

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

**Pennsylvania Special Education Hearing Officer  
Final Decision and Order**

**CLOSED HEARING**

**ODR File Numbers:**

24453-20-21 and  
24483-20-21

**Child's Name:**

[W.S.]

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

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**Hearing Officer:**

Charles W. Jelley Esq.

**Date of Decision:**

05/19/2021

## PROCEDURAL HISTORY

The student (hereafter Student)<sup>1</sup> resides in the School District (District) and attends a local elementary school. In the fall of 2020, after disagreements between the parties, about the Student's eligibility for special education services, the Parents requested an independent educational evaluation (I.E.E.). The District declined the Parents' request for an I.E.E. and issued prior written notice. On December 29, 2020, the District filed a timely due process complaint defending their evaluation, asserting that at all times it complied with the Individuals with Disabilities Education Act (IDEA)<sup>1</sup> and Section 504 of the Rehabilitation Act of 1973,<sup>2</sup> as well as the federal and state regulations implementing those statutes.

On January 12, 2021, Parents filed an answer to the District's Complaint and a counterclaim IDEA Complaint. In their counterclaim Complaint, Parents are seeking: (1) a private I.E.E. funded by the District; (2) a finding of an IDEA disability, (3) the development of an I.E.P., and (4) an award of compensatory education for the 2017-2018, 2018-2019, 2019-2020 and 2020-2021 school years up to and including such time as Student is provided with appropriate supports and services. The District denies all assertions in the Parents' counterclaim Complaint. By way of further answer, the District asserts that the 2017-2018, 2018-2019, and part of the 2019-2020 claims are time-barred by the applicable two-year statute of limitations.

The District's I.E.E. Complaint and the Parents' FAPE Complaint were combined for disposition before the same hearing officer. The party filing

<sup>1</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14).

<sup>2</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1-104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1-15.11 (Chapter 15).

the request for the hearing shouldered the burden of proof. Four virtual hearing sessions were conducted.<sup>3</sup> Following a thorough review of the intrinsic and extrinsic evidence presented for the reasons set forth below, all of the Parents' claims are denied.<sup>4</sup> An appropriate Order and Notice of Appeal follow.

### **ISSUES IN DISPUTE**

1. Did the District fail to identify the Student for either IDEA or Section 504 services for the 2017-18, 2018-19, 2019-20, and 2020-21 school years? If so, is the Student entitled to compensatory education as appropriate relief?
2. Did the District fail to properly evaluate and identify the Student as a person with a disability need for specially-designed instruction (S.D.I.) or accommodations? If yes, is the Student entitled to an independent educational evaluation (I.E.E.) at public expense? and,
3. Are any of the Student's claims barred by the statute of limitations provided for under IDEA and Section 504? (N.T. pp. 18-20).

### **FINDINGS OF FACT**

#### **THE STUDENT'S CURRENT STATUS**

1. Parents and Student are residents of the District. (SD-9 at 1).
2. Student is [redacted] years old and currently enrolled in [redacted] grade. (SD-11 1, SD-1, SD-9 p.1).
3. Student is currently identified as eligible under Section 504 based on "having behaviors consistent with children diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) (SD-11 at 2).

<sup>3</sup> 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 (SD-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to duplicative exhibits may not be to all, and references to Parents in the plural will typically be made where it appears that one was acting on behalf of both.

<sup>4</sup> After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that I can draw inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the issue(s) in dispute.

## **[REDACTED] GRADE**

### **2014-2015, 2015-2016 and 2016-17 SCHOOL YEARS**

4. Student attended [redacted] at a private school, and no concerns were noted or reported that year. (SD-8 at 1-3, SD-1 P.1).
5. Student attended [redacted] grade in the District, and no areas of concern were noted, and it appears that the Student met all grade-level expectations. (SD-8 at 4-6, N.T. pp. 27-28).
6. At the beginning of the 2015-2016 school year, the Parents hired a special education [teacher] to tutor the Student in the home. During the 2016-2017 school year, the tutor advised the Parents of her concerns. (N.T. p. 308). After working with the Student, the tutor suspected the Student had processing issues and ADHD. (N.T. p.310) The tutor told the Parents about her disability-related suspicions. (N.T. pp.302-311).

### **[REDACTED] 2017-2018 SCHOOL YEAR**

7. Student was in [redacted] grade for the 2017-18 school year and spent the day split between two teachers, one who taught Science, social studies, and math and another who taught language arts, reading, spelling, and writing. (N.T. p.395, N.T. pp. 420, 434).
8. Early in Student's [redacted] grade year, Parents expressed concerns about Student's Anxiety about going to School. (N.T. 37) During the 2017-2018 school year, Parents' first email to District staff regarding the Student's Anxiety was sent on September 5, 2017, to the teacher (N.T. 38, P-3 p. 1).
9. During [redacted] grade, the Student displayed emotionality and meltdowns at home due to anxiety. Parents advised District staff of these meltdowns. The meltdowns frequently occurred at bedtime and were observed two to three times per week. (N.T. 41-42, P-3 pp.4-5).
10. Parents advised the District when Student was having difficulties at home. (N.T. 47, P-3, pp.8-9).

11. During [redacted] grade, the Student received occupational therapy (O.T.) at the Parents' expense during this school year. The Occupational Therapist advised Parents that Student's needs were related to anxiety. The District was aware that the Student was receiving O.T. services. (N.T. p.38-39).
12. Student also received private counseling services to address anxiety during the [redacted] grade year. (N.T. p.52).
13. During [redacted] grade, the Student began to exhibit changes in school performance. The Student had difficulty completing multi-step problems. The Student displayed difficulty completing work. The Student became anxious and rushed through tests. (N.T. p.403). The Student was unable to complete more than one step at a time. (N.T. p.49, p.52). The Student did not hand in school papers requiring Parents to check in with District staff to ensure that papers were received. (N.T. 57, P-3, p.14). It was reported that the Student moved around and fidgeted in class. While the Student displayed frequent off-task behaviors, the Student's reading comprehension when compared to others was "extremely good at reading." (N.T. pp.428-430).
14. While the Parent expressed concerns about the Student having anxiety during the [redacted] grade school year, the Student's teachers explained that they did not see signs of anxiety in the classroom or that the Parents' reports impacted the Student during the school day. (P-3 p.1, P-3 p. 4, P-3 pp.5-6, N.T. pp. 396, 407, 413, N.T. pp. 422, 430, N.T. p.331, pp.361-62).
15. During the [redacted] grade school year, several regular education interventions were used to reduce anxiety and improve self-regulation. The regular interventions included a quiet work area, reminders to check work, reminders to take your time, chunking of assignments, giving assessments piece by piece, provide the Student a timer and included the Student attending guidance counselor directed self-esteem and coping group. (N.T. pp. 403-404, N.T. pp. 316, 318, 322, P-3 pp.15-16). No data was collected;

however, the teachers continued implementing the regular education interventions throughout the school year. (N.T. p. 180).

16. Student's teachers for this school year reported that the Student appeared to do well, got along well with classmates, and saw few concerns about Student. (N.T. pp. 395-96, 398, 416-17, N.T. pp. 420-21, p.425, pp.427-28, SD-4).
17. Student completed the 2017-18 [redacted] grade school year receiving an "Advanced" on the English Language Arts (E.L.A.) Pennsylvania System of School Assessment (PSSA) and "Proficient" on the mathematics PSSA. (SD-6 p.1 (2018 PSSA Results)). Using the District-wide rubric as an assessment measure, the Student was proficient in all characteristics of a successful learner and consistently met all grade-level academic expectations. (SD-8 pp. 7-8, SD-4 p.11-12 (noting average to above-average academic achievement in [redacted] grade)).
18. Parents regularly emailed District staff when they became concerned about Student's grades (N.T. 51, P-3, pp. 5, 9, 11, 13, 14).
19. The Parents had regular contact with Student's guidance counselor once or twice per month (N.T. 41, N.T. 54).
20. Parents emailed the counselor to advise her that they were seeking outside counseling services. Parents were having difficulty finding a counselor to work with Student that accepted their insurance. (N.T. 40, P-3, p.4).
21. In-School, the guidance counselor offered suggestions to Parents regarding supporting Student anxiety. The counselor recommended that the Parents allow the Student to participate in group counseling sessions offered by the counselor during the school day. (N.T. p.40, P-3 pp.3, 53). The guidance counselor also suggested, and the Parents agreed that the Student should participate in a different test anxiety group. (N.T. p.46, p.53 P-3 p.6-7).
22. The guidance counselor also discussed Student's circumstances with the private counselor. (N.T. 320). After speaking with the private counselor,

the guidance counselor suggested the Student be given more time to complete tasks to reduce anxiety. On or about that time in March 2018, the Parents requested, and the District agreed to conduct a Section 504 evaluation. (N.T. pp.323-325).

23. On April 24, 2018, Parents sent an email to the guidance counselor indicating that they wanted to "move forward with the 504 processes as much as we can at this point." (P-3, p.17).
24. In response to this email, a meeting was scheduled for the end of April 2018 or early May to discuss the Student's needs with teachers and the school psychologist. (P-3 p. 18, N.T. 66) At that time, Parents were asked to put the request for the 504 evaluation in writing. (N.T. p.67).
25. On May 28, 2018, Parents requested that the District "proceed with 504 testing to determine and assess classroom accommodations [redacted]" The email contained a list of requested assessments, including I.Q. testing, and occupational therapy (O.T.) evaluation, along with behavioral and social skills rating scales. (P-3, p.19, N.T. p.67).
26. On May 30, 2018, the guidance counselor responded to Parents requesting clarification regarding the type of testing being requested. The guidance counselor indicated that I.Q. testing would require a full special education evaluation and not a 504 evaluation. (P-3 pp.19-20) Parents responded with confirmation of their desire to pursue an evaluation for a 504 plan. (P-3 pp. 20-21). Parents received the Permission to Evaluate (P.T.E.) for the 504 testing over the summer of 2018. The Parents promptly signed and returned the document upon receipt. (N.T. p.73, SD-3). During the summer of 2018, Parents followed up with the District to determine the status of the 504 evaluation. In August of 2018, it was determined that the permission to evaluate and related documents were misplaced in the special education office. (N.T. p.72, P-4 pp.1-2).

## **THE [REDACTED] GRADE 2018-19 SCHOOL YEAR AND THE SECTION 504 EVALUATION**

27. Student was in [redacted] grade for the 2018-19 school year and [spent] half of the day in English Language Arts (E.L.A.) and half of the day in math and science class. (N.T. p.436, N.T. p.449).
28. Teachers reported that Student performed at or above grade level, got along well with peers, and saw few concerns. (N.T. p. 43, SD-4 12, N.T. pp. 450-51).
29. On October 20, 2018, the District completed a 504 Evaluation that found the Student was not eligible under Section 504. (SD-4 p.13, SD-5). The 504 Evaluation consisted of gather information from Parents, teachers and collected social and emotional information using the BASC-3. The Parents' ratings scored the Student in the Clinically Significant range for anxiety and the At-Risk level for Depression and Withdrawal; the Student's remaining six BASC-3 scores fell in the typical range. The Parents' Adaptive Scale scores ranked Adaptability at the Clinically Significant range while the remaining four scores fell in the typical or average range. The teacher's BASC-3 scores reported no social, emotional, or behavioral concerns. (SD- pp.4-5). The Evaluation Report notes that on October 18, 2018, the Student completed a BASC-3 Self Questionnaire; however, the scores are not reported. (SD-4 p.5 paragraph 1).<sup>5</sup>
30. The evaluation also included ratings on the Becker Youth Inventory-2 (BYI-2). The BYI-2 includes five self-experience rankings of depression, anxiety, disruptive behavior, and self-concept. The Student's scores were as follows based on [the] self-report: Depression – "Average," Anxiety, "Average,"

<sup>5</sup> Results on the validity scales indicate that Parents' and teachers' rating scales were within the "Acceptable" range in all areas and can be interpreted as a valid and reliable measure of Student's current level of social, emotional, and behavioral functioning. BASC-3 assessment results are reported in terms of T-scores and percentile ranks.



Disruptive Behavior, "Average," Self-Concept, "Lower than Average." The Student's scored "Average" on this assessment, indicating that the Student does not self-report any more characteristics of depression than peers. (SD-4 p.4 pp.5-6).

31. The Beck Self Concept Inventory (BSCI-Y) rankings explore self-perceptions, such as competence, potency, and positive self-worth. The Student's scores [were] in the *average* in this area, indicating the Student's acting out behaviors occurred not more often than other children. (SD-6). In particular, the Student score was lower than average in this area, indicating that the Student demonstrates a slightly lower self-concept than other children. (SD-4 p.6).

32. The O.T. evaluation included results from the Beery-Buktenica Developmental Test of Visual-Motor Integration (V.M.I.) and the Planned Writing assessment. The Student's overall score is above suggested expectations [redacted]. The Student has some difficulty with control and spacing of letters. This area was slightly below expectations of 95%. The report notes the Student reported occasional pain during handwriting when completing lengthy writing assignments. The overall evaluation indicates that the Student displays functional skills in sensory processing, fine motor tasks, handwriting, and visual-motor integration. The O.T. examiner suggested the following regular education interventions the Student should take periodic breaks and move around when completing lengthy writing assignments. The O.T. also noted that the Student could also use a keyboard/computer to complete writing assignments. Based on a global assessment, the O.T. concluded that no other school-based occupational therapy interventions are recommended. (SD-4 pp.8-10).

33. The evaluation report included a classroom observation. The observation noted in comparison to same-aged peers indicated that the Student could participate appropriately when working on individual assignments. Student

seemed attentive to teacher instruction and completed classroom assignments according to the teacher's directions. For the duration of the lesson, the Student remained in the assigned area, was able to wait [for Student's] turn, and remained on task. During group discussion and activities, the Student seemed attentive to the teacher's instruction and completed tasks according to the teacher's directions. Student seemed to have benefitted from the opportunity to check in with the teacher individually. (SD-4 pp.11-12). On November 11, 2018, the District provided the Parents with prior written notice of its decision not to identify the Student as a person with a disability. (SD-5).

**[REDACTED] GRADE 2019-2020 SCHOOL YEAR**

34. Student was in [redacted] grade in the 2019-20 school year and spent about half the day with one teacher who taught Math, Science, and social studies and the other half of the day with a teacher who taught language arts. (N.T. p. 473, N.T. pp. 503-504).
35. Student's teachers in [redacted] grade testified that the Student did well in School, got along with peers, and that they saw few concerns. (N.T. pp.474-75, N.T. p. 505).4
36. The Student's teacher testified that while the Parent explained that the Student had anxiety, they did not see signs of anxiety in the school setting. (N.T. p. 474, p.479, p.493).
37. During the course of [redacted] grade, the Student was provided regular education interventions, including alternative locations for assessments, checking in with the Student during the assessment, breaking the assessments into parts and retaking of tests. (N.T. p.475, p.479, p.481, p.494, P-5 pp.6-7).

**[REDACTED] GRADE 2020-2021 SCHOOL YEAR**

38. The Student was in [redacted] grade for the 2020-21 school year and attended part of the school year, at Parents' selection, in an entirely virtual

model and part of the year in full in-person instruction. (N.T. p.523, N.T. p.542, N.T. pp.196-197).

39. The District completed the IDEA evaluation report (E.R.) on November 20, 2020, which concluded that the Student was not eligible under IDEA but was eligible under Section 504. (SD-9 p.10, SD-10). This E.R. consisted of a review of information provided by Parents, the information provided by Student's teachers, classroom observations, testing observations, a review of state and local assessments, and a review of Student's report cards. (SD-9 pp.1-4, N.T. pp.557- 162).
40. Student's [redacted] grade teachers explained that while the Student is doing, the Student struggled during the virtual instruction and struggled with completing work. (N.T. p.523, p.525, p.526, N.T. p.542).
41. On March 18, 2020, the Parents requested, and the District agreed to an IDEA Evaluation on March 18, 2020 (SD-7, P-5 p.26). On the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) using standardized administration procedures, the Student earned an "Average" Standard Score of 100. (SD-9 p.5). On the Kaufman Test of Educational Achievement, Third Edition (KTEA-3), using standardized administration procedures, the Student earned an "Average" score on 17 of the subtest an "Above Average" score on one subtest. (SD-9 pp.6-7).<sup>6</sup> The Student's profile on the Behavior Assessment System for Children, Third Edition (BASC-3) completed by the Mother indicates significant problems with Hyperactivity, Anxiety, and Attention Problems. Based on the Mother's ratings, the Student also experiences problems with the following behaviors:  
Hyperactivity - interrupting others - not waiting for turn; Anxiety - worrying

<sup>6</sup> The KTEA-3 results demonstrate academic skills commensurate with same aged peers in the areas of Basic Reading (Decoding Composite = 107); Reading Composite = 103, Reading Fluency (Reading Fluency Composite = 108; Silent Reading Fluency = 102), Reading Comprehension (Reading Understanding Composite = 103, Reading Comprehension = 98; Reading Vocabulary = 109), Math Computation (Math Computation = 89), Math Problem-Solving (Math Concepts and Applications = 89), Written Expression (Written Language Composite = 114; Written Expression = 115), and Spelling (Spelling = 111) skills. (SD-9 p.9).

about what others think - worrying about tasks - making decisions, and Attention Problems - listening well - staying focused - missing deadlines. The Mother's BASC-3 pattern of responses also indicates several other content areas fall within the "At risk" range. The "At-risk" areas include anger control, emotional self-control, executive functioning, and resiliency. This profile indicates that the student tends to become irritable quickly and has difficulty maintaining self-control when faced with adversity. The overall profile indicates the Student can become easily upset, frustrated, and/or angered in response to environmental changes and sometimes has difficulty controlling and maintaining [Student's] behavior and mood. Next, the profile indicates that the Student may have difficulty overcoming stress and adversity within the school environment. (SD-9 pp.7-9).

42. Given this response pattern on the BASC-3 rating scale, the evaluation team concluded that the Student demonstrates behaviors consistent with the diagnosis of ADHD (T-Score = 71; Percentile = 97%). (SD-9 pp.9).
43. Although the Parent's responses indicate behavioral or mood difficulties, the overall degree of these difficulties does not fall within the clinically significant range. The Student's current testing and curriculum-based assessments (PSSA, M.A.P.) indicate that Students' academic skills are commensurate with the same age-grade peers. (SD-9).
44. After reviewing the existing data, the evaluation team concluded, Student did not meet the criteria of a student with an Emotional Disturbance or a Learning Disability.(SD-9).
45. However, the team concluded the Student's ADHD disorder did qualify as an IDEA disability under the definition of an "other health impairment." (O.H.I.). Although the team found the Student was disabled, the team also concluded the Student's disability did not require specially designed instruction. (SD-9).
46. Based on the Student's ADHD disability, the evaluation team recommended that the Student qualified for Section 504 FAPE accommodations. The

evaluation team suggested the following accommodations: (1) extended time to complete assessments/test chunking of lengthy assignments; (2) use an assignment notebook/student planner; (3) advanced notice about upcoming projects and reports; (4) present all assignments and due dates verbally and visually; (5) preferential seating to minimize distractions when participating in School or virtually. (SD-9 pp.9-10).

47. The Student completed the [redacted] grade report card grades fell in the A –B range. (SD-8 at 11). The Pennsylvania State System of Assessment (PSSA) testing was not administered in the spring of 2020. For the 2019-20 school year, the Student earned above-average scores on Measure of Academic Progress (M.A.P.) testing in reading and math. (SD-9 p.3).
48. The Student's participated in M.A.P. testing for reading and math three times a year. Results from [previous] grades on the M.A.P. assessments indicate that Student has consistently performed above District and grade-level norms in reading and math. (SD-9 p.3).
49. Following the E.R. meeting, on December 15, 2020, the District issued a 504 Plan that included various accommodations: (1) including small group testing; (2) extended time; (3) checking for understanding, preferential seating; (4) advance notice of major projects/assessments; (5) chunking of lengthy assignments; (6) prompting to record assignments; (6) verbal and visual presentation of assignments and due dates, using verbal and nonverbal means to gain Student's attention; (7) wait time to respond; (8) provision of completed class notes; (9) daily check-in to assist with organizing materials and assignments, and (10) weekly check-ins with the school counselor. (SD-11 pp. 2-3).

### **THE KNEW OR SHOULD HAVE KNOWN DATE**

50. At the beginning of the 2015-2016 school year, the Parents hired a special education teacher to tutor the Student in the home. After working with the Student for a few months [fall 2015], the tutor suspected the Student had

processing issues and suspected the Student was a person with Attention Deficit Hyperactivity Disorder (ADHD). (N.T. p.310). The tutor told the Parents about her suspicions that the Student displayed warning signs of a disability. (N.T. pp.302-311).

51. On or about October 20, 2018, after evaluating the Student, at the Parent's request, a team of knowledgeable individuals, including the Parents, concluded the Student was not a person with a disability within the meaning of Section 504. On November 11, 2018, the District provided the Parents with a prior written notice denying the Student's Section 504 eligibility. (SD-3, 4, 5).
52. The Parents then waited until January 21, 2021, to file the instant due process Complaint challenging the October 20, 2018 evaluation, November 11, 2018, prior written notice, and the November 2020 IDEA prior written notice denying IDEA eligibility. (SD-3, 4, 5, 10)

### **APPLICABLE LEGAL PRINCIPLES**

### **CREDIBILITY DETERMINATIONS**

Hearing officers, as fact-finders, are charged with the responsibility of making witness credibility determinations.<sup>7</sup> This hearing officer now finds the District's and the Parents' witnesses were credible, and their testimony was essentially consistent concerning 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, however, I found the testimony of some witnesses to be more responsive, convincing and persuasive than others. First, I now find that the regular education classroom teachers' testimonies

<sup>7</sup> 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); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

were clear, cogent, and convincing. The teachers persuasively described how they followed the applicable Section 504 and/or IDEA eligibility process. Second, as explained below, in calculating the knew or should have known date, I will also give added weight to the Parents' private special education tutor's testimony that in the fall of 2015 and 2016, she made the Parents aware of the Student's IDEA eligibility.

### **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 whose disabilities "adversely affect" the student's "educational performance" such that they require "specially-designed instruction." 20 U.S.C. §§1401-1415, 34 C.F.R. 300. §306.

On the other hand, Section 504 and Chapter 15 contain their own child find requirements that appear similar to but are much broader in scope than the IDEA's reach. 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.<sup>8</sup> Rather than list a defined set of disabilities, Section 504 requires districts to locate, evaluate and educate individuals whose "physical or mental impairments" "substantially limit" a "major life function."<sup>9</sup> While both statutes require individual assessments, the scope, type and eligibility

<sup>8</sup> Benjamin Logan (OH) Local Sch. Dist., 113 LRP 24739 (OCR 03/07/13) (in determining whether a student is eligible under Section 504 a district must consider whether a student's disability substantially limits any major life activities, not just learning), Oglethorpe County (GA) Sch. Dist., 69 IDELR 227 (OCR 2016), Hamilton County (FL) Sch. Dist., 59 IDELR 111 (OCR 2012).

<sup>9</sup> *Tustin (CA) Unified Sch. Dist.*, 64 IDELR 119 (OCR 2014) (district may have violated Section 504 when it only reviewed a student's passing grades).

requirements are distinct.<sup>10</sup> Section 504 eligibility process focuses on if the disability "substantially limits" a "major life function."<sup>11</sup>

### **IDEA FAPE MANDATE**

A central purpose of the IDEA (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them FAPE.<sup>12</sup> A FAPE is offered to a student when (a) the District complies with the procedural requirements outlined in the IDEA, and (b) the individual education program (I.E.P.) developed by a team of knowledgeable people is reasonably calculated to enable the student to receive meaningful educational benefits *Rowley*, 458 U.S. at 206-07. An IDEA FAPE includes specially-designed instruction and related services targeted to meet the student's unique needs, set out in conformity with a written I.E.P. document.<sup>13</sup> While school districts are required to comply with all IDEA procedures, not all procedural errors render an I.E.P. legally inadequate, inappropriate or insufficient under the IDEA.

### **IDEA EVALUATIONS AND ASSESSMENTS**

The IDEA sets forth three broad criteria that the local educational agency must meet when evaluating a child's eligibility for services under the IDEA. First, evaluators must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." Second, the district "[may] not use any single measure or assessment as the sole criterion" for determining either whether the child is a child with a disability or the educational needs of the child. *Id.* § 1414(b)(2)(B). And third, the District

<sup>10</sup> *Dear Colleague Letter*, 58 IDELR 79 (OCR 2012), *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015)<sup>9</sup>"to the maximum extent permitted by the terms of the ADA" districts should construe ADA definitions in favor of expansive coverage).

<sup>11</sup> *Kennett Consol. Sch. Dist.*, 118 LRP 27976 (SEA PA 05/10/18), 20 USC § 12102 (4)(E).

<sup>12</sup> 20 U.S.C. § 1400(d)(1)(A), *Schaffer v. Weast*, 546 U.S. 49, 51 (2005), *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-81, 200-01 (1982).

<sup>13</sup> 20 U.S.C. § 1401(9)(D), 20 U.S.C. § 1414(d), 34 C.F.R. § 300.17(d), 34 C.F.R. § 300.320.



must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C. § 1414(b)(2)(C). These intertwined subparts of the IDEA regulations impose workman-like criteria that school officials must meet when evaluating a child to determine if the child is IDEA eligible.

A child's initial evaluation or reevaluation consists of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments and classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. § 300.305(a)(1). Second, based on their review of the existing data, including input from the child's parents, the evaluation team must "identify what additional data, if any, are needed" to assess whether the child has a qualifying disability and, if so, "administer such assessments and other evaluation measures as may be needed." *Id.* § 300.305(a)(2)(c). Under the second step of the analysis, the District is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent." See *id.*, § 300.304(b). All assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." *Id.* § 300.304(c)(1). In combination, these well-established criteria have the effect of ensuring the evaluation either confirms or rules out the student's potential disabilities, identifies the student's individual eligibility, determines if the student needs special education tailored to the child's educational circumstances.<sup>14</sup>

<sup>14</sup> An IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas County School District RE-1*, U.S.\_\_\_\_\_, 137 S. Ct. 988, 999 (2017).

## **THE RELATIONSHIP BETWEEN THE EVALUATION, THE IEP AND FAPE**

Once the District completes a full individual evaluation, provided the evaluation team determines the Student is IDEA eligible, the focus then shifts to creating an I.E.P. that includes: a statement of the student's present levels of academic achievement and functional performance 34 C.F.R. § 300.320(a); establishes measurable annual goals designed to meet the student's needs resulting from the student's disability; that enable him or her to make progress in the general education curriculum 34 C.F.R. § 300.320(a)(2)(i); provides for the use of appropriate special-designed instructional services 34 C.F.R. 300.320(a)(4); and, continuous progress monitoring.<sup>15</sup> Annually after reviewing the student's continuous progress monitoring data towards mastery of the measurable I.E.P. goals, districts must adjust, modify and revise the I.E.P. goals and S.D.I.s to meet the student's then-current circumstances. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

### **IDEA STANDARDS FOR SUBSTANTIVE AND PROCEDURAL COMPLIANCE**

While individualization is the central consideration for purposes of the IDEA, districts are not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). The IDEA directs that an impartial hearing officer's decision must be made on substantive grounds. 20 U.S.C. § 1415(f)(3)(E)(i). If a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b)

<sup>15</sup> The Supreme Court has stated that the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (*Endrew F.*, 137 S. Ct. at 1000).

significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits 20 U.S.C. § 1415(f)(3)(e)(ii), 34 C.F.R. § 300.513(a)(2). On the other hand, a substantive violation occurs when a school district fails to offer a FAPE that is reasonably calculated to provide meaningful benefit and significant learning. *Rowley*, 458 U.S. at 203, 20 U.S.C. § 1415(f)(3)(e)(ii), 34 C.F.R. § 300.513(a)(2). A FAPE includes "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" *Rowley*, 458 U.S. at 203. A proper assessment of whether a proposed I.E.P. meets the above FAPE standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010).<sup>16</sup>

### **SECTION 504 FAPE REQUIREMENTS**

Section 504 requires that districts comply with specific procedures in the provision of services to students with disabilities. For example, Section 504 FAPE requires adherence to the following requirements regarding the provision of a FAPE (34 C.F.R. § 104.35), educational settings (34 C.F.R. 104.34 ), and procedural safeguards (34 C.F.R. 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 C.F.R. §104.33 (b)(1)(i). Section 504's FAPE standard supports and reinforces the nondiscrimination directive at 34 C.F.R. §104.4.<sup>17</sup>

<sup>16</sup> *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (applying the snapshot rule).

<sup>17</sup> See, e.g., *Hamilton County (FL) Sch. Dist.*, 59 IDELR 111 (OCR 2012), *Bristol-Warren (RI) 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).

"The most significant difference between the FAPE requirements of Section 504 and those of [IDEA] Part B is that Part B requires FAPE, consisting of special education and related services, implemented based on an I.E.P. 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 I.E.P.." *Letter to Williams*, 21 IDELR 73 (OSEP 1994). The requirement to provide FAPE under Section 504 includes students receiving services under the IDEA and different accommodations and related services according to a 504 Plan. *C.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41 (3d Cir. 2013).<sup>18</sup>

### **STATUTE OF LIMITATIONS AND CLAIM ACCRUAL**

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 governed by the IDEA two-year statute of limitations. 34 C.F.R. §300.507. In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015), the Third Circuit applying the federal discovery rule laid out the framework of how 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." Later, in *G.L.*, the Court emphasized that the IDEA's statute of limitations is

<sup>18</sup> Parents' Section 504 claims here repackages the IDEA child-find and FAPE claims as violations of § 504, for the same reason; therefore, in this instance the disposition of the IDEA claims for the most part resolved the Student's Section 504 FAPE claims. *K.D. by Theresa Dunn and Jonathan Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 256 (3d Cir. 2018) (Section 504 claims were a repackaging of those allegations underlying the IDEA claim).

a *filing* deadline that should not affect the "crafting of the remedy." *Id.* 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.<sup>19</sup>

### **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 IDEA and Section 504 violations.<sup>20</sup> With these fixed principles in mind, I will now turn to the District's affirmative statute of limitations defense.

### **ANALYSIS AND CONCLUSIONS OF LAW**

#### **THE TWO YEAR STATUTE OF LIMITATIONS**

The District argues applying the IDEA statute of limitations at 20 U.S.C. 1415(f)(3)(c), that the Student's 2017-2018, 2018-2019 and 2019-2020 child-find and FAPE claims are untimely. Relying on *E.P., by and through his parents, Allison H.-P and Michael P. v. Twin Valley School District*, No. 20-2078, 2021 WL 365878 (E.D. Pa., February 3, 2021), the Parents argue two interrelated points. First, they argue that the "knew or should have known" date is January 21, 2021. Second, they argue the Student is a person with a disability within the meaning of the IDEA; therefore, they contend the District should provide an IEP, not a Section 504 Agreement.

For all of the following reasons, I disagree with the Parents reading of §1415(f)(3)(c) certain claims are time-barred. Second, I disagree with the Parents suggested application of *E.P.* to these facts. Third, while I find the Student is a person with a disability within the meaning of Section 504, I

<sup>19</sup> *G.L.* citing with approval *Disabled in Action v. SEPTA*, 539 F.3d 199 (3d Cir. 2008) ("Ordinarily, a statute of limitations begins to run from the moment the potential plaintiff has a "complete and present cause of action." (citations omitted).

<sup>20</sup> *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015).

also find, on these facts, that the proposed December 2020 Section 504 Agreement provides a FAPE.

### **CERTAIN SCHOOL YEAR CLAIMS ARE TIME-BARRED**

In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 626 (3d Cir. 2015), the Court held that the federal discovery rule included in §1415(f)(3)(c) governs the accrual of IDEA and Section 504 FAPE claims. The *G.L.* Court explained that the federal discovery rule embodied in §1415(f)(3)(C) "begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have discovered the facts constituting the violation—whichever comes first." *G.L.* at 614, citing *Merck & Co.*, 559 U.S. at 653.<sup>21</sup>

Accordingly, applying *G.L.*, many of the Student's IDEA child-find and Section 504 FAPE claims filed in the January 21, 2021 Complaint are time-barred. Let me explain further.

"As a general matter, a cause of action 'accrues' when it has "come into existence as an enforceable claim or right." Black's Law Dictionary (9th ed. 2009). Stated another way, accrual is "the event whereby a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action." Ballentine's Law Dictionary (3rd ed. 1969). This is an objective feature of any extant claim: the question is whether all of its elements have come into existence such that an omniscient plaintiff could prove them in Court. At that point, the cause of action is 'complete' and has therefore accrued. [...] accrual has to do with the existence of a legally cognizable right to obtain a judicially sanctioned remedy, not the practical capacity to file a lawsuit."

\* \* \*

"Accrual, as we have said, occurs once events satisfying all the elements of a cause of action have taken place. At that point, the period prescribed by the applicable statute of limitations ordinarily begin to run - time begins to

<sup>21</sup> See also, *G.L.* citing with approval *Disabled in Action of Pennsylvania v. S.E. Pennsylvania Transp. Auth.*, 539 F.3d 199, 209 (3d Cir. 2008) (federal discovery rule determines accrual of Section 504 and American with Disabilities Act claims).

count against the plaintiff, such that if enough of it goes past he can no longer obtain relief. [...] There exist, however, various statutory and judge-made rules that operate to toll the running of the limitations period - that is, "to stop [its] running"; 'to abate' it, Black's Law Dictionary (9th ed.), *supra*, or '[t]o suspend or interrupt' it, Ballentine's Law Dictionary, *William A. Graham Co. v. Haughey*, 646 F.3d 138 146-147(3d Cir. 2011)(*Graham II* Court). Simply stated 'accrual' of a cause of action occurs at the moment in time when all of the essential components come into being as a matter of objective reality." *Id.* at 149-151 (some internal citations omitted).

First, as early as Kindergarten in 2015, the Student worked with a certified special education teacher as a home tutor. Second, the tutor testified credibly that as early as the fall of 2016, she suspected the Student was a person with a disability. Third, the tutor also testified credibly that as early as the fall of 2016, she made the Parents aware of her suspicion that the Student may be a person with a disability. Fourth, according to the Parents, the Student specific regular education interventions did not produce any tangible results. Yet, the record is clear that Parents failed to cogently explain why they waited two years, from 2016 to 2018, after multiple "storm warnings" to request a Section 504 evaluation.<sup>22</sup> Fifth and last, the Parents, once in possession of the sufficient facts – the Section 504 evaluation report- and actual notice of the District's refusal – prior written notice- to identify the Student, Parents failed to convincingly explain why they waited an additional two-plus years before filing the 2017-2019, 2018-2019, and

<sup>22</sup> "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." *Cetel v. Kirwan Financial Group, Inc.*, 460 F.3d 494, 507 (3d Cir. 2006), "Storm warnings," when heeded cause a reasonable person to act to protect their rights. *Id.* The District bears the burden of demonstrating such "storm warnings of depicting obvious culpable activity. Once put into play, the burden then shifts to Parents "to show that he exercised reasonable due diligence." *Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 400 (3d Cir. 2006).

2019-2020 claims on January 21, 2021. The above Conclusions of Law are based on the following analysis and application of the facts.

The Parents' back and forth email communications with the District, beginning in October 2016 through December 2020, are clear indicators of the Parents' ongoing due diligence inquiries. By October 2018-November 2018, the Parents' extended inquiries gathered up sufficient facts about the nature of the Student's alleged disability and the alleged District's inaction, *i.e.*, refusal to identify the Student. To the extent the Parents now argue the communications describe examples of the Student's Anxiety, problems with homework, and self-regulation; they also establish multiple "storm warnings, before and after October 20, 2018, of the alleged culpable conduct, *i.e.*, alleged violations and the growing disagreement over the District inaction in identifying the Student's IDEA or Section 504 eligibility. The record is preponderant that the District staff, with the Parents' knowledge, provided a series of regular education interventions. The record is also preponderant that the Parents at the time the interventions were provided and continuing to the present contend that the interventions were ineffective. Despite this firm belief, the Parents waited until March 2020, some 15 plus months, to request an IDEA evaluation.

I now find that upon receipt of the October 2018 evaluation and the November 2018 prior written notice denying eligibility, all the essential elements of an IDEA or Section 504 child-find claim came into existence. Parents either knew or should have known" in November 2018 of the "alleged violation" – failure to identify the Student and the Parents either "knew or should have known" of the "action" the forms the basis of the Complaint. The denial of eligibility was actionable and obvious, yet they waited.

This well-documented sequence of events now leads me to conclude that by November 2018, a reasonably prudent parent would have amassed sufficient



facts such that they could move forward and file a complaint to prove an alleged violation. Based on this record, I now find the Parents' delay in filing a January 2021 counterclaim Complaint was untimely and unreasonably delayed. Accordingly, applying 20 U.S.C. §1415(f)(3)(c), I now find the Student's 2017-2018 and 2018-2019 school year claims are time-barred. I also find applying 20 U.S.C. §1415(f)(3)(c) the time bar extends into the 2019-2020 school year until November 11, 2020. I will now analyze the Parents remaining Section 504 and IDEA-Section 504 child-find claims from October 21, 2020, to the present.

### **E.P. V. TWIN VALLEY SCHOOL DISTRICT IS NOT APPLICABLE**

The Parents' *E.P.* argument is misplaced. The facts in *E.P.* and this action are perfect opposites. Unlike here, the record in *E.P.* was preponderant that *E.P.* had a long history of multiple disabilities and that those disabilities substantially limited the Student's major life activities at home and in school. The record in *E.P.*, unlike here, included multiple instances when *E.P.*'s disability substantially limited the student's major life functions. For example, unlike here, *E.P.* underwent a 20-day inpatient hospitalization, received in-home behavioral health services and missed 49 school days. As a consequence of the disabilities, *E.P.* experienced a substantial limitation in completing school assignments on time.

The Student here has average to above-average classroom grades, no discipline incidents, does not receive in-home behavioral health services, attends school and maintained above-average scores on state and district-wide testing. Therefore, *E.P.* does not factually or legally support the Parents' IDEA eligibility argument. Accordingly, for all of the following reasons, I now find the Parents' *E.P.* and factual §1415(f)(3)(c) statute of limitation arguments miscalculate the accrual date and the reach of *E.P.*

## **THE PARENTS' CLAIMS AND THE DISTRICT' RESPONSE**

The Parents contend that the District failed to complete a full individual IDEA evaluation due to the ongoing health and safety restrictions. In particular, Parents argue the virtual observation was flawed. Next, they argue the team relied on one assessment measure - the M.A.P. - in making the IDEA eligibility determination. They also contend the psychologist should have completed additional emotional and executive functioning assessments. Finally, they argue that due to the health, safety, and social distancing limits, the Student's 5th-grade teachers should have provided input and/or completed additional emotional or executive functioning checklists. The District replies the evaluation was appropriate. For all of the following reasons, I agree with the District.

### **THE EVALUATION TEAM COMPLETED A COMPREHENSIVE IDEA EVALUATION IN ALL AREAS OF SUSPECTED DISABILITY**

In March 2020, the Governor issued a series of Executive Orders closing schools and directing all to shelter in place, on or about the same time the Parents requested an IDEA evaluation. While the IDEA evaluation was delayed until October 2020, the Parents failed to prove the delay was more than a non-prejudicial harmless procedural violation. The record lacks proof that the Student's FAPE rights or the Parents' participation rights in the child-find evaluation or IEP process were substantively violated. Accordingly, the procedural claim is denied.

The IDEA requires that each child undergo a full individual evaluation before providing special education and related services to a child with a disability. 34 C.F.R. § 300.301. The IDEA further mandates that public agencies must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the Parent that may assist in determining whether the child is a child with a disability and need of

S.D.I. 34 C.F.R. §300.8. 34 C.F.R. §300.304 (b). At times, and this is not one of those instances, the failure to utilize a variety of assessment tools in conducting an evaluation may rise to the level of a substantive denial of FAPE.

The evaluation here included Parent input, teacher input, teacher observations, a review of the existing Student's M.A.P. and P.S.S.A. testing, classroom grades, a virtual classroom observation, standardized norm-referenced ability testing, achievement testing and updated BASC-3 behavioral ratings completed by the Mother. I now find the District administered a variety of individualized assessments in all areas of suspected disability.

The individual assessment tools gauged the Student's ability, achievement, social, emotional and behavior skill sets. Across the board, the teachers commented the Student needed to improve assignment completion and submission and learn how to ask for teacher help. As for the missed assignments and the low E.L.A. grade, the Math teacher and the other teachers agreed that the Student's missed assignment rate was "nothing more than the average student" incompleteness rate. (SD-9 p.2).

The evaluation report included a detailed review of the Student's M.A.P. performance, taken three times a year, [for the last six grades]. The M.A.P. testing data indicates the Student consistently performed above District and state-level norms in Math and Reading. The statewide P.S.S.A. testing reports scores fall in the "Proficient" and "Advanced" ranges. For the most part, the Student's report card grades for the 2019-2020 school year fall in the "Average" range. Therefore, I now find the record is preponderant that the evaluation team used a variety of valid assessment tools, discussed homework completion, anxiety and behaviors in the home and made an informed decision about the Student's IDEA eligibility. After reviewing all of the evidence, I now find the District considered all relevant disability-related

circumstances in making the eligibility decision. While the data set leans towards finding an IDEA disability, as explained below, the same data set does not establish a "need for specially-designed instruction." Finally, contrary to the Parents' contention, I find that the evaluation team relied on a variety of factors in reaching the eligibility decision.

### **THE EVALUATION TEAM'S IDEA AND SECTION 504 ELIGIBILITY DECISIONS**

The teachers' observations did not report, and the virtual observation did not note signs of anxiety in the school setting. The Mother's BASC-3 scores do not establish warning signs that the Student's inattention, incomplete homework or anxiety, in the home required special education supports during the school day. Neither the Parents' nor the teachers' observations, in 2018 or 2020, established an (1) inability to learn that cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behavior or feelings under normal circumstances; (4) a general pervasive mood of unhappiness or depression; and, (5) a tendency to develop physical symptoms or fears associated with personal or school problems. The record is clear that the Student's "Average" I.Q. score, "Average" achievement testing, district-wide testing and classroom performance profile rules out the presence of a specific learning disability. The record is also preponderant that the Parents failed to prove the Student's BASC-3 rankings or the evaluation as a whole establishes the Student is a person with an emotional disturbance. 34 C.F.R. §300.09.

The Mother's October 2020 response pattern on the BASC-3 notes that the Student demonstrates behaviors consistent with the diagnosis of A.D.H.D. (T-Score = 71; Percentile = 97%). Factoring in the other BASC-3 scales within the "At-risk" range indicating elevated behavioral or mood difficulties in the

home environment, the evaluation team, concluded Student met the IDEA disability criteria as a person with an "other health impairment" (O.H.I.).

Although the team concluded the Student is a person with an O.H.I. disability, the team, after reviewing the existing data, also concluded that, at this time, the O.H.I. does not rise to the level that the Student "needs" specially-designed instruction.<sup>23</sup> Parents counter the team's conclusion contending that the District failed to administer additional behavioral scales or assess executive functioning. The Parents' argument impermissible combines two separate and distinct elements of the IDEA's eligibility - the presence of a disability vs. "need for specially-designed instruction" criteria into one eligibility factor. This reading is inconsistent with the plain text of the IDEA.

IDEA eligibility is a three-step process. First, IDEA requires the evaluation team to decide if the Student has one or more of the IDEA recognized disabilities. Included in that decision-making, the team determines if the IDEA disability "adversely affects the Student's educational performance?" If these two intertwined eligibility factors are present, the team moves on to determine if, as a consequence of the IDEA disability, the Student "needs specially designed instruction." 34 CFR § 300.306. For all of the following reasons, when the team moved to the third prong, the team found, and I agree, the Student, at this time, does not need "specially-designed instruction."

First, contrary to the Parents' suggestions, executive functioning is not a standalone IDEA disability. Accordingly, given the variety of assessments

<sup>23</sup> The "need for specially designed instruction" determination answers the question if as a result of the IDEA disability the Student requires any adaptations of or to the "content, methodology, or delivery of instruction" to access the general curriculum and/or meet state standards. 34 CFR §300.306. *See also*, Zirkel, P. (2018), *An adjudicative checklist for child find and eligibility under the IDEA*, West's Education Law Reporter, 357, 30-31, *Dear Colleague Letter*, 61 IDELR 172 (OSERS 2013), *Letter to Delisle*, 62 IDELR 240 (OSEP 2013), *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010), *Letter to Sawyer*, 30 IDELR 540 (OSEP 1998), *Letter to Ulissi*, 18 IDELR 683 (OSEP 1992).

used here, which included sub-measures of executive functioning, I now find, the lack of a standalone assessment of executive functioning, in and of itself, is not *per se* prejudicial or otherwise inappropriate.

Second, even if administered, the argued for assessments would not provide the team with the required data to determine if the Student "needs specially-designed instruction" due to the O.H.I. The Parents argued for assessment tools, if administered, would determine a factor already assessed in the Student's favor, *i.e.*, the Student has an IDEA disability that "adversely affects educational performance." Once the disability eligibility decision was made, additional data about the presence of a disability was unnecessary, and further inquiry would be duplicative. Stated another way, repeating assessments that determine the presence of an IDEA disability does not establish a "need for specially-designed instruction."

Third, the assessment data is clear that the Student, at this time, does not "need specially-designed instruction." The evaluation team reviewed the Student's level of performance compared to age/grade-based standards and scores (*i.e.*, the discrepancy from expectations); all of the individual assessment scores fell in the "Average" range. The evaluation team relying on the Student's performance on age/grade-based classroom standards, like the M.A.P. grade level scores and P.S.S.A., statewide rankings at the "Advanced" or "Proficient" level concluded the Student profile as a whole does not indicate a "need for specially-designed instruction." While the Student's latest homework and anxiety struggles are troubling, the record is preponderant that the regular educators are aware, regular education interventions are in place to address the struggles. Moreover, as discussed below, in December 2020, the District offered to provide multiple Section 504 accommodations that would allow the Student access to and benefit from participation in the regular education curriculum. Accordingly, I now find in favor of the District and against the Parents. While not eligible for

IDEA services, the District found the Student eligible for Section 504 services. I will now shift focus to determine if the December 2020 Section 504 Agreement offers a FAPE.

### **THE SECTION 504 PLAN PROVIDES FOR ACCESS, PARTICIPATION AND BENEFITS**

Under both the IDEA and Section 504, a school district must "identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *D.K.*, 696 F.3d at 249. This standard requires that districts identify students "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." *Id.* at 250. In this instance, I now find, under these circumstances, the District at all times relevant acted reasonably in completing all assessments and offering a FAPE. For all the reasons described above and below, any delay in evaluating the Student was a harmless non-prejudicial procedural error.

The December 2020 Section 504 plan includes fourteen or more personalized accommodations. This extensive cluster of individualized accommodations targets the Student's disability-related needs to plan, organize, and complete assignments on time. At the same time, the Section 504 accommodations offer an opportunity to improve self-advocacy skills. When the record is viewed as a whole, the proposed accommodations offer the Student access to the general education curriculum, a commensurate opportunity to participate and an equally effective opportunity to benefit from participation in regular education. Accordingly, the Parents' Section 504 denial of FAPE claim is denied.

## ORDER

**And now**, the 18<sup>th</sup> day of May 2021, in favor of the District against the Parents.

1. The record is preponderant that the District completed a comprehensive, full and otherwise appropriate evaluation in all areas of suspected disability.
2. After reviewing the record, I now find the Parents have failed to muster sufficient proof that the Student is IDEA eligible.
3. The record is clear that the Parents either knew or should have known by November 11, 2018, that they could file a due process complaint. The record is clear that the Parents' filed their due process complaint on January 21, 2021; therefore, any IDEA or Section 504 claims that accrued in the 2017-2018 school year and continued through the 2018-2019 school year until November 11, 2020, are time-barred.
4. Finally, I find the record is preponderant the District's December 2020 offer of a Section 504 Agreement is otherwise appropriate.
5. All other claims and affirmative defenses are dismissed with prejudice.

*Charles W. Jelley, Esq.*

Hearing Officer

ODR FILE # 24453-20-21 and

ODR FILE #24483-2021

May 05/19/2021