This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order
ODR No. 21218-18-19
CLOSED HEARING

Child's Name:
E.F.

Date of Birth:
[redacted]

Parent:
[redacted]

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Date of Decision:
04/03/2019

Introduction

This matter concerns the educational rights of a student (the Student). The Student resides in the respondent school district (the District) with the Student's parents (the Parents). The Parents do not live together but act as a team and agree about the Student's education – so much so that they are referred to collectively throughout this decision.

The Parents allege that the Student [] has disabilities. For the period of time in question, the Parents allege that the District violated the Student's rights 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*.

For reasons detailed below, I find in part for the District and in part for the Parents.

Issues[1]

The issues presented in this due process hearing are:

1. Is the Student eligible for special education services pursuant to the IDEA?
2. Should the District have developed a Section 504 Plan sooner than it did?
3. [Redacted.]
4. Did the District deny the Student a FAPE from September 24, 2016, through the end of the 2017-2018 school year pursuant to either the IDEA, Section 504, or [redacted] and, if so, is the Student entitled to compensatory education?
5. Are the Parents entitled to tuition reimbursement, including transportation costs, for a private school program in the Summer of 2018 and the 2018-2019 school year?
6. Did the District act with deliberate indifference by not finding Student eligible for special education or a Section 504 Plan sooner than it did?
7. Are the parents entitled to reimbursement for an un-reimbursed portion of an Independent Educational Evaluation (IEE)?

Findings of Fact

I carefully considered the entire record of this hearing. Although there are certainly factual disagreements in this case, the record and the parties' closing arguments illustrate that very few of the underlying facts (what happened and when) are in dispute. I make findings of fact only as necessary to resolve the issues before me. I find as follows:

The 2010-11 School year (Kindergarten)

[1] The parents identified the issues on the record at NT 16-17. The Parents also included a demand for prevailing party fees and expert fees. Those demands fall outside of my jurisdiction but are a preservation of claims.

1. The Student started attending the District in kindergarten. NT 301-302.

The 2011-12 School Year (1st Grade)

2. The Parents requested a special education evaluation when the Student was in 1st grade. The Parents were concerned about the Student's reading, attention, active listening, and following directions. The Parents were also concerned that the Student did not like school and expressed negative thoughts about self (e.g. "I really don't like myself"). S-1, S-3.

3. The District evaluated the Student and drafted an Evaluation Report (ER), which was completed on May 7, 2012. S-3.

4. As part of the evaluation, the District used the WIAT-III, a standardized, normative test of academic achievement. The Student scored in the average range or above in all WIAT-III sub-tests except for oral reading fluency which was an 84, one point from the average range. S-3.

5. As part of the evaluation, the District used the WISC-IV, a standardized, normative test of intellectual ability. Using that test, the District found that the Student had a full-scale IQ of 126 and a General Ability Index of 130. S-3.

6. As part of the evaluation, the District used various behavior rating scales, including the BASC-2, ADHD-IV, and BRIEF, to determine the Student's behavioral and executive functioning needs. In general, some of these assessments indicated that the Student was distractible in school but was well-regulated overall. S-3.

7. As part of the evaluation, the District conducted a speech and language evaluation and found that the Student did not qualify for speech and language services. S-3.

8. In the ER, the District concluded that the Student was not a child with a disability and was not eligible for special education or Section 504 accommodations. However, the District noted that the evaluation results "did warrant ongoing intervention and monitoring for relative weaknesses in the areas of reading decoding and regulation of attention (and related learning behaviors)." S-3.

9. [redacted]

10. Starting at the end of first grade and continuing into second grade, the District provided instructional support for reading skills. N.T. 318, S-49.

2012-13 School Year (2nd Grade)

11. [Redacted].

12. [Redacted.]

13. The Parents had the Student privately evaluated at the start of the 2012-13 school year. The private testing included a battery of standardized, normative reading assessments. The private testing was completed, and the private evaluator issued a report on November 10, 2012 (the Private Reading Evaluation). S-6.

14. Every score that the private evaluator obtained placed the Student in the average range. The independent evaluator did not conclude that the Student had a reading disability. Even so, the private evaluator noted that "the scores do not tell the whole story" because the Student's reading abilities were lower than expected based on the Student's high cognitive ability, and that the tasks presented during the reading assessments were exhausting for the Student. The private evaluator recommended educational interventions, including the Wilson Reading System (Wilson).[2] S-6.

15. The private evaluator also cautioned that the Student frequently squinted while reading, signaling the need for an eye exam. S-6.

16. The Parents provided a copy of the Private Reading Evaluation to the District shortly after it was finished. *See, e.g.* NT 320.

17. On March 28, 2013, the Parents obtained a "Consultation Note" from a private clinical psychologist. The private psychologist did not evaluate the Student or seek additional information from the District. Rather, relying upon the District's ER and the Private Reading Evaluation, the private psychologist concluded that the Student has dyslexia. This conclusion was based on the discrepancy between the Student's intellectual abilities and academic achievement on standardized assessments, and the Student's pattern of strengths and relative weaknesses[3] in those assessments. S-6.

18. In the Consultation Note, the private psychologist also noted that the Student demonstrated higher-level reading and writing skills and had made progress in those domains. S-6.

19. The Parents did not immediately share the Consultation Note with the District. S-11.

[2] Wilson is a specialized reading curriculum based on the Orton-Gillingham reading methodology. Wilson is a multi-sensory, sequential, phonemic system that – if implemented with fidelity – teaches to automaticity.

[3] The Student had no weaknesses relative to peers based on standardized testing. The Student's weaknesses are in the form of slightly lower test scores in some domains relative to slightly higher test scores in other domains. S-6.

20. The Parents retained another private psychologist who is also a reading specialist to review the Student's records. The second private psychologist did not evaluate the Student or seek input from the District but did interview the Student over three sessions. The second private psychologist made no diagnoses, but also concluded that the Student would benefit from Wilson. The second private psychologist put that recommendation in a letter. S-10.

21. The Parents did not immediately share the second private psychologist's letter with the District. S-11.

22. [Redacted.]

23. The Parents testified that the Student would come home from school during 2nd grade feeling frustrated and upset. NT 319-320. That testimony is credible, but there is no evidence that the Student exhibited negative behaviors other than distractibility in school. *Passim*.

2013-14 School Year (3rd Grade)

24. In the summer between 2nd and 3rd grade, the Parents started private Wilson tutoring for the Student. The Parents also shared the Consultation Note and the second private psychologist's letter with the District around this time. S-11, NT 181-182.

25. Between the summer before 3rd grade and the end of 5th grade, the Student received private Wilson tutoring once per week during the school year and twice per week in the summers. NT 376.

26. After its receipt of the Consultation Note and the second private psychologist's letter, the District issued a Permission to Evaluate on September 4, 2013. S-12. The Parents did not respond.

27. The District re-issued the Permission to Evaluate on September 23, 2013.[4] S-12. The Parents again did not respond.

28. The District re-issued the Permission to Evaluate again on October 2, 2013. S-12.

29. On October 8, 2013, the Parents denied consent to evaluate the Student. S-12. The Parents were concerned [redacted]. S-12.

30. When rejecting the evaluation, the Parents maintained that the Student was dyslexic, but also commented that 3rd grade was going "smoothly" and expressed hope that the Student would "continue to thrive in an environment using best teaching practices." *Id*.

[4] The first re-issuance was via hand delivery during a meeting with the Parents.

31. The parties agree that the Student's performance improved in 3rd grade. *Parent's Closing* at 8, *District's Closing* at 4.

32. More specifically, at the start of 3rd grade, the Parents reported to the 3rd grade teacher that the Student was anxious, lost weight at the start of 1st and 2nd grade, and had developed negative avoidance behaviors. By the end of 3rd grade, the Parents reported that the Student enjoyed reading so much that it was difficult to get the Student to stop reading at night. S-11.

33. On more quantifiable measures, by the end of 3rd grade, the Student was at or above proficiency in all academic domains based on the Student's report card. The Student was at or above benchmark levels in all tests except for reading fluency (118 with a benchmark of 127). S-11, S-14. The Student scored advanced on the PSSA math assessment and proficient on the PSSA reading assessment. S-54.

34. [Redacted.]

35. The District issued a Permission to Evaluate form on June 13, 2014. The Parents did not reply. S-15.

2014-15 School Year (4th Grade)

36. The District re-issued the Permission to Evaluate on August 27, 2014. S-15. The Parents did not respond.

37. The District re-issued the Permission to Evaluate again on September 26, 2014. S-15. The Parents did not complete the form but replied by email saying that they did not want the District to evaluate the Student. In the same email, the Parents reiterated their belief that the out-of-school tutoring was sufficient, and that the District was providing a "positive learning environment in the classroom…" S-16.

38. The Parents described the Student's 4th grade year as "fantastic." S-18. More objectively, the Student scored Advanced in English Language Arts, Mathematics, and Science in Spring 2015 PSSAs. S-54.

2015-16 School Year (5th Grade)

39. Throughout 5th grade, the Parents diligently communicated with the Student's teacher. This included both an introductory email with information about the Student at the start of the school year. The Parents also sent an email noticing that some stomach issues were coinciding with difficult academic tasks. P-8, S-18.

40. The Parents did not request special education testing in 5th grade. *Passim*.

41. [Redacted.]

42. The Student finished 5th grade with A and B grades. The Student's [one] teacher noted that "[Student] has made significant progress in [Student's] ability to articulate ideas and responses in written expression." S-19.

43. The Student was above benchmark in winter 2016 and proficient in Study Island assessments. S-19. The Student scored proficient on the PSSA in English Language Arts and Advanced in Mathematics in spring 2016. S-54.

44. The Parents were satisfied with the Student's improvement and decided to discontinue Wilson tutoring at the end of 5th grade. NT 390-391; P-10.

2016-17 School Year (6th Grade)

45. The Parents did not request a special education evaluation during 6th grade.

46. The Student did not receive Wilson tutoring during 6th grade.

47. In February 2017, the Student responded "I don't know" in response to a "common" question from a science teacher in science class. The science teacher wrote "I don't know" with the Student's name on the board. The Parents were under the impression that the incident did not bother the Student but wrote to the science teacher on February 20th to ask about it. The Science teacher replied that he was sure that the Student was not bothered by the incident and "learned a valuable lesson that [the Student] needed to pay more attention to details." P-8.

48. The Parents responded to the science teacher and other district personnel explaining that the Student was dyslexic. The Parents were upset by the science teacher's actions, as they felt that the science teacher was deliberately trying to shame the Student and analogized the incident to bullying. They asked the science teacher to stop all such practices. S-8.

49. [Redacted.]

50. [Redacted.]

51. Student was challenged in math during 6th grade to a greater extent than in prior years [redacted], math was no longer easy for the Student. NT 391, S-20. Confronted with a new challenge, the Student independently sought out the math teacher to ask for clarification on assignments and materials. *Id*.

52. On March 28, 2017, the Parents wrote to the 6th grade teacher to report that the Student was frequently crying at home, frequently asking to be home schooled, and saying that other students were mean. The Parents were not sure if this was

"normal bumps for the age and 6th grade," but asked for the teacher's opinion. S-8

53. The teacher was surprised and sad to hear this report, as it was not consistent with what the teacher observed in school (the teacher had the Student for ELA, Homeroom, and Advisory). The teacher saw the Student as happy and engaged and reported that the Student had friends. The teacher wondered if the Student had negative experiences on the bus or via social media and recommended that the Student speak with the school guidance counselor. The Parents denied that the Student was on social media but agreed that the Student should see the Guidance Counselor. S-8.

54. The Student occasionally spoke with the Guidance Counselor in 6th grade. *Passim*.

55. The Student scored proficient on the PSSA in both English Language Arts and Math in spring 2017. S-54. The Student's final grades in 6th grade were a B in Language Arts, Social Studies, and Accelerated Math. The Student earned an A in Science, [redacted foreign language], Art and Wellness (a health class). The Student earned a C in band. S-52.

56. [Redacted.] The District recommended that the Student re-take pre-Algebra at the 7th grade level.

57. The Parents were concerned about the District's math placement recommendation and brought that concern to the District's Director of Special Education and Pupil Services (the Director). In internal emails, the Director [redacted] agreed with the Parents that the District's placement recommendation "makes no sense." P-8.

58. The Director coordinated with teachers and learned about the Student's reported dyslexia. The Director then contacted the Parents about two things: First, the Director explained that the District used a waiver process – available to all students – that would let the Parents override the District's placement recommendation and put the Student into Algebra for 7th grade. Second, the Director explained that if the Student's dyslexia "was getting in [the Student's] way, [the Student] has a legal right to … accommodations under 504." S-21.

59. Ultimately, the Parents used the District's waiver system to place the Student into Algebra for 7th grade. *See, e.g.* NT 480.

2017-18 School Year (7th Grade)

60. 7th grade students transfer to a new school building in the District.

61. August 23, 2017 the Parents sent an email to the Guidance Counselor. The Parents wanted to "make an appointment to discuss if a 504 would benefit [Student]." S-22.

62. The Guidance Counselor replied the same day, acknowledging receipt, and said that she would try to respond in substance the next day. S-22.

63. On August 24, 2017, the Parents sent another email to the Guidance Counselor with information about the Student (similar to the introductory emails that the Parents had sent to teachers in prior years). S-23.

64. The Guidance Counselor replied the same day, thanking the Parents for the information and asking if they would "like to further discuss a 504 … or come in to meet with the [Student's teaching team]." S-23.

65. The Parents (specifically, the Student's mother) and the Guidance Counselor then spoke by phone. The Guidance Counselor explained that they could discuss a 504 plan or a team meeting. The Parents did not want the Student to stand out and declined those options. However, the Parents asked that the teachers monitor the Student and come forward if they felt that a formal request for services would be beneficial. The Guidance Counselor shared that information, and the information about the Student, with the Student's 7th grade teachers at the Parent's request. S-23.[5]

66. The Student's grades declined during the first marking period of 7th grade. S-52. More specifically, the Student received As in PE, Family and Consumer Science, Technology, Health, and Art. The Student received Bs in [a foreign language] and 7th grade Science. The Student received a C in American History, Ds in Algebra I and English, and an F in Band. S-52.

67. The Student's math teacher felt that Student should be placed into Pre-Algebra to learn the skills to be successful in Algebra I. S-25. As early as October 24, 2017, the Algebra I teacher wrote to the Guidance Counselor and Principal to say that the Student was "crashing and burning." S-25.

68. The Parents and teachers were in frequent communication with each other via email about the Student's academic progress and concerns. P-8.

69. The District uses an Academic Intervention Team (AIT) process. The AIT is a pre-referral team consisting of guidance counselors, principals, a prevention specialist, a special education supervisor, and an academic advisor. NT 440-441.

[5] There is some conflicting testimony about the conversation between the Student's mother and the Guidance Counselor. Below, I find that both witnesses testified credibly in that both recalled events as they remembered them. I resolve that conflict by relying upon contemporaneously-drafted documents – S-23 in particular. The authenticity of that document (what it says, when it was sent, etc.) was not challenged.

70. The Student was not referred to the AIT. From the District's perspective, the F in Band was a result of the Student not attending lessons, and the other grades were not atypical for students adjusting to middle school. S-52, NT 443-445.

71. Because Student was not in the AIT process, general education classroom interventions were not consistent across classes and no data was being taken to ensure daily interventions [were] done with fidelity. NT 443.

72. By the end of the second marking period, the Student's grade in Band improved from an F to a C, and in Algebra I from a D to a B. The Student's grade in [a foreign language], however, fell from a B to a D, and Technology fell from an A to a C. All other grades stayed the same, including the D in English. S-52.

73. On January 29, 2018, Parents requested an evaluation. S-28. The District issued a permission to evaluate form on February 2, 2018. S-29. The Parents signed the form, providing consent. S-29.

74. The District solicited parent input for the evaluation. The Parents wrote that the Student struggled to have "a positive experience with teachers, feeling out of sync with … peers." The Parents also wrote that the Student gets "bored and frustrated easily in class. Disinterested in success with class assignments and is not a people pleaser by nature." S-29.

75. The District evaluated and reported its findings in an evaluation report dated April 23, 2018 (the 2018 ER). S-31.

76. The evaluation included a re-administration of the WIAT-III. All scores on the WIAT-III were in the average range. S-31.

77. The evaluation included an administration of the WISC-V. The Student's full-scale IQ was assessed to be 111. The evaluator noted, however, that discrepancies in sub-tests scores indicated that the full-scale IQ was not an accurate representation of the Student's cognitive abilities. Rather, sub-tests scores were more useful. Nearly all of those fell into the "High Average" range. S-31.

78. Teachers and Parents completed the BRIEF-2, a rating scale to assess executive functioning. Although there was variability on certain sub-sets, the Parents rated the Student as average across nearly all domains. Teachers reported clinically elevated or clinically significant ratings that tend to align with ADHD diagnoses. As a whole, the Student's "Global Executive Composite" was average as rated by the Parents and "Clinically Elevated" as rated by teachers.[6] S-31.

[6] The Student also completed a self-rating for the BRIEF-2, which was average across the board.

79. Teachers also completed a Connors-3, which is a behavioral checklist used to assess students who may have ADHD. The teachers rated the Student as "very elevated" in nearly every domain. The Student self-rated as average or low in all domains. The evaluator concluded that a "consistent pattern of inattention and/or hyperactivity was not observed across settings or raters". S-31.

80. The evaluation included a BASC-3 to assess the Student's social and emotional functioning. Both parents rated the Student and their ratings are reported individually. Two teachers also rated the Student and their ratings are also reported individually. Both parents rated the Student as average in all domains. One teacher rated the Student as average in all domains except for "Attitude Towards Teachers" which was "At Risk." The other teacher rated the Student as average in most domains but rated the Student as "At Risk" in some domains – mostly those that assess the Student's adaptability. S-31.

81. The 2018 ER included a significant amount of narrative teacher input. Through that input, teachers expressed concerns about the Student's academic progress, work completion, peer relationships, attention and focus. S-31.

82. The evaluator concluded that the Student was not a child with a disability for IDEA purposes and did not qualify for Section 504 accommodations. [Redacted.] S-31.

83. By the end of the third marking period, two of the Student's grades improved (Band C to B, Technology C to B). Other grades declined ([foreign language] - D to F, Science - B to C, Algebra I - B to D, Health - A to B). All other grades stayed the same, including the D in English. S-52.

84. On May 11, 2018, the Parents and District personnel met to discuss the 2018 ER. During the meeting, the Parents and District agreed that the Parents should meet the 8th grade teachers before the end of 7th grade. Ultimately, the Parents thought it would be better to meet the 8th grade teachers at the start of 8th grade. *See* S-43.

85. The Parents also disagreed with the 2018 ER and requested an IEE at the District's expense. District policy places a $2,500 cap on IEEs. The Parents selected an evaluator who charges $5,500 for an IEE. Negotiations between the Parents, District, and evaluator ensued. Ultimately, on May 16, 2018, the Parents and District signed a contract under which the District agreed to pay $2,500 and the Parents agreed to pay the additional $3,000. H-1.

86. Also on May 16, 2018, the Parents signed record releases enabling the District to send the Student's records to two private schools that serve children with disabilities. For clarity, these were the private schools' forms that the Parents could send to the District, and not anything that – by itself – would alert the District to the Parents' interest in private schools. S-40.

87. By the end of the fourth marking period, two of the Student's grades declined (History - C to D, Technology - B to D). Two grades improved (Health - B to A, English - D to C). S-52.

88. The Student's final grades in 7th grade were: As in PE, Family and Consumer Science, Health, and Art; Cs in Band, Science, History, and Technology; and Ds in [a foreign language], Algebra I, and English. S-52.

89. The Student scored Proficient on the PSSA in English Language Arts and Mathematics in spring 2018. Student also scored Proficient on the 2018 Algebra Keystone exam. S-55.

Summer 2018

90. The Parents placed the Student in a summer program run by one of the private schools referenced above (the Private School). P-1.

91. On August 13, 2018, the Parents informed the District that they were placing the Student in a different private school (not the school that the Student attended in the summer of 2018) and would seek reimbursement from the District. S-49.

92. On August 23, 2018, the private evaluator issued the IEE. On every academic assessment administered by the private evaluator, the Student scored in the average range except for Oral Reading and Sentence Writing Fluency, both of which were slightly depressed. The IEE showed no indication of ADHD. S-49.

93. The private evaluator compared the Student's scores on academic tests to the IQ scores obtained in 2012 (1st grade) and found a significant discrepancy between the Student's intellectual ability in reading and the Student's ability to read. The private evaluator concluded, therefore, that the Student had dyslexia. *See* S-49.

94. The private evaluator also concluded that the Student had Generalized Anxiety Disorder and Persistent Depressive Disorder/Dysthymia. S-49. The only information in the IEE to support those conclusions are the Parents' narrative impressions. S-49.

The 2018-19 School Year (8th Grade)

95. The Parents and District met on September 4, 2018, to review the IEE. At the time, the District was under the impression that the Student was attending the private school referenced by the Parents on August 13. During the meeting, the District sought the Parents' consent to consider the IEE and conduct additional speech and language and occupational therapy assessments.[7] S-50.

[7] Parental consent is not required for schools to consider the documents that Parents provide. Parental consent is required for schools to do the additional assessments that the District offered in this case.

96. The Parents provided consent on September 5, 2018. The District then contacted the private school referenced by the Parents on August 13. The District learned through that contact that the Student was attending the Private School (the same that the Student attended in the summer of 2018).

97. On September 24, 2018, the Parents filed a complaint initiating these proceedings.

98. The District completed its re-evaluation and issued a report on November 9, 2018. The report includes observations of the Student at the Private School and a review of all records including the IEE. Based on that review, the District concluded that the Student's difficulty with working memory and executive functioning weaknesses qualified the Student for Section 504 accommodations. For IDEA purposes, the District concluded that the Student has a disability but is not in need of specially designed instruction. S-60.

99. The District offered a Section 504 plan on November 27, 2018. The plan offers accommodations to address the Student's executive functioning needs, particularly related to following multi-step directions, and school-based counseling. S-67

100. The Parents amended their due process complaint on November 28, 2018.

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 case, all witnesses testified credibly. There was very little dispute concerning the underlying facts. To the very small extent that testimony from one witness contradicted another, the witnesses simply recalled facts differently.

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 S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

Child Find

In the parlance of special education law, "child find" is a term of art describing a school's obligations under 34 U.S.C. § 300.111 and 22 Pa. Code § 14.121. Those regulations require LEAs to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be "advancing from grade to grade." 34 U.S.C. §300.111(c)(1). Once identified, schools have an obligation to determine if children suspected of having a disability require special education. Schools typically satisfy that obligation by proposing to evaluate children who are suspected of having a disability.

IDEA Eligibility

The IDEA and its implementing regulations establish a two-part test to determine eligibility. First, a student must have a qualifying disability. Second, by reason thereof, the Student must require specially designed instruction (SDI). See 34 C.F.R. § 300.8.

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.

Historically the Third Circuit has 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).

LEAs are 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 minimus" 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.

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.

More recently, 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). These courts 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. This more nuanced approach 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 "same position" 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) may be warranted 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. See 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 – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. 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.

Tuition Reimbursement

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *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). This is referred to as the "*Burlington-Carter*" test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

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 District 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 only "handicapped persons," and the question of whether a student is a handicapped person calls for an inquiry into how that term is defined. The definition is provided in the Section 504 regulations 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."

The test is somewhat more defined under Chapter 15. 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.

If a student is a handicapped person, Section 504 prevents school districts from discriminating on the basis of disability by denying the student 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.

Chapter 15 also 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."

After providing these definitions, Chapter 15 explains what schools must do for protected handicapped students at 22 Pa Code § 15.3:

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."

From this point, Chapter 15 goes on to list a number of rules describing what must happen when a schools or parents initiate evaluations to determine if students are protected handicapped students.

After evaluations, Chapter 15 goes into more detail about service agreements. In doing so, Chapter 15 first sets out rules for what must happen when parents and schools are in agreement at 22 Pa Code § 15.7(a):

If the parents and the school district agree as to what related aids, services or accommodations should or should no longer be provided to the protected handicapped student, the district and parents shall enter into or modify a service agreement. The service agreement shall be written and executed by a representative of the school district and one or both parents. Oral agreements may not be relied upon. The agreement shall set forth the specific related aids, services or accommodations the student shall receive, or if an agreement is being modified, the modified services the student shall receive. The agreement shall also specify the date the services shall begin, the date the services shall be discontinued, and, when appropriate, the procedures to be followed in the event of a medical emergency.

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).

[Section Redacted.]

Discussion

IDEA Eligibility - September 24, 2016 Through End 6th of Grade

There is no preponderant evidence in the record to establish that the Student meets the IDEA's two-part test for eligibility described above during the period from September 24, 2016 through the end of the 2016-17 school year.

[Redacted.]

[Redacted.] Consequently, the Parents are correct that the Student's performance in school and on standardized tests of academic achievement were lower than expectations in 6th grade.

The record does not clearly establish the statistical significance of the discrepancy (a standard measure of the deviation from what was expected). For purposes of analysis, I will assume that the discrepancy was statistically significant to the point that the Student should have been identified with a specific learning disability in reading. Under that assumption, the District should have considered the Student's need for SDI.[8]

There is no preponderant evidence that the Student required SDI in 6th grade. The Student earned As and Bs in core academic subjects, including [redacted]. The Parents do not challenge the legitimacy of those grades. Grades by themselves are not always conclusive evidence of any student's progress. But, as the Supreme Court noted both in *Rowley* and *Endrew*, grade-to-grade progression is a hallmark of appropriate instruction for children with disabilities who are able to complete grade-level work. In this case, the Student was thriving academically without special education supports. This establishes that the Student did not need special education in order to derive an educational benefit from the District's academic instruction.

Education goes beyond academics, but there is no preponderant evidence that the Student required special education to derive a meaningful benefit from the non-academic aspects of school during 6th grade. The incident with the 6th grade science teacher is unfortunate – what the teacher did was wrong.[9] There is no evidence, however, that the Student's emotional state or executive functioning deficits impaired the Student's performance in school. To the contrary, the Parents' report of concerning behaviors at home in March 2017 was a genuine surprise to the teachers, as the behaviors were not seen in school.

For the same reasons, I find that nothing in 6th grade triggered the District's IDEA Child Find obligations. The District had no reason to suspect the need for special education.

[8] I appreciate the timing of the District's initial evaluation relative to the analysis for 6th grade. The District affirmatively concluded that the Student did not have SLD in 1st grade. There is no evidence of what the discrepancy would have been, or even if there would have been a discrepancy at all, in 6th grade. My analysis overlooks this issue – giving the Parents the benefit of the doubt.

[9] I find no evidence that the science teacher singled the Student out because of the Student's disability. Regardless, the science teacher's actions are repugnant. There are better ways to stress the need for diligence and attention to detail than singling out a child for humiliation.

In the absence of preponderant evidence that the Student required special education to derive a meaningful educational benefit, I find that the Parents did not establish IDEA eligibility during 6th grade.

Section 504 - September 24, 2016 Through End 6th of Grade

Similar to the analysis for IDEA eligibility, I find that the District had no reason to offer the Student accommodations under Section 504, as implemented by Chapter 15, during 6th grade. Still assuming for the sake of analysis that the Student had a disability, there is no preponderant evidence that the Student required regular education accommodations in order to access the District's programs. In the absence of such evidence, I find that the Parents did not establish a Section 504 violation in 6th grade.

[Section Redacted.].

IDEA Eligibility – 7th Grade (2017-18 School Year)

The Student's academic performance changed significantly in 7th grade. Teachers raised concerns about the Student's academic performance early in the school year as the Student's grades in core academic subjects dropped. I reject the District's argument that the Student's grades were attributable to a typical adjustment to a new school building. Were that the case, the Student's grades would have improved as the Student adjusted. While some grades improved between the first and second marking period, others did not. The Student's persistent D in English is particularly concerning, especially since the Parents alerted the District to the Student's dyslexia diagnosis.

More likely than not, the District was operating under the assumption that the Parents did not want the Student assessed for services under the IDEA or Section 504. That is beside the point. The IDEA imposes an affirmative child find obligation on LEAs. LEAs are required to offer evaluations when child find is triggered, regardless of parental preferences (real or perceived).

I can understand why the District would not propose a special education evaluation immediately when first marking period grades were reported.[10] Regardless, it was clear by the end of the second marking period that the Student's grades were down significantly compared to all prior years and were not improving. At this point, the District should have offered an evaluation. I cannot speculate about whether the District would have offered an evaluation if the Parents had not requested one. It is fortunate, however, that the Parents initiated the evaluation process at the same time that it became clear that an evaluation was necessary.

[10] It is not clear why the District did not refer the Student to the AIT, but an AIT referral is not grounds for delaying an evaluation when Child Find is triggered.

There is no question that the District's evaluation was technically sound or that it complied with IDEA requirements at 20 U.S.C. § 1414. The Parents do not challenge the District's findings, but rather what those findings mean.

As with the previous evaluation, the Student scored in the average range across all academic tests. The Student's intellectual ability, however, was now in the average range as well. Unlike prior testing, the 2018 ER revealed that there was no longer a discrepancy between the Student's intellectual ability and academic achievement as measured by standardized tests. This substantiates the District's conclusion that the Student did not have a specific learning disability.

The conclusions in the 2018 ER concerning the Student's attention and executive functioning are more difficult to understand. Teachers reported concerns in these domains, and standardized ratings scales were used to quantify those concerns. Those rating scales resulted in average index scores, which factor in multiple sub-parts. Looking more closely at those sub-parts, it appears that the Student may have qualified for special education as a child with an Other Health Impairment (OHI) based on symptoms consistent with ADHD.[11] However, neither party argues that the Student has ADHD, and subsequent testing in the IEE points in the opposite direction. I cannot substitute my untrained impressions of the 2018 ER for the professional opinions of both the District's evaluator and the Parents' private evaluator.

In sum, both the District and the Parents had serious concerns about the Student's academic progress from the start of 7th grade. The Parents requested a special education evaluation at the same time that the District would have been obligated to offer one. That evaluation concluded that the Student did not have a disability. This conclusion is frustrating because nothing in the report explains the Student's real-world academic performance.

Children who do not have disabilities can (and sometimes do) perform poorly in school. According to the District's evaluation, that is what happened in this case. It is the Parents' obligation to prove that the Student had a disability. A sharp decline in grades, by itself, does not establish a disability. The 2018 ER also does not establish a disability. With so many unanswered questions, it was appropriate for the Parents to request an IEE.

The IEE in this case is problematic. The private evaluator is highly trained, has years of experience, and testified credibly with candor and thoughtfulness. The problem is that the evaluator compared new achievement testing to old IQ scores to conduct a discrepancy analysis. That analysis served as the basis of the private evaluator's conclusion that the Student has a specific learning disability. I cannot accept that analysis because updated intelligence testing, which was available at the time of the

[11] The District's evaluator was not qualified to render a medical diagnosis. I do not suggest that the District should have provided a medical diagnosis regardless of the evaluator's credentials. Rather, LEAs may conclude that a student qualifies as a child with OHI by finding behaviors consistent with ADHD, regardless of a medical diagnosis.

IEE, provided a lower IQ score for the analysis. Again, the Parents do not challenge the testing results reported in the 2018 ER. Using the most current, accepted data, the discrepancy analysis should have compared the Student's average IQ scores to the Student's average academic performance scores. Since the private evaluator did not do this, the Parents' only evidence that the Student has a specific learning disability based on a discrepancy model is invalid. The private evaluator's other diagnoses are not well-supported (again, the IEE included testing indicating that the Student does not have ADHD).

The ultimate result is deeply dissatisfying. When a child's grades suddenly decline, comprehensive testing should identify the reason why. That did not happen in this case, and the Parents were (and are) right to be concerned. At the same time, under the standards that I must apply, neither the 2018 ER nor the IEE establish that the Student had a disability for IDEA purposes. It is the Parents' burden to establish that the Student was a child with a disability. The evidence of a disability in this case is not preponderant. For these reasons, I deny the Parents' IDEA claims for the 2017-18 school year.

Section 504 – 7th Grade (2017-18 School Year)

The District violated the Student's rights under Section 504 during the 2017-18 school year. From the outset of 7th grade, the District was on notice that the Student was regarded as a child with a disability – specifically dyslexia. At the same time, the Student's grades in English, the most reading intensive academic class, immediately tanked.

To make matters worse, the District had a system in place to standardize regular education accommodations and track progress but did not use that system to help the Student. As a result, the Student did not receive consistent regular education supports. Data regarding the efficacy of regular education interventions was not collected.

Further, the results of the IEE and the 2018 ER are not substantially different. The record does not reveal what new information the District learned about the Student's executive functioning needs from the IEE. I find that the District had all of the information that it needed to conclude that the Student was protected from the date of the 2018 ER (April 23, 2018) at a minimum. The date is actually earlier, as teachers were expressing concerns about the Student's executive functioning and ability to follow multi-step directions even before 7th grade. With no better evidence, I find that the District's issuance of first quarter grades in the 2017-18 school year is the tipping point. At that point, the District knew that there were concerns about executive functioning, knew that the Student was regarded as having a disability, and knew that the Student was not accessing regular education in a meaningful way (as indicated by the Student's grades).

The District also had good reasons to believe that the Parents would not consent to a Chapter 15 evaluation or a Section 504 Plan. That belief does not diminish the District's

obligations. The District did not comply with those obligations. That failure is a substantive violation of the Student's rights.

To remedy this violation, I award one hour of compensatory education for each day of the 2017-18 school year from the end of the first marking period until the end of the school year. The Parents may decide how the hours of compensatory education are spent. Compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs or educational programs. If the Student returns to the District's programs, compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should be provided through the Student's IEP. When purchasing products or services, the cost of compensatory education shall not exceed the market rate within the District. Compensatory education shall not be used for products or services that are primarily for leisure or recreation.

Deliberate Indifference

There is some question as to whether ODR hearing officers have authority to decide Section 504 intentional discrimination claims, as opposed to Chapter 15 educational claims. ODR hearing officers have no direct authority to hear claims arising under Section 504 itself. Rather, ODR hearing officers have authority to hear claims arising under Chapter 15. For example, if a child is a protected handicapped student but not IDEA-eligible, an ODR hearing officer can resolve disputes concerning the child's Service Agreement (the plan through which regular education accommodations are provided to ensure access to the curriculum).

Having considered the issue, other Hearing Officers have concluded that ODR hearing officers have authority to hear intentional discrimination claims arising under Section 504. *See e.g. C.L. v. Mars Area Sch. Dist.,* ODR No. 16696 (2016); *C.B. v. Boyertown Area Sch. Dist.,* ODR No. 16749 (2016); *J.C. v. Greensburg Salem Sch. Dist.,* ODR 19230-1617AS (2018). There is support for this conclusion in Chapter 15 itself, which is intended to ensure complacence with Section 504. *See, e.g.* 22 Pa. Code § 15.1, relating to 34 C.F.R. Part 104. I reach the same conclusion as my colleagues.

Intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). However, "deliberate choice, rather than negligence or bureaucratic inaction" is necessary to support such a claim. *Id.* at 263.

The knowledge element was absent in *S.H.* Consequently, the Court did not go on to discuss the alleged failure to act. *Id.* More recently, the Third Circuit addressed the failure to act element in *School District of Philadelphia v. Kirsch*, 71 IDELR 123, 722 F. App'x 215 (3d Cir. 2018). In *Kirsch*, a school district did not inform parents that it had a policy of not holding IEP meetings or responding to email in the summer. Parents

claimed that the school district's failure to inform them of the policy constituted deliberate indifference. The *Kirsch* court found no evidence that the failure to inform was a deliberate choice, and so it rejected the claims.[12]

Above, I find that the District violated the Student's rights under Section 504 and Chapter 15. Now, I must determine if the District acted with deliberate indifference under the standards set forth in *S.H.* and *Kirsch.*

I do not find that the District acted with deliberate indifference. The District's inaction in this case is tantamount to negligence or bureaucratic inaction. There is no evidence that the District actively considered its obligations to the Student under Section 504, or made a deliberate choice to do nothing. I deny the Parents' claim that the District acted with deliberate indifference for this reason.

[Redacted.]

Tuition Reimbursement

Above, I find that the Parents did not establish by preponderant evidence that the Student is a student with a disability for IDEA purposes. That renders the *Burlington-Carter* test inapposite. Similarly, tuition reimbursement at its core is based on an LEA's failure to offer a FAPE in violation of the IDEA. The Parents have not established a FAPE entitlement under the IDEA. I deny the Parents' demand for tuition reimbursement for these reasons.

IEE Reimbursement

The Parents argue in favor of full IEE reimbursement under the standard articulated above, and that the District's policy of capping IEE reimbursement is no defense. I agree with the Parents that the District's policy is no defense. If the Parents proved that the 2018 ER was inappropriate, they would be entitled to an IEE at public expense. "At public expense" means that the Parents pay for no part of it.

Under the unique facts of this case, the issue is not controlled by IDEA standards, but by contract law. The parties signed a contract with the private evaluator. Under the contract, the District agreed to pay a portion and the Parents agreed to pay a portion. No evidence was presented that would invalidate that contact under any theory of contract law, and the Parents raise no argument in this regard. The IDEA provides a mechanism by which Parents can obtain "firepower to match the opposition" in the form of an IEE. *Schaffer v. Weast*, 546 U.S. 49, 61 (U.S. 2005). Instead of exercising that right, the Parents signed a contract and agreed to pay for some of the IEE. [13] I see no

[12] Technically, the District Court found that there was evidence of negligence, not a deliberate choice. The Circuit Court affirmed this.

[13] The Parents did not explicitly waive their IDEA rights under the contract. Rather, the contract evidences a meeting of the minds between the Parents, the District, and the private evaluator.

reason to void that agreement. I deny the Parents' demand for IEE reimbursement for this reason.

ORDER

Now, April 3, 2019, it is hereby **ORDERED** as follows:

1. The Parents did not establish by preponderant evidence that the Student is eligible for special education services pursuant to the IDEA.
2. The District should have developed a Section 504 Plan sooner than it did. Specifically, the District should have offered a Chapter 15 evaluation when first marking period grades were released during the 2017-18 school year.
3. [Redacted.]
4. The District violated the Student's rights under Chapter 15 and Section 504 from the day that first marking period grades were released during the 2017-18 school year through the end of the 2017-18 school year. I award compensatory education of an amount and under the conditions expressed in the accompanying decision.
5. The Parents are not entitled to tuition reimbursement, including transportation costs, for a private school program in the Summer of 2018 and the 2018-2019 school year.
6. The District did not act with deliberate indifference by not finding Student eligible for special education or a Section 504 Plan sooner than it did.
7. The parents are not entitled to reimbursement for an un-reimbursed portion of an IEE.

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

/s/ Brian Jason Ford
HEARING OFFICER