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:
23927-2021KE

Child's Name:
A. P.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
Joy Waters Fleming, Esq.

Date of Decision:
2/8/21

INTRODUCTION

Student [1]is [redacted], a District resident, and unilaterally placed by the Parents,[2] in a private school. The Parents allege that the District violated the Student's rights by failing to timely identify Student with a qualifying disability and offer an appropriate program and accommodations under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), the Americans with Disabilities Act (ADA) as well as the federal and state regulations implementing those statutes. [3]

This matter proceeded to a multi-session hearing convening virtually due to the COVID-19 pandemic and resulting in intermittent school closures.[4] The Parents seek reimbursement for an independent educational evaluation (IEE), reimbursement of private school tuition and all associated costs, or compensatory education. The District maintains its actions were appropriate for Student and that no remedy is due.

For reasons that follow, the claims of the Parents are denied.

ISSUES

1) Did the District fail to timely identify student as a child with a disability and eligible for services under the IDEA and/or Section 504?

2) If the District did fail to timely identify student as a child with a disability and thereby denied student a free, appropriate, public education, should Student be awarded compensatory education; and if so, in what form and amount?

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[1] In the interest of confidentiality, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

[2] Both Parents participated in the due process hearing. For ease of reference, the word Parent references an action by one Parent as opposed to a joint action.

[3] The Parents IDEA claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101- 14.163 (Chapter 14). The applicable federal and state regulations implementing Section 504 are found at 22 Pa. Code Chapter 15, and 34 C.F.R. Section 104.101 et seq.

[4] This hearing required five separate video-conference sessions. Because of schedule conflicts, availability of witnesses, including the necessity for additional sessions, the decision due date was extended for a good cause, upon written motion of the parties.

3) Did the District propose an appropriate educational program for Student for the 2019-2020 school year?

4) If the offered program was not appropriate for the 2019-2020 school year, are Parents entitled to tuition reimbursement and associated costs for the private school placement?

5) Did the District propose an appropriate educational program for Student for the 2020-2021 school year?

6) If the offered program was not appropriate for the 2020-2021 school year, are Parents entitled to tuition reimbursement and associated costs for Student's private school placement?

7) Did the District discriminate against Student in violation of Section 504 and the ADA?

8) Are the Parents entitled to reimbursement for the Independent Educational Evaluation they obtained?

FINDINGS OF FACT

1. Student is [redacted] and unilaterally placed by the Parents in [redacted] grade in a private school.

2. From birth to the age of two, Student struggled to eat and drink, experienced allergic reactions to various foods, and was hospitalized for influenza, RSV, tympanostomy tube placement, a URI, and required an NGT feed because of poor oral intake. (P-2; N.T. 44-45)

3. Student received birth to three occupational therapy services from early intervention. (P-12, p. 4; N.T. 131, 106, 220)

4. In November 2015, at the age of two, the Children's Hospital of Philadelphia (CHOP) multi-disciplinary team conducted a feeding assessment of Student consisting of medical, nutrition, occupational therapy, psychology, and speech pathology for inadequate intake of liquids and tube dependency. (P-2)

5. The CHOP assessment indicated a possible diagnosis of food protein induced enterocolitis syndrome (FPIES) and food aversion, food allergies. CHOP recommended that Student participate in an intensive day hospital admission to improve acceptance of food and increase variety. The Parent did not provide this information to the District until the due process hearing. (P-2)

6. CHOP recommended that Parents follow up with the FPIES clinic, discontinue tube feeding and follow up with day hospital admission program. (P-2, p. 5)

7. From 2015-2019, Student attended a Montessori preschool (N.T. 13, 167, 169)

8. From August 9, 2016, to August 29, 2016, Student received treatment through the CHOP Pediatric Feeding & Swallowing Center, day hospital program. Upon discharge from the program, CHOP recommended that Parents continue with the current feeding plan and continued occupational therapy (OT) to practice self-feeding. CHOP indicated that no follow up was needed at the feeding center. (P-4, p. 6)

9. In December 2016, the County Intermediate Unit determined Student ineligible for preschool special education services. (P-12, pp. 4, 6, P-25; N.T. 102, pp. 527-528)

10. From September 2017 to September 2018, Student received services through the Southeastern Pennsylvania Autism Resource Center (SPARC), Pediatric Feeding Disorders Program. (P-5, P-10)

11. In January 2018, CHOP assisted the Parent with obtaining wrap-around services so a health aide could assist the Student at lunchtime. The Parent did not provide the District with this information until the due process hearing. (P-8; N.T. pp.111-114, 122-126)

12. In March 2018, SPARC created a feeding protocol to increase Student's variety of foods, introduce textures, decrease refusal behaviors, and increase self-feeding. The Parent did not provide the District with this information until the due process hearing (P-6; N.T. pp. 111-114, 122-126, 167)

13. In May 2018, SPARC created a revised feeding protocol. The Parent did not provide the District with this information until the due process hearing (P-7; N.T. pp.61, 111-114, 122-126)

14. The County Intermediate Unit (IU) is responsible for evaluations of pre-school aged children. The IU contacts the District before each school year to advise of children receiving services and potentially in need of evaluation upon kindergarten entry. The District did not receive notification from the IU about Student. (N.T. pp. 351-352, 369-370)

15. The District engages in child find activities that include website and newspaper notifications and information placed in the school district calendar. To fulfill child find responsibilities toward private school students, the District sends letters to private schools within its boundaries that includes information on the evaluation and referral process and services available through the County Intermediate Unit. (N.T. 354)

2018-2019

16. Student attended a Montessori preschool on a full-time basis during the 2018-2019 school year. (N.T. 167-169)

17. On November 12, 2018, the Parent contacted the District via email indicating:

    I am attaching [redacted] s evaluation packet to this email, including the consent form, parent information form, attachment to parent information form. BASC 3 form, and a letter from… current enrichment school (attachment 1 to this email).

    In the consent form, it is requested to mail the hard copies to [ ]. However, the enclosed envelope (see attachment 2) states: 'Hatboro-Horsham School District, Special Education, 899 Horsham Road, Horsham PA 19004'. I would appreciate if someone clarified where these hard copies should be mailed and if possible, forwarded these forms to Ms. [ ] if she is the person in charge of evaluation.

    We would also appreciate if today's date, November 12, 2018, be considered the starting date for the 60-day evaluation period. Not only has [redacted] not been getting education since October 10, 2018, but neither has my other [child][Student] with special needs been receiving necessary treatments for [gender pronoun] feeding disorder (see attachment 3) due to the time and attention [redacted] needs [redacted][.]

    After I receive an email confirming the mailing address, I will promptly mail the hard copies of the attached forms. (P-11, S-4, P-11, p.3) [5]

18. The attachment in Parent's email to the District was a November 6, 2018, letter from SPARC that stated:

    To whom it may concern:

    [Student] has been receiving outpatient treatment for [gender pronoun] a feeding disorder at SPARC since September 2017, including intensive feeding therapy in early 2018. It is recommended [Student] continue [gender pronoun] treatments on a weekly basis, including clinic and home sessions. However, the family unexpectedly stopped all treatments on October 4, 2018. [Parent] reported this halt in treatment was due to traumatic events that happened to their older [child] at [gender pronoun] public school.

    We encourage the family to contact SPARC as soon as it is feasible for [Student] to resume services. (P-11, p. 3, S-4; N.T. 137, 192)

19. Student was [redacted] when the Parent sent the November 6 email to the District. The Parent selected the November 6, 2018 letter to attach to the email because it contained the

[5] The Parents' exhibit (P-11) introduced at hearing was heavily redacted rendering the intention of the email nearly impossible to discern. The District objected repeatedly to the introduction and references to P-11 on grounds that it was misleading and inaccurate. The Parent's version of this communication was admitted into the hearing record; however, the District's version of the email at (S-4), was admitted into the hearing record over the objection of the Parents. (S-4) was relied upon for resolution of the due process hearing issues.

most updated information that referenced Student's involvement with the Autism Resource Center. (S-4; N.T. 202)

20. The Director of Special Education received the November email but believed it referenced a preschool child of unknown age and educational status. The District did not issue permission to evaluate the Student after receiving the November 6 email or respond to the Parent. (S-4; N.T. 347, 350, 364, 370, 391).

21. On May 30, 2019, CHOP indicated that Student required secondary medical assistance to address health care needs. CHOP confirmed Student's primary diagnosis of FPIES, a developmental delay, neurological and psychological impairments that significantly limited ability to eat independently requiring monitoring at all meals. CHOP indicated that the refusal to eat affected social relationships at school. The Parent did not provide the District with this information until the due process hearing. (P-9; N.T. pp.111-114, 122-126)

EMAIL 2

22. On June 29, 2019, the Parent emailed the District and indicated:

    Our [gender identification], is entering kindergarten next year (the 2019-2020 school year), and as you know, our family resides in Hatboro-Horsham School District. The District is therefore [Student's] LEA. We write because [Student] is a child with disabilities who requires special education services yet the District has not identified [gender pronoun] and offered [gender pronoun] an IEP. [Student] has a rare condition (food protein induced enterocolitis syndrome) and developmental delay, by reason of which [gender pronoun] needs, among other supports, a personal aide.

    Since the District has failed to address [Student's] needs, we intend to place [gender pronoun] at a private school at District expense. We request that the District pay for [Student's] tuition and all associated costs, including transportation, at [private school] during the 2019-2020 school year. (P-13; N.T. 140-141)

23. The District regarded the June 29, 2019 email from the Parent as advising of Student's enrollment in a private school, had no information that Student received IU services as a preschooler and did not issue a permission to evaluate. (N.T. 379-380)

24. The District did not regard the June 29th email as a request for an evaluation since the Parent indicated an intention to enroll Student in a private school. (N.T. 383)

25. On July 19, 2019, the Parent registered Student at the private school for the 2019-2020 school year. (P-17)

2019-2020 School Year-Kindergarten

26. Student attended kindergarten at the private school during the 2019-2020 school year. (P-17)

27. The private school with the County Intermediate Unit screens all kindergartners for developmental and academic concerns. After the screening, the private school refers some students for additional intervention, if circumstances warrant. The private school screened Student, but further referral was determined unnecessary. (N.T. 613-615, 642-643)

28. On September 11, 2019, SPARC observed Student's kindergarten lunch environment and noted Student seated at allergy table with one peer, permitted 30 minutes for lunch, all food packed was eaten within 25 minutes, and an adult checked in with the students every 5 minutes. The Parents did not provide the lunch observation report with the District until the due process hearing (P-18; N.T. 111-114, 122-126, 169-170)

29. The private school develops and implements an accommodation checklist for Students if necessary. Student did not require or have an accommodation checklist during kindergarten. (N.T. 616, 620, 643-644)

30. On March 20, 2020, a private evaluator commenced a psychoeducational evaluation of Student. (P-12; N.T. 104)

31. The private school provided Student with prompting, wait time and assignment to small groups to increase comfort with answering questions in the school environment. (N.T. 627)

32. The private school placed Student at a lunch table with other students with allergies where a lunch monitor checked in with the children. (N.T. 629)

33. The private school issues report cards on a trimester basis. Student's December 2019 report card provided an assessment scale of 1 (beginning to develop), 2 (developing with assistance) and 3 (applies independently) to determine performance. Student received no grades of "1", a few "2s" but mainly grades of "3". Teacher comments were all favorable. S-20)

34. On June 8, 2020, the Parent wrote to the District and stated:

    As you know, my [gender, name] attends [private school]. [Gender pronoun] will be entering first grade next year (the 2020-2021 school year). [Student] is a child with a disabilities – [gender pronoun] has a rare condition (food protein induced enterocolitis syndrome), developmental delay, social communication disorder, and anxiety. By reason of [Student's] disabilities, [Student] needs, in a public school setting, special education services and accommodations. The District has neither evaluated [Student] nor offered [gender pronoun] an IEP or any accommodations. (P-15)

Since the District has not addressed [Student's] needs, we intend to place [gender pronoun] at [private school] for the 2020-21 school year at District expense. We request that the District pay for [Student's) tuition and all associated costs, including transportation, at [private school] during the 2020-21 school year. (P-16)

35. On July 2, 2020, the Parents obtained a private evaluation of Student to address concerns related to psychological, educational, and socio-behavioral needs.[6] The Parents did not request funding for the private evaluation until the due process complaint. (P-12; N.T. 104, 209)

36. The evaluator conducted interviews with family, reviewed records provided by the family, administered aptitude and achievement testing, obtained behavioral information from the Parent and a teacher, and conducted a sensory profile. Student was observed during testing but not in school. (P-12)

37. The private evaluator concluded that the Student met the criteria for an educational classification of OHI related to the feeding disorder, a current social communication disorder (and underlying residual anxiety), and sensory processing differences. (P-12, pp. 24-25)

38. The evaluation recommended that Student receive accommodations including a small class size with few sensory distractions, social skills development opportunities, preferential seating, mealtime support, adherence to allergy protocols, and wait time. The evaluator also recommended that Student receive an OT assessment. (P-12, pp. 25-26)

39. The Parents provided the private evaluation report to the District and to the private school. (P-12, P-19; N.T. 212, 218, 346)

40. On July 17, 2020, the Parents filed a due process complaint against the District. (S-2)

41. Although the District received the private evaluation, it did not initiate its usual protocol of involving the school psychologist because it was summer, there was a pandemic, and evaluations did not commence again until September. (N.T. 383)

2020-2021 School Year

42. During the 2020-2021 school year, Student attended the first grade in a private school.

43. In September 2020, after receiving the private evaluation report, the private school developed an accommodations checklist for implementation during the school year. (P-12, P-26; N.T. 620)

[6] The cover page of the private evaluation incorrectly indicated that the school and family referred Student to the evaluator. (N.T. 643)

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Legal Principles

Burden of Proof

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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). Accordingly, the burden of persuasion and production rests with the Parent, who requested this hearing. In IDEA disputes, the hearing officer applies a preponderance of proof standard.

Credibility Determinations

As factfinders, hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. The relationship between the parties is strained. As the hearing progressed, the circumstances of that discord were revealed with veiled references to dishonesty, unprofessional conduct, and scripted litigation. At the time of the hearing, known to all but the Hearing Officer, the parties were embroiled in other litigation. I did not want to be distracted by details about that dispute. However, counsel could not resist peppering their questions, objections, and responses with specks of suspicion about the motives of testifying witnesses. Although this interfered with my ability to assess credibility, it did not eradicate it. I found the testimony of the private school principal forthright. Her testimony focused on Student's observed and documented needs during kindergarten and the influence of the private evaluation report on the development of supports during the first grade. The principal's testimony was largely credible and instructive. That testimony, in addition to the strong and irrefutable documentary evidence, aided my resolution of this matter. I found the Parent's testimony to be generally credible as it related to the early concern and struggles experienced when focused on the needs of a sick baby. However, when reviewing the record, I was troubled by the lack of disclosure of medical and treatment information provided to the District in conjunction with alleged pre-enrollment requests made by the Parent. Additionally, no one from the feeding clinic testified, although the Parent claimed that Student still needs and receives on

going treatment. To the extent that my findings of fact depend on accepting one witness' testimony over another's, I have accorded more weight to the witness based on the witness' testimony and the other evidence presented.

IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as "child find." School districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not required to identify a disability "at the earliest possible moment." *Id*. (citation omitted). Nevertheless, when a school district has reasonable suspicion of a disability, the obligation is triggered. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012) (citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Perrin v. Warrior Run Sch. Dist*., 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015). Child find is an ongoing requirement. *Id*.

The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of a number of specific classifications and who, "by reason thereof, needs special education and related services." 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a); 22 PA Code §14.102(a)(2)(ii)). Among the identified disabilities are, among others, speech and language impairment, and health impairment(s). The IDEA states that an "other health impairment" means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that:

1. Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
2. Adversely affects a child's educational performance. 34 CFR 300.8 (c)(9).

With respect to the second prong of IDEA eligibility, "special education" means specially designed instruction which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a). Further, specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3). "There is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination." *Chelsea D. v. Avon Grove School District*, 2013 U.S. Dist. LEXIS 98125 *24 (E.D. Pa. July 15, 2013) (quoting *West Chester Area School District v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002)). The IDEA further requires the states to provide a "free appropriate public education" (FAPE) to all students who are eligible for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "'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). First and foremost, of course, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

Procedural FAPE

From a procedural standpoint, the family has "a significant role in the IEP process."

Schaffer, supra, 546 U.S. at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such "significant impediment" to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

Full participation in the IEP process does not mean, however, that an LEA must defer to parents' wishes. *See*, e.g., *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives," and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002)(explaining that "parents who seek public funding for their child's special education possess no automatic veto over" an LEA's decision). If the parties are not able to reach a consensus, it is the LEA that must decide, with parents afforded procedural safeguards if they do not agree. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 12406, 12597 (1999).

Section 504 and ADA Principles

The IDEA places an affirmative duty on districts to locate, evaluate and educate children who are diagnosed with 13 different disabilities and whose disabilities "adversely affects" the student's "education" such that they require "specially-designed instruction." 20 U.S.C. §§1401-1415. Section 504 and Chapter 15, on the other hand, contain their own child find requirements that appear similar to, but in fact, are much broader in scope that IDEA.

Section 504 requires districts to evaluate students who, because of handicap/impairment, need or are believed to need special education or related services. 34 C.F.R. §104.35 (a) See 22, Pa. Code § 15.2. Rather than list a defined set of disabilities, Section 504 requires districts to locate, evaluate and educate individuals whose "physical or mental impairments" "substantially limit" a "major life function." While both statutes require individual assessments, the scope, type, and eligibility requirements are distinct.

In the context of education, Section 504, and its implementing regulations "require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a).

Under Section 504, "an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of" the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit". *Ridgewood, supra*, 172 F.3d at 247. Significantly, "[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not." *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002). Section 504 further prohibits discrimination based on a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii).

To establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is "disabled" as defined by the Act; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *Ridgewood*, *supra*, 172 F.3d at 253. The applicable federal regulations implementing Section 504 require that an evaluation shall be conducted "before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id*. The evaluation is conducted by a local educational agency (LEA)

such as a school district.

Pennsylvania's Chapter 15 regulations similarly obligate the LEA to obtain sufficient information to determine whether a child is a "protected handicapped student" and to involve the parents in that process. 22 Pa. Code §§ 15.5, 15.6. Additionally, a parent must be given an opportunity to meet with school district representatives to discuss any evaluations and accommodations and be notified of the procedural safeguards that attach. *Id.*

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). With respect to the ADA issues, the substantive standards for evaluating claims under Section 504 and the ADA are also essentially identical. *Ridley School District. v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those statutes. See, e.g., *Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). The IDEA statute of limitations also applies to Section 504 claims such as those raised here. *P.P. ex rel. Michael P. v. West Chester Area School District*, 585 F.3d 727, 737 (3d Cir. 2009). In this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

Tuition Reimbursement

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three-part test to determine whether a school district is obligated to fund a private placement when parents unilaterally remove a child and enroll the child in a private school. *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program and placement legally appropriate under the IDEA?

Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. *See also, Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). This three-part test is referred to as the "*Burlington-Carter*" test for tuition reimbursement claims under the IDEA.

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). 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., supra* 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. *Id.*

Parents' Claims

The Parent's overarching contention is that Student has qualifying disabilities under the IDEA, Section 504, and the ADA, the District knew of these conditions, yet the District failed to identify Student consistent with its child find responsibilities and evaluate despite repeated Parent requests. The Parents seek tuition reimbursement for their unilateral placement of Student in a private school, compensatory education, and reimbursement for their privately obtained evaluation. The District denies that Parents are entitled to relief and contends that Parents have failed to establish Student is an eligible child and that Parents' never requested an evaluation of the Student. This dispute's foundation is found in a series of three emails sent by the Parent to the District in November 2018, June 2018, and later in June 2020. The Parents contend the emails were intended to put the District on notice of Student's eligibility for special education services

and to request an evaluation. Various documents outlining the background of Student's medical history and treatment from the treating children's hospital were introduced by the Parents at the hearing but were never provided to the District during the year and half period, this claim encompassed. Based on the totality of evidence in this case, the Parents have failed to preponderantly establish entitlement to relief.

November 12, 2018 Email

The Parents purport that their November 12, 2018 email, sent to the District constituted notice of Student's disability and should have resulted in commencement of an evaluative process. The Parents have failed to meet their burden of proof with respect to this allegation. The email from the Parent to the District stated:

> I am attaching [redacted] s evaluation packet to this email, including the consent form, parent information form, attachment to parent information form. BASC 3 form, and a letter from [gender pronoun] current enrichment school (attachment 1 to this email).
>
> In the consent form, it is requested to mail the hard copies to [ ]. However, the enclosed envelope (see attachment 2) states: 'Hatboro-Horsham School District, Special Education, 899 Horsham Road, Horsham PA 19004'. I would appreciate if someone clarified where these hard copies should be mailed and if possible, forwarded these forms to Ms. [ ] if she is the person in charge of evaluation.
>
> We would also appreciate if today's date, November 12, 2018, be considered the starting date for the 60-day evaluation period. Not only has [redacted] not been getting education since October 10, 2018, but neither has my other [child][Student] with special needs been receiving necessary treatments for [gender pronoun] feeding disorder (see attachment 3) due to the time and attention [redacted] needs [redacted][.]
>
> After I receive an email confirming the mailing address, I will promptly mail the hard copies of the attached forms.

At the point Parent sent this email, unbeknownst to the District, Student was [redacted], a preschooler, and not slated to begin kindergarten until the following school year. However, the email contained none of that information. The email lacked Student's age, name, current enrollment, and educational status, as well as corroborative medical information. The email was primarily about Student's sibling and the return of evaluation documents pertaining to that child.

The clearly stated purpose of the email was to clarify the mailing address and proper recipient for the return of an "evaluation packet" and other documents, all unrelated to the Student who is the subject of this due process matter. In the final full paragraph, the Parent refers to Student's "special needs" a "feeding disorder" and references an attachment. The attachment was a letter addressed to "whom it may concern" that indicated that Parents' unexpected cessation of feeding treatment for the Student because of issues reported by the Parent that related to a sibling of Student. The November email and attachment did not request an evaluation of Student nor infer that any action, reply, or response from the District was expected. Based on the evidence adduced during the hearing and the contents of the November email, the Parents had knowledge of the special education evaluation process. The Parents astutely requested an immediate start to the "60-day evaluation period" but never specified that they had an interest in a District evaluation or even District enrollment of the Student. The District did not fail with respect to its child find obligations. The Parents have failed to establish by a preponderance of evidence that the District should have had a reasonable suspicion that Student was a child with a disability in need of special education and related services.

June 29, 2019, email

Between the November 2018 email from the Parent and June 29, 2019, the District and Parents had no substantive communication about the Student until Parents sent a second email to the District. That email stated:

> Our [gender identification], is entering kindergarten next year (the 2019-2020 school year), and as you know, our family resides in Hatboro-Horsham School District. The District is therefore [Student's] LEA. We write because [Student] is a child with disabilities who requires special education services yet the District has not identified [gender pronoun] and offered [gender pronoun] an IEP. [Student] has a rare condition (food protein induced enterocolitis syndrome) and developmental delay, by reason of which [gender pronoun] needs, among other supports, a personal aide.
>
> Since the District has failed to address [Student's] needs, we intend to place [gender pronoun] at a private school at District expense. We request that the District pay for [Student's] tuition and all associated costs, including transportation, at [private school] during the 2019-2020 school year.

The Parents contend the June 2019 email, sent months before Student's start of kindergarten, required the District to conduct an evaluation. They further contend that reasonable school officials, at the very least, would have wanted to know more about Student's condition after receiving a second email. Although the concluding paragraph of the Parents' email advises of Student's unilateral placement in a private school, the preceding information, more accusatory in tone of perceived District shortcomings, never indicates an interest in enrollment, evaluation, or any District services or interventions. I agree with Parents that, at the very least, the District should have acknowledged the email and clarified the Parents' communication as a request, declaration, or demand. However, even when read in tandem with the Parents November 2018 email, there was simply not enough information presented to charge the District with a reasonable suspicion that the referenced child might be IDEA or 504 eligible. The email is provocative but again contains no discernable request for the District to do anything. It is understood that at this point, the District knew little about this child, except that Student was an incoming kindergartner, and according to the Parent suffered from a specific condition (for which treatment was previously received), and by Parent assessment, required aide services. No updated corroborating medical information was disclosed, no follow-up from the District was requested, no intention to enroll Student in the District was stated. Although the Parent added IDEA suggestive phrases that Student was "not identified", "disabled" and needed "special education", this only further supports the District's proposition that Parents' had advanced knowledge based on previous special education interactions with the District, well-versed in the procedure for requesting District evaluations, and represented by counsel. This is not suggesting that legal representation is inappropriate. However, the District repeatedly insinuated that the Parents were represented by Counsel – in issues involving the sibling- during the period. I strenuously declined efforts to receive unnecessary and, in my view, irrelevant details of that of matter. However, the Parents knowledge of special education procedures, when ignorance or limited knowledge is claimed, certainly goes to credibility throughout their communication with the District. An assertion by a Parent, no matter how forceful that a Student is disabled or in need of special education, without corroborative detail and a commensurate request for an evaluation, is not enough to trigger District action. The final declaration in the email, from the Parent, in my view, solidified the intention of this communication. Student would not be enrolled in the District for kindergarten and would instead attend a private school.

In this case, the Parent never requested an evaluation or expressed an intent to enroll the Student. District's failure to respond might have been discourteous, but it was not violative of the IDEA or section 504. The Parents have failed to preponderantly establish that the June email was sufficient to constitute notice, obligating the District to offer an evaluation of Student or to charge the District with "reasonable" suspicion that Student was a qualified disabled child.

June 8, 2020 Email

Student attended kindergarten at a private school for the 2019-2020 school year. In March 2020, a private evaluator commenced an evaluation of Student. During the school year, the District received no further communication from the Parents regarding the Student until an email sent on June 8, 2020, again notifying of Student's continued enrollment in a private school and requesting District payment for the 2020-2021 school year. The email stated:

> As you know, my [gender, name] attends [private school]. [Gender pronoun] will be entering first grade next year (the 2020-2021 school year). [Student] is a child with a disabilities – [gender pronoun] has a rare condition (food protein induced enterocolitis syndrome), developmental delay, social communication disorder, and anxiety. By reason of [Student's] disabilities, [Student] needs, in a public school setting, special education services and accommodations. The District has neither evaluated [Student] nor offered [gender pronoun] an IEP or any accommodations.
>
> Since the District has not addressed [Student's] needs, we intend to place [gender pronoun] at [private school] for the 2020-21 school year at District expense. We request that the District pay for [Student's] tuition and all associated costs, including transportation, at [private school] during the 2020-21 school year.

The District reasonably construed this communication as notice of Parents' intention to seek public funding for Student's continued enrollment in the private school for the upcoming school year. If intended to request an evaluation or initiation of the process to determine eligibility for services, it does not. Again, it contained no request for a District evaluation or any action; no District follow up was requested. The email from the Parents was purely declaratory.

Recently, in *A.B. v. Abington Sch. Dist*., No. 20-1619 (3d Cir. Jan. 8, 2021) the third circuit, in an unpublished decision, determined that a parent's one-sentence email, which did not mention the student but asked which programs the district could offer, failed to put the district on notice that she was requesting an offer of FAPE. The panel noted that vague inquiries are not enough to put the district on notice of its FAPE obligations. "[The parent] must either manifest an intent to enroll the child or request an evaluation," *Id*. (emphasis added). In all three emails sent to the District, the Parent did not request an evaluation or express an interest or intention to enroll the Student. In the series of emails sent to the District, the Parents did not request an evaluation and were insufficient to put the District on notice of its FAPE obligations.

The Parents have failed to establish that Student is eligible under the IDEA or Section 504. In July 2020, the Parents' private evaluator completed a psychoeducational evaluation of Student, for which reimbursement is now sought. The private evaluator did not observe the Student in school, did not speak with the teachers at the private school but communicated through email, did not review Student's private school kindergarten report card, reviewed medical information supplied by the Parents but did not contact any of the medical providers involved with Student's feeding needs. The Parents provided the report to the District but, days later, requested a due process hearing. The content of the evaluation certainly contained information that Student might be child with a disability. However, the evaluative conclusions were qualified with "the current evaluation is not fully definitive regarding diagnostic considerations nor educational classification, given the inability to observe and collect information within [gender description] educational placement due to the current pandemic". This rendered the evaluation far from conclusive. Although the private evaluator recommended accommodations for incorporation into Student's school day (small class size with few sensory distractions, social skills development opportunities, preferential seating, mealtime support, adherence to allergy protocols, wait time),[7] the private school principal testified that during kindergarten, Student received no accommodations and after a developmental screening, demonstrated no needs that merited further referral. Additionally, the principal indicated that

[7] The principal appeared to concede that the "accommodations" in place would be those that any responsible educator would employ for the benefit of all students, not just those that have an identified disability.

accommodations were currently in place, but none appeared to be specialized for Student's needs and were supports naturally available for the entire student body, as needed.

Eligibility for special education depends on both identification as well as the need for specially designed instruction. The Parent's private evaluator concluded Student was a child with a disability but stopped short of determining that Student needed specially designed instruction in the written report. Interestingly, in testimony, the psychologist appeared to amend his conclusion and testified that SDI "could be appropriate for Student." I do not interpret that equivocation as a clinical determination that Student needed specially designed instruction or that educational performance was adversely affected. The determination of disability under the IDEA is more definitive. Based on the evidence, the Parents have failed to establish that Student's educational performance was adversely affected or that any impairment was present that substantially limited one or more major life activities. Student does not meet the criteria for identification as OHI. Consequently, the Student is not eligible for a service agreement under Section 504. The Parents simply did not provide preponderant evidence in that regard.

Finally, the Parents assert that Student was excluded from participation in, denied the benefits of, or subject to discrimination based on a disability. The District was never placed on notice, and the Parents never enrolled Student into the public school. The Parents have not proven entitlement to relief based on discrimination under Section 504.

CONCLUSION

The Parents have not preponderantly established that the District failed to meet their IDEA or Section 504 child find obligations toward this Student. The Student does not meet criteria as a child with a disability under the IDEA or Section 504. The District did not have a reasonable suspicion that Student might be eligible under the IDEA or Section 504. The Parents never asked for a District conducted evaluation. The Parents have not established that the District discriminated against the Student. Since the District did not deny Student FAPE or violate

Section 504 and, by extension, the ADA, no legal right exists for reimbursement of the private evaluation or any other remedy.

ORDER

AND NOW, this 8th day of February 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. No remedy or relief is due Parents in this matter.

It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Joy Waters Fleming

Joy Waters Fleming, Esq.
HEARING OFFICER
ODR File No. 23927-2021

February 8, 2021