

## **Pennsylvania Special Education Hearing Officer**

### **Final Decision and Order**

#### **OPEN HEARING**

#### **ODR File Number:**

23695-19-20

#### **Child's Name:**

X. V.

#### **Date of Birth:**

[redacted]

#### **Parent:**

[redacted]

#### *Counsel for Parent*

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#### **Local Education Agency:**

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#### **Hearing Officer:**

James Gerl, CHO

#### **Date of Decision:**

March 2, 2021

## **BACKGROUND**

The parent filed a due process complaint alleging that the school district denied a free and appropriate public education to the student throughout the time the student was enrolled in the school district, specifically alleging bullying and failure to address behaviors and pain issues. The complaint also alleged an evaluation violation, denial of meaningful participation and disability discrimination against the student in violation of Section 504 and the Americans With Disabilities Act. The school district raised a defense asserting that the statute of limitations prevents some of the parent's claims. I find that the statute of limitations prevents claims asserted by the parent that occurred before May 8, 2018. I find that the parent has proven that the school district denied a free and appropriate public education to the student by failing to address the effects of bullying upon the student. I find in favor of the school district on all other issues.

## **PROCEDURAL HISTORY**

This hearing required two separate virtual sessions. Although the parties did an excellent job of stipulating to over 40 facts, counsel failed to efficiently use their time to present testimony. One hearing session should have been plenty for the amount of testimony relevant to issues in this case.

Nine witnesses testified at the hearing. Parent exhibits P-1 through P-19 and parent exhibits P-21 through P-24 were admitted into evidence. (There is no P-20.) School district Exhibits S-1 through S-14 were admitted into evidence.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. All arguments

submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

### **ISSUES PRESENTED**

The parent's posthearing brief presented argument on an issue related to IEP implementation that was not in the complaint or the list of issues agreed to by counsel prior to the hearing. Said issue was not considered because it was not properly before the hearing officer and the school district had no opportunity to present evidence on the issue. IDEA § 615(f)(3)(B); 34 C.F.R. § 300.511(d). The due process complaint and the response thereto raised the following issues:

1. Whether the school district has proven that the statute of limitations bars some of the parent's claims?
2. Whether the parent has proven that the school district denied a free and appropriate public education to the student by failing to address the effects of bullying upon the student?

3. Whether the school district otherwise denied a free and appropriate public education to the student?

4. Whether the school district violated the evaluation or Child Find provisions of IDEA by failing to timely evaluate the student?

5. Whether the school district denied the parent meaningful participation in the student's education?

6. Whether the school district discriminated against the student in violation of Section 504 or the Americans With Disabilities Act?

### **FINDINGS OF FACT**

Based upon the parties' stipulations of fact, as agreed to by counsel before the hearing, I make the following findings of fact.

1. The student is [redacted], resides within the school district and has been enrolled in the school district since September 2013.

2. The student is [visually impaired] and has been diagnosed with Perthes Disease and asthma.

3. The district nursing records reflect that the student had at least 148 nurse visits. From January 2018 to June 2018, 62 visits to the nurse were to use the restroom, as permitted by the student's 504 plan, because of physical restraints and restrictions with the student's [mobility device] and physical restrictions. Fifty-three visits were described as pain/tenderness. The other visits were for various other issues.

4. During the 2014 – 2015 school year, the student was in second grade. The teachers noted that the student had difficulty focusing on assignments and difficulties with transitions between tasks. The student's

grades for the school year included development toward proficiency and proficiency evident at this time.

5. In third grade, it was noted that the student's math grades reflect that development towards proficiency for the entire year. The student scored below basic on the PSSA for math. On PSSA English Language Arts, the student scored basic. Under social skills and work habits, teachers noted that the student would be distracted by peers.

6. During the 2016 – 2017 school year, the student was in fourth grade. The student's reading level was below grade level all year. The student's guided reading level at the end of the year was equal to students in the first and second marking period of 4th grade and continued to score below basic for math and basic for English Language Arts on the PSSA. The student is listed as having been absent ten days during the school year, nine of which were excused.

7. During the 2017 – 2018 school year, the student was in fifth grade. The student's teachers noted that the student was distracted by peers, did not display self-control, and responded inappropriately when corrected. Math scores on the PSSA were below basic throughout the year. The student remained below grade level for reading; however, the student did progress from guided reading Level 2 to Level S by the end of the year. The math teacher noted that the student has difficulty determining information in word problems, has difficulty recalling previously taught processes and should practice basic multiplication. Concerning social skills, the teachers noted that the student responds inappropriately when corrected, asks for clarification when needed, does not display self-discipline, is distracted by peers and encourages peers.

8. On November 28, 2017, the student underwent surgery for Perthes Disease. The student was approved to return to school on January

22, 2018. Following the surgery, the student required the use of a [mobility device].

9. Records listed the student as having been absent 48 days during the 2017 – 2018 school year. Teachers sent work home for the student to complete; however, due to medication, the student was not able to complete all of it. No homebound instruction or intervention services were provided.

10. On April 22, 2018, a Section 504 evaluation was conducted and a service agreement was created for the student. Present at the 504 meeting were the school nurse and the student’s mother. The Section 504 service agreement provided accommodations related to the student’s ability to physically navigate between classes due to the student’s medical condition and use of a [mobility device].

11. On May 23, 2018, the school district received a letter from a Children’s Hospital modifying the student’s medical needs to require a [different mobility device], rather than [the original mobility device], since the student was progressing with medical treatment.

12. On September 4, 2018, the school district received a letter from the Children’s Hospital listing restrictions for the student as no sports/ physical education/recess until further notice. On September 13, 2018, the school district received another letter from the Children’s Hospital providing that the student no longer needed to use [a mobility device].

13. During the 2018 – 2019 school year, the student received grades of B in science, art, family and consumer science and health/physical education. The student received C’s in reading, people and culture, and math. The student received F’s in two sections of exploratory language, as well as an F in technology education.

14. In the 2018 – 2019 STAR math assessment, the student scored below basic in math, which required “urgent intervention.”

15. In the 2019 – 2020 school year, the student started seventh grade. The student’s grades that year ranged from C’s, D’s and F’s in literacy and math. The student earned grades of F, F and B in social sciences. The student’s grades in science and related arts were F’s.

16. In the final 2019 – 2020 report card, the student had grades of F in art, exploratory languages and music. The student’s teacher for exploratory languages commented that the student “wastes time in class.” The student’s grade reports included grades of F in math and science.

17. The student received eight disciplinary infractions during the 2019 – 2020 school year. The disciplinary write-ups were for the following behaviors: inappropriate language, loitering, eating at a non-designated time or area, late arrival and failure to meet classroom expectations.

18. At the end of November 2019, during parent/teacher conferences, the student’s mother requested that the student be evaluated for special education.

19. Following the November 2019 parent/teacher conference, the student’s teacher for intervention and enrichment contacted the special education department at the request of the student’s mother. For the third quarter of the 2019 – 2020 school year, the student was assigned to a different teacher for intervention and enrichment, who was also the student’s teacher for math class.

20. The school district’s school psychologist contacted the student’s mother by phone to discuss the request for an evaluation. Due to the timing of the school year and the holiday schedule, the school psychologist asked whether the student’s mother would be agreeable to the Permission to

Evaluate form being sent home on the first day back at school in January 2020. The student's mother agreed to that arrangement.

21. On January 2, 2020, the Permission to Evaluate form was sent to the student's mother. The Permission to Evaluate form was signed by the student's mother on January 4, 2020 and received by the school district on January 7, 2020.

22. The school district's evaluation was completed on March 6, 2020. The evaluation includes a parent interview, cognitive and behavioral testing, rating scales, as well as observations.

23. During a telephone interview for parent input in December 2019, the student's mother explained the student's medical conditions from the prior year, as well as current academic concerns. The student's mother stated that the student is overwhelmed and stressed out. The student's mother stated that the student did well in the past but is not understanding the work now. The student's mother stated that the most important goals for the student is that the student be taught work that the student can understand and be able to complete it at grade level.

24. In the ratings, the parent stated that the student always has had a short attention span, becomes frustrated easily, spells poorly, has problems with reading and math, is slow start to complete tasks, has difficulty tracing and drawing, is restless/fidgety/squirmy, and procrastinates. The student's mother stated that the student is distractable, has difficulty understanding time and money, tires easily, fears criticism, has problems with memory, has poor balance and coordination/ is clumsy most of the time. The student's mother said that the student sometimes is anxious or worried, moody, resistant or refuses homework, is easily upset and aggravated very easily. The student's mother continued that the student needs schoolwork to be explained in better detail to understand it. The mother stated that when the

student understands schoolwork and is motivated, the student enjoys completing work. When nervous about tests, the student sometimes shuts down. The mother stated that the student gets upset and aggravated very easily.

25. Cognitive testing for the evaluation showed that the student's IQ fell in the below average range at the third percentile compared to peers nationwide. In the Woodcock – Johnson IV achievement testing, the student scored low in both reading and math. The written language score was low average.

26. In the Kaufman Assessment Battery for Children, the student earned a full composite index of 72, which is in the third percentile of scores and is below average.

27. The student's achievement testing included the Woodcock – Johnson Test of Achievement, which had results of low in reading, low in math and low in written language.

28. For behavior assessments, the BASC-3 was completed with rating scales completed by the parent and a teacher. Parent rating scales showed attention problems and executive functioning as clinically significant concerns. Teacher rating scales showed that the student was in the average range with the exception of study skills which was at the low end of at risk.

29. The Connors-3 was also completed by the parent and two teachers. Parent rating scales showed areas in the very elevated range for inattention, executive functioning and learning problems. However, the evaluator noted that the inconsistency index score indicated a possible inconsistent response style and that that should be taken into consideration when interpreting results. One teacher's rating scales had elevated concerns for executive functioning, as well as very elevated scales for defiance/

progression. A teacher's rating scales had high average concerns for learning problems and peer relations. The rating scales for a second teacher all fell within the average ranges.

30. Teacher observations and input from the student's 2019 – 2020 school year included that the student is talkative in class, has the ability but showed lack of effort.

31. The student's social studies teacher reported that the student is very talkative in class but does not put forth much effort. The student's science teacher observed that the student does not complete work and the student is averse to doing work. The student's English language arts teacher noted that the student struggles with following directions and putting forth any effort in school, and that the student does not make up missed work and is often overactive.

32. The teachers recommended that an attendance plan may be considered should the student's health issues become a factor when the student needs to miss instruction.

33. The student was found eligible for special education under the primary disability category of "other health impairment." The student's eligibility classification was determined because of the student's diagnosis of Perthes Disease that led to missed instruction time, as well as a lack of participation in classes and the student not being fully able to engage as a result of health factors.

34. On March 4, 2020, the student was given a one day out of school suspension to begin on March 5, 2020 and one day of alternative to suspension to be served on March 6, 2020. The student was scheduled to return to school the following Monday, March 9, 2020, for a meeting with a counselor.

35. Following the incident that led to the student's suspension, the parent called for [medical attention]. The student was medically treated on March 4, 2020 and was permitted to return to school on March 6, 2020.

36. On March 5, 2020, the school psychologist called the student's mother to discuss special education evaluation.

37. The student did not return to school in person following the out of school suspension. The parent put in a transfer request for the student to attend another middle school within the district on March 9, 2020, with a signed statement from the parent on March 10, 2020. The parent's letter stated that the request was made due to "extensive amount of trauma" the student had experienced. The school district was then closed beginning on March 12, 2020 because of COVID - 19.

38. The student remained in the student's current academic schedule with teachers from the current middle school until the transfer request was granted after May 8, 2020. The student was transferred to a second middle school in response to the parent's request.

39. On May 4, 2020, the school district contacted the student's mother to arrange an IEP meeting. The IEP team for the student met virtually on May 12, 2020.

40. On June 16, 2020, revisions were made to the student's IEP, without a meeting, by agreement of the district and the parent. The revisions to the IEP were made in response to the parent's request for transportation to the second middle school as a related service.

41. The student is currently assigned to the second middle school for the student's eighth grade school year.

Based upon the evidence in the record compiled at the due process hearing, I make the following findings of fact:<sup>1</sup>

42. The student is a happy child who enjoys video games. (NT 395 - 398)

43. [redacted]. (P-12; NT 108, 223, 301)

44. The student's mother expressed academic and behavioral concerns regarding the student to the student's teachers at parent/teacher conferences since at least the second or third grade school years. (2014-2015 and 2015-2016) (NT 388)

45. On November 15, 2017, a Children's Hospital sent the school district a letter requesting homebound instruction for the student from December 4, 2017 to January 12, 2018. On December 6, 2017, the student's mother visited the school and had a conversation with the school district's school nurse. The nurse explained the temporary medical excusal, or homebound, program that the district offered. During this conversation, the student's mother refused temporary medical excusal for the student. (P-2, P-11; NT 149, 154 - 160)

46. The student's mother actively participated in the development of the student's Section 504 service plan when the student was [using a mobility device] after surgery on April 11, 2018. The parent agreed to the creation of the plan and accommodations provided. The parent actively participated in a

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<sup>1</sup> (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT\_\_\_").

meeting to amend the student's 504 service plan after the Children's Hospital recommended that the student not participate in sports, recess or gym and agreed to the modification to the 504 service plan on June 8, 2018. The student's mother participated in and agreed to the termination of the student's Section 504 service plan on September 19, 2018. (S-2; S-4; S6; NT 149 – 150, 366 – 370)

47. The student's mother received a Notice of Procedural Safeguards on April 11, 2018 when the student's 504 service plan was first put into effect. (S2; NT 366 – 367)

48. The student was bullied by another student who was nearly twice the student's size. On March 18, 2019, the larger student hit the student. On November 19, 2019, the much larger student slapped the student. In both of those instances, the school nurse applied ice to the student as medical treatment. (P-11 at p. 9; NT 347-348, 108-111)

49. A special education facilitator for the school district witnessed an incident during the 2019 – 2020 school year during which the same larger bully [redacted]. Other staff also witnessed the incident. (NT 39 – 40, 46, 74 – 75)

50. On another occasion, the school principal called the student's mother because the same larger bully had threatened to "get" the student after school. (NT 347-348)

51. The school district maintained records of bullying of the student that were not provided to counsel for the parent. The assistant principal was able to pull up records on a computer within minutes that described an incident of bullying of the student. (NT 207 – 209)

52. Being targeted, threatened and physically assaulted by the bully had an emotional impact upon the student. As a result of the bullying by the much larger student, the student did not want to attend school. (NT 348)

53. The student's mother informed the student's teachers of her concerns regarding the bullying of the student by the much bigger student. (NT 279-280)

54. The student's mother raised concerns regarding the bullying of the student by a student who was twice the student's size with the school district's school psychologist when contacted regarding the special education evaluation for the student. (S-7)

55. The student's mother told the student's IEP team at the May 12, 2020 IEP team meeting that the student's mother was concerned about the bullying of the student by the larger child. (NT 399-403)

56. On March 4, 2020, an incident occurred while the student was in math class. The student was not following directions, running around the classroom and acting [inappropriately]. The math teacher instructed the student to calm down. The student demanded to know what the student was doing wrong, and the math teacher responded by listing the things that the student had been doing wrong. The student was embarrassed by the teacher's statement and became visibly angry. [Redacted]. (NT 274 – 286; S-14)

57. The student continued to become angry and was cursing. The student [acted aggressively towards the teacher]. [Redacted]. (S-14; NT 274 – 286)

58. The assistant principal then called for security and instructed them go "hands on," which meant that security should restrain the student and move the student to the office. [Redacted]. (P-23; NT 187 – 188, 217)

59. The school district provides a Crisis Prevention and Intervention training for certain staff. The crisis prevention and intervention training teaches that if there is an incident in a classroom, the correct procedure is to call the assistant principal. If the situation cannot be deescalated, then security is called. If necessary, security guards can restrain a student using the techniques taught in the crisis prevention and intervention training. Teachers are not supposed to restrain students. Not all staff are trained in crisis prevention and intervention. (NT 238, 445 – 447)

60. The student's math teacher was not trained in crisis prevention and intervention. The two security guards [redacted] were trained in crisis prevention and intervention. (NT 243, 445 – 447)

61. The student was taken to the vice principal's office [redacted] on March 4, 2020. The student was crying and very upset when the student arrived at the vice principal's office. At one point, the student fainted. (NT 117 – 118, 192 – 193)

62. The student called the student's mother and the student's mother soon arrived at the vice principal's office. [redacted] (P-22; P-23; NT 192, 354, 391)

63. The student was upset as a result of the incidents that occurred on March 4, 2020 while the student was at school. Thereafter, the student was afraid of school. (NT 348, 356 – 358)

64. Prior to the incident on March 4, 2020, the student and the math teacher had a very good relationship. The student was not a discipline problem at school. (NT 300 – 305; S-7; NT 72-73, 195-16-96)

65. An IEP was developed for the student on May 12, 2020. The IEP provides a number of accommodations and specially designed instruction, including certain items designed to address the student's pain as a result of

the student's disability: maintaining communication with medical providers and the student's home; considering environmental factors that may lead to increased pain levels; and daily monitoring sheet to track the student's pain levels. The IEP provides no counseling or any other related services. The IEP requires weekly consultation among regular education teachers and special education staff concerning the student's academic needs and specially designed instruction, as well as a monthly consultation with the special education facilitator to discuss the student's progress. The section of the IEP on present levels of performance includes a discussion of the student's Perthes Disease and hip surgery, as well as the academic impact of the pain that the student suffers. The section of the IEP on parental concerns mentions that the student's mother stated that the student had been bullied by a student twice the student's size. The IEP notes that the student had been found eligible under the category of "other health impairment." The IEP includes two English language arts goals, one math goal and one goal that addresses the student's off-task behaviors. The IEP places the student in the regular education classroom for 89% of the school day. The IEP does not include any related services, specially designed instruction or goals designed to address the effects of bullying upon the student. (S-10; NT 180)

66. At the May 12, 2020 IEP team meeting, the student's mother noted her concerns that the student had been bullied by the much larger student. (NT 399 – 403)

67. On March 10, 2020, the student's mother requested that the student be transferred to a different middle school in the district because of the actions that occurred on March 4, 2020. The school district did not immediately grant the transfer request because schools were closed at about that time due to the COVID-19 related school closures. Because of the COVID closures, the parent and the school district agreed that the transfer would not

take effect immediately in view of the fact that classes were not being conducted in person, but rather virtually. The transfer request was later granted and the parent's request for transportation to the middle school was granted and the student's IEP was amended to reflect the transportation as a related service. (P-17; S-12; NT 64 – 65, 120 – 121, 133, 134, 450 – 451)

68. The student's mother actively and meaningfully participated in all meetings regarding the student's education and all evaluations of the student conducted by the school district. (Record evidence as a whole)

69. The due process complaint for this case was filed on May 8, 2020. (S-9)

### **CONCLUSIONS OF LAW**

Based upon the arguments of counsel, all of the evidence in the record, as well as my own independent legal research, I make the following conclusions of law:

1. A due process complaint filed under the Individuals with Disabilities Education Act (hereafter sometimes referred to as "IDEA") 20 U.S.C. § 1400, et seq. must be filed within two years of the date that the parent or agency knew or should have known of the alleged action that forms the basis of the complaint. 34 C.F.R. § 300.511(e); 34 C.F.R. § 300.507(a)(2); 300.507(a)(2); IDEA § 615(b)(6) and (f)(3); GL by Mr. GL and Mrs. EL v. Ligonier Valley School District Authority, 802 F.3d 601, 66 IDELR 91 (3d Cir. 2015); DK by Steven K and Lisa K v. Abbingtion School District, 696 F. 3d 233, 59 IDELR 271 (3d Cir. 2012).

2. Although Section 504 of the Rehabilitation Act does not have its own statute of limitations, the Third Circuit has held that IDEA's two-year statute of limitations applies to claims made under Section 504. PP ex rel.

Michael P v. Westchester Area School District, 585 F. 3d 727, 53 IDELR 109 (3d Cir. 2009).

3. The U.S. Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program (hereafter sometimes referred to as "IEP") is reasonably calculated to enable the child to make appropriate progress in light of the child's unique circumstances. Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. \_\_\_\_, 137 S. Ct. 988, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F. 3d 248, 72 IDELR 261 (3d Cir. 2018).

4. In order to provide FAPE, an IEP must be reasonable, not ideal. KD by Dunn v. Downingtown Area School District, *supra*.

5. The appropriateness of an IEP in terms of whether it has provided a FAPE must be determined at the time that it was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; it requires an educational plan that provides the basic floor of educational opportunity. Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 281 (3d Cir. 2012); DS v. Bayonne Board of Education, 602 F. 3d 553, 54 IDELR 141 (3d Cir. 2010); Mary Courtney T. v. School District of Philadelphia, 575 F. 3d 235, 52 IDELR 211 (3d Cir. 2009).

6. For a procedural violation to be actionable under IDEA, the parent must show that the violation results in a loss of educational opportunity for

the student, seriously deprives the parents of participation rights, or causes a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, supra; IDEA 615(f)(3)(E); 34 C.F.R. § 300.513(a).

7. Bullying is defined as aggression within a relationship where the aggressor has more real or perceived power than the target and the aggression is repeated over time. Students with disabilities are disproportionately affected by bullying. Students who are targets of bullying behavior are more likely to experience lower academic achievement, higher truancy rates and other negative effects. Dear Colleague Letter, 61 IDELR 263 (OSERS 2013).

8. The failure of a school district to stop or address the bullying of a student with a disability may constitute a denial of FAPE. Shore Regional High School Board of Education v. PS, 381 F. 3d 194, 41 IDELR 234 (3d Cir. 2004).

9. Where a school district fails to address significant safety concerns of a student with a disability, the student may be denied a FAPE. See, Lillbask ex rel. Mauclaire v. State of Connecticut Dept. of Educ., 397 F. 3d 77, 42 IDELR 230 (2d Cir. 2005).

10. Where a parent proves that a student's education was adversely affected by bullying, FAPE has been denied. See, TK and SK ex rel. LK v. New York City Dept. of Educ., 779 F. Supp. 2d 289, 56 IDELR 228 (E.D. NY 2011), aff'd 810 F. 3d 869, 67 IDELR 1 (2d Cir. 2016).

11. An evaluation report must be presented to the parents of a student who requests an evaluation within 60 calendar days after the public agency receives written parental consent for the evaluation, not including summer vacation days. 22 PA Code § 14.123(b); 34 C.F.R. § 300.301(c).

12. IDEA requires that a parent of a student with a disability be afforded meaningful participation in the IEP process and in the education of

the student. 34 C.F.R. § 300.501(b) and (c); DS and AS ex rel. DS v. Bayonne Board of Education, *supra*; Fuhrmann ex rel. Fuhrmann v. East Hanover Board of Education, 993 F. 2d 1031, 19 IDELR 1065 (3d Cir. 1993), 34 C.F.R. § 300.501. See, Deal v. Hamilton Board of Education, 392 F. 3d 840, 42 IDELR 109 (6th Cir. 2004); J.D. v. Kanawha County Bd of Educ, 48 IDELR 159 (S.D. WV. 2007).

13. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of a disability be excluded from participation and/or be denied the benefits of or be subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 PA Code § 15.1. To establish a violation of Section 504, a parent must prove (1) that the student is disabled; (2) that the student was otherwise qualified to participate in school activities; (3) that the school district receives federal funds and (4) that the student was excluded from participation in or denied the benefits of or was subjected to discrimination at the school. Ridley School District v. MR and JR ex rel. ER, 608 F. 3d 260, 58 IDELR 271 (3d Cir. 2012).

14. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable relief. Forest Grove School District v. T.A., 557 U.S. 230, 52 IDELR 151 at n. 11 (2009); Ferren C. v. School District of Philadelphia, 612 F. 3d 712, 54 IDELR 247 (3d Cir. 2010); C.H. by Hayes v. Cape Henlopen School District, 606 F. 3d 59, 54 IDELR 212 (3d Cir. 2010); School District of Philadelphia v. Williams ex rel. L.H., 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Valley Area School District, 71 IDELR 87 (N.D. Penna. 2017). See, Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Board of Education Albuquerque Public Schools,

530 F. 3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 52 IDELR 239 (SEA WVa. 2009).

15. Compensatory education is one remedy that may be awarded to parents when a school district denies FAPE to a student with a disability. In general, courts, including the Third Circuit, have expressed a preference for a qualitative method of calculating compensatory education awards that address the educational harm done to the student by the denial of FAPE. G.L. by Mr. G.L. and Mrs. E.L. v. Ligonier Valley School District Authority, *supra*; Reid ex rel. Reid v. District of Columbia, *supra*. In Pennsylvania, in part because of the failure of special education lawyers to provide evidence regarding harm to the student caused by a denial of FAPE, courts and hearing officers have frequently utilized the more discredited quantitative or “cookie cutter” method that utilizes one hour or one day of compensatory education for each day of denial of FAPE. The cookie cutter method has been approved by courts, especially where there is an individualized analysis of the denial of FAPE to the particular child. See, Jana K. by Tim K. v. Annville Cleona School District, 39 F. Supp. 3d 584, 63 IDELR 278 (M.D. Penna. 2014).

16. The school district has proven that claims asserted in the due process complaint that occurred before May 8, 2018 are barred by the statute of limitations. All other claims in the complaint have been timely filed.

17. The parent has proven that the school district denied a free and appropriate public education to the student from May 12, 2020 to the present by failing to address the effects of bullying upon the student.

18. The parent has not proven that the student’s IEP is otherwise substantively inadequate. The student’s May 12, 2020 IEP appropriately addressed the student’s behaviors and accounted for the student’s pain issues. With the exception of its failure to appropriately address the effects of bullying upon the student, the May 12, 2020 IEP was reasonably calculated to provide

meaningful benefit to the student given the student's unique individual circumstances.

19. The parent has not proven that the school district's special education evaluation of the student was not timely completed.

20. The parent has not proven that the parent was denied meaningful participation by the school district in the student's education.

21. The 504 service plan created by the school district for the student was appropriate and the parent has not proven that the school district discriminated against the student on the basis of a disability in violation of Section 504 or the Americans With Disabilities Act.

## **DISCUSSION**

### **I. STATUTE OF LIMITATIONS**

#### **1. Whether the school district has proven that the statute of limitations bars some of the parent's claims?**

The school district contends that some of the allegations of the complaint are barred by the two-year statute of limitations under IDEA. The complaint in this matter was filed on May 8, 2020. The school district contends that claims prior to May 8, 2018 are barred by the statute of limitations and should not be considered. The parent's post-hearing brief asserts that the allegations in the complaint were timely filed because the parent was not aware that the student had behavioral and academic issues until the 2020 evaluation report.

The parent's contention, however, is refuted by the parent's own testimony. The student's mother testified that she was aware that the student had behavioral, attention, and academic issues since the 2nd or 3rd grade. In addition, the parent signed an Acknowledgement of Receipt of Procedural Safeguards, including an acknowledgement that she received the procedural safeguards in April of 2018 when the student began the student's Section 504 plan. Accordingly, it is concluded that the parent knew or reasonably should have known of the actions or inactions by the school district forming the basis for a potential due process complaint, and knew or reasonably should have known that the parent had a basis for a complaint at least by April 2018. The parent has not asserted that either of the applicable exceptions to the statute of limitations apply in this case. Accordingly, the allegations of the current due process complaint that allege actions or inactions by the school district prior to May 8, 2018 are time barred.

To the extent that the testimony of the parent conflicts with the testimony of the school district staff concerning this issue, it is concluded that the testimony of the parent is less credible and persuasive than the testimony of school district staff because of the demeanor of the witnesses, as well as the contradiction between the parent's testimony and the position taken by the parent in the parent's post-hearing brief.

It is concluded that the school district has established that all allegations in the due process complaint before May 8, 2018 are barred by the statute of limitations.

## **II. MERITS**

### **2. Whether the parent has proven that the school district denied a free and appropriate public education to**

**the student by failing to address the effects of bullying upon the student?**

The parent contends that the school district denied a free and appropriate public education to the student by permitting the student to be bullied and by failing to address the effects of the bullying. The school district contends that the student was not bullied, citing the testimony of the assistant principal, who was in charge of behavior incidents and who handled most of the discipline at the middle school. The assistant principal testified that the student was not bullied because the student was not constantly harassed. The school district also contends that it was not aware that the student was bullied.

School bullying is pervasive and the victims of bullying often suffer academically, behaviorally and psychologically. Dear Colleague Letter, 61 IDELR 263 (OSERS 2013); GAO Report on School Bullying, (GAO 2012), available at <http://www.gao.gov/assets/600/591202.pdf> . Students with disabilities are disproportionately affected by school bullying. Dear Colleague Letter, 61 IDELR 263 (OSERS 2013).

First, it is disturbing that the assistant principal in charge of discipline and behavior incidents does not understand the definition of bullying. A student need not be constantly harassed to have been bullied. Bullying is defined as aggression within a relationship where the aggressor has more real or perceived power than the target and the aggression is repeated over time. Dear Colleague Letter, 61 IDELR 263 (OSERS 2013). The student in this case clearly was a victim of bullying.

The student was bullied on numerous occasions by a [redacted] student more than twice the student's size. The highly aggressive behaviors by the much larger, more powerful student included [various aggressive incidents]

The incident in which the student was slammed into a locker by the much larger bully was witnessed by several staff members of the school district. The school principal was aware of the threat by the larger student to “get” the student after school and called the student’s mother to alert her of the threat. Thus, it is clear that the school district was aware that the student had been bullied on numerous occasions by a much larger student.

Moreover, the claim that school district was not aware of the bullying of the student is contradicted by the documentary evidence. The evaluation report by the school district’s school psychologist mentions that the student’s mother told the school psychologist of the student’s problems with the bully. The school nurse’s records reveal two other incidents involving the same larger bully, both of which required that ice be applied as medical treatment. The IEP notes that the student’s mother was concerned that the student was being bullied by a student twice the student’s size. Clearly, the school district was aware that the student was a victim of bullying.

There is no evidence in the record that the school district ever investigated the bullying of the student or disciplined the bully. There were vague references in the testimony of the special education director to the effect that one class was changed to separate the two students and to hypothetical discipline records which could be in the other’s student’s records, but no evidence of any investigation or discipline was entered into evidence.

The failure of the school district to properly investigate and respond to the bullying of the student is compounded further by the fact that the school district failed to provide a safe environment in which the student could learn. On March 4, 2020, a teacher became frustrated when the student was acting inappropriately during class. The school district had never provided its Crisis Prevention and Intervention training to this particular teacher. The result was

a “hands-on” restraint of a student by the teacher. It should be noted that there is a lot of conflicting testimony and information concerning the March 4, 2020 incident in the record in this case. Much of the evidence is not persuasive. Some of it consists of hearsay statements by students who were present that day but who did not testify in the hearing. Although such hearsay evidence is admissible in administrative hearings under IDEA, it is of very little persuasive value. There is insufficient evidence to conclude that the teacher intended anything improper by restraining the student. There is clear evidence, however, that the school district failed to properly train the teacher in the use of techniques for restraining students. This includes the failure to train the teacher in the district’s own preferred training, which it calls “Crisis Prevention and Intervention.” The failure to train a teacher who was working with a student with a disability led to an improper restraint of the student which further aggravated the school district’s previous action in not investigating or responding to the bullying of the student. It should be noted that the written statement by the teacher is more credible and persuasive than the testimony of school staff regarding the March 4, 2020 incident because of the demeanor of the witnesses and because of a critical contradiction, as pointed out in the parent’s post-hearing brief, between the testimony of the teacher and the testimony of the assistant principal concerning whether the assistant principal entered the classroom on the day of the incident.

Despite the school district’s knowledge of the bullying of the student, the IEP developed by the school district for the student fails to provide any supports, specially designed instruction, or related services designed to address the bullying and its effects upon the student. The IEP does not provide for counselling or any other measures designed to address the effects of the bullying upon the student. It is clear from the evidence in the record

that the student was bullied while at school and that the school district failed to take any appropriate action in the student's IEP to address the effects of the bullying. As a result, the student felt unsafe at school and developed a desire to not attend school.

It is clear that the unique individual circumstances of this student include the fact that the student had been bullied and the effects of the bullying upon the student. These effects were magnified by the school district's failure to properly train the teacher who inappropriately restrained the student on March 4, 2020. The failure of the school district to address the effects of the bullying and the March 4, 2020 incident in the student's IEP reveals that the May 12, 2020 IEP for the student was substantively inadequate because it was not reasonably calculated to confer meaningful educational benefit in view of the student's unique circumstances. The period of the denial of FAPE runs from the date of the IEP through the present.

In addition to the discussion above, an adverse inference against the school district must be taken with regard to this issue. The school district had documentation concerning at least one of the incidents of bullying of the student that it failed to provide to the parent in this case. IDEA includes a broad procedural safeguard that permits a parent to inspect and review all educational records concerning a student with a disability that are collected, maintained or used by the school district. 34 C.F.R. §§ 300.613, 300.501. Despite the procedural safeguard that a parent should be provided all records concerning a student, the school district failed to provide documents from its "sapphire" system. During testimony at the hearing, the assistant principal called up documentation regarding the bullying of the student concerning the March 18, 2019 incident in which the much larger student hit the student. The school district failed to disclose this document to the parent despite the fact

that the assistant principal was able to locate the document within a matter of just minutes while testifying. Because the school district had documents concerning the bullying of the student that it failed to provide to counsel for the parent despite the request by counsel for such documents, it is concluded that the contents of such documents would provide additional damning evidence concerning the extent and nature of the bullying of the student and the school district's failure to provide a free and appropriate public education to the student. An adverse inference that the school district denied FAPE to the student by failing to appropriately address the bullying of the student and its effects upon the student is hereby taken.

To the extent that the testimony of the school district staff was inconsistent with the testimony of the student's mother, the testimony of the student's mother is more credible and persuasive with regard to this issue because of the demeanor of the witnesses, as well as the contradictions between the testimony and argument by the school district and the documentary evidence as stated above. Accordingly, the parent has proven that the school district denied a free and appropriate public education to the student for the period of time from the date of the student's IEP, May 12, 2020, through the present by failing to provide an IEP that addressed the student's needs resulting from the bullying.

### **3. Whether the school district otherwise denied a free and appropriate public education to the student?**

The parent contends that the student was denied a free and appropriate public education throughout the student's time as a student in the school district. A number of claims for denial of FAPE are barred by the IDEA statute of limitations. (See previous discussion for the period of time before May 8, 2018.)

Concerning the relevant time period, the only allegations made by the parent concerning a substantive denial of FAPE beyond the bullying allegations involve an alleged failure to properly address behavioral issues of the student and an alleged failure to address the student's pain needs.

The record evidence does not support the parent's contention concerning behaviors. A review of the evidence reveals that the student did not have any serious behavior issues. The student was not a discipline problem. When evaluating the student for possible special education services, the school district school psychologist conducted two behavioral assessments of the student to further determine whether the student had any behavioral needs that were not being met.

During the time just prior to the evaluation report, the student was having some issues concerning off-task behaviors. The IEP developed for the student on May 12, 2020 by the school district does appropriately address the student's off-task behaviors by including a behavioral goal designed to address the off-task behaviors.

The parent contends that the failure by the school district to conduct a functional behavioral analysis of the student constitutes a denial of FAPE. IDEA only requires, however, that the school district appropriately address any behavioral issues. IDEA does not require that the student receive a functional behavioral analysis. IDEA § 614(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). Moreover, the parent's concerns about the behaviors of the student were likely unfounded; the inconsistency index score for the parent's rating scales indicated a possible inconsistent response style which raises doubts about the validity of the concerns.

In this case, the school district did appropriately address the student's off-task behaviors by including an IEP goal designed to address the behaviors. With respect to the behaviors of the student, the IEP developed by the school district appropriately addresses the student's behavior issue.

Concerning the student's pain issues, the IEP contains numerous accommodations or specially designed instruction designed to address any pain the student may have been experiencing. Among the items included in the IEP were the following: maintaining communication with medical providers and the student's home; considering environmental factors that may lead to increased pain levels; and daily monitoring sheet to track the student's pain levels. Clearly the IEP addressed the student's pain needs. The parent's contention is rejected.

The parent has not alleged any procedural violations with regard to the alleged denial of a free and appropriate public education.

To the extent that the testimony of the student's mother is inconsistent with the testimony of school district staff, the testimony of school district staff is more credible and persuasive with regard to this issue because of the demeanor of the witnesses, as well as the credibility factors discussed elsewhere in this decision.

Accordingly, it is concluded that the parent has not proven the student was denied a free and appropriate public education by the school district except as stated in the previous section with regard to the failure to address the effects of bullying upon the student.

**3. Whether the school district violated the evaluation or Child Find provisions of IDEA by failing to timely evaluate the student?**

The parent contends that the school district violated IDEA by failing to timely evaluate the student. The school district contends that the parent fully agreed to a brief extension of the time period to complete the evaluation of the student and the student's IEP.

The school district's school psychologist testified credibly and persuasively that the student's mother agreed to a brief extension of the evaluation and IEP process in December 2019. When discussing the evaluation and IEP process with the student's mother, the school psychologist asked the parent if she would agree to a brief extension of the deadlines for the evaluation process and the IEP because the holiday break was coming up soon.

The mother testified that she did not recall a conversation with the school psychologist. This testimony contradicted other testimony in which the mother stated that she had no other option but to agree to an extension. The student's mother's testimony in this regard is not credible or persuasive.

It is concluded that parent has not established that the school district violated IDEA because of the timing of the evaluation of the student.

Even assuming *arguendo* that the facts in the record constitute a procedural violation of the evaluation rules, however, it is clear that there is no actionable procedural violation in this case. The parent has shown no resulting harm to the student or any denial of meaningful participation in the

process. Accordingly, any procedural violation, if there were one, would clearly be harmless.

To the extent that the testimony of the student's mother is inconsistent with the testimony of school district staff regarding this issue, the testimony of school district staff is more credible and persuasive because of the demeanor of the witnesses, as well as the additional credibility factors discussed above.

The parent has not proven that the school district has violated the evaluation or Child Find rules of IDEA.

**5. Whether the school district denied the parent meaningful participation in the student's education?**

The parent contends that the school district denied the parent meaningful participation in the student's educational process. The primary contention of the parent in this regard is that the school district allegedly ignored the parent's request for homebound instruction.

The school district contends that when it received the letter from the Children's Hospital requesting homebound instruction for the student, the school district's school nurse met with the student's mother to discuss the matter. The nurse discussed the possibility of homebound instruction or temporary medical excusal with the parent. During this conversation, the student's mother refused a temporary medical excusal or homebound instruction. The student's mother made it clear that she wanted the student in school. The parent cannot refuse services and then complain that the school district unlawfully failed to provide the services. When working collaboratively

on the education of a child, both parents and school district staff must behave reasonably. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).

The student's mother testified that she had never refused homebound instruction or temporary medical excusal. However, on cross-examination, the student's mother's memory of the conversation was very poor. On the other hand, the testimony of the school nurse was supported by a contemporaneous school district record showing that the parent refused temporary medical excusal in a conversation at the school on December 6, 2017. It is concluded that the testimony of the school nurse is more credible and persuasive than the testimony of the parent with regard to this issue because of the demeanor of the witnesses, as well as the parent's poor memory and the contradiction between the parent's testimony and the contemporaneous school record.

In the parent's post-hearing brief, the parent asserts other allegations with regard to this issue. For example, the parent contends that the school district caused the parent to feel that her requests were invalid. There is no evidence in the record, however, that even remotely suggests that the school district was abusive or intimidating to the parent in any way. The record evidence reveals that the parent actively participated in the student's education. The student's mother frequently expressed concerns, had conferences with staff, and attended relevant meetings. Clearly the student's mother meaningfully and actively participated in all aspects of the student's education.

The parent has not proven that the school district denied the parent the right to meaningful participation in the student's education.

**6. Whether the school district discriminated against the student in violation of Section 504 or the Americans With Disabilities Act?**

The parent contends that the school district discriminated against the student in violation of Section 504 and the Americans With Disabilities Act. The school district contends that the student's 504 plan was appropriate and that the student was not discriminated against. The parent contends that she was not even aware of the student's 504 plan.

It should be noted that at least some of the parent's allegations are time barred. Because the initial 504 plan was created before May 8, 2018, it is outside the statute of limitations relevant to this case. Even assuming *arguendo*, however, that the complaint allegations pertaining to the initial Section 504 plan was timely filed, there is no evidence in the record to support that the school district discriminated against the student on the basis of disability. The student's 504 plan appropriately addressed the student's needs.

In the parent's post-hearing brief, the focus is primarily upon two areas. First, the parent contends that the student's 504 plan was inappropriately removed. Second, the parent contends that the student was discriminated against when the school district failed to provide homebound instruction to the student. The parent's contentions regarding homebound instruction were discussed in detail in the previous section of this decision. Such discussion is incorporated by reference herein.

Concerning the termination of the 504 plan, the student's mother actively participated in the meeting convened by the school district on September 19, 2018 during which it was decided that the plan would be

ended, and the parent agreed with the termination of the plan. The parent cannot agree to the termination of a 504 plan and then turn around and claim that the termination of the 504 plan was unlawful. When working collaboratively on the education of a child, both parents and school district staff must behave reasonably. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).

The parent's testimony is not as credible or persuasive as the testimony of the school district staff concerning this issue because of the demeanor of the witnesses, as well as the following inconsistencies: the testimony of the student's mother concerning not being aware of a 504 plan or there being no appropriate process to terminate the 504 plan is impaired by the contemporaneous school records and the documentary evidence in this case that show that the mother attended three meetings concerning the student's 504 plan and that the parent actively participated in the 504 meetings regarding the student and agreed to the initial 504 plan, as well as a later modification to it and the termination of the 504 plan on September 19, 2018.

It is concluded that the parent has not proven that the student was discriminated against on the basis of a disability in violation of Section 504 or the Americans With Disabilities Act.

### **III. RELIEF**

Although the majority of the allegations in the parent's complaint have not been proven, the parent did prove that the school district denied a free and appropriate public education to the student for the period from May 12, 2020 to the present by failing to develop an IEP for the student that appropriately addressed the effects of bullying upon the student. Given the

broad powers of hearing officers to order appropriate relief on a finding of a violation of the special education laws, the following relief is awarded.

The student's IEP shall be amended within 15 days of the date of this decision. At a minimum, the IEP must be changed to include counseling as a related service to help the student deal with the effects of bullying the student suffered at the hands a student twice the student's size. The IEP team for the student shall meet within 30 days of the date of this decision in order to consider whether additional supports, accommodations, or specially designed instruction should be included in the student's IEP to help the student deal with the effects of bullying.

In addition, compensatory education is awarded to the student. An award of "make whole" relief or "qualitative" compensatory education, as envisioned by the Third Court of Appeals in the GL case, is not possible in this case because neither party has submitted any evidence concerning the educational harm that the student may have suffered as a result of the denial of a free and appropriate public education. Although "cookie cutter" or quantitative awards of compensatory education are, and should be, frowned upon, it is the only approach that is available to the hearing officer based upon the evidentiary record compiled by the parties in this case.

Quantitative compensatory education awards generally award a full day or one hour of compensatory education for each day of denial of FAPE. In this case, an individualized analysis yield[s] a conclusion that the parent has proven only one of a large number of claims of denial of FAPE and other violations. Accordingly, the school district is ordered to provide compensatory education to the student as a result of the school district's denial of a free and appropriate public education to be calculated at a rate of one hour times the number of school days from May 12, 2020 to the present. Full days of

compensatory education would not be appropriate here because the IEP was otherwise substantively appropriate with the exception for its failure to address the effects of bullying upon the student.

The school district argues in its brief that compensatory education should not be awarded because no claim can be ripe in view of the school closures resulting from the COVID19 pandemic. This argument is rejected. It may well be true that this student will be entitled to additional compensatory covid services as a result of the mandatory school closures and subsequent virtual learning when the district resumes normal operations, but that is a separate question from whether the school district has complied with IDEA in the meantime. The deadly pandemic and related school closures have caused numerous difficulties for school districts, parents and students as well as everybody else. However, IDEA is a federal law that was not overruled or suspended during this trying time. Moreover, it is uncertain when the school district will resume normal operations. The school district's failure to design an IEP that addresses the student's needs resulting from the bullying that it had knowledge of compels an award of compensatory education now given the specific facts of this case.

In addition, because the assistant principal in charge of discipline and bad behaviors provided disturbing testimony that revealed that the assistant principal was not familiar with the definition of bullying, the school district is ordered to provide training within 90 days of the date of this order to all staff that deal with special education students or students on 504 plans concerning the definition of bullying, the effects of bullying upon the victim, the nature and prevalence of bullying of students with disabilities, and effective strategies for dealing with the effects of bullying upon students with disabilities.

Because equitable relief under IDEA should be flexible and because IDEA is a collaborative process, Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005), the parties shall have the option to agree to alter the relief awarded herein so long as both parties and their lawyers agree in writing.

### **ORDER**

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. The student's IEP shall be changed and the IEP team shall meet as aforesaid;
2. The student is awarded compensatory education to be calculated as described above;
3. The school district shall provide the training, as described in detail above;
4. The parties may adjust or amend the terms of this order by mutual written agreement signed by all parties and all counsel of record; and
5. All other relief requested by the instant due process complaint is hereby denied.

**IT IS SO ORDERED.**

**ENTERED: March 2, 2021**

*James Gerl*

James Gerl, CHO  
Hearing Officer