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

Pennsylvania Special Education Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR File Number:
22924-19-20

Child's Name:

E.P.

Date of Birth:

[redacted]

Parent:
[redacted]

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Hearing Officer:

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Date of Decision:

04.03.2020

INTRODUCTION AND PROCEDURAL BACKGROUND

The Parents of an elementary school-age Student filed the instant due process Complaint alleging the District's failed to locate, identify, evaluate and then offer the Student a free appropriate public education (FAPE), as defined by Section 504 of the Rehabilitation Act (Section 504) and it state law counterpart at 22 Pa. Code Chapter 15 (Chapter 15). Therefore, Parents are seeking compensatory education from kindergarten through fourth grade.[1] The District denies all claims and further avers that certain are time-barred. After taking testimony, reading the record and after giving due consideration to the arguments and the extrinsic and intrinsic evidence, I now find in favor of the Parents. The Student's claim for compensatory education accrued on or about October 10, 2018, the Student filed the claim on October 29, 2019; therefore, Student's claims from kindergarten, first, second, third and part of fourth grade are **GRANTED**. The District's Motion to limit the scope of the claims as time-barred from kindergarten through fourth grade until the Parents made the unilateral placement is **DENIED**. All other claims or affirmative defenses, like the reasonable rectification period, not otherwise proven or addressed herein, are dismissed with prejudice.[2] An appropriate **ORDER** follows.

[1] The Parents claims arise under Section 504 of the Rehabilitation Act and 22 Pa. Code Chapter 15. The federal regulations implementing Section 504 are codified at 34 CFR §104.104.1-37. The Decision Due Date was extended for a good cause, upon written motion of the Parties. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

[2] After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that a preponderance of evidence exists that will enable me to draw inferences, make Findings of Fact and Conclusions of Law. Consequently, I do not reference portions of the evidentiary record that are not relevant to the ultimate factual or legal issues in dispute.

Issues

1. Did the District fail to locate, identify, evaluate and offer the Student a Section 504 FAPE in kindergarten; if not, is the Student entitled to appropriate relief in the form of compensatory education?
2. Did the District fail to locate, identify, evaluate and offer the Student a Section 504 FAPE in first grade; if not, is the Student entitled to appropriate relief in the form of compensatory education?
3. Did the District fail to locate, identify, evaluate and offer the Student a Section 504 FAPE in second grade; if not, is the Student entitled to appropriate relief in the form of compensatory education?
4. Did the District fail to locate, identify, evaluate and offer the Student a Section 504 FAPE in third grade; if not, is the Student entitled to appropriate relief in the form of compensatory education?
5. Did the District fail to locate, identify, evaluate and offer the Student a Section 504 FAPE in fourth grade; if not, is the Student entitled to appropriate relief in the form of compensatory education? (N.T. pp.1-30).
6. Are any of the Student's claim barred by the applicable statute two-year statute of limitations; if yes, what is the date the Parents either knew or should have known of they should have filed the instant action? (N.T. pp.15-30).

FINDINGS OF FACT

THE STUDENT ENROLLS IN THE DISTRICT

1. The Student resides the Parents in the District. [Redacted]. The Student was [redacted] *in utero*. The Student's [redacted] impacted the Student's growth and development. (N.T. at 32-33). The Student's records note that at birth, the Student displayed significant sensory needs. (S-2 p.2).

2. At the age of three, the Student was identified as a person with an "other health impairment" (OHI) within the meaning of the Individual with Disabilities Act and who because of that disability otherwise needed special education services. After completing the IDEA

evaluation, the IU found the Student eligible for specially-designed instruction (SDI) and provided the Student with an Individual Education Program (IEP). Thereafter the Student received early intervention services through the Intermediate Unit (IU) prior to enrolling in the District. (N.T. at 33-34... (P-6; N.T. at 33-34, P. S-2 p.1, P-6).

3. The Student's preschool IEP included services and goals to address: eating deficits, social deficits, sensory; and, emotional deficits. (P-6 at 1-7; N.T. at 33-37).

4. The Student enrolled in the District for the 2014-2015 school year. The District issued an IDEA permission to evaluate the Student in all areas of suspected disability. The Parents consented. (S-2).

5. After a few weeks of school, on September 9, 2014, the mother wrote to the kindergarten teacher, informing her that the Student had a very difficult time with homework. (P-1 p.2). Each month thereafter, the Mother would email the teacher about recurring behavioral difficulties in the home related to homework, school refusal, and escalating emotional dysregulation like crying, hitting, and tantrums. (P-1, P-2).

6. On December 12, 2014, the District issued the expected Reevaluation Report (RR). (S-2).

7. The District's reevaluation includes a review of the then existing data, a cognitive assessment, achievement testing, a direct observation, teacher input, parent input, social/emotional rating scales, an executive function rating scale, and an occupational therapy evaluation. The RR notes that as early as age three, the Student had developmental delays in social/emotional development, sensory needs, adaptive/eating skills and daily transitions. (S-2).

8. The December 12, 2014, RR included Parent BASC-3 ratings placing the Student At-Risk in ten (10) of the BASC-3 categories. (S-2 p.14).

9. The RR team, including the Parents, determined after reviewing multiple assessment scores, ratings and data sets, the Student's profile no longer supported a finding of IDEA eligibility for specially-designed instruction. The RR also referenced the Student was in private therapy and was receiving private occupational therapy. The RR further notes the Parents were starting an in-home program of community-based behavioral services related to emotional dysregulation, believed to be connected to the exposure to *in utero* [redacted]. After reviewing the report, the RR team, including the Parents, concluded the Student no longer met IDEA eligibility criteria as a person with a disability in need of specially-designed instruction (SDI). The District proposed and the Parents agreed to exit the Student from IDEA services. The District did not offer and the Parents did not ask for an individual assessment to determine if the Student was otherwise eligible for Section 504 FAPE supports. (S-2).

10. On January 21, 2016, the Mother wrote to the teacher to inform her that the in-home behavior dysregulation reached the point of "battling" with the Student to complete homework. The Mother reported that when the Student returned home from school, the Student would become emotionally dysregulated, begin to yell, shove, hit, kick, throw and break objects in the home. (P-2 p.1).

11. On February 4, 2016, the Student's private [redacted] social worker emailed the teacher several internet links relating to behavior, emotional regulation and education. (P-2 at 5, 11-12). The resources included links to understanding sensory processing, zones of regulation, and other behavior management resources. (P-2 pp.5-7).

12. When the school year ended, the Student was promoted to First

Grade. *Id.*

THE 2015-2016 FIRST GRADE SCHOOL YEAR

13. Throughout First Grade the Mother and the teacher regularly emailed about the Student's experience during the school day. The Mother regularly updated the teacher that completing homework was again becoming a behavioral dysregulation issue. By January 2016, the Mother regularly expressed concerns that when the Student returned home, the Student would cry, hit, shove and break objects in the home. (N.T. pp.56-59).

14. On January 21, 2016, prior to responding to the Mother, the teacher emailed the school counselor and the social worker about the Student's academics and [redacted]. In responding to the counselor, the teacher stated, "In my opinion, mommy is going to have to keep pushing for things we don't see here at school. So we need to decide if this is what we want to happen in [redacted] future years at [redacted]. While I appreciate the struggle she is facing, I am not sure that we want to open ourselves up to services such as this. This needs to be a team decision since I will be out of the picture in [redacted] upcoming year." (N.T. pp.131-133).

15. Thereafter, the teacher, the guidance counselor and the social worker communicated by email about the Mother's complaints and the teacher's reactions. Although the social worker stated that an "IEP should be held," no one on the staff requested an evaluation. (P-2 p.2). Instead, they decided the teacher would send an email stating the no one in the school observed similar behavior and put off the social worker's suggestion to "call the mother in." (P-3 p.3).

16. Although the First-grade report card notes "Advanced" to "Proficient" skill levels and further notes, the Student earned the highest ranking of a 4 in Community Leadership, Collaborative Learning, and Self-

Directed Learner, the Student, continued to have meltdowns in the home. (S-19 p.1, P-pp.1-11). [3]

THE 2016-2017 SECOND GRADE SCHOOL YEAR

17. Throughout the Second Grade year, the Mother repeatedly emailed the teacher advising her that the Student often had meltdowns or was very anxious at home about things that happened at school. The Mother made the teacher aware of the Student's anxiety about school, the Student struggled with social interaction at school, and that eating continued to be a big challenge for the Student at home and in school. P-3 at 1-2, 10-11.

18. On September 29, 2016, the Mother wrote to the teacher, informing her that the Student was sobbing and screaming about going to school. (P-3 at 3). That same day the teacher emailed the Mother stating the Student went to the nurse on several occasions complaining about adnominal pains. (P-3 p.3).

19. On October 25, 2016, the Mother emailed the teacher stating the Student was complaining that everything seems so different this year," and "school just isn't the same this year." The Mother also noted the Student complained about not being able to understand the reading assignments. (P-3 p.5). Similar concerns, complaints and requests for help continued throughout the second-grade year. (P-3 pp.1-11, P-4 pp.1-40)

20. On November 4, 2016, the Mother wrote to the teacher to say that the Student was upset and crying because of events during library

[3] Meltdowns is the catch phrase to include times when the Student's emotional state was dysregulated. Meltdown like behaviors include, but are not limited to, hitting, punching, crying, and breaking things. (N.T. *passim)*.

time. In the same message, the mother stated the Student asked to be home-schooled. (P-3 at 8).

21. On or about December 1, 2016, the Student underwent a private psychiatric evaluation. (S-3). The examiner diagnosed the Student with the following impairments, Intermittent Explosive Disorder, Oppositional Defiant Disorder, Autism Spectrum Disorder, [redacted], Disruptive Mood Disorder, Parent-Child problems, and other psychosocial circumstances like [redacted], and social interaction/relations deficits. (S-3.)

22. The December 16, 2016, psychiatric evaluation notes acting out behaviors include hitting, punching and kicking. The Mother also reported that while the Student was doing academically well in school, frequent meltdowns, after school, occurred when the Student was expected to complete homework. (S- 3 p.3; N.T. 104).

23. On December 5, 2016, prior to the annual [redacted] meeting, the Mother wrote to the teacher, the school Principal and the [redacted] teacher. The Mother informed the staff of a recent private evaluation. The email also included an update about the Student's private OT progress. In the email to the team, the mother made several requests. First, in light of the report, the Parents requested an evaluation by a school psychologist. Second, in light of the diagnoses and the private OT report, the mother requested sensory breaks throughout the day. [Redacted]. (P-3 p.10). Although both Parents, the [redacted] teacher, the classroom teacher, and the principal attended the meeting, the District never issued a permission to evaluate. The record is clear that the building principal acting as the local education representative (LEA) never gave the Parents prior written notice of the District's refusal to evaluate the Student. Likewise, the principal did not provide the Parents with their IDEA or

Section 504 procedural safeguards (N.T. pp.230-233).

24. As the year progressed, the Student continued to do well in school was promoted to third grade and continued to meltdown at home. (S-, P##1, 2, 3, 4, 5).

25. Prior to the start of third grade, the Student had a neuropsychological evaluation. (S-4). The evaluation did not include any input from the Student's teachers or personnel at the school. The report included regular used cognitive, social and emotional assessments/rating scales. The report notes, consistent with previous results, the Student displayed high cognitive ability, along with deficits in tasks that require shifting attention. The report next notes the Student is experiencing difficulties with emotional control, planning, organization, lower inhibition, and applied executive functioning skills. From a diagnostic perspective, the examiner concluded that Student's profile met the impairment criteria for Frontal Lobe and Executive Function Deficits, in addition to a history of Autism. The examiner made nine recommendations including the following: (1) continued individual therapy, (2) medication management strategies to control mood, anxiety and emotional control, (3) social skills instruction, (4) 30 to 60 minutes of physical activity five times a week, (6) encouraging the Student to write about stressful events, feelings, and thoughts, (7) continued implementation of an IEP, (8) placement in a private, and (9) individualized community-based therapy. While the report recommends that the Student continue to receive IEP services, the record is clear the Student was not IDEA eligible at the time of the report. (S-4).

26. Although the report was received by the Student's building team, the District did not convene a meeting to review the report, conduct

an individual assessment, or issue IDEA, Section 504, [redacted] procedural safeguards agreeing to or rejecting the examiner's recommendations. *Id.*

27. On October 17, 2017, during third grade, the Parents again in writing requested an evaluation reminding the principal that they requested an evaluation in December 2016. (S-21 p.9). On November 1, 2017, the Mother emailed the principal and the principal acknowledged receipt of the request to evaluate. In response to the Mother, the principal acknowledged, "this is a new one for me since there [sic] not identified issues or observable one when at school… out of school issues should be handled through outside services working with families. (S-21). The email goes not to say he did not have any recollection of an outside report. *Id.* Rather than reject the request, the District responded by scheduling a meeting with the Parents. *Id*.

28. On November 21, 2017, [redacted]. (S-21 p.12. N.T. 290-210). At the meeting, the Mother asked if a three page typed Parent input document listing the Parents' concerns, the Student's concerns, including a list of five need areas, could be included [redacted]. The list noted the 2016 autism diagnosis, the neuropsychological evaluation and recommendations. P-4 pp.23-26).

29. On November 22, 2017, the Parents emailed the principal inquiring [redacted]. [Redacted]. (P-24 pp.21-22). That same day, the principal emailed [redacted]. The classroom teacher stated that while she disagreed with the Parents understanding about the meeting, she would make sure the Student had a protein snack at the end of the day. [Redacted] suggested that the accommodations could be put into a draft 504 plan after the holidays. (P-4 pp.18-27).

30. While the record is unclear as to the specifics of what the Parties did

or did not agree to, the record is clear the Parties agreed to implement a series of regular education tiered interventions including and complete an occupational therapy screening. The Parties further agreed that if there was no effect from the interventions, then further evaluations would be warranted. (S-21 p.12; N.T. 190, 215, 233-236). Some 90-days later, the interventions began. The record is clear that the District never defined the interventions or collected any data to assess the efficacy of the interventions, issued progress reports, or circled back for a follow-up 90-day conference. (N.T. pp.220-335).

31. On or about November 24, 2017, the Student underwent and the District received a private Binocular Skills Evaluation. On January 10, 2018, an occupational therapy evaluation (including visual-motor integration assessment) was then completed and provided to the District. P-14.

32. On February 26, 2018, the District sent the Parents an invitation to participate in an IDEA IEP conference. The Parents signed and returned the invitation on March 1, 2018. The invitation notes a copy of the IDEA procedural safeguards is available upon request from the school. (S-6). The record is unclear if the Parents received a paper copy of the procedural safeguards. *Id.*

33. On March 6, 2018, rather than participate in an IEP conference, the District converted the meeting into a Section 504 eligibility meeting. After reviewing the vision evaluation, the District offered and the Parents agreed the Student should receive a Section 504 Agreement. The Section 504 Agreement notes the Parties agreed to a series of testing accommodations, including frequent breaks, and preferential seating. (S-6).

34. In May 2018, prior to fourth grade, the Parents secured another

private psychological evaluation. The examiner targeted the ongoing dysregulation issues like hitting kicking, focusing, concentrating, and the Student's ongoing limitations in social and communication interactions. (S-7). The report notes that the Student has a long history of neurodevelopmental impairments related to autism spectrum disorder, attention-deficit problems and impulse control problems. The examiner diagnosed the Student with an Associated Disruptive Mood Dysregulation. The examiner also noted signs of depression, inattention, and explosive behaviors in the home. The examiner recommended 32 weeks of community Family Based Mental Health Services targeting mood dysregulation, impulse control and anger management. At the same time, the examiner reports the Student is excelling in school. (S-7).

35. On October 5, 2018, the Mother wrote to the principal to inform him that the Student was struggling with social interactions on the school bus. More specifically, she complained that [redacted]. (P-5 at 4). The Principal investigated the complaint and no one was disciplined. *Id.*

36. On or about October 10, 2018, after reviewing the private report, the District, offered and the Parents accepted an updated 504 Agreement. (S-8). The updated Section 504 Agreement included four additional accommodations, including social skills, support from the guidance counselor, flexible space during independent work, the ability to work at the Student's own pace and discrete adult check-ins to ensure completion of homework. The Section 504 update also included the additional accommodation time to monitor and complete eating lunch. (S-8). The record is unclear what new impairment the accommodations were targeting. *Id.*

37. On October 10, 2018, the District offered and the Parents accepted an updated Section 504 FAPE Agreement including nine

accommodations such as allowing the Student to take tests verbally, frequent breaks during testing, all standardized test would be administered in small groups, preferential seating, and weekly social skills support by the guidance counselor, a once a week check-in to assess needs for the week, a distraction-free environment to complete independent work, additional time to complete classroom tasks involving moving from station-to-station, long with additional time to eat lunch in the event the Student takes longer than 20-minutes to complete eating (S-8). The Section 504 Agreement did not address the Parent's chief concern of meltdowns related to the completion of homework after school. (S-8).

38. On October 12, 2018, the District issued and the Parents completed a ten-page Parent Input Form for another IDEA RR. (S-10). The Input form did not request any input regarding any of the well documented long-standing impairments included in the private psychiatric evaluation, the neuropsychological evaluation, the OT evaluation, or the private psychological evaluation. (S-10).

39. On October 17, 2018, the Student was admitted into an emergency 20-day acute inpatient residential partial hospitalization program. (S-9). On admission, the Student complained about feelings of being mad, depression, bullying, teacher trust issues, difficulties with social interactions, and feeling of hopelessness. (S-9 p.4). While inpatient, the Student missed 20 days of school. (N.T. 205; S-17 p.1).

40. The October 2017 RR included input from the Parents, the teachers and outside professionals. The Parents' primary concern leading into the October 2018 evaluation was to collect data about the Student sensory needs, overstimulation, the 2016, 2017 and 2018 diagnoses of autism, ADHD, behavioral dysregulation, ODD and the in-home after school meltdowns. (S-11 p.30).

41. The District's psychologist observation included, in the RR, notes the Student's rate of on-task behavior was greater than the observed peers. S-11 p.4.

42. The RR summarized the results of the all of the private evaluations dating back to the 2016 private psychiatric evaluation noting eight different mental health impairments, the 2017 neuropsychological evaluation noting two mental health impairments, the 2018 private psychological evaluation noting three mental health impairments, the October 2018 Section 504 Service agreement noting the visual impairment, the February 2018, [redacted] OT evaluation report noting a sensory impairment, the October 2018 partial hospitalization summary noting two mental health impairments, [redacted], along with a summary of the ongoing nine or more Section 504 in school accommodations. (S-11 p.5 and S-13 p.6).

43. The RR team reviewed the Student's history of standardized testing indicating "Above Average Cognitive Ability" and "Average Achievement." (S-11 p.7).

44. The RR included multiple measures of social skills, emotional development, and adaptive behavior. For, example, the Mother's scores on the Social Skill Improvement System-Emotional Learning Edition (SSIS-EEL), indicated ratings in the "Well-Below Average" range. Scores in this range typically indicate significant problems with overall social-emotional functioning. At the same time, the teachers rated the Student in the "Average Range." While the Mother's Behavior Assessment System for Children-Third Edition (BASC-3) ratings for Externalizing Problems, Internalizing Problems, School Problems, and Behavior Symptoms, were in the "Clinically Significant Range," the teachers were in the "Average Range." (S-11 p.10).

45. The Mother's adaptive behavior rating of real-life skills like grooming, dressing, safety, safe food handling, school rules, ability to work, money management, cleaning, making friends, social skills and personal responsibility were in the "At-Risk" range, the teachers were in the "Average" range. (S-11 p.9-10).

46. The RR notes the Student's scores on group and standardized testing falls at or near grade level. (S-11 p.12-13). After reviewing the existing data, the District and the Parents agreed to collect additional normed based cognitive, behavioral and social skills ratings/assessments. (S-11).

47. On February 2, 2019, the District provided the Parents with the results of the additional testing. The updated evaluation included scores form the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) and the Test of Pragmatic Language-2nd Edition (TOPL-2). The Student's scores on the CELF-5 and the TOPL-2 were in the normal limits. The Mother's ratings, however, suggested pragmatic language weaknesses. (S-13 pp.9-13).

48. The February 2019 ER included updated results of another BASC-3, along with new data from the Gilliam Autism Rating Scale-Third Edition (GARS-3), the Multidimensional Anxiety Scale for Children-Second Edition (MASC-2), the Scales for Assessing Emotional Disturbance, Second Edition (SAED-2), the Social Skills Improvement System (SSIS), and the Social Skills Improvement System, Social-Emotional Learning. (SSIS-SEL). (S-13).

49. The Student's self-reported BASC-3 scores rates "School Problems" at the "At-Risk" level, Internalizing Problems at the "Clinically Significant" level and "Inattention/Hyperactivity" behaviors at the "Average" level. The Student's "Personal Adjustment" score fell at the "At-risk" range. (S-13 p.17).

50. The GAR's ratings were completed by two teachers and the Mother. An Index score of 71 or above suggests the likely probability of autism. While the summary of the GARS states the teachers' ratings fell in the "NOT VERY LIKELY" range, the Mother's ratings fell in the "VERY LIKELY" range. (S-13 p.17 vs. S-13 p.27) (capitalization in original).

51. The Student's scores on the MASC-2 calculated an overall anxiety level, from both respondents. The Student's and the Mother's ratings fell in the "Very Elevated" range. (S-13 p.19).

52. The Student's SAED-2 ratings completed by two teachers did not indicate any behaviors consistent with emotional disturbance or atypical behavioral dysregulation. (S-13. pp.20-21).

53. The Student's SSIS assessment of social behavior scores fell in the "Average" range. (S-13 p.20).

54. The Student's scores on the Problem Behaviors Scale fell in the "Above Average" range, indicating the Student's exhibits more problems than peers and that interventions designed to reduce such behaviors may be warranted. (S-13 p.20).

55. While the teacher's SSIS-EEL fell in the "Average" range across all ten domains. (S-13 p.21), the Student's ratings, on the other hand, fell in the "Well Below Average" range indicating significant problems with overall social-emotional functioning. (S-13 p.21).

56. After reviewing the then existing data collected across both evaluations, the District members of the team concluded the Student was not a person with a disability in need of IDEA based specially-designed instruction. The Parents disagreed. (S-13). Shortly after the review, the District issued Prior Written Notice (PWN), concluding the Student was not eligible for IDEA services. At the same time, the

evaluation team did, however, concluded the Student continued to need all the existing Section 504 supports for the visual impairment, with the caveat that the team should reconvene "if the Student is observed to demonstrate maladaptive behavior in the school. (S-13 p.28). [Redacted]. S-13 pp.26-28. The RR team did not make any conclusions about the long history of behavioral health/mental health impairments dating back to 2016. *Id.*

57. On or about March 8, 2020, the District offered and the Parents accepted an updated Section 504 Agreement. The updated Section 504 Agreement added the following accommodations: (1) included regular check-ins with the School Counselor or a preferred adult to assess Student's level of anxiety, (2) create opportunities to access brain stem-based sensory activities throughout the day, and, (3) allow homework to be attempted during the school day. (S-14). In all the Section 504 Agreement, then included ten (10) accommodations. (S-14). The Section 504 Agreement did not address the Student's behavioral dysregulation connected to homework. *Id.*

58. On or about April 4, 2019, the District sent the Parents a Notice of First Offense for Truancy, noting 59 absences during third grade. (S-15, S-16, S-17).

59. Dissatisfied with the RR, sometime in the Spring 2019, the Parents requested, and the District agreed to fund, an Independent Educational Evaluation (IEE) IDEA evaluation at public expense. (N.T. 272).

60. The IEE targeted IDEA eligibility. (S-19 p.29).

61. The IEE was completed on June 19, 2019. The IEE included Parent and teacher input, a direct observation of the Student in the school, along with the results of 11 different nationally normed assessment/evaluation of academic, social, behavioral and executive

functioning. The IEE report included many of the same previously administered assessments in the previous RRs and in the private psychological evaluations. Similar to the previous evaluations, the Mother ratings indicated multiple impairments while the teachers' ratings were just the opposite. (S-19).

62. The Student's results on the national normed referenced cognitive and achievement tests were consistent with earlier private and District data sets. [Redacted]. (S-19).

63. The IEE examiner agreed with the District that the Student was not IDEA eligible for specially-designed instruction or in need of an IDEA based positive behavior support plan during the school day. Based on the teacher's ratings, and the existing data the examiner concluded the Student did not demonstrate any DSM diagnosable conditions, in the school, like autism, emotional disturbance, ADHD, or an OHI that would qualify the Student for IDEA services. (S-19).

64. The IEE examiner also commented on the huge discrepancy between the Student's behavior in the home and the school. The IEE examiner opined that the variance complicated and made it diagnostically impossible to reach a conclusion about the disparity of the Student's behaviors across settings. (S-19 pp.28-29).

65. The IEE examiner then concluded while the Student's visual impairment and the anxiety did not adversely affect the Student's learning or behaviors, in the school setting, the Student should continue to receive the ongoing Section 504 accommodations. (S-19 p.29).

66. The IEE examiner did not opine, gauge, or contradict any of the previous mental health or behavioral health impairments in the private evaluations. The IEE examiner did not reach any conclusions if the Student's long history of multiple impairments substantially

limited any of the Student's major life functions. (S-19).

67. But for the 59-days missed during fourth grade, the Student's attendance during first through third grade was unremarkable. (S-18, N.T. 99; S-17). The school records note that when the Student did return to school, the Student was able to catch up academically. Prior to and after returning to school, the Student experienced social interaction difficulties on the bus, at lunch and in unstructured social situations. (N.T. 323-325, P-1, 2, 3, 3, 5, S-11, S-13, S-19).

68. Throughout the fourth grade, despite the hospitalization the Student, was able to attain grade- level expectations and pass all classes. Although the Student passed all classes, the Student had multiple meltdowns at home, had difficulties relating to social interactions, homework completions issues, peer-to-peer conflicts and teacher mistrust issues. (N.T. 104, 163, 213, 292, 317, N.T. 97-98; S-18; P-26, N.T. 323-325, P-1, 2, 3, 3, 5, S-11, S-13, S-19).

Applicable Legal Principles Burden of Proof

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion rests with the Parent, who requested this hearing, while the burden of production rests with the District. In IDEA disputes, the hearing officer applies a preponderance of proof standard.

Credibility Determinations

Hearing officers, as fact-finders, are charged with the responsibility of making credibility determinations of the witnesses who testify.[4] This hearing

[4] *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014);

officer now finds the District's and the Parents' witnesses were credible, and their testimony was essentially consistent with respect to the actions taken or not taken by the District or the Parents in evaluating the Student's Section 504 eligibility.

For all the reasons that follow, at times, I found the testimony of some witnesses to be more cogent and persuasive than others. First, I will give the District's teachers, the social worker, the principal and [redacted] testimony less persuasive weight. While the teachers worked with the Student each day, for all the reasons that follow, the evidence is preponderant that the teachers did not cogently describe how they followed the applicable Section 504 eligibility process. Second, the record is equally sparse as to how the teachers, the principal, the guidance counselor, or the social worker factored in or out the Student specific mitigating circumstances. Third, while the principal's testimony was credible, he too was in no way at all persuasive as to the Section 504 eligibility process. As the LEA in the building, he was charged with having a working knowledge of the Section 504 child find process. The principal could not cogently explain when asked on two occasions, in writing, by the Parents, why he failed to provide the Parents with either a permission to evaluate, issue procedural safeguards, call for a Section 504 or IDEA team meeting to review the private reports. At the same time, the principal could not cogently explain why when the Parents provided the vision exam, the Section 504 team quickly met and offered a FAPE juxtaposed against how he treated the other private evaluations of record. Fourth, for all of the following reasons, on the intertwined topic about the persuasiveness of Student's IEE as to the Student's Section 504 eligibility, I now give less weight to the examiner's report on Section 504 eligibility. Like the District, the IEE examiner was focused on IDEA eligibility; therefore, either by design or error, she did not discuss the Student's long history of impairments. While the IEE meets the

A.S. v. Office for Dispute Resolution (*Quakertown Community School District*), 88 A.3d 256, 266 (Pa. Commw. 2014).

applicable IDEA requirements, the IEE fails to far short for Section 504 purposes. Granted, the IEE examiner did review several different IDEA classifications that overlap with Section 504 impairments; however, the IEE examiner then stopped short of making any statements regarding whether the impairments impaired a major life function. Therefore, I will give the report less weight as to the remaining Section 504 eligibility issues in dispute. Placing all of the above in context, I will now turn to the analysis of the District's affirmative defense and the Parents' claims.

Section 504 Chapter 15 and IDEA Child Find

IDEA places an affirmative duty on districts to locate, evaluate and educate children who are diagnosed with 13 different disabilities and who disabilities "adversely affects" the student's "education" such that they require "specially-designed instruction." 20 U.S.C. §§1401-1415. Section 504 and Chapter 15, on the other hand, contain their own child find requirements that appear similar to, but in fact, are much broader in scope that IDEA. Section 504 requires districts to evaluate students who, because of handicap/impairment, need or are believed to need special education or related services. 34 C.F.R. §104.35 (a) *See* 22, Pa. Code § 15.2. Rather than list a defined set of disabilities, Section 504 requires districts to locate, evaluate and educate individuals whose "physical or mental impartments" "substantially limit" a "major life function." While both statutes require individual assessments, the scope, type and eligibility requirements are distinct.

SECTION 504'S TWO PRONGED ELIGIBILITY STANDARD

Unlike the IDEA, a Section 504 assessment generally won't require a great deal of scientific, medical, or statistical evidence. 28 CFR 35.108 (d) (v) CFR 34.136. The Office of Civil Rights has pointed out that the Americans with Disabilities Act (ADA) modifications to Section 504 did not require the United States Education Department to amend the regulations implementing Section 504. Noting that the regulations are valid as written, OCR stated

that it would enforce its regulations in a manner consistent with the ADA.[5] Therefore, the applicable ADA regulations are now part of a district's child find process.

The 2016 amendments to the Title II regulations require districts and other public entities to construe these definitions broadly in favor of expansive coverage "to the maximum extent permitted by the terms of the ADA."[6] The 2016 Title II and in turn the Section 504 regulations, define a "physical or mental impairment" as a : (i) Any psychological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, immune, circulatory, hemic, lymphatic, and endocrine; or (ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability. 28 CFR §35.108 (b) (1).

The Title II and the Section 504 regulations then define major life activities to include but are not limited to: caring for oneself, performing manual tasks, seeing, hearing eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, or interacting with others, working. 28 CFR §35.108 (c)(1)(i); 28 CFR §35.108 (c)(1)(ii). In *North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009), OCR noted that the ADA expanded the list of major life activities. OCR also clarified that major life activities are not limited to those identified in the statute. *Saginaw City Schs. (MI),* 116 LRP 13436 (OCR 12/17/15), *See also, Dear Colleague Letter*, 58 IDELR 79(OCR 2012).

[5] *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015).

[6] 28 CFR 35.108 (a) (2). *See also, Dear Colleague Letter*, 58 IDELR 79 (OCR 2012) (stating that districts must interpret the definition of "disability" liberally when evaluating students' eligibility for Section 504 services).

Like the IDEA, a Section 504 team's determination, whether an impairment is substantially limiting, requires an individualized assessment. 28 CFR §35.108 (d)(1)(vi), 34 CFR §104.36. To assist districts in making the determination of when an impairment substantiality limits a major life activity, the applicable regulations, adopted nine interactive rules of construction. The applicable rules provide as follows.

(1) Substantially limits" is not intended to be a demanding standard.
(2) The threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.
(3) An impairment does not need to substantially limit more than one major life activity.
(4) An impairment that is episodic or in remission qualifies as a disability if it would substantially limit a major life activity when active.
(5) An impairment does not need to prevent or significantly or severely restrict an individual from performing a major life activity to be substantially limiting; the question is how the impairment limits the individual's ability to perform the major life activity as compared to most people in the general population.
(6) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.
(7) An individual with an impairment generally does not need to produce scientific, medical, or statistical evidence to show how his/her performance of a major life activity compares to the performance of most people in the general population (however, the individual may present such evidence where appropriate).
(8) Public entities may not consider the ameliorative effects of mitigating measures when determining whether an impairment substantially limits a major life activity.
(9) The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability. 28 CFR § 35.108 (d)(1).

The 2016 Title II regulations further provided that the following impairments substantially limit major life functions:

1. Deafness substantially limits hearing;
2. Blindness substantially limits seeing;
3. Intellectual disability substantially limits brain function;

4. Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;
5. Autism substantially limits brain function;
6. Cancer substantially limits normal cell growth;
7. Cerebral palsy substantially limits brain function;
8. Diabetes substantially limits endocrine function;
9. Epilepsy, muscular dystrophy and multiple sclerosis each substantially limits neurological function;
10. Human Immunodeficiency Virus (HIV) substantially limits immune function; and,
11. Major depressive disorder, bipolar disorder, post-traumatic stress disorder (PTSD), traumatic brain injury, obsessive-compulsive disorder, and schizophrenia each substantially limits brain function. 28 CFR § 35.108 (d)(2)(iii). *Dear Colleague Letter*, 58 IDELR 79 (OCR 2012), and *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015).

The applicable regulations make clear that districts should focus their individual assessments on the extent of the impairment rather than on the results achieved. This means that a student who succeeds academically through additional time and effort or through the use of compensatory strategies may still have a disability. 81 Fed. Reg. 53,236 (2016). Furthermore, a district cannot consider the ameliorative effects of "mitigating measures" when determining whether an impairment substantially limits a major life activity. 20 USC 12102 (4)(E), and 28 CFR § 35.108 (d)(1)(vii).

Mitigating measures include, but are not limited to:

1. Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment, and supplies;
2. Use of assistive technology;
3. Reasonable modifications or auxiliary aids or services;
4. Learned behavioral or adaptive neurological modifications; and,

5. Psychotherapy, behavioral therapy, or physical therapy. 28 CFR § 35.108 (d)(4).

"These provisions highlight ... impairments that virtually always will be found to substantially limit one or more major life activities. Such impairments, however, still warrant individualized assessments, but any such assessments should be especially simple and straightforward."[7] For example, in *Kennett Consol. Sch. Dist.*, 118 LRP 27976 (SEA PA 05/10/18), the hearing officer found the district's eligibility determinations, based on the uncontested private evaluations, grades, absences, and the number of tardy arrivals was a sufficient individualized assessment. In determining whether a student's impairment substantially limits her/his major life activity of learning or whether she/he is "succeeding" in school, a district must consider all relevant information available -- it cannot just consider the student's grades or test scores.[8] Therefore a student may be eligible when the impairment limits other major life activities, such as thinking, social interactions, or concentrating.[9] Likewise, a district that limits the consideration of major life activities it is willing to consider violates Section 504. Districts shouldn't rely on grades alone when weighing if a student's condition substantially limits a student's educational performance.[10] For example, in an analogous

[7] 81 Fed. Reg. 53,232 (2016), 34 CFR § 104.35, and 34 CFR § 104.36. 34 CFR §104.33 (b)(1), 28 CFR § 35.108 (d)(4).
[8] See, *Tustin (CA) Unified Sch. Dist.*, 64 IDELR 119 (OCR 2014) (expressing concerns that a district may have violated Section 504 when it only reviewed a student's passing grades and proficient test scores before deciding that her auto-immune disorder did not substantially limit her major life activity of learning).
[9] *See, e.g., Hamilton County (FL) Sch. Dist*., 59 IDELR 111 (OCR 2012).*See, e.g., Benjamin Logan (OH) Local Sch. Dist.*, 113 LRP 24739 (OCR 03/07/13) (indicating that a district must consider whether a student's disability substantially limits any major life activities, not just learning, in determining whether a student is eligible under Section 504); *Oglethorpe County (GA) Sch. Dist.*, 69 IDELR 227 (OCR 2016) (noting that a student may qualify as having a disability even if the student's impairment does not substantially impact academic performance); and *Stokes County (NC) Schs*., 117 LRP 2203 (OCR 09/23/16) (observing that a teacher gave out erroneous information when she told the parent that only a condition that impeded learning could qualify the student under Section 504).
[10] S*ee, e.g., Hamilton County (FL) Sch. Dist*., 59 IDELR 111 (OCR 2012) (noting that the district indicated that it would reconsider the child's eligibility if problems with his grades or social interactions arose, suggesting that it inappropriately restricted its eligibility determination to substantial limitations in only two major life activities); *Bristol-Warren (RI)*

IDEA situation, a Pennsylvania district erred when it "seemingly made no effort to explore a causal relationship" between a student's emotional function and her attendance. Instead, because the student continued to earn "almost exclusively" "A's" and showed advanced performance on classroom-based assessments and standardized test scores, the district concluded that her mental health needs did not affect her educational performance. Ultimately, the court held that the district's reasoning meant that it didn't assess the student in all areas of suspected disability. *Rose Tree Media Sch. Dist. v. M.J.*, 74 IDELR 15 (E.D. Pa. 2019); *Independent Sch. Dist. No. 283 v. E.M.D.H.*, 74 IDELR 19 (D. Minn. 2019).

THE SECTION 504 FAPE REQUIREMENTS

Once a student is identified, Section 504 requires that districts comply with specific procedures in the provision of services to students with disabilities. For example, Section 504 requires adherence to the following requirements regarding the provision of a FAPE, (34 CFR § 104.35), educational settings (34 CFR 104.34), and procedural safeguards (34 CFR 104.36). In particular, Section 504 FAPE requires the provision of regular or special education, including related aids and services that "are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 CFR §104.33 (b)(1)(i). Section 504's FAPE standard supports and reinforces the nondiscrimination directive at 34 CFR §104.4. Section 504 regulations at 34 CFR §104.33 (b)(2) state that one way of meeting the Section 504 FAPE standard of 34 CFR §104.33 (b)(1)(i) is the implementation of an individualized education program developed in accordance with the IDEA. The regulations note that compliance with the procedural safeguards of the IDEA is one means, but not the sole means of meeting the procedural safeguards requirement of Section 504. 34 CFR §104.36.

Reg'l Sch. Dist., 56 IDELR 303 (OCR 2010) (noting that the district failed to consider whether the student's disabilities impacted any major life activities other than learning).

SECTION 504 FAPE SUBSTANTIVE REQUIREMENT

Although on the surface the Section 504 and IDEA standards are similar, courts have held that FAPE under the IDEA and FAPE under Section 504 have distinct standards. FAPE under the IDEA is an affirmative duty to provide an appropriate public education, whereas FAPE under Section 504 is a negative prohibition against discrimination. *C.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41 (3d Cir. 2013). "The most significant difference between the FAPE requirements of Section 504 and those of Part B is that Part B requires FAPE, consisting of special education and related services, implemented on the basis of an IEP document, whereas Section 504 requires FAPE, consisting of regular or special education and related aids and services, as implemented by any appropriate means, including, but not limited to, an IEP." *Letter to Williams*, 21 IDELR 73 (OSEP 1994). The requirement to provide FAPE under Section 504 encompasses students receiving services under the IDEA, as well as different accommodations and related services pursuant to a 504.

SECTION 504 PROCEDURAL SAFEGUARDS

The Section 504 regulations establish a set of procedural safeguards that districts must extend to the parents of students who have disabilities or who are suspected of having disabilities in connection with the provision of FAPE. First, the Section 504 procedural safeguards require districts to provide parents with notice of their procedural safeguards, including their right to request an evaluation and the right to request an impartial hearing. Second, under Section 504, districts must establish and implement procedural safeguards for parents, including the opportunity to examine relevant records such as information obtained through investigations and interviews. The procedural safeguard includes the opportunity for the parents (or guardian) to examine relevant records. Along with the option to request an

impartial hearing with opportunity for participation by the parents, representation by counsel, and a review procedure. 34 C.F.R. 104.36.

REMEDIES AND APPROPRIATE RELIEF

The same remedies available under the IDEA are generally available under Section 504. Therefore courts and hearing officers may award compensatory education and reimbursement as a remedy for alleged Section 504 violations.[11] With these fixed principals in mind, I will not turn to the District's affirmative statute of limitations defense.

ANALYSIS AND CONCLUSIONS

OVERVIEW OF THE PARENTS' CLAIMS AND THE DISTRICT'S REPLY

The parties agree [redacted]. The parties further agree the Student is not otherwise eligible as a person with a disability and in need specially-designed instruction as defined in the Individuals with Disabilities Education Act. The parties further agree the Student is a person with a disability with a vision impairment as defined under Section 504. The Parties disagree if the Student's long history of behavioral health and/or mental health impairments expands the Student's Section 504 eligibility and if the impairments also require Section 504 supports. The Parties also disagree over what accommodations, related services, or supplemental services the Student required, once identified to receive a Section 504 FAPE. The Parents contend that as early as kindergarten, the District either knew or should have known the Student was a person with a disability as defined by Section 504. On the other hand, the District contends it was not until third grade when the Parents presented a vision evaluation, which after review by the

[11] *See, e.g., Easter v. District of Columbia*, 66 IDELR 62 (D.D.C. 2015) (allowing a 22-year-old student to seek compensatory education based on the District of Columbia's alleged failure to make special education services available after his release from a juvenile detention facility); *Horton v. Boone County Sch. Dist.*, 62 IDELR 25 (E.D. Ky. 2013) (noting that a former student with ADD could seek compensatory education for his allegedly deficient Section 504 services); *See, also, J.B. v. Avilla R-XIII Sch. Dist.*, 61 IDELR 153 (8th Cir. 2013) (holding that the parents' requests for compensatory education and reimbursement for special education expenses brought their Section 504 claim within the scope of the IDEA's exhaustion requirement).

District triggered Section 504 FAPE eligibility FAPE. The District further contends that even if the child was eligible for services, all claims more than two years from the filing of the Complaint are time-barred. Finally, the District asserts that at all relevant times, the Student received a Section 504 FAPE. With the dispute clearly framed, I will now turn to the claims and affirmative defenses.

SECTION 504 STATUTE OF LIMITATIONS, CHILD FIND AND FAPE CHALLENGES

For all of the following reasons, after carefully considering all relevant extrinsic and intrinsic evidenced-based facts, I now find in favor of the Parents and against the District. The Parents, after an appropriate period of due diligence, either knew or should have known of the alleged violation/injury the Student may have suffered by October 10, 2018, the date the District agreed to provide a Section 504 FAPE. I reach this conclusion mindful of the following guiding principles. In *P.P. v. West Chester Area Sch. Dist.,* 585 F.3d 727 (3d Cir. 2009), the Third Circuit Court of Appeals held that Section 504 claims premised on child find and denial of FAPE claims are now governed by the IDEA two-year statute of limitations, and not the Pennsylvania limitations period applicable to personal injury claims. 34 CFR §300.507. Then, in *G.L. v. Ligonier Valley Sch. Dist. Auth*., 802 F.3d 601 (3d Cir. 2015), the Third Circuit applying the discovery rule laid out the parameters to set a date certain when a student's FAPE claims accrue. In particular, the Court held "[C]laims that are known or reasonably should be known to parents must be brought within two years of that 'knew or should have known' date, (KOSHK) and parents may not... knowingly sit on their rights or attempt to sweep both timely and expired claims into a single 'continuing violation' claim brought years later." Next, in *G.L*., the Court emphasized that the IDEA's statute of limitations is a *filing* deadline that should not affect the "crafting of the remedy." *Id.* In answering the accrual question, I note that the *G.L*. court cited with approval the court's decision in *Disabled in Action v. SEPTA*, 539 F.3d 199 (3d Cir. 2008). In

SEPTA, the Court held, "Ordinarily, a statute of limitations begins to run from the moment the potential plaintiff has a "complete and present cause of action." (citations omitted). Application of the two-year statute of limitations is a highly factual determination that a hearing officer must make on a case-by-case basis.[12] District courts within the Third Circuit, applying the IDEA's discovery rule, have generally focused on certain action(s) or inaction(s) by a school district and/or the parents in determining whether a reasonable parent was sufficiently alerted to the fact that his or her child would not be appropriately accommodated.[13] The moment the parent has a "complete and present cause of action" is linked to what facts were otherwise known or subject to being known, which in turn assists in calculating how much time a reasonable person would take to uncover relevant facts. The time frame to uncover relevant facts is also fact-dependent. For instance, was the violation obvious and therefore subject to immediate knowledge, when it occurred. Or was the violation hidden and, therefore, subject to discovery at a later point in time is a critical factor in triggering discovery.

If the injury is immediately discoverable, like in *G.L.*, when the student left the school on a specific date, then the fact finder must determine if the Parents filed a timely complaint within two (2) years of the known action/injury date. *G.L.* 802 F.3d at 606. If the answer is yes, the claims are timely, and the Student is entitled to a "complete" remedy, assuming liability is established. *G.L.* 802 F.3d at 625. If, on the other hand, the injury is unknown, emerging, or hidden, these variables contribute to a finding that the length of time needed to discover the relevant facts are otherwise

[12] *J.L. ex rel. J.L. v. Ambridge Area Sch. Dist.*, 622 F.Supp.2d 257, 266 (W.D. Pa. 2008) (citing 71 Fed. Reg. 46540-01 at 46704-06 (August 14, 2006) (codified at 34 C.F.R. § 300.511)); *see also Swope v. Cent. York Sch. Dist.*, 796 F.Supp.2d 592, 605 (M.D. Pa. 2011).

[13] S*ee, e.g., E.G. v. Great Valley Sch. Dist.*, No. CV 16-5456, 2017 U.S. Dist. LEXIS 77920, 2017 WL 2260707, at *9 (E.D. Pa. May 23, 2017); *B.B. by & through Catherine B. v. Del. Coll. Preparatory Acad.*, No. 16-806, 2017 U.S. Dist. LEXIS 70245, 2017 WL 1862478, at *3 (D. Del. May 8, 2017); *Solanco Sch. Dist. v. C.H.B.*, No. 15-02659, 2016 U.S. Dist. LEXIS 104559, 2016 WL 4204129, at *7 & n.10 (E.D. Pa. Aug. 9, 2016).

extended, *i.e.,* subject to discovery, at a later date. Therefore, this fact-finder must isolate the event(s) and inquire(s) about "sufficient critical facts"[14] that either establish or point to a time when the violation was either discovered or subject to discovery. Once discovered or subject to discovery, the injury accrues, thereby triggering the statute of limitations clock. *G.L*. 802 F.3d at 606-607. Simply put, a cause of action accrues when a "reasonable person acting diligently would otherwise discover; or at least inquiry if a violation, [injury or wrong] occurred." *G.L. 802 F.3d at* 605-606.[15] Reasonable diligence takes many paths; here, however, it is linked to an inquiry of "sufficient critical facts" identifying or pointing to a "violation" [wrong/injury] and any "action" or "inaction" on the part of the District or for that matter the parent. In a somewhat analogous case in *Cetel v. Kirwan Financial Group, Inc.*, 460 F.3d 494, 507 (3d Cir. 2006), the court described the due diligence standard in a situation of an investor who is called upon to review the contents of multiple writings. The court opined that in such instances, the investor is held to the standard of using "inquiry notice" as a path to ascertain the accrual date. "Inquiry notice" is the examination of facts that would "lead a reasonable person to diligently begin investigating the possibility that his legal rights had been infringed." *Id*. Parents, like investors who review multiple documents, must demonstrate how "inquiry

[14] *Vitallo v. Cabot Corporation*, 399 F.3d 536, 538 (3rd Cir.2005)(explaining that discovery of substantial/sufficient critical facts as part of due diligence).
[15]See, *Merck& Co. v. Reynolds*, 559 U.S. 633, 651, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010) (holding that when a "statute says that the plaintiff's claim accrues only after the 'discovery' of . . . facts," a limitations period does not "begin '*before*' discovery' can take place"); *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1386 (3d Cir. 1994)(describing the discovery rule as postponing "[t]he beginning of the limitations period from the date a plaintiff was wronged until the date a plaintiff discovers that he or she was injured), *Nazareth Area School District Pennsylvania State Educational Agency*, 111 LRP 50824 111 (May 29, 2010) (Hearing Officer Ann Carroll applying the discover injury rule dismissing parents' compensatory education claim as untimely); *I.H. ex rel D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 773-74 (M.D. Pa. 2012)(District Court Judge Jones applying the discovery injury rule dismissing parents' IDEA claims as untimely).

notice" factored into their "reasonable diligence," such that they were unable to discover the otherwise hidden or emerging violation. *G.L.* 802 F.3d at 614; *Nazareth Area School District*, at 6-7;*Wilson v. El-Daief;* 600 Pa. 161, 964 A.2d 354, 363, 366 n.12 (Pa. 2009).

On the other hand, the burden is on the District, as the moving party, to present evidence of "storm warnings." *Cetel* 460 F.3d at 507. "Storm warnings" are "essentially any information or the accumulation of data that would alert a reasonable person, the parent, to the probability that misleading statements or significant omissions ["actions" inactions"] had been made." *Id.* "Storm warning" arguments, however, place the district in the unenviable position of contending that the injury or "action" is so obvious that an untrained layperson would somehow know they were injured. "Storm warnings," if noted, cause a reasonable person to act to protect their rights. *Id.*

Once the District can show the presence of a "storm warnings," the burden of production then shifts to Parents to show they acted diligently to discover sufficient facts supporting the injury and its cause, but despite their reasonably diligent efforts, the injury remained otherwise undiscoverable. *Cetel* 460 F.3d at 507-508; *Nazareth Area School District*, at 6-7; *Knopick v. Connelly*, 639 F.3d 600, 609, (3d Cir. Pa. 2011); *Vitallo* 399 F.3d 538. Accordingly, proof of "storm warnings" coupled with the lack of "diligence" and "inquiry" will result in a determination that the cause of action accrued at some earlier point in time, which in turn, starts the running of the statute of the limitations time clock. *Id*. After reviewing documents and testimony about "diligence," "inquiry," and "warnings," which establish a time frame or a date certain when a reasonable person would know of the hidden injury; thereafter, the fact finder must then determine if the complaint was timely filed.[16] *Id*. As much as "diligence," "inquiry," and "storm warnings" assist the

[16] In *William A. Graham Co. v. Haughey*, 646 F.3d 138, 148 (3d Cir. Pa. 2011) the court held a cause of action accrues at the moment, all the elements of the cause of action come

fact-finder in establishing "when" the claim accrued, these rules also assist the fact-finder in defining "what" [action or inaction] must be discovered. Therefore, with these fixed principles in mind I will now address the more difficult question -- and the crux of the dispute between the Student and the District-- namely when did this two-year statute of limitations begin to run on the Section 504 child find and/or the denial of a FAPE claims.

Here, Parents' proffered discovery KOSHK date is June 19, 2019, the date of the IEE; the District, on the other hand, contends the KOSHK date is December 3**,** 2014, the date of the District's first evaluation discontinuing the IU IDEA services.

After completing a careful fine-grained analysis of the extrinsic and intrinsic evidence and after disentangling the Parties arguments, I now find the Parent's claim accrued on or about October 10, 2018. October 10, 2018, is the date the District, for the first time, offered a Section 504 FAPE Agreement. October 10, 2018, is also the date the District provided the Parents, for the first time, their Section 504 specific procedural safeguards. October 10, 2018, was the first time after amassing multiple evaluations, the Parents possessed sufficient critical facts to understand the scope of the Student's undiscovered and otherwise hidden impairments. Contrary to the District's assertions, if this were an IDEA dispute, I would not use the December 3, 2014, date as the KOSHK date rather that date began the long journey of inquiry notice.

While one could argue that each email or meeting after the principal refused to issue the procedural safeguards is a KOSHK date, this argument misplaced. It took the Parents until October 2018 to complete the collection

into being, as a matter of objective reality, such that a party with knowledge of all the facts could get past a motion to dismiss for failure to state a claim).

of sufficient facts to understand the Student's impairments and the District's obligations.

At the age of three, the Student was identified as needing special education as a person with a disability. Upon entering kindergarten, the Parents learned that the early intervention services remediated the delay. [Redacted]. Thereafter, the Student, like other kindergarten students, had a somewhat good year academically, yet the dysregulation was becoming an issue. Early in first-grade things began to get more turbulent, which in turn caused the Mother to become more vigilant. After emailing the teacher, the guidance counselor and the social worker and after being told the Student was progressing, the Mother initiated a series of private evaluations. By December 2016, of first grade, the mother remaining vigilant then continued to collect relevant data, which, when provided to the District, was ignored. Despite being pushed aside, the Mother continued her due diligence, which untimely uncovered the otherwise hidden vision impairment. Thereafter as the pieces came together about the extent and scope of the unseen impairments, the Parents began to press for services. Following *G.L*. and *SEPTA*, the December 2014 date, in this context, clearly December 2014 is not the KOSHK date. Rather the December 2014 evaluation is the first point in time when the Parents should have initiated and did initiate their reasonable due diligence search. Therefore, for all the above reasons, I now find that October 10, 2018, is the KOSHK date; accordingly, the Parents had until October of 2020, to file the instant action. Having filed the action within two years of the KOSH date, if proven the Student is entitled to appropriate relief for each year, the District fell short. Accordingly, applying this analysis, I will now turn to an analysis of all year-by-year claims.

SECTION 504 CHILD FIND AND FAPE CLAIMS

First, Section 504 places the affirmative duty on the District, not the Parents, to locate, identify, evaluate and educate the Student. 34 CFR §§104.30-104.36. After distilling the regulations and the case law, I now

find that to establish a child find violation; the Parents must prove the staff and/or the Parents had a reasonable suspicion to suspect the Student was a person with a disability or regarded the Student as a person with a disability. Once that suspicion arose, the Parents or the staff could have asked for an evaluation. The Parents did ask and the District on two occasions did nothing. Thereafter, the District had an affirmative obligation to complete an individualized evaluation and/or assessment of the Student in a reasonable period of time. An individualized assessment includes a review of the existing data and, if needed, the collection of additional data to either rule in or rule out if a student has an impairment that substantially limits a major life function. In this particular instance, for all of the following reasons, I now find, based on these particular facts, a reasonable suspicion existed long before third grade. At the same time, I now find the delay in evaluating the Student was unreasonable. Finally, I now find that while the IDEA evaluation was otherwise appropriate for IDEA purposes, the District, once of notice of the numerous non-IDEA impairments, the District failed to conduct a second assessment applying the applicable Section 504 eligibility standards.[17]

Furthermore, based upon the totality of the circumstances in reviewing the internal email communications between the teachers, the principal, the social worker, [redacted] and the Mother I now find the record is preponderant that the first-grade teacher either directly or indirectly influenced the other "team" members not "… to open ourselves up to [mental health] services such as this." This direct or indirect influence

[17] *Dear Colleague Letter*, 58 IDELR 79 (OCR 2012), and *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015) (Question 33. A student has a disability referenced in the IDEA, but does not require special education services. Is such a student eligible for services under Section 504? The student may be eligible for services under Section 504. The school district must determine whether the student has an impairment which substantially limits his or her ability to learn or another major life activity and, individualized determination of the child's educational needs for regular or special education or related aids or services. For example, such a student may receive adjustments in the regular classroom.).

directly interfered with the other staff members, child find obligations child find obligation. The evidence is preponderant that once the first-grade teacher raised the concern about the "pushy" mother, the social worker, who suggested an evaluation backed off. While the specifics are unclear what other internal communications exist, the record is, however, abundantly clear that the first-grade teacher and the guidance counselor guided the team away from the individualized assessment path. In making this decision, they also steered the Student down a different difficult path.

Unfortunately, while traveling that path, the Student first stumbled over the completing homework dysregulation hurdle. The dysregulation stumbles then contributed to a pattern of extreme meltdowns, which in turn led to the emerging peer-to-peer social interaction troubles. The record is clear, due to an awkward communication style and smoldering dysregulation, the students on the bus no longer wanted to interact with the Student. That awkward style allowed others to make fun of the Student's race. This consistent dysregulation and pattern of negative teacher and peer social interactions overtaxed [redacted] and emerging self-regulation mitigating capabilities. This death by a thousand cuts then lead the Student to be hospitalized, and otherwise isolated, away from home for 20 days. Despite the introduction of additional mitigating measures like in-home counseling and behavioral supports, the Student was not able to find a different path back to consistent self-regulation. Throughout the five year journey, the team either knew or should have suspected that each year the homework problems, the meltdowns and the in-home behavioral health supports, which in the beginning were dimly light warning signals, would soon turn into the flashing glowing warning signs of a suspected impairment. For some unknown reason, maybe the first-grade teacher influence over the team or the teams, or maybe because of an implicit basis about mental health supports in

schools, the decision to not refer and complete an individualized assessment, in this particular instance, violated the District's Section 504 child find obligations. The team members either refused to see or looked the other way, as the homework, [redacted] and the school-wide behavioral expectations became daily triggers for dysregulation, anxiety and depression. The constant dysregulation further exacerbated the Student's underlying behavioral and mental health impairments. Granted, while the staff did not see the meltdowns, they did see a [redacted] youngster struggle to complete work that should have been easy. The team would not tell a child with nocturnal epilepsy; they were not person with epilepsy and could not go to the nurse in school because they did not see the Student have a night time seizure. The evidence is preponderant that no one on the team ever considered if the Student's high cognitive ability and self-taught, yet undeveloped self-regulation strategies were acting as mitigating strategies within the meaning of Section 504. The team either erred in not making the referral or justified their implicit bias by relying on the IDEA eligibility standards and the Student's academic grades to justify their actions and or inactions. Granted, the IDEA evaluation, for IDEA purposes, was otherwise appropriate; however, for this Student, with this constellation of impairments, the team should have suspected and completed an in-depth Section 504 assessment. For whatever reason, the team lost sight of the vastly different Section 504 eligibility standards. At the same time, equally telling, yet unexplained, is how the team quickly granted Section 504 eligibility based on the physical disability like a vision impairment. I find it peculiar that nowhere in the extrinsic or intrinsic evidence, anyone every commented on how the vision problems substantially limited a major life function, yet the Student was found eligible. The Student's high academic performance, the proxy used to justify the lack of any other impairments, remained constant, prior to and after the vision evaluation, more likely than not, [redacted]. Even

though the District offered and the Parents agreed to the IEE, the IEE examiner, based upon the IDEA referral question, like the other District evaluators completed a typical IDEA eligibility evaluation. Once completed, like the other District evaluators, she determined the Student was not IDEA eligible. While not part of the District team, the District team, limited the scope of the evaluation to a determination of IDEA and not Section 504 eligibility. This error compounded and affirmed the District's engrained predetermination. Granted, while the IEE examiner did rule out the impairments of autism, anxiety and emotional difficulties as IDEA disabilities, the inverse is not, however, true. Here the IEE examiner failed to consider and rule out if the Student's autism, anxiety, or the remaining constellation of behavioral health and mental health impairments substantially impaired the Student's major life functions within the meaning of Section 504. Therefore for all of the above reasons, I now find in favor of the Parents and against the District. I will not turn to the Student's denial of a FAPE claim once the District did identify the Student as Section 504 eligible.

SECTION 504 FAPE

As discussed above, I now find that the Parents did not sit on their rights. Rather as part of their due diligence, from December 2014 through October 2018, the Parents obtained two or more different psychological evaluations, an OT assessment, a psychiatric assessment and a vision assessment. Each time once the assessment was completed, they give the private assessments to the District for review and reaction. Contrary to the regulations, as discussed above, the District never completed an individualized assessment of the Student's possible Section 504 impairments.[18] Pursuant to 22 Pa. Code Chapter

[18] See, *Stokes County (NC) Schs*., 117 LRP 2203 (OCR 09/23/16) (finding that the prior district's determination of IDEA ineligibility was "not dispositive that the Student did not have a disability for purposes of a Section 504 evaluation."); *Valley Oaks (CA) Charter Sch*., 115 LRP 52093 (OCR 06/29/15) (a charter school erred when it failed to evaluate the student after the father provided medical documentation about the student's

15.6(d) the District had "25 school days" to evaluate the information submitted by the parents. Once completed, the District should have sent a written response to the parents, either agreeing to or rejecting the Parents' request for services along with notice of their procedural safeguards. 22 PA. Code Chapter 15. § 15.8. Accordingly, I now find in failing to complete an individualized assessment, and by not utilize the applicable black letter law of assessment, the District denied the Student a Section 504 FAPE by under identifying the areas in need of an accommodation. I also find as a consequence of the continuous course of conduct of withholding procedural safeguards, violating child find and employing the wrong eligibility criteria, the District acted unreasonably. Therefore, to remedy these violations, the Student is now awarded compensatory education from first grade through the last day the Student attended school in the District. Finally, I now find that the procedural and substantive child find, evaluation/assessment and FAPE violations, described herein, rise to the level such that the Parents are awarded their out of pocket costs for the psychiatric evaluation, the neurological evaluation, the OT and the psychological evaluation. If this remedy is not provided, the Student's education would not otherwise be free.[19] With this analysis concluded, I will now move on to calculate the appropriate relief of compensatory education.

depression); *Chesterfield County (SC) Pub. Schs.*, 54 IDELR 299 (OCR 2009)(because the district received an independent psychological assessment strongly indicating the student might have a disability, it was required to promptly determine whether the student needed to be evaluated); and, *North Kansas City (MO) #74 Sch. Dist.,* 72 IDELR 166 (OCR 2017) (a student's hospitalization due to depression and anxiety, coupled with a parent's request for an IEP or 504 plan, should have prompted the district to conduct an evaluation).

[19] *Lauren G. v. West Chester Area Sch. Dist.*, 60 IDELR 4 (E.D. Pa. 2012) (ordering a Pennsylvania district to reimburse the parents of a high schooler with severe depression and obsessive-compulsive disorder for five weeks' worth of services at a therapeutic boarding school); and *Howard County Pub. Schs.*, 42 IDELR 161 (SEA MD 2004) (finding that reimbursement for a residential program, including costs arising from the provision of nonmedical care and room and board, is an available remedy for violations of Section 504).

THE COMPENSATORY EDUCATION CALCULATION

Regrettably, the record as it currently exists does not describe or quantify the compensatory education loss the Student suffered. Although the Student is entitled to compensatory education, the proffered evidence does not properly support a factual calculation of the size of or the magnitude of an appropriate award. Rather than an award to much, which is unfair to the District or too little, which would penalize the Student, I will Order the District to pay for an independent evaluation/assessment to determine the scope of the loss. This way, once the calculation is made, the Parties can either reach an agreement about the scope of the loss. In the alternative, either Party can file another action to resolve the new disagreement over the make-whole compensatory education plan Ordered herein.

Either way, I now find the Student would be made whole and the District would not otherwise be expected to do more than required by law.

To remedy the failure to educate the Student, the District is now **ORDERED** to pay for a comprehensive assessment, such that, to the extent practicable, the evaluator can set out the essential elements of a well-articulated compensatory education plan. A well-articulated compensatory education plan should quantify any and all losses the Student suffered as a result of the denial of a Section 504 FAPE. This make whole plan should include the type and amount of compensatory education services needed to place the Student in the same position, the Student would have occupied but for the LEA's multiple violations of Section 504. The above equitable relief is not an offset to any other legal relief that may or may not be available to the Student for any other violations of Section 504. Furthermore, as the District

did not produce any reasonable rectification factors, the award is not offset as the argument is otherwise waived.[20]

Once the loss is calculated, the Parents in their sole discretion are authorized to select otherwise qualified providers or regular education, special education, or related services as defined in the applicable IDEA or Section 504 regulation. Once selected, the District is **ORDERED** to pay the providers at the market rate where the services are provided, within a reasonable period of time. At the same time, the Parent is **ORDERED** to calculate their out of pocket costs associated with the psychiatric evaluation, the OT, the neurological evaluation, and the psychological evaluation and submit the same to the district for payment. Thereafter, once submitted, the District is **ORDERED** to pay all costs within a reasonable period of time.

SUMMARY AND CONCLUSIONS

For all of the reasons described herein, the child find and denial of a Section 504 FAPE violation require an appropriate relief. An otherwise appropriate **ORDER** follows along with the Notice of Appeal.

ORDER

And Now, this April 3, 2020, it is hereby **ORDERED** as follows:

1. The Student is awarded compensatory education, for child find and Section 504 violations beginning in kindergarten through the date the Parents made the unilateral placement in fourth grade

2. The District is **ORDERED** to pay the costs for an independent evaluator to calculate the Student's educational loss and, at the same time, prepare a comprehensive make whole plan of

[20] *Jackson-Johnson v. D.C.*, 2015 U .S. Dist. LEXIS 53909 *28 (D.D.C. Mar. 30, 2015) (hearing officer can order evaluation to develop the record and engage in the fact-specific inquiry essential to determine what, if any, compensatory education would be appropriate); *Phillips v. District of Columbia*, 736 F. Supp. 2d 240, 55 IDELR 101 (D.D.C. 2010) (action remanded to hearing officer with instructions to determine what, if any compensatory education would be appropriate to ameliorate the denial of a FAPE); *Henry v. District of Columbia*, 750 F. Supp. 2d 94 (D.D.C. 2010(same); 34 C.F.R.§300.508(d).

compensatory education. The essential elements of a well-articulated compensatory education plan should reflect the type, frequency, intensity and quantity of compensatory education services needed to place the Student in the same position the Student would have achieved but for the LEA's multiple violations of the IDEA.

3. Parents are free to select a properly licensed, certified, or credentialed individual to conduct the assessment of the Student and prepare the compensatory education plan.

4. Once the plan is completed, the District is **ORDERED** to pay the full costs to provide the Student with the comprehensive make whole compensatory education plan services.

5. Once the loss is calculated, the Parents in their sole discretion are authorized to select otherwise qualified providers or regular education, special education, or related services as defined in the applicable IDEA or Section 504 regulation to deliver the compensatory education services.

6. Once selected, the District is **ORDERED** to pay the compensatory education providers at the market rate where the services are provided within a reasonable period of time.

7. The Parent is directed to calculate their out of pocket costs associated with the psychiatric evaluation, the neurological evaluation, OT and the psychological evaluation; thereafter, once submitted, the District is **ORDERED** to pay all costs within a reasonable period of time.

8. I now find since the District did not submit any evidence establishing the reasonable rectification period, that affirmative defense is otherwise waived.

9. All other claims for appropriate relief or affirmative defenses are dismissed with prejudice.

s/ Charles W. Jelley, Esq. LL.M. Special Education Hearing Officer
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