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

Pennsylvania Special Education Hearing Officer Final Decision and Order

ODR No.
26851-22-23

CLOSED HEARING

Child's Name:
K.R.

Date of Birth:
[redacted]

Parent:
[redacted]

Counsel for Parent:
Scott H. Wolpert, Esquire
400 Maryland Drive, Fort Washington, PA 19034

Daroff Charter School:
5630 Vine Street, Philadelphia, PA 19139

Counsel for Daroff Charter School:
George Gossett, Jr. Esquire
4840 Old York Rd Fl 1, Philadelphia, Pennsylvania 19141

The Universal Companies:
800 S. 15th Street, Philadelphia, PA 19146

Counsel for The Universal Companies:
Dana Y. King, Esquire
134 Plymouth Road, Plymouth Meeting, Pa 19462

Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
02/16/2023

Introduction

This special education due process hearing concerns the rights of a child with disabilities (the Student). The matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

There are three parties to this hearing, which is unusual for special education due process hearings. The parties are the Student's parent (the Parent), the Daroff Charter School (Daroff), and the Universal Companies (Universal).

The hearing was requested by the Student's parent (the Parent). The Student is a former student of the Daroff Charter School (Daroff), which is now closed. There is no dispute that the Student was a "child with a disability" as defined by the IDEA while attending Daroff from August 11, 2020, through April 7, 2022. There is no dispute that, as a child with a disability, the Student was entitled to a free appropriate public education (FAPE) during the time in question. The Parent alleges that the Student did not receive a FAPE during the time in question and demands compensatory education as a remedy.

The Daroff Charter School (Daroff) was a Renaissance Charter School in the School District of Philadelphia (SDP).[1] Under SDP's Renaissance Charter Initiative, several public schools with long-term academic and climate challenges were converted into charter schools. Renaissance Charter Schools operate in buildings that used to be SDP buildings. For special education purposes, there is no legal distinction between a Renaissance Charter School and any other Pennsylvania charter schools. At all times, Daroff was subject to Pennsylvania's special education regulations for charter schools, 22 Pa. Code § 711.

The Universal Companies (Universal) is a charter school management company or an "educational management service provider," which is a term that is used but not defined in Pennsylvania's Charter School Law. *See* 24 Pa. Stat. §§ 17-1703-A (definitions), 17-1715-A (concerning the separation between a charter school's administrator and "a company that provides management or other services to another charter school"), 17-1729.1-A(c)(4) (requiring "multiple charter school organization applicants" to include organization charts showing the relationship between charter schools and educational management service providers within applications). Under Pennsylvania's Charter School Law, Daroff was managed by its own board of trustees. *See generally,* 24 P.S. § 17-1716-A. Documents submitted in this

[1] SDP is not a party to these proceedings.

case, however, indicate that Universal was deeply connected to and integrated with Daroff, perhaps as contemplated by 24 P.S. § 17-1729.1-A(c)(4). Other documents submitted in this case indicate that Universal and Daroff separated from each other as Daroff was closing.

The Parties' Positions

The Parent's core allegation is that the Student was entitled to, but did not receive, a FAPE. The Parent alleges that the denial of FAPE resulted in substantive harm, and compensatory education is an appropriate remedy to redress that harm. The Parent also alleges that the Student's Local Educational Agency (LEA) was obligated to provide a FAPE and is responsible for any remedy. The Parent takes the unusual position that Daroff, Universal, or both were the Student's LEA during the time in question and named both entities as respondents. Terms like 'joint and several liability' are rarely if ever used in special education due process hearings. Avoiding legal terms of art that may not apply in this proceeding, the Parent avers that Daroff, Universal, or both are responsible for providing a remedy for any violation of the Student's right to a FAPE during the time in question.

Daroff takes a highly unusual position by joining the Parent in a stipulation that the Student did not receive a FAPE during the time in question. Daroff not only agrees with the Parent concerning liability (the FAPE violation), Daroff also agrees with the Parent concerning remedy. Discussed below, Daroff agrees with the Parent's calculation of compensatory education. Daroff's does not, however, join the Parent's argument about what entity owes compensatory education to the Student. Daroff argues Universal acted as the Student's LEA by directing Daroff's actions, and that many of the people who developed the Student's special education program were employed by Universal, not Daroff. As such, Daroff argues that Universal is responsible for the FAPE violation and must provide any remedy.

Universal takes no position at all concerning the FAPE violation or what remedy is appropriate if the Student's rights were violated. Rather, as a charter school management company, Universal argues that it never was – and cannot be – the Student's LEA. Consistent with that stance, Universal argues that it cannot take a position as to whether the Student received a FAPE because it was never responsible for the Student's FAPE. Universal takes no position as to the form of remedies for the same reason. However, Universal disagrees with both the Parent and Daroff concerning its LEA status and responsibility to provide a remedy. Universal disputes Daroff's characterization both of the relationship between itself and Daroff, and of the employment status of several of the individuals involved in the Student's education. Universal has consistently taken the position that it should not be

a party to these proceedings and is not responsible for remedying any violation of the Student's IDEA rights.

The Dispute between Daroff and Universal

As indicated above, there is a dispute between Daroff and Universal about which entity was the Student's LEA during the time in question. Universal argues that, as a matter of law, it cannot be an LEA. Daroff disputes this and argues that Universal was the Student's LEA during the time in question. The dispute between Daroff and Universal became apparent when Universal moved to dismiss the Parent's complaint and Daroff opposed the motion.

As *dicta* only, I believe that Universal has a strong argument. However, as explained in a pre-hearing order, I do not have authority to resolve disputes between educational entities. That pre-hearing order speaks for itself and is attached hereto as Appendix A.

Any determination about whether Universal, Daroff, or both are responsible for remediating any violation of the Student's right to a FAPE also resolves the dispute between Universal and Daroff – a dispute that exists beyond my jurisdiction. I will, therefore, determine what remedy is owed to the Student but will make no determination as to what entity or entities must provide the remedy.

Stipulations

On January 20, 2023, during the hearing session, all three parties agreed to admit the Parent's exhibits (P-1 through P-28). All three parties also agreed to admit Universal's exhibits (UC-1 through UC-4).[2] Daroff introduced no exhibits.

Also, during the hearing, the Parent and Daroff jointly stipulated that the Student was denied a FAPE for 328 school days at a rate of four hours per school day for a total of 1,312 hours. Universal did not join this stipulation. Both the Parent and Daroff agree that compensatory education is an appropriate remedy. *See, e.g. Daroff's "Statement of Stipulation."* Their stipulation, however, did not extend to the calculation of compensatory education.

Also, during the hearing, Universal explicitly took no position as to whether the Student's right to a FAPE was violated during the time in question. As

[2] UC-4 was uploaded after the hearing session, consistent with the parties' agreement.

such, Universal does not deny that the Student's right to a FAPE was violated. *Passim*.

On February 3, 2023, the Parent filed a written closing statement in which the Parent argued that compensatory education should be calculated at a rate of six hours per school day over the same 328 school days, bringing the total compensatory education to 1,968 hours.

February 10, 2023, Daroff filed a "Statement of Stipulations." Through that statement, Daroff stipulates that the Student's right to a FAPE was violated for 1,968 hours during the time in question, adopting the Parent's calculation. In that statement, Daroff also avers that 1,968 hours is the correct calculation under the "hour-for-hour" method described below.

Issue

Considering the above-referenced stipulations and pre-hearing order, there is only one issue to resolve: Is the Student owed 1,968 hours of compensatory education?

Findings of Fact

With a stipulation as to both liability and remedy in place, findings of fact are somewhat superfluous. Even so, both the IDEA and Pennsylvania's IDEA implementing regulations require hearing officers to include findings of fact in their decisions. *See, e.g.* 20 U.S.C. § 1415(h); 22 Pa. Code § 14.162(f).

My independent review of the documents entered into evidence via stipulation of all three parties reveals the following:

1. During the entire time in question, the Student's behaviors significantly impeded the Student's education. P-8, P-10, P-12, P-13, P-14, P-20, P-21, P-22.

2. During the entire time in question, no entity responsible for the Student's education offered or conducted a Functional Behavioral Analysis by Board Certified Behavior Analyst. *Id*.

3. During the entire time in question, the Student's IEP had provisions targeting the Student's communication needs. These included use of an AAC device and 1:1 paraprofessional support. P-10, P-13, P-14, P-21, P-22.

4. During the entire time in question, the IEP provisions for an AAC device and 1:1 paraprofessional support were implemented infrequently and sporadically. *Id*.

5. During the entire time in question, the Student did not make meaningful progress towards IEP goals, resulting in the repetition of IEP goals year-to-year.[3] *Id*.

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

[3] The year-to-year repetition of IEP goals does not establish any violation of the IDEA per se. Rather, such repetition tends to signal a lack of progress and the need to reconsider what type and amount of special education will enable a child to achieve IEP goals.

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 in 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 Perkiomen 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)

In sum, 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.

Discussion

During the hearing, I explained to Daroff and Universal that I would hold that the Student's right to a FAPE was violated unless either of them took a contrary position. Universal did not take a contrary position but rather took no position at all. Daroff did not take a contrary position but rather joined the Parent's position, turning the Parent's averment into a two-party stipulation. Nothing in my independent review of the evidence runs contrary to the Parent and Daroff's stipulations. Therefore, I accept the stipulation as to liability: whatever entity was responsible for the Student's special education violated the Student's right to a FAPE during the time in question.

Discussed above, compensatory education is an appropriate remedy for a denial of FAPE. Ultimately, both Daroff and the Parent agree that compensatory education is an appropriate remedy in this case. During the hearing, Daroff did not join the Parent regarding the calculation of compensatory education. After reviewing the Parent's calculation (presented in the Parent's closing statement), Daroff filed an additional stipulation whereby it joined the Parent's calculation. Nothing in my independent review of the evidence runs contrary to the Parent and Daroff's stipulations. I award 1,968 hours of compensatory education to remedy the FAPE violation.

The Parent may decide how the compensatory education is used. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related service needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The 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 District through Student's IEPs to 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 Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21). The

compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost of providing the awarded hours of compensatory services shall be limited to the average market rate for private providers of those services in the county where the District is located.

ORDER

Now, February 16, 2023, it is hereby **ORDERED** as follows:

1. The Student is awarded 1,968 hours of compensatory education.

2. The Parent shall direct the use of compensatory education, subject to the limitations stated above.

3. Nothing herein determines whether Daroff, Universal, or both are responsible for providing or funding the compensatory education awarded herein.

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

/s/ Brian Jason Ford
HEARING OFFICER

Appendix A

Pre-Hearing Order of November 8, 2021

Pennsylvania
Special Education Due Process Hearing Officer

K.R., Universal Daroff Charter School & The Universal Companies

ODR No. 26851-22-23

Pre-Hearing Order

Introduction and Procedural History

This special education due process hearing concerns the special educational rights of a student with disabilities (the Student). The Student's Parent (the Parent) initiated this matter on August 11, 2022, by filing a due process complaint (the Compliant). The Parent named the Universal Daroff Charter School (Daroff) as the only respondent in the Complaint. The Parent's claims arise primarily under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

On October 7, 2022, the Parent amended the Complaint to name The Universal Companies as a co-respondent (the Amended Complaint). The substance of the claims in the original and amended complaint are similar. The inclusion of The Universal Companies (Universal) was the most significant difference. The Parent alleges that, for the time in question, Daroff, Universal, or both were the Student's Local Educational Agency (LEA) and are responsible to remediate any violation of the Student's IDEA rights.

On October 21, 2022, Universal moved to dismiss. Universal's argument, discussed below, is that it is not, and never was, the Student's Local Educational Agency (LEA) as a matter of law. As such, Universal takes the position that it is an improper party to this due process hearing.

On October 31, 2022, the Parent replied to Universal's motion. The Parent presents a two-part argument. First, the Parent argues that Universal's claim that it was not the Student's LEA is predicated on disputed facts that are not in evidence. Second, the Parent avers that Universal acted as, and held itself out as, the Student's LEA during the pertinent period. The Parent argues that Universal took on LEA responsibilities by acting as the Student's LEA.

On October 31, 2022, Daroff also replied to Universal's motion. Like the Parent, Daroff takes the position that Universal is a proper party. Daroff argues that Universal provided all education and special education to the Student, including development and implementation of the Student's Individualized Education Program (IEP), pursuant to a contract between itself and Universal.

Having reviewed all the submissions, for reasons stated below, I deny Universal's motion to dismiss.

The Parent's Allegations

The Student, who is nonverbal, is eligible for special education as a child with both Autism and a Speech or Language Impairment (SLI). The Student has several educational needs because of these disabilities, including the need for Specially Designed Instruction (SDI), and is, therefore, a child with a disability as defined by the IDEA. The Student is also protected by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*.

The Parent enrolled the Student in Daroff [redacted] at the start of the 2018-19 school year. The Student remained enrolled in Daroff until April 22, 2022. During that time, Daroff and Universal collectively offered IEPs to the Student. Those IEPs placed the Student in a specialized private school. The Parent alleges that those IEPs did not offer the Student appropriate special education and, therefore, violated the Student's right to a Free Appropriate Public Education (FAPE).[1]

The Parent seeks remedies for the period starting two years prior to the complaint (August 11, 2020) through April 22, 2022. For that time, the Parent demands full days of compensatory education.[2]

Universal's Motion to Dismiss

Universal avers that it is a Pennsylvania nonprofit company that provides educational management services to charter schools – but is not a charter school itself. Universal concedes that it provided educational management services to Daroff during the time in question. Universal argues, however, that only LEAs, State Educational Agencies (SEAs), educational service agencies, and public agencies can be responsible for the provision of a FAPE

[1] The Parent details seven ways in which the IEPs fell short of the FAPE mandate. This includes a claim that Daroff and Universal failed to comprehensively evaluate the Student.
[2] The Parent also demands attorney's fees, which is beyond my authority to award. That demand is taken as a reservation of rights. The Parent also demands "any and all other appropriate relief."

to a child with a disability. Since Universal is none of those things, it argues that it cannot be responsible for any violation of the Student's right to a FAPE as a matter of law.

Universal attached documents to its motion. Universal argues that those documents establish that Daroff, not Universal, received a charter from the School District of Philadelphia. Universal also argues that those documents establish its relationship with Daroff as an educational management company and show when that relationship ended.

Universal also argues (with no citation to authority) that Pennsylvania Charter School law "clarifies" the relationship between educational management companies like itself and charter schools like Daroff by permitting any corporation to establish a school as a separate entity and then petition for a charter on the school's behalf.[3]

Universal also argues that it exists outside the jurisdiction of Pennsylvania special education due process hearings. To make this argument, Universal cites to due process hearings in which hearing officers dismissed private third parties named as a respondent in due process complaints.[4]

Daroff's Response

Daroff opposes Universal's motion to dismiss. Daroff claims that it had a contract with Universal and, through that contract, Universal provided all educational services to Daroff students. Daroff alleges that, consistent with its contract, Universal made all educational decisions regarding the Student, participated in IEP teams, drafted educational documents including IEPs for the Student, and held itself out to both Daroff and the Parent as the Student's LEA. Daroff included a copy of the contract in question with its response to Universal's motion.

The Parent's Response

The Parent first takes aim at the various documents submitted by Universal with its motion. The Parent notes several inconsistencies within those

[3] Pennsylvania's charter school law is Article XVII-A of the Pennsylvania School Code of 1949 codified §§ 17-1701-A — 17-1751-A.

[4] I decline to discuss in detail Universal's argument that it exists outside of a hearing officer's jurisdiction because that argument lacks merit. There is a significant difference between dismissing claims against an improper party and dismissing a party for lack of jurisdiction over that party. Seen through a favorable lens, the decisions that Universal puts forward concern only the former. Nevertheless, I discuss every case that Universal relies upon in the discussion section below.

documents and points out that those documents may not have been controlling during the time for which the Parent raises claims. The Parent further argues that facts concerning Universal's status as the Student's LEA are in dispute, and I cannot accept documents filed with a motion as proof of Universal's LEA status. Taken from the other direction, the Parent argues that Universal must prove its non-LEA status at the due process hearing.

The Parent also makes an estoppel-like argument. The Parent argues that Universal acted as and held itself out as the Student's LEA and cannot now disclaim its LEA status. The Parent sent documents with her response to illustrate how Universal acted as the Student's LEA during the time in question. This argument, and the documents, are consistent with Daroff's argument.

Statutory Definitions

In Pennsylvania, LEAs are responsible for the provision of a FAPE to children with disabilities in *almost* every instance. The IDEA defines the term Local Educational Agency at 20 U.S.C. § 1401(19)(A) as follows:

> The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

In Pennsylvania, public school districts, charter schools, and cyber charter schools are the most common examples of LEAs under the § 1401(19)(A) definition.[5] However, the IDEA includes two other definitions of LEA at §§ 1401(19)(B) and (C).[6] The definition of LEA at 20 U.S.C. § 1401(19)(B), brings "educational service agencies and other public institutions or agencies" into the definition of LEAs. The quoted term includes:

> (i) an educational service agency; and

[5] In Pennsylvania, traditional public schools, charter schools, and cyber charter schools have the same substantive IDEA obligations to children. *See* 22 PA Code § 14, 22 PA Code § 711.
[6] The § 1401(C) definition concerns BIA funded schools, which is not applicable in this case.

(ii) any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

The IDEA also defines the term Educational Service Agency at 20 U.S.C. § 1401(5) as follows:

(A) means a regional public multiservice agency—
(i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and
(ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State; and
(B) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school.

In Pennsylvania, Intermediate Unites (IUs) are the most common example of ESAs; they function as regional public multiservice agencies.

Discussion

Assuming that Universal's averments about itself are true, Universal does not squarely fit into any statutory definition of an LEA. Universal's argument, however, is unavailing.

The Parent's argument that I cannot simply accept Universal's averments as true is well-taken. Many facts are in dispute, and some of the documents presented to resolve those disputes are more confounding than clarifying.[7] Yet this is not the basis of my determination because no rules of procedure a strictly binding on these proceedings. I also reject the Parent's estoppel argument. A reasonable parent's good faith belief that an entity is an LEA does not make that entity an LEA. Rather, I deny Universal's motion because that is what equity requires.[8]

The fact that Universal does not neatly match the statutory definitions of an LEA is not dispositive. IDEA case law illustrates the importance of construing the Act consistently with its remedial nature. *See, e.g., A.W. v. Jersey City*

[7] For instance, Universal's name does not appear consistently throughout the documents.
[8] Remedies for IDEA violations are equitable in nature. *See, e.g. Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Pub. Sch., 486 F.3d 791, 803 (3d Cir. 2007) (en banc) (discussing the IDEA's "comprehensive remedial scheme"); *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 614 (3d Cir. 2015) (discussing "the broad remedial purposes of the IDEA").

Either Daroff, Universal, or both are responsible to remedy any volition of the Student's right to a FAPE during the time in question. That ambiguity, by itself, is sufficient reason to deny Universal's motion to dismiss if the IDEA's remedial nature is given its proper weight. Further, legal remedies for FAPE violations aim to remediate a loss of special education benefits. Assuming that both the Parent's and Daroff's allegations are true, Universal both planned and provided the Student's special education during the time in question. Consequently, Universal may be the only entity that can supply that which the Parent claims was lost. Dismissing Universal, therefore, is contrary to the remedial nature of the IDEA.[9]

Further, it is not within my authority to resolve the ambiguity about whether Daroff, Universal, or both were the Student's LEA during the time in question. Both Universal and Daroff argue that Universal's LEA status is resolved as a matter of Pennsylvania contract law and Pennsylvania's Charter School Law. My jurisdiction to resolve Pennsylvania Charter School Law disputes lies exclusively within Pennsylvania regulations applying the IDEA to the Commonwealth's charter schools, 22 Pa. Code § 711. A dispute about whether a charter school violated a child's right to a FAPE is properly before me. A dispute about which of two entities carry the obligations that come with a charter must be adjudicated elsewhere. No law, statute, regulation, or precedent grant me authority to resolve such claims.

In making this determination, I am aware of cases in which courts have expanded hearing officers' jurisdiction to enable hearing officers to resolve threshold issues in IDEA claims. Contract disputes are the most common example. Hearing officers may determine if parties to a due process hearing are bound by a contract – typically a prior settlement agreement – if doing so resolves a threshold issue. *See, I.K. v. Sch. Dist. of Haverford Twp.*, 961 F. Supp. 2d 674 (E.D. Pa. 2013); *A.S. v. Office for Dispute Resolution (Quakertown Cmty. Sch. Dist)*, 88 A.3d 256 (Pa. Commw. Ct. 2014). Those same cases do not disturb the long-standing, widely accepted principal that Pennsylvania hearing officers have no authority to interpret or enforce a contract. Rather, hearing officers must determine if a contract between the

[9] The Federal Rules of Civil Procedure are not binding in these proceedings, but the circumstances are analogous Rule 19(a)(1)(A). Without Universal's participation as a party, the Parent may be denied complete relief.

parties "exists" when doing so is necessary to resolve a threshold issue. *Id.* But even if a contract exists, litigants must go to court for enforcement.

In this case, Daroff claims that its contract with Universal shifted LEA obligations to Universal during the time in question. Even if Daroff is correct, I can do no more than say that Daroff and Universal were bound by a contract during the time in question (a fact that does not seem to be in dispute). I have no authority to interpret the contract one way or another, and I have no authority to enforce the contract.

Moreover, the sliver of contract law jurisdiction that I have via case law activates only when determining the existence of a contract is a threshold issue to an underlying IDEA claim. In this hearing, the question of whether Daroff, Universal, or both were the Student's LEA during the time in question is not a threshold issue. I need not determine which entity was responsible for the provision of FAPE to determine whether the Student received (or was offered) a FAPE during the time in question. The entities' IDEA obligations are not relevant to questions about what the Student's special education needs were at the time, or whether special education offered to the Student was reasonably calculated to confer a meaningful educational benefit. *See Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

I must also acknowledge the practical realities of dismissing Universal. A large part of my duty as a hearing officer is to develop an administrative record that enables fact-finding to resolve the issues presented for adjudication. *See* 20 U.S.C. § 1415(h)(4), 22 Pa. Code § 14.162(f), 22 Pa. Code § 711.62. Dismissing Universal will make that task difficult. The Parent and Daroff both allege that Universal developed and implemented the Student's IEPs, either directly or through the private school. If so, the most likely witnesses are Universal's employees, or were at the time. Universal also may be in possession of critical evidence. This goes beyond hearing efficiency. Dismissing claims against Universal would likely be prejudicial to the Parent's ability to present evidence at the hearing and would unnecessarily hinder one of my core obligations.

None of this is to say that Universal's overarching argument is without merit. It is possible that Universal carefully constructed its relationship with Daroff to avoid IDEA liability, and a tribunal with broader authority may ultimately excuse Universal from this action. The merit of Universal's argument – that it cannot be an LEA as a matter of law – compels me to carefully examine the precedent that Universal relies upon.[10] Ultimately, I conclude that the

[10] I do not require a table of authorities, but Universal's motion includes a table of authorities listing four due process level cases. Some of those cases are cited in the body of

precedent Universal puts forward is not controlling in this case or does not overcome the reasons for denying Universal's motion set forth above. I will address the decisions that Universal puts forward in chronological order: [11]

Z.R., Chester County Intermediate Unit, ODR No. 2866-1112-AS (02/06/2012)

Of all the cases that Universal relies upon, this is the most on point and the most helpful to Universal's case. The *Z.R.* due process hearing concerned a student who was placed by a third party into a private residential treatment facility (RTF). The RTF was located outside of the student's local school district. Pennsylvania law contemplates this situation and divides responsibility between the home and "host" school districts. *See* 24 Pa. Cons. Stat. § 13-1306. In the *Z.R.* hearing, the host district – the district in which the RTF was located – was responsible for the provision of FAPE to the Student. The host district discharged that obligation through a contract with its IU. Pursuant to that contract, the IU provided special education to the student on the host district's behalf. The parents requested a hearing against the IU, alleging a denial of FAPE. The IU moved to dismiss as an improper party because it was not the student's LEA. Ultimately, I agreed with the IU.

In the abstract, the *Z.R.* hearing can stand for the proposition that contracts between LEAs and non-LEA special education providers do not transfer LEA obligations to those providers. The analogy to the instant case is obvious. However, the specifics of the *Z.R.* case are important and are different from this case. First, in *Z.R.*, Pennsylvania law conferred LEA status to the host district and not to the IU. Second, the *Z.R.* case came directly after another due process hearing involving the same family. In the prior hearing, the hearing officer determined that the host district was the student's LEA. The absence of changed circumstances between the prior hearing and the *Z.R.* hearing at ODR No. 2866-1112-AS was a factor in the outcome.

Despite the differences between the *Z.R.* case and this case, it is not difficult to find examples of LEAs contracting with third parties (IUs or otherwise) for the provision of special education services. The instant case is an example. According to the Amended Complaint, Universal and Daroff placed the

---

Universal's motion. I will review the cases cited in the table for completeness. Additionally, Universal cites to *A.W. v. Middletown Area Sch. Dist.*, No. 1:13-CV-2379, 2016 U.S. Dist. LEXIS 147285 (M.D. Pa. Oct. 25, 2016), but only for the proposition that 22 Pa Code § 14 is Pennsylvania's IDEA implementing regulation. That is true for traditional public schools. Pennsylvania's IDEA implementing regulation for charter and cyber charter schools is 22 Pa. Code § 711.

[11] All of these decisions are at the administrative due process level and so none are binding.

Student in a private school through the Student's IEP. Functionally, Daroff and Universal developed the Student's IEP and then handed the IEP to a third party for implementation. There is no allegation that the contractual relationship between the private school and Universal and/or Daroff conferred LEA status to the private school because there is no allegation that the private school developed the Student's IEP.[12] Contracts between LEAs and third parties do not typically transfer LEA liability to the third parties. The primary difference in this case is the allegation that Universal acted as the LEA. Handing an IEP to a third party for implementation is not at all similar to a third party developing an IEP. The *Z.R.* case is distinguishable from this case for this reason as well.

M.B., New Media Technology Charter School, ODR File No. 18046-1617 (09/09/2016)

In the *M.B.* case, the student attended a charter school. The student's parent requested a due process hearing against the charter school. Then, the parent filed a second due process complaint against the Pennsylvania Department of Education (PDE) which is Pennsylvania's State Educational Agency (SEA). The hearing officer found that parents may request hearings only against LEAs, and then granted PDE's motion to dismiss. This matter is distinguishable because, in *M.B.*, all parties agreed that the charter school was the LEA and PDE was the SEA. In this case, there is no agreement about Universal's status. Additionally, in the *M.B.* case, the basis of the parent's claims against PDE was that it failed in its general supervisory duties – not in its provision of special education to the Student. In this case, the Parent does not allege that Universal failed to supervise Daroff. Rather, the Parent alleges that Universal directly violated the Student's right to a FAPE.

B.B., Elwyn Inc., ODR No. 18909-1617-KE (07/17/2017)

The *B.B.* due process decision has limited probative value because its core holding was overturned in *Montgomery Cty. Intermediate Unit No. 23 v. K.S.*, 546 F. Supp. 3d 385 (E.D. Pa. 2021) (holding that tuition reimbursement, including reimbursement for transportation, is available to Early Intervention students).

To whatever extent the *B.B.* case is still valid, it is mostly contrary to Universal's position. In *B.B.* case, Elwyn was the early intervention LEA in the family's school district.[13] B.B.'s parents requested a due process hearing

[12] If the private school developed the Student's IEP and held itself out as the Student's LEA, presumably the Parent would have named the private school as a co-respondent as well.
[13] In Pennsylvania, the school district in which a family resides is rarely the LEA for early intervention services. Rather, LEA status is conferred to the Mutually Agreed Upon Written

against the LEA, the school district, and PDE.[14] The issue concerned the appropriateness of the Student's transportation. The hearing officer concluded that Pennsylvania did not delegate responsibility for early intervention transportation to LEAs, and so PDE retained that responsibility. The hearing officer ordered PDE to provide appropriate transportation. Procedurally, however, the hearing officer did not dismiss any of the three potentially responsible parties at any point through and including the final order. The *B.B.* decision (to the extent it is still valid) is an example of how hearing officers have concluded that multiple entities may be responsible for at least a portion of a child's FAPE in some circumstances and, therefore, should not be dismissed from due process hearings.

D.L., Cheltenham Twp. Sch. Dist., ODR 19663-1718 (11/20/2017)[15]

The *D.L.* due process hearing was another § 13-1306 case. D.L.'s parents requested a due process hearing against both the home and host school districts and the RTF. As stated in the order, the Parents acknowledged that there was no judiciable issue presented against the RTF, and I dismissed claims against the RTF on that basis. This case is different because the Parent alleges a justiciable issue against Universal.

Summary and Conclusions

Universal's overarching argument may be sound. Regardless of the applicability of the decisions that it relies upon, Universal does not clearly fit into any definition of "LEA." Even so, I cannot dismiss Universal as a party to this due process hearing. There are four reasons for this:

First, it is beyond my authority to interpret or enforce the contracts and charter agreements that may or may not have conferred LEA responsibilities to Universal – or shielded Universal from those responsibilities.

Second, as a practical matter, it will be more difficult to make a record enabling me to resolve this case if Universal is excused from these proceedings. I am obligated to make findings of fact to resolve the Parent's claims. Universal is in the best position to supply those facts.

Arrangement (MAWA) holder. In the *B.B.* case, Elwyn was the MAWA holder. I refer to Elwyn as the LEA for simplicity.

[14] The hearing officer referred to PDE as DOE throughout the decision.

[15] Universal cites to ODR No. 19466, which exists in public only as a redacted dismissal order attached as an appendix to its companion case, ODR No. 19663.

Third, resolving Universal's LEA status is not a threshold issue to reach any of the Parent's claims. Cases expanding my authority to resolve threshold issues are not applicable.

Forth, and perhaps most importantly, dismissing Universal may leave the Student with no remedy for a FAPE violation. Case law instructs that the IDEA must be interpreted consistently with the remedial nature of the Act, and so equity requires Universal’s participation in this hearing as a party.

ORDER

Now, November 8, 2022, it is hereby **ORDERED** that The Universal Companies motion to dismiss is **DENIED.**

/s/ Brian Jason Ford
HEARING OFFICER