

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

DECISION

Child's Name: T.R.

Date of Birth: [redacted]

Dates of Hearing: 3/21/2016, 7/7/2016, 7/8/2016, 7/22/2016, 7/29/2016,
8/1/2016 and 8/2/2016

Open HEARING

ODR File No. 17322-15-16

Parties to the Hearing:

Representative:

Parents

Parent Attorney

Parent[s]

Pro se

Local Education Agency

LEA Attorney

Commonwealth Connections Academy

Kimberly Colonna Esq.

Charter School

McNees, Wallace, & Nurick, LLC

4050 Crums Mill Road

100 Pine Street, PO Box 1166

Harrisburg, PA 17112

Harrisburg, PA 17108-1166

717-232-8000

Date of Decision:

September 17, 2016

Hearing Officer:

Charles W. Jelley Esq. LL.M.

Overview and procedural history

The Parent filed a due process complaint alleging violations of the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), Title II of the Americans with Disabilities Act (ADA), and a First Amendment to the United States Constitution free speech/retaliation claim, seeking legal and equitable relief. The Parent's due process hearing complaint alleges individual and system-wide substantive and procedural claims of the IDEA and Section 504 claims.¹ The Parent represented the Student. Legal counsel represented the Charter School.

As a threshold matter, this hearing officer finds he does not have subject matter jurisdiction over the Parent's claims under the ADA and the First Amendment. Therefore, the ADA discrimination and the First Amendment speech/retaliation claims are dismissed with prejudice and are therefore exhausted.

The Parent claims the Student did not receive a Free Appropriate Public Education (FAPE) during the 2013-2014, 2014-2015 and the 2015-2016 school years. The Parent argues when the record is viewed as a whole, the LEA's substantive and procedural violations establish a three-year denial of FAPE. To support these generalized contentions, the Parent points to the lack of a continuum of options. Next, they suggest that the Student needs daily live hands-on instruction either in the home or in bricks and mortar setting. The Parent points to the Student's failing grades, incomplete or missing legally sufficient prior written notices (PWN), and Student's overall lack of meaningful progress. Finally, the Parent contends the evidence is preponderant that the LEA's programs as designed were inappropriate *ab initio*.

The Charter School filed a motion to dismiss arguing certain claims were barred by the statute of limitations. After taking testimony and reviewing the Parties written submissions, I denied the Charter School's motion. Therefore, Parent's claims

¹ But for the cover page of this Decision, in the interest of confidentiality and privacy, the Student's name and gender, and other potentially-identifiable information are not used in the body of this decision. The Parent ultimately filed a single due process complaint separating the facts and the allegations about two different students against the Charter School. The Students in both actions had the same teachers, therefore, to maximize the efficient presentation of the testimony the witnesses who participated, in both hearings, presented testimony on the same day in each case. When the witnesses were called on the same day, both Parties were provided with extended time to question each witness in each action. Each transcript was prepared separately for each action. When background testimony like work history was established in one action, the testimony was cross-referenced and accepted in the other action.

for all three school years were presented and decided herein.

The LEA specifically denies any procedural violations occurred. In the alternative, if any did occur, they contend that the procedural violations did not rise to the level of a denial of FAPE. Next, they contend the Student made progress. Based upon these two main arguments the LEA argues the Student's claims do not merit either compensatory education or a prospective placement. As the evidence proffered was limited to this Student, I find that the Parent did not prove a system-wide failure; that said, the violations established for this Student were, however, preponderant and reached the level of a denial of FAPE.

To remedy the violations, the Parent suggests an award of retrospective compensatory education and a prospective placement in a private setting. Although the hearing covered multiple sessions with numerous witnesses, the Parent did not offer any evidence on the prospective placement relief. Therefore, the Parent did not meet the burden of proof to merit a prospective placement. Accordingly, absent a record, I am not inclined to grant a prospective placement.

Although the Parent requested a qualitative award of compensatory education, she failed to present any proofs. As for the compensatory education relief, the record does not contain an expert report to support that type of award. When the record is read as a whole, the evidence is, however, sufficient to construct, formulate, and calculate an equitable make whole hour-for-hour compensatory education relief.²

Issues

Did the Charter School fail to provide the Student with FAPE during the 2013-2014 school year? If the answer is yes, is the Student entitled to an equitable award of compensatory education?

Did the Charter School fail to provide the Student with FAPE during the 2014-2015 school year? If the answer is yes, is the Student entitled to an equitable award of compensatory education?

Did the Charter School fail to provide the Student with FAPE during the 2015-2016 school year? If the answer is yes, is the Student entitled to an equitable award of compensatory education?

². The Decision Due Date was extended for good cause when requested by the Parties. On one occasion, the Parent became ill, at the hearing, that particular hearing session was therefore abruptly halted.

Did the Charter School discriminate against the Student during the 2013-2014 school year? If the answer is yes, is the Student entitled to an equitable award of compensatory education?

Did the Charter School discriminate against the Student during the 2014-2015 school year? If the answer is yes, is the Student entitled to an equitable award of compensatory education?

Did the Charter discriminate against the Student during the 2015-2016 school year? If the answer is yes, is the Student entitled to an equitable award of compensatory education?

Findings of Fact

The 2013-2014 School Year

1. The Student enrolled at the Charter School on September 3, 2013. (S-14, p.5).
2. The Student's prior school prepared a reevaluation report (RR) dated December 12, 2012. The RR stated that the Student was a person with the following multiple disabilities: Other Health Impaired (OHI) due to [Student's] Attention Deficit Hyperactivity Disorder (ADHD), and a secondary disability of Specific Learning Disability (SLD) in Written Expression. (S-1, p. 22).
3. The reevaluation report indicated the Student had average cognitive ability. (S-1). The prior school also performed a functional behavior assessment that addressed the Student's off-task behavior and self-regulating behaviors. (S-3).
4. On the Kaufman Test of Educational Achievement 2nd Edition, in 2012 the Student's earned a Math Concepts and Application Standard Score (SS) of 99 at the 47th percentile, a Written Expression SS of 93 at the 32nd percentile, a Math Computation score of 95 at the 37th percentile, and a SS of 98 at the 45th percentile (S-1 p.3).
5. The prior school district amended the Student's IEP in January 2013 and again in June 2013. (S-4; S-5).
6. The amended IEP from the prior school included writing and behavior goals, various program modifications and specially-designed instruction (SDIs) related to behavior and organization were listed. The IEP also included occupational therapy (OT) services twice per month for 30 minutes per session. (S-5).
7. When the Student enrolled, the Charter School scheduled an IEP Team meeting to discuss the transfer IEP's goals, related services, and placement. (S-8).

8. An occupational therapist met with the Student on September 19, 2013, to gather input for the upcoming IEP Team meeting. An IEP team meeting was held on September 23, 2013, and a new IEP was developed. (S-9). The new IEP included Present Levels of Educational Performance (PLEP) gleaned from the prior school district's IEP. (S-9 pp.6-10). On page 9, the new IEP notes the Student would be educated in the regular education classroom 100% of the time (S-9 p.25). On page 23, the new IEP notes the Student was to receive Itinerant Support 20% of the school day (S-9 p.23). The unsigned NOREP at S-9 on page 2, recommends that the Student receive Itinerant Support, Supplemental Support and, Full-time Support. (S-10 p.2). Another NOREP states that the Charter School initially recommended Itinerant Support (S-15 p.1).
9. The September 2013 IEP included written expression goals and OT goals related to Student's writing skills. (S-9, p. 15-16). OT services were offered twice per month for 30 minutes per session. (S-9, p. 15-19). The IEP included SDIs for writing and organization skills. (S-9, p.15-19).
10. The SDIs targeted the Student's attention and organization skills by providing reduced assignments, the flexibility to break up lessons into smaller segments, allowing the Student to stand or take frequent breaks, and included prompting strategies to help the Student stay on task. (S-9 p.17-18).
11. The written expression SDIs included a scribe, extended time to complete assignments, and graphic organizers for the writing process. (S-9 p.17).
12. The special education learning support prepared and provided the Parent with four progress reports. (S-17). The progress reports contained graphs that reported the Student's performance on the writing goal. (S-17). The graphed data did not plot the Student's transfer baseline scores upon enrollment. *Id.*
13. The special education teacher worked on organization skills, and offered math, reading, and writing support. (S-19).
14. After the occupational therapist's first meeting, with the Student, the therapist recommended further assessment with the Test of Visual Perception Skills (TVPS). (S-28, p.1-2).
15. On January 8, 2014, the Charter School agreed to proceed with the TVPS testing. (S-11). Some four months later, the OT assessment was completed on May 15, 2014. (S-18).
16. On June 6, 2014, the occupational therapist recommended the Student's level of OT service be increased from 30 to 45 minutes per week. (S-18, p.8). The Parties agreed to the increase of OT services to 45 minutes per week. (S-14, p. 20; NT p.707).

17. After an IEP meeting held on June 13, 2014, the Charter School prepared and implemented a new IEP (S-13; S-14). When the OT writing goal was later mastered, a new OT goal was added. (S-14, p. 9). The writing goal is linked to the state standards. *Id.* The OT prepared and gave the Parent progress reports (S-18; S-14, p.17; S-17).
18. The June 13, 2014 IEP noted concerns about the Student's struggles with long-term and short-term memory. After a discussion at the IEP team meeting, the Charter School agreed to undertake a neuropsychological evaluation. The Parties agreed the evaluation would be conducted in the fall. (S-14, p. 10; S-7).
19. On June 18, 2014, the Charter School issued a permission to reevaluate. (S-16). The Parent consented to the evaluation. On or about the same time, the Parent informed the Charter School that the prior school district agreed to fund an Independent Education Evaluation (IEE) (NT 151). Instead of proceeding with the June 18, 2014, noticed evaluation, the Charter School agreed to wait for the results of the IEE.

Facts Related to the 2014-2015 School Year

20. During the 2014-2015 school year, the Student continued to be educated in the general education classes with modifications on tests, quizzes, and portfolios. (NT 277; S-36, p. 42, 47, 53-54). The IEP included SDIs, like speech-to-text program, direct instruction on organizing and completing assignments, visuals aids, graphic organizers, chunking of large assignments, and sample math problem models that displayed the steps for completing the problem. (NT 277-78; S-14, p. 19-20).
21. When the Student struggled in math, the Charter School adopted the Successmaker Math software program (NT 278; S-36, p. 24).
22. The Parent then complained about the level of difficulty of the classroom work, the quick pace in regular education, and made the staff aware the Student was not able to complete the work independently. (NT 654).
23. The Student was not able to keep up with the pace of the classwork. The Student was not able to and did not complete as many lessons in a day as expected (NT 654). The Student earned grades for the first semester of 2014-2015 dropped. In the first semester of the 2013-2014 school year, the Student earned A's and B's; in the 2014-2015 school year, the Student earned a B+, C-, D+ and an F in the core classes. (P-7, p. 2).
24. On October 20, 2014, the Parent provided the Charter School with the IEE prepared by [Redacted] Center in August 2014. (P-17, p. 1; P-16). The Parent never explained why the report was prepared in August and shared in October. The Independent Educational Evaluation (IEE) report agreed with and corroborated the ADHD finding and added a diagnosis of Expressive

Language Disorder, Disorder of Written Expression, and Executive Function Disorder. (P-16, p. 15).

25. The IEE described how the Student's oral language skills limited the Student's written expression. (P-16, p. 12).
26. The IEE evaluator could not calculate the Student's full-scale IQ due to a wide scatter among the sub-test scores. (PE-16 p.59).
27. The Student's achievement test percentile rank scores ranged from <1st percentile to the 46th percentile. (PE-16 p.39). The Student's grade equivalent scores ranged from <K.0 in Story Recall Delayed to 7.3 in Reading Fluency. (PE-16 p.39).
28. The Student's Oral Language, Math Calculation, Academic Skills, and Academic Fluency skills ranked in the Low Average Range. The Student's Broad Reading and Written Expression scores were in the Low Range. (PE-16 p.39). The Student's Broad Reading, Broad Math, and Academic Applications skills were in the Average range (PE-16 p.39).
29. When the Student enrolled in the Charter School, the Student could read 111 wpm; the Student could also answer 17 out of 18 questions correct in a one-minute assessment of reading comprehension on the 4th-grade level (S-9 p.29).
30. When the Student enrolled in the Charter School, the Student's Robust Vocabulary was Average, Language Arts performance was average, Writing skills were Below Basic, and the Student's Oral Reading Fluency performance was proficient. (S-9 p.29).
31. The IEE evaluator reported the Student's Math Concepts and Application, Written Expression, and Math Computation standard scores went down when compared to entry levels present levels. (PE-16 p.39; S-1).
32. When the Charter School received the independent evaluation, it shared the report with the IEP team members including the Charter School's contract psychologist, the teacher, the manager of special education, and the director of special education. (NT p.146, p.174).
33. The test data in the IEE report was incorporated into the Charter School's November 15, 2014, Reevaluation Report (RR). (S-22; NT 255; S-23).
34. In December 2014, an IEP was prepared. (S-24 p.26). This time, the IEP team recommended a change in placement to a Supplemental Support Program. (NT p.671).
35. The Supplemental Support Program curriculum is aligned to the state standards. The Supplemental Support Program uses the Compass Odyssey curriculum. (NT 402). The Supplemental Support Program was discussed at the Student's IEP meeting in December 2014, and SDIs were added. (NT 237-239, 256; S-24 p 22). Additional information about the Supplemental Support Program was provided to the Parent by email and through a group Q &A session that the Parent attended. (S-27).

36. The December 2014 IEP included a revised math goal. (S-24, p.20). However, before the IEP was completed, the teacher followed up by phone with the Parent on January 21, 2015, about the Supplemental Support Program. (NT 238; S-36 p.7). The teacher noted the phone discussion in the IEP; however, the notation, gives the inaccurate impression that an IEP Team meeting was held on January 21, 2015. (S-13, p.5; NT 238). The finalized IEP and NOREP were presented to the Parent on January 27, 2015. (S-24; S-25).
37. On March 19, 2015, the Charter School issued another PTR, this time to determine how to address the Student's behavioral needs, speech and language needs, language processing difficulties, and executive function concerns raised by the IEE report. The PTR also included a request to conduct a functional behavioral assessment (FBA) and a Speech-Language evaluation to address the suspected language disorder discussed in the IEE. (S-29; NT 672-676).
38. A Board Certified Behavior Analyst (BCBA) completed the FBA. (S-33, p.24-36). The FBA included two observations of the Student functioning in the on-line learning environment and one observation of the Student in the community. (S-33, p. 29-31). The FBA noted weaknesses in executive functioning skills and a lack of independence in completion of schoolwork. The FBA evaluator provided the team with a list of recommendations that could be used in a positive behavior support plan. (S-33, p.34, pp.41-42). The IEP team later developed a positive behavior support plan. (S-30; S-43, p.5).
39. In April 2015, the Student underwent a comprehensive speech-language evaluation, conducted by a speech-language therapist. (NT p.790; S-31). As part of her evaluation, the therapist interviewed the Parent and prepared a summary of the Student's developmental history. (NT pp.88-89; S-31). The therapist conducted formal assessments of the Student's speech and language ability. The therapist also observed the Student's speech and language skills and interactions. (NT 92-112; S-31; NT 81, 86-87). The therapist then prepared a report; the therapist concluded the Student had expressive language needs. (NT p.111; S-31). The therapist, however, disagreed with the [Redacted] Center's reported finding of receptive language disorder. (NT 111).
40. When the therapist was subpoenaed to testify in the due process hearing, she realized that she made errors in transferring assessment scores for the CELF-4 into her report. (NT p.90, p.106). The therapist never notified the team or the Parent about the error. By the time, the therapist testified at the hearing the Charter School paid for yet another speech and language evaluation. (NT pp.118-19; P-21). The therapist testified that after rescoring the data, the corrected scores corroborated the IEE evaluator's finding of a receptive language disorder and need for services. *Id.*

41. On May 29, 2015, the Charter School issued another RR. (S-33). The RR included the results of the FBA and speech-language evaluation. The RR included many recommendations about (a) how occupational therapy would be increased to address writing; (b) allowing the Student to convey ideas or answers with non-written alternatives; (c) breaking tasks down into manageable chunks and sub-skills into smaller parts to ensure mastery; (d) modeling; (e) use of behavior momentum to encourage task completion; (f) use of checklists; and (g) teaching a system of organization for academic materials. (S-33, pp.41-43). The RR noted the Student's writing skills improved to writing three sentences, without a scribe, on a selected topic, in correct order, with correct punctuation. (S-34, p.1, p.11).
42. Over the course of one semester, the Student's math computation and math concepts skills improved from a 4.26-grade level to a 4.41-grade level. (S-34, p. 8, p.15).
43. The Student mastered the OT goal of improving attention and slowing the pace of work. (S-35, p.10).
44. On September 30, 2015, after reviewing the RR, the IEP Team developed a new IEP. (S-47).
45. The September 30, 2015, IEP included the proposed support of a one-on-one Instructional Aide for 20 hours per week and added the support service of a Board Certified Behavior Analyst (BCBA) for 8 hours per week. (S-43, p. 25). The IEP team recommend that the Student receive speech and language therapy for 45 minutes per week (S-43, p. 25.), and OT services for 45 minutes per week. (S-43, p.25).
46. The September 2015 IEP included a written expression goal, a mathematics goal, executive functioning goals to improve independence in organization, and OT goals. (S-43, p. 21; S-43, p. 20). The IEP also included two speech and language goals to address vocabulary and social skills. (S-43, pp.21-22). Two behavior goals were added related to improving the Student's ability to follow multiple-step directions. (S-43, p. 22-23).
47. During the follow-up IEP meetings on September 22 and 30, 2015, the team discussed the Student's academic difficulty and the quick pace of instruction in the Supplemental Support Program. The Charter School special education manager recommended that the Student be considered for participation in a full-time special education program. (NT p.615).
48. The Charter School then issued a NOREP calling for placement in Full-Time Learning Support class, noting the increase in OT, Speech and Language time, the 20 hours a week of one-on-one support from the Instructional Assistant, and the BCBA support (S-45 p.2). The Parent did not approve the NOREP. *Id.*
49. The Charter School proposed and the Parent consented to yet another assessment, this time using the SRA curriculum to determine if the Student

- should be placed in the full-time special education program. (NT 615; S-47 p.9). The Student's Decoding and Reading Comprehension scores ranged from kindergarten to 2nd or 3rd grade.*id.* (NT 616-17; S-47 p. 9)
50. The September 30, 2015, IEP includes data about the Student's math and reading present levels. When the Student took the SRA math placement test, the Student performed at the second-grade level. (NT 617; S-47, p.9). The SRA scores are comparable with the Student's Read 180 3rd grade reading level and Math 180 1st grade level scores (S-53; S-54).
 51. The SRA, Read 180, Math 180 levels are inconsistent with the Student's previous Successmaker Math scores, which ranked the Student between 4.25 and 4.41-grade levels. (S-47, p.9).
 52. The Student's pre-Charter School baseline Math scores listed in the 2012 transfer RR noted the Student was performing at 4.38-grade level (S-1 p.10) with 45 minutes a week of live teacher hands-on instruction.
 53. On October 9, 2015, the Student's IEP was revised again to include new goals for Reading Comprehension, Reading Fluency, Mathematics, and Written Expression. (S-44, pp. 23-25; NT pp.603-05). The IEP was also revised to reflect the Student's suggested placement into a full-time special education placement. (S-44, p.32).
 54. The Student's second quarter progress report noted that the Student was unable to set up an equation to solve math problems and struggled with writing in expanded notation form. (S-48, p.13).
 55. In early December 2015, after arrangements were made for the Instructional Aide to provide services, the support was abruptly placed on "on hold." The Parent questioned the Instructional Aide and the BCBA credentials. *Id.* The Parent questioned why the Instructional Aide did not have a teaching certificate. (P-18, p.25). The Charter School acquiesced to the Parent's "on hold" request and did not provide the Instructional Aide support. (S-50). On February 4, 2016, the Parent unilaterally suspended the services of the BCBA (S-50).
 56. The Learning Support teacher missed work and therefore did not provide services as written in the IEP. When the teacher missed work, the Student missed 27 language arts classes, 24 reading classes, and 24 math classes. (S-6; NT 336). On the days when classes were canceled, the teacher provided online work to reinforce skills that the students were learning (NT 337).
 57. At one point during the dispute, the Charter School filed truancy charges when the Student failed to participate in the online classes or turn in assignments. (PE-1).

Legal Basis and Discussion

A. Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case, the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise," then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case, the Parent asked for the hearing and thus bore the burden of proof. There were instances of conflicting testimony where credibility and persuasiveness determinations were made to establish a fact. Some witnesses were, however, more persuasive on some points than others. In each instance, this hearing officer was able to draw inferences from which one could ultimately determine the facts.

Persuasiveness

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. In the course of doing so, hearing officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.³

Thus, all of the above findings are based on a careful and thoughtful review of the transcripts, a reading of all of the exhibits and a direct observation of many witnesses; therefore, the decision is based upon a preponderance of the evidence presented. While some of the material evidence is circumstantial, the hearing officer can derive inferences of fact from the witnesses' testimony and the record as a whole is preponderant. On balance, despite inconsistencies, the hearing officer found all of the witnesses' testimony represents their complete recollection and understanding of the events.

³ *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution, Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014)

Free Appropriate Public Education

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1). FAPE is “special education and related services,” at public expense, that meets state standards, provide an appropriate education, and are delivered in accordance with an IEP. 20 USC §1401(9).

School districts must provide FAPE by designing and administering a program of individualized instruction that is set forth in an IEP 20 USC §1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” *Shore Reg'l High Sch. Bd. of Ed. v. P.S.* 381 F.3d 194, 198 (3rd Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3rd Cir. 1988).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.”” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must describe specially-designed educational instruction tailored to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 181-82 (1982). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996).

A school district is not required to provide the best possible program to a student, or to maximize the student’s potential. *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3rd Cir. 2012). An IEP is not required to incorporate every program, aide, or service that parents desire for their child. *Ibid.* Rather, an IEP must provide a “basic floor of opportunity” for the child. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the program and its execution were reasonably calculated to provide meaningful benefit. *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995) (appropriateness is not judged prospectively so that lack of progress does not in and of itself render an IEP inappropriate.) The appropriateness of an IEP must be determined as of the time at which it was made, and the reasonableness of the program should be judged only based on the evidence, known to the school district at the time at which the offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3rd Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Implementing Intrastate Transfer Student's IEP

The IDEA regulations identify the IEP meeting process how schools can provide FAPE to Students who transfer from one school to another during the school year. Under these regulations, the new school must provide FAPE, that includes “comparable services” to those described in the student's prior IEP, until the district conducts an evaluation pursuant to 34 C.F.R. §§300.304-300.306 and then develops, adopts, and/or implements a new IEP if appropriate 34 C.F.R. §300.323.; 20 USC 1414(d)(2)(C)(i)(2). The Office of Special Education and Rehabilitative Services, U.S. Department of Education (OSERS) interprets the word “comparable” to have the “plain meaning” of the word, which is “similar” or “equivalent.” Therefore, “comparable” services mean services that are “similar” or “equivalent” to those that were described in the child’s transfer IEP from the previous public agency, as determined by the child’s newly-designated IEP Team in the new public agency. Fed. Reg. Vol. 71, No. 156 at 46681 (Aug. 14, 2006). The Office of Special Education Programs (OSEP) has also opined that the requirement to provide “comparable services” can include a duty to provide “temporary goals aligned with the annual goals in the student’s prior IEP.” *Letter to Finch*, 56 IDELR 174 (OSEP Aug. 5, 2010). When the Student enrolls in the new school, the new school district conducts an initial evaluation, not a reevaluation, which requires parental consent. Fed. Reg. Vol. 71, No. 156 at 46682 (Aug. 14, 2006).

While not directly on point, the status of a transfer student’s out-of-state IEP was addressed by the Third Circuit in *Michael C. v. Radnor Twp. School District*, 202 F.3d 642 (3rd Cir. 2002). In the *Radnor Twp.* decision, the court held that in the case of an interstate transfer student, the new school district is not required to consider the out-of-state IEP as continuing in effect in the new state. *Id.* 202 F.3d at 651. In reaching that decision, the court approved the reliance on both the administrative rulings. *Id.* 202 F.3d at 649-650. The school district may choose to provide special education services while it pursues an initial evaluation.⁴ *Id.*

The court gave great weight to the OSEP policy memorandums noting that after enrolling a student with an IEP from another state, the transferee school district’s first step is to determine whether it will adopt the out-of-state evaluation and eligibility determination or conduct its own evaluation. After the evaluation, the

⁴ See also, Memorandum 96- 5, 24 IDELR 320 (OSEP 1995), Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 111 LRP 63322 (OSERS 09/01/11), Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 47 IDELR 166 (OSERS 2007), Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations 54 IDELR 297 (OSERS 2010).

district and the Parents must meet to develop an IEP. Once the IEP is developed, the district must provide the parent Prior Written Notice *Id.* These basic principles apply equally when the student moves from one local education agency (LEA) to another in the same state.

Prior Written Notice

LEAs must issue Prior Written Notice (PWN) when a district acts to initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE to the child. 34 CFR 300.503 (a). The PWN must include the following components: (1) a description of the action proposed or refused by the district; (2) an explanation of why the district proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action; (4) if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained.

When is a Procedural Violation a denial of FAPE

A purely procedural violation of the IDEA can result in prospective injunctive relief to ensure future compliance with IDEA procedures, not compensatory relief, or tuition reimbursement. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir.2010). A procedural violation may rise to a substantive violation justifying compensatory education or tuition reimbursement, but only where plaintiffs can show that procedural defects caused such substantial harm that FAPE was denied. *Id.* at 66-67. To prove such substantive harm, Parents must prove by a preponderance of the evidence that “procedural inadequacies (i)[i]mpeded the child's right to a FAPE, (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of the educational benefit.”⁵ Accordingly, not all procedural due process notice violation give rise to the denial of FAPE.

If the parents have not been denied the opportunity for meaningful participation and the student has not suffered any loss of educational opportunity, then the student may have received FAPE regardless of procedural violations.

⁵ See also, *Rodrigues v. Fort Lee Bd. of Educ.*, 458 Fed.Appx. 124, 127 (3rd Cir.2011) (not precedential); *N.M. ex rel. M.M. v. Sch. Dist. of Philadelphia*, 394 Fed.Appx. 920, 923 (3rd Cir. 2010) (not precedential).

Therefore, simple noncompliance with IDEA procedures is not enough to find a denial of FAPE. *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008).

Compensatory Education

In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) the court endorsed a “complete” make whole remedy favoring relief for the entire period of the violation *G.L.* 802 F.3d at 626. Compensatory education “ ‘accrue[s] from the point, that the school district knows or should know of the injury to the child, and the 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.’ ”⁶ One approach to calculate the compensatory education relief is to adopt the *MC* “cookie cutter” approach. The second option is to employ the *Reid* “qualitative” approach. The third compensatory education option is to make an equitable determination about the time and services necessary to provide appropriate relief.⁷ Each option, however, assumes the record is properly developed to support an equitable finding.

Compensatory education is appropriate relief that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA.⁸ Compensatory education should place the child in the position they would have been in but for the violation.⁹ As an *equitable* remedy, compensatory education is intended to provide more than “some benefit” or for that matter “meaningful educational benefit and significant learning”.¹⁰ The factors included in the compensatory education relief analysis hinges on student specific facts like how much more progress the student might have shown if he or she had received the required special education services, the student’s age, ability, past achievement, stage of learning, unmet needs, and the student’s current present level.

⁶ *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).

⁷ *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).

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 *Boose v. District of Columbia*, 786 F.3d 1054, 1058 (D.C. Cir. 2015).

Therefore, the make whole calculation requires some evidence about the type and amount of services needed to place the student in the same position he or she would have occupied but for the LEA's violations of the IDEA.¹¹

Also after *GL* following *MC*, the parent must establish when the District either "knew or should have known" the child was not receiving FAPE.¹² Assuming a finding of a denial of FAPE, the District, on the other hand, must produce evidence on what they suggest is the length of a reasonable rectification period. *Id.* Whether the parents follow *Reid* or *MC*, the make whole remedy must be supported by the record evidence. *Id.*

Application of Legal Principles

Since enrolling in the Charter School, the Parent has participated in numerous IEP meetings. The Student has been evaluated, tested, and assessed on countless occasions by numerous professionals. The IEPs are becoming longer and now run between 25 to 30 plus pages in length. The evaluation reports and the IEE are between 30 to 50 plus pages long. Despite all these extensive efforts, a thoughtful review of the data reveals a downward trend in performance. This downward trend includes a backward movement away from the regular education classroom into restrictive settings using an alternative curriculum. In a relatively short time, the Student with average ability, who once participated in all general education classes has shuffled in and out of an Itinerant Learning Support, to a Supplemental Learning Support and is now in a Full-Time Learning Support placement. In each placement, the Student's grades went down and achievement has stagnated. Curiously, the Charter School, by agreement with the Parent, has agreed not to implement an IEP that would provide 20 hours a week of one-on-one support from an Instructional Aide and eight (8) hours a week on behavior support from a BCBA.

¹¹ *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid, supra*. (the parent, as the moving party, has the burden of "propos[ing] a well-articulated plan that reflects the student's current education abilities and needs and is supported by the record."); *Phillips ex rel. T.P. v. District of Columbia*, 736F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciola, Mag. J.); *Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012). (the burden of proof is on the parents to produce sufficient evidence demonstrating the type and quantum of compensatory education that makes the child whole).

¹² *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).

When the Student enrolled, the Student did not require the extensive support of a one-on-one aide, a BCBA, or the extensive behavioral support plan proposed. When the Student enrolled, the Student's overall achievement standard scores were higher. When the Student enrolled in the Charter School, the prior school district's evaluation report noted the Student had average ability. Today, due to a widespread scatter in the Student's sub-test scores, the private evaluator cannot establish the Student's ability level.

When the Student attended public school, the Student received 15 minutes of math support, from a learning support teacher, three times a week. (S-1 p.10). The 45 minutes a week enabled the Student, as a 4th grader, to perform at or near the 4.38-grade level. (S-1 p.10). Compared to today, after three years of cyber school education, the Student is now working on a 2nd-grade level math and 3rd-grade level reading. Even using the Charter School's best data, the Student is back working on 4th-grade level work as an 8th grader. By definition, this steep downward data trend is a denial of FAPE on two different fronts. First, the Student is not making progress. Second, the least restrictive setting mandate, including the use of supplemental aids and supports, was not activated to counter the loss of benefits.

Although the prior school district's IEP provided direct hands-on live math instruction, the Student's first Charter School IEP did not have a math goal, yet math was a need. The transfer IEP notes the Student's SDIs included using the Successmaker Math Lab program. (S-4 p.6). Although Successmaker Math software was available, at the Charter School, the staff shuffled the Student in and out of multiple software programs. Each time the new software was introduced the Student was assessed, each assessment yielded mixed results. The assessment revealed the scores were either going down or staying close to the entry-level baseline levels of performance. This trend went unnoticed during the IEP and RR meetings.

When the Student enrolled in the Charter School, the Student could read 111 wpm; the Student could answer 17 out of 18 questions correct in a one-minute assessment of reading comprehension (S-9 p.29). The Student's Robust Vocabulary was Average, Language Arts performance was average, Writing skills were Below Basic, and the Student's Oral Reading Fluency performance was proficient. Today the opposite is true; many of the Student's achievement performance measures have decreased. For example, from 4th Grade to the present, the Student's Math Concepts and Application, Written Expression, Math Computation standard scores went down. Out of the 12 achievement Subtest scores reported, in the IEE, the Student's profile reported four scores in the Low Average Range, and two in the Very Low range (PE-16 p.39). The Student's Oral Language, Math Calculation, Academic Skills, and Academic Fluency skills ranked in the Low Average Range.

The Student's Broad Reading and Written Expression scores are now in the Low Range. (PE-16 p.39). Curiously, the Charter School never contradicted any of the test results. In fact, the Charter School's own data across the multiple software assessment confirms the Student's downward spiral. This downward pattern of test scores does not reflect significant learning or meaningful benefit for a Student with average ability. When the Charter School became aware of the Student's homework and participation issues rather than schedule an IEP meeting, the Charter School reflexively filed truancy charges. (P#1).

When the Student's September 2013 IEP team recommended the Student be assessed with the Test of Visual Perceptual Skills, the Charter School waited until November 2014 to approve the request. (S-9 p.9; S-11; S-18 p.6). The delay raises the inference that the Charter School local education agency representative in attendance did not have the authority to commit resources. The Test of Visual Perceptual Skills evaluates seven (7) visual perceptual skill areas. The IEP team connected the need for the perceptual skills assessment data to the Student's reading and writing skills deficits. (S-9 p.9). Although the OT testing was completed on January 8, 2014, the results were not shared with the IEP team until some four months later on May 15, 2014. (S-18 p.6). The delay in assessing the Student is well beyond the applicable evaluation, and annual IEP timelines. 22 Pa Code §711.22; §711.24 *et seq.* The back and forth between the Parties over the years has resulted in the Student not receiving timely services like an OT assessment, BCBA behavioral supports, and 20 hours a week of one-on-one Instructional Aide supports. The Parties' adversarial posture coupled with the constant back and forth has interfered with the Student receiving tangible FAPE benefits.

The Parties called multiple witnesses, presented numerous exhibits, and the Parties briefed the issues extensively, Yet no one, explained how the Student's overall beginning baseline performance in 2012-2013 was greater than the Student's overall 2016-2017 overall performance. The Student's stagnant Math performance after a series of assessments and restrictive placements is baffling. No one explained how or why the downward trend was not picked up during continuous progress monitoring. The fact that such an error could happen to a Student with average ability is disturbing. The fact that the Speech evaluator made a transcription error is understandable, the fact that the Charter School waited until it came out on cross-examination is bewildering. For the period of time the IEP team relied on the incorrect assessment data the Student was denied FAPE. In this instance, the Student did not receive the expected benefits from the speech and language program.

While the staff graphed the Student's performance, the graph data failed to include the Student's entry-level baseline scores. The failure to include that important data point skewed the data analysis. The failure to build upon the Student's present levels led the Student down a crooked path to a series of inappropriate goals, different curriculums, and more restrictive environments.

The private evaluator noted the Student is "sad" and has "significant negative feelings" about school, and the teachers. (PE-16 p.35). The evaluator goes on to opine the Student is experiencing "feelings of inadequacy and lack of control over life's events" (PE-16 p.35). Notwithstanding these negative feelings, the Student still sees school as important even though the work is very hard. (PE#16 p.35). These feelings are real and if not addressed may well interfere with future progress.

Oddly enough, the IEP interventions and SDIs that were supposed to improve the Student's overall performance did just the opposite. In searching for the right software program, the team lost sight of the fact that continuous progress monitoring requires the team to compare objective data and performance over time. While it is apparent the data was collected, somehow the downward or flat trends went unnoticed. This pattern of fundamental omissions and errors led to a series of substantive omissions that resulted in a denial of FAPE.

Like the virtual charter student in *Pittsburgh School District*, ODR FILE #16476-1415 KE (Skidmore 2015), the evidence here is preponderant that the Student requires structure and consistency, including continual prompting, checks for attention and behavioral support that while included in the transfer IEP were not implemented. The Parties agree the Student has trouble completing assignments and remaining on task. Yet supplemental supports and alternatives were not discussed. The evidence is also preponderant that the Student did not benefit from the presentation of instruction via live or recorded virtual lessons yet no other instructional options were considered.

Accordingly, I now find that each IEP from 2013-2014 to the present failed to provide a FAPE. At the time each IEP was developed, implemented, and revised, it was not reasonably calculated to provide "meaningful benefit" and "significant learning." Whatever progress the Student made was *de minimis* when juxtaposed against the Student's baseline levels.¹³

¹³ The LEA's failure to provide FAPE under the IDEA is a violation of the Section 504 FAPE mandate. Therefore, the equitable relief Order herein should once achieved remedy the LEA's equal access and equal opportunity violations under Section 504.

The calculation of the appropriate relief requires further discussion about the length of the reasonable rectification period and the equitable methodology used to calculate the make whole remedy.

Compensatory Education

Although the qualitative approach was suggested as the basis for relief, the Parent did not submit any testimony on the *Ried* approach. Absent essential *Reid* proofs, the record instead lends itself to the application of the *M.C.* hour-for-hour approach. The Student evaluation history, the IEE, and the RRs provide a sufficient factual basis to compute, formulate, and devise an hour-for-hour make whole remedy. The regulations provide that a secondary student should attend school for a minimum of 990 hours per school year. 22 Pa Code Chapter 11.3(a). Therefore, 990 hours is the base number of replacement hours, plus or minus applicable equitable factors.

The failure to accurately gauge the Student's present levels, draft needs-based goals, implement the IEP as written, review, and tweak the IEP based on the Student's performance permeated the entire school day and the school year. The Charter School's fundamental errors proximately caused the Student to be segregated into a series of restricted environments that compounded the problem. These factors weigh in favor of a complete hour for hour relief.

Applying the black letter equitable maxim that "equity regards as done what should have been done," I am Ordering the Charter School to belatedly pay the costs for the Student to participate in 990 hours of compensatory education for three school years. As the Charter School did not offer any evidence on the reasonable rectification period, therefore following *Student with a Disability*, 66 IDELR 90 (SEA IN 2015) I find the reasonable rectification period is ten days. Therefore, the compensatory education award is equitably reduced by 50 hours for each of the three school years at issue.

The Parent can select a third party to provider(s) to deliver the compensatory education services. An independent third party, selected by the Parent, will prospectively execute the equitable remedy of specific performance of the LEA's past FAPE duties. The LEA is directed to pay a third party provider to provide the compensatory education services at the prevailing rate in the community where the services are provided.

The Parent selected third party provider may use the compensatory education hours to provide whatever specially–designed instruction, related services, assistive technology, supplemental services, and aids necessary to make the Student whole. The LEA is directed to fund the compensatory education plan until all of the hours are used. The Parent is encourage to use the hours as soon as possible. Based upon the Student’s current present levels, the hours may be used beyond the Student’s 21st birthday. The LEA should reimburse the service provider at the customary rate for services rendered in the market or location where the services are provided. Four times a year the third party provider, selected by the Parent, will give the Parent a progress report verifying the Student’s measurable progress.

While the equitable remedy of specific performance will provide the Student with the lost benefits promised, the limited equitable relief Ordered herein will also prevent the likelihood of an oversimplification of the lost tangible and intangible FAPE benefits. The equitable calculation of compensatory education hours, as set forth here, also avoids the perils of an unacceptable Student windfall. An award of any greater relief would be punitive in nature, while at the same time, an award of any fewer hours, based upon the Student’s age, the emerging urgency for transitional services described above would not be equitable relief.

As soon as possible, the Parties should meet and develop an IEP for the 2016-2017 school year consistent with the findings herein.

Prospectively, it is this hearing officer’s sincere hope, that the Parties will put aside their adversarial postures and positions to forge a path where they can once again work collaboratively. Otherwise, the future promise of FAPE will be squandered. The Student has expressed a sincere desire to learn and grow. I encourage the stakeholders to immediately act on the Student’s preferences, interest, and needs as they move forward together.

ORDER

And Now, this September 16, 2016, it is hereby **ORDERED** as follows:

1. The Student is awarded 990 hours of compensatory education for the 2013-2014 school year. The award of 990 hours is equitably reduced by 50 hours, which in this instance, for the 2013-2014 school year reflects the time it should have taken the Charter School to remediate the denial of FAPE.

2. The Student is awarded 990 hours of compensatory education for the 2014-2015 school year. The award of 990 hours is equitably reduced by 50 hours, which in this instance, for the 2014-2015 school year reflects the time it should have taken the Charter School to remediate the denial of FAPE.
3. The Student is awarded 990 hours of compensatory education for the 2015-2016 school year. The award of 990 hours is equitably reduced by 50 hours, which in this instance, for the 2015-2016 school year reflects the time it should have taken the Charter School to remediate the denial of FAPE.
4. The Parent can select a third party provider to deliver the compensatory education services. Any service provider selected, by the Parent, shall provide the Parent four (4) progress reports a year until all of the compensatory education hours have been depleted. The hours can be used after the Student turns 21.
5. The Charter School is Ordered to reimburse the Parent selected provider the costs for the services provided at the hourly rate charged for the services in the location where the services are provided.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer
September 17, 2016