

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: J.H.

Date of Birth: [redacted]

Dates of Hearing: 3/21/2016, 3/31/2016, 6/1/2016, 7/7/2016, 7/8/2016,
7/22/2016, 8/1/2016 and 8/2/2016

Open HEARING

ODR File No. 17321-15-16

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney
Pro Se

Local Education Agency
Commonwealth Connections Academy
Charter School
4050 Crums Mill Road
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LEA Attorney
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Date of Decision:

September 16, 2016

Hearing Officer:

Charles W. Jelley Esq.

Overview, procedural, and litigation 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 of the United States Constitution free speech retaliation claim. The Parent and the Student are seeking legal and equitable relief. The due process hearing complaint notice alleges both substantive and procedural violations of the IDEA along with claims of system-wide violations 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 Parents' claims under the ADA and the First Amendment. Therefore, the ADA and the First Amendment 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 2014-2015 and the 2015-2016 school years. The Parent also claims system-wide procedural due process violations denied the Student FAPE. In response to the Parent's substantive denial of FAPE claims, the LEA responds the Student made progress.

The LEA also denies any procedural violations. In the alternative, if any procedural violations did occur, they contend that the procedural violations did not rise to the level of a denial of FAPE. Based upon these two main interlocking arguments, the LEA argues the Student's claims do not merit either compensatory education or a prospective placement.

The Parent, on the other hand, argues when the record is viewed as a whole,

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. When the witnesses were called in the different actions 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.

the LEA's substantive and procedural violations establish a denial of FAPE. The Parent to support these generalized contentions, points to the LEA's failure to provide prior written notice (PWN) when the Student was moved in and out of the virtual regular education classroom. Next, Parent suggests that the LEA's lack of ongoing progress monitoring, coupled with the predetermined use of self-instructional online computer software programs to provide specially-designed instruction denied the Student FAPE. The Parent contends the Student needs daily real-time instruction provided by a live highly qualified staff, in the home. Absent teacher support in the home, and other supplemental support, the Parent contends the Student fails to achieve significant learning and meaningful progress. The Parent contends these fundamental errors and flaws are part of a system-wide denial of FAPE. The Parent contends these violations are preponderant proof the Student's IEP as designed were inappropriate *ab initio*.²

As the evidence proffered was limited to this Student, therefore, I find that the Parent did not prove a system-wide failure to provide FAPE; that said, the violations, omissions, and actions herein established for this Student were preponderant and reached the level of a denial of FAPE. The IDEA and the Section 504 FAPE violations are of such a basic nature that the LEA may well want to revisit its policies, practices, and procedures about how to provide FAPE to a student who transfers with an IEP during the school year.

To remedy the violations, the Parent's demand an award of retrospective compensatory education and a prospective placement in a private setting. Although the hearing covered multiple sessions with numerous witnesses discussing 40 to 50-page documents, 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. The demand for a prospective placement is denied.

Similarly, the overlapping proofs of the denial of the IDEA FAPE mandate, in this instance, is also evidence of discrimination. Therefore, to the extent the Section 504 and the IDEA FAPE claims overlap, any equitable remedy ordered herein will resolve the Section 504 claim for equitable relief.

² At the same time as this action was proceeding, the Parent also made virtually identical claims on behalf of another student who attends the Charter School. At times, the parallels between the two actions are striking. That said, each due process decision was reached based on the facts, evidence, and testimony in each record. The Parties did not object to this hearing officer presiding over both actions.

As for the compensatory education claim, while the record does not contain an expert report describing the components of the make whole remedy when the record is read as a whole, the evidence is sufficient to construct, formulate, and calculate an equitable make whole compensatory education remedy.³

Procedural History

During the course of these proceedings, the Parent filed a third due process complaint regarding the Charter School's May 2016 invitation to participate in an IEP meeting to develop the Student's program for the 2016-2017 school year. The third hearing request was assigned to this hearing officer, after taking testimony from one witness, the Parent withdrew the Complaint. As an aside, the Parent also filed a fourth due process complaint that was assigned to another hearing officer regarding a dispute about the Student's Charter School records. The hearing officer in that matter ultimately concluded that he did not have jurisdiction over the Parent's claim to modify the Student's school records.⁴ Therefore, the complaint was dismissed.

Prior to this 2015 due process complaint, the Parent, and the Student were a party to yet another due process hearing about the Student's previous school district offer of FAPE. The hearing officer in the previous action found the transfer IEP, agreed to here was appropriate. The Parent appealed the hearing officer's decision to federal court. At the time of this decision, the Parent is awaiting a final decision from that appeal. In the Spring of 2014 when the Student enrolled, the Parties agreed to implement the prior school district's IEP. The transfer IEP was implemented, in bits and pieces, from the Spring of 2014 through May 2015. Numerous witnesses testified about the implementation of the transfer IEP. The appropriateness and the accuracy of the data in the transfer IEP are not at issue here. Accordingly, there is an irrebuttable presumption that the transfer IEP as developed was an offer of FAPE.

Statement of the Issues

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?

³The 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.

⁴In Re JH ODR No. 17636-15-16-KE (Culleton 2015) <http://odr-pa.org/uploads/hearingofficerdecisions/17636-15-16.pdf>

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?

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

1. In the spring of the 2013-2014 school year, during the 8th-grade year, the Student transferred from a public school to [the] Charter School (S#13 p.6).
2. Prior to enrolling at [Charter School], the Student was reevaluated in April 2014, during the seventh grade, by the prior school district (S-1).⁵
3. The prior district's reevaluation report stated the Student's reading comprehension was on the 7th-grade level, that word recognition was at or above grade level, and reading fluency was at or just below grade level (S-1, p. 8-13).
4. The reevaluation report stated the Student scored average in writing and below average in several areas of math (S-1, p. 14-22).
5. The Student's test scores reflected age-appropriate speech and language skills; (S-1, p. 30) however, the evaluator noted slow processing speed, focusing difficulties, and attention deficits that needed specially-designed instruction (S-1).
6. The prior school's reevaluation concluded the Student was a person with an Other Health Impairment (OHI) due to Attention Deficit Hyperactivity Disorder (ADHD), and because of the disability needed specially-designed instruction (SDI) (S-1, p. 42-43). The Parties agree the Student is a person with a disability within the meaning of the IDEA and Section 504 of the Rehabilitation Act (S-1).
7. The prior school district's IEP included a math goal, a behavior goal, positive behavior plan, related services, transition goals, transition services, and SDIs related to behavior, organization, anxiety, transition, and social skills (S-2, p. 81-

⁵The prior district's reevaluation report is 55 pages long (S-1). The prior school's IEP is over 100 pages long.

- 87). The IEP also calls for the Student to receive small group live instruction for mathematics (S-2, p. 86).
8. The prior school district IEP included transition services targeting math concepts and application skills, a self-editing checklist for long-term assignments, social skills instruction for 30 minutes weekly, replacement strategies to improve behavior, and direct live hands-on instruction in completing self-monitoring strategies (S-2 pp. 74-77).
 9. The transition program included an employment and independent living goal along with detailed services, times for direct instruction and transition activities. For example, the services/activities called for 30 minutes a week of instruction to reduce anxiety, 30 minutes a week of direct instruction to improve organizational skills, and 30 minutes a week to improve social skills (S-2 p.77).
 10. The prior school district's IEP included three goals to address improving behavior, completing tasks and compliance with requests (S-2 p.82). The IEP included a Positive Behavior Support Plan (PBSP) targeting classroom disruptions, noncompliance, and competing assignments (S-1 pp.98-100). The IEP called for the Student to receive Itinerant Learning Support for up to 20% of each school day (S-2 pp.92-93).
 11. Upon enrolling at the Charter School, the Parent agreed to act as the Student's Learning Coach (S-4).
 12. When the Student enrolled, the Charter School did not prepare a new IEP, but instead by agreement of the Parties [Charter School] agreed to implement the IEP developed by the prior school district (NT pp.106-07).⁶ The Parties did not create an interim IEP. *Id.* The Charter School did not issue a Notice of Recommended Assignment (NOREP) or provide the Parent with Prior Written Notice (PWN). *Id.*
 13. The prior school district's IEP was the subject of a due process hearing in 2014. (J.H. ODR #15046-1314 KE (Valentini October 10, 2014). Hearing Officer Valentini held that the prior district's evaluation was comprehensive and the Student's IEP was appropriate. The Parent appealed the decision to federal court. No part of this decision modifies or reverses any findings of fact or conclusions of law in the J.H. ODR #15046-13-14-KE (Valentini October 10, 2014) decision or Order. Therefore, this hearing officer takes notice that the transfer IEP and evaluation in place at the time of the Student's enrollment was appropriate, the evaluation was comprehensive, and that the transfer IEP as written met the Student's needs.
 14. The Parties initially agreed that the Charter School staff would take baseline data during the Student's initial enrollment (NT 107). The Parties did not set a time limit when the baseline data collection would end or when they would

⁶The prior school IEP is 107 pages long.

meet to review the new cyber school baseline data. *Id.* Ultimately, in November of 2014, the Charter School issued a Permission to Evaluate (PTE) (S-6). The Parent quickly consented to the request. *Id.*

15. For a portion of the 2014-2015 school year, the Student was placed in all regular education classes (NT p.24). Rather than provide the daily 48 minutes of direct instruction in Math in the transfer IEP, the Student spent time using a math software program, participated in live lectures, and reviewed recorded live math, science, and language arts lectures (NT pp.79-82).
16. The transfer IEP noted, and the Parties agreed, the Student had an average ability but also had a slower processing speed with weaknesses in math. Initially, [Charter School] placed the Student in a general math education curriculum, with virtual support from a learning support teacher (NT pp.50, 53).
17. The first [Charter School] learning support teacher consulted with the general education teachers to ensure the agreed-upon modifications and accommodations were in place and implemented (NT pp.50, 54-55). The virtual learning support teacher supported the Parent, in the role of Learning Coach, and the Student with online work, assisted in the completion of assignments, and occasionally reviewed the Student's portfolio work (S-8, p. 14; S-24, p. 35, 31, 29, 25, 21, 19, 16; NT 82-87, 128-30, 159-60).
18. The learning support teacher provided the Student with modified assessments in social studies, art, language arts, and science; however, the Student did not consistently take advantage of the support (S-8, p.15-20). At times, the Student did take advantage of online tutoring sessions, one-to-one instruction, and additional direct instruction sessions (S-8, p.15-20).
19. By October 2014, the Charter School provided the Student with weekly counseling sessions to assist with social skills concerns (S-20; S-21, p.20-21).
20. On or about October 6, 2016 the Learning Coach/Parent sent a message to the learning support teacher and the teacher's supervisor claiming the Student was behind in classes and indicating that the Learning Coach/Parent needed help in developing a plan to make up the missing work (S-24, p. 39).
21. The Learning Coach/Parent also stated the Student lacked foundational math skills and was working below grade level in math (S-24, p.39).
22. On October 9, 2014, the Charter School made the Successmaker Math software available to the Student and the Learning Coach/Parent (S-8, p. 14-15; NT p.79-80).
23. The Successmaker Math software program provided instructional support, in addition to the Student's participation in the general education curriculum (NT p.79, p.120). After the Student completed the initial assessment, the software program determined the initial placement level; the software program then presented guided practice on skills where the Student needed to improve and

provided feedback on incorrect answers (NT ppp.120-21). The skills presented by the software are tailored to the Student's initial assessment and subsequent responses (NT p.121). The learning support teacher did not provide 48 minutes of daily live hands-on teaching. *Id.*

24. The November 10, 2014, computer-generated summary of the Student's online time, assignment attempted, and assignment completed report showed the Student was failing most classes (P- 11 p.1).
25. Although this was the Student's first assessment by the Charter School, in November 2014, the Charter School issued a Permission to Re-evaluate (PTR). For the remainder of the semester, the learning support teacher continued to provide consultative help to the staff, the Student, Learning Coach/Parent, and suggested modifications (NT 88, S-24, p.11-19).
26. Although the learning support teacher and the general education teachers modified a number of lessons in Art, Essential Algebra Readiness, and Language Arts, the Student continued to fall behind (NT pp.102-03, P-11, p.1-2).
27. At the same time, while the Charter School and the Parent were working on the plan to make up the missed assignments. Sometime in the fall, the learning support teacher assessed the Student's reading fluency and comprehension. The assessment data uncovered that while the Student's fluency was strong, reading comprehension was a need (NT pp.134-35). When learning support teacher reviewed the data, the teacher made the unilateral decision to use the Successmaker Reading software program (NT p.135). Successmaker Reading targets comprehension, fluency, grammar, phonics, spelling, and other language arts skills (S-18, p.1). Successmaker Reading provides ongoing feedback based upon answers (NT pp.36).
28. When Semester A ended, the Student completed all of the lessons in Language Arts, Science, Social Studies, and Educational Technology. However, the Student only completed 49% of the lessons in Essential Algebra Readiness and Art (S-16, p. 5; NT p.146).
29. When Semester A and Semester B ended, the Student was not participating in regularly scheduled Live Lessons. The Student failed [Student's] first and second-semester classes of the 2014-2015 school year (PE-11).
30. In January 2015, before the evaluation report was completed and without the benefit of an IEP meeting, the Parent received an email from the learning support teacher stating the Student would be placed into a Supplemental Support Program (PE-1 p.1; PE-2 p.1; S-24, p.14; NT p.92, p.143).
31. On January 12, 2015, the Student took yet another assessment this time in the Math 180 program and scored a 765 (S-36, S-37; NT p.643). The Student's September 10, 2015 initial score of 270 placed [Student] in the lower end of the range for Grade Level 1 (S-37). The January 2016 score placed the Student in

4th Grade range (S-37). Both scores place the Student in the Below Basic category. (S-37).

32. The Student's IEP from the prior school notes that in April 2014, the Student was working on 7th-grade math problems (S-2 p.40; S-2 p.81). The Student remained in general education classes for science and history (NT p.377; p.583).
33. Rather than convene an IEP meeting to discuss the Supplemental Support Program, the Charter School invited the Parent to attend a Question and Answer (Q&A) session that described the Supplemental Support Program placement (NT pp.143-44; S-24, p.10; NT p.692). The guardian attended a Question & Answer (Q&A) session regarding the Supplemental Support Program (S-16, p.6). After attending Q&A session, the Student was placed in the Supplemental Support Program (NT p.692). The LEA, however, did not issue a NOREP or PWN. *Id*
34. The Supplemental Support Program offered daily live and/or recorded instruction in Language Arts and Math, taught by a special education teacher. (S-16, p. 5; NT p.692).
35. When the Student began the Supplemental Support Program, a new learning support teacher became the instructor (NT p.613). The new instructor previously served as the Student's math teacher for the second semester of the 2014-2015 school year (S-25, pp.21, 22, 23, 35, 37, and 40). By May 2015, the Student's math grade had improved from an F to a C- (P-11, p.4).
36. The Charter School then decided the Student should utilize the Read 180 reading software. The skills taught in the Read 180 curriculum are the same as the skills taught in other 9th grade English classes, but the content of the reading materials was different (NT p.444-48). The Read 180 class targets are reading skill deficits, not grammar or writing styles (NT p.462). The Read 180 teacher is dually certified in both English and special education (NT 222). The Student was expected to work independently in the Read 180 software 15-20 minutes per day (NT p.227; NT 257-58, 266). The Read 180 teacher also worked on improving writing (NT p.258, p.274). The Read 180 Math and Read 180 is an alternative curriculum for students who cannot participate in regular education (NT pp.320-324). The Student was also scheduled to participate for 30 minutes a day in Language Arts (NT 264).
37. In February 2015, the Charter School completed the testing, previously consented to in the November 2014 Permission to Evaluate (S-8, p.25-41).
38. The initial evaluation report was issued on March 13, 2015. The Student's achievement assessment results were consistent with the prior school district's April 2014 evaluation. The evaluation results demonstrated that the Student has average to above average reading skills, with lower than expected scores in reading comprehension (S-8, p.25-26). The Student's Broad Math standard score of 69 was considered Very Low. (S-8, p.25-26).

39. On March 13, 2015, the Charter School completed the RR. The 51-page evaluation report, included Parent input, a review of past evaluations, teacher input, classroom assessment results, norm-referenced standardized assessments, a functional behavior assessment, the Student's present levels on an audiological processing assessment, and an assessment of executive functioning (S-8). To promote remediation of the Student's executive functioning deficits, the May 2015 IEP included a one-to-one support staff person in the home, for 600 minutes per week, along with supports from a Board Certified Behavior Analyst (BCBA) service of 60 to 120 minutes per week (S-13 p. 25-26).
40. The Charter School evaluation included a Functional Behavior Assessment (FBA) and an Occupational Therapy (OT) evaluation (S-7; S-8, p. 27-42; (S-8, p.27-28).
41. The OT opined the Student did not need OT services (S-8, p.39). The RR suggested the Student had age-appropriate speech and language skills, sufficient fine motor, and visual perception skills for full participation in [Student's] academic program. The RR identified weakness related to math, processing speed, social skills, reading, written expression, and work completion (S-6).
42. Although the Student transferred to the Charter School in April 2014, the initial RR was completed some 10 months later at the end of the 8th grade school year (S-13 p.6).
43. On May 7, 2015, the Parents requested an Independent Educational Evaluation (IEE) at public expense (S-15 p.8-11). Curiously, on May 22, 2015, the Charter School agreed to fund the IEE (S-15 pp.8-11). The agreement to fund the IEE is a tacit admission the Charter School RR was inappropriate. Although the Charter School agreed to fund the IEE, the Charter School proceed to use the RR to develop a new IEP. *Id.*
44. On May 29, 2015, after the RR was completed and reviewed by the Team, the Charter School convened an IEP meeting, which resulted in the Charter School issuing its first IEP. For the first time the Charter School issued a NOREP/PWN describing the basis for its actions and decisions (S-13, p. 22).
45. In May 2015, the proposed IEP formally changed the Student's participation in special education from Itinerant to Supplemental Instructional Support, emphasizing specially-designed instruction in Language Arts, Math, written expression, a positive behavior support plan, along with a virtual counseling goal to address the Student's anxiety and social skills deficits (S-13 p.6).
46. The Student's June 2015, performance reports states the Student earned a grade of 43% in Math (S-17 p.3). The Student's Language Arts performance reports from January 2015 to June 2015 ranged from 20% to 100% (S-21).
47. In June 2015, the Student's reading performance reports noted the Student attempted 45 exercises, answered 24 correct, and earned a score of 53% placing

the Student at the Below Basic level (S-23). When the Student does not answer a preset percentage of the online questions accurately, the software “locks” the program. When the program is “locked”, the Student cannot log in and use the software. The Math teacher reported the Student was locked out of the math program on four or more occasions (S-23 p.23). When the teacher unlocks the program, the teacher will review the material with the Student, if the teacher is satisfied with the Student’s oral responses, the teacher will unlock the software and let the Student move forward to the next unit (NT pp.619-626). The criterion for moving on after a lockout was not discussed.

48. On September 28, 2015, the Charter School convened another IEP meeting. At this IEP meeting, the guardian rejected the services of an in-home Personal Care Assistant (PCA) and supports from a BCBA (S-31 p.1). The Parent/Learning Coach acknowledged that the staff explained how these services would help to improve the Student’s executive functioning and support the proposed modifications to the academic classes, once again, however, the Parent/Guardian refused to approve the PCA and BCBA services (S-31 p.1-2).
49. After the September 28, 2015, IEP meeting, the Charter School scheduled a follow-up meeting on October 7, 2015, for the staff to meet with the guardian at the home to review the IEP; the Parent, however, cancelled that meeting (S-31, p. 2; NT p.695). The guardian wanted assurances from the Charter School that the PCA was qualified to provide instruction to address the Student’s alleged Receptive-Expressive Language Disorder (NT 672). Curiously, when the Parent made the request, the Student was not yet diagnosed by the private evaluator with a Receptive-Expressive Language Disorder. *Id.*
50. Previously the guardian expressed dissatisfaction with the Compass Odyssey curriculum used in the Supplemental Support Program during the second semester of 2014-2015, school year (NT p.436). Despite the concern, Compass math continued to be used as the online math software.
51. On September 3, 2015, on the third day of school (S-28), the Parent/Learning Coach discussed software program options in reading and math with the new teacher. After the conversation, the Parent agreed that the Student should take the placement tests for a new replacement curriculum software program called Read 180 and Math 180 (P-1, p. 13-15; NT pp.439, 641).
52. On September 8, 2015, the guardian was invited to participate in an overview of the Read 180 and Math 180 curriculum, which provided additional information about how the programs would assist the Student (S-45, p. 14-15). Based on Student’s scores, the Student was assigned to classes using the Read 180 and Math 180 curriculum. The Charter School did not issue a Permission to Evaluate when it administered the Read 180 testing or the 180 Math assessments. CCA did not schedule an IEP meeting to review the data or issue

a NOREP when they used the Read 180 and the Math 180 assessment results to increase the Student's time in special education from Itinerant to Supplemental. *Id.*

53. On September 10, 2015, the Student took an initial Read 180 Math inventory pretest and earned a score of 270 (NT 641, S-30; NT p.642, S-32, p.1). Shortly thereafter, the Student was placed in the Read 180 Math and reading programs. *Id.*
54. During the 2015-2016 school year, the general education teachers modified the assessments and the work in the Science and History classes (NT pp.450-51); reduced choices for multiple choice questions; provided word banks for other questions, and lowered the expectation of what was an acceptable written expression answer to not more than two sentences (NT pp.473-74; S-48). The teachers read the tests to the Student and provided modified quizzes (NT pp.379-382). During the 2015-2016 school year, the staff also provided word banks, at one time removed essay questions from tests, and reduced the number of multiple choice answers on tests and quizzes (NT p.412; NT p.382, p.389, pp.416-17). The regular education staff also asked the special education teacher and the supervisor of special education to review classroom modifications and accommodations (NT p.395).
55. The Math 180 - Read180 teacher created a checklist that put all of Student's assignments in one place, provided graphic organizers to help summarize the information from the textbook chapters, and developed a visual vocabulary list to help the Student overcome language and sequencing weaknesses (NT pp.406-07). The teachers provided the Student with guided notes, chapter summaries, and review activity worksheets to help the Student learn the course content (NT p.412).
56. The Read 180 - Math 180 teacher testified that the Student made progress. Yet the record reflects the Student earned a D in the class, which by the Charter School standards is a passing grade for the class (P-11 p.14; NT p.417).
57. The World History teacher testified that Student was successful in the general education class, with the modifications (NT pp.583-84). The Student appeared to do well on portfolio assignments and unit tests (NT p.584). However, when the grades were posted, the Student achieved a D as a final grade in the general education World History class (NT p.586).
58. After the Parent filed the due process complaint on February 2, 2016, the Parent provided the Charter School with a "Comprehensive Neurodevelopmental Evaluation" prepared by a New York-based private evaluator (P-13). The Charter School paid for by the Independent Education Evaluation (IEE) (P-13).
59. A pediatrician, not a school psychologist, prepared the IEE report with the assistance of a school psychologist (NT pp.188-92).

60. The independent evaluator did not observe the Student in the online learning environment before he prepared the report (NT p.194). The independent evaluator did not recall speaking to anyone at [Charter School] before he prepared the report (NT p.194). The independent evaluator did not recall what documents he reviewed in preparing the report (NT pp.195-97). The independent evaluator did not make any effort to determine why or how the results of the evaluation differed from the results of other evaluations of the Student. The IEE report did not discuss the Student's prior diagnosis of a nonverbal learning disability (NT p.197-200). When the evaluator did administer the same assessment, the evaluator did not compare the prior results with the current results (NT p.197-200). The report does not add much to the mix of understanding how the Student learns or what types of specially-designed instruction or software would produce significant learning (NT pp.206-07). The independent evaluator acknowledged that his evaluation report findings were affected by the Student's anxiety and that, as a result, the Student's scores were an under-estimation of Student's skills. The IEE did not include any curriculum-based assessment or provide useful instructional baseline data to begin instructional support in the regular or special education classroom (NT pp.201-202; P-13, p.4).
61. The IEE report did, however, provide a new diagnosis of Mixed Expressive and Receptive Language Disorder. The IEE report, however, did not describe, with any particularity, if the disorder adversely affected the Student's education, what could be done to minimize how the disorder affects learning, or opine if the Student's disorder is a disability, or if the Student needs specially-designed instruction (P-13, p.10; NT pp.188-90).
62. After administering four different assessments, measuring behavior and emotions the independent evaluator concluded that the Student "... has made significant progress emotionally and behaviorally. In fact, there are no significant concerns about [redacted] behavior" (P-13 p.27). This conclusion directly contradicts the Parent and the Charter School's position that the Student's behavior was interfering with learning, the need for the PCA, the BCBA supports, and the positive behavior support plan (S-6; S-13).
63. At various times, during the dispute, the Student moved in and out of regular education and special education placements without the benefit of an IEP meeting or a NOREP. At one time, the Student was in all general education classes (NT p.350-353). On another occasion, the Student was in general education with consultative Itinerant Support. Then on another occasion, the Itinerant Support was changed to Supplemental Support (NT p.437). In addition, during the time of the dispute, the Student participated in the Fast Math program, the Study Island program, the Compass Odyssey curriculum, Foundations, Read 180, and Math 180, (NT pp. 436-437; pp 345-349; P-14).

The constant changes in computer software were accomplished without the benefit of an IEP meeting, an objective team-based review of the data, or [Charter School] issuing a NOREP or PWN (NT pp.320-324).

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 Parents 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.⁷

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 each witness; 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

⁷ *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); *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003)

the witnesses' testimony represents their complete recollection and understanding of the events.

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 meet 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 (3rd Cir. 1999). In order to provide FAPE, the child’s IEP must describe specially-designed educational instruction designed 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, related service, or supports 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 (3rd 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 new school district proposes to conduct an evaluation, “to determine if the child is a child with a disability and to determine the educational needs of the child”, the new district, here the Charter School, offered to conduct an initial evaluation, unlike a reevaluation, an initial evaluation, 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 of the administrative rulings. *Id.* 202 F.3d at 649, 650.

Therefore, a school district or in a case a Charter School may choose to provide

special education services, as written, while it pursues an initial evaluation.⁸ *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 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 a public school to a charter school 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 FAPE, (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (iii) caused a

⁸*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).

deprivation of the educational benefit.”⁹ Accordingly, not all procedural due process notice violations 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. 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.’”¹⁰ 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 calculation option is to review the record as a whole, make equitable adjustments; and then formulate a make whole remedy, grounded in the pure equitable powers of the fact finder, to grant appropriate relief.

Compensatory education is appropriate relief that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA.¹¹ Compensatory education should place the child in the position they would have been in but for the violation.¹²

As an *equitable* remedy, compensatory education is intended to provide more

⁹ 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).

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).

¹¹ *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).

¹² *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.

than “some benefit” or for that matter “meaningful educational benefit and significant learning.”¹³ The factors included, in the compensatory education relief 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. 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.¹⁴ Also after *GL* following *MC*, the parents must establish when the District either “knew or should have known” the child was not receiving FAPE.¹⁵ 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.*

When any of the above alternatives are employed, it is common practice for the fact finder to note several of the relevant/applicable equitable factors considered in crafting the make whole relief order. Several of the common equitable variables included in the order granting the appropriate relief, in no particular sequence are as follows: (1) the duration of the relief/time limits; (2) calculating the reasonable rectification period; (3) tagging the starting point when the LEA either knew or should have known about the denial of FAPE; (4) classifying the nature of the lost benefits; (5) the age of the Student; (6) the Student’s present levels; (7) the identification of and allocation of payer’s responsibility to fund the make-whole costs; (8) the equitable limits on the parent’s decision making power to select the service provider; (9) the service provider’s responsibility to deliver regular ongoing measures of success; and, (10) a statement of the generalized nature of the compensatory education services necessary to provide the appropriate relief.¹⁶

¹³ *Boose v. District of Columbia*, 786 F.3d 1054, 1058 (D.C. Cir. 2015).

¹⁴ *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).

¹⁵ . *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).

¹⁶ . *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).

Each alternative, is acceptable, provided that, the relief granted makes the student whole. Implicit in each alternative, is the working assumption that the record is properly developed to support the award of the equitable relief ordered.

Analysis and Application of Legal Principles

When a student transfers from a public school to a charter school, the new charter school has several options. First, the Charter School may implement the transfer IEP as written. Second, the LEA may create an interim plan, while they await the results of its initial evaluation and then offer a new IEP. To avoid any undue interruption in the student's services, the evaluation and the development of the new IEP must be completed "within a reasonable period of time". *Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11). Granted while the agreed-upon initial interim services do not have to be identical, they must, however, be comparable/similar in nature. In this instance, when the Student transferred in the Spring of 2014, the LEA held a meeting and agreed to implement the transfer IEP without modifications. Therefore, the LEA agreed to implement the IEP as written. The record is preponderant the Parties did not discuss what services would not be provided. The LEA did not describe what or how "comparable/similar services" would or would not be provided to the Student. In fact, the LEA never provided the Parent with prior written notice (PWN) about its actions or the factual basis for its decision. This initial substantive/procedural failure would later prove fatal.

As a result of the initial IEP meeting, the Parties agreed to collect baseline data. Unfortunately, for the Student, no clear time limits were established to review the data, revisit or revise the IEP. In essence, after the Student enrolled the LEA prepared a course schedule and the Student began the online self-instruction computer-based learning services. While the transfer IEP called for 48 minutes of daily instruction by a highly qualified live teacher, the Charter School LEA mixed live lessons with recorded online lessons in both regular and special education. Although the LEA knew, the Student had executive functioning deficits, anxiety, attention, and behavioral weaknesses, without the benefit of a comprehensive evaluation they implemented a self-directed online learning program. Soon after enrolling it became apparent, the Student's attention and organizational deficits would interfere with online learning.

When the Parent complained, the Student was falling behind and failing, the staff consolidated lessons and eliminated lessons. When those strategies did not work, the staff moved the Student into a replacement curriculum that, at times, changed the course content, the level of participation in regular education and the expected level of achievement.

The multiple changes in the coursework, curriculum, and levels of support contributed to uncertainty and increased anxiety.

The multiple changes lead to frustration and almost daily confrontations on both sides. One of the most telling examples of uncertainty/confrontation centers around the Student's present levels and instructional levels. Although the Student's present levels in the transfer IEP states the Student should work on 7th-grade math, the LEA moved the Student in and out of multiple 6th grade or lower math placements.

Although the Student's behavioral, anxiety and emotional needs were predominate, the LEA delayed implementation of the counseling services. Aware of the fact that the Student's behavior, concentration, and focusing interfered with learning, the LEA never trained the Parent/Learning Coach to implement the transfer IEP's positive behavior support plan.

These ongoing actions and omissions contributed to a substantial failure to implement the agreed upon IEP. In *Cyber Village Academy #4025*, 108 LRP 21574 (SEA MS 2008) the Office of Civil Rights, in investigating a Parent complaint about a cyber school's applied the IDEA regulations at 34 CFR § 300.101 and concluded that the failure to implement the IEP as written was a denial of FAPE. In this instance, after agreeing to implement the IEP, the LEA failure to implement the transfer IEP, as written was a denial of FAPE. That substantive violation also included a procedural violation when the Charter School also failed to provide the Parent with prior written notice.

The prior written notice (PWN) described in the NOREP serves multiple functions. First, the PWN commits the LEA to implement the IEP. Second, the PWN provides the Parent with a clear factual notice of the basis of the LEA's decisions, actions, and/or refusals. PWN also provides the Parent with notice of any test or assessment the LEA relied upon in reaching its decision. While the Parent here is clearly aware of her due process rights, the Parent was never given the opportunity to understand the factual basis of the LEA's decision or the test data describing the basis of the LEA's decision. The failure to provide the Parent with legally sufficient PWN substantiality interfered with the Parent's ability to participate in the IEP process. These fundamental procedural and substantive violations caused an ongoing interference with the Student's FAPE rights. The procedural and substantive violations also interfered with the Parent's right to participate in the IEP process thereby violating the Parent's substantive and procedural rights. These multiple violations combined and caused the Student to suffer a substantive denial of FAPE.

The Charter School's lack of clarity, basic working knowledge of how to analyze the transfer IEP, implement and provide comparable services contributed to a series of later equally serious substantive and procedural violations.

The IDEA regulations are straightforward and provide clear guidance on how to ensure the student's procedural and substantive rights are honored. The Charter School waited almost six months, after the Student's transferred, to issue a Permission to Evaluate (PTE).

This delay under these circumstances was unreasonable. Although the Parties agreed to collect baseline data, the data was never compared to the Student's past performance in the bricks and mortar setting. In March 2015, some eight months after the transfer, the LEA completed a comprehensive evaluation of the Student. The evaluation noted the Student was earning failing grades, achievement testing and instructional grade level performance was trending downward. The evaluation also noted anxiety was escalating. Behavioral issues like refusing to attend live lessons had escalated to the point that the Charter School filed truancy charges. These events were all red flags that the Charter School online learning model was insufficient, inadequate, and inappropriate. In this instance, the IEP team failed to continuously monitor the Student's performance and make necessary adjustments.

The IDEA requires the LEA to have an IEP in place at the beginning of each school year. The child's placement must also be determined at least annually. 34 CFR 300.116 (b)(1). It is black letter law that the failure to implement the written IEP, as written, and offer an appropriate placement annually is a denial of FAPE. *Compton Unified Sch. Dist.*, 41 IDELR 254 (SEA CA 2004). Each student with an IEP must also receive the benefits of ongoing progress monitoring. The results of the student's progress monitoring must be regularly reviewed and discussed annually, or sooner, at the IEP conference. The record here is preponderant that while the LEA did collect data, a group of knowledge professionals did not systematically review the data.

While video conferencing and online learning are innovative practices, the IDEA requires the LEA representative, the teacher(s) and the Parent to jointly develop/write the measurable goals. The record here reflects, on more than one occasion, the regular education staff either did not attend the IEP meetings, or attended and then dropped off the phone/video conference. Granted, while not all teachers are required to attend all IEP meetings when staff do not attend, the excused staff members must provide written input to the other team members that tangible student-centered benefit was not provided here. The failure to provide and coordinate teacher/parent input, in the cyber school environment, denied the Student the benefits of a working IEP team.

Essentially, while each teacher was connected online, a factual disconnect existed in understanding the Student's present levels and unique needs. The disconnect among the teachers, and between the Learning Coach, the teachers, and the Student from each other was a contributing factor that caused the denial of FAPE.

One example of the disconnect between the Parties is evidenced by the mid-year Language Arts change in placement. The Language Arts change resulted in the Student and the Learning Coach working on multiple assignments that went ungraded and unnoticed by the new teacher. Though well intended, this mid-year change occurred without the benefit of an IEP conference or PWN. The LEA contends that the Parent was aware and consented to the change, implying that the formality of the PWN should somehow be excused, under these circumstances, as harmless error. That suggestion is unacceptable.

The PWN and IEP meeting requirements are mandatory. These bedrock practices exist to prevent what happened here; namely, a predetermination of the Student's placement premised upon a quick fix predetermined software package. The software could not and did reduce the Student's anxiety. Computer software in and of itself is not a substitute for specially-designed instruction delivered and monitored in real time by a highly qualified teacher.

On more than one occasion, the Student's classroom placement, course work, and level of support changed, yet the Charter School did not offer a PWN describing the factual basis of the action. The May 2015 IEP all but eliminated the Student's direct instruction services/activities needed to achieve the transfer IEP academic, behavioral, and transition goals. Like the virtual charter student in *Pittsburgh School District*, ODR FILE #16476-1415 KE (Skidmore 2015), the evidence here is overwhelming 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.

Early on, when the Parent emailed staff about the Student's apparent online disconnect, the LEA scrambled to provide a variety of different software packages. Contrary to the IDEA needs driven program mandate, the available software programs drove the development of the Student's program. Essentially the online software programs predetermined the Student's multiple placements into and out of successive regular and special education placements. While placement-testing scores are a factor, when the Parent asked about other options, the IEP team never met to discuss what other supplemental aids and services were available prior to the Student's

removal from the regular education classroom and curriculum.¹⁷ This fundamental error compounded the ongoing violations.

In *Student with a Disability*, 66 IDELR 90 (SEA IN 2015) the school district did not convene an IEP meeting within 10 days of the date of the intrastate transfer Student's enrollment. When the parent filed a complaint, the state department of education ordered the district to take corrective action, including issuing a memorandum to relevant staff regarding the need to conduct a move-in IEP meeting to review the IEP services and goals. In *Pontiac City Sch. Dist.*, 115 LRP 17833 (SEA MI 2015) the district violated the IDEA when it waited to review an intrastate transfer student's IEP before providing special education services these joint violations contributed, like here, to a denial of FAPE.¹⁸

For example, the previous school district agreed to provide 48 minutes a week of live contact with a special education teacher, 30 minutes of live social skills training, 30 minutes of live anxiety counseling, 30 minutes of live direct instruction to address organizational skills, and provide the tangible benefits of a positive behavior management plan. The record is preponderant the Student never received the meaningful benefits of these agreed-upon services.

In another instance, the Student waited for an unreasonable amount of time before the LEA scheduled the virtual counseling services. While, the LEA was aware the Parent agreed to act as the Learning Coach; the LEA never trained the Parent how to implement the positive behavior supports program. The transfer IEP goals were very specific about the need for ongoing behavioral support yet the services were not provided.

¹⁷ *Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist.*, 19 IDELR 908 (3d Cir. 1993) (The *Oberti* test requires the LEA to make reasonable efforts to accommodate the child in a regular classroom. The test requires the IEP team to review the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special class. Educational benefits include both academic and socialization opportunities. Socialization can include the development of social and communication skills, increased sense of self-esteem, language, and role modeling. Finally, the team must consider the possible negative effects, including those the child would have on other students in the class. These factors and others were never discussed or considered.).

¹⁸ *Pillager Area Charter Sch. #4080*, 110 LRP 65969 (SEA MN 09/01/10)(when a district fails to provide comparable services to an intrastate transfer student with a disability the district could find itself liable for reimbursement, compensatory education, or both). See, e.g., *Pikes Peak BOCES*, 8 ECLPR 86 (SEA CO 2011); *Prince George's County Pub. Schs.*, 7 ECLPR 62 (SEA MD 2009).

The Charter School's March 2015 functional behavior analysis and positive behavior support plan closely resembled the behavioral supports in the 2014 transfer IEP. Yet, for some unexplained reason, the LEA waited until September 2015 to offer in-home support of a PCA and a BCBA to address the behavioral goal. These substantial material omissions/lapses for the most part, went unnoticed, while others were never explained.

The present levels in the transfer IEP noted the Student was performing at or slightly above 7th-grade level; yet after a year of attendance at the charter school, the Student's May 2015 present levels note the Student was working on 6th grade or below instruction. While a comparison of the two present levels notes regression, the team continued to press for virtual online instruction. Regression is the opposite of meaningful progress. It is axiomatic that if the services as written are not provided, monitored, and revised as needed, FAPE is denied. In this instance, whatever progress/learning the Student did achieve, the learning/progress was *de minimis* at best.

To support its progress argument, the Charter School points to data that the Student's Math level changed .49% in less than six months. This evidence is contradicted, however, by the LEA's other data that the Student was failing Math, had poor impulse/attention control, was locked out of math lessons, and displayed multiple behaviors that interfered with learning. The online environment exceeded the Student's executive functioning skill set. Whatever progress the Student made, it was inadequate, insufficient, and unacceptable. While some may argue the present levels in the transfer IEP are inaccurate or exaggerated, I cannot accept that argument when, as here, the IEP was thoroughly tested in a prior due process hearing and found appropriate as written.

The IEP notes the Student is expected to graduate in 2019, yet the 90 minutes of dedicated live hands-on transition instruction, in the transfer IEP was eliminated. In place of the live hands-on direct instruction, the May 2015 IEP substituted several vague transition statements. The May 2015 transition services are not measurable or linked to any tangible transition outcomes, interest, or preferences. Rather than use a variety of assessment tools, as required, to assess the Student's transition needs, the learning support teacher instead used a single measure (S-13 p.6). This type of cursory assessment is unacceptable and legally insufficient. The record is preponderant that Charter School failed to muster the existing data to set ambitious goals, monitor progress, determine unmet needs, assess the Student in all areas of unique need, and build upon the Student's present levels.

Accordingly, I find the LEA denied the Student FAPE.¹⁹ That said, the calculation of the appropriate relief requires considerable discussion about the reasonable rectification period and the calculation of the make whole remedy.

Compensatory Education

The Parent did not submit any testimony on the *Ried* approach therefore absent a record I will use the *M.C.* hour for hour “cookie cutter” approach. *G.L.* however now instructs us that the equitable remedy must make the student whole. The record as a whole, however, calls for the application of a blended *M.C.* “hour for hour” with the equitable adjustments approach to compute and devise the make whole remedy. The regulations provide that a secondary student should have the equal opportunity to attend school for a minimum of 990 hours per school year. 22 Pa Code Chapter 11.3(a). Thus, 990 hours is the base number of hours plus or minus equitable factors. In this instance, the Student’s initial IEP called for Itinerant Support up to 20% of the school day. Due to the implementation errors, that Itinerant level of support soon morphed into Supplemental Support for up to 50% of the school day. The transfer IEP allotted specific time each week to specific transitional services, related services, and academic classes. The Charter School data sheet also tracked the Student’s time on task and by default tracked the Student’s rate of regression. Putting aside the Student’s lackluster level of achievement, a review of the Student’s time on task proves that the time spent using the various software packages did not provide the Student with equal access to the mandated 990 hours of instruction.

The transfer IEP called for the Student to achieve measurable levels of mastery. The transfer IEP also provided initial pre-regression baseline data and a description of the specially-designed instruction, the level of support, services, and instructional time once needed to provide meaningful benefit. Hearing Officer Valentini found the transfer IEP was appropriate; therefore, I will include the transfer IEP into the mix in calculating and devising the equitable make whole remedy.

Applying the black law equitable maxim that “equity regards as done what should have been done” rather than Order a specific number of hours of service, that may or may not make the Student whole. I am directing the LEA to pay a third party provider to educate the Student until the Student attains the academic, behavioral, social, transition goals, and benefits identified in the transfer IEP. The third party provider may use whatever specially-designed instruction, related services,

¹⁹ The LEA’s failure to provide FAPE under the IDEA is a violation of the LEA’s 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.

supplemental, auxiliary aids or services, and assistive technology necessary to achieve the goals.

In this instance, the independent third party will provide the equitable remedy of specific performance of the LEA's past duties. Therefore, the LEA is directed to fund the compensatory education plan until such time, as the Student achieves **all** of the academic, transition, social, and behavioral goals to the criterion set forth in the transfer IEP. While the equitable remedy of specific performance will provide the Student with the lost benefits once promised, the limited equitable relief Ordered herein will also prevent the likelihood of an oversimplification of the lost FAPE benefits. The equitable calculation of compensatory education hours, as set forth herein, also avoids an unacceptable Student windfall. Any more services might well be punitive in nature, any fewer services, based upon the denial of FAPE here would not be equitable.

The Parent can select the provider of the services. The LEA should reimburse the service provider at the customary rate for services rendered in the market or location where the services are provided. The third party provider is directed to deliver up to 990 hours of instruction each calendar year, for as long as it takes to achieve the transfer IEP goals. Four times a school year, the third party provider, selected by the Parent, will provide the Parent and the Charter School a progress report on the Student's measurable progress towards attaining the goals. Following, *Student with a Disability*, 66 IDELR 90 (SEA IN 2015) I find the reasonable rectification period is ten days. Therefore, in the first year of implementation of the Order, the compensatory education plan hours are equitably reduced to 950 hours. Thereafter the third party provider is directed to provide the Student up to 990 hours per year. The compensatory education hours Ordered herein, should begin as soon as possible, and continue, if necessary, after the age of 21. Once the transfer IEP goals are mastered, the obligation to fund the make-whole relief is terminated.

ORDER

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

1. The Charter School is directed to pay a third party to provide the Student with up to 990 hours of compensatory education each calendar year for as long as it takes the Student to achieve the transfer IEP goals.
2. The reasonable rectification period in this action is 10 days. In the first year of implementation of this Order, the compensatory education plan hours are equitably reduced to 950 hours. Thereafter the third party provider is directed

to provide the Student up to 990 hours each calendar year. The compensatory education hours Ordered herein, should begin as soon as possible, and continue, if necessary, after the Student reaches the age of 21.

3. Four times a calendar year, the third party provider, selected by the Parent, will provide the Parent and the Charter School a progress report on the Student's measurable progress towards attaining the goals.
4. The Parent can select a third party provider to deliver the compensatory education services.
5. Any provider selected shall provide the Parent four (4) progress reports a year until such time as all of the compensatory education hours have been used.
6. 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.
7. Once the transfer IEP goals are mastered, the obligation to fund the make-whole relief is terminated.

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

September 17, 2016