of Lovaas, a trained service provider,[103] *albeit* one not under contract with Defendant, was appropriate during the specified time periods and, therefore, will not disturb the Hearing Officer's conclusion.

Plaintiffs also assert entitlement to compensatory education as an appropriate remedy for Defendant's alleged failure to provide G.K. with a FAPE during the relevant time period. This particular remedy is designed to require school districts to belatedly pay expenses that they should have paid all along, *Mary T. v. Sch. Dist. of Phila.*, 575 F.3d 235, 249 (3d Cir. 2009) (citing *M.C.*, 81 F.3d at 395 (quoting *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986) (quotation marks omitted)), and when "an IEP fails to confer some (*i.e.*, more than *de minimis*) educational benefit to a student." *M.C.*, 81 F.3d at 396. The right to compensatory education "accrue[s] from the point that the school district knows or should know of the IEP's failure." *Id.* A "disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." *Id.*

This Court finds that Plaintiffs' argument lacks merit and agrees with the Hearing Officer that Plaintiffs waived their compensatory education claim because the claim was not identified as an issue, either implicitly or explicitly, during opening statements.[104] As noted by the Hearing Officer, prior to the commencement of the due process hearings, the parties through counsel, agreed to the statement of issues, with a clarification by Plaintiffs' counsel that Plaintiffs sought

[103] N.T. 390.

[104] "[T]he opening statements must explicitly identify all aspects of the dispute between the parties, specify clearly what each party is asking me to resolve, and suggest how each matter in dispute should be resolved by the decision to be issued in this matter." N.T. 8.

(1) reimbursement for payments to a provider Parents obtained, and (2) payment of expenses for which there were unpaid bills.[105]

Plaintiffs characterize the Hearing Officer's conclusion as legal error, and assert that they preserved their claim for compensatory education at the due process hearing:

> MR. STANCZAK: At this point, Madam Hearing Officer, we are asking for a ruling that the IU failed to implement [G.K.]'s program in accordance with [G.K.'s] IEP, that that failure has resulted in a denial of FAPE. That the Parents have reasonably taken efforts to assure the consistent provision of services through Lovaas and that they incurred either out-of-pocket expenses or liability for those services at this point approaching $11,000.[106]

The Hearing Officer restated the issues on the record as follows:

> HEARING OFFICER: I'm going to restate the issues as I understood them. . . . First of all, has the IU offered and provided early intervention services that were appropriate for student in accordance with the student's IEP and student's identified needs. Secondly, have the Parents selected appropriate service providers to replace IU services. Third, should the IU be required to provide services by providers selected by Parents due to the IU's inability to provide appropriate services.
> Has the IU selected appropriate service providers able to deliver sufficient and appropriate services to meet student's needs. And should the IU be directed to reimburse Parents for out-of-pocket expenses to replace the services that the IU did not provide, either because Parents rejected the services or because the providers withdrew from providing services.
> Does that fairly hit the issues?
>
> MR. STANCZAK: It does. Just one addition I would make with regard to the out-of-pocket expenses, there were also charges, and the Parents were billed for services that they have not been able to pay for. You said out-of-pocket plus liability.
>
> HEARING OFFICER: Oh, right. I think I said reimburse. I did say out-of-pocket expenses. Reimburse Parents for expenses.
>
> MR. STANCZAK: Right.
>
> HEARING OFFICER: Mr. Gilsbach?

---

[105] Decision 3 n.1; N.T. 34-36.
[106] N.T. 26.

MR. GILSBACH: That's the issues as we understand them to be.[107]

Notwithstanding Plaintiffs' self-serving interpretation of the issues summarized by the Hearing Officer, this Court finds that the Hearing Officer correctly determined that the issues agreed to by the parties do not include a request for compensatory education. The summary of issues indicates that Plaintiffs, instead, made a claim for reimbursement for out-of-pocket expenses, paid and pending payment. Compensatory education is a retrospective and in-kind remedy for failure to provide an appropriate education for a period of time. *P.P.*, 585 F.3d at 740 (quotations omitted). Therefore, Plaintiffs' request for compensatory education is deemed waived. In addition, since this Court has determined that Defendant provided appropriate services and a FAPE, Plaintiffs' request for compensatory education, even if viable, is denied, as moot.[108]

Lastly, Plaintiffs request an award of attorney's fees under the IDEIA, which essentially provides that a district court in its discretion may award reasonable attorney's fees as part of the costs to a prevailing party who is the parent of a child with a disability. *See* 20 U.S.C. §1415(i)(3)(B). A prevailing party is one who "succeed[s] on any significant issue in litigation which achieves some of the benefit of the parties sought in bringing suit." *W.H. v. Schuykill Valley Sch. Dist.*, 954 F. Supp. 2d 315, 331 (E.D. Pa. 2013) (quoting *John T. ex rel. Paul T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 555 (3d Cir. 2003) (quotation omitted)). Because

---

[107] *Id.* at 34-35.

[108] The IU also suggests that, pursuant to the April 4, 2012 settlement agreement, Plaintiffs have waived any claims for compensatory education. (Dfts' Resp 5). The release at paragraph two provides that Parents are precluded from making any and all claims against the IU, including claims for "costs, expenses, liabilities (including liability for compensatory education and/or tuition reimbursement) . . . through June 1, 2012." (P-2). This Court finds the IU's argument is without merit, however, because the time frame under consideration with respect to Plaintiffs' requested relief is June 1, 2012, through February 2013.

this Court is affirming the decision of the Hearing Officer, Plaintiffs are not a "prevailing party" and, therefore, are not entitled to an award for attorneys' fees, and their request is denied.

IV. Section 504/Rehabilitation Act Claim

Lastly, Plaintiffs purport to state a claim for relief under §504 of the RA asserting that Defendant denied G.K. a FAPE under Part B of the IDEIA which guarantees disabled children three years and older a FAPE.[109] Parents contend that G.K. was discriminated against because of a disability which impacted G.K.'s readiness for further education.[110] Section 504 of the RA provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, 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. . . .[111]

29 U.S.C. §794(a). Under the accompanying regulations, a "qualified handicapped person" includes, with respect to public preschool, one to whom a state is required to provide a FAPE under §612 of the EHA (as stated, the IDEIA's predecessor), 34 C.F.R. §104.3(l); *Andrew M. v. Del. Cnty. Office of Mental Health and Mental Retardation,* 490 F.3d 337, 350 (3d Cir. 2007). The IDEIA governs the affirmative duty to provide a public education to disabled students, while the RA embodies the negative prohibition against depriving disabled students of public education. *C.G. v. Pa. Dept. of Educ.*, 734 F.3d 229, 234 (3d Cir. 2013) (citing *W.B.*, 67 F.3d at 492-93); *see also Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 487 (W.D. Pa. 2010) (the Third Circuit has found "few differences, if any, between IDEA's affirmative duty and

---

[109] 20 U.S.C. §1412(a)(1)(A).
[110] *Id.* at §1400(d)(1)(A).
[111] Because the same standards govern both the RA and Americans with Disabilities Act ("ADA") claims, *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 269 n.8 (3d Cir. 2014) (citing *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 189 (3d Cir. 2009)), the RA and ADA are frequently referenced together. No ADA claim is being made here, so the Court references only the RA in its analysis.

§504's negative prohibition.") (quoting *N.E.*, 172 F.3d at 253)). Thus, the IDEIA provides a remedy for "inappropriate educational placement decisions, regardless of discrimination," while the RA prohibits and provides a remedy for discrimination. *C.G.*, 734 F.3d at 234.

Failure to provide a FAPE violates Part B of the IDEIA and generally violates the RA because it deprives disabled students of a benefit that non-disabled students receive simply by attending school in the normal course. *Id.* at 235; *see also Andrew M.,* 490 F.3d at 350 ("[W]hen a state fails to provide a disabled child with a free and appropriate education, it violates the IDEIA. However, it also violates the RA because it is denying a disabled child a guaranteed education merely because of the child's disability."). In many cases, a plaintiff's sole theory of RA discrimination is that the defendant school failed to provide a FAPE. *Andrew M.*, 490 F.3d at 350. Thus, when a plaintiff applies the same core facts supportive of the IDEIA claim and said claim fails, the RA claim must also fail. *Id.* (citing *Emily Z. v. Mt. Lebanon Sch. Dist.*, 2007 WL 3174027 (W.D. Pa. 2007)).

Here, Plaintiffs posit that their claims asserted under §504 are parallel to those based on a denial of a FAPE under the IDEIA.[112] *P.P.,* 585 F.3d at 730; *Andrew M.*, 490 F.3d at 349. The basis of a plaintiff's claim is the denial of an education that is guaranteed to all children. Therefore, to establish a claim under §504 of the RA, a plaintiff must demonstrate that (1) the plaintiff has a disability, or was regarded as having a disability, (2) the plaintiff was "otherwise qualified" to participate in school activities, (3) the school or the board of education receives federal financial assistance, and (4) that the plaintiff was "denied the benefits of the program or

[112] Pelts' Brief 43.

was otherwise subject to discrimination because of [his] disability." *D.E.*, 765 F.3d at 269 (citing *Chambers,* 587 F.3d at 189); *Andrew M.*, 490 F.3d at 350 (citing *N.E.*, 172 F.3d at 253).[113]

Defendant argues that Plaintiffs have waived any §504 discrimination claim for relief. This Court agrees. It is apparent from the administrative record, the Hearing Officer's decision, Plaintiffs' issues presented at the due process hearing,[114] and Plaintiffs' written closing argument submissions, that Plaintiffs did not substantively establish a §504 discrimination claim. The fact that Plaintiffs disagree with the Hearing Officer does not automatically state a claim for relief under the RA. *W.H.*, 954 F. Supp. 2d at 330. Plaintiffs do not point to explicit record evidence to support their claim of discrimination by Defendant against G.K. due to a disability, *i.e.*, that G.K. was "singled out, isolated, or denied full participation with classroom peers," *M.R.*, 680 F.3d at 281; that Defendant failed to provide services in the "least restrictive environment," *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578-79 (3d Cir. 2000); or that G.K. "was excluded from participation in, denied the benefits of, or subject to discrimination." *W.H.*, 954 F. Supp. 2d at 331 (citing *Christen G. by Louise G. v. Lower Merion Sch. Dist.*, 919 F. Supp. 793, 821 (E.D. Pa. 1996)); *N.E.*, 172 F.3d at 253. In essence, nothing in the administrative record supports Plaintiffs' contention that Defendant's alleged failures were because or "by reason of [G.K.]'s disability." 42 U.S.C. §12132. Moreover, the Hearing Officer determined, and this Court agrees, that G.K. was not denied a FAPE. Consequently, Plaintiffs' failure to establish an IDEIA claim or a failure to provide an appropriate FAPE constitutes a failure to establish an RA claim. *Andrew M.*, 490 F.3d at 350. Having failed to establish a violation of §504 of the RA, Plaintiffs are, therefore, not entitled to damages on this claim.

---

[113] The IDEIA requires that in exchange for federal funds, states provide disabled children, as defined in Part B of the IDEIA, with a FAPE in the "least restrictive environment." *See* 20 U.S.C. §1412; *John T. ex rel. Paul T. v. Pennsylvania*, 2000 WL 558582, at *2 (E.D. Pa. May 8, 2000).
[114] N.T. 18-28.

CONCLUSION

Giving "due weight" to the determination of the state agency, which possesses expertise in the field, this Court finds that the administrative record, as a whole, supports the facts found and legal conclusions reached by the Hearing Officer, which are consistent with the requirements of the IDEIA. Therefore, for the reasons stated herein, the decision of the Hearing Officer is affirmed. Consistent with the reasons stated, Plaintiffs' motion for summary judgment or for judgment on the administrative record is denied, and Defendant's motion for summary judgment or for judgment on the administrative record is denied, *in part*. An appropriate Order consistent with this Memorandum Opinion follows.

NITZA I. QUIÑONES ALEJANDRO, U.S.D.C. J.