

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: A.D.

Date of Birth: [redacted]

CLOSED HEARING & STIPULATED RECORD

ODR Case Numbers:

ODR NO. 18788-1617AS

ODR NO. 18789-1617AS

Parties to the Hearing:

Representative:

Parent[s]

David J. Berney, Esquire
Vanita Kalra, Esquire
1628 J.F.K. Boulevard
Suite 1000
Philadelphia, PA 19103

Young Scholars - Kenderton
Charter School
1500 W. Ontario Street
Philadelphia, PA 19140

Unrepresented &
Non-Participatory

Pennsylvania Department of Education
333 Market Street / 9th Floor
Harrisburg, PA 17101

M. Patricia Fullerton, Esquire
Elizabeth Anzalone, Esquire
333 Market Street / 9th Floor
Harrisburg, PA 17101

Date of Decision:

July 6, 2017

Hearing Officer:

Charles W. Jelley, Esquire LL.M

BACKGROUND LEADING UP TO THE DUE PROCESS COMPLAINT

The Student¹ is a middle school-aged student residing in the Philadelphia school district. The student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)² for specially designed instruction and related services as a student with a Specific Learning Disability (SLD). The procedural background in these matters is intricate. As set forth more fully below, the student attended the Charter School (“Charter School”) which is now closed.

THE STUDENT’S 2014 DUE PROCESS COMPLAINT

On or about July 7, 2014, the Parent filed a due process complaint on behalf of the Student alleging that the Charter School denied the Student a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*, (“IDEA”), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.*, (“Section 504”), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.*, (“ADA”). *Stipulations of Fact (“S.F.”)* at ¶ 17; *Parent’s Due Process Complaint (“Complaint”)* at ¶ 13.

THE 2014 HEARING OFFICER DECISION

On December 24, 2014, Hearing Officer Cathy A. Skidmore found in favor of the Parent and awarded prospective placement at the Private School (“Private School”) with pendency and compensatory education to remediate harms arising from Charter School’s failure to provide Student FAPE. *S.F.* at ¶ 18; *Complaint* at ¶ 14; *J.Exh.1* at 27-28. A special needs Trust (“Trust”) was established for the benefit of Student and was funded by the compensatory education award.

THE CHARTER SCHOOL STOPPED PAYING THE [REDACTED] INVOICES

On or about September 1, 2015, the Private School prepared, executed, and forwarded a written tuition contract to the Charter School for the Charter School’s signature. The tuition contract required the Private School to provide educational services to Student during the 2015-2016 school year. The contract called for the Charter School to pay the associated monthly FAPE tuition costs at a daily rate of \$227.50 (J.Exh. 10, 12). The tuition contract further provided for a tuition reconciliation process by which Charter School is obligated to pay any additional tuition owed no later than June 30, 2018. (J.Exh. 15 p.4 at ¶10a.)

¹ The generic use of “student,” rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student. This action has a companion case involving the Student’s sibling, both actions involve the same factual circumstances, with the same Charter School, Private School, the trustee and the Pennsylvania Department of Education. Both due process decisions, as described below, were decided on the same day.

² 20 U.S.C. §§1400 *et seq.*

The Charter School paid the Private School's tuition bills invoiced for the eight month period September 2015 through April 2016 (J.Exh. 14) The Charter School failed, however, to pay the tuition invoices for the two months prior to Charter School's closure. (J.Exh. 3, 10, 14) Despite Charter School's failure to pay the last two monthly tuition invoices Charter School owed to the Private School, Student continued to receive appropriate educational services through the end of the 2015-2016 school year. (Stip. 25, 30)

THE STUDENT'S COUNSEL CONTACTS PDE AS THE SEA

On September 29, 2016, Parent's counsel informed PDE of Charter School's failure to pay tuition for the last two months of the 2015-2016 school year and asked PDE to pay the invoices Charter School owed to the Private School (S.F. 31; J.Exh. 2). On October 2, 2016, Parent's counsel provided copies of the outstanding tuition invoices for the last two months of the 2015-2016 school year to PDE (S.F. 32; J.Exh. 3). Each of the invoices identifies the daily tuition rate of \$227.50 and is directed to Charter School alone (J.Exh. 3). PDE responded that it would not pay the outstanding tuition bills Charter School owed to the Private School, stating:

PDE will not pay outstanding tuition bills that [Charter School] allegedly owes to the Private School. In a matter involving similar circumstances, the Eastern District Court of Pennsylvania dismissed PDE as a party where: 1) a closed charter school placed a student in a private school prior to closure; 2) the charter school failed to pay tuition bills, and 3) the student received the private school services. *Olivia B. v. Sankofa Academy Charter School*, 2014 WL 3797282 (E.D. Pa. 2014). As in *Olivia B.*, the two students that you represent received their educational services and there was no harm to the students. Payment of the bills is an issue for [Charter School] and the Private School to resolve. (S.F. 33; J.Exh. 4)

THE PARENTS FILED THE INSTANT DUE PROCESS COMPLAINT

On February 16, 2017, Parent filed a due process complaint against Charter School and PDE alleging Parent paid the outstanding tuition invoices Charter School owed to the Private School and seeking reimbursement from PDE for Charter School's invoices paid by the parent. (S.F. 35, 36; J.Exh. 6) Upon request for copies of the receipts associated with Parent's payment of the tuition invoices Charter School owed to the Private School, PDE was informed on February 22, 2017, that payment of the tuition invoices owed by Charter School was imminent (S.F. 38; J.Exh. 8) In response, PDE requested information related to why Parent was paying Charter School's debt. There is no evidence to support that Parent responded. (S.F. 39; J.Exh. 9)

Following receipt of the due process complaint PDE conducted a fact-finding investigation and issued a report on February 28, 2017, finding, in part:

- a. The Private School sent invoices to Charter School throughout the 2015-2016 school year;

- b. Charter School paid the Private School tuition invoices for the 2015-2016 school year with the exception of the May 2016 and June 2016 tuition invoices;
- c. The Private School sought payment for the May 2016 and June 2016 tuition invoices from Student's special education Trust Fund; and
- d. On February 27, 2017, the Private School received a check dated February 23, 2017, from Student's Trust in payment of the May 2016 and June 2016 invoices (S.F. 43; J.Exh. 10)
- e. The fact-finding investigation also found the Private School sought payment from Student's Trust with the knowledge of Parent's counsel (J.Exh. 5, 10)

The question before the hearing officer is whether the Pennsylvania Department of Education (PDE), as the State Education Agency ("SEA"), is required to reimburse a third party, the trustee for the voluntary payment of the Charter School's tuition debt, for the Student's last, agreed upon Individual Education Program (IEP) and pendent "stay put" placement. (S.F. at ¶36)

PDE submits that the IDEA does not require PDE, acting as the SEA, to reimburse the Parent or the trustee that voluntarily chooses to pay an outstanding tuition debt owed by a closed charter school. PDE further contends that the dispute involves the Charter School's failure to honor its contractual obligations to a private school, rather than an IDEA dispute.³ Therefore, they contend the hearing officer, therefore, lacks jurisdiction.

The Parent counters PDE's fact-finding contention raising four interrelated and intertwined arguments. First, Parent contends payment by the trustee, on behalf of the Student, violates the IDEA's requirement that the Student's education is "free."⁴ Second, the Parent argues that under a *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993) analysis the equities favor the Student. The Parent contends that because the Student's pendent program was Ordered, by Hearing Officer Skidmore and later agreed to by the defunct Charter School, PDE cannot avoid the SEA's obligation to ensure the LEA is providing FAPE. Therefore, the Parent contends, the SEA, is required to reimburse the trustee. Third, the Parent argues, in the alternative, that the Parent is entitled to reimbursement as the private school was the Student's last agreed upon program and placement. Therefore, the Parent contends, the SEA is responsible for making all payments for the pendent "stay put" placement when the instant action was filed. *See*, 20 U.S.C. § 1415 (j). Finally, the Parent argues that the United States District Court for the Eastern District of Pennsylvania has repeatedly found that PDE must step in where a charter school ceases to exist and therefore cannot or will not remedy past denials of FAPE.⁵

³ PDE relies upon *Olivia B. v. Sankofa Acad. Charter Sch.*, No. 14-867, 2014 U.S. Dist. LEXIS 105257 (E.D. Pa. Aug. 1, 2014) as a bar to the instant action.

⁴ The "free" provision of FAPE, defined as "At no cost", means that all specially designed instruction is provided without charge, but it does not preclude incidental fees that are normally charged to students without disabilities or their parents as a part of the regular education program." 34 CFR §300.39 (b)(1). Although, the Due Process Complaint was filed by the Parent, the payments to the private school came from the Student's compensatory education Trust, therefore, for this decision, the terms "Parent" and "trustee" will be used interchangeably.

⁵ *See, e.g., R.V. v. Rivera*, 2016 U.S. Dist. LEXIS 167250 at *15-16 (E.D. Pa. Dec. 5, 2016); *H.E. v. Palmer*, 2016 U.S. Dis. LEXIS 148904 at *33 (Oct. 27, 2016); *R.J. v. Rivera*, 2016 U.S. Dist. LEXIS 108165 at *6-8 (E.D. Pa. Aug. 16, 2016); *Charlene R. v. Solomon Charter School*, 63 F.Supp. 3d 510 (E.D. Pa. 2014).

After the matter had been submitted on briefs, the hearing officer directed the Parties to file supplemental letter briefs to address the holding in *Fisher v. Stafford Twp. Bd. of Educ.*, 289 F. App'x 520 (3d Cir. 2008) (non-precedential), a decision not briefed by the Parties. In *Stafford Twp. Bd. of Educ.* the court held that the parent, who did not challenge the pendent IEP, was not entitled to reimbursement for voluntarily supplementing the aides' salaries the school board paid the staff who worked with the child.

Instead of an evidentiary hearing, the Parties drafted and agreed to the following factual Stipulations which in turn, incorporated by reference, a series of Joint Exhibits (J.E.) enumerated below. The Parties have jointly framed the issue, in dispute, as a matter of law. This manner of presentation of the facts negated any finding of credibility. The Parent as the moving party must shoulder the burden of proof.⁶ The issue, as presented, is a matter of first impression.

FINDINGS OF FACT BASED UPON A STIPULATED RECORD⁷
AMENDED STIPULATIONS OF FACT

The parties submitted the following stipulations and incorporated by reference herein, the below-listed documents in lieu of an evidentiary hearing in the above-captioned matter and agree as follows:

BACKGROUND

1. Parent (Parent) is the mother of (Student).
2. The Student was born on [redacted] and is currently an early teen-aged student.
3. The Charter School is a school building located within the [local] School District ("School District").
4. Before the 2013-2014 school year, the Charter School was operated by the School District. The Student attended the Charter School at that time.
5. Beginning with the 2013-2014 school year, the School District granted Charter School a charter to operate the Charter School as a Renaissance charter school known as "Charter School".

⁶ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

⁷ The findings of fact are entirely drafted by counsel for the Parent and PDE. This hearing officer, having reviewed the stipulations of those parties and the stipulated exhibits, accepts the stipulated findings of fact as drafted. For stylistic consistency with his decision-writing, however, certain stylistic or grammatical changes have been made. Also, given the hearing officer's use of "Private School" or "Charter School", that designation is used in this decision, even though the parties utilized a different designation in the stipulations; certain other designations in the stipulations are used earlier in the decision and are carried over into the stipulations. Finally, so that the parties, or a reviewing body, can be assured that the stipulated findings of fact are adopted here in their entirety, the parties' submitted stipulations, closing statements and letter briefs are included in the record as HO Exhibits 1-6.

6. Charter School surrendered its charter effective June 30, 2016.
7. Once the Charter School ceased operations at the end of the 2015-2016 school year, the School District resumed operations of the [school building].
8. From the 2013-2014 school year through the 2015-2016 school year, the Charter School was a Local Education Agency (“LEA”) as defined by the Individuals with Disabilities Education Act of 2004 (“IDEA”). 20 U.S.C. § 1401(19).
9. From the 2013-2014 school year through the 2015-2016 school year, Charter School received federal financial assistance.
10. The Pennsylvania Department of Education (“PDE”) is Pennsylvania’s State Education Agency (“SEA”) as defined by the IDEA. 20 U.S.C. § 1401(32).
11. PDE receives federal financial assistance.
12. At all times relevant to the above-captioned matter, Student was identified as eligible for services pursuant to the IDEA. 20 U.S.C. § 1400 *et seq.*
13. During the 2013-2014, 2014-2015, and 2015-2016 school years, Student was enrolled in Charter School.
14. During the 2013-2014, 2014-2015, and 2015-2016 school years, Charter School served as Student’s LEA.
15. As the SEA, PDE has general supervisory obligations related to an LEA’s implementation of the IDEA and is responsible for ensuring that eligible students receive FAPE. 20 U.S.C. § 1412(a)(11).
16. Pursuant to the IDEA, PDE, as the SEA, is required to arrange for and/or “provide special education and related services directly to children with disabilities” when an LEA is unable or unwilling to provide educational services to which a student is entitled. 20 U.S.C. § 1413(g).
17. On or about July 7, 2014, Parent filed a due process complaint against the Charter School, seeking, *inter alia*, an order that Charter School place Student at a private school and provide compensatory education for Student.

18. On December 24, 2014, following a due process hearing, Hearing Officer Cathy Skidmore, M.Ed., J.D. issued a decision docketed at ODR # 15203-1415 KE ordering Charter School to (a) prospectively place Student at a private school for the remainder of the 2014-2015 school year, (b) pay Student's tuition, and (c) provide compensatory education to Student. Hearing Officer Skidmore also ordered that the private school would be Student's pendent placement. (J.Exh. 1)
19. While Student was still enrolled in Charter School, Charter School placed Student at the Private School pursuant to the hearing officer's decision docketed at ODR # 15203-1415 KE for the remainder of the 2014-2015 school year and continued to place Student at the Private School for the 2015-2016 school year.
 - 19.a. For the 2015-2016 school year, Parent asserts that Charter School did not propose an IEP for Student and PDE has no evidence that Charter School proposed an IEP for Student for the 2015-2016 school year.
20. The Charter School closed at the end of the 2015-2016 school year and surrendered its charter.
21. Following Charter School's closure at the end of the 2015-2016 school year, Student enrolled in the School District.
22. The Student continues to be enrolled in School District and continues to be educated at the Private School.
23. School District became responsible for satisfying tuition invoices associated with Student's attendance at the Private School from July 2016 to the present.
24. Before July 2016, Charter School was responsible for satisfying tuition invoices associated with Student's attendance at the Private School due to the hearing officer's December 24, 2014, decision and then Charter School's decision to continue to educationally place Student at the Charter School for the 2015-2016 school year.
25. The Student received appropriate services during Student's placement at the Private School.
26. The Private School submitted tuition invoices to Charter School for the time Student attended the Private School during the 2014-2015 and 2015-2016 school years.

27. During the 2015-2016 school year, Charter School failed and has been unable or unwilling to pay the May 2016 and the June 2016 tuition invoices the Private School submitted to Charter School.
28. The May 2016 and June 2016 invoices total \$8,872.50.
29. Other than the May 2016 and June 2016 tuition invoices, the Charter School paid all other Private School tuition invoices for the time Student attended the Private School before the School District assumed responsibilities as the LEA in July 2016. (J.Exh. 14)
30. Despite Charter School's failure to pay the May 2016 and the June 2016 tuition invoices the Private School submitted to Charter School, Student remained at the Private School and continued to receive appropriate educational services.
31. By email dated September 29, 2016, Parent's counsel informed PDE that Charter School failed to pay for the last two months of tuition at the Private School for the 2015-2016 school year and asked: "if PDE will be paying the tuition...". (J.Exh. 2)
32. On October 2, 2016, Parent's counsel provided PDE with a copy of the due process decision docketed at ODR # 15203-1415 KE and copies of the unpaid Private School tuition invoices and informed PDE that Student received educational services associated with the time period covered by the tuition invoices. (J.Exh. 1 and 3)
33. On October 19, 2016, PDE informed Parent's counsel that PDE would not pay the outstanding tuition bills owed to the Private School by Charter School. (J.Exh. 4).
34. On or about February 1, 2017, the Private School sought payment from Parent to satisfy the outstanding tuition bills. (J.Exh. 5)
35. On February 16, 2017, Parent filed a due process complaint against PDE docketed at ODR # 18789-1617 AS. (J.Exh. 6)
36. The due process complaint docketed at ODR # 18789-1617 AS seeks reimbursement of tuition paid by Parent associated with Charter School's failure to pay the outstanding tuition invoices from the Private School for the months of May 2016 and June 2016, or, in the alternative, compensatory education. (J.Exh. 6)
37. On February 17, 2017, PDE requested confirmation that Parent paid the Private School's May 2016 and June 2016 tuition invoices owed by Charter School and provide copies of the payment receipts. (J.Exh. 7)

38. On February 22, 2017, PDE was informed: “the invoices will be satisfied imminently.” (J.Exh. 8)
39. On February 22, 2017, PDE sought information related to Parent’s alleged obligation to pay the outstanding tuition invoices owed to the Private School by Charter School. (J.Exh. 9)
40. In the interim, PDE conducted a fact-finding investigation related to Charter School’s alleged failure to pay Student’s outstanding tuition invoices to the Private School during the 2015-2016 school year. (J.Exh. 10)
41. During PDE’s fact-finding investigation, PDE obtained a copy of a check dated February 23, 2017 in the amount of \$8,872.50, from [redacted] Trust (“Trust”) payable to the Private School documenting that the Trust had satisfied the outstanding tuition invoices owed by Charter School for the months of May 2016 and June 2016 (J.Exh. 11)
42. The Trust had been created for the benefit of Student by Charter School to satisfy the compensatory education award that Hearing Officer Cathy Skidmore, M.Ed., J.D. ordered the Charter School to provide Student pursuant to her decision docketed at ODR # 15203-1415 KE.
43. On February 28, 2017, PDE issued a fact-finding report to Parent, finding, in part:
- a. The Private School sent invoices to Charter School throughout the 2015-2016 school year;
 - b. Charter School paid the Private School tuition invoices for the 2015-2016 school year with the exception of the May 2016 and June 2016 tuition invoices;
 - c. The Private School sought payment for the May 2016 and June 2016 tuition invoices from Student’s special education Trust Fund; and,
 - d. On February 27, 2017, the Private School received a check dated February 23, 2017, from Student’s Trust in payment of the May 2016 and June 2016 invoices. (J.Exh. 10)
44. In addition to the pleadings filed in the above-captioned matter, the parties stipulate that the following documents are hereby incorporated by reference herein and admitted into the record by stipulation and that the documents comprise the entirety of the substantive evidence in this matter:

- Exhibit 1: Hearing Officer Cathy Skidmore, M.Ed., J.D. decision docketed at ODR # 15203-1415 KE, dated December 24, 2014.
- Exhibit 2: Email from Vanita Kalra to Patricia Fullerton, dated September 29, 2016 (12:48 pm)
- Exhibit 3: Email from Vanita Kalra to Patricia Fullerton with invoice attachments related to Student dated October 2, 2016 (8:25 pm)
- Exhibit 4: Email from Patricia Fullerton to Vanita Kalra, dated October 19, 2016 (2:45 pm)
- Exhibit 5: Email chain from [K. S.] to Parent, dated February 1, 2017 (9:10 am)
- Exhibit 6: Due Process Complaint
- Exhibit 7: Email from Patricia Fullerton to Vanita Kalra, dated February 17, 2017 (4:34 pm)
- Exhibit 8: Email from Vanita Kalra to Patricia Fullerton, dated February 22, 2017 (11:43 am)
- Exhibit 9: Email from Patricia Fullerton to Vanita Kalra, dated February 22, 2017 (12:19 pm)
- Exhibit 10: PDE's Fact-Finding Report, dated February 28, 2017
- Exhibit 11: Check No. 0015828 from Trust payable to Private School in the amount of \$8,872.50, dated February 23, 2017
- Exhibit 12: Tuition agreement for the 2015-2016 school⁸
- Exhibit 13: NOREP issued by Charter School, dated June 15, 2016
- Exhibit 14: Customer Transaction History 2015-2016 School Year

ISSUE

The question before the hearing officer is whether the Pennsylvania Department of Education as the SEA is required to reimburse the Parent for the voluntary tuition education payment, made by the Student's trustee, owed to the Student's Private School, when the Charter School/LEA is unable or unwilling to pay the Student's monthly FAPE costs.

⁸ Like the "New Jersey State Department of Education Mandated Tuition Agreement" in the companion cases at ODR FILE # ODR NO. 18790-1617AS and ODR NO. 18791-1617AS, the "Tuition Agreement for [Private School] an Approved Private School" here contains identical language, that the Charter School will follow all federal and state law (J.Exh. 12 ¶10). Instead, Private School acting in the capacity as an "Approved Private Academic School" first promised to provide the educational services described in the pupil's individualized education program (J.Exh. 12 ¶1. Then again in paragraph 3, Private School promised to "comply with all requirements of the Pennsylvania Department of Education" (J.Exh. 12 ¶3). It is clear that the Student was the intended beneficiary of the Charter School – Private School. "Tuition Agreement."

LEGAL PRINCIPLES AND UNDERPINNINGS

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, "represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' finding that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Bd. of Educ. of Hendrick Hudson Central School Dist. Westchester Co. v. Rowley*, 458 U.S. 176, 179, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) (quoting H.R. Rep. No. 94-332, p. 2 (1975)). The IDEA requires states that receive federal funding to provide a free appropriate public education ("FAPE") to all disabled students. *Ferren C. v. School Dist. of Phila.* 612 F.3d 712, 717 (3d Cir. 2010) (citing 20 U.S.C. § 1412(a)(1)(A)).

A FAPE HAS FOUR PRONGS.

The "free" prong is at issue here. First, the school must provide specially-designed instruction and related services "**at no cost**" or charge to the student or the parent.

Second, the FAPE must be provided "in conformity with the individualized education program (IEP) required under section 1414(d) of this title." 20 USC § 1401(9)(D). The individual education program—or IEP—is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988) The IEP includes the child's functionality, current academic performance, her academic goals, how to measure academic progress, and what accommodations she needs. 20 U.S.C. § 1414(d)(1)(A)(i). A team of school officials, teachers, and the child's parents work together to form the IEP. *Id.* § 1414(d)(1)(B).

Third, the FAPE must "meet the standards of the State Educational Agency." *Id.* § 1401(9)(B). Here, the state educational agency is the Pennsylvania Department of Education. PDE must craft a state plan that, among other things, allows all disabled children to receive FAPE in the least restrictive environment. *Id.* § 1412(a)(1), (5). PDE must then supervise its school districts—or local educational agencies—to ensure that they follow this plan. *Id.* 20 USC §1412(a)(11).

To receive federal money under the IDEA, a state must submit a plan of compliance to the Secretary of Education, who then distributes funding. 20 U.S.C. §§ 1412-1414. The IDEA then gives the SEA the responsibility of apportioning the funds to LEAs, whereby the LEAs apply to the SEA in order to receive that funding. 20 U.S.C. § 1413(a). The SEA is responsible for ensuring that LEAs comply with the mandates of the IDEA in providing educational services to those eligible students. 20 U.S.C. § 1412(a)(11)(A).

The LEA, as the entity that is actually providing services to children with disabilities, must develop an IEP for each eligible child that should include (1) present levels of achievement and performance, (2) measurable annual goals, and (3) special education and supplementary aids and services to be provided to the child, as well as other details regarding the child's educational program. 20 U.S.C. § 1414(d)(1)(A)(i). The IEP should evolve with the child's development and should be continually revised as appropriate. 20 U.S.C. § 1414(d)(4).

Thus, IDEA delegates supervisory authority to the SEA, which is responsible for administering funds, setting up policies and procedures to ensure local compliance with IDEA. Next, the SEA can fill in, for the LEA, by providing services directly to students in need where the LEA is either unable or unwilling to establish and maintain programs in compliance with IDEA. The LEA is responsible for the expenditure of IDEA funds to establish programs in compliance with IDEA, and the maintenance of records and the supply of information to the SEA as needed to enable the SEA to function effectively in its supervisory role under IDEA. *Gadsby v. Grasmick*, 109 F.3d 940, 943 (4th Cir. 1997).

Recently, in *Santino P. v. Pa. Dep't of Educ.*, No. 16-5230, 2017 U.S. Dist. LEXIS 92432 (E.D. Pa. June 15, 2017), in addressing the charter school acting as the LEA and the SEA relationship the court held as follows:

“The SEA is responsible for ensuring that LEAs comply with the mandates of the IDEA in providing educational services to those eligible students.” *Charlene R. v. Solomon Charter Sch.*, 63 F. Supp. 3d 510, 513 (E.D. Pa. 2014)(citing 20 U.S.C. § 1412(a)(11)(A)). The LEA is the entity that actually provides services to children under IDEA. *Id.*; *see also* 20 U.S.C. § 1414(d)(1)(A).

It is the SEA, however, that "retains primary responsibility to ensure that all children with disabilities receive the education that is their right under the IDEA." *Charlene R.*, 63 F. Supp. 3d at 513; *see* 20 U.S.C. §§ 1412(a)(11)(A), 1413(g)(1); *Kruelle v. New Castle Cty. Sch. Dist.*, 642 F.2d 687, 696 (3d Cir. 1981); *see also* *Pachl v. Seagren*, 453 F.3d 1064, 1070 (8th Cir. 2006); *St. Tammany Parish Sch. Bd. v. State of Louisiana*, 142 F.3d 776, 784 (5th Cir. 1998); *Gadsby v. Grasmick*, 109 F.3d 940, 943 (4th Cir. 1997).

PDE must also provide an administrative grievance procedure for disabled children and their parents. 20 USC § 1412(a)(6), § 1415. This procedure is meant to be a faster, cheaper alternative to litigation. It has several steps. The IDEA requires that state educational agencies set up a three-step grievance procedure—complaint resolution, optional mediation, and due process hearings. 34 C.F.R. § 300.500. The Pennsylvania Department of Education has done so. *See* 22 Pa Code Chapter 14 *et. seq.* State Educational Agencies must also ensure that school districts and charter schools school acting in the role of the LEA’s implement the grievance procedure and tell parents about it. 34 C.F.R. §300.149(a)(1), §300.504.

First, the parent may file a complaint on any FAPE-related matter with the school district and the state educational agency. *Id.* 20 USC § 1415(b)(6). PDE then investigates the matter and responds accordingly. 34 C.F.R. § 300.152. Meanwhile, the school can convene a preliminary meeting between the parents, school officials, and the child's IEP team. 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510.

A hearing officer conducts the hearing, under the authority of the state educational agency. 34 C.F.R. § 300.511(b)-(c). The hearing officer's decision is final. *Id.* § 300.514(a). The state due-process hearing is the end of the IDEA's grievance procedure. Once the state hearing officer issues a decision, the parties may file an original action in federal court. 20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. §300.514(a), § 300.516. But the action cannot be filed until a state hearing officer has issued a decision—that is, until the parties have reached the end of the IDEA's grievance procedure. 20 U.S.C. § 1415(i)(2)(A). This principle is known as the IDEA's exhaustion rule. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 753, 197 L. Ed. 2d 46 (2017). The rule applies only to claims alleging the denial of FAPE. *Id.*

Claims that could have been brought under the IDEA but weren't must still go through the IDEA's grievance procedure before a court can hear them. 20 U.S.C. § 1415(l). The exhaustion rule also applies to the Student's claims.

ANALYSIS AND APPLICATION OF LEGAL PRINCIPLES

The term "free" seems simple enough to understand, interpret and apply. However, this dispute adds a novel factual twist, namely, if the LEA closes, can the private school the Student is attending then seek payments for unpaid services from the Parent. If "free" means "free" the answer is no. That said, do the equities then require PDE to reimburse the trustee who paid the outstanding invoice. The answer is yes. While the SEA's contract argument at first blush is appealing, the state forfeited the contract shield protections, in this instance, when they agreed to accept federal dollars and become the responsible SEA.

The Tuition Agreement between the Charter School and the Private School is found at J.Exh. 12. When the Private School agreed to comply with federal law, the terms, conditions and obligations in the Charter School - Private School Tuition Agreement precluded the Private School from charging the Parent for FAPE related costs. In fact, the contract specifically provides at paragraph 10, that the Private School will follow "all federal and state laws and regulations"; therefore, the unambiguous terms of the contract embody the SEA's and the LEA's interdependent duties to provide FAPE, at no cost. *See*, 34 CFR §300.39 (b)(1).

PDE relies heavily on *Olivia B. v. Sankofa Acad. Charter Sch.*, No. 14-867, 2014 U.S. Dist. LEXIS 105257 (E.D. Pa. Aug. 1, 2014) as a shield in this dispute. While the six charter school students in *Olivia B.* did not prevail against PDE, the instant action is distinguishable. Unlike the students in *Oliva B.*, the Student here was denied a "free" appropriate public education when the trustee paid the invoice. Unlike the students in *Olivia B.*, the Student's Charter School and the Student's Private School agreed that the Student's education would be "at no cost" *i.e.* "free." In fact, the Student's case here is even stronger than the students in *Oliva B.* The Student here, like the unpaid private school in *Oliva B.* is the intended third-party beneficiary of the Charter School - Private School Tuition Agreement.⁹ As the intended beneficiary, the Student has a vested third party beneficiary contract right to enforce the vested right to a "free" education. *See, P.N. v.*

⁹ In *Olivia B.*, the parent and the school district entered into a settlement agreement, although the private school, the third party contract beneficiary, of the settlement agreement, was never paid, *Olivia* received FAPE. *Olivia* 2014 U.S. Dist. LEXIS 105257 at *30-31. Once the Student's trustee, here, paid the invoice, the third party beneficiary, the Student was denied a "free" education.

Greco, 282 F. Supp. 2d 221 (D.N.J. 2003) (disabled student terminated from a private school could initiate a third-party beneficiary contract action to remedy the breach of the district's private school contract and for violations of the student's IDEA rights).¹⁰

Under the IDEA, if the charter school or a school district, *i.e.* the LEA, just flat out refuses to pay the invoices, the Private School may not seek payments from the Parents. 34 CFR §300.39 (b)(1) The Private School could, however, refuse to provide services, which in turn would put the LEA in a “stay put” predicament. The black letter law is clear: the private school cannot directly or indirectly force, cajole or strongly encourage the Parent to pay for the past or future FAPE services when the LEA places the student. That sadly did not occur. In defining "special education" as "specially designed instruction **at no cost**" to the parent" the regulation adds qualifiers - the “**at no cost**” language does "not preclud(ing) incidental fees which are normally charged to nonhandicapped students or their parents as a part of the regular education program." 34 CFR §300.39 (b)(1)(emphasis added). Neither Party disputes the fact that the costs here are all direct FAPE related costs.¹¹

Variations of the instant “free” means “free” dispute occurred shortly after Congress passed the Education for All Handicapped Children’s Act (EHA) commonly called P.L. 94-142, now IDEA. In a series of OSEP letters dating as far back as 1978 and continuing to the present, the Bureau of Education of the Handicapped (BEH), now the Office of Special Education Programs (OSEP), told the LEAs and the SEA’s that private schools should not charge parents for FAPE related costs.¹²

¹⁰ A third-party beneficiary is "one who, although not a party to the contract, and hence, not in privity with the promisor...is permitted to enforce the contract between the promisor and the promisee for its (the third-party beneficiary's) benefit." *Visor Builders, Inc. v. Devon E. Tranter, Inc.*, 470 F. Supp. 911, 923 (M.D. Pa. 1978). Under Pennsylvania law, a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. The Student’s status as the third party beneficiary collapses PDE’s contract argument.

¹¹ The IDEA requires that the SEA ensure that a child with a disability placed in a private school by an LEA is provided special education and related services: (1). In conformance with an IEP that meets the requirements of 34 CFR §300.320 through 34 CFR §300.325 ; and (2). At no cost to the parents;(b) Is provided an education that meets the standards that apply to education provided by the SEA and LEAs including the requirements of this part, except for 34 CFR §300.18 and 34 CFR §300.156 (c); and (c) Has all of the rights of a child with a disability who is served by a public agency. 34 CFR §300.146.

¹²Letter to Anonymous 20 IDELR 1155 20 LRP 2370, Office of Special Education Programs (October 8, 1993) “Under Part B, special education and related services must be provided at public expense. Therefore, in order for education to be “free” under Part B, special education and related services must be provided at no cost to parents. The Part B regulations define the term “at no cost” to mean that all specially designed instruction is provided without charge, but does not preclude charging incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program. Thus, it is permissible under Part B for public agencies to charge parents of children with disabilities for certain “maintenance fees,” such as for the art, chemistry, or lab supplies mentioned in your letter, provided they are incident fees normally charged to parents of nondisabled children as part of regular education programs.”; Letter to Fretwell, 211 IDELR 137 11 LRP 6771, Bureau of Education for the Handicapped (October 30, 1979) (Parents of handicapped children may not be charged for costs related to education and services necessary for a child to benefit from special education. If support other than special

In a closely analogous situation in 1980, the Office of Civil Rights in closing out a founded discrimination complaint against the *Pennsylvania Department of Education*, 257 IDELR 106 257 LRP 7112 (April 7, 1980) concluded that PDE failed to provide a “free” education to certain students in private school. OCR held PDE violated Section 504’s FAPE requirement by failing to provide a “free” appropriate education to children placed in private residential schools. OCR found that the state paid a portion of costs of the private placements for each child, and then the private schools, like here, billed parents for the remainder in the form of a fixed fee for unidentified services. OCR found the imposition of such fixed fees "as a condition for the receipt of appropriate educational services" violated then 45 CFR §84.33(c)(1), (3) now 42 CFR §104.33(c)(1), (3). OCR also found that the state violated 45 CFR §84.33(c)(2), now 42 CFR §104.33(c) by failing to ensure that children placed in private residential schools were not provided transportation to and from school at no cost. OCR ordered PDE and PDE agreed to cease, these practices and reimburse parents for improper charges. OCR also ordered PDE to implement a sanctions program against private schools to ensure that they ceased such practices as well.¹³

While not stated as a Stipulated Fact, the repeated attempts by the Private School to collect the Charter School debt creates a reasonable inference that the Private School would soon take action to obstruct the Student’s “free” education. Therefore, I find that although the Student received an appropriate education, in the end, that education was not “free.”¹⁴

THE APPROPRIATE RELIEF IN THIS INSTANCE IS REIMBURSEMENT

The IDEA provides that courts and by analogy, hearing officers can grant “appropriate relief” to remedy a denial of FAPE. Courts have found that the IDEA grants broad authority to craft an appropriate remedy for violations of the IDEA. *Forest Grove Sch. Dist. v. T.A.*, 52 IDELR 151 (U.S. 2009); *R.L. and S.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11th Cir. 2014); *Lauren G. v. West Chester Area Sch. Dist.*, 60 IDELR 4 (E.D. Pa. 2012); and *Borough of Palmyra Bd. of Educ. v. F.C.*, 28 IDELR 12 (D.N.J. 1998).

The Parties agree that the trustee paid the Private School \$8,872.50 (Stip. #29). In *R.V. v. Rivera*, 2016 U.S. Dist. LEXIS 167250 at *15-16 (E.D. Pa. Dec. 5, 2016), *H.E. v. Palmer*, 2016 U.S. Dis. LEXIS 148904 at *33 (Oct. 27, 2016); *Charlene R. v. Solomon Charter School*, 63 F.Supp.

education and the related services, as defined in the applicable regulations, is needed, costs to parents are not prohibited.)

¹³ Although the hearing officer sought additional guidance from the parties on *Fisher v. Stafford Twp. Bd. of Educ.*, 289 F. App'x 520 (3d Cir. 2008) (non-precedential) decision, unlike *Stafford* the fact that PDE initiated fact finding about the denial of FAPE claim in conjunction with the repeated attempts by the Private School to collect the debt, the Parent here, by filing the action against the Charter School and PDE placed the IEP at issue. See also, *Letter to Busch* 211 IDELR 281 Office of Special Education (May 18, 1981) (Under 34 CFR 300.4, special education and related services provided in conformity with an IEP must be at "no cost" to the parent; private agencies, however, may develop interagency agreements with an LEA which describe the services to be paid for by the private agency and those to be paid for by the LEA); *Letter to Schwartz*, Bureau of Education for the Handicapped 211 IDELR 211 LRP 6607 (May 8, 1978)(if State agency places or refers children to private school or facility, such placement or referral must be made at no cost to parents).

¹⁴ After finding that the Student’s education was not “free,” I am not compelled to reach a determination on the Parent’s alternative reimbursement arguments.

3d 510 (E.D. Pa. 2014) the courts held that, in certain instances, the IDEA's "appropriate relief" provision required PDE, as the SEA, to fund and implement compensatory education awards when the charter school abruptly closes. An appropriate Order follows.

THE EQUITIES FAVOR THE STUDENT'S REIMBURSEMENT REQUEST

Realizing that "appropriate relief" determinations require the application of equitable maxims, the equities, here, favor the Student. First, the trustee used compensatory education funds, targeted to make the Student whole for past deprivations of FAPE, to pay for current services in the pendent IEP. Using the compensatory funds to satisfy the LEA's and SEA's preexisting duties is contrary to the make-whole philosophy announced in *G.L. v. Ligonier Valley School Dist. Auth.*, 802 F.3d 601, 614 (3d Cir. 2015). Using the compensatory education funds, as stipulated, essentially negates the Student's right to reach the path to significant learning and meaningful benefit. Second, from a contract perspective, PDE would be unjustly enriched if the Trust and the Private School are not reimbursed.

If the Private School reconciliation invoice goes unpaid, the Private School may have a viable *quantum meruit* claim.¹⁵ As the case law stands today, PDE as the SEA is the responsible public agency.¹⁶ Therefore, reimbursing the trustee and the Private School for FAPE related costs here is not a novel remedy. Accordingly, PDE is directed to pay the trustee the sum of \$8,872.50. These payments are due no later than 90 days from the date of this order.¹⁷

It is my sincere hope and wish that this Decision will end the circle of litigation surrounding this unique Student.

¹⁵ "Quantum meruit [or quasi-contract] is an implied contract remedy based on payment for services rendered and on prevention of unjust enrichment." *Param Techs., Inc. v. Intelligent Home Solutions, Inc.*, No. 04-1348, 2005 U.S. Dist. LEXIS 18097, 2005 WL 2050446, at *4 (E.D. Pa. Aug. 25, 2005). "In service contracts, for example, recovery under quasi-contract may be available where the parties have not fixed the value of the service to be provided, but it would be unjust to allow the beneficiary to retain a benefit for which there was an implied promise to pay." *Id.* "In Pennsylvania, a party seeking to plead unjust enrichment must allege the following elements: '(1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the defendant; and (3) the defendant's acceptance and retention of the benefit under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.'" *Kliesh v. Select Portfolio Serv., Inc.*, No. 12-548, 2012 U.S. Dist. LEXIS 90651, 2012 WL 2500973, at *8 (E.D. Pa. June 29, 2012), quoting *Giordano v. Claudio*, 714 F. Supp. 2d 508, 530 (E.D. Pa. 2010) (further quotations omitted).

¹⁶ *R.V. v. Rivera*, 2016 U.S. Dist. LEXIS 167250 at *15-16 (E.D. Pa. Dec. 5, 2016); *H.E. v. Palmer*, 2016 U.S. Dis. LEXIS 148904 at *33 (Oct. 27, 2016); *R.J. v. Rivera*, 2016 U.S. Dist. LEXIS 108165 at *6-8 (E.D. Pa. Aug. 16, 2016); *Charlene R. v. Solomon Charter School*, 63 F.Supp. 3d 510 (E.D. Pa. 2014); *Santino P. v. Pa. Dep't of Educ.*, No. 16-5230, 2017 U.S. Dist. LEXIS 92432 (E.D. Pa. June 15, 2017).

¹⁷ Since neither the Parent nor the Private School have made a claim for interest, the claim *sub silentio* is otherwise waived, therefore, PDE is directed to pay the face value of the invoices.

ORDER

AND NOW, this 6th day of July 2017, in accordance with the preceding Findings of Fact, Conclusions of Law and Analysis, it is hereby **ORDERED** that within 90 days of this **ORDER** the Pennsylvania Department of Education is directed to pay the sum of \$8,872.50 to the [redacted] Trust.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and **ORDER** are **DENIED** and **DISMISSED**.

July 6, 2017

[Charles W. Jelley, Esq. LL.M.](#)
Charles W. Jelley, Esq. LL.M.
HEARING OFFICER
ODR NO. 18788-1617AS
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