

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

HEARING

ODR File Number: 21143-18-19

Child's Name: M. R.

Date of Birth: [redacted]

Parent:

[redacted]

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Hearing Officer: Charles W. Jelley Esq.

Date of Decision: 10/29/2019

BACKGROUND AND PROCEDURAL HISTORY

The Parents of Student (“Parents”) commenced this action via the filing of a due process complaint on September 6, 2018, (Complaint). The Complaint alleged that Bucks County Montessori Charter School (Charter School or LEA or Charter) failed to provide the Student with a Free Appropriate Public Education (“FAPE”), as provided for under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (Section 504) during the 2016-17 school year, and failed to offer or have in effect a FAPE prior to the 2017-18 school year and each year thereafter.¹ Parents now seek compensatory education, reimbursement for payment of private school tuition, reimbursement for out of pocket expenses for providing FAPE/related services and other appropriate equitable relief. The Charter School asserts that at all relevant times, they complied with the IDEA and Section 504 and applicable state regulations.² In its Answer to the Complaint, and at various points throughout the proceedings, the Charter School asserted an affirmative defense that the Charter School ceased to be the

¹ The Parents’ IDEA claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). At the same time the applicable federal and state regulations implement Section 504 are found at 22 Pa. Code Chapter 15, and 34 C.F.R. Section 104.101 *et seq.* Over the course of this action, due to schedule conflicts, availability of witnesses, including the necessity to schedule an additional session to address special considerations about certain questioned documents, described below, the Decision Due Date was extended for a good cause, upon written motion of the Parties on multiple occasions; therefore, the final Decision, with the expressed consent of the Parties, is well beyond traditional IDEA timelines.

² References to the record throughout this decision will be to the Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, at times Stipulations of Fact with be referenced as Stip. and the Hearing Officer Exhibits (HO-) followed by the exhibit number and page when necessary. Several of the hearing sessions took place face-to-face with others occurring using a virtual hearing format. When a fact occurs throughout the presentation of testimony I will cite fact as N.T. *passim* followed by the witness’s affiliation, *i.e.* Parents or Charter. At times to denote a specific fact of consequence I will use N.T. followed by the page number.

Student's local education agency (LEA) when the Parents unilaterally removed and then enrolled the Student at the private school.³

Having reviewed the pertinent case law, the parties' well-briefed arguments, and upon giving due weight to the testimonial and non-testimonial extrinsic evidence, I now find the Charter School was the Student's LEA for all claims. I also find the Charter School failed to provide the Student with a FAPE, for each year at issue; therefore, I will now enter an Order granting appropriate relief in the form of compensatory education, reimbursement for out of pocket FAPE/related services expenses and tuition reimbursement.

STATEMENT OF THE ISSUES

1. Did the Charter fail to provide the student with a free, appropriate, public education during the 2016-2017 school year? If so, is the Student entitled to compensatory education, and reimbursement for out of pocket expenses? N.T. pp.4-29.
2. Did the Charter offer a free appropriate public education for the 2017-2018 school year? If not, is the Student entitled to tuition reimbursement for the out of pocket costs like private tuition plus any and all out of pocket costs/reimbursement for providing a FAPE for each year the Student was denied a FAPE and/or attended the private school? N.T, p.22, N.T. p.23, N.T. p.29 and Complaint ¶ 33-39.⁴

FINDINGS OF FACT

³ *Moore v. Kulicke & Soffa Indus.*, 318 F.3d 561 (3d Cir. 2003) (courts generally favor placing the burden of proof on the party who must prove a positive rather than the party who must prove a negative).

⁴ Although the Parents make denial of FAPE claims under the IDEA and Section 504, the essential elements of each denial of FAPE claim for liability and equitable relief, under both statutes and regulations in this instance directly overlaps. Therefore, the Parents' theory of liability under the IDEA and Section 504 and for appropriate relief are *sub silentio* combined as one claim for each school year in the Statement of Issues set forth above. The Parents did not raise a claim for Section 504 discrimination, before this hearing officer; therefore this hearing officer will not undertake a traditional discrimination deliberate indifference legal analysis. See, *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 275 (3d Cir. 2014) (quoting *Ridley Sch. Dist. v. M.R.* 680 F.3d 260, 283 (3d Cir. 2012). See also, *Fry v. Napoleon Community Schools*, 137 S. Ct. 988 (2017 (February 22, 2017)

BACKGROUND AND PROFILE OF THE CHARTER SCHOOL

1. The Charter School is a non-profit public charter school located in the Pennsbury School District, formed under Pennsylvania law. As a non-profit charter school that otherwise receives federal IDEA dollars, the Charter acts as an LEA for all current and previous students with disabilities who are IDEA eligible. N.T. *passim* Charter.
2. The mission of the Charter is to provide a Montessori education to students in grades K-6. The school is organized into Kindergarten, Lower Elementary (grades 1-3), and Upper Elementary (grades 4-6). N.T. p.46.
3. As a charter school with a specific educational mission, Parents must elect on their own to apply for admission. N.T. pp.474-475. The Student's Parents made that election prior to the 2014-2015 school year. N.T. p.476.
4. In Montessori education, students attend class with different-aged peers in the lower and upper elementary grade bands and typically remain with the same teacher for all three years. N.T. p.46. Older students are encouraged to assist and help younger students locate items in the classroom and model appropriate classroom behavior. N.T. p.101.
5. The Student, with the rest of the class, each day had a "Montessori block," where the students would use multi-sensory tools, like manipulatives and would also receive small group instruction in the lessons of the day. N.T. p.101. N.T. p.46.

THE PUBLIC AND PRIVATE 2015-2016 INITIAL EVALUATIONS

6. In 2015 the Student underwent a private Vision Efficiency and Visual Processing Evaluation. The examiner found the Student to have differences, which negatively affected schoolwork. In particular, the examiner found signs of a convergence insufficiency, an oculomotor dysfunction (eye-tracking deficiency), an accommodative insufficiency (focusing difficulty), visual-motor integration deficits, visual intake-visual memory deficits, and directionality deficits. P-3 pp.1-2. The examiner recommended vision therapy, support for reading and generalized classroom accommodations. P-3 pp.3-5.
7. In March of 2015, in the Spring of the first-grade year, the Student was administered the Terra Nova assessments. S-13, S-14.
8. At the end of the first-grade year, the Student earned a Reading Composite

score on the Terra Nova assessment at a grade equivalency of “0.0.” S-13 p.9.

9. Thereafter on March 15, 2015, the Charter completed an initial evaluation, which included a student observation, a review of records, along with the administrations of a variety of assessments like the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), the Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ-IV), the Behavior Assessment System for Children, Second Edition (BASC-2), the Conners Rating Scales, Third Edition, and an occupational therapy assessment, in June 2015. P-7.
10. On the WISC-V, the Student earned a full-scale intelligence score of 94, in the Average range. The analysis of the testing indicated while the Student displayed average cognitive ability, with strengths in visual-spatial processing, the Student’s overall assessment profile noted relative weaknesses in working memory. The Student’s working memory scores indicated a short attention span and distractibility. The observation notes at the time the Student was “lost.” The Woodcock-Johnson Achievement scores range from “Average” to “Well Below Average.” The Student’s initial achievement scores show written expression as a strength, with somewhat less well developed and only slightly below grade level scores in math. The greatest areas of academic need appeared in reading comprehension, reading fluency and decoding. The report indicates the Student was one year below grade level. The Evaluation Report also notes these areas were also significantly discrepant from the overall cognitive ability. The Parents’ and the teacher’s BASC-2 ratings indicate the Student’s conduct is average; however, the Student does display negative emotions and anxiety about school, has problems following directions and joining in group activities, and study skills are underdeveloped. On the Conners Scale, the ratings indicated the Student has difficulty sustaining attention, focus and displays signs of hyperactivity or impulsive behavior in school consistent with an Attention Deficit Disorder predominantly inattentive diagnosis. P-7.
11. The Evaluation Report was amended in June of 2015 to include the results of an Occupational Therapy evaluation. P-7. After administering three different assessments, the OT examiner noted the Student displayed difficulties in writing, reading visual-motor integration, visual fatigue. The examiner opined that the Student needed support for visual-motor skills. The Parent did not express any disagreement with the Evaluation Report results in March 2015, or as amended, in June 2015. N.T. P-7 pp.157.

12. On June 3, 2015, the teacher emailed the Charter's OT addendum to the ER to Parent. Shortly thereafter, the Parent spoke briefly on the phone with the OT evaluator. On June 15, 2015, the Parent informed the teacher that she did not believe the evaluation was otherwise complete (N.T. *passim* Parents).
13. In response to the Parents' concerns, on June 16, 2015, the teacher again emailed the Mom the ER, IEP and the Notice of Recommended Educational Placement (NOREP) asking her to sign, advising that they could talk by phone at a later date. S-18 p.15.
14. The email did not include a copy of the then-current procedural safeguards. No invitation to participate in a face-to-face IEP meeting or evaluation meeting was held to discuss the OT assessment or Parents' emerging concerns (S-18). The testimonial and non-testimonial extrinsic record note a brief telephone conversation took place between the teacher and the Parent. (S-18 pp.11-14).
15. While the Parents agreed to the Student's need for special education, they did not fully agree with the OT report or the "Addendum" to the evaluation report. Thereafter the Parents signed the NOREP, as requested, but did not check the box on the form approving the placement or the program (P-9, N.T. p.688, N.T. pp.697-698). The record is unclear, but by all accounts, someone from the Charter later checked off "approved" on the Parents' NOREP form without notice to or consent of the Parents. (S-6:11).
16. Likewise, someone from the Charter later checked the ER approval box for Parents on the evaluation team participation form. (Compare P-9 (parent copy) to S-6 (Charter-checked copy) N.T, p.372, N.T. pp.292-2930).
17. Parent did not, in fact, approve the evaluation report believing that the Student's overall needs were unmet. The special education teacher told the Parents that they should sign the paperwork before any of their concerns could be addressed. (NT 290:25-293:22; S 18:15; NT 697-698).

THE 2016-2016 AND THE 2016- 2017 IEPs

18. On February 1, 2016, Parent advised the Charter that the Student had received upwards of 20 of the 30 prescribed vision therapy sessions. S18:19, NT p.297.
19. The Charter offered and the Parents accepted the results of the ER and the LEA offered and the Parents accepted an initial IEP. P-6. The IEP's present

levels of educational and functional performance were a reproduction of the Evaluation Report assessment data. The present levels note decoding, reading comprehension, reading fluency, written expression, mathematics calculation and mathematics problem solving as IDEA areas in need of specially-designed instruction (SDI). P-6.

20. The IEP included a reading decoding goal, a reading comprehension goal, a broad-based math goal and an OT goal. The IEP did not include any individual goals for written expression, reading fluency, or decoding. The goal statements called for the Student to “increase” the then-current skill set. Rather than include objective measurements of achievement/progress, the goals reference a range of activities the Student would be expected to perform on the “State Standards.” The present levels of academic and functional performance did not include objective baseline data or curriculum-based data describing the Student’s expected performance on the “State Standards.” The IEP also included six generic forms of SDI. The OT goal called for the Student to receive 150 minutes of OT for the first marking period; thereafter, OT services were terminated. At the same time, the IEP called for the special education teacher to receive up to 30 minutes of OT consultative feedback on successful interventions for the first marking period; thereafter, like the direct OT supports, the service ended (P-6).
21. In addition, the special education team modified all classroom work, didactic materials, and classroom demands. N.T. p.74.
22. The Student’s lower elementary classroom teacher for 2014-2015, 2015-2016 and 2016-2017 school years interacted with the special education department several times per week regarding the Student’s academic programming, needs and progress. N.T. at 90-91.
23. The teacher provided the Parents with progress reports, akin to a report card, several times per year. S-18. At the same time, the Charter provided the Parents with IEP specific progress monitoring information. (S-4). The progress monitoring notes included subjective anecdotal statements and somewhat limited objective data. For example, the progress monitoring notes state, “[Redacted] is embarrassed that [Redacted] cannot do much of the work the other third-graders do.” S-4 p.4. At another point, the progress monitoring notes, [Redacted] is “never on the correct page, or problem” “[Redacted] cannot answer questions about the story,” and [Redacted] “is often drawing in [Redacted] workbook or falling asleep” (S-4 p.4). Similar comments describe the Student’s writing skills, spelling, number reversals,

as deficits, and state that the Student is often “embarrassed” that the Student’s work is different. (S-4 pp.4-6).

24. The Student’s second IEP was created on March 23, 2016. This IEP was in effect during the latter portion of the 2015-2016 first grade school year and the first two-thirds of the second grade 2016-2017 school year. P-11. Input from team members on the IEP noted that Student was functioning below academic grade-level expectations in the areas of decoding, reading fluency, reading comprehension, and spelling. P-11 p.8.
25. In March 2016, the Charter proposed the Student’s IEP for the 2016-2017 school year. The present levels note the Student requires “large amounts of extra help to complete follow-up tasks. In many regular education situations, [Redacted] requires one-to-one teacher support to complete work that would normally be assigned and expected to be completed independently. [Redacted] requires a higher level of scaffolding to help [redacted] express [redacted] ideas in writing. [Redacted] cannot sound out enough first-grade level to write complete sentences independently. When [redacted] needs to write, a teacher must help [redacted] by transcribing most of the words from [redacted] spoken sentences on a whiteboard or paper.” Furthermore, “... a teacher must help [redacted] when the Student works with peers in the regular education classroom.” P-11.
26. Under the heading of “Current Classroom-Based Assessment” in March 2016, the special education teacher’s input notes the Student cannot complete second-grade work independently, requires “much” one-on-one help, and cannot do any work independently when reading is required. In March of Second Grade, at the time the IEP team was drafting the IEP, the special education teacher notes, the Student did not have any skills or strategies to decode words, the Student does not have any sense of number values and sequences, does not know basic addition and subtraction skills and was reading at the kindergarten level. P-11 p.6.
27. The OT reported the Student completed the goal; thereafter, the OT supports do not appear as a related service. (P-11 p.7).
28. The IEP’s goals and overall level of programming was identical to the previous IEP with the following exceptions: OT was dropped, a foreign language exemption was provided which then allowed the Student to participate in an additional learning support slot for 30 minutes during the language time slot, and included a provision for all work to be “adapted to [redacted] level”. P-1 While the initial ER found the Student’s performance in math to be just barely “average,” the IEP reported the Student had “no

sense of numbers,” and was working below grade level when compared to peers. P-11 p.6. Following the implementation of the initial IEP, the Student was reported to be very sad, anxious and struggling in the classroom. P-11 p.8

29. For the most part, the present levels in the March 2016 IEP matched the present levels in the previous IEP. The IEP notes decoding, reading comprehension, reading fluency, written expression, spelling, mathematics calculation and mathematics problem solving as need areas. The IEP goal statements targeted reading decoding, reading comprehension, written expression, and math facts. For example, the math goal called for “[redacted] will be able to select and apply mathematical operations in a variety of contexts to grade level.” The goal statements did not include spelling or mathematics calculation or mathematics problem-solving goals. The progress monitoring data embedded in the proposed IEP is made up of anecdotal statements, includes minimal objective data and otherwise lacks expected objective progress monitoring data. The IEP goal statements do not match up with the present levels. Although the school year was ending, and the goal called for the Student to “... increase [Redacted] writing skills to grade-level” the Student’s written expression skill set was limited to writing “... simple 3 to 4-word sentences, but struggles with spelling, capitalization and punctuation.” P-11 p.20, N.T. pp.59-65.
30. While the progress monitoring notes identify emotional and attention-based deficits, the IEP did not include goals, SDIs, programming, data collection or progress reporting for emotionality, decreasing crying, or increasing focusing/attention. The overall level of intervention, level of support, the intensity of programming were not adjusted to address the then-current present academic, social, or emotional levels. P-11, *Id.*
31. The 2016-2017 IEP continued to provide the Student with only one (1) hour per day of targeted special education supports. P-11.
32. In April 2016, subsequent to the March 2016 IEP meeting, the Charter assigned another teacher to provide the Student with one-on-one Orton-Gillingham reading tutoring three (3) days a week from 9:30 to 10:15 as part of the Student’s schedule. The decision to do so did not involve Parents. P-11 p.16. The decision to add the Orton-Gillingham supports modified the Student’s participation with peers in the regular education classroom during the school day. P-11, N.T. *passim* Charter and Parents. The Charter did not issue prior written notice or a NOREP describing the basis for the proposed action.
33. In April 2016, due to school-wide Terra Nova testing, the Charter school

without prior written notice to the Parents discontinued the three days a week one-on-one Orton-Gillingham reading supports. P-11 p.16.

34. According to the Charter's records and the testimony of Orton-Gillingham teacher worked with the Student during the month of May 2016 until the end of the school year in early June. S-11 pp.9-21.
35. The IEP did not list Orton-Gillingham reading as a form of specially-designed instruction and the Orton-Gillingham teacher did not collect progress monitoring data. P-11.
36. In October 2016, Parent told the Charter she was obtaining a private dyslexia assessment ("Dyslexia Report") and requested a meeting. S-18 p.47, P12, P pp.6-7. No meeting was scheduled. The Parents provided the Dyslexia Report to the special education teacher in November 2016. P-12.
37. In November 2016, the Student's progress monitoring reports reflected little to no progress. P-23. Sometime in November 2016, the Parents unilaterally decided to provide dyslexia therapy to the Student from December 9, 2016, through June 8, 2017. The Student attends and the Parents paid for 22 weekly dyslexia therapy sessions. The Student's initial sessions were held at the dyslexia center. The dyslexia center therapist, who provided the supports, was a certified New Jersey school teacher trained and certified in the dyslexia remediation. Stipulations of Fact [Redacted] Stipulation #14.
38. In November 2016, the special education team noted in its monthly report: "[redacted] – parents are having [the Student] tested for dyslexia and will share results; we will then look into additional supports to assist [redacted] in school." S-11.
39. Sometime in November of 2016, the Parents obtained and provided the Charter the results of an outside report from a university-based reading/special education clinic ("Dyslexia Report"). P-12, N.T. p.181.

THE RESULTS OF THE PRIVATE DYSLEXIA REPORT PROVIDED VALUABLE DATA AND PERSPECTIVE

40. The private examiner evaluated the Student's decoding, encoding, oral reading, phonological processing, visual-motor integration, immediate sequential recall, and information processing skills. The Dyslexia Report examiner concluded the Student is a person with Mild to Moderate Dyseidetic Dyslexia/Problematic

Dysphonetic Dyslexia.⁵

41. The examiner administered and the Student earned the following scores on portions of or sub-tests on a variety of well-known standardized tests: Wechsler Individual Achievement Test-III (WIAT-II), Word Reading 18th percentile, Pseudo word Decoding 4th percentile, Spelling 13th percentile; Gray Oral Tests (GORT-5), Rate, 16th percentile, Accuracy 9th percentile, Fluency 9th percentile, Comprehension 5th percentile, Oral Reading Quotient 5th percentile; Comprehensive Test of Phonological Processing (CTOPP) Elision 50th percentile, Blending Words 37th percentile, Phonological Awareness 42nd percentile; Phonological Memory, Memory for Digits 16th percentile, Non-word Repetition 25th percentile, Phonological Memory 16th percentile; Berry-Buktenica Developmental Test of Visual-Motor Integration (Berry-VMI) Visual Motor Integration 14th percentile, Visual Perception 86th percentile; Visual Aural Digit Span Test 9 (VADS), Aural-Oral 50th percentile, Visual Oral 25-50th percentile, Aural-Written 25th percentile, Aural Input 25th percentile, Visual Input 25th percentile, Oral Expression 25th percentile, Written Expression 25th percentile, Intra-Sensory Integration 25th to 50th percentile,, Inter-Sensory Integration 25th percentile; Test of Information Processing Sills (TIPS) Visual Order 21st percentile, Visual Unordered 34th percentile, Visual Modality 25th percentile, Auditory Ordered 50th percentile, Auditory Unordered 55th percentile, Auditory Modality 50th percentile, Delayed Recall 25th percentile. When compared to the Student's overall full-scale IQ in the average range, the private evaluation results indicate the Student is underperforming and falling behind. P-12.
42. After describing the teaching and learning implications of the Student's testing profile, the examiner recommended a "... minimum of 200 minutes per week of intensive, individualized instruction that remediates cognitive processing deficits as well as reading, spelling and writing." The examiner also suggested that the Student should participate in a phonetic based reading program like the Orton-Gillingham program. P-12. The report included a series of targeted recommendations, including preferential seating, simple explanations, reduction of the number and pace of concepts, testing, homework completion and extra time to write things down. P-12 pp. 14-15. Lastly, the Dyslexia Report recommends having the Student participate in "literacy tutoring or homework

⁵ Dyseidetic dyslexia is the reduced ability to perceive whole words for instantaneous reading and spelling, despite having been seen on repeated occasions. Dysphonetic dyslexia is a reduced ability to integrate symbols and sounds, resulting in difficulty developing and using word attack skills to decode single, unknown words.

support” instead of a foreign language class. P-12 pp 15

43. Although the Charter received the private “Dyslexia Report,” the Charter did not issue a Permission to Re-Evaluate form, did not schedule a meeting to consider the Parent’s input in the Dyslexia Report and did not reissue another evaluation report. The special education teacher discussed the “Dyslexia Report” with the Charter school’s psychologist and another representative from the intermediate unit. The record is clear that at some point, the Charter school members of the IEP team, without Parent input began implementing several of the recommendations in the Dyslexia Report. For example, the Charter staff provided the Student with an Orton-Gillingham reading program, and substituting for the Student’s foreign language time, if any. N.T. pp.183-185. Thereafter, the special education teacher contacted the Parent to discuss the report’s findings. N.T. p.185.
44. The first time the Parent learned that the Student received Orton-Gillingham reading supports was at the hearing. N.T. p.330:22. The Orton-Gillingham tutor did not discuss the reading program with the Parent. Likewise, the IEP team did not update the IEP, the SDIs, or schedule an IEP meeting. P-11 p.3; N.T. p 644:22, N.T. p.665. Neither the Orton-Gillingham teacher or the special education teacher provided the Parents with any agreed-upon or targeted progress monitoring data about the reading intervention. N.T. *passim* Charter and Parents.
45. Prior to the Orton-Gillingham tutor assignment, the Student had been rostered for group learning support. The Orton-Gillingham tutoring substituted for, rather than supplemented, the group learning support, three days a week, maintaining a total of 300 special education one-on-one or small group instructional minutes per week. The Orton-Gillingham then began to pull the Student from the small group learning support work three days a week. P-23, S-11 pp.14-15, N.T. p.634. Although the change from a small group to one-on-one instructions changed the Student’s level of participation in the regular education classroom, the Charter did not issue prior written notice, procedural safeguards, or a NOREP (NT *passim* Charter and Parents).
46. For the 2016-2017 school year, the Student was scheduled to receive 60 minutes per day of direct learning support, three days a week one-on-one Orton-Gillingham reading tutoring and two days a week in a small group. The Orton-Gillingham tutor was out on medical leave for the first five months of the 2016-2017 school year. During that time, the Student did not have one-on-one Orton-Gillingham reading instruction. S-11 pp.22-23, S-11, N.T. p. 636; p.637, p.661, N.T. p.135.

47. During the same time period, the Charter assigned the Student to the Charter's mandatory PSSA prep classes. The Student reacted negatively to the PSSA prep class. As a consequence of the change in the Student's level of participation in the targeted services, the Student began to cry in school every day. Parent inquired if the Student could be exempted but received no response forthcoming. S-2:6, N.T. p.135.
48. The 2016-2017 IEP progress reporting shows while the Student was promoted to third grade, the teachers struggled to identify the Student's then-present instructional level (S-7, S-8, S-11, S-11, S-13).
49. The 2016-2017 progress monitoring reports do not include objective progress data for mathematics, attention, anxiety, visual-motor, OT/sensory, reading, decoding, encoding, or functional needs. P 11. The anecdotal progress monitoring updates state the Student was working at "almost second-grade level." The second-grade work indicates a decrease in the Student's then-current present levels from the previous school year. (Compare P-24 November 2016, third grade level to mid-second grade level, with April 2017, and first-grade level P-3 p.2).
50. During the early months of the 2016-2017 school year, when the Orton-Gillingham tutor was out on medical leave, the Student was in a reading group with the special education coordinator for a minimum of 45 minutes to one hour per day with two other students. S-11. In addition, the special education teacher provided additional learning supports during the two-hour block following the reading group. S-11 pp.22. The Charter did not issue prior written notice, procedural safeguards, or a NOREP describing the action or the change in supports. N.T. *passim* Charter and Parents.
51. Beginning in June 2016, the Parents requested reimbursement for their out of pocket private vision therapy expenses. Sometime in mid-June 2016, the special education teacher, after discussing the Parents' request with the building principal, without the benefit of an evaluation, informed the Parents that the Charter denied their request for vision-related supports and reimbursement. Although the Charter denied the request, they did not provide the Parents with prior written notice, procedural safeguards, or a NOREP describing the basis for the refusal, call for an IEP or evaluation team meeting to review the request. The email denial statement did not identify the names of the persons who participated in the denial decision, the date of the in-house denial meeting, or the records reviewed in making the denial decision. N.T. p. 291, P7p.15; N.T. pp.296, S-18 pp.37-41. Thereafter, the Parents continued to pay for the private vision therapy

services (N.T. *passim* Parents and Charter).

52. Sometime in January 2017, the Orton-Gillingham teacher returned to work; thereafter, the Student again resumed Orton-Gillingham instruction. The Orton-Gillingham instruction includes strategies like a tapping out method for spelling, sentence writing, instant word drills, and fluency practice using the Take Flight program, for three hours and forty-five minutes (225 minutes) per week. The Orton – Gillingham instructor then provided targeted services during the regular education reading block, and also at another time in lieu of Student’s foreign language class period on Wednesday. S-11 p.34; N.T. p.621. The IEP team never met to recalculate or adjust the Student’s participation with non-handicapped peers in the least restrictive setting and the Charter never provided prior written notice, procedural safeguards, or a NOREP describing the basis for the action. N.T. *passim* Charter and Parents.

THE 2017-2018 OFFER OF A FAPE

53. No meetings or discussions of the Student’s program occurred between receipt of the Dyslexia Report and the due date of the Student’s 2017-2018 IEP, March 2017. N.T. pp.404-405.
54. While various Charter school documents indicate the Father participated in the IEP-ER-NOREP process, the Father testified credibly that he did not attend any IEP meetings in the Charter or sign any documents. The Father also testified credibly that he did not sign the IEP attendance sheet, the ER meeting, or the NOREP. The record is unclear how the Father’s signature appears on a signature line on several FAPE documents maintained by the Charter and shared as records in these proceedings. N.T. pp.725-730, HO Exhibits 1-6 IEP Paperwork-Questioned Documents.
55. The “March 2017 IEP” document in evidence (P15) was received by Parent in response to a request for the “most recent IEP” in May 2017. This IEP document includes information dated April 2017, post the date on the face of the IEP document. (P-15 p.16).The parental concerns statement in the IEP was created by the Charter without Parent input. N.T. p.194.
56. The IEP paperwork packet maintained by the Charter, in this Student’s file, included at HO #6, include a post-dated invitation to a meeting which was not called and did not occur. The record includes a NOREP dated to coincide with a meeting that did not occur, with a date of issuance predating the signature of the issuing principal. An IEP was prepared that was not the

product of a face-to-face IEP team; also, the LEA failed to secure an acknowledgment of receipt of the applicable procedural safeguards. The proposed program was basically identical to the level of intervention and supports contained in previous IEPs, with some modifications to the present levels not otherwise attributed to a teacher. Some of the input on the IEP documents appears in red ink. P-15.

57. The 2017-2018 IEP lacks documentation that the mandatory IEP team members were included in the development of IEP. The record is clear that the Parents did not waive attendance or participation of any IEP team members or themselves. N.T. p. 752:17-23, HO#6.
58. When the Charter sent the IEP to the Parents, the IEP packet did not include prior written notice or procedural safeguards. N.T. p.752, HO 6. Although the Student was entering third grade, the IEP states the Student was then reading at a first-grade level. P-15 p., P-15 p. 7 The IEP notes the Student's math skills continued to score in the early first-grade level. The IEP present levels also noted that the Student continued to be unable to physically form numbers. P-15 p.19.
59. On May 12, 2017, Parent asked the Charter to schedule an IEP meeting with Parents' private dyslexia expert to discuss the Dyslexia Report and the Student's needs. The Charter did not schedule a meeting in response to this request. P- 2 p.12, N.T. p.412.
60. On May 17, 2017, the Student came home from school and made a suicidal statement linked to school frustration. NT 329:17-23. Parent again contacted the Charter, repeated the request for a meeting and asked how they could work with the Charter to coordinate programming. No meeting was ever scheduled. P-2 p.12, N.T. p.412.
61. On August 3, 2017, Parents sent notice to the Charter of their intention to make a unilateral private school placement at the Charter's expense. P-16. The Charter did not issue a permission to evaluate form, call an IEP meeting, N.T. p.349) or take any other formal action in response to this notice. N.T. pp.3, N.T. 348, N.T. *passim* District and Parents). Parents advised the Charter, in August, that they would be enrolling the Student in the private school. N.T. p.415 p.8.
62. Upon receipt of the notice of intent to remove the Charter did not issue a notice of intent to evaluate and did not issue an invitation to an IEP meeting. N.T. p.349. The Student did not attend the Charter at the start of the 2017-2018 school year. The Charter did not make a report of nonattendance or make a truancy report. N.T. pp.610-611.

63. In mid-September, Parents enrolled the Student at the private school for the 2017-2018 school year. They advised the Charter of this fact in writing and then withdrew the Student. N.T. p.349.
64. Parents privately paid tuition, specialized service costs, and transported the Student to and from the private school during the 2017-2018, 2018-2019 and 2019-2020 school years. (N.T. *passim* Parents and District).

THE PRIVATE SCHOOL

65. The private school is a well-established and highly respected school for students with language-based learning disabilities. The private placement provides programming specifically designed to address dyslexia, including the Student's weak reading, attention, sequential memory, occupational therapy and speech therapy needs. The private school provides a full day environment implementing specialized reading, writing and math programming across all core curriculum areas, not just during pullout sessions. All teachers are trained in the multisensory teaching approach, which includes a well-defined multisensory phonics-based and fluency practice approach to help students in all subject areas. The multisensory strategies learned in reading class cut across the curriculum throughout the school day. (P-32, N.T. *passim* Parents and Experts).
66. The private placement addresses the Student's emotional needs. The Student's reading, written and spoken language style is understood by all teachers. The record is preponderant that the private school provides explicit instruction in reading, written composition, handwriting, and phonological awareness. The supportive, understanding, effective learning environment has otherwise reduced the Student's suicidal statements, anxiety and engagement during the school day. N.T. pp.566-569, N.T. *passim* Parents.
67. Standardized testing, at the private school, post-removal from the Charter, establishes that the Student made meaningful progress at the private school program. N.T. pp.493-497, P-19, P-25, P-26, P-27, P-29, P-30, P-31.
68. Parent expended \$46,920.00 in tuition costs for the 2017-2018 school year and \$47,810.00 in tuition costs for the 2018-2019 school year. The Parents expended similar sums for the current 2019-2020 school year. N.T. pp.360.
69. Parent expended \$2,025.00 in related services for speech services during

the 2017-2018 school year and \$5,655.00 in related service costs during the 2018-2019 school year. N.T. p.361. Parents expect to expended similar costs for the current school year. N.T. *passim* Parents.

70. Parent expended \$3,000.00 in dyslexia therapy costs during the 2016-2017 school year, \$1,500.00 costs in dyslexia evaluation and \$800.00 in auditory processing evaluation during the 2016-2017 school year. N.T. p.361.
71. Parents did not provide any receipts at the hearing for the outside related services or tuition payments that they allegedly made for services for the Student. N.T. p.416; *see also* N.T. pp.360-361
72. Parent provided two round trips of 22.6 miles per school day during the 2017-2018 school year for a total of 162 days and two round trips of 22.6 miles per school day during the 2018-2019 school year for a total of 165 days. N.T. pp.359-360. As of this date, the Parents continue to transport the Student to and from the private school.
73. Parents incurred expert costs for the presentation of their case. N.T. *passim*.
74. On August 3, 2017, Ilene Young, Esquire, counsel for the Parent, sent a letter to administrators at Charter School advising the Charter that Parent believed that the Student had been deprived of a FAPE by the Charter School and that it was the Parent's "intention" to place the child in a private school at "LEA expense." P-16 p.1. The letter does not indicate that the Parents had visited or were ever interested in a particular private school as a potential private placement for the Student. S-1
75. On August 17, 2017, counsel for the Charter School contacted Ms. Young and inquired as to whether the Parent was seeking a specific level of support and "whether [the Parents] have, in fact, taken steps to enroll the Student in a private school." S-1 p.1.
76. In a follow up message dated August 21, 2017, counsel for the Charter informed Ms. Young as to several programming options available at the Charter, indicated the Charter's willingness to conduct and fund an Independent Reading Evaluation of the Student, and stated that "the LEA is willing and able to make any changes to the current IEP to reflect a change in the delivery of services at the request of the Parents. Please let me know if a meeting can be set up to address such changes." S-2 p.1.
77. Thereafter, no further conversations were held between counsel. No further communication transpired between employees of the Charter and the Parent prior to September 12, 2017. On that date, Parent unilaterally withdrew the student from the Charter School via email, stating, "[The Student] will be

attending the [redacted] this year. At this time, the Student needs to be withdrawn from (Charter School).” S-8.

78. After September 12, 2017, the Charter School did not issue prior written notice, convene IEP meetings, issue procedural safeguards, or issue a permission to reevaluate. N.T. *passim* LEA and Parents.

THE EXPERT PSYCHOLOGIST’S TESTIMONY

79. For the hearing, the Parents provided an opinion letter, dated February 11, 2018, from a school psychologist to support their position that the Charter did not offer an appropriate educational placement. P-20. The expert then testified at the hearing in this matter. On cross-examination, the expert admitted that the entirety of the content of the opinion letter was the result of his interview of the Parent. N.T. pp.504-506.
80. The expert psychologist did not independently verify any of the information he obtained from the Parent with representatives or employees of the Charter. N.T. pp.506-507.
81. The psychological expert rendered an opinion on the “adequacy” of the IEPs issued by the Charter to the Student. N.T. p.5. The expert was unaware, at the time of trial, after rendering an opinion on the adequacy of the IEPs, that Charter had the capacity to provide Orton-Gillingham instruction or that it was being provided to the Student while enrolled at the Charter. N.T. p.508.
82. The expert psychologist opined that after reviewing the Student’s profile, that the Student, who was receiving five hours of out-of-school tutoring per week, could be emotionally affected by the length of such tutoring. N.T. p.514.
83. The expert did not conduct any observations of the Student at the Charter or the private school. Although the Student scored in the “average” range in the executive functioning domain on the Conners assessment that was administered in 2015, the expert opined, without the benefit of knowing the Student or having conducted any observations of the Student, that the objective ratings and tests scores, in the record at the time of the evaluation indicated that the team should have further evaluated the Student. N.T. pp.438-442 and p. 534.
84. The expert, after reviewing all of the Student’s records, concluded that the IEP lacked SDIs and goals linked to then known needs and circumstances

N.T. pp.446-455.

85. After reviewing the IEPs and the ER, the expert noted that the IEP lacked goals, objectives and SDIs linked to attention, written expression, decoding, encoding, emotional and social needs. N.T. pp.454-461.

THE PARTIES STIPULATION ABOUT THE DYSLEXIA EXAMINER

86. The Parties stipulated to the following facts in lieu of direct testimony of the expert witness, from the Dyslexia Center (Center) who participated in the Dyslexia Center assessment of the Student's reading disability, the determination of the Student's then-current present levels and also participated in the implementation of 22 plus hours of targeted individualized dyslexia specific Orton-Gillingham reading interventions.
1. [Redacted] is the founder, owner and director of the Dyslexia Center of Princeton, [address redacted] from October 2008 through the present. She has been a dyslexia education professional for ten years.
 2. [Redacted] holds a B.A. from Princeton University, and has held an active New Jersey State Teaching Certificate since 1980.
 3. [Redacted] received her original training in dyslexia education from Dyslexia Institutes of America, including training in assessment, curriculum, operations, and therapies, including Orton-Gillingham based phonics and fluency programming for students with dyslexia.
 4. [Redacted]'s duties at the Dyslexia Center include hiring and supervising the Center's diagnostician, [Redacted] Ph.D.; hiring and training all therapists, hiring, training and managing the Center Coordinator and business staff. [Redacted] reviews, revises and improves the Center's curriculum materials and plans each client's sessions, which are delivered by the assigned Orton-Gillingham therapist. [Redacted] provides an hour-long consultation to review, interpret results, translates the assessments into actionable, laymen's terms. [Redacted] is responsible for all marketing, financial and operational aspects of the Dyslexia Center. [Redacted] maintains a personal caseload of a portion of the Center's clients for educational therapy.

5. [Redacted] stays current with dyslexia education via continuing education seminars, including attending Wilson Reading Systems seminars.
6. As part of [Redacted's] professional responsibilities, [Redacted] maintains familiarity with local schools providing specialized programming for students with dyslexia. One of these schools is [Redacted].
7. The Dyslexia Center has provided assessment and consultation to more than 700 students.
8. [Redacted] has been recognized as an expert witness otherwise qualified to provide expert testimony concerning dyslexia education in New Jersey State Court of Common Pleas.
9. Based on training, education and experience, [Redacted] qualifies as an expert in dyslexia education.
10. The Dyslexia Center procedure for the intake of new students is as follows. This procedure was followed with the instant Student:
 - a. After an intake phone call, an assessment is scheduled. The assessment is administered by and diagnosis offered by [redacted], Ph.D., a licensed clinical psychologist. The assessment is designed to determine whether an individual has dyslexia, what kind, and how severe, and to identify the underlying causes (cognitive processing deficits) of that individual's dyslexia.
 - b. The Center produces a report, the Center team meets to consider it, and an hour-long consultation is scheduled with the client's parents (or the client him/herself, if an adult) to interpret the results shown in the report and propose next continuing steps for therapeutic intervention as well as recommended educational accommodations and modifications.
 - c. Once the assessment is reviewed with the client remedial, developmental and specially-designed individual services are offered to the client. If appropriate, Center staff provide dyslexia therapy sessions that follow a standard protocol, personalized for each client. Using the Center's copyrighted version of an Orton-Gillingham-based scope and sequence reading program, Center clients attend weekly 2-hour sessions designed to remediate underlying dyslexia cognitive processing deficits.

11. The Center's typical results for an average client are 15-18 months' reading fluency improvement over the first 24 sessions (6 months) of therapy.
12. Most clients remain in the remediation program for 12-18 months.
13. The Center offers educational consultation, including but not limited to attending IEP or other meetings, along with meeting with the child study team and/or classroom teachers to interpret results of assessments, and program recommendations.
14. [Redacted]'s center provided dyslexia therapy to [Redacted] from December 9, 2016, through June 8, 2017, via 22 weekly dyslexia therapy sessions. [Redacted's] initial 3 sessions were with [Redacted], then with [Redacted], a Center therapist, who is a certified New Jersey school teacher trained and certified in the Dyslexia Center's methodology.
15. Weekly, after each session, [Redacted] or the office manager, per protocol, reviewed data taken by the therapist during each of [Redacted's] sessions. Once the data was reviewed the Center staff either updated or created [Redacted] next dyslexia specific session plan for the following week.
16. [Redacted] had weekly knowledge of [Redacted's] progress in the program.
17. [Redacted expert] also had frequent conversations with [Redacted's] mother during this time period, from which she collected anecdotal observations of [Redacted's] progress.
18. [Redacted expert's] Dyslexia Center assessment was administered by [redacted] using the Center's standard battery of assessments.
19. [Redacted's expert] Dyslexia Center assessment allowed [Redacted] to determine that [Redacted] had mild-moderate Dyseidetic dyslexia and problematic Dysphonetic dyslexia. [Redacted's] dyslexia has its roots in weakness in phonological processing, phonological memory, visual-motor integration, and low visual and auditory working memory.
20. [Redacted expert] was asked to provide recommendations for school by [Redacted's] Parents.
21. [Redacted expert] recommended that Parents look at [Redacted] School, The [Redacted] School, and/or The [Redacted] School, as a possible private placement.
22. The current [Redacted] School meets [Redacted expert's] SLD and reading multisensory criteria.

THE QUESTIONED IEP, EVALUATION AND NOREP DOCUMENTS

87. A review of the IEP, ER and NOREP documents at Hearing Officer Exhibits ## 1 through 6 confirms that the Charter did not schedule or hold a face-to-face IEP to prepare the Student's March 2017 offer of a FAPE for the 2017-2018 school year. N.T. pp.683-712.N.T. p.716, N.T. pp.752-754, N.T. pp.758-760, Hearing Officer Exhibits ## 1 through 6.
88. A review of the IEP, ER and NOREP documents at Hearing Officer Exhibits ## 1 through 6 confirms serious questions and reasonable doubt exist if the Parent's signatures, the date notations and/or the different colored ink checkmarks, of any kind, on the IEP or the ER indicating consent, approval, and/or participation, in the development of the IEP or ER documents were actually made by or authorized by the Parents. N.T. pp.683-712, N.T. pp.734-736, N.T. p.745, N.T. 748-750, Hearing Officer Exhibits ## 1 through 6.
89. While the Father's name and signature appear on the 2015 and 2017 IEP documents, in the record at Hearing Officer Exhibits ## 1 through 6, the record is preponderant that the Father did not attend either IEP meeting. N.T. pp.678-707, N.T. pp.674-675, N.T. pp.682-683, N.T. pp. 702-704, N.T. pp.721-726, N.T. pp.732-735, N.T. pp.760-761, Hearing Officer Exhibits ## 1 through 6.
90. The Father did not attend the March 2017 IEP meeting, yet his signature appears on the document in one color ink while the date notation appears in another different colored ink. .T. pp.678-707, N.T. pp.674-675, N.T. pp.682-683, N.T. pp. 702-704, N.T. pp.721-726, N.T. pp.732-735, N.T. pp.760-761, Hearing Officer Exhibits ## 1 through 6.
91. The Father did not authorize his wife or anyone at the school to sign his name or date the documents. N.T. pp.678-707, N.T. pp.674-675, N.T. pp.682-683, N.T. pp. 702-704, N.T. pp.721-726, N.T. pp.732-735, N.T. pp.760-761, Hearing Officer Exhibits ## 1 through 6.
92. All of the above Findings of Fact were made after a lengthy, careful and deliberate review of the testimonial and non-testimonial extrinsic evidence. N.T. *passim* Parents and Charter.

CONCLUSIONS OF LAW AND GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that 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). Accordingly, the burden of persuasion, in this case, must rest with the Parents who requested this administrative hearing. At the same time, the Charter accepted the burden of proof regarding its affirmative defense that the Charter was not this Student's IDEA LEA. Nevertheless, the application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See, *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).

This hearing officer found all of the witnesses who testified to be credible. Each witness testified to the best of his or her recollection from his or her perspective about the actions taken or not taken by the then relevant team in evaluating, instructing and designing the Student's program. I will, however, as explained below when and if necessary, give less persuasive weight to the testimony of certain witnesses when the witness fails to provide a clear, cogent and convincing explanation of how he/she evaluated the Student's eligibility, designed the Student's IEP, implemented the IEP or designed and participated the preparation of the prior written notice, or the NOREP, at issue.

For all the reasons that follow, at times, I found the testimony of some witnesses to be more cogent and persuasive than others. Based upon a variety of factors, I will now give the Parent's dyslexia expert and school psychologist testimony describing the Student's dyslexia assessment, private tutoring, ER, IEP, NOREP and recommended changes to or critique of the Student's IEP persuasive weight⁶.

⁶ In this particular instance, based upon record as a whole I gave less persuasive weight to the testimony of the Charter school staff who failed to demonstrate the ability to cogently describe Student specific facts like: (1) the time, frequency/duration of contact with the Student; (2) the witness's understanding of the Student's disability, educational, academic and emotional needs; (3) the witness's understanding of the Student's behavioral, attention, self-regulation and social skills needs/circumstances; (4) the witness's understanding of the Student's reinforcement needs and rate of learning; (5) the Student's behavior in the home/community; (6) the Charter School and the IEE testing, assessment and evaluation data; and, (7) any individual Student specific

On the intertwined topic, about the appropriateness of each IEP, offered I gave the Parents' expert school psychologist comments greater weight than Charter's witnesses testimony on the development of and the implementation of the Student's goals, the description of the present levels, the selection of the SDIs, the related services, and the use of any and all supplemental aids and services. While the Charter staff were more familiar with the local curriculum, the Charter staff did not cogently explain how they gauged the Student's needs, implemented the Student's program, collected progress monitoring data, complied with the applicable procedural safeguards or adjusted the Student's program around the Student's then known individual circumstance and/or lack of meaningful progress. Furthermore, the Charter staff who prepared the IEPs, the ER, the progress monitoring and the NOREPs failed to cogently explain away the nagging issues around the unanswered questioned documents described herein.

FREE APPROPRIATE PUBLIC EDUCATION

The IDEA and the implementing state and federal regulations obligate local education agencies (LEAs or districts) to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Districts meet the obligation of providing FAPE to eligible students through the development and implementation of an IEP that is "'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). Recently, the U.S. Supreme Court was called upon to consider once again the application of the *Rowley* standard, and it then observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew*

circumstances discussed herein like the Student's present levels, the IEP goals, the Dyslexia Center report, the Student's present levels pre- enrollment and post enrollment at the unilateral private school placement.

F. v. Douglas County School District RE-1, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Andrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Andrew* court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352. The *Andrew F.* standard is not inconsistent with the above longstanding interpretations of *Rowley* by the Third Circuit. As *Andrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, a school district is not required to provide the “best” program, but rather one that is appropriate in light of a child’s unique circumstances. *Andrew F.* In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education, related services to be provided to the child and progress monitoring strategies." *Id.* 20 U.S.C. §1414(d)(1)(A)(i). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).⁷ A school district may violate the IDEA in two different ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 206). "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably

⁷ A FAPE, as the IDEA defines it, includes both "special education" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). An LEA must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program. 20 U.S.C. § 1401(9)(D). Furthermore, the IDEA further requires that: "[a]t the beginning of each school year, each local educational agency . . . shall have in effect for each child with a disability in the agency's jurisdiction, an individualized education program . . ." 20 U.S.C. §1414(d)(2)(A).

calculated to enable the child to receive educational benefits." *Fresno Unified*, 626 F.3d at 432 (citing *Rowley*, 458 U.S. at 206-07); *Andrew F.*, 137 S. Ct. at 999.

A procedural violation occurs when a district fails to abide by the IDEA's procedural safeguards requirements. Procedural violations do not necessarily amount to a denial of a FAPE. *See, e.g., L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009). A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010).

A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," the IDEA, however, does not guarantee "the absolute best or 'potential-maximizing' education." *Rowley, Andrew F., Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).

THE BURLINGTON AND CARTER TUITION REIMBURSEMENT TEST

To determine whether parents are entitled to reimbursement for their unilateral placement in a private school after refusing a public school's offered FAPE, courts apply the three-part *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985) (hereafter *Burlington-Carter*) test. Under the *Burlington-Carter* test, the party seeking reimbursement relief must show: (1) The public school did not provide a FAPE; (2) Placement in a private school was proper; and (3) The equities weigh in favor of reimbursement. The parent must establish each of the three prongs of the *Burlington-Carter* test to prevail.

Thus, failure on any one of the prongs is fatal to a demand for reimbursement. Indeed, if the plaintiff fails to establish the first prong of the test, then the reviewing court may immediately end its analysis. *See, e.g., Benjamin A. through Michael v. Unionville-Chadds Ford Sch. Dist., No. 16-2545, 2017 U.S. Dist. LEXIS 128552, 2017 WL 3482089, at *15 (E.D. Pa. Aug. 14, 2017)* (applying the "*Burlington-Carter* test" to private school tuition reimbursement case)(stopping analysis after concluding that aggrieved student/parents had not established the first prong of the *Burlington-Carter* test). *See also, N.M. v. Central Bucks Sch. Dist.*, 992 F. Supp. 2d 452, 472 (E.D. Pa. 2014)(same). To prove the first prong of the test—that the public school did not provide a FAPE—the party seeking relief must show that the public school failed to "offer an IEP reasonably calculated to

enable a child to make progress appropriate in light of the child's circumstances.
“*Endrew*.

COMPENSATORY EDUCATION AS APPROPRIATE RELIEF

Compensatory education is appropriate relief designed to compensate a disabled student, who has been denied a FAPE.⁸ Compensatory education should place the child in the position they would have been in but for the IDEA violation.⁹ Compensatory education “accrue[s] from the point that the school district knows or should know of the injury to the child.”¹⁰

A child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” *Id.*

With these firmly established applicable IDEA legal principles in mind, I will now turn to an analysis of the Parents’ claims, applicable defenses and the multiple requests for appropriate relief. With these principles in mind, I will now turn to an analysis of the testimonial, non-testimonial evidence, the facts and applicable law.

ANALYSIS AND CONCLUSIONS OF LAW

THE COMPETING ARGUMENTS ABOUT THE LEA

The Charter School points to *A.K. v. Green Woods Charter School*, ODR No. 21167-1819AS (March 22, 2019), as the basis of its affirmative defense that once the Student was removed and or withdrew from school, the Charter School was no longer the LEA. Relying on *A.K.*, the Charter seeks an immediate dismissal of all related IDEA/Section 504 denial of FAPE, tuition reimbursement and compensatory education claims. In short, the LEA contends when the Parents removed and enrolled the Student in the private school by operation of law, the school district in which the Student resides became the Student’s LEA at that moment, and thereafter all of the Charter School’s past and future FAPE

⁸ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005).

⁹ *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to “conform[] to . . . [a] standard that looks to the child's present abilities”, whereas compensatory education is meant to “make up for prior deficiencies”. *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP “carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job.”

¹⁰ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

obligations ended. *A.K.* at 13. The LEA then asserts, if the Parents filed a due process complaint about tuition reimbursement *prior to* “disenrolling *the Student*, or without disenrolling the student, the LEA’s FAPE obligation would continue and the Parent could proceed with the instant action.” (Charter Closing Statement p.7).

The Parents respond, relying on *C.V. v. City Charter High School*, ODR No. 15477-1415AS (2015) for the proposition that the state Charter School enrollment-funding law argument does not defeat IDEA rights of students and parents under federal Law. The Parents assert they followed all applicable requirements set forth in the LEA’s and the state published procedural safeguards; therefore, the action should proceed. Next, they contend, assuming the Charter interpretation of the statutes and regulations is correct, the Charter School failed to provide Procedural Safeguards Notices or prior written notice of the Charter’s reading of the statute. Assuming this contention to be true, the Parents then argue the Charter prevented the proper filing of the Complaint; therefore, they now seek an exception to the notice and tuition reimbursement complaint filing requirements.

Taking into account the statutory text, the interlocking sections and overall scheme describing the role of the LEA and after distilling the record and untangling the arguments, for all of the following reasons, I now find the Charter is this Student’s LEA for the tuition reimbursement, out of pocket cost reimbursement and the compensatory education claims. The Charter’s cite to 24 PA.C.S.A Sections 17.1701-A-17-1751 is misplaced. While I agree with the Charter that enrollment is the linchpin connector to create the LEA’s duties and the Student’s rights, at the same time, the LEA’s argument misunderstands the interlocking text of the IDEA that creates, defines and otherwise limits the Charter’s statutory duties, as the LEA, to this particular Student.

THE CHARTER IS THE LEA

On its face, 24 PA.C.S.A §§ 17.1701-A-17-1751 does not in any way limit or displace the Charter School’s affirmative duties as the LEA, to this particular Student. Instead, 24 PA.C.S.A §§ 17.1701-A-17-1751 enumerates how charter schools are formed, governed, funded via the transfer of funds from the district of residence and otherwise monitored by PDE as the IDEA state education agency (SEA). Thus, nothing in 24 PA.C.S.A § § 17.1701-A-17-1751 persuades me that the Charter is relieved of its IDEA LEA obligation in this particular instance. Once the Charter accepted IDEA or federal dollars, the Charter accepted the duty to defend any timely filed complaints about the Charter’s actions, inactions and/or

omissions when acting as the Student's LEA. This finding is particularly true in cases such as this, where the sole reason for this Student enrolling in the private school, after providing the required IDEA removal notice, was the alleged failure of the Charter to have an appropriate IEP and FAPE in effect at the time of the Student's removal. All federal financial assistance under the IDEA is directed to the state educational agency (SEA) for its distribution, in turn, to the school districts, charter schools and intermediate educational units responsible for providing FAPE. 34 C.F.R. § 300.200. I cannot discern any clear statutory text that supports the LEA's broad interpretation of 24 PA.C.S.A § §17.1701-A-17-1751 at the expense of the plain language of the IDEA FAPE and due process requirements at issue.

The IDEA is clear. Parents of a child with a disability have no individual entitlement to IDEA or state funding; therefore, it is axiomatic, the lack of local funding is not dispositive as to the Charter's role, the IDEA filing deadline/requirements or the manner in which the LEA-Student relationship terminates for IDEA liability purposes.¹¹ Therefore, the Charter's position based upon the general text of the Charter School statute is rejected.

THE LEA'S ONGOING PROMISE TO PROVIDE A FAPE

Once the Commonwealth takes in IDEA funds, the Pennsylvania Department of Education (PDE) must ensure that all LEAs, public and charter, meet the standards of the SEA §1401(9)(B). Here, the state educational agency is PDE and the standards are set forth in the IDEA, the state Charter School statute and 22 Pa. Code 711. PDE as the SEA and the Charter as the LEA must craft a plan that, among other things, allows all disabled children, in public and charter schools, to receive a FAPE in the least restrictive environment (LRE). At the same time, the state and local plans must allow either party, parents or charter, to file a due process complaint when disagreements arise. *Id.* 20 U.S.C. § 1412(a)(1), (5), §

¹¹ States retain the primary financial responsibility for the education of all children with disabilities. States who receive IDEA funds must use these funds to meet IDEA obligations and to help with the excess cost of educating students with disabilities. 34 C.F.R. § 300.202 (a). Any state seeking to obtain funds pursuant to the IDEA must submit a state plan to the secretary of the United States Department of Education (USDOE). 34 C.F.R. §300.100. That plan must provide assurances that show, among other things, that the state has a policy ensuring that all IDEA-eligible children have the right to FAPE. 34 C.F.R. §300.101 (a); and 34 C.F.R. §300.101 (b). All federal financial assistance under the IDEA is directed to the SEA for its distribution, in turn, to the school districts, charter schools and intermediate educational units, who serve as an LEA otherwise responsible for providing FAPE, procedural safeguards and prior written notice. 34 C.F.R. §300.200.

1415. The IDEA then gives the PDE as the SEA the responsibility of apportioning the IDEA funds to LEAs, provided that the local entity - public or charter school - agrees to submit a similar IDEA FAPE assurance plan. PDE must, as part of its IDEA plan, then supervise its school districts and charter schools who, after submitting a local IDEA plan, may then act as the LEA. The LEA to SEA plan is the mechanism through which the PDE provides general supervision, monitoring and technical assistance to each public and private LEA. 20 U.S.C. § 1412(a)(11)(A).

Read together Section 20 U.S.C. §1412 *et seq.*, the IDEA SEA requirements to USDOE and Section 20 U.S.C. §1413 *et seq.*, the LEA to SEA requirements, isolates upwards of 25 different assurances a charter school who takes IDEA funds must give to the SEA when a charter agrees to take IDEA LEA funds. Nothing in 24 PA.C.S.A § §17.1701-A-17-1751 modifies the Charter's LEA assurances. The Charter's IDEA assurances spell out the scope, breadth and duration of the Charter's LEA duties to Student. In this instance, the Charter acting as the Student's LEA agreed to ensure that disabled students are provided procedural safeguards, and a FAPE, in the LRE 34 C.F.R. § 300.109. As for this bundle of rights, the General Assembly of Pennsylvania enacted charter school legislation that provides an entitlement to services for all children with disabilities consistent with all of the terms of the IDEA. Accordingly, nothing in the Charter School statute negates, terminates, or modifies the LEA's ongoing duty to provide a FAPE and procedural safeguards.

THE LEA'S PROMISE TO PROVIDE DUE PROCESS

For children age 3 onward, FAPE and procedural safeguards are pursued by the State Board of Education's adoption of implementing regulations at 22 Pa. Code 711.¹² All charter schools acting as LEAs agree that pursuant to 34 C.F.R. §300.121, they will provide parents with copies of their procedural safeguards. The procedural safeguards describe in an understandable fashion the parents' due process rights such as how to file a FAPE complaint about tuition reimbursement, the LEA's FAPE duties and companion obligations as set forth at 34 C.F.R. §§ 300.500-300.536. The Charter, as the LEA, mutually agreed with PDE, to ensure parents of charter school children, are provided with impartial due process forums wherein they can enforce the IDEA requirement otherwise adopted by reference and/or explicit rule adoption under Chapter 711. Chapter 711's adoption by

¹² 11 P.S. §§ 875-101, 11 P.S. §875-503, 24 P.S. §13-1372(1), 24 P.S. §17-1732A(c)(1) & §17-1751-A and 22 Pa. Code §711 *et. seq.* See also, 34 C.F.R. § 300.109 Authority and/or Responsibility.

reference and explicit rules cross-references and incorporates the IDEA federal regulations covering all procedural safeguards, including the right to file a denial of FAPE for tuition reimbursements.¹³ The fact the State Board did not adopt 34 C.F.R. § 300.209, as argued by the LEA, did not alter the Student's FAPE or procedural safeguards.¹⁴ For example, the LEA upon accepting IDEA funds, pursuant to 34 C.F.R. § 300.140, promised to advise parents that when disagreements arise the parents may file due process complaints within two years of when they either knew or should have known of the alleged violation of the actions that form the basis of the complaint. This due process right includes challenges to the identification, evaluation, education, placement, or the provision of a FAPE.¹⁵ The adoption of the two-year federal filing deadline by the Charter School, acting as the LEA, extended its scope and the time-line of its LEA responsibilities.¹⁶

As a condition of funding, pursuant to 34 C.F.R. §300.148, the LEA as part of its agreement with the PDE, made assurances that disagreements between the parents and the Charter/LEA regarding the availability of a program appropriate for the child, and the question of financial reimbursement, were subject to the due process procedures in 34 C.F.R. §§ 300.504–300.537.¹⁷

In particular, in this instance all LEAs, including charter schools, agree that if the parents of a child with a disability, who previously received special education, like here, and related services under the authority of an agency, enroll the child in

¹³ See, 34 C.F.R. §§ 300.501-300.537, 34 C.F.R. §300.121 Authority and/or Responsibility, 22 Pa Code §§ 14.162–14.163, 22 Pa. Code §711.62.

¹⁴ See, 34 C.F.R. §§ 300.501-300.537, 34 C.F.R. § 300.121 Authority and/or Responsibility, 22 Pa Code §§ 14.162–14.163, 22 Pa. Code § 711.62. See, also 34 C.F.R. § 300.109 Authority and/or Responsibility. See, *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016); *Dear Colleague Letter on Students with Disabilities in Charter Schs.*, 116 LRP 53782 (OSERS/OCR 12/28/16); and *Frequently Asked Questions about the Rights of Students with Disabilities in Pub. Charter Schs. Under the Individuals with Disabilities Educ. Act.*, 69 IDELR 78 (OSERS 2016). *Young Scholars - Kenderton Charter Sch.*, 115 LRP 4481 (SEA PA 12/24/14) (concluding that a charter school could not excuse its failure to implement a student's IEP by alleging that it had other financial and operational responsibilities, such as reviving the student's underperforming school).

¹⁵ See, § 300.140 Authority and/or Responsibility, 22 Pa. Code § 14.102(b)(xv), 22 Pa. Code § 14.104, 22 Pa. Code §711.62, 24 P.S. §1732-A(c)(2) and §1749-A(b)(8) of the Charter School Statute.

¹⁶ See, *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015)(even though the student was currently being provided a FAPE by another LEA, the parents had two years to file their claim against the previous LEA).

¹⁷ Chapter 711 (22 Pa. Code §711.3), See also, §300.148 Authority and/or Responsibility, 22 Pa. Code §14.102(b)(xv), 22 Pa. Code §711.3(b)(xvi).

a private preschool, elementary school, or secondary school without the consent of or referral by the agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. The Charter's adoption of these multiple SEA "state standards," at 34 C.F.R. § 300.148, and in 22 PA. Code §711(c) now obligates this Charter /LEA to participate and defend the instant claims.

THE PARENTS PROVIDED PROPER NOTICE OF THE REMOVAL

The record is preponderant, the Parents met all of the published conditions precedents, in the published and/or provided procedural safeguards, to otherwise make and advance a claim for tuition reimbursement. The Parents, through counsel, notified the Charter School of their intent to remove the Student, waited, and then enrolled the Student in the private school. See, 34 C.F.R. § 300.148 (d)(1)(ii).¹⁸ Thereafter, although the Charter School had 10 days to evaluate the Student, it did not. The fact that the mother then notified the Charter School that the Student was attending the private school and withdrew the Student, thereby allowing the Charter School to take another student off the waiting list does not permit the Charter to wash its hands and otherwise escape its IDEA assurances to the Student and PDE. Therefore, the plain language reading the above interlocking text as a whole convinces me that the Charter, at all times relevant, was this Student's LEA.

In short, the Charter's application of the IDEA and the state Charter School statute renders the Student's clearly established FAPE right and procedural due process right to make a claim for tuition reimbursement otherwise meaningless and the relevant IDEA text, at issue, superfluous; such a reading is rejected.¹⁹

Even assuming *arguendo* the Charter School's reading of the IDEA and the Charter statute is correct, [and it is not] the record is preponderant that the Charter never informed the Parents in the local procedural safeguards packet of its understanding of how parents can provide timely notice and resolve program, placement and reimbursement disputes as contemplated at 34 C.F.R. §§ 300.504–

¹⁸ *SR.B. v. Mastery Charter School and the School District of Philadelphia*, 55 IDELR 282 (E.D. Pa. 2010) (charter school's attempt to evade its obligations under the IDEA by passing the buck - in this case, a special-needs student's education -- to the District is troubling).

¹⁹ *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001)(it is a cardinal principle of statutory construction that a statute should be construed so as to prevent no clause, sentence, or word shall be read as superfluous, void, or insignificant).

300.537 and 300.148.²⁰ Therefore, I now agree with the Parents that the procedural safeguards either published on the District's website or otherwise available did not place the Parents on notice of the LEA's reading of the notice and complaint filing requirements in a tuition reimbursement dispute. This lack of notice under these circumstances now permits the Parent to take advantage of the pre-complaint tuition reimbursement notice exceptions found at 34 C.F.R. § 300.148 (e). In this instance, the Charter's failure to provide prior written notice prevented and interfered with the Parents' responsibility to provide prior notice of the unilateral placement and the timely complaint filing requirements.

Accordingly, I now find in this instance, the LEA otherwise prevented the parents from providing the requisite notice. *Id.* Hence, the record is preponderant, the Parents followed the published dispute notice requirements at 34 C.F.R. §300.148, and filed a timely complaint, against the proper LEA, pursuant to 20 U.S.C. §1415 (b)(6)(B) and 20 U.S.C. §1415 (f)(3)(C) about an alleged denial of a FAPE for a previously enrolled child.²¹

Accordingly, the Charter School's participation as the LEA in this dispute is essential.

THE 2016-2017 IEP WAS FUNDAMENTALLY FLAWED

The statement of a student's present levels of academic achievement and functional performance must be all-encompassing so as to provide a starting point that reflects the entire range of the child's needs, including both academic needs like reading, math, communication, and social/emotional skills. The present levels statement should provide relevant background information about the child's areas of need, strengths, interests, and learning style. 34 C.F.R. §300.324 (a). The written

²⁰ See, *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016); *Dear Colleague Letter on Students with Disabilities in Charter Schs.*, 116 LRP 53782 (OSERS/OCR 12/28/16); and *Frequently Asked Questions about the Rights of Students with Disabilities in Pub. Charter Schs. Under the Individuals with Disabilities Educ. Act.*, 69 IDELR 78 (OSERS 2016). *Dutkevitch v. PA Cyber Charter Sch.*, No. 3: CV-07-1672, 2009 U.S. Dist. LEXIS 131276 (M.D. Pa. Apr. 8, 2009, *non-precedential*) (charter school, as the LEA, not the district of residence was responsible to provide a FAPE). See also, *Young Scholars - Kenderton Charter Sch.*, 115 LRP 4481 (SEA PA 12/24/14), *R.B. v. Mastery Charter School and the School District of Philadelphia*, 55 IDELR 282 (E.D. Pa. 2010).

²¹ The parents or agency must file a complaint within two years of the date they knew or should have known about the underlying action). Special education practitioners should note that this is the minority view, a view previously followed by District Courts in the 3d U.S. Circuit Court of Appeals. See *e.g. G.L. v. Ligonier Valley Sch. Dist. Auth.*, 66 IDELR 91 (3d Cir. 2015). See, 34 C.F.R. §300.148 Authority and/or Responsibility, 22 Pa. Code §14.102(b)(xv), 22 Pa. Code §711.3(b)(xvi).

present levels help the IEP team develop a document that will provide the child with ambitious measurable goals and equally challenging short term objectives. The targeted needs areas then written as measurable goals, in the IEP, enable everyone working with the child to understand the Student's initial level of functioning in effect. In short, the statement of present levels of academic performance essentially creates an initial ground zero for designing reasonably calculated educational programming and in turn, sets the metric for gauging future meaningful progress. *Bakersfield City Sch. Dist.*, 51 IDELR 142 (SEA CA 2008). Therefore, ambitious goal statements and challenging objectives will hinge on how effectively the IEP team gathers and interprets information about the child's then-current performance. When this record is read as a whole, the Charter failed to design, determine and draft objective present education levels, measurable goals and clear progress monitoring protocols. *Questions and Answers on Andrew F. v. Douglas County School District. Re-1*, 71 IDELR 68_(2017).

The statements of present levels of educational performance did not fully consider the unique needs of the child, establish a firm start point for establishing goals or describe the Student's areas of need, strengths, interests, and learning style.

Although the Student had previously received services, in first grade, the following year's present levels were essentially cut and pasted for the previous IEP. The present levels failed to objectively define the Student's encoding, decoding, reading fluency, written expression and math needs. The anecdotal statements in the present levels and the progress notes taken together indicate the Student's overall performance was regressing, yet the IEP team did not make any definite adjustments to the overall goals, SDIs or the level of intervention. While the ER found the Student's performance in math to be just barely "average", the anecdotal present levels/notes report the Student had "no sense of numbers," and was working below grade level when compared to peers. (P-11p.6). No one cogently explained why a Student who "does not have a sense of numbers" is working on an annual goal ". . . to select and apply mathematical operations in a variety of contexts to grade level." When reviewed as a whole the present levels, goals and progress monitoring do not match up with the requirements that Parents are provided "data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction. . ." 34 C.F.R. § 300.309(b). Granted while the IEP team need not draft IEP goals in a manner that the parents find optimal, the goals must be objectively measurable. *Bridges v. Spartanburg County Sch. Dist. Two*, 57 IDELR 128 (D.S.C. 2011) (The use of percentages tied to the completion of discrete tasks is an appropriate way to measure student progress).

The present levels and goal statements, at issue, in the 2016-2017 IEP did not contain a clear statement of the instructional conditions, behavior, or a criteria for success. *Independent Sch. Dist. No. 701 v. J.T.*, 45 IDELR 92 (D. Minn. 2006) (An IEP's statement that a student would "improve his functional academic skills from a level of not completing assignments independently to a level of being able to read, write, and do basic math skills independently" was too vague to permit measurement of the student's progress); and *Anchorage Sch. Dist.*, 51 IDELR 230 (SEA AK 2008), *aff'd*, 54 IDELR 29 (D. Alaska 2009) (affirming a finding by an independent hearing officer that the lack of clear, measurable goals in a child's IEP precluded an objective measurement of the child's progress).

The evidence is preponderant that the overall level of intervention, level of support, and intensity of programming were not adjusted to address the Student's then-current present levels, needs and circumstances. Therefore, after carefully reviewing the testimonial and non-testimonial extrinsic evidence I now find the Charter school failed to offer and provide a FAPE during the 2016-2017 school year, an appropriate Order awarding compensatory education follows.

THE 2017-2018 TUITION REIMBURSEMENT CLAIMS AND THE LEA'S RESPONSE

The Parent contends as a result of multiple procedural and substantive violations, the Charter's multiple offers of a FAPE, when offered, were not appropriate. In particular, the Parent argues that the Charter does not understand the Student's learning disability. As a consequence of this misunderstanding, the Parents contend the IEPs are not otherwise appropriate in light of the Student's unique learning needs and circumstances. They then argue the LEA failed to meet its procedural obligations to meet, confer, and offer an ambitious challenging program. In short, they contend that the Charter failed to have a FAPE in effect at the start of the school year. The Charter, on the other hand, contends that at all times relevant, it complied with all applicable substantive, procedural, evaluation/assessment and IEP regulations and progress monitoring requirements. Simply stated, the LEA contends the Parents' 2017-2018 FAPE, and tuition reimbursement claims are misplaced.

For all of the following reasons, after reviewing all of the testimonial and non-testimonial extrinsic evidence proffered on both sides, I now find in favor of the Parents and against the Charter. A Final Order in favor of the Parents' tuition reimbursement claims follows.

THE COMBINED INTERTWINED PROCEDURAL AND SUBSTANTIVE VIOLATIONS CONTRIBUTED TO A DENIAL OF A FAPE

The Charter's actions, inactions and omissions, in this instance, contributed to both procedural and substantive FAPE violations. The procedural violations, in this instance, resulted in "the loss of an educational opportunity," "seriously infringed the parents' opportunity to participate in the IEP formulation process," and also "caused a deprivation of educational benefits."²² At the same time, the Charter's actions resulted in intertwined substantive violations of *Rowley* and *Andrew F.*

First, rather than issue prior notice and hold an annual IEP meeting, the Charter sent the proposed IEPs to the Parents by email or home in the Student's backpack.²³ Second, contrary to the applicable regulations, the Charter failed to hold face-to-face meetings to accept Parental input, review the private independent testing and/or revise the offer of a FAPE. Third, the Charter failed to give due weight to the IEE results and the Parents' input into the development of the Student's future program, placement, and subsequent progress monitoring. Fourth, by failing to provide prior written notice, the Charter school staff, after reviewing the Dyslexia Report, in isolation, made a series of unilateral decisions and changes to the Student's then-current placement in the least restrictive setting and IEP goal statements. For instance, when the Charter's staff modified the amount of time the Student participated with peers in regular education classroom, they also failed to issue prior written notice or hold an IEP meeting. The Charter staff also failed to progress monitor the new one-on-one reading instruction. Taken as a whole, the unilateral changes violated the Student's FAPE rights and the Parents right to participate in the IEP process. Fifth, as expected, the Charter's actions, inactions and omissions in reviewing the Dyslexia Report resulted in a loss of an educational opportunity and interfered with the Parents' right to participate in the IEP process. The Charter's failure to issue prior written notice infringed upon the Student's right to receive an ambitious reading program and targeted SDIs. Sixth, when the Charter unilaterally changed the Student's program and placement the IEP team also failed to update the reading encoding/decoding goal and also failed to update

²² *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010).

²³ LEA's must consider the results of any independent educational evaluation, actively discuss placement options, and answering parents' questions. *Board of Educ. of Waterford-Halfmoon Union Free Sch. Dist.*, 20 IDELR 1092 (SEA NY 1994). In *R.L. v. Miami-Dade County School Board*, 63 IDELR 182 (11th Cir. 2014), the court held that parental participation in the IEP process means more than having an opportunity to speak. The court explained that a district must show that it came to the meeting with an open mind and was "receptive and responsive" to the parents' position at all stages, rather than cutting the conversation short when parents express their concerns.

the progress monitoring schedule. These violations isolated the Student and froze the Parent out of the IEP process. Seventh, the Charter's failure to hold a follow-up IEP meeting when they unilaterally halted and then restarted the Orton-Gillingham reading interfered with the Parents' right to participate in the IEP process and caused a loss of educational benefits. The on-again-off-again reading program coupled with the piecemeal instruction during the hiatus of the Orton-Gillingham instruction resulted in an inadequate, insufficient and inappropriate offer of a FAPE. Eighth, all of the above actions, omissions and inactions were completed without providing the Parents with prior written notice, procedural safeguards, or a NOREP. Hence, the net result of the Charter's repeated procedural and substantive violations denied the Student any chance for a FAPE. See, *Rowley, Andrew, and Downingtown*. Hence, the Charter failed to have a FAPE in effect at the start of the school year. These factual findings and conclusions of law do not, however, end the tuition reimbursement analysis.

THE PRIVATE SCHOOL WAS PROPER AND THE EQUITIES FAVOR THE PARENTS

The Charter's global argument loses sight of the holding in *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 556 IDELR 389 (U.S. 1985). In *Burlington* the court held a parental violation of then Sec. 1415(e)(3) by changing the student's "then-current educational placement" for upwards of two years coupled with the District's failure to offer IEPs for two years, during the pendency of the due process proceedings did not constitute a waiver of the parents' right to seek reimbursement for expenses of the private placement. Otherwise, as argued, here the Parents would be forced to leave the child in what may turn out to be an inappropriate educational placement or obtain the appropriate placement only by sacrificing any FAPE or reimbursement claim. Here the Parents assumed the risk of loss when they made the unilateral placement. Likewise, the Charter assumed the risk, when they relied upon their affirmative defense and never again offered a FAPE. The combined actions, inactions and omission described herein now cause me to find that the equities favor the Parents.

The private placement provides direct daily multisensory instruction in reading, written expression and math. All of the teachers at the private school implement and reinforce the school-wide Orton-Gillingham multisensory reading techniques. The private school offers a low student to teacher ratio. Like the Charter's schedule, the instructional day at the private school consists of direct instruction in the core subjects of reading, writing and math.

To ensure the private school staff are prepared, all teachers at the private school receive ongoing professional development. In short, the Student's classes at the private school are small, the instruction is individualized and the schedule is set up to provide ample opportunity for small group and/or one-on-one instruction.

To ensure the Student is making progress, the staff regularly discuss the Student's decoding, encoding, fluency, math and written expression programming needs and progress. Each day the Student receives small group or one-on-one direct instruction in planning, organizing and basic executive functioning skill development. While the staff at the private school do not develop an IEP *per se*, the services at the private school target the Student's unique SLD related academic needs, strengths and circumstances.

While not dispositive of appropriateness, the objective testing data, from the private school, now supports a finding that the Student is making progress. The evidence is preponderant that the Student's reading, writing and math scores are improving.

Additionally, the record is preponderant that the Student no longer cries or makes suicidal emotional statements upon returning home from school. Therefore, I now find the private school offers and provides the Student with a proper, ambitious and appropriate program that addresses all areas of this Student's SLD needs and circumstances.

THE EQUITIES FAVOR THE PARENT

The Charter, in reliance on its affirmative defense, did not offer any meaningful attack on the global equities prong. Prior to removing the Student, the Parents provided the requisite notice and otherwise cooperated with the Charter. This fact favors Parents.

The record is also preponderant that Parents were candid and credible when asked on cross-examination, about when they first made the decision to enroll the Student and the follow-up questions about when they made their first tuition payments. These candid answers cut against any finding of predetermination or interference in the IEP process. While not dispositive on the equities prong, I would be remiss to not discuss the questioned documents like the prior written notices, IEP signature pages and associated documents produced at the hearing. No one from the Charter cogently explained why the Parents' signatures and the dates on the documents, at times, are in different colored ink. No one from the Charter seriously challenged the Father's statement that he did not attend any meetings and he did not sign any of the documents, yet his signature appears on several documents. No one from the Charter challenged the Mother's contention that she did not check the box that she agreed to the evaluation report, yet the box is checked. Moreover,

while the Mother could not state emphatically that she did not sign the questioned documents, no one from the Charter testified that they saw the Mother execute the documents at a face-to-face IEP meeting. While the authenticity of the Mother's signature is in question, the fact that the documents were not prepared in the ordinary course of business, as otherwise expected by the regulations, is, in this instance, an equitable factor that cuts against the LEA and favors the Parents. Based on the scope and breadth of the substantive and procedural violations described above, I now find the equities favor the Parents; an Order granting the Parents' request for tuition reimbursement follows.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF

The Student is a person with a SLD, the Student's IEPs, for each year at issue, called for the Student to receive specially-designed instruction for the better part of the school day in either the regular education classroom, the special education classroom, or in non-academic classes. The Student is scheduled to attend school for upwards of five and a half to six-hours a day. The record as a whole provides preponderant evidence that the Student did not receive a FAPE for one school year. For all the reasons set forth above, I now find the failure to meet the Student's unique needs resulted in a loss of a chance to learn and otherwise progress throughout the school day. Therefore, I now find based upon the Student's then-current academic, emotional and behavioral needs the failure to provide substantive and procedurally appropriate IEPs denied the Student an appropriate education for every minute of every hour of every day for the 180 days the Student should have attended school during the 2016-2017 school year.²⁴ Hence, the Student is awarded 900 hundred hours of compensatory education.

²⁴ I reached the award of compensatory education after taking into account factors like; (1) the Student is a person with an SLD in reading, math and written expression, (2) how much more progress the student might have shown if he or she had received the required special education services, (3) the Student's age, ability, past achievement, stage of learning, unmet functional academic skills, social, emotional, behavioral needs, and (4) with a clear understanding that the Student's then-current circumstances, all of which adversely affected the Student's educational performance throughout the school day. School year calculation of compensatory education 900 hours per year. See, 22 PA Code § 11.1. School term. Public prekindergarten, when offered, and kindergartens, elementary and secondary schools includes 900 hours of instruction as the equivalent of 180 school days. See also, 24 P.S. §5-503, 24 P.S. §15-1501, 24 P.S. §15-1502, 24 P.S. §15-1503, 24 P.S. §15-1504

The compensatory education services **ORDERED** herein can take the form of any developmental, corrective, remedial or specially-designed instruction including related services, transportation services to and from the compensatory education service provider, supplemental aids, one-on-one supports, modifications, accommodations, or assistive technology, as these terms are currently defined and applied in IDEA or Section 504 regulations.

The Parents, in their sole unfettered discretion, can select all compensatory education service providers. The Parents are permitted to self-fund the provision of compensatory education services and then obtain immediate reimbursement from the Charter, within 30-calendar days, for any and all costs incurred to provide the compensatory education services described herein. The compensatory education services described above may take place in either the Student's county of residence or at any setting or location selected by the Parents in their sole discretion.

As set forth in the attached Order, the Charter is directed to pay all compensatory education invoices at the market rate charged by the provider where the service is provided within 30-calendar days of receipt of the invoice, demand or statement. Accordingly, a Final Order awarding 900 hours of compensatory education follows.

CONCLUSIONS

First, the Charter is the LEA for all reimbursement, compensatory education and tuition reimbursement claims. Second, the record is preponderant that the Charter failed to commit sufficient resources, each year in issue, to have a FAPE in effect at the beginning of the school year. Third, the record is preponderant that the private school is an appropriate/proper placement and the private school can meet the Student's reading, math and written expression needs. Fourth, based upon a careful review of the testimonial and non-testimonial extrinsic evidence in the record and the exhibits, I now find the equities favor the Parent. Fifth, the record is preponderant that the Dyslexia Report added valuable information about the Student's needs and circumstance; therefore, the Charter is now Ordered to reimburse the Parents for the out of pocket costs associated with the evaluation. Sixth, the Parents failed to meet their burden of proof regarding the request for reimbursement for the costs of the Vision Evaluation; therefore, the reimbursement request for Vision Evaluation is denied. Seventh, the Parents did meet their burden regarding the request for reimbursement for tutoring and travel expenses; therefore, the Parents' tutoring and travel claims are granted. The dyslexia tutoring provided

some benefit and the travel cost is a reimbursable related service expense. Accordingly, a Final Order awarding the Student appropriate relief and directing the Charter to reimburse the Parent for out of pocket costs now follows.

ORDER

And now this October 29th, 2019, I find in accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that Parents' claim for tuition reimbursement, compensatory education and reimbursement for out of pocket expenses in this matter is **GRANTED**.

1. The Charter is **ORDERED** to reimburse the Parent for their out of pocket tuition reimbursement cost relating to the Student's attendance at the private school during the 2017-2018, 2018-2019 and 2019-2020 school year.
2. Within 15 days, of this **ORDER**, the Parents are **ORDERED** to provide the Charter with written invoices or statements of all private school tuition costs for the 2017-2018, 2018-2019 and the 2019-2020 school years; thereafter, 91 days after this **ORDER** the Charter is **ORDERED** to reimburse the Parents for all tuition payments.
3. Within 15 days, of this **ORDER**, the Parents are **ORDERED** to provide written invoices or statements of all tutoring costs; thereafter, 91 days after this **ORDER**, the Charter is **ORDERED** reimbursement all tutoring payments.
4. Within 15 days, the Parents are **ORDERED** to provide written invoices or statements of all travel costs or payments; thereafter, 91 days after this **ORDER**, the Charter is **ORDERED** to reimburse the Parents for all travel expenses to and from the private school traveled during the 2017-2018, 2018-2019 and the 2019-2020 school year.
5. Within 15 days, the Parents are **ORDERED** to provide written invoices or statements of all payments for the Dyslexia evaluation; thereafter, 91 days after this **ORDER**, the Charter is **ORDERED** to reimburse the Parents for the cost of the Dyslexia evaluation.
6. For FAPE violations occurring during the 2016-2017 school year, the Student is awarded 900 hours of compensatory education.
7. The compensatory education hours awarded herein can take the form of any developmental, corrective, remedial or specially-designed instruction including related services, transportation services to and from the compensatory education service provider, transitions services, supplemental aids, one-one-one supports, modifications,

accommodations, including specially-designed instruction as these terms are defined in the current or future regulations implementing the IDEA/Section 504.

8. The Parents in their sole, absolute and unfettered decision can select the compensatory education service provider(s). As set forth in the attached **ORDER**, the Charter is directed to pay all invoices at the market rate charged by the compensatory education service provider, where the service provider is located within 30-days of receipt of the request for reimbursement.
9. The Parent is also permitted to self-fund the compensatory education services and then obtain immediate reimbursement, within 30-days, for any and all costs associated in providing the compensatory education services described herein, including travel to and from the provider otherwise described herein.
10. The Parents' claim for reimbursement for the vision evaluation is denied.
11. It is further **ORDERED** that any claims or affirmative defenses not specifically addressed by this Decision are denied.

Date: October 29, 2019

Charles W. Jelley, Esq. LL.M
Special Education Hearing Officer
ODR FILE #21143-1819 KE