DECISION

Due Process Hearing for Student DM, Student GM, and Student MM

ODR File Nos. 8867, 8868, and 8869/07-08 AS

Date of Birth: xx/xx/xx

Dates of Hearing: July 14, August 28, September 17, and October 15, 2008 – Closed Hearing

Parties to the Hearing:

Ms.

Lancaster-Lebanon IU/EI Program
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Lancaster, PA 17601

Representative:

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Hearing Officer: Debra K. Wallet, Esq.

Record Closed: November 19, 2008

Date of Decision: December 4, 2008

BACKGROUND:

Student D, Student G, and Student M are xx-year-old triplets (date of birth xx/xx/xx) born to [redacted] [hereinafter Mother].

Students D and M, but not G, received some Early Intervention services for speech and physical needs from birth to age three. Upon enrollment in the beginning of the 2007-08 school year, the [redacted] School District [hereinafter H School District] did not evaluate the children but provided Students D and M with Instructional Support Services. The family then moved in March 2008 to the [redacted] School District [hereinafter M School District] where Mother asked that all three of the children be evaluated for eligibility for special education under the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 *et seq*. [hereinafter IDEA]. The results of these evaluations are not known.

On May 14, 2008, Mother filed a due process complaint on behalf of each of her three children alleging that the Lancaster-Lebanon Intermediate Unit 13 [hereinafter Intermediate Unit] violated its Child Find duties under the IDEA and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 [hereinafter Section 504], in failing to evaluate and provide special education needs for these three children between ages three and five. Mother requests compensatory education from May 14, 2006 until September 1, 2007, the start of the H School District's school year, and reimbursement for an independent evaluation by a school psychologist whose testimony was presented at this hearing. Because of the commonality of issues, Mother requested a joint due process hearing which request was granted by the Hearing Officer.

The Intermediate Unit argues that there has been no violation of any Child Find obligation because Mother opted for private pre-school services rather than public-sector

services offered by the Intermediate Unit at the time of transition at age three. Repeated explicit notice of the availability of preschool disability-related services had been provided to Mother but she declined these services. According to the Intermediate Unit, sufficient Child Find outreach efforts are provided to the general public and were provided particularly to Mother.

ISSUES:

1. Did the Intermediate Unit fail in its Child Find responsibilities under the IDEA?

2. Did the Intermediate Unit fail in its responsibilities under Section 504?

3. Should compensatory education be awarded?

4. Should the Intermediate Unit pay for the cost of the private evaluation of these three children by psychologist Mr. B?

FINDINGS OF FACT:

1. Triplets, Student D, Student G, and Student M, were prematurely born on xx/xx/xx and have at all times lived with their Mother. (IU-2.1; N.T. 10-August[1]).

2. Mother filed three Due Process Complaint Notices dated May 14, 2008, asking for a joint hearing because of the "significant commonality" of issues. (HO-1 through HO-3).

3. The Intermediate Unit filed a timely response to these complaints on May 28, 2008. (HO-8).

4. The parties elected to have a closed hearing. Hearings were held July 14, August 28, September 17, and October 15, 2008. The parties submitted written briefs as directed on November 5 and November 19, 2008, at which time the record was closed.

[1] Unfortunately, the pages of the transcripts from the July 14 and August 28 hearings are not numbered consecutively. Both transcripts start at page 1; hence the need to distinguish between them.

5. Mother's request for a joint hearing was granted by the Hearing Officer. (N.T. 6- August).

6. The following exhibits were admitted: Hearing Officer Exhibits HO-1 through HO-12. Parents Exhibits P-1, P-3 through P-13, P15 through P-16, P-18, P-20 through P-26, P-28 through P-39, P-48 through P-56; Intermediate Unit Exhibits IU-1 through IU-23. (N.T. 10-11 July; 99 July; 103-106 July; 108 July; 159-160 July; 163-164 July; 5 August; 317; 519; 541).

7. Mother called three witnesses: herself, psychologist Mr. B, and family physician Dr. V.

8. The Intermediate Unit called three witnesses: Ms. A, Supervisor, Pre-School Early Intervention; Ms. H, MH/MR Early Intervention Support Coordinator; and Ms. B, social worker for the Intermediate Unit Preschool Program.

Student D

9. Student D is a child at risk for developmental delay due to premature birth as a member of a set of triplets.

10. Mother referred Student D to the Lancaster County Early Intervention Unit [hereinafter LCEI] in August of 2002. (N.T. 212; P6-2).

11. Student D's Mother testified and reported to the M School District that Student D was in need of an evaluation and exhibited developmental delays. (P-15)

12. Student D was diagnosed as having met "the criteria for Attention Deficit/Hyperactivity Disorder (ADHD)" during kindergarten school year by the family doctor. (P- 17).

13. Student D was diagnosed as having a Specific Learning Disability, namely a disorder in phonological processing, by Mr. B, a school psychologist. (P50-6).

14. Student D is of Puerto Rican heritage but speaks English only. (N.T. 49; P-13-3).

Student G

15. Student G is a child at risk for developmental delay due to premature birth as a member of a set of triplets.

16. Student G is of Puerto Rican heritage but speaks English only. (N.T. 21 August).

17. Mother did not refer Student G to LCEI. (N.T. 217).

18. Student G's Mother testified and reported to the M School District that Student G was in need of an evaluation and exhibited developmental delays. (N.T. 98; P-38, P-39).

19. Student G was immediately placed in English as a Second Language and Title I academic programs upon enrollment in kindergarten. (N.T. 26 August).

20. Mr. B states that he believes "[d]iagnosing [Student G] with a learning disability would involve the mother in the educational process and would ensure that Student G's progress was objectively measured." He also recommends that Student G "be placed with children who are non-disabled." (P56-9).

Student M

21. Student M is a child at risk for developmental delay due to premature birth as a member of a set of triplets.

22. Mother referred Student M to LCEI in May of 2003. (N.T. 216).

23. Student M's Mother testified and reported to the M School District that Student M had significant delays as a young child. (P-32).

24. Student M was diagnosed as having met "the criteria for Attention Deficit/Hyperactivity Disorder (ADHD)" during kindergarten school year by the family doctor. (P- 34).

25. Student M was diagnosed as having a Specific Learning Disability in math and reading by Mr. B, a school psychologist. (P53-7).

26. Student M is of Puerto Rican heritage but speaks English only. (N.T. 113).

With Respect to All Three Students

27. None of the children received a multi-disciplinary evaluation from the Intermediate Unit. (*See, e.g.* N.T. 34 August).

28. The Intermediate Unit has entered into a mutually agreed-upon written arrangement with the Pennsylvania Department of Education, under which the Intermediate Unit provides services under Part B of the IDEA to eligible children from their third birthday until the "age of beginners" or the age of first-graders.[2] (N.T. 147 August).

29. The Intermediate Unit has an ongoing relationship with LCEI relating to toddler transition. Generally, the toddler transition process includes a meeting at the family's home at which it is discussed whether or not the parents wish to move into Intermediate Unit services. (N.T. 122, 125-27 August).

30. The Intermediate Unit conducts community outreach efforts aimed at publicizing its program for children from the third birthday onward, with the intended purpose of locating and identifying children who may be eligible under Part B of the IDEA. These outreach efforts include: semi-annual public notices, more frequent advertisements in a local Parent Magazine, participation in a local coordinating council (including its child find committee), the employment of social workers, the dissemination of flyers, the organization and publicizing of presentations, training for daycare centers and nursery schools, presentations at community fairs and public libraries, encouraging pediatric rehabilitation centers and others to advise parents that they should contact the Intermediate Unit if the parent has concerns about their child's development, and letters and other materials issued jointly with LCEI. (N.T. 134-47 August, 280-292, 297-298, 302-306; IU-17 through IU-23).

31. LCEI sought and received Mother's permission to share information regarding two of her children with the Intermediate Unit. In so doing, LCEI described the Intermediate Unit as a "school or educational facility" and gave Mother the Intermediate Unit's address. (P 4-2; P 21-11).

32. As part of an Individualized Family Service Plan (IFSP) (*see* N.T. 219-220) that LCEI developed with Mother before the children were two years old, and that was given to Mother when completed, LCEI recorded some of the information that it had given Mother regarding the services available through the Intermediate Unit, as follows: "Parent understands that funding changes to IU when child turns 3. Transition will be discussed again prior to [Student D's] 2nd birthday." (IU-4.16; N.T. 230-31).

33. As part of an IFSP that LCEI developed with Mother before the children were two years old, and that was given to Mother when completed, LCEI recorded some of the information that it had given Mother regarding the services available through the Intermediate Unit, as follows: "[Student M's] mother understands that funding for Early Intervention is provided through MH/MR until Student M's 3rd b-day. At that point the funding continues

[2] Under 11 P.S. § 875-304 and 22 Pa. Code §§ 14.101 & 14.151(a), the program is for "eligible young children," a term which is defined by reference to the "age of beginners," which in turn is defined by reference to the minimum age of first graders in a student's school district.

through the IU. Transition will be further discussed after [Student M] turns two." (P 23-16; IU-9.16).

34. As part of an IFSP that LCEI developed with Mother and that was given to Mother when completed, LCEI recorded some of the information that it had given Mother regarding the services available through the Intermediate Unit, as follows: "The family is aware that a transition meeting will need to be held with the Intermediate Unit 4 months before [Student D's] 3rd birthday to discuss the transition to the Intermediate Unit upon age 3 and to share information." (P 9-42; IU-5.15).

35. As part of a letter to Mother, LCEI said that it was time to review two of the children's IFSPs and said that, "[i]n addition, we need to discuss [Student D and Student M's] transition to the IU #13 Early Intervention Program, since their 3rd birthday is only 4 months away." (P 12-13; P 26-10; IU-6.1; IU-12.1).

36. LCEI Service Coordinator Ms. H met with Mother at the family's home on November 18, 2004. One of the purposes of the meeting, as communicated beforehand to Mother, was to discuss transition around the children's third birthday. (P 26-11; IU-6.2). Ms. H and Mother "discussed [Student M's] upcoming third birthday and whether Mom is interested in transitioning Student M to the IU." (P 25-20; IU-14.3).

37. LCEI Special Instructor Ms. M spoke with Mother on December 3, 2004 about a possible transition meeting among Mother, LCEI, and the Intermediate Unit. (P 25-22; IU-14.5). Mother and Ms. M agreed to have the meeting on January 4, 2005 at the family's home. (P 25-22; IU-14.5).

38. At the appointed time for the transition meeting at the family's home on January 4, 2005, Mother did not show up. (P 25-23; IU-12.5). As a result, Ms. H sought, on January 6, to make arrangements for another meeting. (P 25-23; IU-12.5). Upon learning that Mother would be meeting with Ms. M during the evening of January 6, Ms. H arranged to join Mother and Ms. M at the family's home in order to "talk to Mom about the transition process again and make sure she wants to proceed." (P 25-23; IU-12.5). That meeting took place and Ms. H "explained again about Early Intervention through [the] IU." (P 25-23).

39. When LCEI determined that Student D was doing well and no longer needed early intervention services, it also said that: "If at any time you have concerns about your child's development, please call Ms. H at [telephone number redacted] or if within 60 days or after Student D's 3rd b-day, call the IU @ [telephone number redacted]." (IU-7.13; N.T. 232-233).

40. After receiving information concerning the availability of services from the Intermediate Unit on and after the children's third birthday and after discussing with LCEI the progress achieved by Student M (who was then the only child deemed eligible under any part of the IDEA), Mother "decided she felt comfortable with [Student M's] current progress and

[did] not feel the need to continue with support after Student M's 3rd birthday." (P 25-23; IU-14.6). Ms. H expressed this at the hearing as follows: ". . . and we talked about again the transition process. And at that time, [Mother] did not feel as though we needed to continue because [Student M] had been making such good progress." (N.T. 225).

41. Mother understood that the funding for early intervention services changed to the Intermediate Unit when the children turned three and that transition involved the opportunity to meet with the Intermediate Unit. (N.T. 65, 68, 70-71, 78 August). She received copies of the IFSPs and related documents and did not perceive any inaccuracies in them. (N.T. 66-67 August). She understood that she could contact the Intermediate Unit within 60 days of her children's third birthday, or any time after that, if she had any concerns about Student D or Student M having a developmental delay or disability. (N.T. 72-73 August).

42. Ms. H testified that if she had had concerns about Mother's decision not to transition to the Intermediate Unit services, Ms. H would have shared her concerns with Mother. (N.T. 237).

43. Ms. H, who had known the triplets since infancy, testified that she did not have concerns about Mother's decision. (N.T. 237).

44. The Hearing Officer finds credible the testimony of Ms. H whose recollection is consistent with the documentary evidence and who had no reason to be untruthful.

45. It is the policy and practice of the Intermediate Unit to respect a parent's decision and not to try to change a parent's mind after a parent decides not to continue with services after the third birthday. (N.T. 134 August). This is so regardless of the severity of a child's disability. (N.T. 148 August).

46. On March 24, 2005, LCEI's Ms. H wrote to Mother, saying: "Also, as we discussed, [Student M] will not be transitioning to the IU#13 Early Intervention Program. If you would have concerns about Student M's development in the future, you can contact the IU#13 at [telephone number redacted]." (P 26-14; IU-12.6).

47. On March 30, 2005, the Discharge Summary issued to Mother by Early Intervention Teacher Ms. M reminded her that, "If [Student M's] family has concerns or questions about Student M's development in the future they should contact IU 13." (IU-13.2).

48. Ms. H believed, and Mother agreed, that Student M had caught up with Student M's siblings in terms of development by March 1, 2005. (N.T. 145; P 25-25).

49. During the period shortly after Student M's third birthday, Mother did not have any concerns about Student M's development. (N.T. 83-84 August).

50. During the period shortly after Student D's third birthday, Mother did not have any concerns about Student D's development. (N.T. 84 August). Mother did not think that Student D had a developmental delay as of Student D's third birthday. (N.T. 72 August).

51. During the period shortly after Student G's third birthday, Mother did not have any concerns about Student G's development. (N.T. 84 August).

52. In approximately April 2007, staff of the private learning center where the children attended recommended that Mother have one or more of her children evaluated by the Intermediate Unit. (N.T. 38-39 August).

53. Mother did not act on that recommendation and she did not contact the Intermediate Unit in 2007. (N.T. 40, 100 August).

54. All three children were enrolled in H School District as kindergarteners at the beginning of the 2007-08 school year. (P 36-1; P 13; P 30; P 36; N.T. 41 August). Mother did not ask H School District to conduct any special education testing and did not think it was worth mentioning that two of the children had participated in the County Early Intervention program. (N.T. 42 August).

55. H School District did not evaluate any of the children under Part B of the IDEA but provided two of the children with Instructional Support Services. (N.T. 48 August). Mother was satisfied with her children's education at H School District. (N.T. 48-49, 53 August; IU-1.3).

56. The family moved to the M School District in March 2008. (N.T. 123).

57. In mid-April 2008, Mother requested that M School District evaluate the children under Part B of the IDEA. These results were not presented to this Hearing Officer as of the close of the record. (N.T. 34 August).

Psychologist Mr. B

58. Mr. B is a licensed psychologist and a certified school psychologist who evaluated the triplets at the request of their mother "for the purposes of planning an educational program" in the early part of the summer 2008. (N.T. 318, 398-399).

59. Mr. B testified that a diagnosis of a learning disability cannot and should not be made at age three. (N.T. 340). He also opined that, unlike at age 6, one cannot assess reading or the ability to understand symbols at age three. (N.T. 489, 493).

60. Mr. B tested the triplets at age 6 relating to skills he would not have assessed, and using assessments that he would not have used, if testing them around their third birthday. (N.T. 419, 405-407, 435).

61. Mr. B thinks that it is a "real possibility" (which he also expressed as a 65% likelihood) that Student G can get an appropriate education in the current school district without being classified as a special education student. (N.T. 482-83).

Family Physician Dr. V

62. Dr. V is a Board Certified family physician. (N.T. 442).

63. Dr. V has been the children's doctor since they were four months old. (N.T. 443). There is no indication that she referred any of the children for disability-related evaluations prior to age 6 or that she concluded that any of the children had Attention Deficit Hyperactivity Disorder (ADHD) before they were six years old.

64. Dr. V has diagnosed Students D and M with ADHD using the DSM-IV and Vanderbilt questionnaires. (N.T. 443, 447, 449; P-17, P-34).

65. Dr. V would not have applied the same diagnostic criteria at age three. (N.T. 464).

CONCLUSIONS OF LAW

1. Mother bears the burden of proof that a Child Find violation under the IDEA has occurred.

2. Mother bears the burden of proof that a Section 504 violation occurred.

3. Mother failed to meet her burden of proof with respect to Child Find and Section 504 issues.

4. The Intermediate Unit fulfilled its Child Find obligations with respect to Students D, M, and G.

5. The Intermediate Unit may or may not be subject to 34 CFR §300.502. *Cf.* 22 Pa. Code §14.151-14.158.

6. Even if 34 CFR § 300.502 is applicable to the Intermediate Unit, the requirements in that regulation for obtaining an independent educational evaluation at public expense have not been met.

7. The Intermediate Unit has no legal obligation to pay for the evaluations conducted by Mr. B.

DISCUSSION OF ISSUES

1. Did the Intermediate Unit fail in its Child Find responsibilities under the IDEA?

The Child Find provisions of the IDEA, found at 20 U.S.C. §1412(a)(3), state that the State is eligible for assistance if that State has in effect policies and procedures to ensure that the State meets each of a number of listed conditions, including:

> All children with disabilities residing in the State, including children with disabilities . . . , regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

The Courts in this Circuit have determined that Child Find is a positive duty requiring a school district to begin the process of determining whether a student is in need of special education and related services at the point where learning or behaviors indicate that a child may have a disability. *Ridgewood Board of Education v. M.E.*, 172 F.3d 238 (3d Cir. 1999). Put in another way, a local education agency (LEA) receiving federal funding under the IDEA has a duty to identify, locate, and evaluate children who have a disability or who are suspected to have a disability. In order to receive services, children suspected to have a disability must also be in need of special education and related services. *See* 20 U.S.C. §1414(a)(4).

The IDEA, at 20 U.S.C. §1412(a)(9), requires a smooth and effective transition from the birth-to-three program to the age three-to-five program. It is contemplated that the

transition process will begin several months prior to age three. The IDEA, at 20 U.S.C. §1437(a)(9), further requires a description of the policies and procedures to be used to ensure a smooth transition for toddlers to pre-school programs.

Although the Hearing Officer has found no case which clearly states that the complaining party has the burden of proof in a Child Find case, this conclusion flows naturally from the burden of proof analysis in *Schaffer v. Weast*, 546 U.S. 49, 57-58, holding that the burden falls on the party seeking relief. Therefore, it is incumbent upon Mother to establish that her children were suspected of having a disability prior to age three and did, indeed, have a need for age three-to-five services.

The easiest case to decide is that concerning Student G, who was never referred for services, even before the age of three. No one who saw Student G or interacted with Student G during the relevant time period suggested that Student G needed a referral for disability-related services. Even Mother, the person who eventually referred the other two triplets for Early Intervention services and who knew Student G as well as the other two, did not refer Student G.

Similarly, Student D, who had received services prior to age three, was determined to have sufficiently improved by age three that Student D was no longer in need of, or eligible for, continued services. Both the LCEI and Mother agreed that Student D was doing well. Even if Mother later changed her mind, a number of notices were given to Mother at the time stating: "If at any time you have concerns about your child's development, please call Ms. H at [telephone number redacted] or if within 60 days or after [Student D's] 3rd b-day, call the IU @ [telephone number redaced]." (IU 7.13; N.T. 232). Had she believed that Student D's

development was not as good as originally thought or that Student D had fallen behind, Mother could have made contact about Student D. She did not.

Perhaps the hardest of the three cases is Student M. Student M had started out much behind Student M's siblings and remained eligible for services on the brink of Student M's third birthday. Nevertheless, Mother stated that she was pleased with Student M's progress and did not feel that Student M needed continuing services.

The Hearing Officer finds compelling and credible the testimony of Ms. H. According to Ms. H, as these children turned age three, Mother wanted to enroll them in a private preschool. Mother apparently understood her ability to pursue services with the Intermediate Unit but simply chose not to request them. The Hearing Officer finds nothing in the statute or regulations that would minimize or negate the Mother's ability to make this decision. Mother made her own assessment of her children: with respect to Student M she was pleased with progress; she apparently never suspected at that time that Student G needed services; and with respect to Student D, this child was believed not to be in need of services.

Sometimes what the Hearing Officer does not hear is just as significant as the testimony presented. Mother at no time testified that she was confused or failed to understand that she could request continuing services for Student M and additional services, if they were deemed eligible, for Students D and G. Had she done so, this Hearing Officer would have examined in great detail the reason for her confusion or the possibility that she was misled by representatives of the Intermediate Unit or the LEIU. The facts are that Mother understood the availability of services, had certainly known how to request and utilize special help for her children in the past, and simply determined that on the eve of her triplets turning age three, no

additional assistance was required. Accepting the parent's choice violates no rule. The Hearing Officer finds no requirement that the Intermediate Unit should have tried to change Mother's mind.

The Child Find system had a consistent human representative, Ms. H, who was known to, and apparently trusted by, Mother. As the children turned three, Mother quite simply decided not to pursue her Intermediate Unit option but to enroll all three children in a private preschool. Here, Mother chose a private preschool over the Intermediate Unit. The failure of the Intermediate Unit to do an evaluation was not negligence and is not a Child Find violation. Rather, the absence of testing was simply the result of the Intermediate Unit's having been told that the family declined the opportunity to access the Intermediate Unit services. There was nothing unreliable about the process or untruthful about the information relayed from Ms. H.

Even after the private day care had recommended that Mother have one or more of her children evaluated by the Intermediate Unit in approximately April 2007, Mother did not contact the Intermediate Unit in 2007. After enrolling the children in the H School District, Mother did not request any special education testing and was satisfied with her children's education there.

The Intermediate Unit showed that it had a legitimate procedure in place for identifying, locating, and evaluating children who are suspected to have disabilities. The process for referral obviously worked for these triplets between birth and age three. The one found to be most in need of services (Student M) was identified, located, evaluated, and actually received Early Intervention services.

Both the psychologist and the family practitioner testified about diagnoses of learning disabilities and ADHD for these children, but at a much later time period: age six. There is nothing in the record, until these triplets were more than *twice as old,* that could support a conclusion regarding disability status under Part B of the IDEA.

Without getting into a great deal of discussion regarding the support for Mr. B's diagnosis, which at first blush appears to be weak, nor any analysis of Dr. V's conclusions, the Hearing Officer accepts the argument that status at age six does not necessarily determine either eligibility or need for services on a child's third birthday. Just as the "measure and adequacy of an IEP" can only be determined as of the time it is offered to a student, not at some later date, *Fuhrmann ex. rel. Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F2d 1031, 1040 (3d Cir. 1993), so too the probative value of a much later psychological evaluation or physician diagnosis is limited.

Preschoolers do change dramatically and their status or need for services in kindergarten may not be reflective of their need for such services at age three or at age five. The Hearing Officer understands that it is impossible to turn back time so as to establish with precision that there was a need for services when these children were three years of age. This could be an impossible burden to place on Mother if it were to be unreasonably imposed. However, there is *nothing* in this record which tips the scale in favor of a conclusion that any one of these three children *needed* services at age three.

It appears here that LCEI did its work in a timely fashion, anticipated transition planning, and arranged for the necessary meetings to discuss transition with Mother. Although there may have been some minor delays, a meeting was indeed held with Mother on January 6,

2005. During that meeting, Student G was never considered to be a child with a disability under the IDEA, Student D was determined no longer to meet the qualifications as a child with a disability, and Student M, although qualified, would not receive services because Mother had decided to place all of the children in private daycare. It appears reasonable for the Intermediate Unit to have relied on this information; there was absolutely no reason for the Intermediate Unit to send its own representative to verify this information.

The fact that Mother opted out does not mean that the Intermediate Unit fell short of its obligation to have a process. Mother's decision at that time was reasonable. So were the Intermediate Unit's actions and reliance. This Hearing Officer finds nothing wrong with the process and determines that there has been no showing of any Child Find violation.

2. Did the Intermediate Unit fail in its responsibilities under Section 504?

The Due Process complaints (HO 1 – 3) raise the issue of a Section 504 violation but Mother's counsel raised this issue only obliquely in opening argument (N.T. 36-36) and not at all in post-hearing briefs. Consequently, it is unknown whether any Section 504 issues remain to be decided. In the event that they remain, the Hearing Officer finds no violations of Section 504.

Section 504 of the Rehabilitation Act of 1973, provides in pertinent part:

> No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) she is disabled or has a handicap as defined by the Act; (2) she is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) she was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability. *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995); *Ridgewood Bd. Of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999). In satisfying the fourth requirement, "plaintiffs 'need not establish that there has been an intent to discriminate in order to prevail under § 504.'" *Matula,* 67 F.3d at 492 (quoting *Alexander v. Choate,* 469 U.S. 287, 297, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985)).

These triplets were not denied benefits or subjected to discrimination. At least on this record, there is no evidence of such. If the argument is that they were "excluded from participation" then the issue is whether or not the Intermediate Unit should have evaluated them at their third birthday. Based upon the Child Find analysis set forth in detail above, Mother knowingly declined services and never requested evaluations. The Intermediate Unit, under all of the circumstances, cannot be deemed to have known or reasonably expected to know of an ADHD diagnosis for Student D and Student M or developmental delays in any of these children when those conclusions were not even reached until the children attained age 6.

The Hearing Officer cannot conclude that Mother has satisfied her burden of establishing any Section 504 violations.

3. Should compensatory education be awarded?

Mother has requested that each Student be awarded compensatory education for three hours each day, to include the summer time period, from May 14, 2006 to September 1, 2007.

Not a single witness explained what harm occurred to these children as a result of any failure to evaluate them, or for that matter, as a direct result of any failure to provide services before normal school age. The Intermediate Unit cogently argues that even if some evaluation for ADHD should have been done or could have been done at age three, there is no proof in this record that any of these three children suffered any harm on account of the absence of an evaluation. IDEA is not an absolute liability statute and what is required is that an LEA develop policies and procedures that will enable eligible students to be identified, located, and evaluated.

The case here is quite different from one in which a school district was held responsible for overlooking signs of disability when the child was being directly educated by that school district. *See*, *e.g. In re the Educational Assignment of L.B.*, Special Education Opinion No. 1145. In the case of L.B., an intermediate unit was found liable for compensatory education where it merely cobbled together a program for an eligible student at the eleventh hour.

Even if the lack of IDEA evaluations in the spring of 2005 was attributed not to parent choice but to the Intermediate Unit's violation of some affirmative duty, there is no basis for concluding that the children suffered harm on account of the absence of an evaluation. Thus, there is nothing for which compensatory time may be awarded to remedy.

Mother has not cited any case in which a Child Find violation was found with respect to a child whose parents had never enrolled him in the LEA's schools. Mother did reference Special Education Opinion No. 1859, *In re the Educational Assignment of R.R.,* as instructive.

In that case, as in most child find cases, the student was visible to the local education agency every day. In addition, nowhere does the Appeals Panel suggest that there is a positive duty to try to talk parents out of their decision. Here, the Intermediate Unit had no opportunity to observe the children because the children were not under its direction.

For all of the reasons discussed herein, Mother's request for compensatory education must necessarily be denied.

4. Should the Intermediate Unit pay for the cost of the private evaluation of these three children by psychologist Mr. B?

The only requirement to pay for an independent psychological evaluation is contained in the regulations at 34 CFR § 300.502. The Intermediate Unit may or may not be subject to 34 CFR §300.502. *Cf.* 22 Pa. Code §14.151-14.158.

Even if 34 CFR § 300.502 is applicable to the Intermediate Unit, the requirements in that regulation for obtaining an independent educational evaluation at public expense have not been met. That regulation establishes that, among the *conditions precedent* to securing an independent evaluation at public expense, is a public agency evaluation with which the parent disagrees. Without question, disagreement with a school district or intermediate unit evaluation is essential to making a successful case for reimbursement of an independent educational evaluation.

Here, the B evaluation was obtained after the filing of the due process complaint and in preparation for this hearing. However, there is no other evaluation in the record with which Mother disagreed. Because the requisites in Section 300.502 have not been satisfied, there can be no order that Mr. B's evaluation be paid by the Intermediate Unit.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. The Intermediate Unit did not fail in its Child Find responsibilities under the IDEA or Section 504.

2. No compensatory education shall be awarded to any of the three children.

3. Because the conditions precedent to awarding the cost of the private evaluation by psychologist Mr. B have not been met, the request for reimbursement of this cost is denied.

Date: December 4, 2008

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