

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING

ODR File Number: 21358-18-19

Child's Name: M B

Date of Birth: [redacted]

Parents:

[redacted]

Counsel for Parent

Michael Raffaele

Kirshenbaum & Raffaele

1230 County Line Road

Bryn Mawr, PA 19010

michael@mykidslawyer.com

Local Education Agency:

Chester County Intermediate Unit

455 Boot Road

Downingtown, PA 19335

Counsel for the LEA

Mark Cheramie Walz, Esq.

Sweet, Stevens

331 E. Butler Avenue

New Britain, PA 18601

mwalz@sweetstevens.com

Hearing Officer: James Gerl, CHO **Date of Decision:** March 19, 2019

DECISION

DUE PROCESS HEARING

21358/18-19KE

BACKGROUND

The parents filed a due process hearing alleging that the intermediate unit failed to conduct appropriate child find activities for the student, a parentally placed private school student. A status conference by telephone conference call, requested by counsel because of the unusual nature of the issues presented by this case, was convened prior to the hearing.

In this case, I find that the parents did not file a timely due process complaint, and, therefore, that the complaint should be dismissed. Assuming arguendo that the complaint had been timely filed, I find in favor of the intermediate unit on the issue of the appropriateness of its child find activities serving parentally placed private school students.

PROCEDURAL HISTORY

At the hearing, five witnesses presented testimony. Parents' Exhibits 1 through 9 were admitted into evidence. The intermediate unit's Exhibits 1 through 30 were admitted into evidence. After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact.

All arguments submitted by the parties have been considered. To the extent that arguments advanced by the parties are in accordance with the findings, conclusions, and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments have been omitted as not relevant or not necessary to a proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES PRESENTED

1. Was the parents' due process complaint timely filed under the IDEA statute of limitations?

2. Were the intermediate unit's child find activities for parentally placed private school students appropriate under IDEA?

3. Is reimbursement an appropriate remedy for a child find violation concerning parentally placed private school students?

FINDINGS OF FACT

Based upon the parties' stipulations of fact at the due process hearing, the hearing officer makes the following findings of fact:

1. The student was born on [redacted] and lives with the student's parents. They are residents of a school district within the boundaries of the intermediate unit.

2. During the 2013 – 2014 school year, the student attended kindergarten in a public elementary school within the boundaries of the intermediate unit.

3. During the 2014 – 2015 (first grade), 2015 – 2016 (second grade) and 2016 – 2017 (first year of third grade) school years, the student attended a private religious school located within the boundaries of the intermediate unit.

4. The student attended a summer reading program at a private school solely for children with disabilities during the summers of 2015 and 2016.

5. The student attended a private school solely for students with disabilities for the 2017 – 2018 (repeat third grade) and 2018 – 2019 (fourth grade) school years.

6. The student was referred for Act 89 reading support services by the teacher at the religious private school the student was attending in October of 2014. A reading specialist for the intermediate unit provided small group reading instruction one time per week for the student and two other students.

7. The student continued to receive weekly Act 89 reading support from the intermediate unit during the 2015 – 2016 and 2016 – 2017 school years.

8. The parties agree that the private school that the student is currently attending is appropriate for purposes of the Burlington/Carter tuition reimbursement claim analysis.

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:¹

9. During the student's kindergarten school year of 2013 – 2014, the student's teacher told the student's mother that there were issues with the student's reading and attention. (NT 361-363)

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parent's exhibits; "S-1," etc. for the intermediate unit's exhibits; references to page numbers of the transcript of testimony taken at the hearing is hereafter designated as "NT___").

10. The student began attending a religious private school within the boundaries of the intermediate unit for first grade in school year 2014 – 2015. The parents enrolled the student in the religious private school because the parents felt that education in the single sex context might decrease distractions for the student. Within the first two months of the student’s first grade school year, the student began receiving both Act 89 reading services from the intermediate unit and resource room work on the Wilson Reading Program from the private school teacher. A meeting of the instructional support team at the private school was conducted during the student’s first grade school year. (NT 192, 287-288. 304, 363 – 364; P-1; P-7 p3; P-9 p2)

11. Act 89 is a state program that provides funding to the intermediate units to provide remedial services to private school students. This intermediate unit provides the following types of Act 89 services: reading specialist support; math specialist support; school counselors or guidance counselors and speech language therapy services. (NT 248)

12. The intermediate Unit’s Act 89 reading specialist worked with the student thirty minutes once per week in first through third grade at the private religious school. The reading specialist sent the parents a written progress report in the spring of 2015. (NT 148, 205; P-1)

13. In March of 2015, while the student was in first grade, the student was administered the Terra Nova 3 assessment and scored in the 51st percentile (average range) for reading. (S-3)

14. In May of 2015, during the student's first grade year, the Act 89 reading specialist from the intermediate unit suggested that the student receive a psychoeducational evaluation. The Act 89 reading specialist made the recommendation for an evaluation of the student to the teacher and principal at the private school that the student was attending. The reading specialist also told the parents about the recommendation, but the parents told the reading specialist that they intended to have the student tested by one of the mother's friends in New York. The Act 89 reading specialist believed that the student was making meaningful progress in reading but made the referral for the evaluation because she believed that the student had not reached the student's maximum potential. The Instructional Support Team for the student at the religious private school did not refer the student for an evaluation. (NT 123 – 124, 166 – 168; 205-206; 268-269; P-1; P-2; P-3)

15. During the summer after first grade, the parents enrolled the student in an intensive summer reading program/camp at a private school that only accepts students with disabilities. The summer program required the parents to read to the student during the evening for about thirty minutes at home. The parents met with the

teacher at the summer reading program to discuss the student's reading issues. (NT 364 – 366, 369 – 371)

16. On February 2, 2016, the Act 89 reading specialist administered the Stanford Diagnostic Reading Test to the student. The student received a score in the 65th percentile, which is in the average range. (S-5)

17. In April of 2016, the student was administered the Stanford Diagnostic Reading Test by the Act 89 reading specialist. The student scored in the 92nd percentile for phonetic analysis, the 44th percentile for vocabulary and the 61st percentile for reading comprehension. The assessment indicated that the student was making progress in the areas assessed. The scores on this assessment were all in the average or above average ranges. (S-6; NT 65 – 66, 151 – 152)

18. Two meetings of the Instructional Support Team at the private school that the student was attending were conducted during the student's second grade school year. The student continued to receive Act 89 reading support and make progress during second grade, and progress reports were sent to the parents in February and May of 2016. (P-2; NT 372; S-5; S-7; P-1)

19. The parents again enrolled the student at the summer reading program/camp at the private school for students with disabilities after the student's second grade school year. The summer program again required the parents to read to

the student during the evenings at home. The parents had a conference with the reading teacher at the private school concerning the student's reading. (NT 374)

20. The student again attended the religious private school within the boundaries of the intermediate unit for the (first) third grade school year in 2016 – 2017. The student continued to receive Act 89 reading services from the intermediate unit during the student's third grade year. Two meetings of the Instructional Support Team at the private school that the student was attending were conducted during the 2016-2017 school year, and the student's progress was discussed at these meetings. . The parents hired a private tutor to work with the student on reading during the entire third grade year in 2016 – 2017. The intermediate unit reading specialist worked with the parents to determine the tutoring program. The student's parents began taking the student for treatment by a psychologist during the student's third grade year because of parent concerns about the student's social struggles. (NT 340 – 343; P-3)

21. In January and February of 2017, the parents had the student evaluated by a private audiologist. The evaluator concluded that the student had an auditory processing disorder characterized by deficits in the areas of speech perception and temporal processing. The evaluator recommended that the student receive a comprehensive reading evaluation. (S-14)

22. On January 30, 2017, the intermediate unit reading specialist administered the Stanford Diagnostic Reading assessment and the student's scores were at the 61st

percentile for comprehension, the 92nd percentile for phonetic analysis and the 44th percentile for vocabulary. The specialist also administered the Fountas and Pinnell assessment and the student scored at the mid-level of second grade for comprehension, decoding and fluency. (S-12; NT 135-136)

23. On February 14, 2017, the staff at the religious private school the student was attending informed the parents that the student was administered the Individual Reading Inventory and that the results of the assessments were that the student was reading on the third grade level. (S-13; NT 67-68)

24. On May 5, 2017, the student was evaluated by the intermediate unit to determine whether or not the student was eligible for Act 89 speech therapy services. The intermediate unit administered the Clinical Evaluation of Language Fundamentals-5 (“CELF-5”). The student received above average scores in every category. The evaluator concluded that the student was not eligible for Act 89 speech services because students who exhibit auditory processing disorders with no other concomitant language problems are ineligible for pullout services. However, the evaluator noted that consultation with parents and teachers and provision of classroom recommendations by a speech language therapist would be appropriate. (S-16; NT 283)

25. On June 6, 2017, the student was assessed by the intermediate unit’s reading specialist. The student scored in the 61st percentile on the Stanford Diagnostic Reading Test. On the Fontas and Pinnell assessment, the student received scores at the

middle or end of second grade in reading comprehension and decoding. On the TAAS assessment, the student received an end of the year raw score of end of third grade. On the Stanford Diagnostic Reading Test, the student received a phonetic analysis score in 92nd percentile, a vocabulary score in the 44th percentile. (P-6)

26. The student made good progress with the Act 89 reading instruction provided by the intermediate unit while the student attended the religious private school within the intermediate unit's jurisdiction. (NT 44, 166 – 168; P-1; P-2; P-3; P-6; S-5; S-6; S-7; S-12; S-19)

27. During the summer of 2017, the parents spoke with the student's pediatrician. The pediatrician recommended that the student be evaluated for special education and pointed out to the parents that the local public school district would conduct the evaluation. The student's parents elected not to have the school district conduct an evaluation, and instead hired a private evaluator to conduct a psychoeducational evaluation of the student. Said evaluation was conducted in mid-August 2017. The evaluator concluded that the student had specific learning disabilities in reading, written expression and mathematics and concluded that the student had a learning disability- other specified neurodevelopmental disorder and attention deficient hyperactivity disorder. The evaluator recommended that an additional year of third grade would be beneficial for the student. The evaluator recommended continued psychotherapy to address the student's emotional struggles. (P-7; NT 342-345)

28. For the 2017 – 2018 academic year, the student repeated third grade, but the student was enrolled by the student’s parents in a different private school that was exclusively for students with disabilities and which is outside the jurisdiction of the intermediate unit. The student attended the same private school for children with disabilities outside the jurisdiction of the intermediate unit for 4th grade for the 2018 – 2019 school year. This is the same private school that conducted the summer programs that the student attended after first and second grade. (NT 47, 70, 382)

29. The parents knew or reasonably should have known of the facts that formed the basis for their complaint no later than August 15, 2015. (Record evidence as a whole)

30. The due process complaint in this matter was filed on October 25, 2018. (S-30)

31. The due process complaint in this matter was not timely filed. (Record evidence as a whole)

32. On August 6, 2018, the parents had the student evaluated by a private occupational therapist. The evaluator concluded that the student would benefit from occupational therapy and suggested that it focus on coordination and dexterity. (P-8)

33. On November 15, 2018, the public school district for the area of residence of the parents conducted an evaluation of the student. The evaluators concluded that

the student has a specific learning disability in reading and that the student has attention deficient hyperactivity disorder. (P-9; NT 33)

34. The student and all other students receiving Act 89 services are placed on a list by the staff of the intermediate unit, and the list is provided to the private school that the students attend. Only about five percent of the students on the list are evaluated for special education. (NT 274-276; S-11)

35. When a student has needs or when a student struggles in school, teachers usually attempt various interventions, supports and other strategies in the regular education classroom before evaluating the student for special education. (NT 56-62)

36. In approximately March or April of every year, the intermediate unit sends out a needs assessment survey to the principals and officials of all of the private schools within the jurisdiction of the intermediate unit. The annual process includes a survey of private school officials concerning the types of child find activities that they want to be utilized by the intermediate unit. (S-15; S-24; S-27; NT 294)

37. In approximately May of each year, the intermediate unit conducts an in-person consultation meeting with officials of all private schools in the jurisdiction. The purpose of the meeting is to develop the child find process for parentally placed private school children and to determine how equitable participation will be designed. At the annual consultation, the administrators from the private schools are informed concerning how to have their students evaluated. (S-17; S-20; NT 222, 246 – 247)

38. The intermediate unit's assistant director of student services meets with all new principals of private schools in the jurisdiction individually to explain the child find process and how they can have private school students evaluated. The assistant director had such a meeting with the principal of the religious private school that the student attended for first through third grades. (NT 287 – 290)

39. The intermediate unit publicizes the child find process and equitable participation process for parentally placed private school students by placing notices, in both English and Spanish, in a local newspaper to provide information to parents. (S-25; NT 181)

40. Because the overwhelming response from private and religiously affiliated schools indicated a preference to utilize literature distribution as the primary method of complying with the child find requirement, the intermediate unit provides posters to each private school and a number of brochures to be inserted into the posters that explain to parents the right to obtain an evaluation and how to go about obtaining such an evaluation. (S-26; S-27; NT 181, 230)

41. The intermediate unit relies upon the teachers and other professionals at the private schools to refer students for evaluations. The teachers and staff of the private schools work with the students on a daily basis, whereas the intermediate unit staff does not work with the students on a daily basis. (NT 290 – 292)

42. The intermediate unit has a longstanding practice of referring private school students to their school district of residence for an evaluation. If the parent does not want the school district to do the evaluation, the intermediate unit does the evaluation. During training on the child find process, staff and officials at private schools are told that it is the longstanding practice of the intermediate unit to refer students directly to their school district of residence, instead of the intermediate unit, for evaluations. During the five years preceding the due process hearing, the intermediate unit has evaluated approximately eight or nine nonpublic students. (NT 184, 262-263, 300 – 301)

43. The Pennsylvania Department of Education Bureau of Special Education conducted an audit of the intermediate unit, including the intermediate unit's child find and equitable participation programs for parentally placed private school students, on April 23, 2018. On July 25, 2018, the Bureau of Special Education issued a report for the audit approving of the intermediate unit's child find and equitable participation programs without any citations or corrective actions issued. (S-22; NT 220 – 221)

44. Each year, the intermediate unit makes a calculation concerning the proportionate share of IDEA funds that must be used for equitable participation services for parentally placed private school students. For the school year 2016 - 2017, the percentage was 1.3067%, which amounted to \$201,164.00. For the 2017 – 2018

school year, the amount was 1.4507%, which amounted to \$224,536.00. (S-10; S-23; NT 215 – 217)

45. In May of 2017 and May of 2018, the intermediate unit invited officials from all public schools within the jurisdiction of the intermediate unit to a meeting to consult with the private school officials concerning how equitable participation funds would be used in the private schools. Through the annual meetings and ongoing conversations with private school officials, it was the consensus that training and consultation would be how the funds would be used in the private schools. (S-17; S-20; NT 177 – 178)

46. The training and consultation services provided by the intermediate unit for equitable participation purposes in the 2016-2017 and 2017-2018 school years included: teacher consultations, workshops, parent consultations, whole class supports and student specific consultations. (S-18; S-21; NT 213)

47. The intermediate unit does not provide any direct services to students with the equitable participation funds that it uses for parentally placed private school students. (NT 213)

48. Although not as a result of a breach of the intermediate unit's child find duty, the parents incurred the following costs: \$3,300.00 for a summer program at the school solely for students with disabilities for each of two summers; \$50.00 per hour for a tutor during the school year once per week for two school years; \$50.00 per hour

for a tutor during the summer of 2017 once per week; \$75.00 per hour for a tutor once per week for the summer of 2017; approximately \$650.00 for an audiology evaluation;; \$5,500.00 for a private psychoeducational evaluation; approximately \$75.00 for a private occupational therapy evaluation; and approximately \$35,000.00 per year for tuition at the private school solely for students with disabilities for each of the 2017 - 2018 and 2018 – 2019 school years. (NT 388 – 390; 401 – 402)

49. The efforts by the intermediate unit to conduct child find for equitable participation purposes were adequate and reasonable. (Record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of counsel, all of the evidence in the record, as well as independent legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. A due process complaint filed under the Individuals With Disabilities Education Act (hereafter sometimes referred to as “IDEA”) 20 U.S.C. § 1400, et seq. must be filed within two years of the date that the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. 34 C.F.R. § 300.511(e); 34 C.F.R. § 300.507(a)(2); IDEA § 615(b)(6) and 615(f)(3); GL by Mr. GL and Mrs. EL v. Liggonier Valley School District Authority, 802 F. 3d 601, 66 IDELR 91 (Third Cir. 2015).

2. There are two exceptions to the IDEA statute of limitations. The two-year statute of limitations does not apply if a parent was prevented from filing a due process complaint due to: (1) specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the due process complaint or (2) a local education agency's withholding of information from the parent that was required under the IDEA to be provided to the parent. 34 C.F.R. § 300.111(f); IDEA § 615(f)(3).

3. For either statute of limitations exception to apply, a parent must show that the misrepresentation or withholding caused the parent to fail to request a timely due process hearing. In addition, the parent must prove that the information that was allegedly withheld or misrepresented is information that IDEA requires to be disclosed to parents. DK by Steven K and Lisa K v. Abington School District, 696 F. 3d 233, 59 IDELR 271 (Third Cir. 2012)

4. In the instant case, the parents' due process complaint was not timely filed.

5. Children who are placed by their parents in private, including religious, schools have no individual right to special education and related services and are not entitled to a free appropriate public education. 34 C.F.R. § 300.137(a); IDEA § 612(a)(10). However, IDEA requires that a local education agency have consultation with private schools within its jurisdiction and conduct child find activities for parentally placed private school students. Although parentally placed children with disabilities in

private schools have no individual entitlement to receive special education and children with disabilities will not be served in the same way or receive the same services they would receive if enrolled in public schools, the local education agency must ensure that some services are provided to parentally placed private school students in the form of equitable participation. 34 C.F.R. § 300.129 – 300.144; IDEA § 612(a)(10); Letter to Lieberman, 50 IDELR 137 (OSEP 2008).

6. Each local education agency is required to conduct child find activities for students enrolled by their parents in private, including religious, elementary schools and secondary schools located within the jurisdiction of the local education agency in order to ensure the equitable participation of parentally placed private school children and an accurate count of those children. 34 C.F.R. § 300.131; IDEA § 612(a)(10). The local education agency designs the child find process based upon consultation with representatives of the private schools. Thereafter, based upon the child count determined by the child find activities, the local education agency makes a calculation of the proportionate share of its IDEA funds to be used for equitable participation purposes and then provides certain equitable participation services to some private school students with identified disabilities. 34 C.F.R. § 300.134; 300.132 – 133; 300.137 – 138; IDEA § 612(a)(10).

7. A parent of a parentally placed private school student may not file a due process complaint concerning equitable services or consultation requirements, but may file a due process complaint for alleged violation of the child find provisions of IDEA for parentally placed students. 34 C.F.R. §300.140; IDEA §612(a)(10); Questions and Answers on Serving Children With Disabilities Placed By Their Parents In Private Schools, {Question L-1} 111 L.R.P. 32532 (OSERS 2011).

8. Under Pennsylvania law, intermediate units are responsible for child find activities necessary to provide equitable services consistent with the federal regulations regarding children with disabilities enrolled by their parents in private schools. 22 Pa. Code § 14.121(d).

9. Act 89 is a Pennsylvania statute that requires intermediate units to provide certain auxiliary services to students enrolled in nonpublic schools. The auxiliary services provided include remedial services, speech and hearing services, services for exceptional children, services for the educationally disadvantaged (such as English as a second language) and such other secular, neutral, nonideological services as are of benefit to all school children. 24 P.S. § 9-922.1-A.

10. In the instant case, the intermediate unit's child find activities for equitable participation were reasonable, appropriate and compliant with the law.

DISCUSSION

1. Was the parents' complaint timely filed?

IDEA requires that a parent file a due process complaint within two years of the date the parent knew or should have known about the alleged action that forms the basis of the due process complaint. In the instant case, the parents contend that they only learned that the student was a student with a disability in February of 2017, when they received the report of the evaluator stating that the student had a disability. The evidence does not support the parents' contention in this regard.

Within the first two months of the student beginning first grade during the 2014 – 2015 school year at the private school the student was attending, the student began receiving both Act 89 reading instruction from the intermediate unit specialist, as well as resource room training in the Wilson Reading Method from the private school teacher. In May of 2015, the intermediate unit's reading specialist told the parents that although the student was making good progress in the reading program, the specialist was recommending that the student be referred for an evaluation for special education. Thus the parents knew in May of 2015, that the Act 89 reading specialist thought that the student should be evaluated for special education.

The parents' concerns about the student's reading issues were so significant that they enrolled the student in an intensive reading program for the summer after first grade at another private school that only serves students with disabilities. The special summer reading program at the private school for students with disabilities included an extensive home reading component, where the parents read with the student during the evenings. In addition, at the end of the summer program, during the summer of 2015, the instructors at the private school had a meeting with the parent to discuss the student.

It is clear from the evidence in the record, therefore, that the parents knew or reasonably should have known of their claim that the student had a disability in reading by the end of the summer after the 2014 – 2015 school year, or by August 15, 2015. In order to file a timely complaint in this matter, the complaint would have had to have been filed on or before August 15, 2017. The due process complaint in this matter was not filed, however, until October 25, 2018. Accordingly, the complaint has not been timely filed.

In their post-hearing brief, the parents argue that the two exceptions to the statute of limitations under IDEA apply to this case. This argument is flawed, however, because the parents refer to the intermediate unit's alleged lack of candor in reporting the student's progress in the Act 89 reading program as the basis for the applicability of the exceptions. The record evidence indicates, however, that the student was

making reasonable progress and was on grade level with regard to reading. Accordingly, there is no factual basis for the assertion of the exceptions.

In addition, the parents' argument conflates the student's progress in the Act 89 state reading program with progress under IDEA. IDEA does not require a free appropriate public education for private school students. Moreover, the exceptions to the statute of limitations under IDEA apply only to withholding or misrepresentation of information that **IDEA requires** be disclosed to parents. DK by Steven K and Lisa K v. Abington School District, 696 F. 3d 233, 59 IDELR 271 (3d Cir. 2012). Because Act 89 is not an IDEA requirement but a separate program required by a state statute, reporting of progress under Act 89 is not required by IDEA. Accordingly, the exceptions to the statute of limitations do not apply.

It should be noted that the statute of limitations analysis assumes that the parents' claim that the intermediate unit breached its child find duty is a valid argument. The next section of this decision rejects that contention; the intermediate unit complied with its child find duty.

Assuming arguendo, however, that there is merit to the parents' claim and the intermediate unit did breach its child find duty by failing to evaluate the student after having had a reasonable suspicion that the student was a student with a disability under IDEA, then the student's parents would have had knowledge of the basis for their claim

at least by August 15, 2015. Accordingly, it is concluded the complaint was not timely filed.

To the extent that the testimony of witnesses favorable to the parents is contradicted by the testimony of the school district witnesses concerning this issue, the testimony of district witnesses is more credible and persuasive than the testimony of the parents' witnesses. In particular, the testimony of the student's mother as to this issue is suspect because of her selective memory- she testified that she could not remember anything that the student's teacher had said to the mother at the end of the intensive summer reading programs that the student attended at the private school for students with disabilities. This testimony stands in stark contrast to the excellent memory that the student's mother had with regard to almost every other detail concerning the student's entire educational program.

The due process complaint in this matter was not timely filed, and it must be dismissed.

2. **Were the intermediate unit's child find activities in compliance with IDEA?**

A parentally placed private school student, such as the student in the instant case, is not entitled to a free appropriate public education and has no individual right to services under IDEA. Rather, parentally placed private school students are entitled to child find to be conducted by the local education agency and equitable participation based upon the count of the private school child find. Under Pennsylvania law, the intermediate unit is required to conduct “child find activities necessary to provide equitable services....” 22 Pa. Code § 14.121(d)

In the instant case, the intermediate unit designed its child find process based upon consultation with private school administrators and parents. Each year, the intermediate unit conducts a needs assessment survey distributed to all private schools within the jurisdiction. The process includes a survey of private school officials about the type of child find activities that they would be interested in having the intermediate unit conduct at their schools. The consensus preference among the private schools in the area was that the child find activities should focus upon literature distribution. The child find process designed by the intermediate unit includes the distribution of literature- posters and brochures concerning the child find and equitable participation programs to be posted at the private schools and available to the parents. Thus, the child find procedure utilized by the intermediate unit was properly designed after meaningful consultation with private school representatives and reflected their preferences. 34 C.F.R. § 300.134(a)

The intermediate unit also conducted an annual in-person meeting to consult with administrators of private schools in the jurisdiction. In addition, staff of the intermediate unit also met with all new private school principals individually to explain the child find and equitable participation processes.

The intermediate unit also posted notices in a local newspaper informing parents about the child find and evaluation processes for private school students. The intermediate unit's child find program relies upon the private schools to refer students for evaluation because the staff of the private schools work with their students on a daily basis. The longstanding practice of the intermediate unit is to refer students who need evaluations directly to their school district of residence. Said school districts would be responsible for developing an IEP in the event that a parent elected to enroll a student in public school. The intermediate unit's private school child find and equitable participation procedures were reviewed and audited by the Pennsylvania Department of Education Bureau of Special Education on April 23, 2018 and found to be in compliance with no corrective action issued.

The record evidence reflects that the intermediate unit took appropriate measures to ensure that it complied with its child find duty for equitable participation by private school students. The intermediate unit's child find and consultation program

is reasonable and well designed to meet its child find duty to provide equitable participation for private school students.

In addition, as noted in the intermediate unit's post-hearing brief, a very similar child find consultation program was upheld under IDEA by a district court and the Third Circuit in the case of PP v. Westchester Area School District, 585 F. 3d 727, 53 IDELR 109 (3d Cir. 2009). It is clear from the record evidence that the child find activities conducted by the intermediate unit were in compliance with IDEA.

The parents argue in their post-hearing brief that the student would have traveled a much different path and ended up in a better place if the student had been properly identified as a child with disability by the intermediate unit. The parents argue that the intermediate unit should have identified the student's lack of progress in reading under the Act 89 reading program and therefore identified the student as a student with a disability. The argument confuses the local education agency's duty under IDEA to private school students with that of public school students. There is no right to FAPE or services for private school students under IDEA. The fact that the student was receiving Act 89 services does not impose IDEA duties upon the intermediate unit. Because the student was enrolled in a private school, the intermediate unit did not have an IDEA duty to report the student's progress to the parents. However, even if the intermediate unit did have a duty to report the student's progress to the parents, the

evidence in this case indicates that the student was making reasonable progress in the Act 89 reading program and was otherwise academically on grade level while enrolled in the religious private school.

As part of their argument in this regard, the parents point to the testimony of the Act 89 reading teacher who worked with the student. The teacher was employed by the intermediate unit. At one point during first grade, the Act 89 teacher referred the student to the officials at the private school for a special education evaluation. In testimony at the due process hearing, however, the Act 89 teacher stated that the student was making reasonable progress in the reading program. The teacher stated, in addition, that although the student was making reasonable progress, she thought that an evaluation might help the student to reach the student's maximum potential. Under no circumstances, however, does IDEA require that school officials maximize the potential of a public school or private school student. See, Mary Courtney T v. School District of Philadelphia, 575 F. 3d 235, 251, 52 IDELR 211 (3d Cir. 2009). The testimony of the Act 89 teacher, therefore, is not evidence that the intermediate unit somehow breached its child find duty. Significantly, the recommendation of the intermediate unit's reading specialist, who only worked with the student for thirty minutes every week, was not acted upon by the teachers and staff on the student's Instructional Support Team at the private, religious school, who worked with the student daily.

Furthermore, the duty to evaluate is triggered only when the LEA has a reasonable suspicion of a disability; an evaluation is not required every time that a child posts a poor grade, gets a bad test score or misbehaves. Ridley Sch Dist v. MR & JR ex rel ER, 680 F.3d 260, 58 IDELR 271 (3d Cir 2012). As the staff of the intermediate unit testified, only about five percent of the students who receive Act 89 services end up being evaluated for special education. Before an evaluation, the school staff work with children who demonstrate needs or struggle with reading or other subjects through interventions, supports and strategies in the regular education classroom. Such interventions are precisely what the private religious school staff, who were trained by the intermediate unit in how to request an evaluation, appeared to attempt in the instant case in the student's first, second and (first) third grade years while the student was on grade level academically.

The parents also argue in their posthearing brief that the policy of the intermediate unit of "off loading" or having the school district of residence be primarily responsible for evaluating students is unlawful. The only authority cited by the parents' brief for this argument is non-regulatory guidance from the state department of education. The policy of the intermediate unit is reasonable, however, given that the school district of residence would be the LEA offering services if the parent enrolled the student back in public school after an evaluation. Also the policy is not arbitrary, and the intermediate unit ends up doing some evaluations. Significantly, the

Pennsylvania Department of Education approved of the intermediate unit's child find and equitable participation policies in a recent audit. The parents' argument is rejected.

Moreover, even if the parents' argument that the student should have been identified as a child with a disability is accepted as correct, which it is not, it is doubtful whether the identification of the student as a student with a disability would have resulted in the student being on a different path or in a better place as the parents claim. The equitable participation services offered by the intermediate unit include only consultative services and not any direct student services. Accordingly, even if there had been a violation, the student would not have received direct services as would a public school student.

To the extent that the testimony of witnesses favorable to the parents is contradicted by the testimony of the intermediate unit witnesses concerning this issue, the testimony of intermediate unit witnesses is more credible and persuasive than the testimony of the parents' witnesses. It should be noted in particular that much of the testimony cited by the parents is suspect because counsel for the parents phrased questions in terms of whether the student had "needs" instead of whether the witnesses reasonably suspected that the student was a child with a disability. Indeed, almost all students have "needs," and the existence of "needs" does not raise a reasonable suspicion that a student is a "child with a disability" as defined by IDEA. The record

evidence reflects that schools frequently provide interventions, strategies and supports in the regular education classroom to students who struggle or have needs; not all such students should be evaluated for special education. By structuring the testimony in this manner, counsel for the parents has obfuscated the meaning of the testimony that was elicited through such questions and the resulting testimony is entitled to very little weight.

The parents have not demonstrated that the intermediate unit's child find activities for equitable participation were insufficient under IDEA.

3. Is reimbursement for private school tuition appropriate for an IDEA violation pertaining to breach of a child find violation to parentally placed private school students?

Both parties agree that although this case involves a request for reimbursement by the parents, the Burlington/ Carter/ TA three pronged test does not apply. {See, Burlington Sch. Comm. v. Dept. of Educ., et. al., 471 U.S. 359, 105 S.Ct. 1996, 556 IDELR 389 (1985); Florence County Sch. Dist. v. Shannon Carter, et. al. 510 U.S. 7, 114 S.Ct. 361, 20 IDELR 532 (1993); Forrest Grove Sch Dist v. TA, 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (2009)} The analysis does not apply here because parentally placed private school students have no right to FAPE or any individual entitlement to services. See discussion of issue 2.

As the parents' brief correctly points out, a hearing officer has broad authority to provide appropriate remedies when IDEA is violated. Forrest Grove School District v. TA, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (U.S. 2009); Stapleton v. Penns Valley Area Sch. Dist., 71 IDELR 87 (M.D. Penna. 2017); In re Student with A Disability, 52 IDELR 239 (SEA WV 2009).

A hearing officer's authority to impose an appropriate remedy, however, is contingent upon there being a violation of IDEA. In the instant case, as the preceding discussion shows, there has been no violation of IDEA by the intermediate unit. Accordingly, there is no basis for any equitable remedy to be ordered.

Moreover, because this was a case involving a parentally placed private school student, the local education agency had no duty to provide a free appropriate public education to the student. Given the fact that no denial of free appropriate public education or other substantive violation, such as a violation of the least restrictive environment provision, has been alleged, an award of compensatory education, or reimbursement for tuition or other expenses incurred, would not be appropriate for parentally placed private school students. See, PP v. Westchester Area School District, 585 F. 3d 727, 53 IDELR 109 (3d Cir. 2009).

In their posthearing brief, the parents cite two Minnesota cases to support their argument that an award of compensatory education to parentally placed private school

students is appropriate. These cases are distinguishable and not helpful, however, inasmuch as Minnesota has a state statute, much broader than IDEA, requiring that parentally placed private school children with disabilities receive a FAPE. RMM by Morales v Minneapolis Public Schs, 67 IDELR 65 (D Minn 2016). Unlike the Minnesota state law, IDEA does not require a FAPE or direct services for private school students. The parents' reliance upon the Minnesota cases is misplaced.

Accordingly, assuming arguendo that there had been a child find violation in this case, the only remedy that would be appropriate would be an order requiring an evaluation. If the intermediate unit had breached its child find obligation, the student would be entitled to equitable participation services only and not a free appropriate public education. The equitable participation services offered by the intermediate unit in the instant case are consultative in nature and do not include any direct student services. Accordingly, the student would not have been harmed by the child find violation in the manner argued by the parents in their post-hearing brief.

In addition, it should be pointed out that a parent is not permitted to bring a due process hearing based upon a dispute concerning equitable participation services or the lack thereof. Child find is the only topic which parents are allowed to file as a due process hearing. Thus the only issue properly before the hearing officer in this complaint is child find. Even assuming arguendo a violation, therefore, the only remedy

available would be an order requiring an evaluation. Reimbursement and compensatory education would not be appropriate remedies. The parent's contentions concerning relief are rejected.

The parents have not demonstrated any violation of IDEA in this case, and no relief is appropriate.

CONCLUSION

It is concluded that the due process complaint brought by the parents in this case was not timely filed and must be dismissed. Even assuming arguendo that the complaint had been timely filed, the parents have not demonstrated that the intermediate unit violated the child find provisions for parentally placed private school students under IDEA. It is concluded, therefore, that the parents have not demonstrated that the intermediate unit violated IDEA or the federal regulations or the Pennsylvania statutes or regulations concerning special education. The parents are not entitled to reimbursement or any other relief.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that all of the relief requested in the due process complaint is hereby denied. The complaint is dismissed.

IT IS SO ORDERED.

ENTERED: March 19, 2019

James Gerl

James Gerl, CHO
Hearing Officer