

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

ODR No. 28261-22-23

Closed Hearing

Child's Name

I.K.

Date of Birth

[redacted]

Parent

[redacted]

Counsel for Parents

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Hearing Officer

Brian Jason Ford

Date of Decision

12/22/2023

Introduction

This special education due process hearing arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504). The matter concerns a child with disabilities (the Student).

The Parent enrolled the Student in the Young Scholars of Western PA Charter School (the Charter) for the 2021-22 school year. During that year, the Student engaged in several behavioral incidents and received a Section 504 Service Plan to provide regular education accommodations. In the summer of 2023, the Student received private evaluations resulting in several medical diagnoses with educational implications. During the majority of the 2022-23 school year, the Student continued to receive Section 504 accommodations. Unfortunately, the Student's behaviors deteriorated from the outset of the 2022-23 school year. The Charter reevaluated the Student in April 2023 and concluded that the Student should receive special education. Before the parties could act on that conclusion, the Student committed a significant infraction of the Charter's code of conduct. The Parent withdrew the Student from the Charter to avoid expulsion.

The Parent requested this hearing, alleging that the Charter violated the Student's rights under the IDEA and Section 504. The Parent demands compensatory education as a remedy.¹

Issues

A single, overarching issue was presented for adjudication: Did the Charter violate the Student's IDEA right to a free appropriate public education (FAPE) during the Student's enrollment in the Charter. The Parent argues that the answer is "yes," and that compensatory education is owed to the Student to remedy the violation. The Charter argues to the contrary.

Discussed below (and consistent with the pleadings and on-the-record colloquies with the parties), the overarching issue may be divided into sub-issues that apply during different period of the Student's enrollment. For example, the Parent alleges both Child Find violation and that an Evaluation Report (ER) prepared by the Charter was inappropriate. Each sub-issue is discussed in greater detail below.

As discussed below, I find in part for the Parent and in part for the Charter.

¹ The Parent also demands fees and costs as a remedy under Section 504. I have no authority to award such damages, but the demand is preserved.

Findings of Fact

I reviewed the record of this matter in its entirety. I make findings of fact only as necessary to resolve the issues before me. I find as follows:

The 2021-22 School Year ([redacted] Grade)

1. The 2021-22 school year was the Student's first year at the Charter. S-1, S-2.
2. The Parent completed enrollment paperwork when the Student enrolled in the Charter. S-1, S-2, S-3.
3. The Parent provided the following information to the Charter upon (or just prior to) the Student's enrollment:
 - a. The Student attended a Pennsylvania public cyber charter school in the school year prior to the Student's enrollment in the Charter. S-1, S-2.
 - b. A psychiatrist had diagnosed the Student with Attention Deficit Hyperactivity Disorder. Other than that diagnosis, the Parent expressed no social, behavioral, or medical concerns about the Student. S-1, S-2, S-3.
 - c. In response to the question, "Does your child receive any special services?" the Parent wrote checked a box to say, "No." The Parent also checked a box to say "No" to questions asking if the Student had operations, head injuries, serious accidents, incidents involving weapons, violence, drugs, or alcohol, prior school suspensions or expulsions, and "problems with vision, hearing or speech," S-1.
 - d. The Parent did not send documentation of "special services" to the Charter. Such documentation, if any, was requested by the Charter as part of the enrollment process. S-1.
 - e. The Parent provided no additional information in response to a question asking for "other pertinent information about your child's health." S-1.
4. On September 30, 2021, the Student initiated a physical altercation with another Student. Charter personnel responded to the incident

and, ultimately, the Student received a three-day out-of-school suspension. P-1.

5. On October 12, 2021, the Student was playing roughly with another student while walking to recess. The other student pushed the Student into a fence, damaging the fence. The Student received a one-day in-school suspension for property damage. P-1.
6. On November 15, 2021, the Charter met with the Parent and presented a Section 504 Service Agreement for the Student (the 2021 504 Plan). The Parent accepted the 504 Plan the next day. S-4.
7. Around the same time that the 2021 504 Plan was developed, the Parent asked the Charter to complete a special education evaluation of the Student. The Charter agreed and the evaluation commenced.² J-5.
8. On December 16, 2021, the Charter documented an incident of the Student physically harassing another student in class by repeatedly touching the other student. Charter personnel spoke with the Student about the incident and documented the incident, but did not discipline the Student. P-1.
9. On January 6, 2022, a nearly identical incident occurred, and the Student was also talking during a test. The Charter addressed the incident in the same way (by talking with but not disciplining the Student) and also contacted the Parent. P-1.
10. On January 6, 2022, the Charter completed the evaluation and finalized an Evaluation Report (the 2022 ER). J-5.
11. The 2022 ER notes that the reasons for referral were, "concerns with behavior, social skills, sensory needs, attention/focus, and fine and gross motor skills." J-5 at 1.
12. The 2022 ER included narrative input from the Parent, solicited through a Parent Input Form. Through that form, the Parent reported that the Student, "is learning the coping skills to be successful in school... [and] feels that [Student] has benefitted from teachers who are highly structured and who give instructions in smaller steps. [Parent] reported concerns with sensory overload, communicating []

² The record does not reveal the exact date that the Parent requested the evaluation. The evaluation report references a Parent Input Form dated November 15, 2021, which is the same day that the 504 Plan was drafted and offered to the Parent. J-5.

needs, and understanding social cues from [] peers. [Parent] reported that [Student] has reported frustration when [Student's] classes become "busy or [Student] feels teachers are overlooking [Student]." J-5 at 1.

13. Through the Parent input form, the Parent also reported that the Student was receiving individual counseling from a third party. J-5 at 1.
14. The 2022 ER included a 15-minute observation of the Student in class by a school psychologist (the Psychologist), and a report of the Psychologist's observations during testing. The Psychologist observed no negative behaviors or behaviors that would negatively impact upon testing. J-5 at 2-4.
15. The 2022 ER included a narrative report of observations conducted as part of a Functional Behavior Assessment (FBA). The FBA included observations on two days in different classes. Each observation was 35 or 40 minutes. The Charter's contracted behavioral consultant observed no significant negative behaviors and concluded that "while [Student] has minor issues with paying attention in class, it is not determined at this time that any behaviors are impacting [Student's] academic or classroom performance." J-5 at 2-4, 20; S-5.
16. The 2022 ER included an Occupational Therapy (OT) evaluation conducted by an IU-employed evaluator (an MOT, OTR/L). The evaluator collected data by observing the Student's handwriting abilities and reviewing standardized surveys completed by teachers. The evaluator concluded that school-based OT services were not recommended. J-5 at 4-5.
17. The 2022 ER included narrative input from two teachers about the Student's strengths and needs. J-5 at 5-6.
18. The 2022 ER included narrative input from six teachers about the Student's behavior, collected by the behavior consultant as part of the FBA. Some teachers reported no behavioral concerns. Other teacher reported that the Student would frequently engage in mildly disruptive behaviors – but those behaviors lasted only seconds and the Student was easily redirected. A more structured survey of two teachers was consistent with the narrative input. See J-5 at 5-8.
19. The 2022 ER included a report of the Student's grades from the first two quarters of the 2021-22 school year. In the first quarter, the

Student earned five A+s (Art, Character Education, Music, Spanish, and Turkish), one A (Mathematics), two A-s (PE and STEM), one B+ (ELA) and two B- (Science and Social Studies). Character Education, PE, and STEM were all one-quarter classes. In the second quarter, the Student's Art, Music, and Turkish grades remained the same (all A+), the Student's ELA, Mathematics, and Social Studies grades all improved (A-, A+, and A+, respectively). The Student's Science and Spanish grades both fell to a C+. J-5 at 8.

20. The Psychologist assessed the Student's intellectual ability using the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V); the Student's academic achievement using the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4); and the Student's behavioral presentation using the Behavior Assessment Scale for Children, Third Edition (BASC-3). J-5 at 8-9.
21. According to the WISC-V, the Student's Full Scale IQ (FSIQ) fell in the "Low Average" range, but only one standard score away from the "Average" range.³ Composite scores contributing to the FSIQ were all in the "Average" and "Low Average" range. J-5 at 10.
22. On the WAIT-4, the Student's Reading Composite score was in the "Very High" range, the Reading Fluency Composite score was in the "Extremely High" range, the Mathematics Composite score was in the "Average" range, and the Orthographic Processing Composite score was in the "High Average" range." J-5 at 12-13.
23. The BASC-3 calls for individuals who know the Student well to rate the Student's behaviors on a questionnaire using a Likert scale. Two teachers and the Parent completed the BASC-3. The Parent's rating on the BASC-3 triggered an F-Index caution, suggesting that the Parent's ratings may over-emphasize the Student's negative behaviors. See J-5 at 13.
24. Both teachers' ratings of the Student using the BASC-3 placed the Student in the average range in all composite scores. One of the teachers' ratings placed the Student in the "at risk" range in two sub-groups, both related to depression. The other teacher's ratings placed the Student in the "average" range in all sub-groups. J-5 at 13-16.

³ The WISC-V's margin of error is not reported in the ER and is not discussed in the record of this case. This hearing officer's own experience suggests that the Student's FSIQ range falls within both the "average" and "low average" groups, but that conclusion is not directly supported by the record of this case.

25. The Parent's rating of the Student using the BASC-3 placed the Student in the "clinically significant" range in all composite scores and all sub-groups except for two sub-groups. J-5 at 13-16.
26. In addition to the clinical and adaptive scales, the Psychologist derived content scales from the BASC-3. As with the clinical and adaptive scales, both teachers' ratings were similar to each other and significantly different from the Parent's ratings. Both teachers ratings placed the Student in the "average" range across the board (one teacher rated the Student "at risk" in a sub-group for negative emotionality). In contrast, the Parent rated the Student in the "clinically significant" range in every domain. J-5 at 16-17.
27. The Psychologist also used the BASC-3 to derive an Executive Functioning Index for the Student. Both teacher's ratings were identical, placing the Student in the "Not Elevated" range in the overall executive functioning index and all sub-groups contributing to that index. The Parent's ratings were in the "Extremely Elevated" range both for the index and all sub-groups. J-5 at 17.
28. The 2022 ER included a summary of the Student's iReady scores. iReady is used by the Charter as a screening tool for all students. The Student's iReady scores placed the Student on grade level in reading and slightly below grade level in math. J-5 at 18.
29. The 2022 ER concluded with the Charter's determination that the Student had a disability but did not require specially designed instruction and, therefore, was not eligible for special education. J-5 at 20. However, the 2022 ER also concluded that the Student would benefit from continued support in a Section 504 Plan and implementation of the Positive Behavior Support Plan (PBSP) used throughout the Charter. J-5 at 20-21.
30. After the Charter issued the 2022 ER, the Student continued to receive accommodations under 2021 504 Plan.
31. On January 10, 2022, the Student was reprimanded for talking during a test. As with similar prior incidents, Charter personnel spoke with the Student and documented the incident but did not discipline the Student. P-1.
32. Similar minor disruptive incidents were documented and addressed the same way on January 11 (throwing an eraser), January 24 ("slam[ing] the top of [a] Chromebook down") February 2 (out of seat during

class), and February 14, 2022 (using a Chromebook during class and talking). All of these minor infractions were documented by the same teacher. P-1.

33. On February 10, 2022, the Student and another student were reprimanded for being “extremely disrespectful” to a teacher. Similar to the minor disruptive incidents, the students were written up and parents were called, but no other discipline was imposed. P-1.
34. On February 11, 2022, the same other student was involved in an altercation in the cafeteria. The Student reacted by moving the other student’s lunchbox. The Charter wrote up the Student and contacted the Parent. P-1.
35. On February 25, 2022, the Charter documented that the same other student was harassing the Student in class. The Student was also written up for not complying with directions in the cafeteria the same day, but no discipline was imposed. P-1.
36. On March 7, 2022, the same other student harassed the Student again. P-1.
37. On April 22, 2022, the Student hit another student with a pencil case and refused to comply with directions during recess (twice). Charter personnel addressed the incident with the Student but imposed no discipline. P-1.
38. On April 22, 2022, the parties met and revised the 504 Plan, adding several accommodations (the April 2022 504 Plan). J-1.
39. On April 27, 2022, the Student made disrespectful comments towards a teacher and refused to comply with directions. Charter personnel removed the Student to a discipline office and imposed a lunch detention and loss of recess. P-1.
40. On May 5, 2022, the Student began testing used to complete a private neuropsychological evaluation. J-4
41. On July 1, 2022, the Student used inappropriate language towards a teacher. The Student was required to write an apology, but no other discipline was imposed. P-1.
42. During the 2021-22 school year, in total, the Student received three days of out of school suspension, one day of in school suspension, and

one recess detention. A dozen other minor infractions, none of which resulted in discipline, were noted. P-1.

43. The Student ended the 2021-22 school year with a 3.575 GPA, finishing the year with an A+ in Art, Charter Education, Music, and Turkish, an A in Physical Education, an A- in Spanish and STEM, a B+ in ELA and Math, a B in Social Studies, and a B- in Science. S-15.

Summer 2022

44. On June 27, 2022, the Student was evaluated by a third-party Psychiatry Fellow. The psychiatrist saw the Student and Parent together, and then each individually, during a two-hour telehealth appointment. The psychiatrist wrote a report after the visit. J-3.
45. Relying exclusively on information provided by the Parent and observations of the Student during an interview, the psychiatrist diagnosed the Student with Bipolar I Disorder, ADHD combined type, Autism Spectrum Disorder, and Separation Anxiety Disorder. J-3.
46. The information that the psychiatrist used to reach those diagnoses came exclusively from the Parent. Some of that information contradicts the Charter's records (e.g. the Parent told the psychiatrist that the Student was suspended about 25 times from school during the 2021-22 school year). J-3.
47. Some information that the Parent provided to the psychiatrist contradicts information that the Parent shared with the Charter when the Student enrolled. For example, the Parent reported to the psychiatrist that the Student previously received Speech and Language services, and was taking several medications commonly associated with ADHD, depression, and sleep problems. J-3.
48. Some of the information that the Parent provided to the psychiatrist is deeply concerning, not documented anywhere else prior to the psychiatrist's writeup, and not previously provided to the Charter. For example, the Parent reported that the Student had ongoing suicidal ideation and had made a [redacted]. The Parent also reported that the Student experienced significant medical problems, including seizures, at a young age. J-3.
49. The psychiatrist noted that information provided by the Student contradicted information provided by the Parent, and that the Student's behavioral presentation during the telehealth visit was

appropriate and not (perhaps stereotypically) associated with the psychiatrist's various diagnoses. The psychiatrist said nothing about why he accepted the Parent's information and rejected the Student's information. J-3.

50. The psychiatrist conducted no testing. Again, the psychiatrist's only source of information was the Parent and a interview/observation of the Student (most of the latter was discarded). J-3.
51. The psychiatrist made no school-based recommendations. J-3.
52. On June 30, 2022, the Student completed testing for the private neuropsychological evaluation. The resulting evaluation report (the Private Report) was issued shortly thereafter. J-4.
53. The Private Report included a review of records including the report from the psychiatrist (J-3), a clinical interview and mental status exam with the Student, an interview with the Parent, another administration of the WISC-V, "selected subtests" of the NEPSY-II, the Wisconsin Card Sorting Task, the Trails-X and the CPT-3 (both are executive functioning assessments), the ADOS-2 and CAPs (both are Autism assessments), and the ABAS-3 and Conners CBRs (both are behavior rating scales completed by parents and teachers). J-4.
54. The Private Report included a narrative section detailing background information and information obtained through clinical interviews and contained within the psychiatrist's report (J-3). As with the psychiatrist, the evaluators who conducted the testing for the Private Report (both doctoral-level psychologists) observed appropriate behaviors noted that the Student denied some of what the Parent reported. J-4.
55. Cognitive information obtained through the WISC-V was nearly identical to information that the Charter obtained through its administration of the same test. J-4.
56. Some of the various autism assessments completed as part of the Private Report were consistent with an autism diagnosis. The Private Report stated that the Student's scores on the ADOS-2 were consistent with an Autism diagnosis. However, the Student's scores on the ADOS-2 were not reported with any specificity other than a narrative statement that scores fell in the "Autism range and are consistent with a moderate level of concern in this area." Similarly, the Student's scores on the CAPs (Clinical Assessment of Pragmatics) were not specifically

reported but were described as below average to poor. In contrast, the Student's scores on NEPSY-2 sub-tests (a neuropsychological assessment for children) were specifically reported. The Student scored "at expected levels" for both affect recognition and theory of mind. J-4.

57. Regarding executive functioning, as with the Charter's administration, the Student's scores on the WISC-V did not indicate executive functioning problems. The Student's scores on the CPT-3 (Continuous Performance Test, Third Edition) signaled statistically significant problems with inattentiveness, vigilance, and sustained attention – consistent with an ADHD diagnosis. On the Trails-X test, the Student scored in the "upper limits of the Below Average range," suggesting underdeveloped executive functioning compared to same-age peers. The WISC-V and CPT-3 results were reported with specificity. The Trails-X results were not. J-4.
58. Regarding adaptive functioning, the Private Report included the ABAS-3, but reported only composite scores. The Parent and two teachers completed the ABAS-3. Like all prior rating scales, there was a discrepancy between the Parent's rating and both teacher's ratings. The Parent rated the Student in the "Extremely Low" range in all domains. One teacher rated the Student in the "Average" range in all domains except for an "Above Average" rating in one sub-group. The other teacher rated the Student in the "Below Average" range in all domains.⁴ J-4.
59. Regarding social-emotional functioning, the Private Report included the CBRS, a rating scale completed by the Parent and three teachers, and a self-rating completed by the Student. The Private Report included detailed CBRS scores along with the evaluators' analysis. J-4.
60. The Student's self-report on the CBRS placed the Student in the "Very Elevated" range for depression, the "Elevated" range for Oppositional Defiant Disorder (ODD), and within normal limits in all other domains. J-4.

⁴ Despite the test's descriptors, the teacher's ratings were more similar to each other than they were to the Parent's ratings. Also, the teacher who rated the Student in the "below average" range is the same teacher who wrote up the Student for multiple minor infractions throughout the 2021-22 school year, none of which resulted in discipline. The Private Report does not provide an F Index or any other validity warning for any of the raters on the ABAS-3. Unlike the BASC-3, it is not clear if the ABAS-3 generates that information.

61. The teachers' ratings on the CBRS were variable between teachers. One teacher placed the Student in the average range in all domains except for a Very Elevated rating for ODD. Another teacher rated the Student in the average range in all domains except for Very Elevated ratings for ADHD – Hyperactive/Impulsive, Autism, and Conduct Problems. A third teacher rated the Student in the average range for all domains except for Very Elevated ratings for Conduct Problems and ODD, and Elevated ratings for Anxiety and Separation Anxiety. J-4.
62. The Parent's ratings on the CBRS were significantly different from the Student and all three teacher's ratings. The Parent rated the Student in the Very Elevated range in all domains except for Separation Anxiety, which the Parent rated in the average range. J-4.
63. The Private Report included diagnoses identical to what the psychiatrist found. J-4.
64. The Private Report included several recommendations. Those recommendations were generic in nature, but several were directly applicable to a school setting (e.g. maintain a predictable classroom routine). J-4.
65. The recommendations in the Private Report are nearly identical in substance to the accommodations that the Charter had put in place through the Student's April 2022 504 Plan. C/f J-1, J-4.

The 2022-23 School Year

66. On September 1, 2022, the Student engaged in a verbal altercation with another student. A teacher stepped between the two students as the fight became physical. The Student received a one-day in-school suspension. P-1.
67. On September 7, 2022, the Student directed threatening language towards a teacher. The Student received a one-day in-school suspension. P-1.⁵
68. On September 30, 2022, the Student took another student's phone and put the phone in the Student's bookbag in the Student's locker.

⁵ A problem with the Charter's computer system resulted in three entries for the same incident. One of those says that the Student received a half-day in-school suspension, another says that the Student received a full-day in-school suspension.

The Student received a one-day out-of-school suspension for stealing. P-1.

69. On October 10, 2022, the parties met to revise the Student's 504 Plan (the October 2022 504 Plan) in response to the Private Report. J-2. The changes were minimal. C/f J-1, J-2.
70. On October 14, 2022, the Student engaged in inappropriate behavior in response to a teacher's effort to redirect the Student. Charter personnel spoke with the Student about the incident and documented it, but no other discipline was imposed. The Student engaged in the same behavior with the same teacher again on October 19, 2022, and the Charter required the Student to write an apology. The Student engaged in the same behavior with the same teacher again on October 21, 2022, and the Charter required the Student to complete a reflection sheet. P-1.⁶
71. On October 18, 2022, the Student entered a classroom that was not the Student's assigned classroom and began touching objects therein. The Student had engaged in the same behavior on several other occasions. The Student received a lunch detention. The Student engaged in the similar behavior again on October 20, 2022. The Student apologized and no other discipline was imposed. The Student engaged in the similar behavior again on October 24, 2022, and received a lunch and recess detention. The Student engaged in similar behavior again on November 9, 2022, and completed a reflection sheet. P-1.
72. On October 25, 2022, the Student threw pencils and a book at another student. The Charter imposed a one-day in-school suspension and required the Student to complete a reflection sheet. P-1.
73. On November 1, 2022, the Student posted an inappropriate photo to a class's Google Classroom page. The Charter had the Student complete a reflection sheet. The Student also lost computer privileges for a week and served an in-school detention. The Charter sent a copy of the post to the Parent by email. P-1.
74. On November 15, 2022, the Student left a classroom twice without permission. After the first incident, the teacher asked the Student why the Student had left. The Student replied that the Student needed a

⁶ There are multiple references to "reflection sheets" throughout the record. None were made part of the record of this case.

break. The teacher reminded the Student of the protocol for requesting a break. Then, shortly before the end of the period, the Student left class again and ran away from the teacher. The Charter imposed a lunch and recess detention and had the Student complete a reflection sheet. P-1.

75. On December 1, 2022, the Student entered a classroom before the prior class was dismissed. The teacher directed the Student to wait outside, and the Student used profanity. The Charter imposed a lunch and recess detention and had the Student complete a reflection sheet. P-1.
76. On December 13, 2022, the Student refused to do work during a class and, instead, walked around the classroom touching objects. Charter staff took the Student to the discipline office, and then the Student returned to class. Once back in the classroom, the Student continued to refuse to work and was disrespectful to the teacher. The Charter required the Student to complete a reflection sheet but imposed no other discipline. P-1.
77. On December 16, 2022, the Student entered an unassigned classroom. Unlike the four (4) prior, similar instances, the Student hid in the unassigned classroom and did not leave when addressed by Charter personnel. The Charter imposed a lunch and recess detention. P-1
78. On December 19, 2022, while the Student was taking a break, the Student tampered with a metal door stopper. When confronted, the Student lied but then told the truth when pressed. The stopper was easily repaired. The Charter had the Student complete a reflection sheet and write an apology. P-1.
79. On December 21, 2022, the Student pushed another student and cut the other student's hair with scissors. The Charter imposed a lunch and recess detention and the Student lost "privileges with scissors until further notice." P-1.
80. On January 3, 2023, the Student used inappropriate language while leaving a classroom. The teacher spoke with the Student about the Student's choice of words and the Charter had the Student complete a reflection sheet. P-1.
81. On January 3, 2023, the Student entered an unassigned classroom and hid (similar to the December 16 incident). When confronted by a teacher, the Student ran out of the classroom. Then, throughout the

class period, the Student appeared a few times at the class window making faces and did not comply with teacher directions to go to the Student's assigned class. At the end of the class period, the Student yelled at another student who left the classroom. This was the Student's second writeup of the day. The Charter had the Student complete a reflection sheet. P-1.

82. On January 3, 2023, the Student misused materials in a STEM class. This was the Student's third writeup of the day. The Charter had the Student complete a reflection sheet and imposed a one-day in-school suspension. P-1.
83. On January 4, 2023, the Parent requested a meeting with the Charter to discuss the Student's struggles with "behavior and mental health." The Parent requested a meeting during the week of January 16. The same day, the Charter agreed to meet and proposed January 19. P-2 at 7.
84. On January 6, 2023, the Student threw another student's class materials on the floor and refused to comply with a teacher's directions to clean up the mess and apologize. The Student then left the classroom without the teacher's permission. The Charter imposed a lunch and recess detention. P-1.
85. On January 6, 2023, the Student also used a computer to access inappropriate content and refused Charter personnel instructions to stop. The Charter had the Student complete a reflection sheet and revoked the Student's computer privileges. The Charter also contacted the Parent. P-1.
86. On January 9, 2023, the Student and other students were throwing a ball "meant for outside recess" in the school building. The Charter had the Student complete a reflection sheet. P-1.
87. On January 9, 2023, the Student also violated the Charter's cell phone policy. The Student ultimately relinquished the cell phone. The Charter had the Student complete a reflection sheet. P-1.
88. On January 10, 2023, the Student "was caught with 3 cell phones, [Student] lied about the first two." The Charter confiscated two of the cell phones but imposed no other discipline. P-1.
89. On January 11, 2023, the Student and other students refused to comply with a teacher's direction to stop talking. The Charter had the

Student complete a reflection sheet and imposed a lunch and recess detention. P-1.

90. On January 12, 2023, another student hit the Student during a game. The Student then hit the other student and tried to hit the other student with a chair until a teacher intervened. The Charter had the Student complete a reflection sheet and imposed a lunch and recess detention. P-1.
91. On January 19, 2023, the Charter met with the Parent and Parent's advocates. P-2.
92. On January 19, 2023, the Student and another student were behaving inappropriately. Both were reminded of school expectations and no discipline was imposed. P-1.
93. On January 20, 2023, the Student attempted to "physically go after another student unprovoked multiple times." The Charter imposed a three-day out-of-school suspension. P-1.
94. On January 31, 2023, the Charter, Parent, and Parent's advocates developed an In-School Crisis Plan to address the Student's escalating behaviors. In several ways, the Crisis Plan was drafted similarly to a behavior intervention plan. However, there is no evidence in the record establishing if or how the Crisis Plan was used in school. J-9, S-7, S-11.
95. On February 1, 2023, the Charter began using a behavior chart. The Parent and all teachers could access the chart online. The chart was completed daily through May 4, 2023. The chart tracked four desired behaviors across each class period (cell phones in "Yonder Case," refrains from talking out, follows directions within two prompts, keeps hands, feet, and objects to self). The chart illustrates that the Student did not comply with behavioral expectations throughout *any* school day in the 2022-23 school year. P-10.
96. On February 2, 2023, the Student pulled on another student's clothing and pushed another student at the bottom of a staircase. The Charter contacted the Parent and spoke with the Student but did not impose discipline. P-1.
97. On February 3, 2023, another student directed inappropriate language towards the Student and hit the Student "with a classroom ottoman."

Charter personnel did not know if the Student did anything to provoke the other Student. The Charter imposed no discipline. P-1.

98. On February 3, 2023, the Student also refused to comply with teacher directions to not talk during a quiz. The Charter imposed no discipline. P-1.
99. On February 7, 2023, the Student and another student broke several pens and pencils, getting ink on a table and floor. The Charter had the students clean the mess and apologize to the teacher but imposed no other discipline. P-1.
100. On February 8, 2023, the Student said, "I'm going to [redacted] someone." The Student repeated that comment to a teacher, outside of the classroom. The threat was not directed to any specific individual. The Student spent the remainder of the school day in an in-school suspension while a threat assessment was completed (the threat was not credible). The Charter also contacted the Parent. P-1.
101. On February 9, 2023, the Student threw a pencil at another student. The other student then threw a book at the Student. The Student then left the classroom without permission and against the teacher's directions and used profanity. The Student then (functionally) received an in-school suspension, spending the rest of the day in the discipline office. P-1.
102. On February 21, 2023, the Student and another student yelled across a classroom to each other and used profanity. Later in the day, the Student left class without permission. A teacher directed the Student to return to class. When the Student returned to class, the Student refused to work, engaged other students in off-topic conversation, made an inappropriate remark to the entire class about another student, and directed profanity towards the teacher. Charter personnel brought the Student to the discipline office and contacted the Parent but did not impose other discipline. P-1.
103. On February 22, 2023, the Student refused to engage in a social skills check-in, directed profanity towards the teacher, and left the office without permission. The Charter contacted the Parent but imposed no discipline. At this point, a conference with the Parent and the Charter was planned, and the Charter indicated that it would address the incident during the conference. P-1.

104. On February 23, 2023, the Student hit another student's back side, laughed at a teacher's warning about the same, and took a computer without permission. The Charter contacted the Parent but imposed no discipline. At this point, a conference with the Parent and the Charter was planned, and the Charter indicated that it would address the incident during the conference. P-1.
105. On March 2, 2023, the Student and another student refused to comply with a teacher's directions to stop talking during class. Separately, on the same day, the Student slapped another student. The Charter imposed an in-school detention. P-1.
106. On March 7 and 8, 2023, the Student repeatedly refused to comply with a teacher's directions to remove a coat. The Charter imposed no discipline. The Charter noted that a plan had been put in place for the Student to have a weighted blanket instead of a coat. P-1.
107. On March 8, 2023, the Student hit another student. The Charter imposed a two-day out-of-school suspension. P-1.
108. On March 9, 2023, the Student climbed lockers and hit other students. The record does not explain why the Student was in school on March 9, 2023, after having been assigned an out-of-school suspension ending on March 10, 2023. Regardless, the Charter imposed a one-day in-school detention. P-1.
109. On March 13, 2023, the Student refused to comply with teacher directions and directed profanity towards a teacher. The Charter contacted the Parent but imposed no other discipline.⁷ P-1.
110. On March 20, 2023, the Student was roughhousing with other students in class, refused teacher redirection, and directed "abusive language" towards the other roughhousing students. The Charter prohibited the Student from playing basketball at recess as a consequence. P-1.
111. On March 29, 2023, the Student again refused to remove a coat. The disciplinary writeup says nothing about a weighted blanket. Separately, on the same day, the Student refused to complete work and refused to stop "play fighting" with another Student. Also, separately, on the same day, the Student mocked people with disabilities, entered a

⁷ This incident, and several others, refer to a "loss of privileges." Nothing in the record explains precisely what that means. When an unspecified loss of privileges is the only consequence, I equate that to no imposition of discipline by the Charter to the Student unless noted otherwise.

classroom without permission, disrupted a class, used profanity, argued with a teacher, and pushed over a chair. The Charter contacted the Parent and imposed “no basketball until after spring break.” P-1.

112. On March 30, 2023, the Student and other students refused to comply with teacher direction to stop talking and start classwork. All students involved received a half-day in-school detention. P-1.
113. On March 20, 2023, the Student also physically fought with another student during dismissal. The Student received a one-day out-of-school suspension. P-1.
114. On April 11, 2023, the Student used profanity and made inappropriate gestures. The Student apologized and the Charter did not impose discipline. P-1.
115. On April 17, 2023, the Charter completed a new evaluation of the Student and drafted a new Evaluation Report (the 2023 ER). There is no dispute that the Parent requested the new evaluation, but the record does not reveal exactly when the Parent made that request. J-6, NT at 69.
116. When requesting the 2023 ER, the Parent expressed concerns about the Student’s ability to self-regulate, communicate with teachers and peers, adhere to social expectations, and maintain class materials. The Parent was concerned that the Student was falling behind academically, and attributed that to the Student’s suspensions. The Parent was also concerned about the Student’s physical safety based on the Student’s propensity to elope from the classroom, outbursts, history of self-harm, and overall destructive behaviors. See J-6 at 1.
117. The 2023 ER included narrative input from the Parent. The Charter obtained this input through a parental input form, a telephone interview with the Parent, and emails with the Parent. The Parent expressed concerns about the Student’s social skills, behaviors, prior receipt of speech and language support, medical history, current out-of-school mental health services, and current medications. J-6 at 1-3.
118. The 2023 ER included a review of prior records including the prior ER, the Student’s disciplinary referrals, the psychiatrist’s report, and the Private Report. J-6 at 3-4, 7-19.

119. The 2023 ER included a summary of information collected by the Charter's contracted behavioral consultant as part of an FBA completed for the 2023 ER. J-6 at 5.
120. The 2023 ER included a 30-minute observation of the Student in gym class and a 15-minute observation of the Student in Math class. Both observations were recorded by the Charter's School Psychologist. The Psychologist also reported observations of the Student during testing and conversations with the Student at that time. J-6 at 5-7.
121. The 2023 ER included a 33-minute observation of the Student in ELA and a 33-minute observation of the Student in Social Studies. Both observations were recorded by the Charter's contracted behavior consultant as part of an FBA completed for the 2023 ER. J-6 at 19-20.
122. The 2023 ER included narrative input from the Student's Math and ELA teachers. J-6 at 20-21.
123. The 2023 ER incorporates a FBA completed by the Charter's contracted behavior consultant. The FBA provides a summary of the information that the behavior consultant collected and reaches a conclusory hypothesizes that the function of the Student's behavior is to gain attention. The FBA included recommendations substantively consistent to the accommodations that were already in place, and recommended development of a Positive Behavior Support Plan for the Student. J-6 at 5, 21-24, 37, 41-42.⁸
124. The 2023 ER stated the Student's final grades for the first trimester of 2022-23 school year and the Student's grades through March 16, 2023 in the second trimester of the 2022-23 school year. In the first trimester, the Student earned an A+ in Art, Character Education, and PE; an A in Music and Turkish, a B in Social Studies, a C+ in STEM, and a C in Science, and a C- in Pre-Algebra and Pre-English. In the second trimester through March 16, the Student had earned an A+ in Art, an A- in STEM and Music, a B+ in Turkish, a B in PE and Social Studies, a B- in Character Education and Science, a C in Spanish, a C- in Pre-Algebra, and a D in Pre-English. J-6 at 23.
125. The 2023 ER reported the Student's current iReady scores in Math and Reading. 36-37.

⁸ Why portions of the FBA were extracted and reprinted within the 2023 ER seemingly at random is a mystery.

126. The 2023 ER included new testing and behavior ratings. These included a new administration of the WIAT-4 and BASC-3, and an administration of the Behavior Inventory of Executive Functioning, second edition (BRIEF-2) and the Emotional Disturbance Decision Tree (EDDT). See J-6 at 25.
127. On the WIAT-4, the Student's Reading Composite score was in the "Very High" range and the Student's Decoding Composite score was in the "High Average" range. The Student's Written Expression Composite score was in the "Average" range. All sub-tests contributing to those composite scores were in the Average to Very High ranges. J-6 at 26.
128. On the WIAT-4, the Student's Mathematics Composite score was in the Low Average range and all sub-tests contributing to that score were also in the Low Average range. J-6 at 26.
129. Two teachers and the Parent completed the BASC-3 ratings. None of them triggered any of the BASC-3's validity warnings. J-6 at 26.
130. On the BASC-3, all three raters found the Student in the Clinically Significant range for Externalizing Problems, the At-Risk range for Internalizing Problems, and the Clinically Significant range in the overall Behavioral Symptoms Index. Within the Interlining Problems sub-groups, all three raters placed the Student in the Clinically Significant range for Depression. J-6 at 27-29.
131. On the BASC-3, one of the teacher's ratings placed the Student in the Clinically Significant range for School Problems. The other teacher's ratings placed the Student in the At-Risk range for school problems. While the ratings fell in different statistical ranges, they were separated by a standard score of only nine. J-6 at 28.
132. On the BASC-3's Adaptive Scales, the Parent and one of the teacher's ratings placed the Student in the Clinically Significant range in the Adaptive Skills Composite Score. The other teacher's ratings placed the Student in the At-Risk range. There was some variability in the teacher's sub-groups contributing to that composite score. The Parent consistently rated the Student in the Clinically Significant range. J-6 at 28-29.
133. On the BASC-3's Content Scales, the Parent and one of the teacher's ratings placed the Student in the Clinically Significant range in nearly all domains with some domains in the At-Risk range. The other teacher's ratings placed the Student in the At-Risk range in nearly all

domains with one domain in the Clinically-Significant range. J-6 at 29-30.

134. On the BASC-3's Executive Functioning Index, the Parent and one of the teacher's ratings placed the Student in the Extremely Elevated range. The other teacher's ratings placed the Student in the Elevated range. J-6 at 30.
135. On the BRIEF-2, the Parent and one of the teacher's ratings placed the Student in the Clinically Elevated (most severe) range in most domains (the Parent's ratings were more significant in more domains than the teacher's) resulting in a Clinically Elevated Global Executive Composite (GEC) score for both. The other teacher's ratings were more variable, ranging from scores within normal limits through the Clinically Elevated range to form a GEC score in the Mildly Elevated range. J-6 at 35.
136. The Parent and one teacher completed the EDDT. Both raters placed the Student in the "Very High Clinical" range in nearly all sub-scales and screeners. By the EDDT's own criteria, both raters' scores strongly indicated an Emotional Disturbance as defined by the IDEA. J-6 at 35-36.
137. The 2023 ER included a summary of the evaluations and reached the conclusion that the Student had a qualifying disability – Emotional Disturbance (ED) – and was in need of Specially Designed Instruction (SDI). The 2023 ER, therefore, found that the Student was eligible for special education. J-6 at 41.
138. On April 25, 2023, the Charter scheduled an IEP team meeting for May 15, 2023. P-2 at 13.
139. On May 1, 2023, the Student and another student were hitting each other during class. Both refused multiple redirections. Both received an unspecified "loss of privilege for 3 days." P-1.
140. On May 3, 2023, the Student was vaping in a restroom in the Charter. The Charter confiscated the vaping device. Charter personnel took the Student to the nurse's office. There, the Student "appeared to be under the influence of an unknown substance." The Charter imposed a three-day out-of-school suspension and, ultimately, initiated an investigation and expulsion proceedings. See P-1.

141. On May 3, 2023, the Charter convened a Manifestation Determination meeting and found that the vaping incident was not a manifestation of the Student's disability. See J-8.
142. Sometime after May 3, 2023 (the record does not reveal the exact date), the Charter and the Parent entered into an agreement by which the Charter would not pursue discipline of the Student and the Parent would dis-enroll the Student from the Charter. See, e.g. NT 144-145. No written agreement was entered into evidence and it is not clear if a written agreement exists. There is no dispute, however, that the Parent withdrew the Student from the Charter shortly after May 3, 2023, and that the Charter was no longer the Student's Local Education Agency (LEA) from that date forward. *Passim*.
143. In sum, during the 2022-23 school year, prior to May 3, 2023, the Student was suspended out of school for seven days; suspended, detained or otherwise removed from regular classes for at least 7.5 days (likely more), and received lunch and recess detentions for at least 6 days (likely more).⁹ See P-1.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

⁹ The Charter did not document exactly when or how long the Student remained in the discipline office or was otherwise removed from class during several disciplinary incidents. The cumulative disciplinary writeups at P-1, therefore, represent the *minimum* period of the Student's exclusion from school. The true amount of time is certainly greater. See P-1.

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

There is ample evidence in the record that the Parent provided misinformation to the Charter at the time of the Student's enrollment. I address this in the discussion below, but I make adverse finding concerning the credibility of the Parent's testimony.

Also, I do not assign equal weight to all testimony. To the extent that I discount otherwise credible testimony, my reasoning is explained in the discussion below.

Applicable Laws

The Burden of Proof

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

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision is no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute

indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Compensatory Education

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

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

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or Reid method.

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

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

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

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

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

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Child Find

The IDEA's Child Find provision requires states to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. § 1412(a)(3). For LEAs, the Child Find duty creates a "continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); see also 20 U.S.C. § 1412(a)(3). LEAs must evaluate children who are suspected to be children with disabilities within a reasonable period of time after the school is on notice of academics or behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). An LEA's failure to evaluate a child suspect of having a learning disability constitutes a substantive FAPE violation.

Evaluation Criteria

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

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

In addition, the District is obligated to ensure that:

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

20 U.S.C. § 1414(b)(3)(A).

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

Section 504/Chapter 15

At the outset, it must be noted that an LEA may completely discharge its duties to a student under Section 504 by compliance with the IDEA. Consequently, when a Student is IDEA-eligible, and the LEA satisfies its obligations under the IDEA, no further analysis is necessary to conclude that Section 504 is also satisfied.

“Eligibility” under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects “handicapped persons,” a term that is defined at 34 CFR § 104.3(j)(1):

Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Chapter 15 applies Section 504 in schools to prohibit disability-based against children who are “protected handicapped students.” Chapter 15 defines a “protected handicapped student” as a student who:

1. Is of an age at which public education is offered in that school district; and

2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and
3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

Section 504 and Chapter 15 prohibit schools from denying protected handicapped students' participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from regular education.

To accomplish this, a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa Code § 15.3.

Students are evaluated to determine what related aids, services, or accommodations that a student needs. Chapter 15 includes for conducting such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The related aids, services or accommodations required by Chapter 15 are drafted into a service agreement. Chapter 15 defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student." 22 Pa. Code § 15.2. Service agreements become operative when parents and schools agree to the written document; oral agreements are prohibited. 22 Pa Code § 15.7(a).

For IDEA-eligible students, the substance of service agreements is incorporated into IEPs. Such students do not receive separate service agreements.

Discussion

Contrary to my typical practice, I begin with a note of *dicta*. Throughout the hearing, several Charter employees and individuals retained by the Charter provided testimony revealing a disturbing ignorance of the Charter's legal

obligations, particularly regarding Child Find. While some of the Charter's witnesses' testimony did not raise alarms in this regard, the testimony as a whole is deeply concerning. Even so, I do not sit in judgment of the Charter's knowledge of its legal obligations. Rather, my task is to examine the record to determine if the Charter violated the Student's educational rights. At the administrative level, if the Charter violated the Student's educational rights, it does not matter if the violation flows from the Charter's ignorance, or from a failure to adhere to obligations that it understood well.

Similarly, one of the Charter's employees testified that, by January 2023, Charter personnel and the Student's peers understood that the Parent had instructed the Student to purposefully misbehave in school. NT at 187. The Charter correctly argues that this testimony was uncontroverted during the hearing. Credible, uncontradicted testimony can be taken as true and used to establish facts under a preponderance of evidence standard. To give the Charter the benefit of the doubt, however, I decline to make a finding in this regard. The Charter asks me to accept as true that 1) the Student was misbehaving in school because the Parent instructed the Student to do so, 2) that the Charter had actual knowledge of this situation, 3) the Charter did nothing to document the circumstances, and 4) the Charter took no action in response to what it knew. The findings that the Charter proposes would be highly prejudicial *to the Charter*. Such an extreme and unusual situation should have prompted both documentation and action, but there is no evidence of either in this case. By giving no weight to this testimony, I am giving the Charter the benefit of the doubt.

The underlying FAPE claim in this case breaks into sub-issues for different periods. I will examine those sub-issues individually.

2021-22 School Year: Start through November 15, 2021

The 2021-22 school year was the Student's first year in the Charter. Enrollment paperwork completed by the Parent placed the Charter on notice of the Student's ADHD diagnosis. Through the same paperwork, the Parent provided inaccurate information to the Charter about the Student's past receipt of school-based services, then-current receipt of outside services, medications, and medical history. As a result, the Charter knew that the Student was regarded as having a disability both for IDEA and Section 504 purposes, but all other information suggested that the Student did not require accommodations, let alone special education, at the time of enrollment.

By November 15, 2021, the Charter had disciplined the Student for several infractions. That discipline included a three-day out-of-school suspension and

a one-day in-school suspension. While the incidence and the discipline were serious, they were isolated. Moreover, at this point, the Charter initiated the Section 504 process.

I find no violation of the Student's educational rights under the IDEA or Section 504 between the start of the 2021-22 school year and November 15, 2021. The Charter's actions during this time directly reflect the information that the Parent provided. Moreover, as soon as the Charter came to understand that the Student likely required accommodations, the Charter convened a team to put accommodations in place.

2021-22 School Year: November 15, 2021, through January 6, 2022

I find no violation of the Student's education rights under the IDEA or Section 504 during the 52-day period from November 15, 2021, through January 6, 2022. Like the prior period, the Charter acted on the information that it had. Nothing in the record proves that the 504 Plan drafted on November 15, 2021, was unreasonable at the time it was written.

In addition, during this time, an IDEA evaluation of the Student was pending. There is no dispute that the evaluation was started and finished within IDEA timelines. Beyond the development and implementation of the 504 Plan, it was proper for the Charter to hold any further action until the 2022 ER was complete.

The 2022 ER

I find that the 2022 ER, completed on January 6, 2022, was appropriate. The standard that I must apply, detailed above, requires me to examine the ER at the time it was drafted and not with the benefit of hindsight. Under that standard, the IDEA's statutory requirements for special education evaluations were met. This is not to say that the 2022 ER is exemplary – it is not (for example, observations of the Student were cursory by most standards). But the 2022 ER is legally sufficient under the applicable standards.

Notably, the 2022 ER used multiple assessment tools to gather information about the Student's educational needs – both generally and in relation to the Parent's concerns. The Charter did not rely on any single measure to reach conclusions. Further, the Charter used board-ranging assessments to collect information concerning the areas of disability that were suspected at that time.

With the benefit of hindsight, it is easy to see how the Student's behaviors became more significant after the 2022 ER, but to say that the 2022 ER was insufficient for that reason is the sort of 'Monday morning quarterbacking' that IDEA case law prohibits. In early January 2022, the Student's behaviors were notable for a small number of isolated but significant incidents. This, in combination with misinformation provided by the Parent during the Student's enrollment, and the Student's strong academic performance, is the context in which the 2022 ER was completed. The 2022 ER was appropriate at the time it was drafted.

The 2021-22 School Year: January 6, 2022, to End

After the 2022 ER was completed, the Student began to frequently engage in minor breaches of the Charter's code of conduct. This resulted in frequent writeups in comparison to the first half of the school year. Nearly all of these incidents were quickly resolved through redirection. It also appears that one teacher was particularly diligent about documenting every minor infraction, even when no discipline was required or imposed. Overall, I find that the increased documentation of the Student's minor behavioral infractions did not constitute a change in the Student's behavior such that the IDEA's Child Find obligation would be re-triggered. The Student's academic performance also remained strong.

I also find no evidence that the Student's 504 Plan was inappropriate during this time. From January 6, 2022, through April 22, 2022, the Student received accommodations pursuant to the original 504 plan. On April 22, 2022, the 504 Plan was revised in response to an isolated, but more significant behavioral incident (but one that did not require discipline). Both before and after the revision, there is no evidence that the 504 Plan was insufficient to enable the Student's participation in school programs to the same extent as nondisabled peers. The Student was academically successful and was consistently able to access the Charter's programs.

Summer 2022

The Parent obtained two documents in the summer of 2022: the psychiatrist's report and the Private Report. Both represent a remarkable departure from the 2022 ER. Both are based on a very large amount of information from the Parent that had not been previously shared with the Charter, and that is contrary to information that the Parent provided to the Charter during the 2021-22 school year.

The substance of the psychiatrist's report is hearsay.¹⁰ I cannot rely on that document to resolve this case. The Private Report relied on the psychiatrist's report, but only in part. The Private Report also flows from testing the Student and collecting information from the Parent and teachers.

The Private Report reached different conclusions about the Student's diagnoses than what was found in the 2022 ER. However, the school-based recommendations in the Private Report were consistent with the accommodations already in place through the 504 Plan. The record does not establish when the Charter received the Private Report. Even assuming the Charter received the Private Report in the summer of 2022, the Charter could reasonably conclude that the accommodations in place were the recommended accommodations. Consequently, the Private Report did not trigger (or re-trigger) the Charter's Child Find obligation nor does it prove that the 504 Plan was inappropriate.

The 2022-23 School Year: Start to April 17, 2023

The Student's behaviors during the 2022-23 school year were different than they were in the prior school year. The change was immediate, noticeable, and well-documented. Above, I find that the Charter's receipt of the Private Report (presumably in the summer of 2022) did not, by itself, trigger a Child Find duty. The Charter's receipt of new and significantly different historical information about the Student, new diagnoses, and an immediate pattern of declining behavior in school did trigger the Charter's Child Find obligation.

From September 1, 2022, the Student exhibited a consistent pattern of alarming behavior. The Charter documented serious behavioral infractions every few days. Whether or not the Charter imposed discipline, the frequency and severity of the Student's behaviors were markedly worse than they were at any point in the prior school year. Given the Charter's actual knowledge, it was immediately apparent that the 504 Plan was no longer successful means of managing the Student's behaviors. Moreover, the Charter now had actual knowledge of the Student's disabilities beyond ADHD and had actual knowledge that regular education accommodations provided under Section 504 were ineffective.

¹⁰ Were the report not hearsay, I would still have significant reservations. The psychiatrist's report is one of the most conclusory documents that this hearing officer has seen, relative to its diagnoses. For example, the psychiatrist diagnosed the Student with Autism after a brief telehealth appointment, no testing, making observations inconsistent with that diagnosis, and discounting information provided directly by the Student. The psychiatrist did not testify to explain how he reached any of the conclusions in the document. Even if I could use the report, I would decline to do so.

Under the totality of the record of this case, I find that the Charter was obligated to either propose a new IDEA evaluation of the Student or accept the Private Report and move on to IEP development no later than November 1, 2022. The Parent did not request a meeting until January 2023, but it was never the Parent's duty to "find" the Student. That duty falls squarely with the Charter and, in this case, was triggered by the Charter's actual knowledge (mostly evidenced by the Charter's own documentation).

The Charter's failure to act in conformity with its Child Find duty from November 1, 2022, until April 17, 2023 (the day it completed the second ER) constitutes a substantive violation of the Student's right to a FAPE. To say that the educational impact of the violation was pervasive would be an understatement. The Student was unable to conform to the Charter's behavioral expectations, and received a disciplinary writeup every week, and for some periods every day. These infractions resulted in significant exclusion from school, both during out-of-school suspensions and in-school detentions and suspensions. Importantly, education encompasses much more than academics. While the Student's academic performance declined during this period, the educational harm to the Student is best measured in the Student's near-constant inability to self-regulate and exhibit behavioral control. Further, the Student's behaviors were dangerous both for the Student and for others. It is very lucky that the Student's frequent elopement and physical behaviors did not result in injuries.

I find that the violation of the Student's right to a FAPE vis-à-vis the Charter's Child Find violation created a harm that permeated the entirety of the Student's school day. I award "full days" of compensatory education from November 1, 2022, through April 17, 2023. This means that the Student is awarded one hour of compensatory education for each hour that the Charter was in session during that time.

The 2023 ER

The 2023 ER, completed on April 17, 2023, was inappropriate under the standard that I must apply. Everything in the 2023 ER is consistent with IDEA requirements. The 2023 ER is inappropriate for what it leaves out.

At this point, the Charter had collected substantial information about the Student, understood the Parent's concerns, and had similar concerns of its own. Like in 2022, the Charter used multiple assessment tools to gather information about those shared concerns. Also like in 2022, the Charter selected broad-ranging assessments to gain comprehensive information. However, in 2023, the Charter also selected more targeted assessments

relative to the parties' shared concerns.

Of note, by the time of testing for the 2023 ER, the gap between what the Parent reported at home and the behaviors that Charter personnel observed in school had closed. By every measure, the Student was meeting eligibility criteria and demonstrating behavioral needs that required SDI. In this way, the 2023 ER mostly confirmed what both parties already knew: regular education interventions, even when provided systematically through a 504 Plan, had failed and more was needed.

The 2023 ER concludes that the Student requires an IEP and a PBSP. Both the 2023 ER itself and the incorporated FBA provide almost no discernable recommendations to the IEP team beyond a continuation of proven ineffective accommodations that were already in place. This flaw renders the 2023 ER inappropriate. It is not enough for an evaluation to provide an analysis of a student's strengths and needs and reach an eligibility determination. Rather, if a student is eligible for special education, the ER must provide actionable recommendations to the student's IEP team.¹¹ See, e.g. 20 U.S.C. § 1414(b)(2)(A). The 2023 ER fell short of this standard.

The 2022-23 School Year: April 17, 2023, through Withdraw

After the 2023 ER was finalized, the Student was caught vaping. The Charter convened a manifestation determination meeting and concluded that vaping was not a manifestation of the Student's disability. Before the Charter convened an expulsion hearing or an IEP team meeting, the Parent withdrew the Student from the Charter.

This matter is not an appeal of a disciplinary change in placement. The expulsion never happened, and the parties' agreement prohibits that action. For these reasons, I decline to consider the appropriateness of the Charter's manifestation determination. That issue is moot.

The FAPE violation that started on November 1, 2022, however, remained ongoing and uncured through the date of the Student's withdraw. Had the 2023 ER been appropriate, case law suggests that compensatory education would stop accruing on April 17, 2023, because the Charter would have a reasonable period to put an IEP in place. In this case, the 2023 ER falls short of IDEA requirements, and so it cannot mitigate an ongoing, substantive FAPE violation. The Student's behaviors remained consistently inappropriate

¹¹ Ultimately, the IEP team must consider any such recommendations, but the IEP team has the final say as to the Student's special education program. Nevertheless, an appropriate ER must provide recommendations for the IEP team to consider. The only recommendations in the 2023 ER was a suggestion to continue accommodations that had already failed.

(at best) from April 17, 2023, through the date of the Student's withdraw. At this point, the Charter had correctly concluded that the Student required special education for behavioral control and improvement, but had not provided actionable recommendations for an IEP team to consider.

The FAPE violation did not change, and so the remedy does not change either. The substantive harm is well documented and pervasive. I award full days of compensatory education from April 17, 2023, through the Student's withdraw from the Charter (one hour of compensatory education for each hour that the Charter was in session during that time).

Compensatory Education

The Parent may direct the use of all compensatory education awarded herein for any appropriate developmental, remedial, or enriching educational service, product, or device that furthers the Student's educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation.

Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the Student's LEA assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent.

Services and products obtained through compensatory education shall not exceed market rates in the Charter's geographic area.

Any compensatory education that is not used by the time that the Student graduates or until the end of the school year in which the Student turns 21 years old, whichever is sooner, is forfeited.

ORDER

And now, December 29, 2023, it is hereby ORDERED as follows:

1. The Student is awarded one hour of compensatory education for each hour that the Charter was in session from November 1, 2022, through the date of the Student's withdraw from the Charter.
2. The Parent shall direct the use of compensatory education, subject to the terms and limitations provided in the accompanying order.

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

/s/ Brian Jason Ford
HEARING OFFICER