



the District on the ADA, Title VI, and EEOA claims, which were not addressed at the administrative level. I will direct both parties to brief the issue of attorneys' fees, because the plaintiffs received partial relief at the administrative level.

## **I. Factual and Procedural Background**

This action stems from the filing of a due process complaint in the Pennsylvania Office of Dispute Resolution ("ODR") by Susan and John B. against the District in January 2010. As mandated by the IDEA, a due process hearing was held before a hearing officer in the summer and fall of 2010. The hearing officer rendered her opinion in November 2010, setting forth her factual findings and legal conclusions. By law, "[f]actual findings from the administrative proceedings are to be considered prima facie correct." *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 270 (3d Cir. 2003). Thus, a district court must defer to the agency's findings "unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." *Id.* "Extrinsic evidence" includes any documents or objective evidence that may clash with a witness's testimony. *See Carlisle Area Sch. v. Scott P. ex rel. Bess P.*, 62 F.3d 520, 528 (3d Cir. 1995) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)). Such evidence can be part of the administrative record, or it may be newly submitted to the district court. *See S.H.*, 336 F.3d at 270 n.3 ("Under the IDEA, the District Court could have taken additional evidence." (citing 20 U.S.C. § 1415(e)(2))). Unlike factual findings, the administrative law judge's legal conclusions are subject to plenary review. *See Munir v. Pottsville Area Sch. Dist.*, No. 3:10-cv-0855, 2012 WL 2194543, at \*3 (M.D. Pa. June 14, 2012) (citing *Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 83 (3d Cir.1999)).

The following account of the facts is based on the hearing officer's decision (Admin. R. Ex. 2 ("HOD")), because after careful review of the evidentiary record, I find no reason to depart from her factual findings.<sup>1</sup> K.A.B. was born in Russia on January 16, 2001. (Pls.' Br. Supp. Mot. J. Admin. R. ("Pls.' Br.") 6.) The parents adopted K.A.B. from a Russian orphanage in December 2005, just prior to his fifth birthday. (HOD ¶ 2; Pls.' Factual Statement and Proposed Findings of Fact ¶ 11.) A month after his arrival in the United States, the parents requested that K.A.B. be evaluated for developmental progress and language skills at the Chester County Intermediate Unit. (Admin. R. Ex. 10, at 12.) The evaluation was inconclusive as to whether he needed services because K.A.B. was not conversant in English. (HOD ¶ 5.) Around the same time, K.A.B.'s parents put him in occupational therapy; the therapist noted no problems. (*Id.* ¶ 6.)

A few months later, K.A.B. began attending a private preschool program. After six months, in August 2006, he entered kindergarten at a District elementary school. K.A.B. continued to attend half-days at the private preschool. The parents provided extensive information about K.A.B.'s background to the District when he entered kindergarten. (*Id.* ¶¶ 9, 11-12.) Shortly before starting kindergarten, K.A.B. was evaluated for speech/language problems. Again, the evaluation was inconclusive as to whether there was a language disorder or K.A.B. simply needed more exposure to English. (*Id.* ¶¶ 7-8.)

Once K.A.B. started kindergarten, his parents requested another speech/language and occupational-therapy evaluation. November 2006 reports indicated that K.A.B. was not eligible for speech/language or occupational-therapy services at that time. In August 2007 his parents had

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<sup>1</sup> The parties had the opportunity to submit additional evidence beyond the administrative record. Neither party did so. In the few instances where the HOD does not include a relevant fact, I will refer to other portions of the record and the parties' briefs.

him evaluated again for speech/language disabilities. No therapy was recommended and the evaluation was inconclusive due to the fact that K.A.B. was an early English-language learner.

(*Id.* ¶¶ 11-12.)

In kindergarten and first grade, K.A.B. was enrolled in regular-education classes. However, he received Instructional Support Team (“IST”) services and English as a Second Language (“ESL”) services throughout this time period.<sup>2</sup> (*Id.* ¶ 13.) K.A.B. exhibited problems in reading fluency, but made progress; again, reading was difficult, in part because K.A.B. was still acquiring English vocabulary. For most of first grade, K.A.B.’s teacher did not think a special-education evaluation was necessary. At the end of the school year, K.A.B.’s teacher discussed the possibility of an evaluation with his parents. (*Id.* ¶¶ 22, 24-25, 29, 34.)

Beginning in August 2008 (the summer after first grade) and continuing through second grade, K.A.B.’s parents purchased twice-weekly one-hour tutoring sessions for him. The tutor was a first-grade teacher at the elementary school that K.A.B. attended. K.A.B. also continued to receive IST and ESL services. At the beginning of second grade, his parents gave the District permission to evaluate him for special-education services. (*Id.* ¶¶ 31, 34.)

For the first part of second grade, K.A.B. received about an hour a day of reading support from the IST teacher and spent thirty minutes a day in ESL working on reading. (*Id.* ¶ 32.) On

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<sup>2</sup> IST was a “pull-out” service in which K.A.B. would leave his regular-education classroom to work in a small group on reading skills. (Admin. R. Ex. 5, at 6-13.) ESL was also a “pull-out” service where K.A.B. would learn English through the acquisition of listening, speaking, reading, and writing skills. (*Id.* Ex. 6, at 51.)

In first grade, the IST teacher and aides worked with K.A.B. and other children (five or fewer) for approximately one hour of IST instruction daily. Combined with his ESL instruction, K.A.B. received approximately ninety minutes of individual or small-group reading instruction per day. (HOD ¶ 18-19.)

November 26, 2008 (during second grade), an evaluation report declared K.A.B. eligible for special education under the classification of learning disabled. The evaluation found not only academic weaknesses, but weaknesses in organization, attention, and focus. (*Id.* ¶¶ 34, 38.)

Pursuant to the evaluation, an Individualized Education Program (“IEP”) was developed for K.A.B. With the implementation of the first IEP in December 2008, K.A.B. began receiving special-education services and IST services were discontinued. (*Id.* ¶¶ 15, 39.) At this point, K.A.B. was in the regular-education classroom for all instruction except language arts and ESL. He spent two hours and fifteen minutes per day on language arts in the special-education setting, with ten to eleven other students. (*Id.* ¶¶ 42-43, 45.)

In April 2009, another evaluation disclosed certain speech/language issues. Goals focused on speech/language deficiencies were incorporated into K.A.B.’s IEP as of May 2009 and it was updated to provide thirty minutes of speech/language therapy per week. (*Id.* ¶¶ 57, 92.) After second grade, K.A.B. was enrolled in a summer program to strengthen his academic abilities. While the parents chose the program, the District partially paid for it. (*Id.* ¶ 54.)

Prior to the start of third grade, the District offered to fund a neuropsychological evaluation for K.A.B. with an evaluator of the parents’ choice. The evaluation was conducted by Dr. Kristen Herzel, and an evaluation report issued in November 2009. It found weaknesses in reading, writing, and spelling, as well as issues related to speech/language articulation. This evaluation again noted difficulties in organization, focus, and attention. It added that K.A.B. demonstrated emotional issues related to anxiety, perfectionism, and low self-esteem. (*Id.* ¶ 56; Admin. R. Ex. 11 P-24.)

K.A.B.’s IEP was revised in November 2009 (partway through third grade). It

incorporated recommendations from the Herzel evaluation and was approved by the parents. Pursuant to this IEP, K.A.B. received 140 minutes of language arts instruction per day in the learning-support setting. There were ten students in the special-education class, and K.A.B. would receive 1:1 reading instruction for approximately thirty minutes a day. K.A.B. also continued receiving speech/language therapy. Finally, K.A.B. remained in ESL; he received 1:1 instruction for thirty minutes three times a week. (HOD ¶¶ 57, 59-61, 95.)

From almost the start of K.A.B.'s special-education program in December of 2008, his parents became frustrated with what they perceived as a lack of progress. (*Id.* ¶ 40.) In April 2010, less than a year after the first neuropsychological evaluation in November of 2009, the parents had K.A.B. privately evaluated by Dr. Karen Kelly. In her report, Kelly diagnosed K.A.B. with developmental dyslexia, a disability that affects reading ability and executive functioning (including skills such as organization). While noting deficits in attention and focus, the evaluation did not separately diagnose an attention disorder. (*Id.* ¶ 70; Admin. R. Ex. 11 P-41.) K.A.B.'s parents expressed their concerns to the District often, finally pulling K.A.B. from District educational programs at the end of third grade. The District offered an "Extended School Year" program to K.A.B. in the summer of 2010, but he did not attend. His parents placed him in a private school, Woodlynde, at the start of fourth grade in September 2010. (HOD ¶ 40, 69; Pls. Br. 6 n.2.)

On January 22, 2010 (midway through third grade), the parents filed a due process complaint with ODR outlining their disappointment with the District's special-education services. They alleged that the District had failed to timely identify K.A.B. as a child with special needs (the "child-find" claim) and failed to provide him a free appropriate public education (the

“FAPE” claim) in violation of the IDEA and section 504. (Admin. R. Ex. 13.) Plaintiffs requested an award of compensatory education to reflect the denial of FAPE from January 22, 2008 (two years before the filing), to September 2010 (when K.A.B. began private school), as well as attorneys’ fees and costs. A hearing was conducted in front of officer Linda Valentini over six dates that spanned from May to October 2010. (HOD at 1.)

On November 19, 2010, the hearing officer issued an opinion setting forth her factual findings and granting partial relief to the parents. She concluded that the District had, for the most part, adequately discharged its child-find duty and provided K.A.B. with a FAPE. However, the hearing officer believed that the District’s November 2008 evaluation was deficient because it did not contain a speech/language assessment. Therefore, K.A.B. was entitled to 11 hours of compensatory speech/language services.<sup>3</sup> Furthermore, the hearing officer found that K.A.B.’s various IEPs had improperly failed to address his difficulties in attention and focus. Therefore, K.A.B. was entitled to 68 hours of compensatory education to develop his self-regulation abilities.<sup>4</sup> (*Id.* at 21.)

## **II. Discussion**

### **A. Claims Adjudicated by the ALJ (Counts I and II)**

#### **1. Legal standard**

“Where no new evidence has been presented to the [c]ourt, motions for summary judgment in an IDEA case are the procedural vehicle for asking the judge to decide the case

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<sup>3</sup> This accounts for the period between December 1, 2008, and May 17, 2009—the point at which speech/language therapy was incorporated into K.A.B.’s IEP.

<sup>4</sup> This was equivalent to one hour per week for 68 academic weeks spanning the period from December 2008 to June 2010.

based on the administrative record.” *K.H. ex rel. B.Y. v. North Hunterdon-Voorhees Reg’l High Sch.*, No. 05-4912, 2006 WL 2331106, at \*4 (D.N.J. Aug. 10, 2006). “The standard of review under which [a district court] considers an appeal of a state administrative decision under the IDEA ‘differs from that governing the typical review of summary judgment.’” *M.A. ex rel. G.A. v. Voorhees Tp. Bd. of Educ.*, 202 F. Supp. 2d. 345, 359 (D.N.J. 2002) (quoting *Heather S. ex rel. Kathy S. v. Wisconsin*, 125 F.3d 1045, 1052 (7th Cir.1997)). The court “applies a modified version of de novo review.” *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 389 (3d Cir. 2006). The modified de novo standard is “unusual”: “[a]lthough the District Court must make its own findings by a preponderance of the evidence, 20 U.S.C. § 1415(1)(2)(B)(iii), the District Court must also afford due weight to the [administrative law judge’s] determination.” *Shore Reg’l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004) (internal quotation marks omitted). “[T]he party challenging the administrative decision bears the burden of persuasion before the district court as to each claim challenged.” *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 270 (3d Cir. 2012).

The district court takes into account not only the record from the administrative proceeding, but also any further evidence the district court accepts into the record. Here, plaintiffs have not proffered any additional evidence beyond the administrative record. Under modified de novo review, “factual findings from the administrative proceedings are to be considered *prima facie* correct.” *Shore Reg’l*, 381 F.3d at 199. “If a reviewing court fails to adhere to them, it is obliged to explain why.” *Id.* They stand “unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion.” *S.H.*, 336 F.3d at 270. Of course, “[t]he district

court's review of the administrative agency's findings of law is plenary, and no deference is given to the administrative law judge's legal holdings." *Munir*, 2012 WL 2194543, at \*3 (citing *Warren G.*, 190 F.3d at 83).

## **2. Application**

In the administrative hearing, plaintiffs invoked both the IDEA and section 504. Their claims under both statutes were identical and fell into two categories. First, the District failed in its obligation to timely identify K.A.B. as learning disabled (the "child-find" claim). Second, the District, having identified K.A.B. as learning disabled, failed to provide him with a free appropriate public education (the "FAPE" claim). (Admin. R. Ex. 13, at 2.) I will treat the IDEA and section-504 claims collectively because the analysis is the same under both statutes. *See, e.g., D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249, 253 n.8 (3d Cir. 2012).

### **a. Child-find claim**

Under both the IDEA and section 504, a school district must "identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *D.K.*, 696 F.3d at 249. This implicitly requires that districts identify students "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." *Id.* at 250. But "a school's failure to diagnose a disability at the earliest possible moment is not per se actionable, in part because some disabilities are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all." *Id.* (internal quotations omitted). "In sum, schools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment." *Id.* at 252.

The hearing officer found that K.A.B. was evaluated at the beginning of second grade to determine eligibility for special-education services. The evaluation report timely issued on November 26, 2008. It classified K.A.B. as learning disabled and found him eligible for special education. With the parents' approval, he began receiving special-education services in early December 2008. K.A.B. was in a regular-education classroom for all instruction except for language arts and ESL. The parents expressed uncertainty that K.A.B. had a learning disability. They were concerned that he would be misdiagnosed with one because he was still acquiring English. (HOD ¶¶ 34-35, 39, 41, 42.)

As the hearing officer wrote in her opinion, the central issue is when the District reasonably should have suspected that K.A.B. had a learning disability—rather than an academic delay secondary to English acquisition—and therefore conducted an evaluation. The IDEA's implementing regulations provide that certain factors must be ruled out before a child can be classified as having a specific learning disability. *See* 34 C.F.R. § 300.309(a)(3). Three of these factors applied to K.A.B. prior to his entry into public school: “cultural factors,” “environmental or economic disadvantage,” and “limited English proficiency.” The hearing officer noted that for the first five years of his life, “K.A.B. was not a part of the culture of the United States or the culture of American or Russian single family living[;] suffered economic disadvantage with limited access to enrichment and environmental stimulation relative to suburban American peers and likely relative to non-institutionalized Russian children[;] and had no English listening, speaking or reading proficiency.” (HOD at 13.) After all, even K.A.B.'s mother was concerned that he would “be misdiagnosed as disabled because of acclimation and language issues.” (*Id.* at 14.)

The hearing officer determined that the timing of the District's initial evaluation of K.A.B. on November 26, 2008, was appropriate. She based her determination on testimony from witnesses for both parties. K.A.B.'s speech/language pathologist and his ESL teacher testified that a foreign-adopted student should be in the country for at least two years before special-needs testing; otherwise the findings may be invalid. (Admin. R. Ex. 6, at 15, 57.) Plaintiffs' expert, Dr. Kelly, testified that studies have found that it takes seven to ten years for a child to develop "academic" English proficiency. (*Id.* Ex. 8, at 8-9.) She verified that the American Speech and Hearing Association recommends waiting two to three years before conducting a special education evaluation for a child who is learning English. She agreed that cognitive testing, such as IQ tests, should only occur after a child has two to three years of English. (*Id.* Ex. 8, at 28-29.) The District's evaluation fell within this time frame.

A number of early evaluations came back inconclusive for the very reason that K.A.B. was learning English. (HOD ¶¶ 11-12.) "When a school district has conducted a comprehensive evaluation and concluded that a student does not qualify as disabled under the IDEA, the school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required." *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 273 (3d Cir. 2012). In the end, the plaintiffs did not offer any compelling evidence at the due process hearing to establish that the District violated its child-find duty—even the testimony of the plaintiffs' expert supported the District's position.

The plaintiffs have not offered additional evidence on this issue since the due process hearing. The facts found by the hearing officer are prima facie correct and plaintiffs have submitted no non-testimonial, extrinsic evidence justifying a contrary conclusion, nor would the

record in its entirety compel a contrary conclusion. I will affirm Hearing Officer Valentini's finding that "the District did not deny [K.A.B. a FAPE] through lack of timely evaluation and identification" (HOD at 21) and I will grant summary judgment in favor of the District on this claim.

**b. FAPE claim**

Under the IDEA, a school district that receives federal funding is required to provide a FAPE to a disabled child through the development of an IEP. "Although the IDEA does not set forth definite guidelines for the formulation of an IEP, the IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009) (internal quotations and citations omitted). The IDEA's FAPE requirement is replicated in section 504. *D.K.*, 696 F.3d at 253 n.8. "Whether the School District fulfilled its FAPE obligations . . . [is] subject to clear error review as [a] question[] of fact"; "such [f]actual findings from the administrative proceedings are to be considered prima facie correct, and if [a court does] not adhere to those findings, [it] must explain why." *Id.* at 243 (citations omitted; some alterations in original). This helps a court "avoid the impression that it is substituting its own notions of sound educational policy for those of the agency it reviews." *S.H.*, 336 F.3d at 270.

The hearing officer found that the District provided a FAPE to K.A.B., excepting the minor deficiencies identified in the administrative decision. The hearing officer determined that the District's program provided K.A.B. with "an excellent opportunity for meaningful educational benefit" and that he in fact "derived meaningful benefit." (HOD at 17.) Even before

K.A.B. was classified as learning disabled, he “received a rich educational experience that provided deep immersion into understanding, speaking, reading and writing conversational and academic English language.” (*Id.*) The hearing officer emphasized that K.A.B. was able to achieve an IQ score in the low average range on a test normed to *same-age native English speakers* after only three years of exposure to English. (*Id.*)

The hearing officer credited the testimony of K.A.B.’s first-grade regular-education teacher, who, “with 20 years teaching experience[,] testified credibly and confidently that she saw growth in reading in first grade, and also that Student made progress in math in first grade and that Student was speaking more confidently.” (*Id.*) The hearing officer found the parents’ contentions and expectations somewhat unrealistic: “The parents wanted the third-grade IEP to carry goals of Student’s achieving literacy skills at the level of a third grader. While a worthwhile target, Student’s inability to meet that target is neither a failure of the IEP nor of the Student.” (*Id.* (internal citations omitted).) She found that K.A.B. had made “meaningful progress toward the goals” and that the District had largely offered K.A.B. a FAPE. (*Id.*)

The testimony from the due process hearing shows that K.A.B. received extensive 1:1 and small-group instruction in language arts. (Admin. R. Ex. 7, at 5-6, 20, 37-38.) The instruction was sufficiently consistent with the recommendations of Dr. Herzal and Dr. Kelly, in that multi-sensory techniques were incorporated into K.A.B.’s instruction. (Admin R. Ex. 11 P-24; *Id.* P-41; *Id.* Ex. 7, at 20, 26, 44, 56-57.) The IEPs provided K.A.B. a chance to make meaningful progress (*Id.* Ex. 12 DASD-26; *Id.* DASD-34; *Id.* DASD-38) and he did so, according to the testimony and assessments of his teachers (*Id.* Ex 7, at 23-25, 60-61, 72).

The hearing officer did, however, side with the parents on two points. First, the District

improperly evaluated K.A.B. in November 2008 by omitting speech/language testing. “[T]he District should have included a new speech/language evaluation, the results of which were likely to be more reliable than those from earlier testing . . . .” (*Id.* at 18.) Second, “the IEPs [did] not sufficiently address the chronic difficulty Student experience[d] with attention and focus.” (*Id.*) While the District pointed out that the *parents* had wanted the attention issues left out of the IEP, the hearing officer correctly noted that it is the District’s obligation—“as the educational experts”—to fashion an appropriate education program. After all, “attention and focus are pervasive throughout any learner’s day.” (*Id.*)

Based on these findings, the hearing officer determined that K.A.B. had lost twenty-two academic weeks of speech/language therapy, at 30 minutes per week, amounting to eleven hours of compensatory education. The hearing officer granted plaintiffs 68 hours of compensatory education (one hour per week for 68 academic weeks spanning from December 2008 to June 2010) based on the District’s failure to adequately address K.A.B.’s issues with attention and focus.

The plaintiffs have not adduced any evidence to overcome the hearing officer’s well-supported findings that K.A.B. received a FAPE. The hearing officer carefully considered plaintiffs’ claims, as evidenced by the grant of partial relief, and I will not disturb her well-reasoned decision. There is no evidence that would justify a decision contrary to the hearing officer’s findings, which are considered *prima facie* correct, nor does the record as a whole compel a contrary decision. There was no clear error. I will affirm the order of the hearing officer, including the grant of 79 hours of compensatory education for speech/language and

attention therapies. Summary judgment will be entered in favor of the District on this claim.<sup>5</sup>

## **B. Claims not Adjudicated by the ALJ (Counts III, IV, and V)**

### **1. Legal Standard**

A motion for summary judgment will be granted only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Facts that could alter the outcome are ‘material,’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir.1996). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’”

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat’l*

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<sup>5</sup> “In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys’ fees as part of the costs—(I) to a prevailing party who is the parent of a child with a disability; . . .” 20 U.S.C. § 1415(i)(3)(B)(i). A claim for attorneys’ fees under the IDEA is separate from a claim that the District substantively violated the IDEA. *See B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462, 470-71 (D.N.J. 1998). The entry of summary judgment against plaintiffs on their child-find and FAPE claims does not resolve the issue of attorneys’ fees, because the District did not challenge the grant of partial relief below.

Plaintiffs concede that they are proceeding pro se before this court and as such are not entitled to attorneys’ fees. But they point out that they are also “seeking counsel fees for their outside legal representation at the administrative level and fees for legal consultation obtained at” the district court level. (Pls.’ Resp. Mot. Summ. J. at 32.) The District has not countered this argument.

“The Third Circuit employs a two-part test in determining whether a plaintiff qualifies as a ‘prevailing party’: (1) the plaintiff must have achieved relief; and (2) there must be a causal connection between the litigation and the relief obtained.” *K.N. v. Passaic City Bd. of Educ.* (citing *Wheeler v. Towanda Area Sch. Dist.*, 950 F.2d 128, 31 (3d Cir. 1991)). The hearing officer explicitly found “for the Parents in part” and granted them 79 hours of compensatory education. (HOD at 2, 21.) Plaintiffs may be entitled to counsel fees and costs. However, I will need further briefing from both parties to determine the propriety of any award and its amount.

*Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the nonmoving party must present “specific facts showing that there is a genuine issue for trial,” *Matsushita*, 475 U.S. at 587 (internal quotation marks omitted), offering concrete evidence supporting each essential element of its claim, *see Celotex*, 477 U.S. at 322-23. The nonmoving party must show more than “[t]he mere existence of a scintilla of evidence” for elements on which it bears the burden of production, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), and may not “rely merely upon bare assertions, conclusory allegations or suspicions,” *Fireman’s Ins. Co. v. DuFresne*, 676 F.2d 965, 969 (3d Cir. 1982).

When a court evaluates a motion for summary judgment, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255. “Summary judgment may not be granted ... if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.” *Ideal Dairy Farms*, 90 F.3d at 744 (internal quotation marks and citations omitted). “[A]n inference based upon a speculation or conjecture,” however, “does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990).

## **2. Application**

### **a. ADA Claim**

Plaintiffs’ ADA claim repeats their claims under section 504 and the IDEA. However, the ADA claim was never stated in the due-process complaint. The IDEA imposes an exhaustion

requirement regardless of the statute invoked: “before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.” 20 U.S.C. § 1415(l). The question is whether the relief sought in the ADA claim is available under the IDEA. Plaintiffs seek “appropriate monetary relief as appropriate damages” for the District’s violation of the ADA.<sup>6</sup> (Pls.’ Mot. J. Admin. R. at 3.) The Third Circuit has held that “compensatory and punitive damages are not an available remedy under the IDEA.” *Chambers*, 587 F.3d at 186. Therefore, plaintiffs’ claim can proceed.

In order to recover compensatory damages under the ADA, a plaintiff must prove intentional discrimination. *See, e.g., Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 827 F. Supp. 2d 409, 422 (E.D. Pa. 2011) (“Although the Third Circuit Court of Appeals has yet to address whether intentional discrimination is required to be eligible for compensatory damages under the ADA or § 504, all other circuit courts to have considered the issue have held unambiguously that compensatory damages are unavailable absent a showing of intentional discrimination.” (citing *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cty., Fla.*, 610 F.3d 588, 603-04 (11th Cir. 2010); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009); *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003); *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567, 574 (5th Cir. 2002); *Powers v. MJB Acquisition Corp.*, 184

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<sup>6</sup> It is unclear whether plaintiffs also seek compensatory education as a remedy for the alleged violation of the ADA. (See Pls. Br. at 34.) However, having elected to pursue compensatory education based on section 504 and the IDEA in the administrative proceedings, they cannot suddenly rely on the ADA to bring a new claim for compensatory education because of the exhaustion requirement set forth in § 1415(l).

F.3d 1147, 1153 (10th Cir. 1999); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 (4th Cir. 1994))).

Plaintiffs never alleged at the due process hearing that the District intentionally discriminated against K.A.B. based on his learning disability. They did not produce any evidence here to show intentional discrimination, because they have not provided any evidence beyond the administrative record. Without such evidence of intentional discrimination, there is no genuine issue of material fact for trial with regard to plaintiffs' ADA claim seeking monetary damages.<sup>7</sup> Summary judgment will be granted to the District on this claim.

**b. Title VI claim**

Under Title VI, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. Plaintiffs claim that the District violated Title VI by implementing a policy under which it delayed special-needs testing for ESL students.

Regardless of whatever factual disputes surround the existence of such a policy, plaintiffs' claim is simply not cognizable under Title VI; therefore, defendant is entitled to judgment as a matter of law. Courts from other circuits have confronted similar claims and rejected them: “[t]he policy of delayed testing did not apply to all foreign-born students in the school district, but only to students categorized as ‘English language learners.’ While Title VI

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<sup>7</sup> To the extent that plaintiffs now seek monetary damages based on a violation of section 504, this claim also fails because they have not adduced any evidence of intentional discrimination. *See Chambers*, 827 F. Supp. 2d at 422 (holding that intentional discrimination is required for compensatory damages under both the ADA and section 504).

prohibits discrimination on the basis of national origin, language and national origin are not interchangeable. A policy that treats students with limited English proficiency differently than other students in the district does not facially discriminate based on national origin.” *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 795 (8th Cir. 2010) (internal citations omitted). *Cf. Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) (stating, in equal protection context, “[a] classification [that] is implicitly made. . . on the basis of language, i.e., English-speaking versus non-English-speaking individuals, [is] not on the basis of race, religion or national origin.”) (citing *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir.1975); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir.1973)).

Even if the claim were cognizable—to the extent that plaintiffs argue that K.A.B. was denied testing, or that his slow progress was accepted, on the basis of his national origin *separate* from his English-language-learner status (i.e., the language discrimination was mere pretext for national-origin discrimination)—plaintiffs have not adduced evidence to survive summary judgment on their Title VI claim. These types of Title VI claims are considered under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Manning v. Temple Univ.*, 157 F. App’x 509, 513 (3d Cir. 2005) (utilizing *McDonnell Douglas* framework in education-discrimination context). Under this framework, a plaintiff must make a *prima facie* showing of discrimination; if he does so, the burden shifts to the defendant to articulate a lawful, nondiscriminatory reason for the challenged action. If the defendant does so, the burden comes to rest on the plaintiff to prove that the proffered reason is pretextual. *See, e.g., Sarullo v. U.S. Postal Service*, 352 F.3d 789, 797 (3d Cir. 2003).

To make a *prima facie* showing in the education context, plaintiffs must show that “(1)

they are members of a protected class; (2) they were qualified to continue in pursuit of their education; (3) they suffered an adverse action; and (4) such action occurred under circumstances giving rise to an inference of discrimination.” *Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 758 (E.D. Pa. 2011). Assuming plaintiffs have made this prima facie showing, the District has given a nondiscriminatory reason for the challenged action: every challenged action resulted from an acknowledgment of K.A.B.’s status as an English-language learner. There is no evidence that the District’s proffered reason is pretextual. There is no evidence in the record from which a reasonable factfinder could find that the District intentionally and invidiously discriminated against K.A.B. specifically because he was born abroad.<sup>8</sup> Thus, summary judgment for the District is appropriate on this claim.

**c. EEOA claim**

The relevant provision of the EEOA provides that “[n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” 20 U.S.C. § 1703(f). Plaintiffs advance two theories. First, they assert that the District’s policy of not evaluating

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<sup>8</sup> Plaintiffs state in their brief that “[t]o refuse to evaluate on the pretext of limited English proficiency, without actually confirming it, is in fact discriminating on the basis of national origin because the only factor relevant to the decision not to test is the fact that the child is foreign born.” (Pls.’ Br. in Supp. of Mot. for J. on the Admin. R. 35.) Plaintiffs’ argument is incorrect on both a factual and logical level. The District clearly *did* evaluate K.A.B. upon his entry into kindergarten and *then* found that it could not derive meaningful results because he was still acquiring English. Furthermore, plaintiffs leap to the conclusion that the only relevant factor was K.A.B.’s nationality. But the District could treat an American-born student the same way, assuming he was raised completely in a non-English-speaking household and community (and the plaintiffs have not produced any evidence that the District would act otherwise).

students for learning disabilities based on their ESL status is a violation of the EEOA. (Pls.’ Br. at 36.) Second, they assert that, even after identification of K.A.B. as learning disabled, the District “continued to provide improper programming” for his disability, “at least in part on the basis of KB’s national origin,” in violation of the EEOA. (*Id.* at 38.)

The elements of a claim under section 1703(f) track the language of the statute. A plaintiff must show “(1) language barriers; (2) defendant’s failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to student[’s] equal participation in instructional programs.” *CG v. Penn. Dept. of Educ.*, 547 F. Supp. 2d 422, 434-35 (M.D. Pa. 2008) (quoting *Leslie v. Bd. of Educ.*, 379 F. Supp. 2d 952, 960 (N.D. Ill. 2005)), *modified on other grounds*, No. 06-1523, 2008 WL 4820474 (M.D. Pa. Nov. 3, 2008). As the text of the statute dictates, the defendant’s failure to take appropriate action must be “on account of . . . race, color, sex, or national origin.” *See Martin Luther King Jr. Elem. Sch. Children v. Mich. Bd. of Educ.*, 451 F.Supp. 1324, 1332 (E.D. Mich.1978) (“This section (f) requires a showing of two things. (1) The denial of educational opportunity must be on ‘account of’ race, color, sex or national origin and, (2) the educational agency must fail to take action to overcome language barriers that are sufficiently severe so as to impede a student’s equal participation in instructional programs.”).

Plaintiffs’ first theory—that the District denied K.A.B. equal access to special-education services by delaying his special-needs testing because he was an ESL student—founders on the same rocks as their Title VI claim. As explained above, discrimination based on English proficiency is not the same as discrimination based on national origin. *See Mumid*, 618 F.3d at 795. Even if the District failed to take appropriate action to overcome a language barrier—that is,

it did not appropriately address K.A.B.’s learning disability—it did not do so “an account of” K.A.B.’s national origin. It is entirely reasonable (in fact, required under the regulations) for the District to take K.A.B.’s language skills into account when determining whether to evaluate or diagnose him. Plaintiffs have not adduced any evidence that it was K.A.B.’s national origin, rather than his limited English proficiency, that motivated the decision to delay special-needs testing.

Plaintiffs’ second theory fails for the same reasons. Even if the District improperly tolerated K.A.B.’s slow progress and provided improper special-education services, there is no evidence that the District failed to take “appropriate action” to overcome K.A.B.’s language barriers (that is, his learning disability) “on account of” his national origin.<sup>9</sup> Thus I will grant summary judgment in favor of the District on the EEOA claim, because plaintiffs have submitted no evidence from which a reasonable fact-finder could find that the District has failed to take appropriate action *on account of* national origin.

### **III. Conclusion**

For the reasons set forth above, I will grant defendant’s motion for summary judgment on the IDEA, section-504, ADA, Title VI, and EEOA claims. I will affirm the hearing officer’s decision, including the grant of 79 hours of compensatory education. Plaintiffs will have an

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<sup>9</sup> Plaintiffs’ EEOA claim is, at bottom, an attempt to repackage their IDEA special-education claims because K.A.B. is a Russian adoptee. The EEOA is most often used to seek rectification of deficient ESL programs. *See, e.g., Horne v. Flores*, 557 U.S. 433, 439-40 (2009). Plaintiffs’ claim centers on the District’s special-education services. It does not appear that plaintiffs are claiming that the District failed to deliver adequate ESL programming on account of K.A.B.’s national origin. Here, the undisputed record shows K.A.B. received ESL services immediately upon his entry into kindergarten, and plaintiffs concede that K.A.B.’s “progress in ESL was significant” and that he gained proficiency in English throughout the relevant time period. (Am. Compl. ¶¶ 89-92.)

opportunity to brief the issue of their entitlement to attorneys' fees and costs based on the partial grant of relief at the administrative level. An appropriate order follows.



IV, and V of the complaint.

3. Within twenty (20) days of the date of this order, plaintiffs shall submit a brief not to exceed ten (10) pages in length addressing whether plaintiffs are entitled to an award for attorneys' fees and costs based on the partial favorable decision they received at the administrative level, and, if so, the amount of any such award. Defendant shall file a response not to exceed ten (10) pages in length within ten (10) days after the filing of plaintiffs' brief.

/s/ William H. Yohn Jr., Judge  
William H. Yohn Jr., Judge