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

ODR No. 13216-1213 AS

Child's Name: A.Z.

Date of Birth: [redacted]

Dates of Hearing: 1/8/13, 1/16/13, 1/17/13

OPEN HEARING

Parties to the Hearing:	Representative:
Parents	Parent Attorney
Parents	None
School District	School District Attorney
Gateway 9000 Gateway Campus Boulevard Monroeville, PA 15146	Jocelyn Kramer, Esq. Law Offices of Ira Weiss 445 Fort Pitt Boulevard, Suite 503 Pittsburgh, PA 15219
Date Record Closed:	February 22, 2013
Date of Decision:	March 9, 2013
Hearing Officer:	Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

This is the second decision concerning this School District and Student. Like the first case, the issues arose from the Family's recent relocation to Pennsylvania and Student's enrollment in the District at the beginning of the 2012/2013 school year. This decision is based upon the same consolidated factual record as the first case, ODR #13338-1213 AS, which resulted in an order permitting the District to conduct an initial evaluation of Student to determine IDEA eligibility, and if necessary, identification of the appropriate disability category or categories, as well as to determine Student's need for special education services and how such needs can appropriately be met via an IEP.

Parents filed the first complaint, initiating this case, in early November 2012 seeking compensatory education for alleged procedural and substantive violations of several provisions of the IDEA statute and regulations and alleged discrimination under §504 of the Rehabilitation Act of 1973.

As explained below, Parents' claims are based largely upon the erroneous belief that the District was required to implement Student's [out of state] IEP but failed to appropriately fulfill that obligation. The applicable law, however, belies the underlying premise of Parents' IDEA and §504 claims. In addition, the evidence does not otherwise support any claim for discrimination on the basis of handicap under §504, or for any substantive IDEA or procedural violation that resulted in a loss of educational benefit to Student, substantial interference with Parents' participation rights or denial of FAPE. Parents' claims, therefore, will be denied.

ISSUES

1. Is the School District required to implement the IEP from a school district in [another state] that was in effect at the time Student stopped attending school in the [out of state] school district?

2. If the District is not required to implement the [out of state] IEP is the District required to provide comparable services, and if so, for what period?

3. Did the District deny Student a free appropriate public education (FAPE) and/or significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Student from the date of Student's enrollment through the date the due process hearing record closed?

4. Did the School District discriminate against Student in violation of §504 of the Rehabilitation Act of 1973?

5. If the District denied Student a FAPE or discriminated against Student, should compensatory education be awarded, and if so, in what form, in what amount and for what period?

FINDINGS OF FACT

1. Student, born [redacted] is currently [a preteenaged] resident of the School District with a medical diagnosis of autism who received special education services in other states before relocating to Pennsylvania. (N.T. pp. 10, 11(Stipulation); S-2, S-2A)

2. The parties stipulated that at the time the due process complaint in this case was submitted and the hearing began, Student was receiving instruction in the home and occupational therapy from the District. The District provided the special education placement and related service based upon an IEP from a[n out of state] school district where the family resided during the 2011/2012 school year. (N.T. p. 12; S-2)

3. Parent enrolled Student in the District on August 31, 2012 the Friday before Labor Day, noting on the enrollment form that Student had received special education and speech services, and attaching an IEP from the [out of state] school district. Parent also requested home-based services. The registration packet was provided to the director of special education on September 4, 2012. (N.T. pp. 60, 95, 98; S-1 pp. 1, 2, 8)

4. Also attached to the enrollment documents was a letter from a[n out of state] neuropsychologist dated April 25, 2012 requesting homebound educational services in Pennsylvania due to Student's diagnoses of an autistic spectrum disorder, a major depressive disorder, an anxiety disorder, ADHD and a history of mental health symptoms and behaviors related to attending school. Student had been receiving home-based

instruction from the [out of state] school district. (N.T. pp. 95, 96, 100, 101, 302; S-2, S-2A)

5. After reviewing the enrollment documents, the District's director of special education made several telephone requests for Student's educational records to the [out of state] school district, and subsequently sent a letter, but did not receive any records until October 15, 2012. (N.T. pp. 95, 114, 119, 120, 129—131; S-1 p. 5, 10A—C)

6. The special education director had telephone conversations with Parent on September 4 and 5. In those conversations, the special education director tried to arrange an IEP meeting, discussed the need for an evaluation of Student and requested that Parent provide records in addition to the [out of state] IEP. Parent initially declined an IEP meeting, and requested that homebound services begin, but ultimately agreed to an IEP meeting on September 19. (N.T. pp. 104—114; P-70 p. 1, P-107 pp. 6, 7, S-2)

7. On September 6, Parent provided the District with a number of documents via e-mail attachments. The most recent information about Student available to the District at the beginning of the current school year was provided by a July 2011 neuropsychological evaluation, in addition to the [out of state] IEP. Achievement testing and other assessment results described in the IEP, and included among the documents sent to the District by Parent, were conducted between 2007 and 2010. (N.T. pp. 96, 97, 100, 114—117, 297, 298; P-70 p. 1, P-107 pp. 4, 5, S-2 pp. 16, 17, S-3A, S-3I pp. 6, 7)

8. The neuropsychological evaluation report listed medical diagnoses of autistic spectrum disorder, major depressive disorder, single episode, severe without psychosis, generalized anxiety disorder and ADHD combined type, all made by a psychiatrist in 2010, prior to the family's relocation to [another state]. An evaluation at Children's Hospital of Philadelphia (CHOP) in 2009 had also resulted in diagnoses of Autism Spectrum Disorder and ADHD. (N.T. p. 299; S-3A pp. 1, 2)

9. In his report, the neuropsychologist noted Student's refusal to attend school beginning in April 2011 and a psychiatric hospitalization around that time for suicidal ideation. (S-3A p. 1)

10. The neuropsychological report recommended that speech/language and OT services be resumed, recommended a physical therapy (PT) evaluation and further auditory processing tests. The neuropsychologist also recommended Applied Behavior Analysis (ABA) to address Student's behaviors such as tantrums and aggression, as well as to improve social skills. He also recommended a detailed IEP, noting that academic instruction needed to begin in the home with short sessions and adjustment by teachers and other service providers to Student's sensory, motor, social and behavior needs. Individual counseling for Student was also recommended, along with neuropsychological follow-up in three months and repeat testing in 18—24 months. (N.T. pp. 299—301; S-3A pp. 6, 7)

11. The [out of state] IEP provided homebound instruction and OT during the 2011/2012 school year, through June 4, 2012. The IEP included one goal, for completing homebound instruction assignments, with three short-term objectives, and specified a number of accommodations to be implemented by the homebound teacher. (N.T. pp. 98, 99; S-2 pp. 2, 4, 7, 10, 12, 13, 19)

12. Student's level of academic performance/functioning was reported in a section of the IEP designated "Prior classroom teacher input," which stated that "[Student] appears to be at grade level in all academic areas, except for writing. He has scored at grade level on all placement assessments, and classroom assignments. His relative strength is math. He is very curious. He is mild-mannered and a pleasure to work with. He is inquisitive." The source(s) of that information, including the name(s) and grade level(s) taught by the person or persons who provided the input, were not identified. (N.T. p. 102; S-2 p. 17)

13. The [out of state] teacher assigned to provide instruction to Student at home during the 2011/2012 school year found Student disinterested in school work and unresponsive when he used traditional instructional methods. The teacher elicited much greater interest from Student when he introduced a computer program for learning, practicing and assessing skills a few weeks after the school year began. (N.T. pp. 633—635, 637, 638, 640, 643)

14. The computer program featured cartoon characters and voices that provided a colorful visual representation of Student's level of success on lesson assessments, as well as clapping and cheering for successful completion of lessons and assessments. These "fun" aspects of the computer program provided encouragement to work on the lessons. (N.T. pp. 643, 647, 648)

15. After noting Student's interest in the computer program, the teacher spent each instructional period watching Student's progress on the computer-based lessons he selected for Student. The teacher was able to identify areas of difficulty and select additional lessons in those areas. The teacher believed Student made progress through the computerized lessons. (N.T. pp. 633, 635)

16. The teacher centered all lessons on [out of state] state educational standards for 5th grade, and specifically the areas tested on the statewide assessments. Fifth grade curriculum standards for [out of state] include the core subjects of math, language arts and science, with history/social studies "on the backburner." The teacher modified the curriculum as necessary to meet Student's needs, particularly in math, where Student had not learned some concepts, requiring Student to be instructed below 5th grade level in those areas. (N.T. pp. 652—655, 658, 659)

17. The teacher focused on math and science instruction during the early part of the 5th grade school year. The teacher did not determine Student's grade level in reading, and did not instruct Student in language arts until January 2012 because he believed Student could read "very well" based on Student's ability to comprehend the computerized lessons, which required reading. The teacher did not instruct Student in written expression

because Student disliked writing and found it particularly difficult. (N.T. pp. 656, 657, 662, 663; P-30)

18. Generally, the teacher selected the curriculum presented to Student based on looking at IEPs and informal assessments. The teacher did not consult with Parent concerning what he should teach Student. (N.T. pp. 662, 663)

19. There were no specifically scheduled parent-teacher conferences during the 2011/2012 school year, since the teacher saw Parent at every instructional session and was able to provide immediate informal feedback after each lesson. (N.T. pp. 650, 651)

20. The teacher did not track Student's progress on the IEP goals. The only assessments administered to Student were those included within the computer program to track progress on the lessons the teacher selected for Student. Although it was possible to print the assessments and results to create a paper record of progress on the computerized lessons, the teacher never did that (N.T. pp. 648—650)

21. Although the teacher is not certain that Student learned everything in the 5th grade curriculum during the 2011/2012 school year, he believes that Student is very bright and should be instructed in the 6th grade curriculum during the current school year. (N.T. pp. 636, 637, 659, 660)

22. Student's [assessment] scores at the end of 5th grade were at Level 3 for Science (on grade level/partial success with content) and Level 2 for reading (below satisfactory level of success). Student's math score was not reported. The ratings in all areas are on a five level scale, from lowest to highest. (P-21)

23. The District began providing 4 hours of educational services at Student's home with two teachers simultaneously on September 10, 2012. Before beginning instruction, the teachers conducted informal assessments of Student's levels in reading, writing and math. (N.T. pp. 453, 454, 456—458, 523)

24. The teachers also began the process of "pairing" with Student, which means developing a relationship such that Student looks forward to the teachers' arrival and willingly participates in the instruction. (N.T. pp. 454, 470, 728; P-129)

25. The teachers began providing Student with a "Direct Instruction" curriculum in math, reading and writing at Student's skill level after determining that Student was below grade level in those areas. (N.T. pp. 456, 565, 721—725)

26. The teachers also implemented a reward system with reinforcements similar to the District-wide token economy used in all elementary schools. (N.T. pp. 474, 475, 731)

27. On September 19, 2012 the parties met to discuss the [out of state] IEP and the teachers' early assessments of Student's academic and behavioral needs. Based upon the teacher reports of Student's significant academic deficits, the District increased instructional time

to 5 hours/week. The District also began providing occupational therapy (OT). (N.T. pp. 269, 270, 419—450; P-43 pp. 1, 8; S-8 p. 1)

28. After discussions at the September 19 IEP meeting, the District notified Parents that it would seek an evaluation of Student, and that services comparable to those provided in the [out of state] IEP would continue for three months. (S-8 p. 1)

29. Subsequently, the District sent Parents three permission to evaluate forms (PTE), but Parents refused consent for any evaluation other than an OT evaluation. A due process complaint initiated by the District to override Parents' refusal to consent to an evaluation resulted in a recent decision in favor of the District. (S-8, S-11, S-14; *Gateway School District v. A.Z.*, ODR #13338-1213 AS (Carroll, February 25, 2013).

30. The teachers originally assigned to instruct Student were unable to continue after early October. The District assigned a different teacher, who continued working on the same curriculum with the later addition of 6th grade curriculum content. (N.T. pp. 628, 729, 791; P-29 pp. 29-92)

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards Applicable to the Issues in this Case

In two important respects the general legal standards that apply to the issues in this case are identical to the standards that governed the previous decision on the District's complaint. In addition, the legal standards applicable to §504 claims in the context of special education services must be considered in this case. Before considering the specific facts in the consolidated record that underlie the decision on Parents' claims, it will again be helpful to begin by describing the primary aspects of the governing law.

1. Right to a Due Process Hearing/Burden of Proof

The procedural safeguards in the IDEA statute and regulations apply equally to parents and school districts, including the opportunity to present a due process complaint and request a hearing. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009).

The decision in *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), in which the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, also applies in this case. Here, however, because Parents filed the due process complaint at issue, it was their burden to establish the District's alleged violations, including denial of FAPE, discrimination on the basis of disability and entitlement to compensatory education.

As discussed in the prior decision, the Supreme Court limited its holding in S*chaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding. That is particularly important in this case, where the consolidated record began with the District presenting its case first, but with no limitation on the use of the testimony and documents as evidence in both cases. As also noted in the previous decision, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

Here, the applicable law, as well as the facts established by the evidence, leave no doubt that the District did not violate either the IDEA statute or the non-discrimination prohibition in §540 of the Rehabilitation Act of 1973. As in the previous decision, therefore, the outcome of this case does not depend upon allocating the burden of persuasion to the party that filed the complaint, Parents in this case.

2. IDEA Requirements Relating to Interstate Transfer Students

The same legal standards relating to interstate transfers also apply to Parents' claims, but with a small shift in the emphasis of the legal requirements toward the District's obligations with

respect to an out of state IEP rather than the District's rights with respect to conducting an evaluation. As stated previously, when a student with an IEP in effect in one state transfers into a school district in another state during the same school year, the federal IDEA regulations require the transferee school to provide comparable services, "until the new public agency—(1) Conducts an evaluation pursuant to §§300.304 through 300.306 (if determined to be necessary by the new public agency);" 34 C.F.R. §300.323(f).[1]

Through the years, that provision has been interpreted by the federal Department of Education through sub-agencies responsible for implementing special education requirements, the Office of Special Education Programs (OSEP) and the Office of Special Education and Rehabilitative Services (OSERS). OSEP issued a general policy memorandum relating to interstate transfers in 1995 and OSERS has provided further guidance in the form of questions and answers concerning how that regulatory section is to be implemented. *See Memorandum 96-5*, 24 IDELR 320 (OSEP 1995); *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 47 IDELR 166 (OSERS 2007; *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations* 54 IDELR 297 (OSERS 2010).

The OSEP policy memorandum notes that after enrolling a student with an IEP from another state, the transferee school district's first step is to determine whether it will adopt the out of state evaluation and eligibility determination or conduct its own evaluation. An evaluation by the new district is "treated as a pre-placement evaluation" requiring parental consent, or, as

[1] This provision also applies under the applicable state regulations. The Pennsylvania special education regulations adopt the federal regulations found at 34 C.F.R. §§300.300—300.325 without change or elaboration. *See* 22 Pa. Code §14.102(a)(2), (xxiv), (xxv), (xxvi), and (xxvii).

occurred with respect to the parties here, a hearing officer order overriding Parents' refusal to consent and permitting the evaluation.

The status of a transfer student's out of state IEP was addressed by the Court of Appeals for the Third Circuit in *Michael C. v. Radnor Twp. School District*, 202 F.3d 642 (3rd Cir. 2002). In the *Radnor Twp. School District* decision, the court held that in the case of an interstate transfer student, the new school district is not required to consider the out of state IEP as continuing in effect in the new state. 202 F.3d at 651. In reaching that decision, the court approved the reliance of both the administrative decision-makers and the district court on OSEP *Memorandum 96-5*, noting that deference is due to official policy statements issued by OSEP. 202 F.3d at 649, 650.

The section of the IDEA regulations relating to interstate transfers does not directly and explicitly address the situation presented by this case, where a student who received special education services in another state does not transfer to a different state during a school year but enrolls in the new school district during the summer or at the beginning of a new school year, when there was no IEP in effect because school is not in session when the student entered the new district. The agency discussions do, however, address the situation of an IEP that is unavailable from either the prior school district or parents. In that event, the new school district "has no duty to provide comparable services. The district may choose to provide special education services while it pursues an initial evaluation." 54 IDELR 297 (OSERS 2010). That language implies that the new school district could also choose to provide only regular education services.

Moreover, in the event a due process complaint is filed because parents disagree with the new district's proposal to conduct an evaluation, or disagree with the interim services provided

by the new district, or if the parties cannot agree upon an interim placement and services, the transferee district may place the student in the regular education program pending the outcome of the due process proceedings. OSEP *Memorandum 96-5*. That conclusion was reiterated by OSERS in 2007:

> If there is a dispute between the parent and the new public agency regarding whether an evaluation is necessary, or regarding what special education and related services are needed to provide FAPE to the child, the dispute could be resolved through the mediation procedures or, as appropriate, the due process procedures. Once a due process complaint notice requesting a due process hearing is filed, the child would remain in the regular school program during the pendency of the due process proceedings.

47 IDELR 166.

3. §504 Legal Standards

The statute prohibiting disability-based discrimination commonly referred to as "§504 of the Rehabilitation Act of 1973" or simply "§504" is found at 29 U.S.C. §794(a), and provides as follows:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

By its plain terms, the statutory language prohibits discriminatory conduct by recipients of federal funds, including a local education agency (LEA) as described in the IDEA statute. In the context of education, therefore, the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with a FAPE. *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009). The substantive right to FAPE, as well as the procedural safeguards to which a qualified disabled

student is entitled under §504 may be satisfied by complying with IDEA substantive and procedural requirements. 34 C.F.R. §§104.33(b)(2), 104.36; *Centennial School District v. Phil L. and Lori L*, 559 F.Supp.2d. 634 (E.D. Pa. 2008); *Lyons v. Smith*, 829 F.Supp.2d 414 (D.D.C. 1993).

To assert a successful §504 claim, a parent must prove four elements: 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in, denied the benefits of or subjected to discrimination by the school district. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

4. Legal Standards Applicable to the Relationship Between IDEA and §504

Nothing in either IDEA or §504 suggests that a school district that appropriately fulfills its §504 FAPE obligations by compliance with the IDEA statute and regulations is thereby deemed to have met the non-discrimination mandate of §504. Pennsylvania regulations implementing §504, and court decisions in Pennsylvania and elsewhere establish that students and parents may pursue a separate claim for discrimination under §504 even where IDEA standards also apply. *See, e.g., J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 13451 (E.D. Pa. 2008); *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008), *Chavez v. Tularosa Municipal Schools*, 2008 WL 4816992 (D.N.M. 2008); *Brenneise v. San Diego Unified School District*, 2009 WL 1308757 (S.D. Cal. 2009). *See, also,* 22 Pa. Code §15.10:

> Notwithstanding other provisions of this chapter, an eligible or noneligible student under Chapter 14 (relating to special education services and programs) may use the procedures for requesting assistance under §15.8(a) (relating to procedural safeguards) to raise claims regarding denial of access, equal treatment or discrimination based on handicap. A student filing a claim of discrimination need not exhaust the procedures in this chapter prior to initiating a court action under Section 504.

See also Chavez v. Tularosa Municipal Schools, 2008 WL 4816992 at *14, *15:

> "In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to a FAPE. In other words, the drafters of Section 504 were not only concerned with [a student] receiving a FAPE somewhere (as was the case with the IDEA), but also that a federally funded program does not treat [the student] differently because [s/he is disabled]…Unlike the IDEA, Section 504 does not only look at what is a FAPE, but also what is fair." *Ellenberg v. N.M. Military Inst.*, 478 F.3d at 1281-82 n.22 (additional citation omitted.

Parents' Denial of FAPE and Discrimination Claims

1. Claims Based on Failure to Implement the [out of state] IEP

Parents' claims in this case depend heavily on their contention that the District was obligated to implement the IEP from [the other state], since any deviation by the District from the goals and services specified in that IEP cannot violate IDEA unless the [out of state] IEP was in full force and effect during the period in dispute.

Review of the legal standards applicable to interstate transfer students who were IDEA eligible in one state prior to moving into a different state establishes that Parents' underlying premise is completely inaccurate. The IDEA regulations, as interpreted by the court of appeals whose decisions must be applied in Pennsylvania, as well as by the federal agencies charged with appropriately implementing IDEA, establish without question that the District had no obligation to implement the [out of state] IEP at any time.

In an apparent effort to avoid the impact of the plain language of 34 C.F.R. §323(f), Parents contend, in the alternative, that the District explicitly adopted the [out of state] IEP at the September 19, 2012 IEP meeting, thereby converting that IEP into an IEP issued by the District. In yet another alternative attempt to establish that the [out of state] IEP was, and continues, in effect Parents argue that they reasonably believed that the District had adopted the [out of state]

IEP, and, therefore, that Parents' "perception" created an obligation on the part of the District to implement that IEP. *See* Parental Closing Arguments/ODR #13216-1213 AS at p. 5. First, there is no legal basis for a claim that a school district's actions must, under any circumstances, conform to parents' belief concerning its obligations under IDEA. Moreover, even if some type of estoppel claim based on Parents' beliefs concerning the effect of the District's actions were possible under some unusual set of circumstances, Parents' reliance on their own belief concerning the District's purported adoption of the [out of state] IEP was clearly unreasonable in this case. The record established that from the first conversation between Parent and District staff, the District told Parent that it needed to conduct an evaluation of Student to determine IDEA eligibility and that it would implement comparable services until an evaluation was completed. (FF 6) In addition, an education specialist with the county Behavioral Health Office, who accompanied Parent to the IEP meeting to serve as Parents' advocate or intermediary with the District, understood that the District was proposing to provide instruction to Student in the home setting guided by curriculum-based assessments conducted by the teachers initially assigned to provide instruction to Student, and, therefore, was not proposing to implement the [out of state] IEP. (N.T. pp. 691, 697) Parents could easily have checked their understanding of the District's obligations and intentions concerning implementation of the [out of state] IEP with the educational specialist, especially when it became obvious to Parents, by early November at the latest, that the District was not implementing the [out of state] IEP. Parents' refusal to question their own beliefs concerning the District's obligation to implement an IEP from a different state, or concerning the District's intentions concerning the [out of state] IEP, cannot alter the District's legal obligations and provide a basis for Parent's claims in this case.

Parents also suggested that the District's refusal to implement the [out of state] IEP was retaliatory, and, therefore, amounted to a §504 violation, contending that the District had agreed to implement the [out of state] IEP until Parents refused permission for an evaluation. As noted above with respect to school districts' concurrent obligation to provide a FAPE under §504, compliance with IDEA regulations is one means of fulfilling §504 FAPE requirements. Although Parents in this case claimed that the District's actions were discriminatory and violated §504 on that basis, not as an alternative to the IDEA claim for denial of FAPE, the principle that IDEA compliance fulfills §504 requirements in this context also applies to discrimination claims by analogy. If a school district takes action based on IDEA requirements and fully complies with those requirements, there can be no viable claim for discrimination. Here, the District had an absolute right to seek an initial evaluation of Student and absolutely no obligation to accept medical or out of state school-based evaluations to establish Student's IDEA eligibility in Pennsylvania. Pursuing the right to an evaluation and refusing to determine Student's IDEA eligibility before the District completed its own evaluation cannot, therefore, provide the basis for a claim of discrimination. Moreover, the District had no obligation to implement the [out of state] IEP regardless of its position with respect to an evaluation and/or Student's IDEA eligibility.

Finally, under the circumstances of this case, it is arguable that the District did not even have an obligation to provide special education services comparable to those in the [out of state] IEP, since Student did not actually transfer into the Pennsylvania District from another state when an IEP was in effect in the other state. The record established that by its terms, the [out of state] IEP was in effect only through the end of the 2011/2012 school year. (S-2 p. 12) Prior to that time, Student was no longer residing in the [out of state] school district, and Parents did not

enroll Student in any Pennsylvania school district before the end of the 2011/2012 school year. Consequently, Student entered the District without an IEP in effect. The District, therefore, could have taken the position from the outset that Student would not be provided with any educational services that were not available to regular education students in the District. Nevertheless, the District initially agreed to provide comparable special education services, and indeed, identified Student's placement as "instruction in the home," a special education placement rather than "homebound instruction," a temporary excusal from school with educational services provided at home that is available to any student school for medical or other serious reasons. (FF 2)

As noted above, parents and school districts can agree to a special education placement and/or services for a student who was IDEA eligible in another state even when no IEP is available, and, therefore can certainly do so when there is no out of state IEP in effect, as the parties did in this case. As discussed in the prior decision and below, however, such an agreement may terminate during the pendency of due process proceedings, and in any event, does not obligate a school district in the new state to implement the out of state IEP unless there is an explicit agreement to do so. Here, despite Parents' efforts to establish that the District adopted and agreed to implement the [out of state] IEP, the record establishes that there was no such agreement by the District.

Claims Based on Parents' Disagreement with the District's Focus of Instruction and Methodology

As applied to the undisputed facts in this case, *i.e.*, that Student first enrolled in the District at the beginning of the current school year after moving to Pennsylvania from [out of state], where Student had an IEP, the applicable legal standards establish that Parents' claims must be denied because the District had very limited responsibility to provide specialized

services to Student beyond those available to regular education students, and because the District's decision to rely strictly on IDEA requirements relating to interstate transfer of a Student who was eligible for special education in [out of state] provides no basis for a claim of disability-based discrimination. Nevertheless, some additional discussion of Parents' issues and arguments concerning the specific services and instruction the District provided is warranted since it is highly likely that the parties will participate in IEP meetings in the future to consider Student's needs and develop an appropriate program and placement after the District's initial evaluation is completed.

Parents based their legal claims and arguments on the District's purported obligation to implement the [out of state] IEP, and particularly the provisions of that IEP relating to the use of a computer and instruction in grade level curriculum. (S-2 pp. 17, 19) It became quite apparent through the questioning of District witnesses at the due process hearing that the true heart of Parents' claims concerning the services the District provided to Student was Parents' fundamental disagreement with the District's curriculum and methodology.

Parents must recognize, however, that although they are entitled to participate in making decisions concerning the education of a child with a disability, they do not have the right to control the process in any respect. *See, e.g., J.E. v. Boyertown ASD*, 2011 WL 476537 at *4 (E.D. Pa. 2011):

> Parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *See* Rowley, 458 U.S. at 199 (stating that a free appropriate public education does not require "the furnishing of every special service necessary to maximize each handicapped child's potential."). Nor is a school district required to provide each disabled child an equal educational opportunity commensurate with the opportunities provided other children. *Id.* at 198; *cf.* *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir.1999). (IDEIA requires no more than a "meaningful benefit," which "must be gauged in relation to the child's potential." (quoting *Polk*, 853 F.2d at 185)).

See also K.C. v. Nazareth Area School District, 806 F.Supp.2d 806, 829 (E.D. Pa. 2011).

Parents clearly preferred the methods used by Student's homebound teacher in [out of state] during the 2011/2012 school year, and presented the telephone testimony of the teacher at the due process hearing, presumably to establish that Student could successfully be instructed entirely in grade level curriculum and that computerized instruction was very successful and should likewise be required of the District. Instead, however, the teacher's testimony established that Student's educational progress during the 2011/2012 school year was uncertain, at best, and based entirely on the teacher's subjective feelings and beliefs concerning Student's reading ability, in particular, without the benefit of any objective assessments in that essential skill area. (FF 17, 20, 21) The only objective assessment of Student's academic performance was provided by the statewide assessment administered at the end of 5th grade, which placed Student at grade level in the [out of state] science curriculum but below grade level in reading.

The teacher's testimony also established that gaps in Student's math skills required some instruction below grade level, as well as repetition and re-teaching of concepts, that he modified the grade level curriculum as necessary to meet Student's needs, and that the computer program apparently used exclusively to instruct Student after the first few weeks of school included built-in reinforcements to encourage Student to keep working. (FF 13, 14, 15, 16)

In substance, therefore, although the details differed, the instruction provided by the District during the first half of the current school year was quite comparable to the services actually provided pursuant to the vague and very limited IEP in effect in the [out of state] school district during the 2011/2012 school year. Parents' claims and arguments concerning the specifics of the District's services during the current school year amount to the type of dispute over curriculum and methodology that cannot support a viable claim for denial of FAPE, whether Parents' claim is analyzed in terms of a procedural violation based on failure to

implement the [out of state] IEP, which the District was clearly not required to do, or in terms of a substantive failure to provide comparable, or otherwise appropriate educational services.

There was simply no evidence that the District teachers did not appropriately establish Student's levels of performance in basic reading, math and writing skills, or that the District did not provide educational services reasonably calculated to assure that Student could make meaningful progress.[2]

The School District's Current Obligation to Provide Student with Special Education Services

In the District's evaluation case, as well as in its defense of Parents' claims in this case, the District requested a decision and order that it was not obligated to provide special education services to Student from the date of Parents' first refusal of consent for an evaluation in September 2012. The District's request for, essentially, a declaratory judgment concerning its special education obligations to Student is based on its contention that the IDEA regulations provide that when a student moves from one state to another, the district in the transferee state has an absolute right to determine the transferring student's IDEA eligibility and needs via an evaluation that is considered an initial evaluation, and, therefore, if parents refuse permission for such an evaluation, the transferee district is justified in considering the transfer student a regular education student whose IDEA eligibility has not been established.

As discussed in the previous decision, OSEP/OSERS guidance for applying §300.323(f) supports the District's position partially, but not entirely. Even if parties in a case relating to an

[2] Although the IDEA regulation relating to students transferring into a school district in a new state who were IDEA eligible in the transferring state does not require implementation of the out of state IEP under any circumstances, and apparently permits the new district to teat the eligible student as a regular education student under at least some circumstances, somewhat paradoxically, the regulation nevertheless requires that the transferee district assure that such students are provided with FAPE. In general terms, under the legal standards applicable in Pennsylvania, therefore, school districts must assure that students with an IEP from an out of state school district must be afforded the opportunity to derive meaningful educational benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009).

interstate transfer disagree with respect to an evaluation, they can agree to an interim program and placement, as the parties did in this case when the District agreed to provide instruction in the home, a special education placement. (FF 2) The District is not, however, required to continue to agree to special education services when a disagreement over an evaluation results in due process proceedings. When that occurs, the District may consider a transfer student a regular education student. *OSEP Memorandum 96-5* at p. 3; *Questions and Answers,* 47 IDELR 166 (OSERS 2007)

There is no explicit guidance for the situation presented by this case, however, where the disagreement over the evaluation first arose in September 2012 but due process proceedings were not initiated until much later. Here, it was Parents who first filed the due process complaint, at issue in this case, on November 3, 2012, which included issues relating to the District's proposed evaluation. Those issues, also raised in the District's later complaint, were resolved by the prior decision on that complaint, and, therefore, are not considered in this decision. As also discussed in the previous decision, although Parents had refused permission for the District to evaluate Student in September and October, the District did not initiate its own due process complaint until early December, after a resolution session was held on Parents' complaint and Parents subsequently rejected the District's third PTE. (S-L) As noted in the prior decision on these matters, until that point, the District was willing to continue its efforts to reach an agreement with Parents concerning the evaluation.

In the previous decision, the District's request to rescind its agreement to provide special education services to Student as of the date of Parents' first refusal to consent to an evaluation in October 2012 was denied. Nevertheless, because Parents' refusal to permit the evaluation described in the District's third PTE resulted in a due process complaint, the District was

permitted to treat Student as a regular education Student during the pendency of the due process proceedings from the date the District's complaint was submitted on December 7, 2012. That decision stands and is reaffirmed in the order in this case. Since the District did not violate IDEA requirements or discriminate/retaliate against Student and/or Parents based on Student's disability or Parents' advocacy on behalf of Student, the time when the District's obligation to provide special education services to Student based on its initial agreement to do so is of no consequence with respect to Parents' claim for compensatory education in this case.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that because the School District did not violate the provisions of either the IDEA statute and regulations or §504 of the Rehabilitation Act of 1973, the District is not required to take any action based on Parents' due process complaint, is not required to provide compensatory education to Student, or to provide any specific special education services until the District completes its initial evaluation and develops an IEP, if warranted by the evaluation results.

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

March 9, 2013

Anne L. Carroll

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HEARING OFFICER