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 Due Process Hearing Officer Final Decision and Order

CLOSED HEARING

ODR No.
22839-19-20

Child's Name:
B.W.

Date of Birth:
[redacted]

Parents:
[redacted]

Counsel for Parent:
Nicole Reimann, Esq.
7 Bala Avenue, Suite 202
Bala Cynwyd, PA 19004

Local Education Agency:
Upper Darby School District
601 N. Lansdown Avenue
Drexel Hill, PA 19026

Counsel for the LEA:
Heather Matejik, Esq.
10 Sentry Parkway, Suite 200
PO Box 3001
Blue Bell, PA 19422-3001

Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
01/24/2020

Introduction

This special education due process hearing concerns the educational rights of a student (the Student) 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), 29 U.S.C. § 701 *et seq*.[1] The hearing was requested by the Student, the Student's biological parents (the Parents) and the Student's aunt (the Aunt) – collectively, the Complainants – against the Student's former public school district (the District).[2]

The Student moved into the District from another state at the start of the 2019-20 school year. Shortly thereafter, the District offered to place the Student into a full-time, out-of-District emotional support program. The Complainants argue that the proposed placement was not appropriate for the Student.

The Student lived within the District's geographical boundaries when the Complainants requested this hearing by filing a complaint with the Office for Dispute Resolution (ODR) with copy to the District. The Student moved out of state after the Complainants filed the complaint but before the hearing convened. The Student's move to another state rendered some issues raised in the complaint moot. Issues concerning the Student's current right to a free, appropriate public education (FAPE) from the District were not presented.

By the time the hearing convened, the Complainants had no demand for a placement within or services directly from the District. Rather, the

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[1] Except for the cover page of this final decision and order, identifying information is omitted to the greatest extent possible.

[2] At various points in time, the Aunt satisfied the IDEA's definition of "Parent" found at 20 U.S.C. 1401.

issues presented concern the appropriateness of the special education that the District offered to the Student during the period of time that it was the Student's local educational agency (LEA) during the 2019-20 school year, and the Student's right to an independent educational evaluation (IEE) at public expense.

As discussed below, the facts of this case are highly unusual. This matter presents a novel set of facts for analysis under the IDEA's interstate transfer regulations. Under existing regulatory guidance, it is not clear if those regulations apply. Ultimately, I reach the same conclusion whether or not the interstate transfer regulations apply.

For reasons explained below, under the constrained analysis that I must apply, I find in favor of the District.

Issues

The issues presented in this matter are:

1. Did the District violate the Student's right to a FAPE by failing to offer an appropriate special education placement during the period of time that the District was the Student's LEA in the 2019-20 school year?
2. Is the Student entitled to an IEE at the District's expense?

Findings of Fact

The record of this hearing is modest in comparison to most special education due process hearings. That is not surprising, given the narrow scope of the proceedings. Nevertheless, I make findings of fact only as necessary to resolve the issues before me. I find as follows:

1. The Student attended a different Pennsylvania school district (the prior PA LEA) during the 2016-17 school year. In an Evaluation Report dated October 18, 2016, (the 2016 ER) the prior PA LEA determined

that the Student qualified for special education as a child with an Other Health Impairment (OHI). S-3.

2. At the time of the 2016 ER, the prior PA LEA noted that the Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and had difficulties with "attention, emotional and behavioral regulation, and executive skills…" Those difficulties negatively impacted upon the Student's academic progress and behavior in school. S-3 at 15.

3. The Student continued enrollment in the Prior PA LEA during the 2017-18 school year. The Prior PA LEA reevaluated the Student and drafted a Reevaluation Report dated August 17, 2017 (the 2017 RR). At this point, the Prior PA LEA identified the Student as a child with an Emotional Disturbance (ED). S-4.

4. At the time of the 2017 RR, the Prior PA LEA noted that the Student demonstrated "significant dysregulation both emotionally and behaviorally [and that the] intensity of these symptoms has increased relative to the most recent evaluation in October 2016." P-4 at 22. The Prior PA LEA noted that the Student's regression occurred despite increased academic and social/emotional supports both in and out of school. *Id.*

5. After the 2017 RR, the Prior PA LEA offered placement in a, "full time special education program in a private, licensed academic day program that can address…significant emotional, behavioral, and academic needs in a highly structured and therapeutic setting with supports and services available." S-6 at 54.

6. The Student attended the specialized private school during the 2017-18 school year and received special education pursuant to an

Individualized Education Program (IEP) dated August 25, 2017 (the 2017 IEP). S-6.

7. The Student and the Student's mother (the Mother) moved to another state. The Student attended public school in the other state during the 2018-19 school year. S-7.

8. Although the date is not revealed by the record, the Mother sent a copy of the 2017 IEP to the out-of-state school district. *See* S-6.[3]

9. The Student received no special education from the out-of-state school district. The out-of-state school district never offered the Student an IEP. But the out-of-state school district did not exit the Student from special education either. NT 263-264.

10. The Student withdrew from the out-of-state school district on May 16, 2019. S-7.

11. Sometime between May 16, 2019, and the start of the 2019-20 school year, the Student moved to live with the Student's father (the Father) within the District.[4] The Mother remained out of state.

12. The first day of the 2019-20 school year for students was August 26, 2019.

13. The District makes an electronic form available for student registration. The Mother completed the electronic registration form on August 27, 2019. S-8.

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[3] The 2017 IEP was faxed by the out-of-state district to the District on September 18, 2019.

[4] During the hearing, the District expressed some confusion as to whether the person identified by the Complainants as the Student's father is the Student's father. I make no finding to resolve this ambiguity. Rather, for purposes of this hearing and in the absence of evidence to the contrary, I assume that person is the Student's father.

14. On the electronic registration form (S-8):

    a. The Mother answered “yes” to the question, “Has the student ever had an individualized education plan (IEP)?”

    b. The Mother did not upload an IEP in a section calling for parents to attach an existing IEP. The Mother uploaded a birth certificate and immunization records to the form in another section. I find that the Mother did not upload an IEP because the Student had no IEP while attending the out-of-state district as opposed to any technical difficulty.

    c. The Mother also answered “yes” in a health history section of the form asking of the Student has ADD or ADHD. In a space immediately following that question asking for a description, the Mother wrote “ADHD.”

15. September 5, 2019 was the first day that the Student attended school in the District. S-22.

16. The Student engaged in negative behaviors from the very beginning of the 2019-20 school year. The Student received a two-day suspension on September 10, 2019. S-31.

17. As part of the registration process, the District requested records from the out-of-state school district. The out-of-state school district faxed the 2017 IEP to the District on September 18, 2019. S-6.

18. The Student received another two-day suspension on September 24, 2019. S-31.

19. After it received the 2017 IEP, the District scheduled an IEP team meeting. The meeting was difficult to schedule (*see* S-26, NT 214-216) but ultimately convened on September 30, 2019. S-9.

20. The Mother participated in the IEP team meeting by phone. The Student's aunt (the Aunt) participated in person. S-9.

21. At the conclusion of the IEP team meeting, the District issued a Notice of Recommended Educational Placement dated September 30, 2019 (the 2019 NOREP). S-13.

22. Through the 2019 NOREP, the District offered full-time emotional support to the Student. By definition, full-time emotional support is a service, not a location. Nevertheless, the District proposed to refer the Student to a full-time, out-of-district[5] emotional support program, such as the program that the Student attended during the 2017-18 school year. *See* S-13.

23. The 2019 NOREP specifies that the Student would attend the neighborhood school while applications to out-of-district, full-time emotional support placements were pending. During that time, the Student and would receive two classes in an emotional support classroom and two, 30-minute social skills sessions per week. S-13.

24. The District relied primarily upon the 2017 IEP when formulating its placement recommendation. The District also considered input from its personnel, who had interacted with the Student since the start of the school year. S-13.

25. The District did not issue an IEP with the 2019 NOREP. NT *passim*.

[5] In the context of this case, out-of-District does not necessarily mean outside of the District's geographical boundaries. Rather, the term refers to any program not housed within a District school or operated by the District.

26. The Student had an altercation with a teacher the same day as the IEP team meeting. While the altercation was not physical, it was serious in nature. S-10.

27. The incident on September 30, 2019 is part of a broader pattern of negative behaviors that the Student consistently exhibited while attending school in the District. Those behaviors are consistent with the behaviors that the Student exhibited while attending the Prior PA LEA. NT 299-301, S-10, S-11, S-12, S-14, S-20, S-21, S-22, S-23, S-26.

28. During the 37 days that the Student attended school in the District, the Student accumulated 42 offenses and 56 disciplinary actions with varying degrees of severity. *Id.*

29. By the end of September, the Student was failing all classes. NT 190-91

30. The Father rejected the 2019 NOREP on October 4, 2019. The District acknowledged receipt of the rejected 2019 NOREP the same day. S-13.

31. When rejecting the 2019 NOREP, the Father wrote the following as the reason for disapproval (S-13 at 3):

> *I need a reevaluation. I also would like an updated IEP. All the recommendation in this document are based on a 2 year old IEP. I also would like to request another evaluation for social emotional functioning, behaviors and adaptive behaviors.*

32. The Complainants requested this due process hearing six days after rejecting the 2019 NOREP on October 10, 2019. At that time, the District had not responded to the rejected NOREP in writing. However, between the rejection and the filing, District personnel spoke with the

Student's mother by phone and were expecting the Mother to withdraw the Student from special education. S-16.

33. None of the Complainants have ever withdrawn the Student from special education. However, in their complaint, the Complainants demanded that the Student remain in general education during the pendency of these proceedings.

34. The District sought the Father's consent to reevaluate the Student on October 23, 2019, through a Prior Written Notice for a Reevaluation and Request for Consent Form (PTRE). The Father provided consent via the PTRE and the District acknowledged receipt the same day. S-18.

35. The Student's last recorded day of attendance in the District was October 31, 2019. *See* S-22. The Student was placed in an inpatient mental health hospital by a non-educational agency on or about November 1, 2019. The mental health placement was the result of an out-of-school incident. NT 233-234.

36. On or about November 11, 2019, the Student moved to live out of state with the Mother. At the time of the hearing, the Student was not receiving special education from the out-of-state district, but a special education evaluation by the out-of-state district was pending. NT 273.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of

judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this hearing, the parties interpret the facts differently and reach different conclusions about what the law requires, but almost none of the underlying facts are in dispute. Nearly all of my findings are based on documents that were admitted to the record via stipulation. To the extent that I rely upon testimony to make findings, those particular findings are not in dispute. Nevertheless, to the extent that an explicit credibility determination is necessary in all due process hearings, I find that all witnesses testified credibly.

Applicable 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 its 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.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd.*

of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ*., 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, 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 an appropriately ambitious education in light of the Student's circumstances.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method.

The more nuanced *Reid* method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the

Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> *"… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."*

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's

education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist*., 2014 U.S. Dist. LEXIS 114414 at 39. S*ee also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Interstate Transfers

The IDEA addresses what LEAs must do when a student with an IEP moves into a school district from another state. Those regulations, found at 34 C.F.R. § 300.323(f) are as follows:

> f) IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), 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); and
>
> 2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

The applicable regulation does not directly and explicitly address the situation 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. Similarly, the regulation does not address the highly unusual circumstances of this case, in which the Student spent a year out of state as an IDEA-eligible student without an IEP or special education of any kind.

The federal Office of Special Education and Rehabilitative Services has issued guidance about what should happen when an IEP 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 provide only regular education services while an evaluation is pending. Even so, the circumstances contemplated by OSERS involve children who received special education from the prior school, but no longer have access to the prior school's IEP.

Similarly, OSERS has issued guidance for situations in which the new school proposes an evaluation and the parents disagree with the proposed evaluation. In such circumnutates, both parties have the right to request a due process hearing. If the school and the parents 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.

Child Find

The IDEA's Child Find provision requires states to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. 1412(a)(3). This provision places upon school districts the "continuing obligation...to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist*., 585 F.3d 727, 738 (3d Cir. 2009); *see also* 20 U.S.C. § 1412(a)(3).

The evaluation of children who are suspected to be learning disabled must take place within a reasonable period of time after the school is on notice of behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). The failure of a school district to timely evaluate a child who it should reasonably suspect of having a learning disability constitutes a violation of the IDEA, and a denial of FAPE. 20 U.S.C. § 1400.

Independent Educational Evaluation 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).

Section 504/Chapter 15

At the outset, it must be noted that an LEA may completely discharge its duties to a student under Section 504 by compliance with the IDEA. Consequently, when a Student is IDEA-eligible, and the LEA satisfies its obligations under the IDEA, no further analysis is necessary to conclude that Section 504 is also satisfied. Conversely, all students who are IDEA-eligible are protected from discrimination and have access to school programming in all of the ways that Section 504 ensures.

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects "handicapped persons," a term that is defined at 34 CFR § 104.3(j)(1):

> *"Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."*

Chapter 15 applies Section 504 in schools to prohibit disability-based against children who are "protected handicapped students." Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and

2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and

3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

Section 504 and Chapter 15 prohibit schools from denying protected handicapped students participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from regular education.

To accomplish this, a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa Code § 15.3.

Students are evaluated to determine what related aids, services, or accommodations that a student needs. Chapter 15 includes for conducting such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The related aids, services or accommodations required by Chapter 15 are drafted into a service agreement. Chapter 15 defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student." 22 Pa. Code § 15.2. Service agreements become operative when parents and

schools agree to the written document; oral agreements are prohibited. 22 Pa Code § 15.7(a).

For IDEA-eligible students, the substance of service agreements is incorporated into IEPs. Such students do not receive separate service agreements.

When parents and schools cannot reach an agreement, a number of dispute resolution options are available, including formal due process hearings. 22 Pa Code § 15.7(b), 15.8(d).

Discussion

I begin by noting that this matter was heard in one hearing session. Seven witnesses testified and 37 documents were admitted into evidence. I commend the attorneys for both parties for their preparation and efficiency.

Application of the Interstate Transfer Regulations

Reasonable minds could reach different conclusions about whether the IDEA's interstate transfer regulations apply in this case. The transfer occurred in between school terms (one day of the 2019-20 school year notwithstanding). Regardless, conducting the analysis though the lens of the interstate transfer regulations and conducting the analysis as if those regulations do not apply yields the same result.

Assuming that the interstate transfer provision applies, a literal reading of the regulation produces a confounding result. The regulation required the District to provide "services comparable to those described in the child's IEP from the previous public agency." 34 C.F.R. § 300.323(f). In this case, the previous public agency was the out-of-state pubic school district. That agency did not issue an IEP, and so there was nothing for the District to implement. The "services comparable" language in the regulation comes in a parenthetical. The proceeding language, which is not in a

parenthetical, requires the District to "provide the child with FAPE." *Id.* Read literally, the District was required to provide a FAPE to the Student by implementing a non-existent IEP. That conclusion is absurd.

Given the confounding result, OSEP's guidance is helpful – even if it is not squarely on point. Taken as a whole, OSEP's guidance strongly indicates that the District was required to place the Student in regular education upon enrollment until such time as it conducted its own evaluation or issued its own IEP. Extrapolating to generalities, OSEP's guidance contemplates circumstances under which there is no IEP to implement, or there is a dispute between the parties about what should be done. Both circumstances are present in this case. In both circumstances, OSEP's guidance is to place the student into regular education pending either the development of an IEP or the resolution of the dispute.

Applying the OSEP guidance to this case, I find that it was proper for the District to place the Student in regular education until it either offered an IEP or an evaluation. Neither of those events occurred until after this hearing was requested. Instead, the District proposed a special education placement without proposing an IEP. I find that this was a procedural violation of IDEA regulations. This violation, however, was not substantive because the Student never actually received the District's proposed special education placement. The Student was placed in the District's general education program during the entirety of the Student's enrollment.

There is ample evidence that the Student did not receive a FAPE while attending the District's general education program. Nothing herein should suggest that the Student received a FAPE while attending the District. Rather, I find that the Student's placement was consistent with OSEP guidance on this issue.

The appropriateness of the Student's actual placement notwithstanding, the IDEA's interstate transfer regulations required the District to offer an evaluation or an IEP. 34 C.F.R. § 300.324(f)(1), (2). In this case, the Parents requested an evaluation before the District proposed one and the District agreed (albeit after this hearing was requested). Analysis of the Student's substantive IDEA rights, therefore, concerns the timeliness of the District's non-existent evaluation.

Application of the Child Find Provision

There is a good argument that the interstate transfer regulations do not apply in this case. Assuming that they do not apply, the substantive question remains the same. Upon enrollment, the District knew that the Student was diagnosed with ADHD (specifically contemplated under the OHI eligibility category) and previously had an IEP. That information, combined with the Student's behaviors at the very start of the school year, was sufficient to alert the District of the potential need for special education. Consequently, the IDEA's Child Find provisions required the District to propose an evaluation even if the interstate transfer regulations do not apply in this case. As such, the alleged substantive FAPE violation is resolved by the timing of the PTRE, and the amount of time that the District had to evaluate the Student whether or not the interstate transfer regulations apply.[6] Both standards require me to examine the timeliness of an evaluation that does not exist.

[6] The fact that the District sought consent for a reevaluation as opposed to an initial evaluation is irrelevant, as the substantive standards for evaluations and reevaluations are the same. *See* 20 U.S.C. § 1414.

The PTRE and the Evaluation Timeline

The District had a reasonable period of time to propose an evaluation under either the interstate transfer or Child Find standard. I will assume, *arguendo*, that the District should have proposed an evaluation on September 10, 2019, which was the date of the Student's first suspension.[7] I will further assume that the Parents would have approved and returned the PTRE on September 10, 2019, had the District issued the document on that day. The District would have had 60 calendar days to complete the evaluation. The District's deadline would have been November 9, 2019. The Student was hospitalized at the earliest theoretical point in time that time that the District's evaluation could have been due, and never returned to the District.

I make no finding as to the exact moment that the District should have proposed an evaluation. Under the facts of this case, using the earliest possible trigger, the District was under no obligation to complete an evaluation before the Student's hospitalization and move to another state. Even if the District's PTRE was late, the harm of the delay was procedural, not substantive. There are no circumstances under which the District would have been obligated to complete and issue its evaluation before the Student stopped attending the District.

In sum, the District was obligated to evaluate the Student regardless of whether the IDEA's interstate transfer regulations apply to this case. It is possible that the District waited too long to propose an evaluation. That delay was a procedural violation, not a substantive violation, because the District was under no obligation to issue an evaluation report before the

[7] I make this assumption for the sake of argument and make no finding as to whether the District's Child Find obligations were triggered on that day.

Student was hospitalized and left the Commonwealth – even if the District had issued the PTRE as the first sign of trouble.

For the foregoing reasons, the Student is not entitled to compensatory education to remedy a substantive denial of FAPE.

Application of the IEE Regulations

IEEs at public expense are available when parents disagree with an LEA's evaluation. In this case, the District never evaluated the Student and so the threshold condition for an IEE demand is not present. The Student is not entitled to an IEE at the District's expense for that reason.

IDEA regulations notwithstanding, an IEE at public expense may be an equitable remedy when an LEA fails to conduct a necessary evaluation. I find that equity does not require an IEE as a remedy in this case. Regardless of the timing of the PTRE, the District was under no obligation to complete an evaluation before the Student's hospitalization and move out of the District.

I make this determination despite some troubling testimony from the District's Special Education Supervisor. The Supervisor testified that the District was planning to issue a PTRE only after the Student acceptance into an out-of-district placement. *See* NT 313. The District issued the PTRE in large part as a response to the due process complaint. *See id.* I have no confidence that the District would have proposed an evaluation in the absence of the due process complaint. My analysis, however, is constrained to the facts of this case. I cannot award a remedy to fix a violation that almost certainly would have occurred had the Student not moved.[8]

[8] I do not find that parents are obligated to initiate due process hearings to mitigate likely FAPE violations. If an LEA provides a FAPE only because parents incurred the expense of due process proceedings, the student's education is not *free*, even if it is *appropriate*. In this case, the Student left the District before an evaluation was due, and so the result would be

Application of Section 504/Chapter 15

For IDEA-eligible children, Section 504 is satisfied if the IDEA is satisfied. *See above.* I find that the District did not violate the Student's substantive right to a FAPE under the IDEA. Consequently, the Student is not entitled to compensatory education under either the IDEA or Section 504.

Conclusion

I have no doubt that the Student did *not* receive appropriate services while attending the District. However, under either of the regulations that apply to this case – interstate transfer or Child Find – the District's FAPE obligation began with a reasonable period of time to propose an evaluation and then 60 calendar days to evaluate. Under facts most favorable to the Complainants, the Student was hospitalized and moved out of the District before the District was obligated to complete its evaluation. Consequently, under either applicable regulation, the District did not substantively violate the Student's right to a FAPE.

ORDER

Now, January 24, 2020, it is hereby **ORDERED** that the Complainants' claims are **DENIED** and **DISMISSED.**

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

/s/ Brian Jason Ford
HEARING OFFICER

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the same even if the District never issued a PTRE. The facts of this case are highly unusual, and my analysis is limited to these particular facts.