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

FINAL DECISION AND ORDER

Student's Name: A.H.

Date of Birth: [redacted]

ODR No. 14487-1314KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Sonja Kerr, Esq. Public Interest Law Center 1790 Benjamin Franklin Parkway 2nd Floor Philadelphia, PA 19103
School District of Philadelphia 440 N Broad Street, Suite 313 Philadelphia, PA 19130	Sarah Davis Esq. Fox Rothschild, LLP 10 Sentry Parkway, Suite 200 PO Box 3001 Blue Bell, PA 19422

Dates of Hearing: 01/07/2014, 01/14/2014, 01/23/2014, 01/24/2013, 02/04/2014, 02/27/2014, 02/28/2014, 03/05/2013

Record Closed: 03/17/2014

Date of Decision: 03/24/2014

Hearing Officer: Brian Jason Ford

Introduction and Procedural History

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4.

This matter was requested on November 22, 2013, and concerns the educational rights of [redacted], a student with disabilities (Student). The hearing was requested by [redacted] (Parent), who is the Student's grandmother, guardian, and "parent" for IDEA purposes.[1] *See* 20 U.S.C. § 1401(23). The claims made in the Parent's Complaint are against the School District of Philadelphia (District). The District is the Student's local educational agency (LEA). *See* 20 U.S.C. § 1401(19).

The Student has significant physical limitations, resulting from spastic cerebral palsy (CP). The Student also has significant vision impairment, and is legally blind. The parties also agree that the Student has developmental deficits, but disagree about the level of those deficits. The District has concluded that the Student meets the IDEA's criteria for a student with an intellectual disability (ID). The Parent contests that designation.

In addition to the dispute about the Student's ID designation, the Parent alleges that the District predetermined the Student's educational program and placement, denying Student an opportunity to meaningfully participate in the development of the Student's Individualized Educational Program (IEP). The Parent also alleges that the Student's IEP was both inappropriate and not properly implemented. As a result, the Parent alleges that the Student was denied a free appropriate public education (FAPE). The Parent demands placement for the Student in Overbrook School for the Blind (Overbrook), compensatory education, revisions to the Student's IEP, and revisions to the Student's eligibility categories.

The Parent's Complaint also includes a demand for an independent educational evaluation (IEE) at public expense. The District denied that request in its Answer, rather than requesting its own hearing to defend its own evaluation. The Parent moved for summary judgment on the IEE demand, arguing that the District's failure to file its own complaint was, effectively, a default. On January 10, 2014, I issued an Interim Order denying the Parent's motion, but placing the burden of proof on the District to establish the appropriateness of its own evaluation. A copy of that Interim Order is attached to this Decision as Appendix A.

[1] There is no dispute that the Student's grandmother is the Student's "parent" for IDEA purposes. I refer to the Student's grandmother as "Parent" throughout this decision both for convenience and to avoid any confusion about the grandmother's rights.

Issues

Although the parties phrase and sub-divide the issues differently, these are the issues that were presented during this hearing:

1. Was the Student properly identified as having ID?

2. Is the Student entitled to placement at Overbrook?

3. Must the District fund an IEE for the Student?

4. Was the Student denied a FAPE, either through the development of an inappropriate IEP, or through a failure to implement the IEP, or both?

5. Were the Parent's procedural rights, including the right to meaningfully participate in IEP development, violated?

There is some ambiguity as to whether the Parent claims that the Student is entitled to placement at Overbrook in order to receive a FAPE, or demands placement at Overbrook as a remedy. I will treat the Overbook placement as a separate issue, but will also address it as a remedy.

Findings of Fact

Two points of information are important guideposts for the findings of fact below. First, as discussed in detail below, I am bound by the findings of a Compliance Investigation Report from the Pennsylvania Department of Education, Bureau of Special Education. As applicable, I have noted which findings are my own, and which were found by the Bureau in the Compliance Investigation Report.

Second, an IEP developed in December of 2013 was offered into evidence over parental objection. That IEP was rejected by the Parent, and has never been implemented. The Parent argues that I must disregard that IEP. Neither party has raised the appropriateness of the December 2013 IEP as an issue. As that issue is not before me, I make no findings of fact as to the substantive content of the December 2013 IEP, and no analysis as to its appropriateness.[2]

[2] There is a more-than-ample record of the Parent's objections to the admissibly of this document. For context in this decision, the Parent demands placement at Overbrook. One factor related to that issue is the District's ability to provide a FAPE on its own. The December 2013 IEP was relevant to these proceedings (and, therefore, admissible) for that reason. Ultimately, as discussed in detail below, analysis of the December 2013 IEP is unnecessary to resolve that issue (something that could not be known before the conclusion of the Parent's case).

I find as follows:

1. At the time of this decision, the Student is [elementary school-aged].[3]

2. Since birth, or very shortly thereafter, the Student has been diagnosed with CP.

3. The Student has limited use of [the Student's] left hand, which is [the Student's] dominant hand.

4. Currently, the Student cannot walk and relies upon a wheelchair for mobility.

5. The Student is non-verbal, but has expressed some communication in the form of sounds, gestures, and facial expressions.

6. The Student is legally blind.

7. Although the Student cannot feed []self, the Student has some ability to swallow soft foods. The Student is also fed through a gastrostomy tube (g-tube).

8. At home, the Student exhibits some behaviors that tend to indicate that the Student is aware of the concept of cause and effect (specifically, the Student is able to operate a stair lift by manipulating a switch, indicating that the Student understands that manipulating the switch causes the lift to move).

9. Currently, the Student exhibits behaviors that indicate an understanding of cause and effect only sporadically in school, prompting [the Student's] teachers to conclude that cause and effect is an emerging concept for the Student.

10. The Student received Early Intervention (EI) services.

11. The parties stipulate that Elwyn Early Childhood Services is the Early Intervention Agency (as defined at 22 Pa Code § 14.101) holding the mutually agreed upon written arrangement (MAWA) for students who reside within the District. Colloquially, Elwyn is the MAWA, and was responsible for the Student's EI program.

12. The parties stipulate that, for early intervention, Elwyn placed the Student in a Pennsylvania Approved Private School (APS) run by [redacted].

13. The parties stipulate that, while attending [the preschool program], the Student received related services pursuant to an IFSP, and that some of those related services were provided by Overbrook. *See* S-10.

[3] I do not include citation to the record for facts that are clearly undisputed, such as the Student's age, or for facts that are stipulated.

14. I take judicial notice that Overbrook is not an approved private school, but rather a Pennsylvania Chartered School for the Education of the Deaf and Blind (not to be confused with Pennsylvania's charter schools, or Pennsylvania's approved private schools).[4] *See Pennsylvania School Code,* Section 1376.1.

15. During EI, the Student received a standing program as part of physical therapy. To enable this, the Student used molded ankle-foot orthotics (MAFOs). The record does not reveal who provided the MAFOs to the Student.

16. The Student transitioned to school-aged services at the start of the 2013-14 school year.

17. Prior to this transition, the District sought and obtained the Parent's consent to evaluate the Student. The Parent provided consent on January 23, 2013.

18. The District evaluated the Student while the Student was still attending the EI program. The District conducted various evaluations, discussed in greater detail below, between February 25, 2013 and June 3, 2013. *See* S-14, S-15.

19. After the evaluation, the District drafted a reevaluation report (RR) that includes the other evaluations, either in detailed summary or verbatim. S-16. The RR is discussed and described in greater detail below.

20. The District did not complete the RR within 60 days of the Parent's consent to the evaluation.

21. After drafting the RR, the District drafted a proposed IEP, dated June 20, 2013. (S-17). The June 2013 IEP indicates that an IEP team meeting convened the same day that the document was created, but the team did not convene in June of 2013. *See* S-28.

22. On July 12, 2013, the Pennsylvania Department of Education, Bureau of Special Education (PDE/BSE or BSE) received a complaint from the Parent concerning the Student, prompting a compliance investigation. S-22.

23. With the BSE investigation pending, the District invited the Parent to an IEP team meeting. The invitation was sent on August 12, 2013. The meeting was scheduled for August 27, 2013. S-24.

24. The IEP team met on August 27, 2013. S-26.

25. On September 9, 2013, BSE issued a Compliance Investigation Report (the end product of BSE's investigation). S-28.

[4] Throughout the hearing, the parties and the hearing officer referred to Overbrook as an APS. This is in error because Overbrook, by operation of law, is not an APS.

26. In the CIR, BSE found that the Student's IEP team, including the Parent, reviewed the RR and "developed an IEP for the Student" at the meeting. S-28 at 3.

27. In the CIR, BSE also found that the District prepared a notice of recommended educational placement (NOREP) dated August 27, 2013 (the same day as the meeting), and presented the NOREP to the Parent the same day. S-28 at 3.

28. In the CIR, BSE also found that the Parent approved the NOREP on August 27, 2013. S-28 at 3.[5]

29. BSE's findings notwithstanding, it was not clear what school building the Student would attend at the time that the Parent approved the NOREP. *See* S-17 at 38.[6]

30. After the August 2013 IEP team meeting, but before the start of school, the District unilaterally determined the Student's building assignment. NT, *passim.* The Student was placed in a multi-disabilities classroom in an elementary school that is not the Student's neighborhood school.

31. The District did not tell the Parent which school the Student was assigned to prior to the first day of the 2013-14 school year. *Parent's Testimony*.

32. The first day of the 2013-14 school year was September 16, 2013.

33. On the first day of school, the Parent took the Student to the Student's neighborhood school. An administrator at that school explained to the Parent that

[5] Regarding BSE's findings, they are BSE's findings and not my own. During the hearing, a huge amount of time, testimony and documentary evidence was put forward concerning the propriety of the August 2013 IEP meeting. The Parent contends that the meeting was improperly convened, including only District administrators and nobody who actually teaches the Student. The Parent also claims that the District came to the meeting with the Student's IEP predetermined. The time, effort and sheer volume of evidence put forward to simply establish who was present at the meeting is astounding. All the while, neither party addressed the impact of BSE's CIR, which includes findings about the meeting and what happened there. Perhaps this is because BSE was addressing a narrow question about IDEA timelines. In addressing that question, however, BSE made findings about what happened, substantively, during the August 2013 IEP team meeting. For reasons articulated in the discussion below, I have no authority to interfere with or alter BSE's findings. As described below, this is a jurisdictional issue. I am obligated to address my own jurisdiction, even when my jurisdiction is not raised by the parties.

[6] In the absence of the BSE CIR, the evidence clearly shows that the draft IEP, dated June 20, 2013, was the document presented at the August 27, 2013 IEP team meeting. (S-17). The revisions to the June IEP were discussed at the meeting. Based on assurances that the District would incorporate the proposed revisions, the Parent signed the NOREP appearing at S-17 pages 38-40. Then, after the NOREP was signed, the District incorporated the changes, resulting in the IEP dated August 27, 2013. (S-26). In sum, were I not bound by the CIR, I would find that the District finished the IEP after receiving the NOREP, and never issued a NOREP for the Parent to approve or reject the final draft.

the Student was not enrolled in that school. After some investigation, the Parent was told the Student's school assignment.

34. The Parent testified that, at the start of the school year, the District sent a bus to pick up the Student that did not have a wheelchair lift. This testimony conflicts with school records indicating that a bus with a wheelchair lift was sent, starting on September 16. (H-2). Upon carefully weighing this conflicting evidence, I find that the District sent a bus with a wheelchair lift to pick up the Student from the start of the 2013-14 school year.

35. Upon learning the building to which the Student was assigned, the Parent went to the school and introduced herself to the school nurse.

36. After speaking with the school nurse, the Parent was of the opinion that the Student's school lacked adequate nursing support to meet the Student's needs. In particular, the Parent was concerned that the Student's teacher, not the school nurse, would administer the Student's g-tube. The parent was also concerned about the nurse's ability to serve the entire student population at the Student's school, and about the proximity of the nurse's office to the Student's classroom.

37. There are, roughly, 1,350 students in the Student's school. There is always one nurse in the building, but never more than one. *See* NT at 1290-1341.

38. The Student's teacher is trained to deliver g-tube feedings. NT at 1129-1131, 1297.

39. A nursing degree is not required to administer g-tube feedings. NT, *passim*.

40. Although g-tube feedings are provided, in part, to reduce the risk that the Student will aspirate while eating, the procedure is not risk-free. The Parent testified, credibly, that the Student has aspirated in the past during g-tube feedings.

41. The Student's IEP does not include an emergency plan to be followed if any serious issue develops during a g-tube feeding (or otherwise). *See* S-26.

42. After visiting to the Student's school, the Parent secured a private nurse for the Student.

43. After the private nurse was secured, the Parent sent the Student to school on the District's bus, starting on October 3, 2013. (H-2).

44. On October 13, 2013, the Parent went to the District's central office and met with a school administrator who is not a member of the Student's IEP team. During that meeting, the Parent expressed concerns about and dissatisfaction with the Student's IEP. The Parent also claimed that she did not understand that she approved the IEP via the NOREP. In response, the administrator printed an additional copy of the Student's NOREP, which the Parent signed indicating disapproval. NT at 219-264.

45. By rejecting the duplicate NOREP on October 13, 2013, the Parent evidenced her disagreement with the IEP that she previously approved. The parties agree, however, that in doing so, the Parent did not revoke consent for the District to provide special education and related services.

46. At school, the Student was to receive a standing plan (like the standing plan in place during EI).

47. The Standing plan was not implemented until the end of January, 2014, because the Student did not have MAFOs in school. *See* NT 1544-1633.

48. The District testified that, to its knowledge, MAFOs are typically sent home with students at the conclusion of EI programming, and then brought to school when school-age programming starts. *See* NT 1544-1633.

49. The Parent testified that the MAFOs did not come home from [redacted].

50. The District contacted the Parent in an effort to obtain the MAFOs, thinking that they were in the Parent's possession. *See* NT 1544-1633.

51. The Parent did not respond to the District's inquires. *See* NT 1544-1633.

52. The District did not contact [redacted] regarding the MAFOs, despite having a release allowing such communication. *See* NT 1544-1633.

53. The IEP calls for 900 minutes of physical therapy per IEP term, and 600 minutes of occupational therapy (OT), speech/language therapy (S/L), and physical therapy (PT), each, per IEP term. The IEP also calls for 60 minutes per month of vision therapy, and 60 minutes per week of nursing. S-26 at 34.

54. The 60 minutes per week of nursing are for the administration of the Student's medication, not for g-tube feedings. S-26.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion in all issues except for the Student's entitlement to an IEE at public expense. Regarding the IEE, the District must prove the appropriateness of its own evaluation.

IDEA Disability Categories

The IDEA recognizes several categories of disabilities. If a student both has a disability that falls into one of the IDEA's categories and, by reason thereof, needs special education and related services, the Student is a "child with a disability" for IDEA purposes. *See* 20 U.S.C. § 1401(3)(A).

Intellectual Disability (ID) is one of the categories of disabilities that are recognized by the IDEA.[7] IDEA regulations define ID to mean "significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance." 34 CFR § 300.8(c)(6).

Multiple disabilities is another IDEA category. "Multiple disabilities means concomitant impairments (such as [ID]-blindness or [ID]-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness." 34 CFR § 300.8(c)(7).

Orthopedic impairment is another IDEA category. "Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures). 34 CFR § 300.8(c)(8).

Visual impairment including blindness is another IDEA category. "Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness." 34 CFR § 300.8(c)(13).

Pennsylvania regulations adopt the disability categories and their definitions from the federal regulations. 22 Pa. Code § 14.101.

Free Appropriate Public Education (FAPE)

Students with disabilities are entitled to a FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14. FAPE does not require IEPs to provide the maximum possible benefit or maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or

[7] Until October 2010, the law used the term "mental retardation." In October 2010, Rosa's Law, Pub. L. 111-256, was signed into law. Rosa's Law changed the term to "intellectual disability." The definition of the term itself did not change.

de minimis educational benefit, relative to a child's ability. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit.

LRE and Continuum of Alternative Placements

The IDEA requires placement in the least restrictive environment (LRE):

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and . . . special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2)(i).

The LRE requirement, as indicated in the text of the regulation, operates relative to an individual student's needs. Several different placement options may be appropriate for any given student at any given time. The LRE requirement compels LEAs to place students in the least restrictive of all possibly appropriate placements.

Consistent with the foregoing, the IDEA establishes a continuum of alternative placements. 34 C.F.R. § 300.115. LEAs must make this continuum available to students in order to meet the needs of each individual student. 34 C.F.R. § 300.115(a). The continuum includes, in order of increasing restrictiveness, instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b).

Placement, Not Tuition Reimbursement

It is important to recognize that the Parent is not demanding tuition reimbursement. Instead, the Parent is demanding a particular placement. Different legal principles apply to these claims.

In a more typical tuition reimbursement case, the well-established, three-part *Burlington-Carter* test applies. *See Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510

U.S. 7 (1993). *See also, Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). This test applies, however, only when parents unilaterally place students into private schools, incur a financial debt to those schools, and then demand reimbursement to recover their costs. *See id.*

In this case, the Parent has not placed the Student into a private school, nor has the parent incurred a debt to a private school. Rather, the Parent demands placement at a Chartered School for the Education of the Deaf and Blind. Overbrook, and other Chartered Schools, are "special schools" on the IDEA's continuum. *See* 34 C.F.R. § 300.115(b). LEA's must make special schools available to IDEA-eligible students, but also must comply with the IDEA's LRE requirements (described above). Juxtaposing these requirements yields a different, three-part test to determine if a student is entitled to placement at a special school when there is no claim for tuition reimbursement. The Parent must prove that: 1) the Student's current placement is inappropriate, 2) the Student's current placement cannot be made into an appropriate placement with the addition of necessary services and supports, and 3) the demanded private placement is an appropriate placement.

Compensatory Education

It is well settled that compensatory education is an appropriate remedy when a LEA knows, or should know, that a child's educational program is not appropriate, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for the LEA to correct the deficiency. *Id*. In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

IEE at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…" 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's

evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

IDEA and Section 504

In the Complaint, the Parent asserts causes of action under Section 504. These causes of action arise out of the same allegations as the IDEA claims. Moreover, all of the relief that the Parent demands arise out of the IDEA claims. Consequently, I proceed under IDEA jurisprudence. *See, e.g. Brown ex rel. R.P. v. Sch. Dist. of Phila.*, 2012 U.S. Dist. LEXIS 104855 (E.D. Pa. July 26, 2012)(Parent's 504 claims survive District's motion to dismiss because the 504 claims arise out of different allegations and *because relief available only under Section 504 was demeaned*).

Discussion

ID Designation

The Parent argues that the District cannot designate the Student as having an ID, because the District did not obtain the Student's numeric IQ score. The District concedes that it did not obtain a numeric IQ score. The District argues, however, that it is not possible to obtain a numeric IQ score for the Student, and that a numeric IQ score is not necessary for the ID designation.

In her closing brief, the Parent references Pennsylvania's definition of "developmental delay," which does require a statistical discrepancy analysis based on scoring from a "developmental assessment device." 22 Pa Code § 14.101. The term "developmental delay," however, applies only to students who are "less than the age of beginners and at least 3 years of age." *Id*. As such, the term does not apply to the Student in this case. Moreover, there is no dispute as to whether the Student has a developmental delay. Rather, the dispute concerns the ID designation. In the Pennsylvania regulations, ID and "developmental delay" are not the same thing. After a student reaches the age of beginners, the Pennsylvania regulations adopt the federal regulations.

Neither the IDEA, nor its implementing regulations, reference a numeric IQ score in the definition of ID. However, any determination as to whether a student has an ID requires an assessment of both "general intellectual functioning" and "adaptive behavior." 34 CFR § 300.8(c)(6). Intellectual functioning is typically measured as an IQ score, and adaptive functioning is typically measured by an analysis of daily living, communication, and social skills relative to same-aged peers.

There is no dispute in this case that the Student's adaptive behaviors are impaired. The record very clearly establishes that the Student requires significant assistance to perform daily living tasks. The fact that the Student, currently, is non-verbal has obvious implications for the Student's ability to communicate. The heart of the ID classification dispute is the Student's intellectual functioning.

The District argues that an IQ score is unnecessary to determine that the Student's intellectual functioning is "significantly subaverage." 34 CFR § 300.8(c)(6). There are two parts to this argument. First, the District argues that no test exists that would fairly measure the Student's IQ. This includes IQ tests that are designed for non-verbal children, but require a physical response to visual prompts. Second, the District argues that, in such circumstances, professional evaluators can use their professional judgment to determine whether a student's intellectual functioning is significantly subaverage, even in the absence of testing.

The Parent's primary argument is that the law requires testing. It is important to note that the Parent does not argue that the Student's intellectual functioning is *not* significantly subaverage. The Parent agrees that the Student has "some undefined level of developmental delay." *Parent's Closing Brief* at 1. Rather, the Parent argues that, currently, the Student's intellectual functioning is unknown. As noted above, the law does not require any particular IQ score, but does require an assessment of the Student's intellectual functioning. The Parent argues that the required assessment must be something more than the professional judgment of an evaluator.

There is certainly a place for professional judgment when conducting IDEA evaluations. If professional judgment were not needed, there would be no need for a "team of qualified professionals" to determine a student's educational needs. 20 U.S.C. § 1414(b)(4)(A). The question, then, is the basis of the professional judgment used to conclude that the Student has an ID. In this case, there is a clear, undisputed basis for the conclusion that the Student has deficits in adaptive behavior. The record reveals, however, that district evaluators relied upon observations and reports of the Student's *adaptive behaviors* to draw conclusions about the Student's *intellectual functioning*. The evaluators also relied upon observations and reports about the Student's understanding of concepts like cause and effect. Testimony from the Student's teachers and the District's evaluators, taken as a whole, suggests that the Student is just beginning to understand cause and effect. Testimony from the Parent suggests that the Student has mastered this concept.

The entirety of the record compels me to conclude that the District's evaluators were completely justified in using their professional judgment to determine that the Student has some amount of deficit in intellectual functioning. I am also persuaded that, currently, it is impossible to obtain an exact measure of the Student's intellectual functioning. More importantly, I am also persuaded that, currently, it is impossible to say what amount of the Student's perceived intellectual functioning is a function of the

Student's cognitive ability, and what amount is a function of the Student's inability to communicate (either separately or as a result of the Student's physical condition).

Given the Parent's burden, it is important that the Parent is *not* asking me to conclude that the Student does *not* have an ID. Rather, the Parent is asking me to find that the District's affirmative determination that the Student has ID was in error. For the forgoing reasons, I conclude that it is not possible to know the Student's intellectual functioning with enough specificity to reach the IDEA's definition. As the Student may or may not have an ID, the District's affirmative determination was in error. I order the District to remove the ID designation from the Student's IEP.[8]

Placement at Overbrook

The most contentious issue presented in this due process hearing was the demand for placement at Overbrook. This issue, however, is the most straightforward to resolve. Unlike the *Burlington-Carter* test for tuition reimbursement, there is no body of case law that compels me to address the components of a prospective placement demand in order. Therefore, for purposes of the placement analysis only, I will assume that the Student's current program is inappropriate, and that Overbrook is appropriate. The issue, under those assumptions, hinges on whether the Parent has proven that the Student's current placement cannot be made appropriate with the addition of necessary supports. Said simply, no evidence or testimony was presented that is pertinent to this question.[9] In the absence of evidence, the Parent has failed to prove that the Student's placement and program, if inappropriate, cannot be made appropriate. In other words, nothing in the record suggests that placement at Overbrook is the only way for the Student to receive a FAPE.

Parent claims that the District has exhibited a lack of understanding of the Student's visual impairment, and that this also justifies placement at Overbrook. In making this argument, the Parent relies upon *Caldwell Independent School District v. Joe P.*, 2012 U.S. Dist. LEXIS 189769, *affirmed*, 2014 U.S. App. LEXIS 283 (5th Cir. 2014). There are striking similarities between *Caldwell* and the instant matter, but there is also a major difference. In *Caldwell*, the parents and student were demanding an inclusionary placement in accordance with the IDEA's LRE mandate. In the instant matter, the Parent is demanding the opposite. Further, the court concluded that the LEA's lack of

[8] In Pennsylvania, the ID designation comes with enhanced protections, pursuant to Chapter 14. By prevailing in the demand to remove the ID designation, the Student is no longer entitled to those protections.

[9] The Parent created a significant record concerning the host of alleged deficiencies in the Student's IEP. Nothing whatsoever in the record concerns why or how those deficiencies cannot be corrected absent placement at Overbrook. For example, the Parent claims that the Student requires a greater level of nursing support than what is available in the current placement. Such a claim, if proven, could be corrected by adding nursing services to the Student's IEP. Nothing suggests why Overbrook is the only solution to the alleged nursing deficiency – or any other alleged problem in the Student's IEP.

understanding of the Student's visual impairments made it impossible for the District to provide a FAPE. Nothing in *Caldwell* suggests that teacher education and training cannot cure such problems.

Caldwell is a case out of the Fifth Circuit, and so it is not binding here. Even if it were, it does not suggest that a LEA's lack of understanding about any particular disability yields a prospective placement award. To whatever extent *Caldwell* is persuasive authority, it suggests only that a lack of understanding can be an important factor in determining whether a student received a FAPE. The determination as to whether a student received a FAPE, and the determination as to what remedy is owed if a FAPE was denied, are separate and should not be conflated. Regardless of whether the Student in this case received a FAPE, the Parent has failed to establish that Overbrook is the only placement in which the Student can receive a FAPE. Consequently, the demand for placement at Overbrook is denied.

Given the ambiguity as to whether placement at Overbrook was presented as its own issue, or whether placement at Overbrook was demanded as a remedy for other violations, I note that the forgoing analysis applies in either scenario. In addition, if Overbrook was demanded as a remedy to other issues, case law establishes that compensatory education is the remedy for a denial of FAPE, and that compensatory education cannot be used to offset the cost of tuition at a private school. *See P.P. v. West Chester Area School District,* 585 F3d 727, 739-740 (3rd Cir. 2009).

Appropriateness of the District's Evaluation

As noted above, the District must prove the appropriateness of its own evaluation. If the District fails to prove that its own evaluation was appropriate, the District must fund an IEE for the Student. To satisfy this burden, the District must prove that its evaluation comported with the IDEA's evaluation requirements at 20 U.S.C. § 1414. The evaluation in question is 2013 RR (S-16).

At the outset, and despite the District's burden, the Parent argues that the District's evaluation is inappropriate (in part) because the District failed to comply with evaluation timelines. This issue was the subject of the BSE CIR. BSE found that the District violated IDEA timelines, but that no substantive harm resulted from the violation. I have no jurisdiction to sit in *de facto* appellate review of BSE compliance investigations. BSE found the violation and awarded no relief. I have no authority to disturb BSE's determination. In making this determination, I make no conclusion as to whether *res judicata* applies to BSE CIRs. Rather, this is purely an issue of my jurisdictional authority. Pursuant to 20 U.S.C. § 1415, I have the authority to resolve any dispute concerning the provision of FAPE. Disputes concerning the outcome of BSE CIRs fall outside of my jurisdictional boundaries.

Regarding the appropriateness of the evaluation, the IDEA sets forth minimum, substantive evaluation procedures at 20 U.S.C. § 1414(b)(2),(3) and 1414(c). These procedures require LEAs to "use a variety of assessment tools and strategies to gather

relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining … the content of the child's individualized education program… ." 20 U.S.C. § 1414(b)(2)(A). Regarding the assessment tools, LEAs may "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and … [must] use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C. § 1414(b)(2)(B),(C).

In addition to the forgoing, the evaluation materials must not be "discriminatory on a racial or cultural basis," must be in the student's native language, must be used for their intended purpose, and must be "administered by trained and knowledgeable personnel" 20 U.S.C. § 1414(b)(3)(A). Finally, the student must be "assessed in all areas of suspected disability… [using] assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided… ." 20 U.S.C. § 1414(b)(3)(B)(C).

The 2013 RR includes a brief summary of the Student's background, focusing on the Student's medical history from birth forward. (S-16 at 1-2). The 2013 RR includes a summary of prior testing, including a list of diagnoses from a March 2011 CHOP report, a September 2009 Early Intervention evaluation, and a July 2008 ChildLink evaluation. (S-16 at 2-3, 6). The evaluator had the Student's teacher at [redacted] complete an Adaptive Behavior Assessment System (ABAS) rating scale. (S-16 at 3). The 2013 RR also included detailed information about the Student's in-school presentation, as reported by the Student's teacher at [the preschool program]. This was consistent with the evaluator's own in-class observations of the Student at [the preschool program]. (S-16 at 3-4).

In addition to the ABAS, new testing was completed in the forms of a Functional Vision Assessment (FVA), an Occupational Therapy (OT) evaluation and a Physical Therapy (PT) Evaluation. The FVA included a review of an October 2012 CHOP Ophthalmology report, the Student's visual functioning as described in [the Student's] IFSP, and the services that were being provided by Overbrook. (S-16 at 7). In addition, the FVA included an interview of the Student's then-current teacher, input from the Student's then-current Teacher for the Visually Impaired, a classroom observation and functional vision testing. (S-16 at 7-8). The OT and PT evaluations were also conducted at [redacted], and are summarized in detail in the RR. (S-16 at 9-10).

Based on all of the information in the RR, the evaluator concluded that the Student's primary disability category was ID, with secondary disability categories of Multiple Disabilities *and* Visual Impairment including Blindness. (S-16 at 6).

The 2013 RR used multiple tools to gather information relevant to all suspected areas of disability. That information was not only useful, but necessary in order for the District to develop an appropriate IEP for the Student. This is consistent with the IDEA's mandate. However, the RR erroneously makes an affirmative determination that the Student has

an ID. As discussed above, the Student may have an ID, but it was not possible to make that conclusion affirmatively at the time of the RR. This error, however, does not compel the District to fund an IEE for the Student.

A purpose of any RR is to determine whether a student continues to be a "child with a disability." In making that determination, evaluators must decide if the student continues to meet any of the IDEA's disability categories. The category determination, however, concerns eligibility, not programming. Programming must be provided in accordance with the student's needs, regardless of the student's eligibility category. In this case, the 2013 RR concludes that the Student meets three of the IDEA's eligibility categories: ID, Multiple Disabilities, and Visual Impairment including Blindness. Separate and apart from that conclusion, the 2013 RR includes information about all of the Student's disabilities – including the Student's visual impairment – so that the IEP team can create an appropriate IEP. Removing the ID designation would not alter the conclusion that the Student is IDEA-eligible, and would not change the information and recommendations provided to the IEP team. This conclusion would be different if the gestalt of the 2013 RR was along the lines of 'the Student has an ID and therefore the Student requires X.' This is not the case here. Rather, the 2013 RR describes the Student's abilities and needs, and also makes conclusions about the Student's eligibility categories. Although the latter was in error, I find no flaw in the former.

I note that the Parent claims that the 2013 RR was inappropriate for its failure to include parental input, as required by 20 U.S.C. § 1414(c). In its CIR, BSE determined that the RR was reviewed with the Parent during the IEP team meeting. Regardless, the 2013 RR does a poor job designating what information was provided by the Parent directly (other than the significant quantity of medical reports that the Parent shared with the District). Despite this, the record indicates that the Parent was given a meaningful opportunity to provide input during the evaluation process. The Parent was advised of the evaluation in advance, and requested the deletion of certain information from the RR. The District compiled with that request. Nothing suggests that the District was adverse to parental input, and the District was responsive to the parental input that it received.

Consistent with the forgoing, I will order the District to issue an updated RR removing the ID designation. I will not, however, order an IEE at the District's expense

Compensatory Education:
Appropriateness of the Student's IEP
Implementation of the Student's IEP

The Parent claims that the Student's IEP is inappropriate for many reasons. Before addressing the IEP's appropriateness, I must clarify which IEP is being challenged. The District developed an IEP in late June of 2013. That IEP was then discussed during a meeting on August 27, 2013.[10] Despite claims to the contrary, BSE has found that the

[10] This is consistent with the BSE CIR. (S-28 at 3).

Parent approved the IEP at the August meeting. The Student's IEP team met again, this time with counsel, on December 20, 2013. A draft IEP was proposed at the meeting, and was rejected.

The August IEP (S-26) is the document that the Parent has approved (per the CIR) and that the District implemented. In analyzing that IEP, it was only with considerable difficulty that I was able to disregard my gut reaction to the document. Instinctively, the amount of service provided through the IEP, relative to the Student's needs, seems paltry. Clearly, I must not substitute my gut reaction to the IEP for the concrete evidence presented in this case. It is the Parent's burden to establish that the IEP is inappropriate. As such, the Parent must put forward evidence proving that the IEP is inappropriate. In the absence of such evidence, I am compelled to conclude that the IEP is reasonably calculated to meet the Student's needs.

Over the course of eight hearing sessions, the Parent put on almost no evidence or testimony concerning the substantive appropriateness of the August IEP. The Parent claims that the IEP is inappropriate because the underlying RR was flawed. I reject that argument for the reasons articulated above. The Parent argues that the IEP is inappropriate because the Parent was denied meaningful participation in the IEP development process. In its CIR, BSE found otherwise (as discussed in greater detail below). Even without the CIR, a denial of meaningful parental participation may rise to a denial of FAPE, result in compensatory education. In such cases, the denial of FAPE and resulting award do not flow from a flaw in the IEP itself. As such, even if I were to find that the Parent was denied meaningful participation, that would not establish the substantive appropriateness of the IEP.

The Parent claims that the IEP is flawed for expressing the amount of related services that the Student will receive in terms of minutes per IEP term (as opposed to sessions per week, with the session length designated). Calculating related services in minutes per IEP term is exceedingly problematic in the context of meaningful parental participation. In the context of the substantive appropriateness of the IEP, however, I look for evidence suggesting that the Student requires more or different services than what is actually provided. Again, to me, the amount of services that the IEP calls for seems very low – but I will not confuse my reaction to the document for evidence of its inappropriateness. In this case, evidence establishes the amount and type of service that the Student actually receives. The record is, amazingly, nearly silent regarding why that amount and type is inappropriate for the Student.[11]

[11] A huge amount of the record concerns what the District will and will not do for students as a matter of policy or district-wide practice. This may go to questions of predetermination and meaningful parental input. It is irrelevant to the question of whether the IEP was reasonably calculated to provide a FAPE to *the Student*. Evidence that the District will not provide a particular kind of service is not evidence that the Student requires the service that the District denied as a matter of policy. Moreover, if a student needs a particular service, and the service is not provided, the reason why is irrelevant.

There are three areas in which the Parent put on evidence suggesting either that the IEP is inappropriate, or that services required by the IEP were denied. First, the Parent put on evidence to suggest that services were not in place from the first day of the 2013-14 school year through October of 2013 when the Student began to attend school. Second, the parent put on evidence to suggest that the IEP does not include the requisite level of 1:1 assistance or nursing care. Third, the Parent put on evidence to suggest that the Student requires more OT or PT than the IEP provides.

The first day of school was September 16, 2013. The Student began to attend school on October 3, 2013. The Parent testified that the District failed to inform her as to which school the Student was to attend. As a result, the Parent took the Student to the wrong school on the first day of school and was turned away. This testimony was completely credible and, in conjunction with the District's unilateral building selection, I attribute any confusion about the Student's building assignment to the District. After the first day of school, some of the Parent's testimony conflicts with the District's records. Some of the Parent's testimony suggests that the Student was kept home because the District failed to send a bus with a wheelchair lift. This directly conflicts with the District's bus records. More generally, the Parent's testimony also indicates that the Parent kept the Student at home until the Parent secured a private duty nurse, because the Parent believes that the District's placement is unsafe without a 1:1 nurse. After the first day of school, I find that the Parent kept the Student home while securing a private nurse, and sent the Student to school once a nurse was scheduled.

The question of whether the Student is entitled to compensatory education from September 17 through October 2, therefore, is connected to the question of whether the IEP provides sufficient 1:1 support or nursing care. If the Student requires a 1:1 nurse, the Parent was justified in keeping the Student home until such support was in place.

The Parent argues that a nurse must perform the Student's g-tube feedings. The Parent testified that the Student has aspirated during g-tube feedings, and that this is why a nurse is required. No evidence, other than the Parent's testimony, was provided to support this. Testimony from the District's pediatrician, however, suggests that g-tube feedings are for the purpose of avoiding aspiration. The Parent also testified that she performs the Student's g-tube feedings, and that she is not a nurse. The Student's teacher is comfortable with g-tube feedings, and has performed many g-tube feedings over the course of her career. The Student's private duty nurse performs g-tube feedings in school.

Educational needs aside, proper g-tube feedings are absolutely critical for the Student, and improper g-tube feedings may have dire consequences. I can think of no issue more serious than this one. The record establishes that people other than a nurse can perform the Student's g-tube feedings. This happens on a regular basis without incident. At the same time, the record also establishes that g-tube feeding carries a certain amount of unavoidable risk, and that a plan must be in place for an *immediate* response should something go wrong during a feeding. This is where the August IEP falls short.

Should the Student aspirate, the Student will require the immediate attention of a nurse (as a starting point). Only one nurse serves the entirety of the Student's school. It is not clear how the nurse would be alerted in an emergency, and there is conflicting testimony about how long it takes to get from the nurse's office to the Student's classroom. Consequently, even though a nurse is not required to perform g-tube feedings, under the unique facts of this case, a nurse must be assigned to the Student. This would not be the case if a nurse was in very close physical proximity to the Student's classroom at all times – but those are not the facts of this case.

For the forgoing reasons, I will order the District to assign a full time nurse to the Student. The Student's IEP team may reconsider the need for a full time nurse if the Student's placement changes in future IEPs. Further, as the IEP fails to provide an appropriate level of nursing support, the Parent was justified in keeping the Student at home until a nurse was in place. I award one hour of compensatory education for each hour that school was in session from September 16 through October 2, 2013. During this time, the Student was unable to attend school due to the deficiency in the IEP.

The remaining issue concerning the substantive appropriateness of the August IEP is the quantity of OT and PT. The record indicates that the Student's standing program did not start until January of 2014. The record also indicates that one of the purposes of the standing program is to prevent the tightness of the Student's muscles that may otherwise result from CP. Some evidence suggests that the Student is tighter now than [the Student] was during the early intervention program. To be clear, the delayed standing program, if anything, is an IEP implementation failure, not a deficiency in the IEP. The parties, however, blame each other for the delayed start. The District, in essence, argues that it is not obligated to purchase medical equipment for the Student, and that the District ultimately ordered MAFOs out of concern, not obligation. The Parent testified that she assumed the Student's MAFOs would transfer from the early intervention program to the District. The record reveals, however, that the Parent took no action when the District requested the Student's MAFOs. Even so, the record also reveals that the District made no effort to obtain the MAFOs from the early intervention program.

Based on the record as a whole, I find that the District proposed a standing program as a continuation of the standing program that the Student received in early intervention. The District observed the Student in that program, and assumed that the Parent would provide the same equipment in the District's program. The Parent assumed that the equipment would simply follow the Student. Both assumptions were wrong, and neither party acted appropriately upon realizing the error. The District had a release to communicate with the early intervention program, but made no attempt to get the MAFOs from [redacted]. The Parent took no action in response to the District's request for the MAFOs. Sadly, the Student suffered as a result.

Ultimately, the District is required to provide the equipment necessary for the implementation of the programs it proposes. Under the unique facts of this case, that requirement extends to MAFOs. The District's failure to secure the required equipment,

in this case, is mitigated by its efforts to obtain the equipment from the Parent, and by the Parent's unresponsiveness to that effort. As such, I will award compensatory education to remedy this IEP implementation failure. The IEP calls for 900 minutes of physical therapy during the IEP term. In Pennsylvania, a school year is 180 days. As such, the IEP calls for five (5) minutes of PT per day. I divide the blame for the failure to provide a standing program equally between the parties. As a result of this mitigation, I will award 2.5 minutes of compensatory education for each day that school was in session between September 16, 2013 and January 31, 2014.

There is no evidentiary support for the myriad of other IEP deficiencies claimed by the Parent. Claims of IEP deficiencies not addressed above are denied. There is no evidentiary support for IEP implementation failures except for those addressed above. Claims of IEP implementation failures not addressed above are denied.

Meaningful Parental Participation

As noted above, due process hearings are not *de facto* appellate reviews of BSE compliance investigations. Issues concerning the District's failure to convene an IEP team in accordance with IDEA timelines, prior to September 9, 2013, have already been adjudicated. BSE concluded that meeting timelines were not met, found no substantive harm, and awarded no relief. Similarly, I will not disturb BSE's findings that an IEP team convened on August 27, 2013, that the team (including the Parent) reviewed the RR at the meeting, that the team (including the Parent) developed an IEP at the meeting, that the District issued a NOREP the same day as the meeting, and that the Parent approved the NOREP the same day. (S-28 at 3).

In other cases, I have concluded that this District's practice of making building selections after IEPs are approved, without any parental input, is a violation of parents' rights to meaningfully participate. *See P.V. v. School District of Philadelphia,* ODR No. 01541-1011AS, *affirmed* 2:11-cv-04027 (EDPA 2013). I have also found in other cases that expressing the amount of services that a student will receive in hours per IEP term can also yield a denial of meaningful participation. Under ordinary circumstances, I would go on to determine if those facts, which are well established in this case, resulted in a denial of meaningful participation. In this case, however, the only conclusion that I can reach without disturbing the CIR, is that the Parent participated in the development of the Student's IEP. The Parent and District reviewed the RR together, and "developed an IEP" at the meeting. This level of participation – direct involvement in the development of the IEP – is meaningful. I cannot find otherwise.

Conclusion

The August 2013 IEP is the only IEP that the District has implemented. In terms of that IEP's substantive appropriateness, the Parent has proven that the Student requires a full time nurse to remain in the placement called for the by the IEP. The Student is awarded one hour of compensatory education for each hour that school was in session between September 16, 2013 and October 2, 2013. In terms of that IEP's

implementation, the Parent has proven that the District failed to implant a standing program from the start of school through the end of January, 2014. Having found mitigating circumstances, I award 2.5 minutes of compensatory education for each day that school was in session during this time.

Regarding the demand for an IEE at public expense, the District has proven the appropriateness of its own evaluation. There is, however, an error in the District's RR. The District is ordered to correct that error by removing the Student's designation as a student with ID.

Regarding the Student's designation as a Student with ID, I have found that the District cannot affirmatively conclude that the Student has an ID. Rather, the Student may or may not have an ID. Until an affirmative conclusion can be made, the Student may not be categorized as a student with ID over parental objection.

Regarding placement at Overbrook, the Parent has not proven that such placement is necessary for the provision of FAPE. I will not, therefore, order the District to place the Student at Overbrook.

Regarding meaningful parental participation, I find that the Parent had an opportunity to meanfully participate in the development of the Student's IEP. To hold otherwise would disrupt the findings of the Pennsylvania Department of Education, Bureau of Special Education (BSE). I have no appellate authority to review BSE's findings in Compliance Investigation Reports.

ORDER

Now, March 24, 2014, consistent with the forgoing decision, it is hereby **ORDERED** as follows:

1. The Student is awarded one (1) hour of compensatory education for each hour that school was in session between September 16, 2013 and October 2, 2013.

2. The Student is awarded an additional two and a half (2.5) minutes of compensatory education for each day that school was in session between September 16, 2013 and January 31, 2014.

3. The District shall remove the Student's designation as a student with intellectual disabilities.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

APPENDIX A: INTERIM ORDER OF JANUARY 10, 2014

S.D., Parent A.H., Student v. School District of Philadelphia	ODR No. 14487-1314KE

Interim Order

Introduction, Background and Procedural History

This matter was requested by [redacted] (Grandparent) on the Grandparent's own behalf and on behalf of [redacted] (Student), against the School District of Philadelphia (District). This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4.

The Grandparent initiated these proceedings by filing a Due Process Complaint (Complaint) on November 22, 2013. Through the Complaint, the Grandparent alleges several procedural and substantive deficiencies in the District's prior evaluations of the Student. *Complaint* at ¶ 8-10, 30, 31, 41. The Complaint also includes a demand for an Independent Educational Evaluation (IEE) at the District's expense. *Complaint* at ¶ 56.[12]

The District filed an Answer to the Due Process Complaint (Answer) on November 26, 2013. The District's Answer was timely. *See* 20 U.S.C. § 1415(c)(2)(B)(ii). Generally, through the Answer, the District denies the Grandparent's allegations concerning its prior evaluations of the Student. *See Answer* at p. 2. The Answer also includes the following statement:

> "Inasmuch as Parent has already requested a due process hearing, rather than request a due process hearing to establish the appropriateness of its evaluation, (34 C.F.R. §300.502(b)(2)(i)), the District will move to add the appropriateness of the June 18, 2013 ER as an issue in the upcoming due process hearing."

Answer at p. 2.

On January 7, 2014, a session of this due process hearing convened. Three additional sessions are scheduled. During the January 7 session, the Grandparent moved to exclude evidence and witnesses that the District intends to call for the purpose of defending its evaluation. The Grandparent further argues that the District must fund the demanded IEE because it has not filed a complaint, as required by the IDEA. The District disagrees, and argues that the

[12] The demand for an IEE alternatively demands reimbursement for the same, should the Grandparent obtain an IEE for the Student during this due process hearing.

Grandparent is not entitled to an IEE at public expense because its evaluation was appropriate, and that it must be given an opportunity to establish the appropriateness of its evaluation.

Both parties filed briefs on this issue on January 9, 2014.

Statutes and Regulations

The IDEA and its implementing regulations establish that, under certain circumstances, parents of children with disabilities are entitled to an IEE at public expense. The pertinent statute is 20 U.S.C. § 1415(d)(2)(A), requiring LEAs to include information about IEEs in procedural safeguards notices. The pertinent regulation is 34 C.F.R. § 300.502, which is discussed *passim*.

Regulations establish what LEAs must do when parents request an IEE:

> "Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations…"

34 C.F.R. § 300.502(a)(2). More importantly for this matter:

> "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either— (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense…"

34 C.F.R. § 300.502(b)(2)(i)-(ii).[13]

Regulations do not set a specific timeline for LEAs to respond to IEE requests. Rather, the regulations provide as follows:

> "If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation."

34 C.F.R. § 300.502(b)(4).

Timing of the IEE Request, Facts Not in Dispute

Both during the January 7, 2014 hearing session, and it in its brief of January 9, 2014, the District avers that the Grandparent's Complaint is the first time that the Grandparent requested

[13] The same regulation also provides that LEAs need not fund IEEs that do not meet agency criteria, regardless of the appropriateness of the District's own evaluation. *See* 34 C.F.R. § 300.502(b)(2)(ii). This provision does not appear to apply to the instant matter.

an IEE at public expense. The Grandparent has not explicitly agreed that the Complaint is the first IEE request, but has not argued to the contrary. The Grandparent's brief of January 9, 2014 points no prior document or date, but rather highlights the District's alleged failure to notify the Grandparent of the right to seek an IEE.[14] For purposes of this Interim Order, I will assume that the November 22, 2013 Complaint is the Grandparent's first request for an IEE at public expense.

Although the parties have not made formal stipulations, there is no dispute that the November 26, 2013 Answer is the District's first response to the IEE request. It is also clear that the District has not funded the requested IEE and has not agreed to fund the requested IEE.

Finally, during the January 7, 2014 hearing session, the District agreed that it must bear the burden to establish the appropriateness of its prior evaluation. This agreement is consistent with both the District's Answer and its motion of January 9.

Discussion

The Grandparent argues in favor of an interpretation of IDEA regulations under which the District was obligated either to fund the requested IEE, or *literally* request a due process hearing to defend its own evaluation. In support of this interpretation, the Grandparent cites to several authorities. Within Pennsylvania, the Grandparent cites to *M.Z. v. Bethlehe*m, 60 IDELR 273, (Third Circuit, March 27, 2013). This case speaks to a parent's right to obtain an evaluation at public expense to remedy an inappropriate evaluation from a school district. It does not speak to the preclusive effect, if any, upon a school district's failure to request its own hearing in response to an IEE request.

Outside of Pennsylvania, the Grandparent cites to *Evans v. Dist. No. 17 of Douglas County*, 841 F.2d 824, 830 (8th Cir. 1988) and a memo from the New Jersey Office of Special Education to the New Jersey Department of Education, dated May 14, 2012. The precedential value of the New Jersey memo notwithstanding, that document urges a change in New Jersey policy to comply with IDEA regulations. The New Jersey memo concludes that funding an IEE or defending prior evaluations at a hearing are the only two valid responses to an IEE request. In *Evans,* a school district was ordered to reimburse parents for an IEE because, in part, it failed to defend its own evaluations at a hearing.

The District also cites to cases to support its position. Some of the cases cited by the District discuss the reasonableness of any delay in requesting a hearing when rejecting an IEE. In *Holmes v. Millcreek Township Sch. District*, 205 F.3d 583, 590, (3d Cir. 2000) the Third Circuit excused a three month delay and in *L.S. v. Abington Sch. Dist*., 48 IDELR 244 (E.D.Pa, 2007), a District Court excused a ten week delay.

[14] Both parties prepared large evidence binders in perpetration for this hearing. The Grandparent's attorney has averred that those binders do not include documentation of a written demand for an IEE at public expense at any point prior to the Complaint. More importantly, the Grandparent's attorney has averred that, to the attorney's knowledge, the Grandparent did not request an IEE in writing at any point prior to the Complaint - regardless of whether such a document was prepared as an exhibit. The Grandparent, via counsel, argues that the District never provided a notice of procedural safeguards explaining the right to demand an IEE in public expense and, consequently, any failure to request the IEE in writing is the result of the District's violation.

Outside of Pennsylvania, the District cites to *Ms. H. v. Montgomery County Board of Ed*., 2011 WL 666033 (M.D.Ala.2011). Although not binding here, the *Ms. H.* court found it reasonable for a school district to defend its own evaluation at a hearing requested by a parent, rather than make a separate request for a hearing in response to an IEE demand. *See Ms. H. v. Montgomery County Bd. of Educ.*, 2011 U.S. Dist. LEXIS 14594, 61 (M.D. Ala. Feb. 14, 2011).

Given the assumptions detailed above, the District responded to the Grandparent's IEE request four days after it was made. This timeline is reasonable by any standard, although I note that the Grandparent has not focused on the timeliness of the District's response. Rather, the Grandparent focusses on the District's failure to file its own complaint.

A very literal reading of 34 C.F.R. § 300.502(b)(2)(i) would yield the conclusion that the District was obligated to "File" its own hearing request. Were I to adhere to that strict reading, the District would still have time to act. Under the standard set by the Third Circuit in *Holmes v. Millcreek Township*, the District could conceivably have another month. Were I to compel the District to file its own complaint, that matter would be consolidated with the instant case, likely resulting in the sort of delay that the Grandparent, in other documents, has objected to.

A less literal reading of 34 C.F.R. § 300.502(b)(2)(i) yields the conclusion that, when rejecting an IEE request, LEAs are obligated to defend their own evaluations at a hearing, regardless of how the hearing comes into existence. In this case, the District acknowledges that it must defend its own evaluation, and that it bears the burden of proof on this issue.

There could be cases in which an LEA's failure to request its own hearing makes a substantive difference - particularly if that failure is coupled with an unreasonable delay in violation of 34 C.F.R. § 300.502(b)(2). In this case, there is no substantive different between placing the burden of proof on the District and compelling the District to defend its own evaluation, and allowing the District to file its own complaint on the same issue. Further, allowing the District to accept that burden and defend its evaluation is also far more efficient, and far less likely to delay these proceedings. In the absence of an unnecessarily delayed response to the IEE request, and under the particular circumstances of this case, I will deny the Grandparents motions and allow the District to defend its evaluation.

In its January 9, 2014 brief, the Grandparent argues that the District has not provided information as required by 34 C.F.R. § 300.502(a)(2). This section, discussed above, is independent of an LEA's obligation to fund an IEE or defend its evaluation at a hearing. Consequently, if the District has not yet provided information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations, it will be ordered to do so.

ORDER

Now, January 10, 2014, it is hereby **ORDERED** as follows:

1. The Grandparent's Demand for an IEE at public expense, via operation of law, and resulting from the District's failure to request its own due process hearing, is **DENIED.**

2. The Grandparent's motion to exclude evidence and testimony concerning the appropriateness of the District's evaluation is **DENIED.**

3. The District bears the burden to establish the appropriateness of its own evaluation.

4. The District is **ORDERED** to provide information to the Grandparent, as required by 34 C.F.R. § 300.502(a)(2), if it has not already done so.

/s/ Brian Jason Ford
HEARING OFFICER