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: G. P.

Date of Birth: [redacted]

OPEN HEARING

ODR File No. 18583-16-17KE

Parties to the Hearing:	Representative:
Parent Parent(s)	Parent Attorney Jeffrey J. Ruder, Esquire John Valantassis, Esquire Ruder Law 429 Forbes Avenue, Suite 450 Pittsburgh, PA 15219
Local Education Agency Pittsburgh Public School District 341 South Bellefield Avenue Pittsburgh, PA 15213-3516	LEA Attorney Annemarie Harr, Esquire Weiss Burkhardt Kramer LLC 445 Fort Pitt Boulevard, Suite 503 Pittsburgh, PA 15219
Dates of Hearing:	4/7/2017, 4/11/2017, 6/6/2017, 6/8/2017, 6/13/2017, 6/16/2017, 6/27/2017
Date of Decision:	August 7, 2017
Hearing Officer:	Cathy A. Skidmore, M.Ed., J.D. Certified Hearing Official

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)[1] is a primary elementary school-aged student who resides within the boundaries of the Pittsburgh Public School District (District). Student, the Parent, and a sibling moved to the area from a foreign country in April 2015 because Student was and is in need of an organ transplant, and is currently on a waiting list for such a procedure.

The Parent contacted the District prior to the family's arrival in the United States and again when they had moved to the geographic area served by the District. After Student was enrolled for the 2015-16 school year, several meetings occurred with friends of the Parent providing interpretation services because the Parent and Student had very limited English proficiency. Student ultimately attended school in the District on only a few days prior to enrolling in a private school in or about March 2017.

In December 2016, the Parent filed a Due Process Complaint against the District asserting that Student is a child with a disability and, as such, is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA),[2] and also falls within the protections of Section 504 of the Rehabilitation Act of 1973 (Section 504)[3] and the Americans with Disabilities Act (ADA).[4] The Parent amended her Complaint by agreement of the District in February 2017.

The case proceeded to a due process hearing convening over multiple sessions which were necessary to accommodate all schedules including a witness from the family's native

[1] Although this was not a closed hearing, in the interest of protecting Student's confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision.
[2] 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).
[3] 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).
[4] 42 U.S.C. §§ 12101-12213.

country, as well as to allow sufficient time for interpretation services at each session.[5] The decision due date was adjusted following the filing of the Amended Complaint and extended for good cause shown on requests of one or both parties over the course of the proceedings.

At the hearing, the Parent sought to establish that the District erroneously failed to identify Student under the IDEA, and failed to offer a free appropriate public education (FAPE) to Student under the IDEA, Section 504, and the ADA, prior to Student's enrollment in a private school. She also raised various discrimination claims. The District maintained that it did not violate any of its obligations to Student, and that it offered appropriate accommodations to meet Student's needs. The record concluded with the parties' written closing arguments.[6]

For the reasons set forth below, the Parent's claims must be granted in part and denied in part. More specifically, the Parent has not established Student's eligibility under the IDEA, but must prevail on certain Section 504 claims.

ISSUES[7]

1. Whether the District complied with its obligations under the IDEA from August 2015 through Student's withdrawal in failing to identify Student as eligible for special education and providing an appropriate program;

2. Whether the District complied with its obligations under Section 504 and the ADA by failing to develop an appropriate program from

[5] Each of the hearing sessions amounted to less than one full day, and sometimes only one half day, for a variety of reasons including the Parent's understandable need to return home for a period of time during the day to provide important medical care for Student.

[6] References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit letter or number. The District included various procedural documents that were identified by letter rather than by number. Citations to duplicative exhibits may be to one or the other or both.

[7] The issues are re-ordered for clarity and ease of discussion. Claims for tuition reimbursement and the provision of English as a Second Language services (N.T. 57-58; S-D pp. 9, 11) were later withdrawn (N.T. 502, 712). The official date of Student's withdrawal from the District is unclear, so the date of the Amended Complaint is used as the end date for remedy purposes, as the Parent requested (Parent Closing Argument at 5, 13).

August 2015 through Student's withdrawal based on Student's status as a protected handicapped student;

3. Whether the District complied with all relevant procedural requirements under the applicable laws;

4. If the District did fail in any of its obligations to Student under the IDEA, Section 504, and/or the ADA, whether Student should be awarded compensatory education;

5. If the District did fail in any of its obligations to Student under the IDEA, Section 504, and/or the ADA, whether the Parent should be reimbursed for certain expenditures she incurred in securing education-related services for Student;

6. Whether the District otherwise discriminated against, and acted with deliberate indifference toward, Student on the basis of Student's disability; and

7. Whether the District discriminated against the Parent based on her association with an individual with a disability (Student)?

FINDINGS OF FACT

1. Student is a primary elementary school-aged Student who resides within the District's boundaries. (N.T. 70-71)

GENERAL BACKGROUND INFORMATION

2. Student has been diagnosed with a rare genetic disorder, Megacystis Microcolon Intestinal Hypoperistalsis Syndrome, also known as Berdon Syndrome. That disorder causes chronic irreversible intestinal failure and also affects the bladder. There is no known treatment or therapy for the disorder. (N.T. 217-18, 220, 241-42; P-21; S-2)

3. Student is not able to eat as a result of the disorder and depends on total parenteral nutrition (TPN), whereby all nutrients are provided intravenously via a central catheter. Student relies upon TPN for all nutrition and currently undergoes that procedure for a continuous period of eighteen hours each day. (N.T. 219-26, 240, 721-22, 728-29)

4. Student had Student's colon removed due to disease in approximately 2015 before moving to the United States. Student has an ostomy pouch that collects waste as it is excreted, and other pouches that collect drainage. It is necessary to keep track of the amount of all expelled liquid so that adjustments may be made to the TPN. (N.T. 222-25, 242, 735-36)

5. One major complication associated with TPN is an infection of the central venous catheter. If an infection is suspected or diagnosed, the patient requires hospitalization for intravenous antibiotics and possible replacement of the central line. If an infection is not treated, the patient is at risk of death. (N.T. 227-30, 734-38)

6. Student has been frequently hospitalized for treatment of infections and other complications of Student's medical condition. The hospital stays have varied in duration from a few days to several weeks. (N.T. 231-32, 243, 721)

7. Student is medically able to attend school, but requires nursing services and may need to limit physical activity to avoid injury or damage to the central catheter. It is preferable that Student attend school when not receiving TPN. Student may also become physically fatigued as a result of the TPN and may only be able to attend school for part of the school day. (N.T. 233-34, 238, 736; P-22 p. 1; S-3 p. 1)

8. Student is medically able to receive instruction at home when receiving TPN. (N.T. 725-26)

9. Nursing services for Student require training in responding to emergencies with the central line and stomas, and sterile techniques to avoid introducing an infection. (N.T. 234, 735-38)

10. Student and the family moved to southwestern Pennsylvania in April 2015. Student is currently on a waiting list with [a hospital for children] (Hospital) for an intestinal transplant. (N.T. 217, 230-31, 720)

11. Student and the Parent have very limited English language proficiency. (N.T. 156, 497)

ENTRY INTO DISTRICT

12. The Parent contacted the District in May of 2015 to arrange for a meeting to discuss Student attending one of its elementary schools for the 2015-16 school year. The Parent met with an acting principal and brought a friend to provide interpretation services. The Parent explained Student's medical condition and they discussed Student's need for nursing services as well as Student taking District-provided bus transportation. (N.T. 250-60, 287-89, 725, 729-38)

13. The Parent expressed a desire that Student attend school when medically able for approximately two hours each day, and also receive homebound instruction. (N.T. 260-62, 725-26)

14. The Parent asked the acting principal about Student attending school at times and provided with instruction at home at other times. The acting principal explained the process of applying for homebound instruction and stated that the District would work together with the Parent. The Parent understood at that meeting that Student could both attend school and be provided with homebound instruction. (N.T. 260-64, 738-40)

15. The acting principal explained that the District was able to provide nursing services, but the Parent stated that a nurse who was fluent in Student's native language would be best for Student. The Parent told the acting principal that she would look for a nurse who was fluent in the native language. The principal did not confirm or deny that her providing her own privately-secured nurse was possible. (N.T. 258-59, 269-70, 293-94, 740-44, 746, 829-30, 891-92, 901-03)

16. Student enrolled in the District on June 3, 2015. The Parent indicated on the enrollment form that the family spoke the language of their native country. (N.T. 83-84, 740, 747; P-1; S-1)

17. The District was not provided with any of Student's educational records at any time. (N.T. 158, 290-91, 535, 543)

18. Since the move to the United States, the Parent had a document from the foreign country that generally and briefly outlined learning objectives for lessons provided to Student in the home during the 2014-15 school year in the native language, English, Mathematics, History, and Geography. (N.T. 828-27; P-44)

19. The school counselor at the elementary school that Student would attend was informed of Student's medical needs in August 2015 about one week prior to the start of school for students. The counselor reviewed a letter from Hospital and spoke with a District nurse and determined that Student would need full-time nursing services and a Section 504 Plan/Chapter 15 Service Agreement (Service Agreement). (N.T. 84-87; P-22; S-3)

20. The letter from Hospital, dated July 31, 2015, stated that Student required a Registered Nurse (RN) on site when Student was at school. The District asked for clarification on whether that was necessary if the Parent accompanied Student to school because the school nurse was not assigned to the elementary school five days a week. The District did not receive a response to that question. (N.T. 567-70; P-22; S-3, S-4 pp. 1, 3, 5)

21. The letter from Hospital included a "Medical Plan of Care." That Plan specified an RN who is proficient with central line care on site and during transportation; a personal care aide (PCA); a limitation on physical force to Student's chest and abdomen; and a description of sterile techniques. The Plan also noted "no academic limitations." (P-22; S-3)

PREPARATION FOR FALL OF 2015-16 SCHOOL YEAR

22. At the start of the 2015-16 school year, the Parent requested that all communications with her be via email so that she could have those communications translated to her native language. (N.T. 117, 171; P-33 p. 3; S-32 p. 6)

23. A nurse from the elementary school visited Student and the Parent at their home in late August 2015 to become acquainted and to ascertain Student's medical needs. The Parent explained her preference to provide the nurse for Student at school, and the nurse agreed that the District could make those arrangements. (N.T. 556-58, 560-61, 563-64, 575, 763, 828)

24. The elementary school nurse spoke with nurses at Hospital to gain an understanding of Student's medical needs. (N.T. 89, 563, 571; S-5 pp. 3-4)

25. Student and the Parent went to the elementary school on August 31, 2015. The nurse spoke with the students in Student's classroom about precautions and safety. (N.T. 560; S-5 p. 2)

26. A number of meetings with the Parent convened near the start of the 2015-16 school year.

    a. The Parent met with an English as a Second Language (ESL) teacher. Discussions at that meeting related to the ESL classroom and Student using District-provided transportation. This teacher understood that the Parent would provide a nurse for Student. A friend of the Parent attended the meeting and provided interpretation. (N.T. 484-87, 494-96; P-33 pp. 1, 24; S-32 p. 1)

    b. The Parent met with the new principal of the elementary school to discuss Student attending school when Student was medically able. The Parent explained to the new principal that she would arrange for a nurse to provide services for Student at school. A District nurse was present for part of that meeting. (N.T. 308-11, 313-14, 316-17, 320-22, 323-24, 327, 337-39, 356-57, 751-55)

    c. The school counselor also met with the Parent near the start of the 2015-16 school year, and the Parent had a friend accompany her to provide interpretation services. District representatives explained that a Service Agreement would be developed to address Student's medical needs including a full time nurse. They discussed various aspects of Student's school day, with the Parent anticipating that Student would attend school on some days when medically able. That meeting was not a formal Service Agreement meeting. (N.T. 90-94, 98, 112, 121-22, 151-54, 158-59)

    d. The Parent explained to the school counselor that she preferred that Student be provided the trained nurse that she had secured who speaks the Parent's and Student's native language. The District was not unwilling to consider such an arrangement in light of Student's significant medical needs, but the school counselor did explain that it could secure a qualified nurse for Student. (N.T. 153-54, 164, 189, 191-93)

    e. At another meeting of the Parent and new principal, the former acting principal was asked to join the meeting during a discussion on the possibility of Student both attending school at times and receiving instruction at home at times. The former acting principal explained that providing both services simultaneously was not the District's policy. The participants also again discussed the Parent providing a nurse for Student and not accepting a nurse arranged by the District. (N.T. 275-80, 287, 289-90, 292, 297, 317, 320, 323, 328-36, 337-39, 753-57)

27. A meeting convened on September 2, 2015 with the elementary school principal, school counselor, assistant principals, and the ESL teacher to discuss how to meet Student's

needs at school. That meeting did not include the Parent. (N.T. 487-90, 496-97; P-33 pp. 1-2; S-32 pp. 1-2)

DEVELOPMENT OF SERVICE AGREEMENT

28. No formal evaluation for the Service Agreement was conducted. A draft Service Agreement was to be based upon the medical information provided from Hospital and subsequent contact by a District nurse to obtain some clarification. (N.T. 88-90)

29. The District did not notify or seek consent of the Parent for an evaluation at the start of the 2015-16 school year. (N.T. 89-90)

30. District representatives developed a draft Service Agreement for Student at the end of August or early in September of the 2015-16 school year after that initial meeting with the school counselor. The Parent did not participate in its development and it was never shared with her. (N.T. 102-03, 107, 126, 158, 160-61; P-2 pp. 1-4)

31. Within a week of the initial development of the draft Service Agreement, it was modified based on input from teachers. No meeting with the Parent was scheduled or held at that time and this revised draft Service Agreement was never shared with her, although the District did obtain a translated version. The Service Agreement was never finalized. (N.T. 107-09, 126, 158-61; P-2 pp. 5-8; P-12; S-6, S-7)

32. The revised draft Service Agreement provided for a single instructional accommodation, assessment based on work completed when in attendance, and also included an iPad with a translation application. A single behavioral/social accommodation was the option to remain in the cafeteria during recess. The section detailing the environmental/accessibility accommodations followed the Hospital's Medical Plan of Care, setting it forth verbatim. (P-8 pp. 5-8; S-6)

33. The Parent was never provided with any procedural safeguards in any language in connection with the fall 2015 draft Service Agreement. (N.T. 90, 190)

2015-16 SCHOOL YEAR

FALL 2015

34. Student attended school for a part of a few school days early in the 2015-16 school year accompanied by the Parent. Student did not attend school again through the end of that school year. (N.T. 112-14, 155, 156, 200, 766-67, 771, 799)

35. Because she was informed of the District policy against a student receiving both homebound instruction and attending school, the Parent ultimately decided that Student would attend school when medically able, and she would arrange for private tutoring. The Parent had also located a nurse from her native country who agreed to provide paid nursing services. However, the elementary school principal told the Parent that the private nurse that had been located was not acceptable because she did not have proper

clearances. The Parent then undertook the task of locating a different nurse from the United States. (N.T. 337-40, 757-63, 766, 769-70, 806-08; P-38 pp. 1-6)

36. The District arranges for nursing services for its students who need them, and contacted the agency it uses for nursing services in the fall of 2015 regarding Student. (N.T. 338, 340, 894-95, 899)

37. The Parent arranged for a nurse through the agency that the District uses for such services and contracted with her in September 2015. The Parent found that nurse to have too little relevant experience and that relationship ended within approximately two weeks. (N.T. 771, 808-11, 831-32, 839-40; P-38 p. 12, P-38 pp. 7-14)

38. The Parent arranged for private tutoring for Student beginning at the start of the 2015-16 school year. Those tutors charged the Parent for the services. (N.T. 772-73, 803-05; P-37 p. 1)

39. In the middle of September, the Parent informed the District that Student was in the hospital. (N.T. S-32 p. 3)

40. The Parent asked about homebound instruction because of Student's hospitalization. The school counselor provided the Parent with an application for homebound instruction on that same day. (N.T. 96, 99-100, 112, 165, 775-77, 781-82)

41. No Service Agreement meeting was scheduled or held after the Parent advised that Student was in the hospital. District representatives believed such a meeting at that time would not be sensitive under the circumstances. The District did not pursue any truancy actions for the same reasons. (N.T. 96-97, 98-100, 161-63, 169-70)

42. The ESL teacher contacted the Parent in late September since she had not seen Student at school. The Parent advised her that Student was hospitalized. (N.T. 94-96, 110, 491-92, 772; S-32 p. 3)

43. Student was hospitalized several times between September 2015 and January 2016 but not for that entire time period. Student was not attending school. (N.T. 783-85)

44. The District considered Student to be medically excused on dates that Student did not attend based on the information provided from Hospital, and never sent the Parent a notice of a truancy elimination plan meeting or other consequences of Student's absences from school. (N.T. 119-20, 161-63)

45. The Parent returned the homebound instruction application at the end of October 2015. Student's gastroenterologist indicated on the application form that Student could return to school immediately for half days. (N.T. 111, 377-79; P-3; S-25)

46. A District health services representative believed that more information was necessary following receipt of the homebound instruction application, considering the request to be not for homebound instruction but for half day attendance. She was also concerned about

accommodations for the medical condition that Student might need in order to attend school. (N.T. 380-88, 392, 791-92; P-32 pp. 1, 6; S-27 pp. 1, 6)

47. The health services representative understood that Student was hospitalized at the time the homebound instruction application was received. She did not try to obtain confirmation on whether Student was in fact hospitalized but anticipated that the school counselor would advise when Student had been discharged. (N.T. 380, 393, 395-99, 401, 404-05, 785)

48. The Parent arranged for another nurse in approximately November 2015 who worked for the family until approximately January 2016. The Parent contacted the District in December 2015 to arrange for Student to begin attending school with that nurse. (N.T. 777-80, 782, 843-44; P-33 p. 23, P-38 pp. 17-19)

49. As of early December 2015, Student could have been approved for homebound instruction and still attend school when medically able for socialization. (N.T. 419-27, 458)

SPRING 2016

50. The health services representative responded to a call from the Parent in January 2016 asking about the delay in homebound instruction. An ESL administrator also offered to become involved with securing homebound instruction at that time. (N.T. 416-17, 432-34, 439, 442-44, 582-87, 787-92)

51. The health services representative submitted the homebound instruction application for assignment of a teacher the day after that January 2016 telephone conversation with the Parent, despite not knowing whether Student was hospitalized at that time. (N.T. 434, 438-40, 446-48; P-32 p. 9)

52. Homebound instruction for Student was approved on approximately January 21, 2016. (P-4)

53. The health services representative met again with the Parent in early February 2016 to discuss scheduling difficulties with the homebound instructors. They also discussed the provision of a nurse by the District or for a private nurse to have all required clearances. The Parent expressed concerns with the agency the District used for contracted nursing services based on the previous experience with a nurse from that agency. (N.T. 448-57, 468-70, 475)

54. In April 1, 2016, representatives of Student's elementary school contacted the Parent to convene a Service Agreement meeting to discuss Student returning to school on a modified schedule while also being provided homebound instruction. By that point in time, representatives at Student's elementary school were aware that a student could both attend school and be provided homebound instruction. (N.T. 138-41, 170-71; P-5, P-33 p. 15; S-8, S-27 pp. 46-50)

55. A translated version of an invitation to the April 2016 meeting was provided to the Parent. (P-13; S-9)

56. The Parent responded to the April 2016 invitation with frustration over the delay in developing a program. (S-27 p. 46)

57. The District sent another communication to the Parent in early May 2016 suggesting a Service Agreement meeting. The Parent did not agree to another meeting and referred the school counselor to her attorneys. (N.T. 143-44, 202; S-27 p. 62)

58. Another meeting was scheduled to convene in May 2016. By that time, the District had offered four different teachers to provide the homebound instruction but, because of scheduling concerns on the part of the family and conflicting constraints on the part of the proposed homebound teachers, no such instruction had been provided. (N.T. 472-74, 476, 583-89, 793-97; S-27 pp. 8-9, 11-45, 51-60, 67)

59. No Service Agreement meeting convened in the spring of 2016. (N.T. 144)

2016-17 School Year

Start of School Year

60. The District sent another communication to the Parent in September 2016 with an Invitation to participate in a Service Agreement meeting. The invitation was provided in the Parent's native language. The Parent was not able to attend at that time. (N.T. 143-45, 174-75; P-7; S-10, S-11, S-12)

61. Also in September 2016, the Parent provided the District with three letters from physicians at Hospital, each recommending that Student attend school for academic and social/emotional development and also be provided with homebound instruction. (N.T. 799-800; P-23, P-24, P-25)

62. A meeting convened on November 4, 2016 to discuss a variety of topics including a Service Agreement. It was not a formal Service Agreement meeting and no final Service Agreement resulted. The Parent did express her concerns with Student returning to the same elementary school, and the participants discussed Student attending school for partial days and a possible schedule for homebound instruction that accommodated the family's schedule. The Parent again expressed concerns with a nurse from the agency with which the District contracts based on the prior experience. (N.T. 145-48, 176-79, 183-84, 297-303, 830-33, 895-96; P-7; S-13, S-14)

63. The District provided an interpreter for the Parent at the November 2016 meeting. (N.T. 303-04)

64. After the November 2016 meeting, the District provided the Parent with a Service Agreement translated into her native language. That document included the revisions discussed at the meeting. (N.T. 160-61, 179-80; P-14; S-14[8])

65. The Parent did not return the Service Agreement as approved or disapproved. (N.T. 180)

66. The Parent completed another homebound instruction application in November 2016 with a notation that Student could attend school for partial days with a nurse, and it was immediately approved. The District then took steps to locate a homebound instructor for Student. (S-27 pp. 63, 65-69, S-29, S-30)

67. A new letter from Hospital in mid-November 2016 again included a "Medical Plan of Care." That Plan specified a private RN who is proficient with central line care on site and during transportation, and a description of sterile techniques. The Plan again noted "no academic limitations." The PCA provision was omitted with the RN specified to perform those tasks. (P-26; S-31)

68. The Parent incurred additional expenses for nursing services in the fall of 2016, anticipating that the nurse would accompany Student to school. (N.T. 812-13 (explaining P-38 p. 20))

69. Student never attended school in the District during the 2016-17 school year. (N.T. 184, 801)

DISTRICT EVALUATION

70. The District issued a Permission for Consent to Evaluate Student for special education on November 9, 2016 based on a request by the Parent made at the November 2016 meeting on the Service Agreement. That document was provided to the Parent in her native language, and she signed her approval on November 21, 2016. (N.T. 148-51, 180-81, 512; P-9, P-17; S-15, S-16)

71. The District conducted an evaluation of Student and issued an Evaluation Report (ER) on January 19, 2017, sixty calendar days after the Parent's consent. (N.T. 512-13)

72. On December 16, 2016, the assigned school psychologist sent to an ESL administrator two documents to be translated into the Parent's native language: a cover letter with a background questionnaire that included potential test dates, and an Adaptive Behavior Assessment System – Third Edition (ABAS-3) rating scale. Both were to be completed by the Parent. (N.T. 516-21, 596; P-10; S-17)

73. The District asked a certified interpreter to meet with the Parent to translate and complete the ABAS-3 rating scales and questionnaire with her. The ABAS-3 document was not

[8] A witness identified S-7 as the translated Service Agreement from November 2016 (N.T. 160), but it is clear from a comparison of S-7, S-13, and S-14 (particularly the dates and the last full paragraph on the first page of S-13 and S-14), even to this hearing officer who cannot read or understand the family's native language, that S-14 (identical to P-14) was the document provided to the Parent after the November 2016 meeting. It appears that the witness confirmed the correct document in later testimony but without referencing the date (N.T. 180).

translated in written form and it is unclear whether the same is true of the questionnaire. (N.T. 596-99, 602-03, 607)

74. On several occasions in January 2017, the school psychologist attempted to schedule testing sessions with the Parent through the ESL administrator and the Parent's interpreter. The school psychologist received a response from the Parent's interpreter indicating that the Parent needed to consult with Hospital regarding upcoming medical appointments. (N.T. 521-22, 535-36; P-10; S-17)

75. By the date of the ER, the background questionnaire and ABAS-3 had not been returned by the Parent, and no assessments by the school psychologist had been conducted (N.T. 520-22)

76. The ER summarized medical information from Hospital including the Medical Plan of Care. No present levels of academic achievement or functional performance, or teacher observations or recommendations, were provided because Student had only minimal attendance at school and because no testing was completed. (P-10; S-17)

77. The determinant factor section in the ER answered in the affirmative that lack of reading and mathematics instruction (based on inconsistent schooling in the United States) as well as limited English proficiency (based on an absence of any ESL instruction in the United States) were determining factors on eligibility. (P-10 p. 3; S-17 p. 3)

78. The school psychologist was not able to determine whether Student met IDEA criteria as a child with a disability, and specifically did not have sufficient information about whether Student's academic performance was impacted. However, the ER concluded that Student did not have a disability and was not eligible for special education. (N.T. 525, 528-29, 537, 552-53; P-10 p. 5; S-17 pp. 5)

79. The school psychologist did recommend a Service Agreement for Student to address Student's medical and related needs at school. (N.T. 530-32)

80. A version of the ER translated into the Parent's native language was provided by the District. (N.T. 533-34; P-18; S-18)

81. The District issued an invitation to a meeting on February 6, 2017, translated into the Parent's native language, to review the ER. The Parent participated in that meeting by telephone, and an interpreter was present at the meeting. (N.T. 538-40; P-11; S-19, S-20)

82. The Parent was also provided with a copy of the Procedural Safeguards Notice in her native language at that time. (S-23, S-24)

END OF 2016-17 SCHOOL YEAR

83. The District recommended another evaluation and issued a second Permission for Consent to Evaluate form translated into the Parent's native language. (N.T. 541-42; S-34, S-35)

84. On February 6, 2017, the District sent a Notice of Recommended Educational Placement/Prior Written Notice form indicating Student would remain in regular education with a Service Agreement. That document was provided in the Parent's naïve language. (S-21, S-22)

85. The Parent notified the District by March 2017 that she was withdrawing Student, and Student began attending a private school (Private School). (N.T. 803; S-D p. 6)

86. The Parent continued to provide Student with private tutoring even after Student started at Private School. (N.T. 838-39; P-37 p. 2)

87. Despite arranging for private nursing services for a number of months between September 2015 and January 2017, the Parent did not ask to have those nurses attend school with Student for a variety of reasons, including the need to train the nurses. (N.T. 840-49)

88. The Parent has been provided psychological counseling and therapy since February 2017 related to Student's medical condition and the family's experiences in the District. The psychologist is located in the family's native country and sessions were conducted regularly via Skype. The psychologist has diagnosed the Parent with Post-Traumatic Stress Disorder, Depression, and Anxiety. (N.T. 860-69; P-42)

INDEPENDENT EDUCATIONAL EVALUATION

89. The Parent obtained an independent educational evaluation of Student by a private psychologist who issued a report (IEE) in early June 2017. The IEE was at public expense. (N.T. 618, 620; P-41; S-E p. 6)

90. The private psychologist conducted assessment of cognitive ability (Comprehensive Test of Nonverbal Intelligence – Second Edition (CTONI-2)) and academic achievement (select subtests of the Wechsler Individual Achievement Test - Third Edition (WIAT-III)) that did not rely on language because of Student's limited English proficiency. Those results did not significantly factor in to her conclusions on Student's eligibility under the IDEA. (N.T. 625-27, 629-30, 652-53)

91. Student achieved an overall average range score on the CTONI-2 and low average range scores on the WIAT-III subtests; however, the private psychologist noted that the results should be interpreted with caution due to several factors including cultural bias and the use of an interpreter. (S-41)

92. The Parent completed rating scales (Behavior Assessment System for Children – Third Edition (BASC-3)) but no teacher form was used because Student had only attended Private School for a few days at the time. The Parent's scales reflected at-risk concerns (at the lower end of that range) with anxiety and depression; some scores could not be calculated because of an insufficient number of responses. The private psychologist explained various reasons for interpreting the BASC-3 results with caution, including the need for an interpreter, the normative sample, and the fact that Student had not experienced many activities that were addressed in the rating scales. The BASC-3 results

did not factor significantly into the conclusions on Student's eligibility under the IDEA. (N.T. 633-35, 659-61; P-41)

93. The private psychologist concluded that Student was eligible for special education under the IDEA based on Student's physical condition requiring frequent hospitalizations and resulting in absences from school, as well as an inability to attend school all day when medically able. The category of IDEA eligibility was Other Health Impairment (OHI) with a recommendation for an Individualized Education Program (IEP). She made several recommendations: academic instruction at home while receiving the TPN; attendance at school with a nurse for special classes and engaging socially with peers; and summer camps. (N.T. 664-65; P-41 pp. 12-13)

RELEVANT DISTRICT PRACTICES

94. In the fall of 2015, District policy was that a student could receive homebound instruction or attend school, but could not do both. That policy changed by the spring of 2016. (N.T. 100, 128-29, 283-85)

95. A student in the District who is hospitalized may be provided homebound instruction if the application indicates that the child is in a hospital. (N.T. 434-36)

96. The sign-in section of a Service Agreement is used to reflect teacher review and approval of the document, not attendance. (N.T. 78-79)

97. There is also a signature line for a parent to approve a Service Agreement, which can be obtained at a meeting or sometimes after the meeting if revisions must be made at a later date. (N.T. 79-81, 106)

98. Teacher approval of a Service Agreement follows a parent's signature on the document. (N.T. 80-81)

99. The District provides parents with a copy of a procedural safeguards notice at Service Agreement meetings, and there is a place for the parent to sign acknowledging receipt. (N.T. 81; S-6 p. 4)

100. The District generally schedules a truancy elimination plan meeting with parents after a third unexcused absence. No such meeting is scheduled for medically excused absences. (N.T. 118-19)

101. The District has interpretation services available through its ESL Department. It also uses a telephonic translation service. (N.T. 159-60, 288, 593-94)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who filed the Complaint and requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by a preponderance of the evidence developed in the record.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution* (*Quakertown Community School District*), 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying to the best of his or her recollection from the witness' perspective. No witness appeared to be anything other than forthright and sincere. Nevertheless, there were a number of contradictions in the testimony, particularly regarding discussions about the availability of homebound instruction when Student would attend school and the parties' understanding of the availability of District-provided nursing services. Still, the inconsistencies that went beyond imprecise memory are much more likely attributed to miscommunications that were compounded by the need for interpretation between English and the Parent's native language rather than any intentional deception. Moreover, it is

unknown how well the several personal acquaintances of the Parent who accompanied her in various meetings and telephone conversations, especially during the 2015-16 school year, were able to accurately interpret both languages.

In reviewing the record, the testimony of every witness, and the content of each admitted exhibit, were thoroughly considered in issuing this decision, as were the parties' comprehensive closing arguments. In light of the communication lapses noted above, the testimony of all witnesses on factual matters was accorded relatively equal weight even where it was contradictory.

IDEA CHILD FIND/ELIGIBILITY PRINCIPLES

The first issue is whether the District complied with its obligations under the IDEA from August 2015 through the date Student withdrew from the District, in its failure to identify Student as eligible for special education and then provide a program. The IDEA and its implementing state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as "child find." Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, school districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability "at the earliest possible moment." *Id*. (citation omitted).

The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of a number of specific classifications and who, "by reason thereof, needs

special education and related services." 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. Those classifications or categories are "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

Merely having a disability, however, does not automatically mean that a child is eligible, since it is a two-part test. With respect to the second prong of IDEA eligibility, "special education" means specially designed instruction which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a). More specifically,

> *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
>
> (i) To address the unique needs of the child that result from the child's disability; and
>
> (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3). Also relevant is the prohibition against finding a child to be eligible for special education if "the determinant factor for such determination is (A) lack of appropriate instruction in reading, including in the essential components of reading instruction[]; (B) lack of instruction in math; or (C) limited English proficiency." 20 U.S.C. § 1414(b)(5); *see also* 34 C.F.R. § 300.306(b).

THE PARENT'S IDEA CLAIM

The Parent contends that the District had reason to suspect Student's IDEA eligibility as of the summer of 2015 and going forward. The District, on the other hand, argues that Student does not meet the requisite criteria. To resolve this issue, it is essential to review the evidence

that was presented in support of and against such a finding.

First, the Parent challenges the District's refusal to conduct an IDEA evaluation of Student until late in 2016. (Parent Closing Argument at 6-7) Contrary to those contentions, however, merely because an individual has a medical condition that is likely disabling does not necessarily mean that the child needs special education, as discussed more fully below. Based on the information that the District had at the start of the 2015-16 school year, this hearing officer cannot conclude that its failure to initiate an IDEA evaluation was unreasonable.

In the District's ER completed in January 2017, there was insufficient information from which the team could conclude that Student was eligible for special education.[9] As both parties observe, the District ER did acknowledge that lack of appropriate reading and mathematics instruction and limited English proficiency were factors in the eligibility determination. It is important, however, to understand that the language in the IDEA and implementing regulations does not dictate that a student with a lack of reading or mathematics instruction or English language proficiency can *never* be []eligible for special education;[10] indeed, the District's school psychologist testified as such based on her own experience (N.T. 527-28). This hearing officer does have some concern with the timing of the efforts to obtain Parent information and conduct testing of Student, particularly given Student's unique circumstances, but the time of the year when the evaluation commenced was also a major factor.[11] In any event, the District found

[9] It should be noted that, even if the District had the education document that the Parent obtained from the foreign country (P-44), the information provided was quite general and of limited utility to an evaluation process.

[10] It is helpful to note that, and not insignificantly, the Annotated Evaluation Report provided by Pennsylvania Bureau of Special Education, through its Pennsylvania Training and Technical Assistance Network, places this section toward the end of the document, as did the District. *See* Evaluation Report – Annotated – School Age at 4, available at http://www.pattan.net/category/Legal/Forms/Browse/Single/?id=57616c18140ba087238b45db&bor=ag=School%20Age%20Annotated**l=English (last visited August 4, 2017).

[11] School districts must complete evaluations within sixty calendar days of receipt of parental consent. Only summer breaks are excluded from that calculation. 22 Pa. Code § 14.123(b).

Student not to be eligible, and it is that conclusion that is truly at issue.

The Parent's IEE, on the other hand, reached an opposite conclusion. In the IEE report, the private psychologist determined, without elaboration, that Student qualified as a student with an OHI and was "in need of specially designed instruction." (P-41 p. 12) The recommendations that followed were the types of accommodations that may be provided in a Service Agreement, rather than specially designed instruction in an IEP. At the hearing, the private psychologist testified that Student would require an alternative or "condensed" curriculum (N.T. 640-41), but later clarified that Student's daily instruction should be based upon what Student already knew and start from there, made necessary by Student's inability to be present for instruction at times (N.T. 643, 653-54). More specifically, the private psychologist opined that Student's curriculum would not be any different than any other student's, but that individual (one-on-one) instruction would be one way to facilitate Student's ability to learn academic skills and progress through the regular education curriculum. (N.T. 666-67, 669)

The federal regulations provide the definition of Other Health Impairment as:

> having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8(c)(9).

Careful review of the record reveals that, as a result of Student's chronic medical condition, Student exhibits limited strength, vitality, or alertness that would be manifested by Student in the educational environment. Although the only suggestion of any limitation made by Student's gastroenterologist and other physicians in writing was that Student would need to be

careful with physical activities that might dislodge the central catheter, and should avoid excessive force to Student's chest and abdomen. (P-21, P-22, P-26; S-2, S-3, S-31), there was uncontradicted testimony that Student could attend school only when medically able to do so, and would likely not have the physical stamina to be present at school for a full school day. This hearing officer concludes that the Parent has established Student meets the first part of the test for IDEA eligibility. In addition, Student's inability to attend school on a regular basis most certainly would adversely impact Student's educational performance.

The second prong of the test, however, defeats the claim of IDEA eligibility. As noted above, the child must require, by reason of the disability, specially designed instruction. That term is defined as, "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction" to meet the child's unique disability-related needs.

There is no evidence that Student requires any adaptation to the content or methodology of instruction. The question thus becomes whether Student requires adaptation to the delivery of instruction. Here, the only potential indication in the record that Student requires anything other than a regular education curriculum and accommodations pursuant to a Service Agreement is the opinion of the private psychologist that Student should be provided instruction that begins where Student left off because Student will have gaps in time when unavailable for instruction. The Parent posits that this recommendation amounts to a change to the "delivery" of instruction and points to the private psychologist's description of a separate curriculum. (Parent's Closing Argument at 10) As noted above, though, the witness provided clarification that the curriculum would not be altered, but that care should be taken to allow Student to begin instruction where it left off, as needed. That type of instruction, as described in this case, does not amount to

specially designed instruction. All children are absent from instruction from time to time, and as a matter of course are afforded an opportunity to make up what has been missed, particularly if the subject area requires sequencing or a spiraling of concepts. Indeed, the District ESL teacher who testified agreed that Student would require such an accommodation for ESL instruction, which is regular education. (N.T. 498-99) Moreover, with the exception of periods of medical complications, Student is and has been generally available for instruction for several hours per day in a combined program of at home services and physical school attendance, which would substantially limit any need to fill extended gaps in Student's educational experience. This hearing officer concludes that, in this particular case, the recommendations regarding provision of instruction to Student is not preponderant evidence that Student requires specially designed instruction by reason of Student's disability.

Finally on this issue, the Parent notes that the IDEA and federal regulations specify that the definition of "special education" includes specially designed instruction "in the classroom, in the home, in hospitals and institutions." 20 U.S.C. § 1401(29); 34 C.FR. § 300.39(a). (Parent Closing Argument at 10) But simply because instruction in a hospital is included in that definition, the provision for instruction while hospitalized does not mean that all instruction in such a setting is special education; if the definition were interpreted that way, all instruction in any setting in the United States, whether a classroom, hospital, or other institution, would necessarily be special education. Thus, this particular contention is unavailing.

In sum, and for all of the foregoing reasons, the record does not establish Student's IDEA eligibility.[12]

[12] It is, of course, possible that Student may be eligible for special education in the future.

SECTION 504/ADA FAPE

The Parent also raises claims under both Section 504 and the ADA. In the context of education, Section 504 and its implementing regulations "require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, "an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of" the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit". *Ridgewood*, *supr*a, 172 F.3d at 247. Significantly, and as the District notes, "[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not." *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002). (District Closing Argument at 24)

Section 504 further prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii).

> In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is "disabled" as defined by the Act; (2) he is "otherwise

> qualified" to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood, *supra*, 172 F.3d at 253. Intentional discrimination, however, requires a showing of deliberate indifference, which may be met by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated … and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013).

With respect to the ADA issues, the substantive standards for evaluating claims under Section 504 and the ADA are essentially the same. *See, e.g., Ridley School District. v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those statutes. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011)*; Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, the discussion below serves as a final determination of all Section 504 and ADA claims which will be considered together in this matter, although Section 504 will be the primary reference.

The applicable federal regulations implementing Section 504 require that an evaluation shall be conducted "before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id*.

Pennsylvania's Chapter 15 regulations similarly obligate a school district to obtain sufficient information in order to determine whether a child is a "protected handicapped student" and to involve the parents in that process. 22 Pa. Code §§ 15.5, 15.6. Critically, a parent must

be given an opportunity to meet with school district representatives to discuss any evaluations and accommodations, and be notified of the procedural safeguards that attach. *Id.*

THE PARENT'S SECTION 504/CHAPTER 15/ADA CLAIMS

It is prudent to first address the asserted procedural irregularities with respect to the Service Agreement process before proceeding to those that were substantive in nature. First, the District appropriately and reasonably began the process of instituting a Service Agreement prior to the start of the 2015-16 school year based on the medical information it had been provided. A number of meetings were scheduled and held near the start of the 2015-16 school year, many of which provided opportunities for discussion and clarification of the program that was to be provided. Nonetheless, it is not at all clear that the District fully understood Student's abilities and needs for accommodations, and particularly whether Student was available for instruction at home during TPN in addition to being available to attend school for important social interaction and non-academic activities. Although the District contends that no full evaluation was necessary (District Closing at 21-22), even a summary-type of assessment or investigation process would have assisted greatly in ascertaining Student's educational and medical needs. In addition, the Parent was never provided with any procedural safeguards regarding the Service Agreement process, and was not invited to a meeting to participate in the drafting of a Service Agreement, as Student began the 2015-16 school year. Compounding these procedural concerns, the Parent's limited English proficiency and reliance upon interpretation services from personal acquaintances further served to set Student up for a 2015-16 school year that was inadequate for Student's needs. These procedural flaws contributed to a substantive denial of FAPE discussed next.

Substantively, and notwithstanding any District policy to the contrary that was not based on individual needs,[13] the plan to allow Student to attend school when able, without more and specifically without regular academic instruction at home, was a fundamental failure under Section 504. It was quite clear that, when Student would be able to attend school, the timing and duration of that attendance would be rather limited and potentially sporadic. However, there was no meaningful inquiry into how to provide educational services outside of that constrained and irregular attendance window that would recognize Student's availability for instruction at home, and perhaps even in the hospital, to better approximate a school day for a child without such a disability. The Parent certainly put the District on notice as early as the spring of 2015 that a combined home and school program would be possible for Student. Moreover, limiting Student to the traditional five hours per week of homebound instruction[14] and relying on a District policy halting consideration of a combination program resulted in a choice of proposals that were not sufficiently individualized for Student and Student's disability under Section 504 and Chapter 15. This hearing officer concludes that the failure to develop a program of partial instruction at home and partial school attendance, based on all of the known circumstances in the fall of 2015, amounted to a denial of FAPE to Student.

However well-intentioned, the District's occasional but infrequent attempts to contact the Parent to ascertain Student's status after the mid-September 2015 notification of a hospitalization cannot be deemed to be sufficient. Student's hospitalizations varied in duration, and while it was indeed sensitive to the circumstances for the District to forego truancy proceedings, some regular

[13] School districts may be required to consider modifications to policies and practices even for nonacademics in order to accommodate a student under Section 504. *Wooster City School District*, 64 IDELR 154 (OCR 2014).
[14] Homebound instruction is intended to be a *temporary* measure. *See* Basic Education Circular, Instruction in the Home (revised June 30, 2005); 22 Pa. Code § 11.25. This hearing officer takes notice that the District's policy for five hours of homebound instruction per week is typical in the Commonwealth, as well as grounded in a funding process by the Department of Education.

pattern of inquiry as to Student's status would have alerted the District to Student's availability for instruction both at school and elsewhere. By way of example, the Parent's December 2015 communication asking about Student returning to school was one lost opportunity for the District to consider what accommodations could be made to allow Student to access an educational program. Even recognizing that the homebound application was perhaps not technically correct from a District perspective (District Closing Argument at 29-30), it remains unclear why no steps were taken to gain clarification on Student's status and availability for instruction. Furthermore, it is not apparent on the record how and whether the District or some other entity might provide instruction while Student was in the hospital, but it is evident that there was no serious investigation into whether such might be possible for Student as it is for other students in the District.

It is apparent and understandable that District representatives experienced some exasperation with the inability of the Parent to approve any of the homebound instructors that it located because of scheduling concerns, particularly since identifying homebound teachers in any school district is challenging at best. However, the District was well aware from late spring of 2015 that Student presented a very unique situation with major medical constraints on scheduling any type of instruction. It is quite unfortunate that the creative and collaborative approach proffered by the acting elementary school principal in the spring of 2015 did not truly come to fruition.

The follow-up in April 2016 was, in short, too little, too late. The Parent's expressed frustration was understandable, particularly in light of the sudden efforts to schedule a Service Agreement meeting after a lengthy period of limited communications. With the end of the school year rapidly approaching, one can hardly fault the Parent for then resisting the

development of an appropriate program that she had initially explored one year earlier. In addition, it is clear that the program would not have differed meaningfully from that proposed prior to April 2016. In sum, Student was denied FAPE over the course of the 2015-16 school year and is entitled to compensatory education.

Little change occurred as the 2016-17 school year began, with a productive meeting not finally occurring until November 2016 that was followed by another application for homebound instruction. As in the prior year, the failure on the part of the District to take meaningful steps toward implementation of a combined home and school program continued to deprive Student of FAPE. Development of the November 2016 Service Agreement included accommodations consistent with the Medical Plan of Care, and the parties discussed means of securing both home and school services. This discussion was a positive step in the right direction, but the previous flaws regarding instruction at home and in the hospital remained and, in any event, there is no evidence that a homebound instructor was located. Lastly, the November 2016 Service Agreement was never finalized. The FAPE denial thus continued during the 2016-17 school year until the Student withdrew from the District, and compensatory education is warranted.

The denial of FAPE also constitutes discrimination against Student under Section 504, and with a remedy provided on that basis, that claim need not be addressed further.

Finally under Section 504, the Parent contends that the evidence establishes deliberate indifference toward Student by the District. This hearing officer cannot agree. Despite the conclusions *infra* that the District did deny Student FAPE under Section 504, the evidence is preponderant that its actions and inactions were a product of its attempts to remain sensitive to Student's serious medical condition and the family's unique circumstances while also attempting to follow District policies and practices. These facts do not establish a "deliberate

choice, rather than negligence or bureaucratic inaction" and, as such, this claim must also fail. *S.H., supra*, 729 F.3d at 263.

ASSOCIATIONAL DISCRIMINATION

Next, the Parent seeks a determination that the District discriminated against her based on her association with an individual with disabilities, in other words with Student. Parent cites *S.K. v. North Allegheny School District*, 146 F.Supp.3d 700 (W.D. Pa. 2015), and *Schneider v. County of Will*, 190 F.Supp.2d 1082 (N.D. Ill. 2002), in support of this claim, and points to testimony and report of her treating psychologist in addition to her own testimony.

In Pennsylvania, special education hearing officers are granted authority to decide FAPE and related issues under Section 504 and Chapter 15, including discrimination against a student based upon disability, in accordance with the procedures provided by the IDEA and Pennsylvania's Chapter 14. 22 Pa. Code §§ 15.1 - 15.11. This hearing officer has not been alerted to any authority to consider associational discrimination claims against a parent of a protected handicapped student, nor has she located any such authority. In addition, this hearing officer is unable to consider and award monetary damages. While the testimony of the psychologist provided context for the issues presented in the hearing, neither of the cases cited support a conclusion that an associational discrimination claim may be decided in this administrative forum. Accordingly, this claim must be dismissed.

REMEDIES

COMPENSATORY EDUCATION

As one remedy, the Parents seek compensatory education, which is an appropriate form of relief where a school district knows, or should know, that a child's educational program is not

appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C., supra*. Such an award may compensate the child for the period of time of deprivation of educational services, excluding the time reasonably required for a school district to correct the deficiency. *Id*. The Third Circuit has recently endorsed a different approach, sometimes described as a "make whole" remedy, where the award of compensatory education is designed "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authorit*y, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

This hearing officer finds that the record does not include evidence on an appropriate equitable remedy that would place Student in the position where Student would be absent the FAPE denials described above. Thus, the hour-for-hour method must provide the basis for the appropriate approach, although the number of hours is extremely difficult to quantify in light of the complexities of this case and cannot be gauged with any precision.

The Parent suggests that full days (6 hours per day) of compensatory education is warranted from the start of the 2015-16 school year to the date of the filing of the Amended Due Process Complaint. (Parent's Closing at 13) However, this proposal does not account for the fact that Student is not always available for instruction and has limited physical stamina, which are two of the characteristics that have established the OHI disability. This hearing officer equitably estimates that Student should reasonably have been provided with two hours per day of instruction at home or in the hospital while receiving TPN (which is consistent with the level of

tutoring services provided), and one hour per day of social interaction (which is a reasonable amount of time following completion of TPN and the end of the school day with time for travel to school), when medically able to receive instruction and/or attend school. The evidence does not, however, provide any definitive pattern of estimating how frequently Student would have been medically able for instruction at home or a hospital, or to go to the school building, during the time period in question. It is this hearing officer's considered estimation that one hour of compensatory education for half of the total number of school days within the relevant time period approximates the educational services that were lost and provides an appropriate remedy for the lack of school attendance. Similarly, for the two hours of instruction that could and should have been provided at home and in the hospital, a reasonable reduction of one fourth of the total number of school days within the relevant time period will account for times when Student would not have been medically available for such instruction and approximate what was denied. The relevant time period with respect to the latter will allow for a thirty school day period at the start of the 2015-16 school year for compliance with all Section 504 and Chapter 15 procedural requirements in convening a meeting and developing an approved Service Agreement while also accommodating Student's mid-September hospitalization. No such adjustment is made for the former because the District was prepared for Student's attendance at school from the start of the 2015-16 school year.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's academic or social/emotional needs and skills. The compensatory education shall be in

addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District should Student re-enroll. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent, and may be used at any time from the present until Student turns age fourteen (14). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent and may be limited to the average market rate for private providers of those services in the county where the District is located.

REIMBURSEMENT FOR EXPENDITURES

The Parent also seeks reimbursement for certain expenditures which she incurred because, she claims, the District failed to provide them; namely nursing and tutoring services privately engaged. The parties do not appear to dispute that the test for reimbursement for such parentally-provided services rests upon a traditional private school tuition reimbursement analysis (Parent Closing Argument at 13; District Closing Argument at 32), and includes three separate inquiries: first, a finding must be made that the program offered by the public school did not provide FAPE; second, it must be determined that the private placement or services are proper; and third, equitable considerations may operate to reduce or deny reimbursement. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009).

Having found a denial of FAPE for educational services, the next question is whether the tutoring services were appropriate. Here, while academic tutoring very likely provided some benefit to Student, the record does not include sufficient evidence on what comprised those tutoring services. Thus, it is not possible to assess whether they were appropriate for Student for purposes of the three-step analysis. Accordingly, this claim must fail.

With respect to the nursing services that were medically necessary in the school environment, it is quite evident that a series of miscommunications led to the parties' differing understanding of the Parent's provision of a private nurse for Student. This hearing officer does not find that the District required the Parent to locate and employ a nurse to accompany Student to school, nor that the Parent was insistent that she identify and approve of a private nurse so long as he or she were trained. In any event, while the Parent did incur expenses associated with obtaining a nurse who would accompany Student to school, the District did not refuse to provide these services; and, it clearly had the resources to do so and even referred the Parent to an appropriate agency. In addition, review of the invoices provided reflects that those medical professionals typically provided services well beyond even a six hour school day. For these reasons, it would not be equitable to award reimbursement for the privately obtained nursing services during the time period at issue.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the evidence is insufficient to support a conclusion that Student is eligible for special education under the IDEA, but that the District did deny FAPE to Student under Section 504. Student will be awarded an equitable amount of compensatory education, but reimbursement for nursing and tutoring services must be denied. The District did not act with deliberate indifference, and the associational discrimination claim shall be dismissed as outside of this hearing officer's authority.

ORDER

AND NOW, this 7th day of August, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not err in its determination that Student is not eligible for special education under the IDEA.

2. The District failed in its FAPE obligations to Student under Section 504 from the beginning of the 2015-16 school year through February 24, 2017, the date of the filing of the Amended Due Process Complaint.

3. The District shall provide Student with compensatory education as follows.

    a. Student shall be provided with two hours of compensatory education per day for 75% of the total number of school days from the thirty-first school day of the 2015-16 school year through February 24, 2017 for the FAPE denial related to instruction at home and in the hospital; and

    b. Student shall be provided with one hour of compensatory education per day for 50% of the total number of school days from the first school day of the 2015-16 school year through February 24, 2017 for the FAPE denial related to attending school.

    c. The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's academic or social/emotional needs and skills. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District should Student re-enroll. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent, and may be used at any time from the present until Student turns age fourteen (14). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent and may be limited to the average market rate for private providers of those services in the county where the District is located.

4. The District did not otherwise discriminate against Student or act with deliberate indifference toward Student.

5. The District is not obligated to reimburse the Parent for nursing or tutoring services.

6. The claim for associational discrimination against the Parent is DISMISSED as outside of this hearing officer's jurisdiction and, to the extent such was necessary, that claim has been exhausted.

7. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives including the form of compensatory education set forth in this decision and Order.

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

Cathy A. Skidmore

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Cathy A. Skidmore
HEARING OFFICER
18583-1617KE