. 1). The IEE included a battery of 15 individual assessments of cognitive ability, achievement, behavior, social development, executive functioning, reading, math, writing, spelling, attention, concentration, and visual-motor ability.
- 116 The 2014 IEE Report and the 2019 IEE Report listed strengths in high-order cognition, short-term memory, long-term memory, phonological processing, semantic understanding, sentence comprehension, and social cognition. (S-30, p. 55-56; S-31, p. 6-8).
- 117 The 2014 Report and the 2019 Report noted weakness in active working memory, expressive language, discourse production, and attention. (S-30, p. 55-56; S-31, p. 6-8).

118 The 2014 Report and the 2019 Report confirmed quasi-medical diagnoses of Expressive Language Disorder, Disorder of Written Expression, Attention Deficit Hyperactivity Disorder, and Executive Function Deficit. (S-30, p. 65; S-31, p. 19). The 2019 Report included, for the first time, a medical diagnosis of "Specific Learning Disorder, Mathematics," Years earlier, in previous evaluations, the Charter identified the Student as having an IDEA based specific learning disability in math. (S-31, p. 19; S-16).

119 The 2019 Report included many of the same recommendations found in the 2014 report like:

- The Student could benefit from a math reference that outlines sequential processes;
 - The Student should be given a list of useful words and phrases to use when writing;
 - The Student needs a system to track short- and long-term assignments, tests, and quizzes;
 - The Student teachers need to teach the Student to break longer assignments into smaller steps;

 - The Student needs to develop a way to organize academic materials routinely;
 - The Student needs extended time for quizzes and tests;
 - The Student should be allowed to keyboard written work and notes; and,
 - The Student should be allowed to use a calculator.
- (S-30, p. 67-75; S-31, p. 20-26).

120 The 2019 Report compared the Student's 2014 to the 2019 standard scores. The comparison of the scores indicates that the Student learned new material and made progress. (S-30, p. 89; S-31, p. 41).

CLUSTER Scores	2014 Standard Score	2019 Standard Score
Broad Reading	101 (Average)	104 (Average)

Broad Math	90 (Average)	102 (Average)
Broad Written Language	74 (Low)	90 (Average)
Academic Skills	88 (Low Average)	93 (Average)
Academic Fluency	89 (Low Average)	109 (Average)
Academic Applications	92 (Average)	96 (Average)

(S-11, p. 103; S-36, p. 172)

121 In 2014, the Student's cluster scores ranged from "Low to Average," while in 2019, the scores fell in the "Average" range in all of the clusters. These Broad Reading, Broad Math and Academic Fluency are in the sold "Average" range. The sixteen (16) point increase in Broad Written Language skills indicated a gain. S-11, p. 103; S-36, p. 172).

122 A side-by-side comparison of the Student's subtest standard scores on the achievement tests from the 2014 and 2019 Yellin Report, but for one – Spelling - fell in the "Average" range:

Subtest Scores	2014 Standard Score	2019 Standard Score
Letter – Word ID	99 (Average)	96 (Average)
Calculation	81 (Low Average)	100 (Average)
Math Fluency	103 (Average)	104 (Average)
Spelling	82 (Low Average)	84 (Low Average)
Writing Fluency	67 (Very Low)	100 (Average)
Passage Comprehension	99 (Average)	95 (Average)
Applied Problems	95 (Average)	100 (Average)

Writing Samples	86 (Low Average)	94 (Average)
Reading Fluency	108 (Average)	--
Word Attack	--	102 (Average)
Oral Reading	--	100 (Average)
Sentence Reading Fluency	--	113 (Average)

(S-11, p. 103; S-36, p. 172).

- 123 The Student's executive functioning deficits remained constant. For example, the Student has a difficult time starting and following through on tasks. The executive functioning challenges are intertwined with difficulties with attention. Emotionally and socially, the Student report few if any concerns. (Tr. 284).
- 124 The examiner provided concrete strategies for individualized instruction, suggested an intensive one-on-one math tutorial, focusing on reviewing what the Student knows and previewing new material before direction in class, explicit instruction in the writing process, a word bank. To address executive functioning, the examiner recommended five specific strategies for material and time management. The examiner also made multiple suggestions to address the executive functioning challenge of shifting attention during note-taking. The examiner also suggested individual and classwork accommodations. The examiner "strongly recommended that [redacted] attend an academic setting with a 1:1, in-person, highly interactive session by a teacher at the [redacted school]. (S-25-59-67).
- 125 The IEE examiner never spoke to anyone at the Charter and never observed the Student in an on-line or in any educational setting. (Tr. 116). The IEE examiner was not aware the Charter offered in-person, one-to-one IA or BCBA supports. (Tr. 116).

126 The IEE examiner opined that "Having worked with [redacted] now since 2014, it has become abundantly clear that on-line instruction has been ineffective. [Redacted] has only been successful when the Charter's course contents were retaught in 1:1, in-person. *Id.*

THE CHARTER'S JANUARY 2020 REEVALUATION REPORT

127 In January 2020, the Charter's school psychologist prepared a 139 page updated Reevaluation Report. (Tr. 180-81).

128 In preparing the Reevaluation Report, the Charter's school psychologist reviewed the 2019 IEE, the 2016 private speech report, the Student current grades and state assessment data, transition information, teacher observation and recommendations, and the most recent occupational therapy evaluation. (S-34).

129 The OT examiner reported that the Student performed in the average range in all developmental areas of motor proficiency on the BOT-2, scored below average on visual-motor integration on the Beery Buktenica Test of Visual-Motor Integration (VMI), and scored lower average or average on all processes of visual perceptual skills on the Test of Visual-Perceptual Skills (non-motor), Third Edition (TVPS-3). (S-34, p. 31-34).

130 The OT assessment was also screened for sensory processing concerns using the Adult/Adolescent Sensory Profile. (S-34, p. 34). The Sensory Profile shows that the Student's responses to environmental stimuli were similar to those of most people in all areas. (S-34, p. 34; Tr. 188-89). The OT did not recommend any direct occupational therapy services and did not recommend any IEP goals for occupational therapy. (S-34, p. 35). The Charter's Director of Special Education discussed the assessment with the OT. The OT stated that the Student did not need any OT goals. (Tr. 288-89). The IEP includes a recommendation from the OT and a schedule to observe the Student while attending tutoring to determine if the wearing

hoodie is related to a sensory processing need. (S-34 p.35). The OT recommendation was rejected by the IEP team after the Director of Special Education had a phone call with the OT. (S-36 p.36)

131. At Parent's request, 104 pages of written Parent input was included within the January 2020 RR. The Parental input, including materials rebuttal statements prepared by Parent, a complete copy of the 2014 and 2019 IEE Report, and daily summaries from the tutors from September through January 2020. (S-34, p. 36- 139; Tr. 182).

FEBRUARY 2020 IEP REVISIONS

127. On February 4, 2020, the Charter held an IEP conference when the Parent declined to meet in January. (S-35, S- 36, p. 2).
128. The February 2020 IEP Revision included each of the 24 recommendations, SDIs and accommodations included in the 2019 IEE Report. The IEP present levels described how the Charter would implement each recommendation, SDI and/or accommodation listed in the IEE. (S-36, p. 17-21; Tr. 167-68).
129. Rather than provide one-on-one face-to-face instruction, the Charter proposed that some of the IEE recommendations be supported by either the BCBA and/or IA in person. (Tr., p. 168-69; S-36, p. 17-21, 287). The IEP present levels, rather than the SDIs, explained how the IA and BCBA would support the delivery of instruction modifications/recommendations targeting pacing, self-monitoring, preview new material, assistance with active reading, breaking down complex tasks into manageable steps, teaching of preplanned strategies, scheduling, written expression, math instruction, self-advocacy and the executive functioning shifting focus/attention deficits. (S-36, p. 40- 41).
130. The Parent, declined the support of the BCBA and IA services. (Tr. 169). The Parent took the position that a Functional Behavior Assessment (FBA)

must be completed before allowing the Student to work with an IA and BCBA. (S-36, p. 41; Tr. 290-292).

131. Although the Charter did not feel that the Parent's request for a functional behavior assessment (FBA) was necessary, the Charter agreed to complete the FBA. The Charter issued a Prior Written Notice and Request for Consent. (S-37, p. 2-9); however, the Parent never signed and/or returned the Prior Written Notice and Request for Consent. The FBA was never completed. (Tr. 292, 331-32).
132. During the 2019-2020 school year, the Student was enrolled in regular education Algebra 1, American Government, Career Planning 11, English 11, Environmental Science, Introduction to Social Media, Art History, and Health Physical Education. (S-36 p.11).
133. At the time of the February 4, 2020, IEP meeting, the Student had 180 overdue lessons that were at least five (5) weeks late. (S-36 p. 11). The Student was in danger of failing all classes. *Id.*
134. As a result of not turning in work, the Student's projected grade in Algebra 1, as of February 4, 2020, IEP meeting grade was 27%. (S-36 p.11). The Student has weak recall deficits and functional working memory deficits are a barrier to recalling the sequences of steps needed to solve math reasoning problems. (S-36 p.11).
135. The case manager offered to support the Student in the general education classes and administer the progress monitoring math computation probes, goals and the transition activities. (S-36 p.11).
136. The math goal assessment probes were again changed. The Charter agreed to have the teacher administer the probes according to the Aimsweb direction and scores will be presented as a percentage correct. (S-36 p.36).

137. As a result of not turning in work, the Student's projected grade in English Language Arts as of February 4, 2020, IEP meeting was 51%. The Student does not attend guided or live lessons. The Student's written expression deficits stem primarily from gaps in expressive oral language, which causes problems in generating sentences with words when speaking or writing. (S-36 pp.13-14). The Student's expressive writing weaknesses include spelling deficits, grammar punctuation capitalization, previewing, planning and self-monitoring deficits. (S- 36 pp. 13-14).
138. The present levels included a table of Woodcock-Johnson III 2014 and Woodcock-Johnson IV 2019 standard scores converted to grade equivalent scores. (S-36 pp.16-17).
139. The present levels include all 24 of the IEE examiner's Student specific learner SDIs, recommendations and accommodations. (S- pp.17-21).
140. Confusingly, the present educational performance levels included what appears to be goal statements and SDIs for a variety of classes, like Algebra 1, American Government, Career Planning 11, English 11, Environmental Science, Introduction to Social Media, art History. (S-36-pp.12-42).
141. The present levels included speech and language data from the 2016 IEE and limited speech data through the present. The speech and language present levels also included goal statements and short term objectives and what purports to be progress monitoring data (S-36 pp.42-46).
142. As far back as 2015 through the present, the IEP team recommended and the Parent rejected one-on-one, face-to-face BCBA and IA supports in the home.
143. The behavioral goal statements in the present levels and the goal statement call for the Student to follow one (1) and two (2) step directions. (S-36).

144. Anticipating the Student's promotion to the next grade, the present levels call for the case manager to update the Student transition information and support with grade-level regular education courses. (S-36 pp.46-52).
145. Page 53 through page 65 includes a verbatim copy of a January 8, 2016, Speech and Language Evaluation, when the Student was 12 years old. S-36 pp. 53-65). Pages 65 through 68 includes a copy of the speech therapist's curriculum vitae. (S-36 pp.65-68). The 2016 speech data is stale and needs to be updated. (S-36).
146. Page 69 through 127 includes a copy of the 2014 IEE and the evaluator's curriculum vitae. (S-69-127).
147. Page 127 through 132 includes a "Declaration" signed by the IEE examiner on behalf of the Student in support of the Parent's Motion for Summary Judgment in her challenge to a 2015 hearing officer's Decision. The inclusion of the "Declaration" places the IEE examiner's impartiality at issue in this dispute. The "Declaration" does not help this hearing officer understand the Student's current present levels. (S-36 pp.127-132).
148. Page 133 through 195 includes a copy of the 2019 IEE and the examiner's updated curriculum vitae. (S-36 pp.133-195).
149. Page 238 includes a copy of the IEE examiner's statement regarding the Student's need to use audiobooks. The examiner's statement further provides the Student is a person with a visual, perceptual, or other physical disabilities that limits the Student's ability to effectively use standard print eligible for on-line audiobooks (S-36 p.238).
150. Page 239 through 259 includes a copy of the Parental input dating from 2014 through February 2020. The input includes the Parent's counterstatement to the Charter's ongoing narrative that the Parent has interfered, obstructed and refused to participate in the IEP process from

2014 through 2020. (S-36 pp. 239-259).

151. Page 261 through 262 includes multiple statements describing the proposed transition activities the Student will engage in during the 2019-2020 school year. (S-36 p. 261).
152. Page 269 and 270 includes the Math computation goal statement and two short term objective statements. The progress monitoring now requires the teacher to administer the probes as a timed test at the 5th-grade level. (S-36 pp.269-270). The timed versus untimed probes and on-line versus offline probe testing were changed from the previous Aimsweb progress monitoring practices. The IEP now calls for the teacher to follow the test maker's instructions. (S-36 compare pp. 269- 270 following maker's administration and scoring instructions vs. p.30, to p.252, p.249 not administered according to test maker's instruction, to S-36 p.250 Aimsweb probes based on 76 problems in 2019, with S-36 p.251 according to test maker's instruction in 2019, with S-36 p.252 according to maker's instruction in 2017).
153. The Charter used Aimsweb math probes as the tool for The Student math progress monitoring. (Tr. 160).
154. The Parent also objected that the Charter was not timing the Aimsweb probe. (Tr. 161).
155. When Parent continued to object to the Charter's method for math progress monitoring, the Charter agreed to reference Aimsweb point values and instructions when administering the probes. (Tr. 162; S-30, p. 122). The Parent, however, never allowed TR to engage in progress monitoring of the revised math goal. (S-40, p. 21).
156. Page 273 of the IEP states the goal is mastered. (S-36 p.273). Page 274 includes a speech goal calling on the Student to demonstrate divergent think skills by completing a writing assignment of at least 3 paragraphs

and scoring at least 4 out of 6 over three trials using a defined rubric. (S-36 p.274).

157. Page 275 includes one unrelated short term instructional objective and two related short term instructional objectives. The first objective calls for the Student to produce more than one answer to a question with justifications. In contrast, the remaining objectives call for the Student to produce a writing using a specific SDI. Two objectives state the Student's baseline is 50%; one objective states the baseline is "3." The baseline statements relate back to data found on page 36, which states the Student mastered the same objective at 90%. (S-36 p.276). The speech present level statements include four (4) speech objectives for 2020, while the goal and short term instructional, in the same IEP, lists three objectives. The goal statements, the present levels and the objectives are confusing and otherwise inconsistent. (S-36 pp.36-39 vs. S-36 pp.273-274).
158. Pages 277 and 278 list a behavioral goal calling for the Student to follow two (2) step commands and to identify and communicate three (3) strategies that benefit learning for 4 out of 5 opportunities for three (3) consecutive sessions. (S-36 p.278).
159. Page 279 lists an OT goal calling on the Student to hand copy one (1) page of a completed guided notes with no more than five (5) errors on three (3) out of three (3) consecutive trials. (S-36 p.279).
160. Pages 281 to 287 list 24 different SDIs. The first SDI references the need to provide assistive technology supports. Neither the RR nor the present levels list the results of an assistive technology evaluation or the results of any trials with different devices or software. The inconsistency between

the SDIs in the present levels and the SDIs found in Section VI of the IEP are confusing. (S-36 pp.281-287).

161. The IEP notes the Student will participate in the general education curriculum with non-disabled peers for all settings with accommodations 100% of the school day. (S-36 pp.291-292).
162. The Charter issued a NOREP calling for the Student to receive Itinerant Learning Support, Speech Services, an instructional assistant and behavior services for upwards of 20% of the school day. The inconsistency between the description of the Student's participation in regular education and participation in special education is confusing. S-36 p.296.
163. The IEP included activities to build skills for managing academic assignments using a calendar to track lessons, calls to and from the Charter, and assignments. (S-36, p. 281).
164. The IEE report recommended the use of audiobooks (S-36, p. 151), so the Charter provided the Student with licenses to two different audiobook programs; however, the Student did not use either program. (Tr. 232-233).
165. The Charter provided the Student with two assistive technology devices, a "LiveScribe Pen" to help with note-taking and a Notebook. Instructions for using the device were provided to Parent. (Tr. 235; PE-36, p 3-10). On her own, the Parent decided to have the Student work with the tutors to learn how to use the note-taking device. The Parent never told the Charter that the Student did not know how to use the device. (PE-36, p. 1).
166. The Parent disapproved the NOREP proposing to implement the February 2020 IEP and filed for due process. (S-36 p. 295).

APPLICABLE LEGAL PRINCIPLES

WITNESS CREDIBILITY

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *See also, generally, David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this case, all witnesses testified credibly. All answered questions to the best of their abilities, were explicit in what they could and could not recall, and sought clarification when appropriate. As discussed below, not all witnesses were persuasive, cogent or clear in their responses.

THE FILING PARTY SHOULDERS THE BURDEN OF PROOF

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

THE IEP PROCESS, THE IEP MEETING, THE IEP DOCUMENT AND FAPE

The IDEA obligates local education agencies (LEAs or charters) to locate, identify, evaluate and provide students with a disability, an appropriate

education, in the least restrictive setting, with children who are not otherwise eligible for special education. 20 U.S.C. §1412. "Special education" means specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability, including (1) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and 2) instruction in physical education. 34 CFR § 300.39 (a)(1). "Specially designed instruction" means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction – (1) to address the child's unique needs resulting from the disability; and (2) ensuring the child's access to the general curriculum so that the child can meet the educational standards that apply to all children within the jurisdiction of the public agency. 34 CFR § 300.39 (b)(3).

The term related services includes (1) speech-language pathology services or any other related service if the service is considered special education rather than a related service under state standards; (2) travel training; and (3) vocational education. 34 CFR § 300.39. To be eligible for IDEA services, the Student must have a recognized IDEA disability which adversely affects the Student's education. 34 CFR §300.8.

The unique needs of a student with a disability may encompass more than a mastery of academic subjects. Unique needs are broadly construed to include academic, social, health, emotional, behavioral, physical, transition, and vocational needs, all as those needs relate to the provision of preschool, elementary, and secondary education services.

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the court held that the IDEA FAPE requirement is met by providing personalized instruction and support services in an IEP that is reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures outlined in the Act are followed.

An IEP is a comprehensive program prepared by a child's "IEP Team," including teachers, school officials, the LEA representative and the child's parents. An IEP must be drafted in compliance with a detailed set of substantive requirements. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). An IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. (1982).

WHEN ARE PROCEDURAL AND SUBSTANTIVE VIOLATIONS A DENIAL OF FAPE

A school district may violate the IDEA in several ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 206). "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits." *Fresno Unified*, 626 F.3d at 432 (citing *Rowley*, 458 U.S. at 206-07); *Andrew F.*, 137 S. Ct. at 999.

A procedural violation occurs when a district fails to abide by the IDEA's procedural safeguards requirements. Procedural violations do not necessarily amount to a denial of a FAPE. *See, C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 64 (3d Cir. 2010). A procedural violation constitutes a denial of a FAPE where it results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation or causes a deprivation of educational benefits. 34 CFR §300.513.

A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F.* 137 S. Ct. 1001. Still, the IDEA does not guarantee "the absolute best or 'potential-maximizing' education."⁴

The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Endrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Endrew* court concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 1001, 197 L.Ed.2d at 352.⁵ Therefore, as *Endrew*, and *Rowley*, make it clear, the IEP must be responsive to the child's identified educational needs and individual circumstances. See, 20 U.S.C. § 1414(d); 34 CFR § 300.324.

DISCUSSION ANALYSIS AND CONCLUSIONS OF LAW

THE 2017-2018 DENIAL OF FAPE CLAIM IS BARRED

The claims before me now relating to the 2017-2018 school year are barred by the doctrines of collateral estoppel and res judicata. Collateral *estoppel* or issue preclusion bars an issue of fact or law from being relitigated where it has already been litigated and decided by a valid and final judgment on the merits. Closely related to collateral estoppel is the doctrine of *res judicata*, which bars relitigation of a claim decided in a prior proceeding. To rely on the affirmative defense of res judicata, a party must establish three elements: (1) a final

⁴ See, *Fuhrmann on Behalf of Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1043 (3d Cir. 1993) (recognizing that IDEA does not entitle a child to the best education available, but only one reasonably calculated to provide him or her with a meaningful educational benefit).

⁵ Long standing Third Circuit case law interpreting the IDEA before *Endrew* is still controlling and otherwise applicable. *Dunn v. Downingtown Area Sch. Dist. (In re K.D.)*, 904 F.3d 248 (3d Cir. 2018).

judgment on the merits in a prior proceeding that involved; (2) the same parties or their privies; and (3) the same "cause of action." The res judicata doctrine's central purpose is to require a party to present all claims arising out of the same occurrence in a single suit. In examining the similarity of the claims (the third element), courts and hearing officers focus on whether the acts complained of are the same, whether the material facts alleged in each suit are the same and whether the witnesses and documentation required to prove such allegations are the same.

Here, there is no real dispute that the first two elements are met. As mentioned earlier, there is likewise no real question that the third element is met as to the FAPE claims contained in the complaint now before me, for the 2017-2018 school year were resolved in the Charter's favor. "Whether two lawsuits are based on the same cause of action turns on the essential similarity of the underlying events giving rise to the various legal claims." *M.R. and J.R. v. Ridley School District*, 2012 U.S. Dist. LEXIS 113600, 2012 WL 3279230, at *5 (E.D. Pa. August 13, 2012).⁶

The Parent's 2017-2018 denial of FAPE claim here is the same, the school year is the same, the denial of FAPE proofs are the same, the witnesses are the same and the parties are the same. To the extent the Parent now wants to split the claims, I also find that litigation tactic is precluded.⁷ Accordingly, applying the doctrines of claim preclusion and issue preclusion, I now find after

⁶ A hearing officer must consider: (1) whether the acts complained of and the demand for relief are the same; (2) whether the theory of recovery is the same; (3) whether the witnesses and documentation required to prove the allegations are the same; and (4) whether the material facts alleged in each suit are the same. See *United States v. Athlone Industries, Inc.*, 746 F.2d 977, 984 (3d Cir. 1984).

⁷ In the Third Circuit, a plaintiff has "no right to maintain two separate actions involving the same subject matter at the same time in the same court against the same defendant." *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977). "The doctrine[] promotes judicial economy by protecting defendants from having to defend against multiple identical, or nearly identical, lawsuits and by protecting courts from having to expend judicial resources on piecemeal litigation." *Luo v. Owen J. Roberts Sch. Dist., No. 14-6354*, 2016 U.S. Dist. LEXIS 148908 (E.D. Pa. Oct. 27, 2016)

reviewing the Hearing Officer McElligott's Decision and the District's Court Decision all FAPE claims from April 2017 through April 2018 were litigated to a final order. Therefore, I now find the 2017-2018 claim is barred. At the same time, I also find that the Student's May 2018 through June 2018 denial of FAPE claims not subject to the Hearing Officer's Order can move forward. Accordingly, I will consider the May 2018 to June 2018 time frame when I address the overall 2018-2019 school year claims that follow.

**THE 2018-2019 OFFER OF A FAPE, THE IEP
AND THE RECORD REVIEW REEVALUATION**

Sometime between the end of December 2017 and January 2018, the Charter asked and the Parent refused to consent to collect additional testing data. Faced with a deadline, the Charter reviewed the then existing data and issued reevaluation. This reevaluation, along with the existing progress monitoring data and the 2017-2018 IEP, would later set the stage for the development of the 2018-2019 IEP.

In mid-September, the Parties received the hearing officer's decision finding that the Charter's 2017-2018 offer of a FAPE and IEP were appropriate. The hearing officer held "[t]he April 2017 IEP is an appropriate program, reasonably calculated to yield meaningful educational benefit to the student given the student's unique needs and circumstances." (S-2, p. 23, 26).

By October 2018 and throughout November 2018, the teachers reached out to Parent when they noticed the Student was not attending class. Sometime in late October early November, the Parent notified the Charter that the Student would no longer attend the on-line direct Math instruction. Instead, the Parent stated that the Student would attend tutoring and work on the daily lessons during the school day.

On about November 2, 2018, the Parent, in an email, requested an IEP conference to address emerging concerns about the on-line classes, the lack of hardback textbooks, the progress monitoring and "Edio" course management

software. The IEP request was overlooked, which then caused the Parent to file a compliance complaint with PDE. In February 2019, PDE directed the Charter to schedule an IEP meeting before April 17, 2019. The Charter scheduled an IEP meeting for early March; the Parent declined; the Charter then rescheduled another IEP conference for early April 4, 2018. Once again, as the tensions increased, the Parent did not attend the April IEP meeting. This time, however, the Charter, without the Parent, held an IEP meeting. Using the limited 2018 reevaluation record review as a base understanding of the Student's then current needs along with the Hearing Officer sanctioned IEP, the IEP team issued a proposed IEP.

The proposed IEP essentially included the same Hearing Officer sanctioned content found in the 2017-2018 IEP. For example, the goals, SDIs, related services, and progress monitoring schedule tracked the IEP upheld by Hearing Officer McElligott. In anticipation of the Student being promoted to the next grade, the IEP team did update the transition plan to include anticipated courses that would allow the Student to move forward with the post-graduation transition goals. The proposed IEP continued to provide two (2) 60-minute speech therapy sessions per week and limited OT support. Although the IEP did not include the previously offered and rejected IA and BCBA services, the Charter was prepared to include the supports if the Parent would agree, however the Parent would not.

Recognizing that the appropriateness of an IEP is judged at the time it is offered, I now find, given the Student's limited attendance, the proposed 2018-2019 IEP, while overly wordy, was otherwise appropriate. Absent new data describing a change in circumstances, the Charter could not offer anything more than what was previously deemed appropriate. The record is preponderant; the Parent's zealous advocacy thwarted the IEP collaborative

process. Accordingly, the Student's May through June 2018 and the Student's 2018-2019 denial of a FAPE claim is denied.⁸

THE INITIAL 2019-2020 OFFER OF A FAPE

In April 2019, although the Parent did not attend the IEP meeting, the IEP team members met and proposed an updated IEP. As the Student was not attending the on-line classes or participating in the progress monitoring, the IEP team decided to reoffer the same goals, SDIs and related services offered in the 2018-2019 IEP. The Charter continued to offer and the Parent continued to refuse the IA and BCBA services. In July 2019, the Charter repeated its request to complete a comprehensive evaluation. After weeks of back and forth negotiations, the Charter agreed to pay the previous 2014 independent evaluator to complete a comprehensive reassessment.

Beginning in September 2019 and continuing through November 2019, the Parties met to develop an updated IEP. During the September and November IEP conferences, the Parent raised concerns about the lack of printed materials, paper textbooks. The Parent also raised a specific concern that the Aimsweb probes should be administered, as recommended by the test maker. The Parent wanted the Charter to administer the probes as a

⁸ The 3d Circuit in *M.R. v. Ridley Sch. Dist.*, 62 IDELR 251 (3d Cir. 2014), *cert. denied*, 115 LRP 21644 , 135 S. Ct. 2309 (2015) held that "stay put" remains in effect through the final resolution of the dispute. When the Parent filed the 2017-2018 due process complaint, unless the Parties otherwise agreed to IEP revisions, the 2016-2017 IEP became the "stay put" IEP. That "stay put program and placement", subject to an agreement of the parties the "stay put IEP" described the bundle of SDIs, related services and goal statements otherwise in effect, until the hearing officer's decision. Similarly "stay put" continues on into federal court. Absent an agreement otherwise the Charter was required to deliver the Hearing Officer sanctioned offer of a FAPE.

timed in person assessment, rather than an untimed on-line assessment. The Parent also asked that the Aimsweb probes be scored using the test maker's instruction. The IEP team members, after reviewing the April 2018 reevaluation, refused each request stating that they did not notice a difference in the Student's performance between the on-line vs. in-person paper and pencil assessment data. The IEP team members also rejected the timing and scoring request. The Charter member of the team stated that the scoring and timing requirements were modified to assess the Student's performance. The team further stated that rather than compare the Student's probe data against a test maker's normative sample, they wanted to collect progress monitoring data that would provide the Student with meaningful feedback based on a percentage of correct responses. Finally, after reviewing the then existing data, the IEP team did not agree to provide paper materials or paperback textbooks.

As in the prior IEPs, the Charter proposed the IA and BCBA implement the specifically designed instruction targeting the Student's executive functioning deficit areas of attention, concentration and completion of multistep tasks. The IEP included a new speech and language goal to build thinking and writing skills. The November 2019 IEP included another new behavioral goal to build executive functioning skills targeting following two (2) step directions and another new goal to learn self-advocacy skills. The Parent rejected these two behavioral goals as she continued to decline the

BCBA and IA supports. The Parent never approved the IEP and the Charter never implemented this IEP as the Student continued to attend private tutoring during the school day. The November 2019 IEP continued to target the goal statements, in the previous IEP goal statements, with somewhat ambitious speech, math, and writing goals. All of the targeted goal areas were linked to previous speech, behavioral and academic assessment data in the then existing record. As the Student was not attending class, coupled with the fact that the team did not otherwise have objective data to reach a different conclusion, I now find the September – November 2019 IEP was reasonably calculated to provide meaningful benefit. The IEE report arrived on about December 6, 2019. The IEE report was a substantial change in circumstances and now requires a change in the analysis of the appropriateness of future offers of a FAPE.

**THE IEE REPORT, THE REVISED REEVALUATION REPORT
AND THE 2020 OFFER OF A FAPE**

The December 2019, 53-page IEE included various academic, cognitive, individual achievement, emotional, behavioral and social assessments. The Parent, the Student, the teachers and the tutors completed checklists and/or questioners for the IEE examiner's review. The examiner explained how the Student's disability interfered with learning new academic, executive functioning and behavioral skills. The IEE confirmed the Student's overall learning profile remained somewhat static. While many of the individual subtest standard scores are higher, the net increase in the scores

is not significant. For example, when the achievement testing from 2014 is compared to the 2019 data, the Broad Reading SS went up 3 points [SS 101 to SS 104] and Broad Math SS went up 12 points [SS 90 to SS 102]. While these modest increases across the board indicate learning gains, they do not support a preponderant finding of significant learning. Noting the modest gains, the IEE examiner suggested 24 different SDIs, modifications and/or accommodations for math, written expression, language development, reading, academic supports, behavioral goals, and organizational/executive functioning skill development. The IEE included a learning plan on how to use the 24 new and improved SDIs, accommodations and recommendations. Finally, the IEE recommended several assistive technology strategies.

On January 14, 2020, the Charter's evaluation team, including the Parent, the OT, the special education teacher, the regular education teacher and the speech therapist, quickly met, accepted the examiner's findings and incorporated the IEE testing data, SDIs, accommodations and recommendations into a new January 2020 reevaluation report. After administering a variety of assessments, the OT did not recommend OT supports at the Charter; at the same time, the OT did recommend limited OT support during tutoring sessions.

In early January 2020, the Charter issued a 139-page reevaluation report, which included an extensive list of unmet needs, documented strengths, and

weaknesses. As the IEE report did not include updated speech and language assessment data, the team included the 2016 IEE speech data and the speech therapist's limited data from the 2018 school year. The Parent requested and the Charter agreed to include a full copy of the 2014 IEE, the 2019 IEE, the IEE examiner's curriculum vitae, and multiple pages of anecdotal records from the Student's tutors as part of the reevaluation report.

After reviewing the reevaluation report, along with the applicable IDEA and Pennsylvania standards, putting aside the stale data and the multiple copies of the reports, I now find the academic, behavioral, cognitive and executive functioning, OT, behavioral, social, emotional data in the January 4, 2020 reevaluation represents a comprehensive evaluation of the Student's needs. At the same time, I seriously doubt the accuracy of the 2016 four (4) year old IEE speech data's instructional relevance. Given that the Student has not been involved in ongoing speech therapy for more than one school year, I now find the speech 2016 speech data stale and needs to be updated. Therefore, I will now Order the Charter school to complete an updated speech evaluation. Let me be clear, but for the speech and language data, the reevaluation is otherwise comprehensive and appropriate. I also find the omission of updated speech data to be a harmless error in this highly unusual situation. Armed with the updated reevaluation report the IEP team met, the resulting IEP raises serious concerns

THE 2020 OFFER OF AN IEP AND A FAPE

THE PRESENT LEVELS ARE FLAWED

On February 4, 2020, the Charter produced and the Parent rejected the 297-page IEP. The IEP team, including the Parents, updated the Student's present levels, transition services, goals/objectives and the SDIs. The statement of the present levels begins on page 11 and ends on page 260. First, I now find the present levels includes an endless stream of stale data. Let me explain the inclusion of the outdated 2014 IEE results, the outdated 2016 speech IEE, the 2015 "Declaration" from the IEE examiner in a federal court action in opposition to a Motion for Summary Judgment, endless pages of subjective, anecdotal statements from the Student's private tutors and a lengthy self-serving statement of Parental concerns countering the Charter's rendition of the Student's education from 2015 to the present did not help me understand the Student current needs, circumstances, deficits or weaknesses. This type of record redux is entirely inappropriate, distracting, burdensome and confuses the reader.

Second, present levels should generally relate to the then-current Student's specific achievement data from the most recent evaluation, formative assessments, curriculum-based assessments, transition assessments, and progress monitoring data. The present levels should also address parental concerns for enhancing the education of the Student, including but not limited to how the Student's disability affects involvement and progress in the general education curriculum. The present levels should address the Student's strengths, academic, developmental, and functional needs related to the Student's disability.

Third, it is clear to me that both sides used the present levels as a launchpad to create a theory of the facts for future litigation. The Parental input

bolsters her judgment; the Charter failed to educate the Student. On the other hand, the Charter allowed the Parent to include the information to demonstrate the Parent's refusal to collaborate. The long history of litigation has now reached the point that both sides, borrowing an equitable maxim, no longer have "clean hands." Both sides created the present levels; therefore, both sides shoulder the responsibility to clear up the confusion. Simply while the present levels may have useful data, the data is buried in a word salad.

Fourth, once the Parties self-serving statements and stale data are factored out, I now find the present levels are insufficient, inadequate and otherwise inappropriate. For example, on pages 36 and 37, the present levels include a side-by-side comparison of the Student's 2014 vs. 2019 achievement testing standard scores and grade equivalent scores. The table purports to state that the Student made between 2.8 years to a 10.3-grade year level advancements in Letter Word Identification, Applied Problems, Spelling, Passage Comprehension, Calculations, Writing Samples, Word Attack, Oral Reading Sentence Reading Fluency, Math Facts Fluency and Sentence Writing Fluency. The second table comparing the Student's achievement cluster scores purports to state that the Student made 5.9 years to 6.75-year grade-level advancement.

Focusing on the math subtest, the Charter contends the Student earned a Math Calculation grade level of 7.8, while the purported Math Calculation subtest grade level score is 6.6. This misconception of grade equivalents has been well documented and rejected by research organizations for years, noting that the grade level metrics create more confusion than clarity.⁹ First,

⁹ See, Misuse of Grade Equivalents, at <http://www.myschoolpsychology.com/testing-information/misuse-of-grade-equivalents> referencing AERA/APA/NCME Joint Committee. (1985). Standards for educational and psychological testing. Washington, DC: American Psychological Association. Association News: International Reading Association. (1981). Journal of Learning Disabilities, 14 (9), 558, Airasian, P. W. (1994). Classroom assessment (2nd ed.), New York: McGrawHill, Inc. Miller, M., Linn, R., & Gronlund,

"grade-equivalent scales are not an equal-interval scale, meaning it is like a ruler with inches of varying lengths." Second, "grade-equivalent units do not represent equal amounts of ability at different points along the scale." Third, "a student who moves the same number of grade equivalents at one level on the scale (e.g., 2.5–2.9), has not necessarily 'grown' in ability the same amount as a student who moves the same number of grade equivalents at a different level on the scale (e.g., 8.5–8.9)." Fourth, "the amount of growth in ability required to move from 2.5 to 2.9 is much greater than that needed to move from 8.5–8.9." Sixth, "because grade equivalents are not equal-interval units, they should not be used in mathematical calculations, such as averaging." *Id.*

Fifth, the Charter seems to miss the point if the calculation is accurate. Since the Student has essentially not attended a full year of cyber-schooling since 2018, the private tutoring and not the Charter are responsible for the dramatic increase. If the table is correct, private tutoring, not the Charter, produced significant learning. Furthermore, if the grade level metric is accurate, the Student would have already mastered the math, reading, spelling and writing goal statements in the proposed IEP, thereby making the IEP goal statements discussed below insufficient and inappropriate. Therefore, as used here, I now find the grade equivalent measures used here as a statement of a present level drastically overstates and misrepresents the Student's present levels and progress. Absent an exact starting point; the IEP process is stalled.

Sixth, beginning on page 17 through page 19, the present levels include a statement of how the Charter will continue to implement the IEE examiner's proposed SDIs/strategies to meet the Student's needs. The SDI statement

N. (2009). *Measurement and assessment in teaching* (10th ed.), New Jersey: Pearson Education, Inc.
Stiggins, R. J. (2009), *Student-centered classroom assessment* (Second Edition), Upper Saddle River, NJ: Merrill, an imprint of Prentice Hall.

belongs in the SDI portion of the IEP. The 24 accepted SDI statements reflect modifications to the delivery of instruction across the curriculum and school day. Sadly, however, the 24 SDIs do not appear in the SDIs in Section VI of the IEP. This inconsistency is problematic.

Seventh, beginning on page 19 through page 20, the present levels include a "Goal" statement calling for the Student to use the Charter's case management software accurately for three consecutive weeks. This "Goal" statement, in the present levels, which, if implemented, would address a need that does not appear as a "Goal" in Section V of the IEP. This type of helter-skelter writing style directly interfered with my comprehension of the Student's needs, circumstance and present levels. As I did, I should not have to struggle to understand the simple concept of how the child's disability affects the child's involvement and progress in the general education curriculum.

Accordingly, I now find that the Student's present academic achievement levels do not objectively describe the Student's math, speech, writing, executive functioning, speech and language baseline. As presented, the present level statements do not allow this hearing officer, the Charter and the Parent to track or measure the Student's starting point, past progress, or foster future progress. *Bakersfield City Sch. Dist.*, 51 IDELR 142 (SEA CA 2008).

Stated another way, when the data was present, the test scores used to describe the Student's performance were not self-explanatory. Absent the use of test manuals, or all participants cannot interpret other aids, the test scores presented without extensive explanation. In this instance, knowing the Parties' history, the Parties will contest the explanation to the bitter end as Student's instructional time runs out. *See also Pocatello Sch. Dist. #25*, 18 IDELR 83 (SEA ID 1991) (noting that the parents could not fully understand the proposed educational program and participate in the IEP

process because, among other things, numeric test scores were neither explained nor self-explanatory). An appropriate Order follows directing the Charter to rewrite the present levels.

THE PROGRESS MONITORING IS FLAWED

The record is preponderant that the Charter did not follow the Aimsweb test maker's instruction when it collected and administered the math probe data. By design, the Aimsweb probes are a timed paper and pencil test consisting of a large sample of problems that vary in difficulty and point value. At one time, the teachers administered the probes according to the test maker's instruction; at other times, the probes were untimed, presented on-line and scored based on a percentage correct rather than on the degree of difficulty. While the IEP called for the data to be presented as a percentage, the IEP team cannot ignore the test maker's instructions. This on again off again testing strategy prevented reliable year-to-year comparison of the progress monitoring data. Therefore, I will now give the progress monitoring data-limited weight. An appropriate Order directing the Charter to follow the test maker's instruction follows.

ALTHOUGH THE GOAL STATEMENTS ARE MEASURABLE, THE GOALS ARE NOT CHALLENGING OR AMBITIOUS

The inconsistencies discussed above regarding the present levels, the updated data in the reevaluation report and the progress monitoring inconsistencies create several unanswered questions. The procedural violations describe above raise serious doubt if the goal statements are ambitious, challenging and reasonably calculated to produce significant learning and meaningful benefit. For example, the misplacement of goal statements found in the present levels raises serious questions if the IEP goals found in Section V of the IEP address all areas of unique need and individual circumstances. For example, when the Student's executive functioning scores are compared, the Student's organizational skills

represent an ongoing unmet constant unique need. I find it puzzling that the IEP team waited until the Student reached 11th grade to target learning how to follow one-step and two-step directions. As pre-Algebra and Algebra require the Student to follow a series of otherwise complicated steps to solve the problem, the record is unclear how a Student who now needs to learn to follow one and two-step directions is earning passing grades in a higher-level math class. The record is also unclear how a Student who has a long-term math calculation deficit can earn passing grades in Algebra with a 5th-grade instructional level. The progress monitoring and the teacher comments about the Student's writing skills do not match the IEE results. The IEE data states the Student writes simple sentences that lack punctuation, capitalization and notes frequent spelling errors. Yet, the IEP does not provide for a standalone time for direct instruction in written expression. Assuming the Charter's statement about the Student's grade level skill calculations in the present levels is accurate and not, the IEP goal statements understate the Student's instructional level, making the goals inappropriate.

When the record is viewed as a whole, this series of inconsistencies create a series of procedural violations that undermine the persuasiveness of the teacher's comments about the appropriateness of the goal statements and the progress monitoring. Faced with these unexplained inconsistencies and procedural violations, I now find the goal statements as drafted are not challenging, complete, or otherwise ambitious. An appropriate Order follows.

THE SPECIALLY DESIGNED INSTRUCTION IS INCOMPLETE

The record is clear the IEP team accepted and incorporated the IEE examiner's recommended SDIs, accommodations and modifications into the IEP. The IEE examiner's learning profile linked the SDIs to the way the Student learns. The recommended SDIs are linked to the delivery of the Student's individualized instruction. I now find, as written, the IEP is

confusing as to what SDIs are needed. Absent an exact list of SDIs; the Student will not have an equal opportunity to access the regular education curriculum. Therefore, the IEP team is directed to incorporate the SDIs, listed in the IEE and the present levels, into the IEP at Section VI. I now find this drafting error is a harmless procedural error.

THE APPROPRIATE RELIEF

Traditionally, a finding of a denial of a FAPE results in an award of compensatory education. In this instance, for the following equitable reasons, I will not award compensatory education. First, the Parent has not allowed the Student to attend school regularly. Second, when the Parent did not present the Student for progress monitoring, neither party benefited from objective data. Absent ongoing data, the IEP team, the Parent and fact finder cannot track progress. I fully appreciate the Parent's genuine belief that the progress monitoring was flawed and the Student's program was inappropriate. That said, rather than work the IEP process, her efforts thwarted the IEP process. Third, for the past two school years, the Parent has made a series of unilateral decisions about the Student's program, placement, and service level. As the IDEA would not condone that behavior on the part of the Charter, I now find that the same unilateral decision making on the part of the Parent, while well-meaning, prevented the implementation of the court-sanctioned IEP. Therefore, based on the totality of the circumstances, the Student's claim for compensatory education is denied. The Hearing Officer's Order, once affirmed, should have been implemented.

The Parties are reminded of the three controlling equitable maxims "equity regards as done what should have been done" the court-approved IEP should have been implemented. Next, "those who come to equity must come with clean hands," the Parent's on and off relationship with the IEP team is troubling when she now seeks equitable relief. And finally," those who seek

equity must do equity." At times, the Parent's zealous advocacy morphed into an obstacle towards reaching a compromised victory. Therefore, applying these maxims, the Student request for compensatory education and the Parent's request for reimbursement is denied. An appropriate Order follows.

ORDER

Now, this October 30, 2020, in accordance with the accompanying Decision, it is hereby **ORDERED** that the Parent's claims are **GRANTED IN PART AND DENIED IN PART**.

1. The Student's denial of a FAPE claim for the 2017-2018 school year is **DENIED**.
2. The Student's denial of a FAPE claim for the 2018-2019 school year is **DENIED**.
3. The Student's denial of a FAPE claim for the 2019-2020 school year is **GRANTED** in part and **DENIED** in part.
4. The Student's claim for compensatory education for the 2019-2020 school year is **DENIED**.
5. The Student's claim for reimbursement for FAPE related costs for the 2017-2018, 2018-2019 and 2019-2020 school year is **DENIED**.
6. The Charter has 20 school days to rewrite the present levels, goal statements, progress monitoring and specially-designed instruction.
7. The Charter is also **ORDERED** to complete an updated speech evaluation within 20-days of the date of this Order. The results should be shared with the Parents and discussed as part of the rewrite of the IEP.
8. Once the IEP rewrite is complete, the Charter should provide the Parent with a revised IEP and a NOREP.

It is **FURTHER ORDERED** that any claim not explicitly addressed in this Order is also **DENIED** and **DISMISSED**.

/s/ Charles W. Jelley

HEARING OFFICER
ODR FILE #23710-1920 KE