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

Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name:
K.L.

Date of Birth:
[redacted]

ODR File 18629 16 17
CLOSED HEARING

Date of Hearing:
5/17/17, 8/17/17

Parent(s):
[redacted]

Marc Davies[1], Esquire, Marc Davies Law, 1315 Walnut Street,
Philadelphia, PA 19107
Counsel for Parent

School District:
Wallingford-Swarthmore School District, 200 South Providence Road,
Wallingford, PA 19086

Lawrence D. Dodds, Esquire, Wisler Pearlstine, LLP, Blue Bell
Executive Campus, 460 Norristown Road, Suite 100,
Blue Bell, PA 19422
Counsel for the School District

Date of Decision:
9/6/17

Hearing Officer:
Brian Jason Ford, JD, CHO

[1]According to ODR records, Mr. Davies represented [one of the Parents].

Introduction

This special education due process hearing concerns the educational rights of a former student (Student) of the Wallingford-Swarthmore School District (District).[2] The due process complaint was filed by the Student's mother. The Student's mother and father are divorced, but acted cohesively during the hearing. I refer to the Student's mother and father collectively, as the Parents, unless explicitly stated otherwise.

The Parents claim that the District failed to identify the Student as a child with a disability, as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. The Parents claim that this failure ultimately led them to place the Student in a private school. The Parents now seek tuition reimbursement.

The District presents alternative arguments in its defense. First, the District argues that the Parents are not entitled to tuition reimbursement as a matter of law. Second, the District argues that the Parents did not present preponderant evidence in support of their claims.

For reasons discussed below, I agree with the District's primary argument. The Parents are not entitled to tuition reimbursement as a matter of law. I issue no opinion regarding the appropriateness of the District's proposed special education placement for the Student (there wasn't one), the appropriateness of the private school that the Parents selected, or equitable factors that may impact upon a tuition reimbursement award. Rather, I find only that the Student, by operation of law, was neither a "child with a disability" as defined by the IDEA, or a "thought to be eligible" student as defined by Pennsylvania regulations at the time that the Student withdrew from public school. Consequently, the Student had no right to a free appropriate public education (FAPE) under the IDEA at the time that the Parents placed the Student in the private school, and I must grant the District's motion to dismiss.

Issue

Are the Parents entitled to tuition reimbursement?

Findings of Fact

All evidence was carefully considered, but I make findings only as necessary to resolve the issue presented. In this case, most documentary evidence and testimony concerned 1) the Student's needs prior to and during the private school placement, and 2) the nature of the private school itself, and its impact upon the Student's learning and overall wellbeing. I found this evidence to be credible. The Student's own testimony was particularly credible regarding the Student's experience in the District's programs, and the Student's experience in the private school. Testimony from both Parents, and from a representative of the private school, was also helpful. That testimony enabled me to

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

understand how the private school functions.[3] As discussed below, however, this case is not resolved by analysis of the alleged inappropriateness of the District's programming, or appropriateness of the private school. Rather, by operation of law, this case is resolved entirely by examination of the District's efforts to evaluate the Student, and the Parents' response to those efforts.

I find as follows:

1. Prior to the 2013-14 school year, the Student [redacted].

2. During the 2013-14 school year and the first half of the 2014-15 school year, the Student's academic performance declined, and the Student's negative feelings and associations with school increased. The Student refused to attend classes and, eventually, had difficulty getting out of bed, let alone attending school.[4] NT *passim.*

3. The Parents and the District communicated about the Student's worsening problems. In response, on October 3, 2014, the District issued a Permission to Evaluate, Consent Form (PTE). S-6.

4. For the PTE, the District used a standardized form, promulgated by the Pennsylvania Training and Technical Assistance Network (PaTTAN). The form was modified only to include the District's logo. S-6.

5. As written on the PTE, the reason why the District sought parental consent to evaluate was: "Concerns have been raised about [Student's] mental health and academic performance. Parents report that [Student] is increasingly despondent at school sometimes unable [*sic*] to get to school." S-6.

6. As part of the evaluation, the District proposed a classroom observation, records review, parent and teacher input, cognitive and academic assessments, and social, emotional, and behavioral assessments. S-6.[5]

7. Around the same time that the District issued the PTE, the Parents had difficulty reaching the District's school psychologist, and were concerned about the amount of time that a special education evaluation would take, and communicated to the District their desire for immediate changes to take pressure off the Student. *See, e.g.* P-6, S-8. The Student's guidance counselor was the Parents' primary contact in the District during this time. *See id*.

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[3] The private school subscribes to the democratic model of education in which the school community, including students, govern the school.
[4] The record is clear that the Parents, and especially the Student's father, took every reasonable measure to rouse the Student and bring the Student to school.
[5] This also prompted the District to issue a NOREP with the same information on October 6, 2014. S-7

8. The Parents and the District arranged to meet at the District to discuss what changes could be made immediately. That meeting was scheduled for October 15, 2014. In the lead up to the meeting, on October 12, 2014, the Parents sent an email to the guidance counselor expressing their dissatisfaction with the school psychologist's responsiveness, saying that they "cannot wait for him [the psychologist] to move forward to help [the Student]." S-8. The Parents also wrote, "we'll bring the paperwork that he [the psychologist] sent, and discuss options with you, and hope for the best." S-8.

9. The reference to "the paperwork" in the October 12, 2014 email from the Parents to the guidance counselor is to the PTE. NT 292-293. However, the Parents did not say that they consent to the evaluation, or had signed the PTE, in the October 12, 2014 email. S-8.

10. On October 15, 2014, the Parents came to the District for the scheduled meeting. The Parents forgot to bring the PTE with them to the meeting. NT 292.

11. During the October 15, 2014 meeting, the Parents met with the guidance counselor. The school psychologist also attended the meeting briefly. NT 295.

12. Although witnesses were not able to recall a meeting nearly three years in the past in exacting detail, a preponderance of evidence establishes that the Parents' primary concern, and the primary discussion during the meeting, was quickly putting accommodations in place for the Student. *See, e.g.* NT 47-48, 296-297.

13. During the October 15, 2014 meeting, the District printed a document titled "Section 504 Annual Notice Letter for Permission to Evaluate" (504 Notice). S-10. The title of the document appears in bold, all caps type at the top of the first of two pages.

14. Through the 504 Notice, the District sought the Parents' consent to identify the Student as a "Section 504/Chapter 15 Protected Handicapped Student" and initiate a Section 504 Service Agreement. S-10.

15. The 504 Notice lists concerns that are different from those listed on the PTE. The 504 Notice states that the Student "has been diagnosed with ADHD, depression and anxiety. These diagnoses appear to be impacting [Student's] ability to adequately assess the school curriculum." S-10.

16. The type of assessment proposed in the 504 Notice is also different from those listed on the PTE. The 504 Notice proposed a "review of educational records … review of private assessments … input from [Student], as well as [] therapists, psychiatrist, teachers, and parents." S-10.

17. The Student's mother signed the 504 Notice on October 15, 2014, providing consent. S-10. The Student's mother also signed a consent form on October 15, 2014, so that the District could consider outside evaluations and communicate with outside therapists about programs and treatment. S-9.

18. After the October 15, 2014 meeting, on the same day and in the days immediately after, the Parents sent emails to the District concerning recent losses the family had suffered, and about the services that the Student was receiving outside of school. P-1.

19. For the remainder of the time that the Student was in the District's programming, the District and the Parents communicated by email about the Student's needs, and what could be done to accommodate those needs. *See, e.g.* P-12.

20. After the October 15, 2014 meeting, the Parents did not ask for a special education evaluation and the District did not offer one.[6]

21. The Student's last day of attendance in the District was December 23, 2014. The Parents enrolled the Student in a private school, and formally withdrew the Student from the District on January 27, 2015. S-31.

22. The Student attended the private school for the remainder of the 2014-15 school year, the 2015-16, and 2016-17 school years. The student obtained competitive admission to a four-year liberal arts college, and started college in the fall of 2017. P-25.

[6] It is difficult to provide citation to something that is not in the record. All emails between the parties were scrutinized. Those emails illustrate the Parents' concerns, as well as their efforts to propose accommodations (some of which were accepted and some of which were rejected).

Legal Principles and Discussion

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence, and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

Tuition Reimbursement

To determine whether parents are entitled to tuition reimbursement, a three-part test is applied. That test is based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the *"Burlington-Carter"* test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Child Find

The IDEA's Child Find rule does not determine the outcome of this case. Rather, the outcome of this case is largely driven by exceptions to the Child Find rule. Therefore, it is helpful to state the Child Find rule before discussing its exceptions.

In the parlance of special education law, Child Find is a term of art describing a school's obligations under 34 U.S.C. § 300.111 and 22 Pa. Code § 14.121. Those regulations require LEAs to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be "advancing from grade to grade." 34 U.S.C. §300.111(c)(1).

The District's Motion to Dismiss[7]

Prior to the hearing, the District filed a Motion for Dismissal in the Form of Summary Judgment, arguing that the Parents were not entitled to tuition reimbursement as a matter of law. I denied that motion in a pre-hearing order. H-2. At that time, the District's argument depended on facts that had not yet been resolved. I wrote, "Nothing herein precludes the District from raising the same defenses, either at the conclusion of this due process hearing, or if the parties reach new stipulations of fact." H-2.

After the Parents' case-in-chief, the District moved for a directed verdict, raising a substantively similar argument. NT 335-351. The Parents responded. NT 354-367. Interpreting my own obligations under the IDEA, I declined to resolve the motion orally at the hearing. The parties' arguments still hinged on disputed facts, and disputed facts must be resolved via findings of fact in writing. *See* 22 Pa. Code § 14.162(f). Now that facts have been found, the District's motion is ripe.

The District argues that the Parents cannot be entitled to tuition reimbursement. The first part of the *Burlington-Carter* test, described above, is whether the District offered a FAPE to the Student. If the District offered a FAPE to the Student, the analysis ends, and the Parents are not entitled to tuition reimbursement.

The *Burlington-Carter* test presupposes that the Student is entitled to a FAPE. The test assumes that the Student is either a "child with a disability," as defined by the IDEA, or a "thought to be" eligible child. *See* 22 Pa. Code § 14.121. As discussed below, both children with disabilities and thought-to-be eligible children are entitled to a FAPE for purposes of the first part of the *Burlington-Carter* test.

A child with a disability is a child with any of the disabilities (or categories of disabilities) recognized by the IDEA and "who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3). The Student was not identified as a child with a disability before the Parents placed the Student in the private school. Even if the Student had a qualifying disability at that time, the need for special education and related services had not been established. Consequently, the Student was not a "child with a disability" as defined by the IDEA at that time.

Under federal regulations, children who are suspected of having learning disabilities are entitled to some of the IDEA's protections. *See* 34 C.F.R. §§ 300.311 (establishing Child Find obligations), 300.534 (related to discipline). Such children are thought-to-be eligible, and have greater protections under Pennsylvania regulations. 22 Pa Code § 14.162 (establishing due process rights for thought-to-be eligible children). Given the conversations between the Parents and District described above, and the District's

[7] At various times, the District's motion was styled as a motion for summary judgement and as a motion for directed verdict. Since no rules of civil procedure strictly apply to these proceedings, the technical name of the District's motion does not matter. At all times, the District asked me to do the same thing for the same reason.

issuance of a PTE, there can be no doubt that the Student was a thought-to-be eligible child at the time of the Student's withdrawal from public school – unless an exception applies. The District's argument is grounded in an exception.

The IDEA's Child Find provisions create a carve out for non-responsive parents. If the District attempted to evaluate the Student, and if the Parents failed to respond to the District's effort, the District is excused from its Child Find obligations. Federal regulations at 34 C.F.R. §§ 300.300(a)(3)(i), (ii) explicitly release LEAs from their obligations under 34 C.F.R. § 300.111 when parents fail to respond.

In the absence of a Child Find obligation, the Student cannot be a thought-to-be eligible child as a matter of law. The IDEA and its federal regulations establish the Child Find obligation, and extend protections to "not determined eligible" children in disciplinary situations. 34 C.F.R. §§ 300.311, 300.534. The extension of broader protections to thought-to-be eligible children, outside of disciplinary situations, is a function of Pennsylvania regulations. 22 Pa. Code §§ 14.121, 14.152, 14.153, 14.162. Although the term "thought to be eligible" is not defined, Pennsylvania regulations at 22 Pa. Code § 14.121 explicitly link the term to the federal Child Find obligation at 34 C.F.R 300.111. Consequently, if a school is excused from its Child Find obligations, it is also excused from its obligations to the thought-to-be eligible child. This includes the obligation to provide a FAPE to that child.[8]

In sum, if the District attempted to evaluate the Student, and if the Parents failed to respond to the District's effort, then 34 C.F.R. § 300.300(a)(3)(i) and (ii) apply. If 34 C.F.R. § 300.300(a)(3)(ii) applies, then the District is excused from Child Find obligations that are otherwise imposed by 34 C.F.R. § 300.111. If the District has no Child Find obligation, then Pennsylvania regulations extending the right to a FAPE to thought-to-be eligible children do not apply. In the absence of those Pennsylvania regulations, the Student had no right to a FAPE under the IDEA at the time that the Parents placed the Student in the private school, and the first prong of the *Burlington-Carter* test fails as a matter of law.[9]

Given the foregoing, the District's motion hinges on whether the District attempted to evaluate the Student before the Parents placed the Student in the private school, and whether the Parents responded to the District's efforts.

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[8] In this situation, the District was also permitted to request a due process hearing to evaluate the Student without parental consent.

[9] If the Student had no right to a FAPE, the question of whether the District offered a FAPE is inapposite. In the absence of a right to a FAPE, any program put forth by the District is appropriate *per se* for IDEA purposes. At that time, the Student also had a right to FAPE under Section 504, but the Parents seek tuition reimbursement, which is an IDEA remedy.

Failure to Respond

The District attempted to evaluate the Student. The District sought the Parents' consent to conduct a special education evaluation on October 3, 2014 by sending the PTE. The deciding factor, therefore, is the Parents' response to the PTE.

The evidence in this case (both documents and testimony) paint a clear picture of parents who were just trying to get help for their child, by whatever means, as quickly as possible. The Parents testified that they had signed the PTE, and had intended to bring the signed PTE to the District during the October 15, 2014 meeting. The Parents argue (via counsel) that the District's actions in that meeting were tantamount to fraud. NT 357. The Parents testified that they forgot the PTE, offered to go home to get it, and were assured by the District that the PTE could be reprinted. The Parents testified that they thought they were signing the PTE when they signed the 504 Notice on October 15, 2014.

I did not include the foregoing in my findings of fact for two reasons: 1) there is evidence to the contrary and 2) I have no authority whatsoever to hear a fraud case, even if that fraud relates to the education of a child with disabilities.

Regarding the evidence to the contrary, there are very clear differences between the PTE and the 504 Notice. The documents have different titles, which are boldly printed on the documents themselves. The documents offer different evaluations. The documents list different concerns. Emails sent after the meeting, generally, are about accommodations and information from third parties – which are the focus of the 504 Notice but not the PTE. Some testimony suggests that the Parents kept the Student's educational records, but the signed copy of the PTE that the Parents intended to bring to the meeting could not be produced.

I do not doubt that the Parents were anxious, and eager to sign documents to move quickly. There is insufficient evidence, however, to conclude that the District duped the Parents, intentionally or otherwise. Moreover, even if the evidence were to the contrary, I do not have authority to conclude that the District engaged in fraud. The scope of my authority is limited to "matter[s] relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A). This provision has been interpreted to include questions about whether a settlement agreements "exists" between two parties. *See, e.g. I.K. v. Sch. Dist. of Haverford Twp*., 961 F. Supp. 2d 674 (E.D. Pa. 2013). In that context, it is possible in theory that Hearing Officers have limited authority to consider fraud as a defense against a contract*. See A.S. v. Office for Dispute Resolution Quakertown Cmty.*, 88 A.3d 256 (Pa. Commw. Ct. 2014). No court has ever explicitly concluded such authority exists, let alone extended that authority beyond disputes about settlement agreements.[10]

[10] Fraud was not pleaded in this case, although it is difficult to imagine how fraud could be pleaded in an administrative special education due process hearing.

In conclusion, the evidence in this case establishes that the District offered a PTE, and that the Parents did not return it. Instead, the Parents and District met, the District offered to move forward under Section 504, and the Parents consented in writing to that plan. For approximately two months thereafter, the Parents and District discussed accommodations, and those discussions were in line with the 504 Notice. After that, the Parents unilaterally placed the Student in the private school.

Typically, a failure to respond contemplated at 34 C.F.R. § 300.300(a)(3)(i) is evidenced by parental silence. The Parents in this case were not silent. They were vocal advocates for the Student. The regulation, however, does not depend on what a failure to respond usually looks like. The District offered an evaluation, the Parents did not respond to that offer, and then both parties went down a different path by attempting Section 504 accommodations instead of IDEA special education. I have no authority to say whether that path was chosen through agreement or deceit. Regardless, the Parents did not respond to the District's PTE. I am obligated to apply laws that consider the Parents' actions, but not their intentions. Therefore, 34 C.F.R. § 300.300(a)(3)(i) and (ii) apply. This sets off the cascade of legal consequences described above, all resulting in the conclusion that the Student was not thought-to-be eligible at the time that the Parents placed the student in the private school, which forces the first prong of the *Burlington-Carter* test to fail as a matter of law.

For the foregoing reasons, the Parents are not entitled to tuition reimbursement.

ORDER

Now, September 6, 2017, it is hereby **ORDERED** that the Parents' demand for tuition reimbursement is **DENIED** and **DISMISSED.**

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

/s/ Brian Jason Ford
HEARING OFFICER