

**DELAWARE DEPARTMENT OF EDUCATION**

**SPECIAL EDUCATION DUE PROCESS HEARING PANEL**

**In the Matter of:** )  
 (*“Student”*), ) **DE DP 18-02**  
 v. )  
*Charter a/k/a* )  
**CHARTER SCHOOL** )  
 (*“Charter”*) and )  
**STATE OF DELAWARE – DEPARTMENT** )  
**OF EDUCATION** (*“State”*) )

**INDEX OF NAMES FOR DECISION AND ORDER**

<b>ACTUAL NAME</b>	<b>REPLACEMENT NAME/TERM USED</b>
	Student or
	Mother
	Father
Charter School	or Charter
	or Charter Board Chair
Maryanne Mieczkowski	M.M. or Director
Bridget Shane	B.S. or Student’s Counsel’s Record Custodian
Allison McCowan, Esq	Charter’s Attorney or Charter’s Former Attorney
	Parents
James Taylor, Esquire	Charter’s Former Senior Attorney
Caitlynn McAndrews	Mother/Student’s Attorney

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**v.** )  
**Charter School a/k/a** )  
**CHARTER SCHOOL** )  
**(“Charter”) and** )  
**STATE OF DELAWARE – DEPARTMENT** )  
**OF EDUCATION (“State”)** )

**FINAL DECISION AND ORDER OF DISMISSAL WITH PREJUDICE**

A hearing took place on October 23, 2017. It was attended by Charter, whose party designee was its last board chair as of September 2016, <sup>1</sup> (“Charter Board Chair”) who testified. Charter was not represented by counsel.

State’s party designee was M. M., the Director of Special Education of the Exceptional Children’s Group for the State of Delaware Department of Education (“Director”) who testified. State was represented by DAG Valerie Dunkle. Esq.

Student’s party designee was the Parent of Student, (“Parent”) who testified. Student was represented by counsel Caitlin McAndrews, Esq. B.S., the records custodian for Student’s Counsel (“Student’s Counsel’s Record Custodian”), testified on October 23, 2017.

This is the final decision in this matter.

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<sup>1</sup>Trial Transcript, 10/23/17 ( hereinafter “TT”), at page 46 line 10 hereinafter this will be 46:10.

## **I. PROCEDURAL HISTORY**

1. Student by Parent filed the Complaint in this above referenced matter with the State on August 11, 2017.<sup>2</sup> The State appointed this Panel to hear this matter.<sup>3</sup> This is the Third Due Process Matter between Student and Charter.
2. The First Due Process Matter between Student and Charter was filed on August 21, 2014, State Exhibit 2, and withdrawn September 16, 2014, State Exhibit 4. State was not a party.
3. The Second Due Process Matter between Student and Charter was filed on December 2, 2015, State Exhibit 5, and dismissed without prejudice, January 28, 2016. State Exhibit 6/
4. The Complaint of August 11, 2017 in this Third Due Process Matter alleged that there was an agreement and contract entered between Charter and both of Student's Parents which Charter was refusing to sign and implement by payment of \$36,000 to an Educational Trust for Student's legitimate educational expenses (herein after "Alleged Contract"). This Complaint of August 11, 2017 alleges that if Charter is not able to perform, State is obligated to perform, by payment. In the alternative, the Complaint of August 11, 2017 alleges if Charter and State are not obligated to perform under the Alleged Contract, Charter (and if Charter is not able, State) is obligated to provide Student another form of compensatory education for the failure to provide Student a Free And Appropriate Education ("FAPE") arising from the following circumstances. On March 5, 2014 Student was inappropriately provided only 10

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<sup>2</sup> There were 2 prior due process complaints filed by Student against Charter which will be discussed elsewhere in this decision.

<sup>3</sup> The Panel consists of a Lawyer who serves as the Panel Chair, an educational professional and a lay person. The educational professional shortly after appointment and before any hearing or evidence and with notice to all parties and no objection was replaced a different educational panel member by the State due to the initial hearing officer's own personal reasons entirely unrelated to this matter or any of its participants.

hours a week of homeward bound instruction by Charter until Student's withdraw from the school in November 2014 because of Student's misbehaviors which manifested because of Charter's previous to March 5, 2014's provision and implementation of an inadequate Individualized Education Program ("IEP) and Behavior Intervention Plan ("BIP") for Student (These are hereinafter collectively referred to as "Core Allegations").

5. In this Third Due Process Matter, Student's claims the Alleged Contract arose as a result of a prior dispute. This prior dispute turns out was a Second Due Process Matter, between Student and Charter.
6. The underlying allegations in the Second Due Process were these same Core Allegations **plus** *additional allegations that Charter wrongfully included in Student's Educational Record records* (hereinafter these addition allegations italicized will be referred to as "Additional Records Claim"). The Second Due Process matter did not include State as a potentially liable party.
7. The First Due Process Matter filed between these parties like this Third Due Process Matter included merely the Core Allegations materially differed from this action merely in not alleging a contract was formed and breached and not including State as a potentially liable party.
8. On August 17, 2017. this Panel in this Third Due Process Matter issued an initial scheduling order and a teleconference took place on August 22, 2017.
9. At this teleconference, State took the position that it was Student's responsibility to serve the Charter. Charter through its Board Chair participated and indicated Charter had no assets or income. Since there were 2 Delaware entities (one a corporation and the other a LLC) containing the same first part of name as the party named in the initial complaint in this Third

Due Process matter, it was unclear as to which was Charter. Student was allowed limited discovery targeted towards determining which was the appropriate entity<sup>4</sup> and State was ordered to supply limited discovery on an expedited basis.

10. State on August 21, 2017 filed its First Motion to Dismiss, and a separate Motion objecting to any testimony by Student's counsel.
11. State on August 22, 2017 filed a Motion to Dismiss for Insufficiency of the Complaint.
12. On August 28, 2017, the Panel issued an Order that the Complaint was insufficient only as to failing to name the school where Student was then presently attending and noting that Student should serve the correct entity as to Charter as the correct entity had been learned. The matter was not dismissed, and Student was given until September 1, 2017 to file an Amended Complaint. A second teleconference was scheduled for September 6, 2017. Also, on August 28, 2017 Student's Counsel in response to the Motion objecting to her testifying indicated she would not be testifying, but that she would rely upon documents that did not run afoul of any ethical prohibition to an attorney testifying.
13. On August 31, 2017, Student filed the First Amended Complaint to this matter which in relevant part identified the school where Student was then attending and set forth the correct entity as Charter. These were the only significant changes from the First Complaint in this Third Due Process Matter.
14. A second teleconference took place on September 6, 2017 where in relevant part, State requested numbering on the First Amended Complaint and agreed to allow correction of a clerical sort of address mistake. This led to Student's filing of a Second Amended Complaint on September 11, 2017. As to State's Motion to Dismiss, this was deferred, and

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<sup>4</sup> With the purpose being so the appropriate entity be appropriately served so any ensuing decision in this Third Due Process Matter not be subject to a later Motion to Open or defense as to a lack of service

the Panel placed this in its September 7, 2017 order along with the reason for deferring and issued an order allowing discovery in the manner of interrogatories, document request and depositions. These were in addition to abilities to subpoena as set forth in the Delaware Administrative Code. The September 7, 2017 Order also gave a deadline to Amendments to the Complaint in this Third Due Process Matter of October 7, 2017. This was not to say that any amendment before then or objection thereto would not be heard, but that no amendments would be allowed after then as a hearing was being scheduled and at that hearing, this Panel wanted all possible allegations. Also, at this second teleconference, the decision was made to bifurcate the hearing with first day afforded to the contractual sort of claims and defenses set forth in State's Motion to Dismiss and the second and third days, if necessary, to deal with any claim for relief Petitioner's had from the Core Allegations.

15. On September 15, 2017 State filed a response to Student's Second Amended Complaint of September 11, 2017 and to a bulk of allegations denied the same for a lack of information and asserted amongst its affirmative defenses an untimeliness defense. Later via Motion to Dismiss, State added a laches defense.
16. After the trial of October 23, 2017, on October 25, 2017, the State asked to add a cross claim against Charter.
17. September 24, 2017, Charter throughs it Board Chair filed a Response to the Second Amended Complaint essentially indicating that it had heard of settlement negotiations but nothing of any alleged agreement until being asked to sign an agreement on May 8, 2017.
18. A prehearing conference took place on October 9, 2017 which resulted in an Prehearing Order which was amended on October 11, 2017 to correct a clerical mistake in the Order.

**19.** On October 12, 2017 The Panel requested whether Charter wanted to waive the resolution session as requested by Student in its second amended complaint of September 11, 2017 and answered by Charter without assertion of an objection to service on Charter. On October 13, 2017 indicated it agreed to the waiver of the resolution session and as a result the deadline to issue a decision 45 day therefrom started on **October 14, 2017 and ends on November 27, 2017 when a decision is due.**

20. On October 23, 2017 the first day of trial occurred. State submitted 10 exhibits which were duly considered and Student 8 exhibits which were duly considered. At trial, Charter Board Chair. Charter's Chairman of the Board testified, M.M. testified on behalf of the State, B.S the Student's Counsel's record custodian and Parent testified. **Neither Charter's Former counsel or Student's Counsel testified or were subpoenaed.**

21. While in the Findings of Facts session all the testimony and Exhibit as well as the Post Trial Submissions of Student and State were reviewed in arriving at the decision as well as the Findings of Facts, this decision does not reiterate all for the sake of making this a tad shorter. The parties were notified the decision would not need a second or third day of trials and this is that decision.

## I. ISSUES

The hearing on October 23, 2017 concerned the issues below:

1. Whether or not there is a binding settlement agreement between Student and Charter?

The answer to this is **No**.

2. Whether if there is a binding settlement agreement between Student and Charter that settlement agreement binds and obligates the State to pay any amounts due and unpaid?

The answer to this is **No** because there was no agreement.

3. Whether Student's complaint against State is timely under 20 U.S. C. §1415(f) (3) (c) or is barred by the equitable doctrine of laches as well as whether if barred there is a legal basis to extend these timelines?

The answer is Student's Complaint in this matter **is not timely under 20 U.S. C. §1415(f) (3) (c), or No and there is no basis to extend the deadline.**

4. Whether this Panel has subject matter jurisdiction to grant Student the relief it seeks from State?

The answer to this is **yes, there is subject matter jurisdiction.**

5. Whether the State's Motions to Dismiss, its Motion to Dismiss filed September 26, 2017 at 4:56 p.m., September 21, 2017 at 2:59 p.m. and August 21, 2017 at 4:24 p.m.. will be granted.

The answer to this is **yes but only as to the Complaint being untimely under 20 U.S. C. §1415(f) (3)(c).**

6. Whether Charter in its present condition and status defunct as a school triggers any of its obligations to transfer to the State under the IDEA as an SEA.

This is moot because Charter had no obligation and essentially nothing transferred to State.

There were 2 requirements to be met, Charter's inability due to being defunct which was found and an obligation, While Charter is defunct, and that condition has been met, there is no obligation, and nothing is transferred. The question of what sort of obligation purely contractual or whether the State should have a day 2 or 3 to the hearings because of the lack of notice did not have to be reached and was not.

7. In the event there is no agreement, but Charter (and or State's conduct) has led to the survival of the claim, but Charters status as not an ongoing viable entity, is the appropriate remedy that the state undertake the defense of the claim against Charter in days 2 and 3 of the hearing?

The answer to this is that **nothing that State or Charter did lead to the survival of the claim and the claim was untimely** and as such there was no need for day 2 or 3 of the hearing.

8. At the hearing, Student via counsel orally moved for the first time for a Default Judgement on the basis that Charter as a Corporation could not defend without counsel. Formerly, State in a Motion to Dismiss alleged the lack of counsel for Charter required Dismissal of State from these proceedings.

The Answer to this is a **Default Judgment is denied** and there is no Dismissal of State due to Charter's lack of counsel..

9. Whether to grant State's Crossclaim against Charter.

**This is moot** as there was no liability to transfer.

### III. FINDINGS OF FACT

1. Charter is a Delaware Corporation known as Charter School. Charter filed an Answer to the Second Amended Complaint in this Third Due Process Matter on September 24, 2017 (“Charter’s Answer”) via its last elected Board Chair, which Student’s counsel never requested be stricken. Rather, Student’s counsel argued that since Charter’s Answer as filed lacked any objection to service and there was no Objection to Service by Charter prior to this, service had been made.<sup>5</sup>
2. Charter has no assets and does have debts as well as these claims. <sup>6</sup>
3. Charters Board Chair, first learned of this alleged contractual obligation when it was sent the Agreement signed by both of Student’s Parents on May 8, 2017 at a time when Charter had not assets or future source of revenue and only Debts.
4. Prior to receiving this alleged contract with Parent’s request for execution, the only evidence presented at trial as to Charter’s actual knowledge as to this matter came from Charters Board Chair, testimony that at a prior Board meeting, before she/he became Chair, there was discussion that Charter was to pay up to a maximum of \$36,000 of Student’s educational expenses upon presentation by Student to Charter of bills, invoices or other documents showing costs for particular educational service or educational tools for this particular Student and during her/his time as Charter Board Chair, Student had presented no such documents.
5. Charter’s Former Attorney on January 6, 2016 sent Student’s Counsel a Draft Proposed Settlement Agreement to be signed by both Student’s Parents where in relevant part

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<sup>5</sup> The support for this is from Rule 12 set forth in the Federal Rules of Civil Procedure and its Delaware Equivalents for Delaware Chancery Court and Superior Court.

<sup>6</sup> TT, Charter Board Chair. 68:21-69:12 and 72:4, 72:23..

\$36,000 was to be paid in two \$18,000 installments into Educational Trust with the first installment due ten (10) days from execution of Agreement by Parents and the second \$18,000 installment due upon the earlier of the exhaustion of funds in the Educational Trust or July 1, 2017. The Trustee of the Educational Trust was Trustee in U.S. state and the funds in the educational trust were to be used for legitimate educational expenses of Student. Charter maintained the ability to contest any disbursement for such expenses via the Trustee's internal procedure or court. While the Trust was irrevocable, it terminated when Student died or there was an Order by Court of Competent Jurisdiction or at the latest when Student was 21. Any monies leftover at the termination of the Trust were to be returned to Charter.<sup>7</sup>

6. On January 28, 2016, Charter's Former Attorney in response to a request from Student Counsel's, sent another Draft of the Proposed Settlement Agreement with the only material change was that last possible date of the second and final \$18,000 installment was changed to July 1, 2016 instead of the earlier version where it was July 1, 2017.<sup>8</sup>
7. On January 28, 2016, Charter through its then attorney and agent, Charter's Former Attorney, confirmed that there was an "agreement in principle" and agreed the pending Due Process Matter (the Second Due Process Matter which had been filed December 1, 2015) should be dismissed without prejudice and both Charter's Former Attorney and Student's Counsel signed and submitted the Dismissal Without Prejudice set forth as State's Exhibit 6. Students Exhibit 1, 34-36.
8. Also on January 28, 2016 Student's then and present counsel indicated that Student was living with Parent. Student's Exhibit 1 at 27.

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<sup>7</sup> Student Exhibit 1 at p.5-14.

<sup>8</sup> Student's Exhibit 1 at p.17-25

9. On February 9, 2016, Charter's Former Attorney sent Student's Exhibit 1, 38-47, a proposed agreement, which was substantively identical to that which Charter's Former Attorney sent January 28, 2016 which led both parties to say there was an "agreement in principle" and a dismissal of the Second Due Process Matter<sup>9</sup> without prejudice. This withdraw/dismissal without prejudice allowed for refile of Student if made in a timely fashion. In the email attaching this document, Charter's Former Attorney and Agent if Student had changes to the Agreement it sent.
10. All the proposed agreements Charter's Former Attorney sent to Student's attorney mentioned in the prior factual findings required both parents to sign and were essentially general releases of all claims raised on which could be raised by either Mother and or Father including those concerning the Student's Educational Records, the Additional Records Claim. The proposed agreements created no obligation for Charter or anybody else to do anything about Student's Educational Records in their then present state<sup>10</sup>, but rather if signed entirely released from Charter from all claims for all time from Mother and Father, including this
11. The reason Mother/Father presented as to why she/he did not sign any of the Proposed Agreements referenced in the prior numbered factual findings was that Mother/Father wanted to prevent Mother/Father from accessing funds and because Mother/Father had an issue with the Documents in Student's Educational Record. That is Mother/Father did not wish to waive the Additional Records Claim at that time. Since none of these were obligations in the agreement and these are at a time when apparently Student was living

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<sup>9</sup> The Second Due Process Matter.

<sup>10</sup> or for Charter to allow Mother/Father to submit other records which was eventually done.

with Mother/Father, there was not acceptance of all the meaningful terms by Mother/Father and not a meeting of the minds during this period.<sup>11</sup>

12. The next time we see emails from Charter's Former Attorney is a July 11, 2016 response where Charter's Former Attorney sends a draft proposed agreement in response to a letter of July 5, 2016 (which is not attached by Student's counsel). However, in the draft proposed agreement sent next by Charter in response to the unknown letter by Student's counsel of July 5, 2016, the second installment became due not on July 2016 (which would have been overdue at that juncture) as initially insisted on by Student but changed back to July 2017 (as initially proposed by Charter's Former Attorney). This shows two things both parents signature remained meaningful to Charter and there was no agreement from the January and February communications and one reason was that Parent purposely would not sign.
13. Student until July 5, 2016 rejected Charter's offers in January and February 2016 by not accepting them in a reasonable amount of time.
14. At some point from at least latter part of January 2016, Student was living with Mother/Father (Student Exhibit "1"). This would mean she/he was not traveling out of country as later proposed by Mother/Father as a justification for the lateness of providing an agreement signed by both Parents. No reason was offered as to why Mother/Father did not sign any of the January or February versions nor is there any evidence that they were sent to Mother/Father prior to July 2016.
15. What Charter sent over on July 13, 2017 as a proposed agreement seems not to have anything different other than an extension of one (1) year for final payment to 2017 and

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<sup>11</sup> The same can be said as to Mother/Father.

was an offer. Mother/Father did not sign this until August 28, 2016 and offered no explanation as to why she/he did not sign this earlier than her/his first set of reasons set forth in paragraph 11. Mother/Father testified that at some point in the summer, 2016, she/he finally got Charter's permission to add certain documents Mother/Father provided to Student's Educational Records. In that Mother/Father did not sign these until August 28, 2016, it is found that until August 28, 2016 she/he was not willing to enter a Contract by signing. Mother/Father knew her/his signature was a condition that had to be fulfilled before there was an Contract. Since both Mother and Father's signature were required in the different proposed agreement sent July 13, 2017, Mother/Father was likewise aware that Mother's/Father's signature was necessary to form a Contract. If the agreement could be held up by Mother/Father refusing to sign, it similarly could be held up by a similar refusal by Mother/Father.

16. Mother/Father claims that Mother/Father lost one version of the offer sent in July 2016 and then would not meet before she/he went out of the country to sign a replacement version which Mother/Father offered to take down to her/him when Mother/Father was in the U.S. These are not sufficient to indicate an acceptance by Mother/Father.
17. On September 19, 2016 Student apparently sent back a version of the Offer signed by Mother/Father, but not Mother/Father. Charter justifiably insisted that the Agreement be signed by both Parents and this is understood in the context that requiring both parents signature removed the possibility of the other parent making an additional claim. Student's Exhibit "1", p.62. This indicates that as of September 2016 that which Charter formerly sent to Student via counsel was not accepted due to a material omission, the non-signature of Mother/Father and Student through counsel was asking for Charter to accept an

Agreement with Mother's/Father's signature only (a counter-offer). However, when Charter indicated on September 22, 2016 reiterated the material condition of both parents' signature as a condition to forming a contract, this was a rejection of the Counter-offer.

18. Mother/Father testified that Mother/Father during this period Mother/Father had indicated Mother/Father at some juncture would be travelling out of the country and would not be available to sign until she/he came back. This in no way precluded the re-mailing of the proposed agreement prior thereto with a cover letter. Rather Mother or Father wanted the signature to be obtained at a live meeting.
19. Mother/Father did not sign Charter's July Offer until March 17, 2017. Mother/Father re-executed her/his signature this date so there was one agreement with all signature presumably because Mother/Father never produced to Mother/Father or her/his counsel the original with Mother's/Father's August 2016 signature.
20. Charter, at trial, credibly testified that the reason it did not sign the July 2016 offer with signatures of Mother and Father dated March 17, 2017 was that Charter simply did not have the monies to pay the underlying obligations.<sup>12</sup>
21. Charter through its Board Director learned of its inability to renew its Charter and be an ongoing entity at the end of September 2016. Charter would close and be defunct at the end of the school year as of May 25, 2017.<sup>13</sup>
22. Charter through Charter Board Chair did not inform the State of any obligation to Student despite having to establish to State in or around September 2016 that it could continue to

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<sup>12</sup> Charter may have been asked to sign this Agreement by Charter's Former Senior Attorney. However, this is not the same as the admission of a contract as Charter's Former Senior Attorney was not the attorney who negotiated the agreement with Student's counsel and there is no way of knowing his reason for saying the same or what whether he was considering at that juncture the effect of the passage of time coupled with the timeliness requirements of the due process complaints..

<sup>13</sup> TT, Charter Board Chair at 45:6

the end of the School Year May 25, 2017. Charter at this point was under the impression to the extent there was request for educational services by Student it would receive invoice or documents describing them from Student directly. It did not receive anything concerning this until May 8, 2016 less than 3 weeks before it would close its doors,

23. Charter in or around October 2016 announced to Delaware paper that it was going out of business at the end of the 2016-2017 school year. Charter indicated that had it known of a firm obligation to pay the \$36,000 at this time it could have paid the same, but it may have meant that it would have closed sooner than the end of the school year.
24. Student's Mother/Father testified that she/he did not know Charter was closing.
25. State only is placed on notice that the Second Due Process Matter was dismissed without prejudice in January 2016. It neither heard from Charter or from Student as to any continuing communications set forth previously and knew of no potential dispute until shortly before this Third Due Process Matter was filed.
26. Student contends the Agreement arises in relation to the Second Due Process Matter which is Exhibit 5 of the State's Exhibits and was filed on December 2, 2015.
27. A comparison of the Student's first and second complaint reveals that the only material difference in the second complaint was including Mother's/Father's objection to records in Student's educational file. Compare State's Exhibit 2 (1st<sup>st</sup> Complaint) and State's Exhibit "5" Complaint in 2d Due Process matter. In this Complaint in the Second Due Process Matter it is averred that the Known or Should Have Known (KOSHK) Date for the Complaint was April 14, 2014. Accordingly, this KOSHK date is used in this Third Due Process Matter.

28. Nothing prevent Student from informing State what was occurring concerning the proposed agreement when it was occurring between Charter and Student.
29. Charter, whether the date used is March 27, 2017 when Student's counsel sent a signed Agreement or when Charter's Director saw it on May 8, 2017, had no assets having conveyed all of them in lieu of foreclosure. Charter had debts besides this litigation. Charter had no streams of income from which it could pay any debts let alone alleged in this matter.
30. There was no available insurance coverage shown at these proceedings despite full opportunities given to all the parties for discovery and subpoena.
31. Student filed the Third Due Process Complaint in this matter in August 11, 2017 and all the amendment in this Third Due Process Matter are substantially the same facts as those averred August 11, 2017 Complaint and relate back to the August 11, 2017 complaint. The timeliness defense is measured against the date of initial a filing in this Third Due Process Matter. August 11, 2017.
32. Student filed a First Due process complaint against Charter on August 19, 2014 and a second due process complaint against Charter on December 1, 2015. The first and second complaints were withdrawn or dismissed by Student with the dismissal of the second complaint being without prejudice.

## II. CONCLUSIONS OF LAW

Based upon all evidence submitted by the parties, both documents and testimony, a chance to review the credibility of persons testifying, arguments by the Parties whether in Motions or Closings Submissions or orally at hearing as well as the legal research done by the Panel, the Panel makes the following Conclusions of Law.

1. Charter as the Local Education Agency (“LEA”) and State, as the State Education Agency (“SEA”) as the “public agencies” in this Due Process Proceeding bear both the burden of proof and persuasion. 14 Del Admin Code § 926.11.10. State and Charter have met this burden.
2. While Charter did not have counsel at the October 23, 2017 hearing and Charter as a corporation does require counsel, Student’s oral motion for a Default Judgment on October 23, 2017 is denied.
3. This Panel has jurisdiction to determine whether there is an Agreement in this Matter. Charlene R. v. Solomon Charter School, 63 F. Supp. 3d 510 (E. D. Pa 2014).
4. This Panel has the jurisdiction to determine whether underlying facts such as Charter’s lack of funds and resources to perform its FAPE obligations gives rise to transfer of Charter’s Obligations to State **without a separate prior insolvency proceeding in another court.** To hold that another proceeding in a court, would mean the Secretary of the Date of Delaware’s Department of Education would have no ability to require a decision be reached within 45 days (of the lapse or waiver of the resolution session) as required by 14 Del Admin Code § 926.15.1. The Secretary has no ability to ensure a timely decision. Rather the entire statutory scheme is created as purposely self-contained,

so relief is available quickly and the Secretary of Education can monitor their timeliness by obligating the Hearing Officer appointed,

5. There was no contract reached in this case between Charter and Student as the record in its totality shows that there was no meeting of the minds. Signatures by both parents were contemplated as necessary before the formation of a contract. While there was not Board Approval, the lack thereof did not affect this decision due the conduct of the Board in similar matters,
6. What the record shows is Charter extended offers to resolve this matter which could be accepted with return of a signed document, signed by both Mother and Father, within a reasonable amount of time.
7. The Offer varied at times as to when the second payment had to be made and this was material difference.
8. The most recent version of the offer first was extended by Charter in July 2016. Acceptance by both Mother **and** Father signing was not done until March 17, 2017 and not sent before March 27, 2017 and not received from anyone from Charter until May 8, 2017. The circumstances from March 17, 2016 forward was that Charter could not pay the \$36,000 as it lacked funds and Charter was within its rights to refuse to sign the document as the offer was not returned within a reasonable amount of time. What is a reasonable amount of time is determined by the circumstance when the Offer is accepted by the signatures of Mother/Father and the non-party Mother/Father. On March 17, 2017(or March 27, 2017 or May 8, 2017) Charter was at the end of its existence lacking resource to fulfil its obligations under the document so it had no choice, but to reject. The

amount of time that it took for Parent's acceptance which required both signature was unreasonable.

9. Student's alternative argument that Charter is required to provide Student with compensatory education as Charter on about March 5, 2014 violated Student's right to a Free Appropriate Public Education ("FAPE") by placing Student on 10 hours weekly homeward bound instruction for Student's misbehaviors that occurred as a manifestation Charter's failures to provide Student both an appropriate Individualized Education Program ("IEP") and appropriate Behavioral Intervention Plan, is not timely under 20 U.S.C. § 1415(f)(3) (C) and 14 DE Admin Code § 926.11.8.
10. Mother/Father and Student knew or should have known no later than April 14, 2014 of all the grounds for this alternative request for compensatory education. The time to file under 20 U.S.C. § 1415(f)(3) (C) and 14 DE Admin Code § 926.11.8. is 2 years from April 14, 2014 and expired on April 14, 2016. This deadline can be extended if Charter prevented Mother/Father by specific misrepresentation that it had resolved the matter or had not provided Mother/Father with information Charter was required to provide. There were no such specific misrepresentations. Rather Charter was clear. Charter wanted both Mother and Father at all times to sign a waiver for all claims made or which could be made, even though Mother/Father was not a party to any Due Process Matter (the first or second or this third one). That is Charter was unequivocally requiring the signature on a general release by both parents as a condition to be met before a contract was formed.
11. Since Student contends State stands in the place of Charter as Charter is defunct and Charter has no liability similarly State has no liability. While the contention that Charter

is Defunct is correct and liability to provide FAPE, would pass through to State if there was liability. There is no liability and the lack thereof similarly passes through.

12. Student did not file this matter in bad faith and its filing was not frivolous. They may be wrong, but this concerns a complicated area and they are innocently incorrect.

### III.DISCUSSION

#### A. STUDENT'S MOTION FOR DEFAULT JUDGMENT AGAINST CHARTER FOR NOT HAVING AN ATTORNEY IS DENIED

This brings us to an argument that since Charter did not have counsel at the Hearing that Petitioners Motion for a Default should be issued. While a corporation needs counsel to proceed in Delaware, Charter, as a corporation, filed an Answer on September 24, 2017 for which Student's counsel formerly relied as proof of service of the Complaint. Student counsel's 9/28 /17 e-mail report in relevant part states: "as a preliminary matter, [ name redacted], filed an answer to the complaint on September 24, 2017, in so doing a defense of insufficient service of process has been waived. Del. Chancery Court Rule 12(h); Del. Superior Court Rule 12(h). This assertion that an Answer is filed and using the same to establish service, directly contradicts Student's argument at the hearing that a Default should issue.

As to State's argument that Charter's lack of counsel means it should be dismissed, the parties State and Charter are separate and the lack of representation of Charter does not impede the State's defense of its claims. Moreover, State provided no authority to support this argument. So, State's position cannot be accepted. Third, Charter did send its last elected Board Director to the hearing. So, it cannot be said that they made no effort.

It is well established that a judgment on issues after evidence presentation is preferable to a Default Judgment. In this case, the unique balance of the equities favors not issuing a Default Judgment and reaching the issues. *Poulis v. State Farm*, 747 F. 2d 863 (3<sup>rd</sup> Cir. 1984) set forth six factors to consider as to whether or not to issue a default judgement.

The first factor under *Poullis* is the extent of the parties' personal responsibility. As the only evidence was that Charter did not have its Charter renewed due to not attracting enough Student's leading to financial unsustainability, there is simply not enough evidence presented to give this factor much weight. Charters present lack of funds as testified was found credible.

The second factor in *Poullis* is prejudice to the adversary. There was no prejudice to Student. Student's Counsel had the ability to conduct discovery on Charter, Charter though Charter Board Chair participated in the entire day hearing submitting to questioning by Student's counsel, the State's Counsel and the Panel. This favors not issuing a default.

The third factor in *Poullis* is a history of dilatoriness. There is no evidence that the lack of counsel delayed this case or of any dilatoriness. This favors not granting a default.

The fourth factor in *Poullis* is whether the conduct was willful or in bad faith. There is no evidence of bad faith or willfulness just a lack of funds. This favors not granting a default.

The fifth factor in *Poullis* is the lack of appropriate other sanctions. In the proceedings prior to the hearing discovery was allowed to all parties this was done so that this matter could proceed on the facts.

The sixth factor in *Poullis* is the relative merit of the claims. The lack of counsel of Charter did not seem to effect Student at the hearing. This favors not granting a default.

The vast majority of the factors above in *Poullis* favor not issuing a default judgment against Charter in favor of Student so one will not be issued.

B. THE STATE'S MOTION TO DISMISS EXCEPT AS TO UNTIMELINESS UNDER THE IDEA AND LACHES ARE DENIED.

The States Motion to Dismiss filed September 26, 2017 at 4:56 p.m., September 21, 2017 at 2:59 p.m. and August 21, 2017 at 4:24 p.m. are denied except as to untimeliness which will be discussed otherwise in this order. While I will not relay verbatim the Motions, they boil down to the following.

The first argument the State made in its August 21, 2017 Motion to Dismiss was that since 34 CFR § 300.51(d) states that settlement agreements between must be enforceable in “any state court, federal court or by the SEA **if the state has other mechanisms procedures that permit parties to seek enforcement resolution agreements pursuant ....**” and this State had no such mechanisms or procedures to permit enforcement of resolution agreements, there is no ability to enforce this Agreement under 34 CFR § 300.51(d). This argument fails as it ignores the existence of this very due process procedure as a mechanism to enforce a settlement agreement. This panel is appointed to hear an IDEA complaint with the first letter of appointment on August 15, 2017 and Dr. Janice Willis was appointed as a replacement panel member on August 24, 2017. The appointment letter from which the jurisdiction of this Panel originates does not carve out an exception for matters which concern resolution agreements alleged or otherwise provided the matter comes under the IDEA. This matter is not a purely private contractual matter. Rather the Student alleges in its complaint that there was a contract resolving a prior IDEA matter. As the court in Charlene R. v. Solomon Charter School, 63 F. Supp. 3d 510 (E.D. Pa. 2014), had jurisdiction to enforce a contract formed in the resolution of a due process/ IDEA matter, this tribunal has the jurisdiction to determine whether indeed a contract was formed or not in the alleged resolution of a due process matter as well as whether to enforce the same. Charlene R. v. Solomon Charter School, 63 F. Supp. 3d 510 (E.D. Pa. 2014)

While this case differs from Charlene R. in that ultimately no contract was formed from the effect of the delay in signatures, this distinction makes no difference to the State's argument that this tribunal can never enforce a contract. As a predicate to enforcing a contract, any tribunal must first determine to determine whether or not a contract is formed and if this tribunal under the IDEA has the ability to enforce a contract under Charlene R. supra by analogy, it follows that such a tribunal has the jurisdiction to determine if indeed a contract was formed from the resolution of a due process matter. Secondly, the State presented a lack of sufficient information at the hearing to determine whether a different administrative procedure in the Department of Education. However, that also has nothing to do with whether or not this Due Process matter can be a remedy. It is.

The second argument the State made in its August 21, 2017 Motion to Dismiss was that it had no knowledge of the Agreement and was not a beneficiary of the alleged Agreement and as such bore no potential liability as neither a party to a contract or a third-party beneficiary of a contract. While it is true that State did not know of a contract and is not a third-party beneficiary, the defect in this argument is the State's duties under the IDEA as an SEA are not just limited by contract law as set forth in Charlene R. v. Solomon Charter School, 63 F. Supp. 3d 510 (E. D. Pa 2014) where it indicates while resolution agreements will generally be honored insofar as consistent with the policy goal of the IDEA to provide FAPE to children. Rather, State's potential responsibility for such contract arises from its role as an SEA under the IDEA and the reality that when a Charter is insolvent the risk transfers to the SEA and not Student. That is IDEA "trumps" a defense that the State never has any responsibility to Student of an insolvent defunct Charter under a private contract. That is there are instances when a private contract will be enforceable in Due process proceedings on State. However, this is not one of those instances.

The third argument was the State made in its August 21, 2017 Motion to Dismiss was State was not named as a party to this litigation. The Panel reads the 4 corners of the Second Amended Complaint as clearly indicating to State it was a party to this litigation. Moreover, this was a topic of the initial teleconference in these proceedings and State clearly should have known it was being sought after as potentially liable from the inception of these matters.

The fourth argument State made in its August 21, 2017 Motion to Dismiss was that it was not shown that Charter is unwilling or unable to honor its obligations. This is denied as unsupported by the evidence. At the hearing, Charter's Board Chair credibly testified that Charter had not assets or prospects for future assets potential income or otherwise from which it could pay any liability at all to Student.

The fifth argument State made in its August 21, 2017 Motion to Dismiss was that it had no knowledge of the facts of this case as being a nonparticipant. This argument was not accepted as this tribunal on September 7, 2017 permitted State to do discovery sufficient to place it in a position to defend itself. Despite this State on or about October 12, 2017 consented to Student not providing all exhibits as to Core Allegations, the noncontractual claims, 5 days prior to the first day of hearing, October 23, 2017.. Further State had the ability to subpoena as did the other parties. The fault for any lack of knowledge as of October 23, 2017 the date of trial falls on State.

The sixth argument State made in its August 21, 2017 Motion to Dismiss that the Complaint was time barred under the IDEA was accepted. However, that required factual exploration at a hearing as to whether the omission fit an exception to the untimeliness arguments under 20 U.S.C. § 1415 and 14 DE Admin. Code 926.7.2 and this will be discussed elsewhere in this opinion.

In its second Motion to Dismiss filed September 21, 2017 State's first argument was that State as the approving authority of the Charter under 14 Del. C. § 504(d) had "no liability for the actions or inactions of a charter school". In Charlene R. v. Solomon Charter School, 63 F. Supp. 3d 510 (E.D. Pa. 2014), that court denied o an analogous argument made under 24 P.S. §17-1714-A(c) noting that a state was barred from creating statutory immunity for itself under 20 U.S.C. § 1403. For this same reason, this argument is denied. Also, this State's acceptance of federal funds acts a waiver of any sovereign immunity argument. A.W. v. Jersey City Public Schools, 341 F. 3d 234, 254 ( 3d Cir. 2003). Moreover, this argument conflict with congressional intent in enacting the IDEA Gadsby v. Grasmick,. 109 F. 3d 940, 943(4<sup>th</sup> Cir. 1997). 14 Del. §504(d) must be construed as compliant with the IDEA and while a Charter's contract for example to get trash removal may lead to no liability of the State, the obligation to provide FAPE to a Student is a different matter as it flows from a Student constitutional rights under the United States and is covered by the IDEA.

The next new argument made by the State is that Charters as a corporation's filing of Dissolution paper's does not discharge it of obligations under 8 Del. C, § 278. While State is correct, Charter's obligations survive the filing of the certificate of dissolution, this does not change the reality that State has not shown Charter has assets or prospects of income or other source to cover any judgment such as actual insurance coverage to alleviate State of any potential responsibilities under the IDEA and indeed the only evidence available is that Charter has no such asset, income or ability to satisfy a judgment. This argument is not a basis for dismissal.

The remainder of the arguments is State's Second Motion to Dismiss were addressed previously.

The third State Motion to Dismiss filed in September 26, 2017 was essentially that the Panel lacked subject matter jurisdiction, and this was not waived by State's failure to assert the same. State is correct that a failure to assert subject matter jurisdiction does not waive subject matter jurisdiction. However, in the circumstances of this case there was subject matter jurisdiction for the inquiry made in this case for the reasons stated concerning the denial of the First Motion of Dismiss.

The next allegation was that somehow this tribunal was impartial in making it a deadline for Student to amend its complaint and asking where in its September 11, 2017 second amended complaint if at all Student alleged a quasi-contract or promissory estoppel argument. As a preliminary matter partiality if established (which it was not) is not a basis for dismissal. The remedy is the replacement of the hearing officer. Second, the Chair making the statement was making sure it had not overlooked something in a 10-page second amended complaint that contained 38 paragraphs as the drafter of the same has a "second set of eyes"<sup>14</sup> and familiarity with the second amended complaint. Third, Student never amended its complaint after the Second Amended Complaint nor invited the Panel attention to where in its complaint it alleged quasi contract or promissory estoppel. So, the argument is moot. Third, the Panel Chair was not partial. The purpose in creating the deadline to amend a complaint was to give Student one full chance to explore any violation of the IDEA in this Third Due Process Action. Likewise, the Panel Chair desired that all claims be made so all administrative remedies could be explored with the idea that all parties including Student, the State and Charter have some finality. Now ultimately Student had counsel and chose not to make a quasi-contract or promissory estoppel claim in this Third Due Process action. State had counsel and chose not to insist that Student

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provide records as to the 2013 -2014 underlying alleged FAPE violations 5 days prior to the first day of hearing. Student stridently objected to the Panel Chair's prior Order to supply custody order. The common element in all of these as well as the objection at trial made by State and Student at trial which were denied is the Panel s desire to determine what occurred in these proceedings for purposes of litigation economy and finality to the parties.

While lawyers disagreed with the above, State and Student both at times, that disagreement had nothing to do with the decision reached in this case. These were all taken as counsel doing what they thought was best for their client. There was neither subjective bias, objective bias nor any appearance of impropriety. There was no basis for recuse and nor any effect to the Panel from State making this Argument (or on a different note Student counsel objection to the supply of custody information). At all times, pretrial and trial, the parties were heard.

### C. THERE IS NO BINDING SETTLEMENT AGREEMENT BETWEEN STUDENT AND CHARTER

The core issue is when Charter was presented an agreement signed by both parents on or about March 27, 2017 or May 8, 2017 or March 17, 2017 was Charter within its rights to not sign the same or make payment. The answer is Charter did not breach a contract in refusing to sign or make payment as there was no binding contract.

As a preliminary matter, this hearing lacked the testimony of either counsel who was directly involved in the negotiations despite full opportunity to all parties<sup>15</sup>. As Student's own counsel could have had a different counsel (without the ethical issue) try this matter, she could have testified. Likewise, all parties could have subpoenaed Charter's Former Attorney or Charter's Former Senior Attorney. State could have. Student could have. They did not. So, while the record relied upon lacks this testimony, that is not a deficiency in this administrative remedy (or its fullness) but a function of how the parties chose to conduct this case.

Student argues that a contract was formed as its attorneys agreed on all essential terms and that the same was not dependent on formal execution by the requested parties. As a general matter contracts can be formed that are not dependent on execution. However, this Panel finds that the record as presented by Student including the e-mails and Exhibits (despite objection by State which is overruled) combined with the testimony, including Mother's/Father's, does not support this alleged contract could be formed without formal signatures. Rather the evidence taken in its entirety shows that at all times the Charter required signature of both parents before there was a binding contract and Mother/Father knew this and acted upon this in initially

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<sup>15</sup> Any party could have been subpoenaed and neither of the attorneys who allegedly part of the negotiations testified and while obviously this is a deficit in the record the Panel had from which the Panel had to make its decision it is one of which the parties were fully made aware of prior to trial and to the extent any party in a later review requests supplementation of the record,, the reviewing court should be made aware of this.

withholding her/his signature What Charter sent was a mere offer that had to be accepted in a reasonable time and was not accepted in a reasonable amount of time.

First, there is Mother's/Father's testimony that she/he would not sign the Agreement presented in January and February 2016 due to issues with educational records of Student as well as the possibility of Mother's/Father's access to these funds<sup>16</sup>. In that any deletion of records is nowhere mentioned in the documents which Student presents as a contract, and those documents are a general waiver of all actions for all time, Mother/Father delay is understood as that she/he was waiting to sign and purposely not signing during this time span until August 28, 2016 as she/he was seeking to amend Students Educational Records as well as not wanting Mother/Father to have access to these funds.

Second, there is the requirement that Mother/Father sign the alleged settlement document which is a general waiver for both parents despite Mother's/Father's status as a non-party in the Second Due Process Matter. As Mother/Father only not Mother/Father brought the Complaint in the Second Due Process Matter if the agreement was complete upon Mother's/Father's signature only Mother/Father could have insisted a stipulation be done that way and if Charter declined could have went to Trial. Mother/Father did not and any request for the same is entirely absent in the record from any of the versions of the proposed agreement and will not be inserted now, Moreover Mother/Father could have had an agreement read into the record by counsel as a part of the order or had attorneys only sign. But that was not what was required. Rather the parties chose to have both parents sign a full and all-encompassing general release, rather than a specific release even though Mother/Father was not a party to the underlying Second Due Process Matter

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<sup>16</sup> Mother/Father position as to Mother's/Father's access seems unreasonable in that the Agreement indicated funds could only be used for Student's legitimate educational expenses. However, this has nothing to do with Mother/Father expression that this was why Agreement were not signed at this juncture.

and was not represented by Mother's/Father's counsel. This is understood in the context of the interest Charter has in avoiding another hearing under any circumstance including from Mother/Father filing a new due process matter due to a change in custody as her/his child then lived with her/him. It is also noted as Parent/ Student's attorney only Counsel lacks the same agency relationship with Mother/Father that she had with Mother/Father. She was not Mother's/Father's attorney.

Third, there is the fact that the parties chose to dismiss their Second Due Process Complaint without prejudice rather than with prejudice. This left Mother/Father at that time the free to timely bring another action. A dismissal with prejudice on the other hand is more consistent with the notion of final contractual settlement.

Fourth, there is the lack in the record of Mother's/Father's request for legitimate educational expenses during 2016. That bespeaks that Mother/Father knew these could not be requested until there was a signature of both her/his and mother/father on a general release.

Fifth, there is the contrast from the language in the alleged agreement which is silent as to the removal of any educational records from Student's educational file coupled with Mother's/Father's testimony that she/he refused to sign the agreement as she/he was waiting for that to occur. Mother's/Father's refusal to sign indicates the removal of records was material and this suggests that the documents tendered do not discuss all that was meaningful terms to Mother/Father.

Sixth, there is the matter it appears that some communications are missing in the e-mail submitted by Student. For example, p.53, Student's Exhibit 1, an e-mail dated refers to a letter

from Parent/Student's Attorney. Yet no letter is presented as evidence and it is noted that at this juncture all payments would have been overdue under the documents.

Seventh, there is State's argument that a written signed version is required by the Code. While the same may not be required as the agreement was not the result of a resolution session or mediation, the requirement of both parents' signatures is consistent with the course of dealings between the parties as it appears in the record. Student was told by Charter that when it submitted the agreement only signed by Mother/Father, the same was deficient as it required Mother's/Father's signature. Student did not bring an action at that juncture, did not request compensation for services but sought Mother's/Father's signature which supports they felt the same was a part of the agreement.

Eighth, there is the history of the other due process matters concerning the same matters and the same parties. Mother/Father is charged with knowing that she/he had a deadline if the resolution fell through and knew the same was April 14, 2016 and hence the need for a full and accurate rendition of all terms of resolution with all signatures. Charter wanted closure and the definiteness provided by a signed document with all terms including who held the \$36,000 provided this closure. The alleged agreement was borne of the alleged resolution of Mother's/Father's Second Due Process Matter having withdrawn first due process matter. The only material difference between the Complaints in the First and Second Due Process matters was the inclusion in the Second but not the first of allegations of the wrongful inclusion of document in Student's educational records relating to Student's additional records claim. Mother/Father via her/his agent and attorney in the Second Due Process Matter admitted the KOSHK date was April 14, 2014. See State Exhibit 5 page 5.4, paragraph 3. This would make the deadline for third proceeding since the matters were withdrawn without prejudice April 14,

2016. However, this makes the requirement to button this down with signatures of both parents sooner not later and the reasonableness of Charter's Director refusal to sign on May 8, 2016 all the more reasonable, not less so.

In sum, the offers exchanged by Charter combined with the record show that at all times both parents' signatures on a general release were required. This were more than a mere formality as this was the 2d due process complaint and an LEA has a legitimate interest in protecting itself from the cost of future litigation. Rather the aspect of requiring signatures was an expressed material condition understood by all parties.

What occurred is on January 28, 2016 Charter's counsel sent Student's Counsel an offer to settle which to be accepted had to be signed by both parents and returned. final payment on this offer was due July 1, 2016. This offer was never accepted. It was never signed by both parents and returned. It never became a contract. Rather the offer lapsed by operation of law with the expiration of time for the final payment, July 1, 2016.

Restatement of the Law, Second. American Law Institute, § 41 titled" Lapse of Time" says:

- (1) An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.
- (2) What is a reasonable time is a question of fact, depending on all circumstances existing when the offer and attempted acceptance are made
- (3) Unless otherwise indicated by the language or the circumstances, and subject to the rule stated in in § 49, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day in which the offer is received.

Applying the above to the January 28, 2016 offer remade on February 9, 2016 by Charter's counsel which had to be signed by both parents, this had to be accepted in a reasonable amount of time and after the final payment was due is simply too long of a duration to be reasonable as the accepting party would be in breach at acceptance and final payment would be due before the first payment.

On July 13, 2016, in response to a query Charter's counsel sent out another offer which differed in that the final payment was not due until July 1, 2017. Again, though to accept this Charter had to receive a signed version from both parents (see Student's Exhibit 1 p. 61, signature lines for both parents) in a reasonable amount of time. What was a reasonable amount of time in this juncture. Under the circumstance, a month is reasonable. What is reasonable is matter of the circumstances. In this case, Student has deadlines under the IDEA to pursue their underlying complaint in Student's Second Due Process Complaint, Since the Second Due Process complaint contains a request to remove information in Student's educational Record that it is found Mother/Father knew of or should have known of this as of April 14, 2014, this would mean that Student had to bring any action premised on wrongfully including these records no later than April 14, 2016. Part of the circumstances from which the reasonableness of the lapse of time of any acceptance is measured is the untimeliness of a new action on the Core Allegations.

This brings us as to September 22, 2016 email by Charter where they indicate that Mother's/Father's signature alone is insufficient and request of Mother's/Father's as well. While this seems a gratuitous extension of time for Student to get them Mother's/Father's signature, even if arguably it acts as an extension, it too had to be accepted in a reasonable amount of time.

The record shows the first time an agreement signed by both parents was sent to Charter

was March 27, 2017.<sup>17</sup> The question then becomes on March 27, 2017 or March 17, 2017

had Student's right of acceptance terminated as an unreasonable amount of time under all the circumstances existing.

The answer is that Student's power of acceptance had terminated by March 17 or 27, 2017. By

then Charter had already determined it would be out of business at the end of the school year

May 25, 2017. In March 2017 there was no meaningful difference between Charter's

Financial when its Board Chair ultimately first saw the Agreement. Charter was broke, it had not

renewed its Charter and made a very public announcement in the papers that it was closing its

doors over six (6) months earlier in October of 2016. It had no funds. It had drastically changed

the composition of its Board. This is even accepting Mother's/Father's testimony that

Mother/Father was awaiting her/his return from being out of the country, is no reasonable excuse

First Mother/Father was in the U.S. when she/he said this. Second the fact that Mother/Father

was out of the country does not preclude her/his signature. At most it

means it is reasonable to allow a couple of months to allow Mother/Father to return or to allow

mailed signatures accomplished. Here under the best scenario painted by Mother/Father, the

lapse of time from the time from Charter sent its September 22, 2016 e-mails until both parties

signed is six (6) months.

Indeed, had both parents signed and return to Charter and accepted this offer and sent

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<sup>17</sup> As consistently stated previous whether you measure the time period as ending March 17, 2017, March 27, 2017 or May 8, 2017, any of them is unreasonably too long.

Charter in September 2016, the evidence is that Charter would have paid it. The testimony as to Charter's Board Chair at the October 23, 2017 hearing is found credible. Charter may have closed earlier than May 2017, but the amount would have been paid as funds at that time existed to do so. They did not in March or May of 2017.

What occurred is Charter's finances declined to the extent they could not be an ongoing entity with it not getting enough Students in its census of September 30, 2016. Shortly thereafter, its revenues from State and private dwindled to the extent that towards the end of October 2016 it knew it could not renew its Charter and made a public announcement. Now while Mother/Father indicates she/he did not know of this, any wait to accept any offer from any entity has to be reasonable and 6 months is too long. That is Charter was not required to execute the contract on March 17 or March 27, 2017 as it was not when its chair testified she/he first saw it on May 8, 2017.

D. STATE IS NOT OBLIGATED TO HONOR THE SETTLEMENT AGREEMENT  
SIGNED BY STUDENT'S PARENTS

As there was no binding agreement, on Charter the fact that Charter has no assets or income sources imposes no liability on the State.

E. STUDENT'S 3<sup>RD</sup> DUE PROCESS COMPLAINT IS NOT TIMELY AGAINST  
CHARTER OR STATE.

Under the IDEA and specifically, §1415 (f)(3)(c), Student's Mother (and or Father) had 2 years from the date they knew or should have known of the Charter's violation of FAPE to bring an action. G.L. v. Ligonier Valley School District Authority, 801 F. 3d 601 (3d Cir. 2015).

This action was filed on August 11, 2017 and in paragraphs 3 through 7 of the Second Amended Complaint Filed September 11, 2017, alleged that Charter had failed to provide FAPE to Student to such a degree that the omissions manifested in misbehaviors of Student as a result of her/his educational disabilities that qualified her/him for IEP in such a manner the Charter, compounded former errors and placed the Student on 10 hours weekly of homeward bound instruction as of March 5. 2014. The Mother/Father withdrew student from school due to the significance of Charter's failure to provide FAPE on November 2014, Student contends that Charter and Student reached a settlement which formed a contract and Charter cannot honor as Charter is defunct and State is bound for this Charter to the extent Charter lacks assets and income to pay for the Contract. If the contractual remedy is not granted, the alternative, Student requests compensatory education for Student from Charter

and State due to Charter's status as closed with no assets or ability to provide educational services.

A side by side review of the complaint in the three Due Process Matters filed between the parties shows they all discuss the same underlying allegations, with the second including additional allegations as to the wrongful inclusion in Student's educational record of documents relating to Student's additional records claim offense and stating the it knew or should have known of the transgressions as of April 14, 2014.

Mother/Father knew or should have known of these violations no later than April 14, 2014.<sup>18</sup> Accordingly, Mother/Father Knew or Should Have Known ("KOSHK") Date is April 14, 2014 and the 2-year period elapsed April 14, 2016. This made both Parent's delay in finally signing the general waivers unreasonable. Mother's/Father's claim that she/he was awaiting the removal of records as a reason for the initial delay is unreasonable especially after careful review of the relevant offer documents sent in January and February of 2016 by Charter. They make no mention of any obligation of Charter (or anyone else) to remove records.<sup>19</sup>

Next we determine there is a reason to extend 2-year limitation.

The relevant provisions of the IDEA 20 U.S.C. § 1415(f)(3) (C) and (D) state:

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<sup>18</sup> The instant due process complaint unlike the second due process complaint makes no mention of the Charter or State's wrongful inclusion of prohibited records in the Student's educational files. The KOSHK date for these seems March 5, 2014 the date Mother/Father knew student was placed on homeward bound 10 hours a week instruction. However, whether the KOSHK date is March 5, 2014, April 14, 2014 or even November 2014 when Mother/Father removed Child from Charter. More than 2 years have elapsed from any of these dates Mother's/Father's filed this action.

<sup>19</sup> It is even possible that there was a separate remedy not a due process matter, but this has nothing to do with Mother's/Father's unwillingness to sign what was a general release.

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing **within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint**, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent **if the parent was prevented from requesting the hearing due to—**

**(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or**

**(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.**

(emphasis and underlining added)

The State of Delaware's rule, 14 DE Admin Code §§ 926.11.8-926.11.9 is the same as the above federal statute as it says:

11.8 Timeline for requesting a hearing: **A parent** or agency **shall request an impartial hearing on their due process complaint within two (2) years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint.**

11.9 Exceptions to the timeline; **The timeline described in 11.8 does not apply to a parent if the parent was prevented from filing a due process complaint due to:**

11.9.1 **Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or**

11.9.2 **The LEA's withholding of information from the parent that was required under these regulations to be provided to the parent.**

(emphasis and underlining added)

. It was very clear from the e-mails and documents sent Charter wanted both parents' signatures on general all-encompassing waivers sent to Student's counsel in January and February 2016 and later sent in July 2017 with the extension of a deadline for final payment.

Additionally, Charter's request for both parent's signatures for acceptance and resolution is supported by its very logical basis. There was a prior due process proceeding withdrawn for which Charter had litigation cost and it wanted to spare itself additional legal cost. Moreover, on January 28, 2016 Charter was advised that Student was living with Mother/Father making Charter's very insistence on signature not only likely, but its reason for insisting on Mother's/Father's signature and waivers therefrom even more logical as custody orders can change and Charter has an interest in protecting itself from the cost of a later legal expense by Mother/Father if it did. In January, February or March of 2016 up until April 12, 2016, Student could have gone forward with the underlying complaint or filed a Third Due Process Matter by April 12, 2016,. It simply didn't and made a choice.

Additionally, the Panel in its findings found meaningful that Charter and Student's dismissed the Second Due Process Complaint without prejudice allowing for a later action; whereas if in January 2016 if all had been accomplished to form a binding agreement on all **wouldn't there have been a dismissal with prejudice as a final contract was formed, which would have precluded a later action?**<sup>20</sup>

Charter did nothing in the record that mislead Student as to its options. They are not responsible for Mother/Father not signing under her/his alleged reason that certain records should not be in Student's file when the Charter's offer said nothing about removal of these records.<sup>21</sup> Charter similarly not responsible for any delay Mother's/Father's avowed unwillingness to sign to prevent Mother/Father from accessing assets. Similarly, Charter is not

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<sup>20</sup> In its closing submission. Student formulated the argument that if it had filed a complaint the same, Charter would have moved to dismiss. That is inapposite, If a complaint were timely that Motion would have been denied. <sup>21</sup>Indeed, the ability to retract records of Charter for a Student who withdrew seems nonexistent. Perhaps they can be added. Perhaps they could have been redacted.

responsible from Mother's/Father's delay in signing. Charter did nothing to influence any of these.

As to the second reason to extend the two-year deadline a withholding of information to Parent required, there is simply no evidence this occurred.

In sum, there is not a basis to extend. That is the Complaint against Charter is dismissed as untimely. Likewise, in that action that Student asserts against State is vicarious and flows from the Charter's status as defunct, the lateness of the claim against Charter similarly flows to State and the action is late against them for the very same reasons. This 2-year limitation did not exist in 2003. Rather it came into existence as a result of Amendments to the IDEA whose purpose was to impose a time limitation to bring actions in fairness to all parties to these proceedings. It will not be ignored

However, additionally the State has the defense of laches but did not include the same in its closing submission and nor did Student concern itself with this argument despite notice to both that it was an issue and regardless the issue of laches is moot.

V. ORDER.

After a hearing, State's Motion to Dismiss is granted and the entire Complaint of Petitioners is dismissed as untimely under the IDEA.

As this matter is dismissed this is a final order and pursuant to 14 Del. Admin. Code §§ 926.16.1 and 926.16.2, any party aggrieved by the findings and decision may appeal to the Family Court in and for the State of Delaware or the United States District Court for Delaware if done within ninety (90) days of this decision.

So, Ordered this 27<sup>th</sup> day of November, 2017.

/s/ Gary R. Spritz

Gary R. Spritz, Esq.

/s/Dr. Janice Willis

Dr. Janice Willis

/s/ Robert D. Overmiller

Robert D. Overmiller

Date:

cc: Caitlin McAndrews, Esq, by email only

Charter School c/o Charter Board Chair by email

Charter School., c.o Charter School., registered agent, DE by mail

Valerie Dunkle, Esq. by email only

Panel Members by email only

Maria Locuniak and Maryann Mieczkowski and Jennifer Kline by email only