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

# Pennsylvania Special Education Due Process Hearing Officer

# Final Decision and Order

## CLOSED HEARING

## ODR File Number 27508-22-23

**Child's Name:**
S.M.

**Date of Birth:**
[redacted]

**Parent:**
[redacted]

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**Date of Decision:**
May/19/2023

**Hearing Officer:**
Charles W. Jelley Esq.LL.M

## OVERVIEW OF THE DISPUTE

The Parent filed the pending Due Process Hearing Complaint alleging failures under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (504).[1] The Parents contend that under either Act, the District failed to locate, identify, evaluate, and educate the Student in a timely fashion. Parents next allege the District discriminated against the Student in violation of Section 504. The Parents relying on the IDEA statute of limitations and its exceptions, assert that claims more than two years before the filing date are timely. Parents seek multiple forms of equitable relief spanning seven (7) years, including a declaratory finding of discrimination, an award of retrospective compensatory education, prospective compensatory education, reimbursement for an independent evaluation, and a high school diploma award. On the other hand, the District relying on the statute of limitations seeks a declaratory ruling that, at all times relevant, they procedurally and substantively complied with each Act during each school year. Finally, regarding the discrimination claims, Parents seek a finding of "deliberate indifference."

After reviewing the record, including the extrinsic evidence and applying the preponderance of evidence standard, I now find the Parents have met their burden of proof that the District failed to provide the Student with a free appropriate public education (FAPE) under either Act. For all the reasons that follow, the discrimination claims are otherwise exhausted and dismissed without prejudice.

## STATEMENT OF THE ISSUES

At the outset of the hearing, the Parent identified the following issues:

[1] All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 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, implementing the IDEA are set forth In 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The federal regulation implementing Section 504, 29 U.S.C. §794 and 794a are set forth at 34 C.F.R. 104, et seq.. The state regulation implementing Chapter 15 are found at 22 Pa. Code Chapter 15, et seq.

Did the District fail to provide the Student with an appropriate education from February 20, 2020, of the 2019-2020 [redacted] school year, through June 2022 of the Student's [redacted] year? If the answer is yes, is compensatory education appropriate relief for each school year?

Are any of the Student's IDEA or Section 504 denial of a free appropriate public education claims time-barred? If yes, do either of the IDEA's statute of limitations exceptions extend the scope of the claims?

Did the District discriminate against the Student in violation of Section 504 or Chapter 15 from February 20, 2020, of the 2019-2020 [redacted] school year, through June 2022 of the Student's [redacted] year? If the answer is yes, what relief can this hearing officer grant?[2]

Are any of the Student's Section 504 discrimination claims time-barred? If yes, do either of the IDEA's statute of limitations exceptions extend the scope of the claims?

At the close of the hearing, the Hearing Officer directed the submission of written closing arguments, and the Parties requested, and the hearing officer agreed to extend the decision due date.

## FINDINGS OF FACT

1. During the 2018-2019 [through 2022-2023 school years], the Student resided with the Parents in the District. (P-1).
2. On or about September 9, 2018, the Parents applied, and the Student was accepted to attend a special admit high school in the District. At admission, students were expected to have an average grade of 80 percent. The mission of the school is to prepare students for higher learning. The curriculum emphasizes

[2] The description, discussion and dialogue about the statement of the issues and defenses is found at pages 19-33 of the Transcript. Parents Section 504 discrimination is twofold. First, they allege intentional discrimination and seeking finding of deliberate indifference. Second, in the alternative, they seem to allege a failure to accommodate discrimination claim or a refusal to modify existing policies claim. NT pp. 26-30.

problem-solving and technological skills. As a special admission high school, the curriculum includes 18 advanced placement courses. (NT p.4, P-1).

3. On or around November 29, 2018, the Parents provided the school with a letter from a doctoral-level, licensed counselor and board-certified behavior analyst that diagnosed the Student with Social Anxiety Disorder. The report notes that since beginning high school, the Student exhibited excessive anxiety and avoidance for fear of negative evaluation by others, including teachers, peers, and parents. The report notes that the anxiety is most strongly explicitly triggered around school performance. (P-2 p.1).
4. The report explains that the Student's anxiety and avoidance behaviors resulted in low grades in some classes due to not turning in work rather than motivation or comprehension. This counselor stated that this behavior change was a departure from former school effort and performance. We are working on turning in her work on time, no matter how done it is or how she feels about it. The private counselor stated that she was teaching the Student to use cognitive and behavioral approaches to address the anxiety. The counselor recommended that the Student receive accommodations through a Section 504 Agreement to address work performance and decision-making. (P-2).
5. The Student's guidance counselor is also the Section 504 Coordinator for the school. After reviewing the report, the suggested three accommodations. First, the private evaluator suggested timely communication with the home when a deadline is missed so that adults (including me) and Parents can assist the Student in dealing with anxiety/avoidance and getting the work turned in. Second, the evaluator recommends an additional accommodation to allow the Student to turn in work, even if late. When the deadlines were extended, the examiner further recommended a penalty for the lateness but not down to a 0 because it is hard to motivate the completion of late work. The third suggested accommodation was the opportunity to complete some extra credit work to improve the grades harmed by turning in work late. The make-up work would afford the opportunity to curb

perfectionism on a similar second project and allow grades to reflect knowledge and effort. (P-2).

6. On or about March 6, 2019, during the [2018-2019] year, the parties met and decided that the Student's anxiety/avoidance diagnosis was a mental or physical impairment that substantially limited the primary life function of learning, thinking, working, and communicating. Based on these findings, the Parties agreed the Student was eligible for a Section 504 Agreement. The District offered, and the Parents accepted a Section 504 Agreement. Without an assessment, the teachers recommended that the Student have up to 25% extended time to complete the assignment. The teacher also recommended that an adult or peer review assignments before deadlines. Finally, the teachers recommended that the staff minimize constructive criticism and give specific feedback to help the Student learn how to self-correct. (P-3 p.6).
7. On or about March 18, 2019, the Parties met, and the District offered a Section 504 Agreement; the agreement included the following accommodations; 1. Up to 25% extended time to complete classwork and homework assignments, including individual and group projects, 2. The Student should proofread all graded assignments before the deadline/due date, and 3. The Student must bring assignments to the teacher before the due date. (P-3 p.9). The record also includes a copy of the Chapter 15, procedural safeguards. The procedural safeguards statement is a two-page document including a footer dated "July 1, 1999 – 22 Pa. Code Chapter 15 MEH-204 (Rev. 8/08)." (P-3 pp.4-5). The Parents accepted the Section 504 Agreement as offered. (P-3). The 504 safeguards did not tell the Parents about the statute of limitations. ( P-3, P*assim*)
8. As the year progressed, the Parents noticed that the Student was not turning in homework, not because the Student did not understand it, but because the Student could not get it perfect. (N.T. p.52).
9. Teachers reported that the Student was not consistently attending classes and completing classwork. (N.T. p.53)

10. Parents sought a new therapist specializing in adolescents and children with obsessive-compulsive disorder (OCD) and anxiety. Because the Student needed intensive support, the Student began meeting with the private therapist twice weekly. (N.T. p.52)
11. In January 2020, the Parents and the private counselor exchanged emails discussing the Student's anxiety/avoidance behaviors, home life, and school. The counselor and the Parents reached out to the guidance counselor asking for new accommodations and suggested more frequent meetings with the guidance counselor and timely communication about missing assignments. In particular, they asked for additional time to complete assignments and partial credit for work turned in late. Due to time commitments, the guidance counselor could not meet with the Student more frequently. Rather than provide one-on-one counseling, the guidance counselor suggested the Student could meet with interns. (P-5). The time with interns never happened. (NT *passim).*
12. The private counselor volunteered to coordinate private counseling with services from the interns. The guidance counselor also suggested that the Student meet with the special education/study skills coordinator. The record does not include any notations that the Student met with the interns or the skills coordinator. The principal denied the request for partial credit for work completed in the second marking period but agreed to allow for partial credit for late assignments for the remainder of the school year. (P-5).
13. In a letter to the guidance counselor/Section 504 Coordinator on February 4, 2020, the Parents requested the District evaluate the Student for IDEA eligibility. The guidance counsel passed the request for testing along to a "Special Education Coordinator," who works with the building psychologist to coordinate all testing. (P-6).
14. On February 6, 2020, the parents and guidance counselor discussed the special education evaluation in an email. The guidance counselor responded, "I was expecting this." (P-6 p.1). In that same email, the guidance counselor ended by

noting, "Physically, mentally and emotionally . . . not sure [redacted] has it in [redacted]. (P-23 p.2).

15. On February 6, 2020, Parents, in writing, again requested a special education evaluation when it became clear that the Section 504 Plan was not enough support for the Student. (P-6; N.T. p.54). The school counselor responded, "I was expecting this." P-6, p.1. 16.
16. On February 7, 2020, the Student's therapist also sent a letter suggesting that the Student might be eligible for IDEA services. The therapist wrote: "The Student's mental health symptoms have progressively worsened throughout [redacted] high school experience. They are particularly exacerbated by the increasing academic demands and expectations for independent performance of academic and organizational skills." (P-7, p.1).
17. The February 7, 2020, letter further stated that the Student was then diagnosed with a Generalized Anxiety Disorder. The private counselor suggested that the District evaluate the Student for IDEA eligibility. (P-7). The letter also included five (5) suggested accommodations like one-on-one or group counseling, extended time, and regularly scheduled meetings with teachers to review assignments. (P-7).
18. On February 10, 2020, the Special Education Compliance Monitor met face-to-face with the Parents, the Section 504 Coordinator, and a school psychologist to discuss the testing request. The Special Education Compliance Monitor gave the Parents a "Permission to Evaluate-Evaluation" form. This particular Form is used to document a parent's oral request for an IDEA evaluation. On page 2, the Parents repeated the earlier request for an IDEA eligibility evaluation. Also, on page 2, the Parents wrote a note stating ["Redacted's] anxiety is preventing [redacted] from being able to succeed in school." (P-23).
19. The Form then provides that "Once the school receives this PTE-Oral Request Form, the school will either: 1. Send you within a reasonable amount of time the PWN for Initial Evaluation and Request for Consent Form that will describe the

process and timeline that will be used for the evaluation, and ask for your consent for the evaluation to begin, OR [sic] 2. Send you a written notice, called a Notice of Recommended Educational Placement/Prior Written Notice that explains why the LEA is refusing to evaluate your child and a Procedural Safeguards Notice that explains how you can challenge the LEA's refusal to evaluate [Redacted Student's Name" (P-7 pp.2-3).

20. On the next page of the exhibit, the Form's heading changes to a "PERMISSION TO EVALUATE-CONSENT FORM (ANNOTATED)(emphasis in original). In the first box, this new Form includes boilerplate language. The second box states, "This evaluation will consist of the following types of tests and assessments; - in handwritten format- the Form states "Observation, review of records." Later on page 5, the Father signed and dated the Form granting permission to evaluate. (P-7 NT pp.168-170). The record does not mention if the District provided the Parents with their IDEA procedural safeguards. (NT *passim*).
21. Although the Parents consented to an evaluation, the District never asked the Parents for input, tested the Student, observed the Student, provided procedural safeguards, or issued a Notice of Recommended Educational Placement (NOREP). (NT pp.330-334).
22. Throughout February, March, April, and May 2020, the Parents, the teachers, and the guidance counselor exchanged multiple emails about completing homework and classroom assignments during virtual instruction. Due to the pandemic shutdown, the District did not assign, and the teachers did not give out grades for completed work. (P-8).
23. Soon after school started for the [redacted] -2020-2021 - school year, the Student deteriorated and entered a partial hospitalization program. From October 21, 2020, to late December, the Student attended an all-day inpatient partial program from 8:30 am to 3:00 pm, Monday through Friday. The Mother told the guidance counselor about the partial hospitalization program (NT pp.71-74, pp.143-147, P-12).

24. The Student was discharged from the partial program on December 15, 2020, and then transitioned to an intensive outpatient program for one week at Parent's expense. The diagnosis on discharge now included a second impairment of Obsessive-Compulsive Disorder. On December 20, 2020, as part of the discharge plan, the treating psychiatrist in the partial program wrote a letter to the District requesting that the Student be tested and provided an IEP. The Mother gave the letter to the District. The private therapist also contacted the guidance counselor /Section 504 Coordinator to coordinate the Student's return. The private counselor also asked how the Student could make up the missed work and inquired about additional school-based testing. The record does not include any follow-up by the District on either point of concern. (P-14, P-15 p.2, NT p.71-74, p.227-229).
25. From January 2021 through early March 2021, the Student attended school virtually and then attended an after-school partial hospitalization program. The Student missed the last school period to attend the after-school program. (NT pp.136-146).
26. In March and April 2021, the Special Education Compliance Monitor, who provided the first 2020 Permission to Evaluate, reached out to the Parents and the guidance counselor to see if the partial hospitalization program would release any testing completed any testing. (P-17 pp.4-6). Neither the Parents nor the school obtained any records from the partial program. *Id.*
27. Although the Parents requested a second evaluation, the District never issued a Permission to Evaluate or procedural safeguards. (NT pp.324-336). The District never completed the second evaluation. (NT pp.324-336).
28. The Student's end-of-year report card noted that during the 2020-2021 school year, the Student missed 141 out of 180 school days. (P-20 Report Card). The Student earned five "Fs," two "D" s, and one "B" in the [redacted] project. The Student's overall grade point average was 1.79. The Student attended summer school, passed three courses, and earned [redacted] status. (NT pp.83-86, P-21).

29. Shortly after the beginning of the –[2021-2022 school year] the Student fell back into the same pattern of generalized anxiety, avoidance, perfectionism, and obsessive-compulsive behaviors. School attendance dropped, and grades dropped. By March 2022, the Guidance counselor contacted the Mother and reported that the Student was "MIA." (P-23). The Mother reports that the Spring of 2022 – the [redacted] year- was "rough." She further reports she had feared the Student could hurt themselves. (NT pp.147-150).
30. Throughout the Spring, the Mother and the guidance counselor exchanged multiple emails about missing assignments, low grades, and lack of attendance. At one point, the guidance counselor/Section 504 Coordinator told the Mother that the Student needed to earn a "high 90" in some classes to graduate. Shortly after that email, the Student stopped attending school in March 2022. (P-17).
31. On March 4, 2022, the Special Education Compliance Monitor emailed Parent and the school counselor about whether the special education evaluation was progressing. (P-17).
32. The parent responded on March 5, 2022, "Yes, we want to move forward with the evaluation." (P-17).
33. The Parent called the Special Education Compliance Monitor on March 29, 2022, and told her that a Permission to Evaluate was signed in February 2020.
34. On March 24, 2022, the school counselor emailed Parent about the Student's attendance. The school counselor/Section 504 Coordinator stated: "It is NOT impossible for [redacted] to graduate, BUT it would need a significant change on [redacted's] part about completing work. Mathematically, it is possible. [Redacted] needs 240 points in each class over the course of 4 quarters. I[f] [redacted] did improve [redacted's] classes for 3rd period that would make life easier for 4th quarter. Otherwise, [redacted] needs as high as a 90 in some classes to get to the 240 points. Physically, mentally, and emotionally…not sure [redacted] has it in [redacted]. (P-23).

35. The Special Education Compliance Monitor responded on April 8, 2022, "Any luck with getting the paperwork from the doctor? I submitted [redacted's] name for an evaluation, but I need to issue the permission to evaluate. I want to get [redacted] evaluated before the end of the school year. Please let me know if you have success with getting the paperwork." (P-17 p.5).
36. The Mother asked the Section 504 Coordinator if the Student could walk at graduation and complete the course later, but the District refused the request. After consulting with the principal, the Section 504 Coordinator denied the requested accommodation. At the time of the request, the Student had earned 18.75 credits. The District expects students to earn 23.5 credits to graduate. (NT p.19-22).
37. The Student's high school graduation rate is between 97 to 98 percent. The Student did not graduate [redacted]. (NT p.298).
38. When the Student stopped attending the District without notice, the District unilaterally unenrolled the Student and dropped the Student from the attendance rolls. (NT pp.95-98, pp.255-262).
39. The Parents obtained a private neuropsychological evaluation [in the summer of 2021]. The evaluator never observed the Student during the school year. The evaluator provided the Parents with the report in November 2021; due to the turmoil at the beginning of the [2021-2022] year, the Parents did not provide the report to the District until July 2022. (P-22, NT pp.90-94). The District never responded to the July 22, 2022, letter. (NT *passim*)
40. The evaluator found that the Student qualified for special education services as a student with an "Other Health Impairment." (P-22).
41. The examiner found that the Student required specially designed instruction in executive functioning. The examiner also found that the strategies that need to be taught to were: (a) long-term planning for written projects, (b) organization of many pieces of detailed information (e.g., a specific multitask task), and (c) creating a timeline for task completion (time management). (P-22).

42. The District's Section 504 Procedural Safeguards form does not include notice of the two-year statute of limitations or any exceptions. (P-3 pp.3-5, P-7).

## GENERAL LEGAL PRINCIPLES

## BURDEN OF PROOF AND WITNESS CREDIBILITY

Generally, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case, the Parents are the party seeking relief and must bear the burden of persuasion.[3]

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."[4] Explicit credibility determinations give courts the information that they need in the event of a judicial review. While no one-factor controls, a combination of factors causes me to pause and comment on particular testimony.[5]

On the Parents' side, I found the Mother open, detailed, and candid in acknowledging what she knew, did, and did not do, like providing the private evaluation when completed.

I next find the testimony of several District witnesses was incomplete, self-contradicting, and not otherwise persuasive. On the District side, the District witnesses did not demonstrate working knowledge of the applicable Section 504 child-find timelines/standards, the IDEA child-find timelines/standards, or the

[3] *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

[4] *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

[5] The fact finder's determination of witness credibility was based on many factors. Clearly, the substance of the testimony, the amount of detail and the accuracy of recall of past events affected my credibility determination. Whether the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. When the testimony is delivered in a persuasive fashion factors like body language, eye contact, and whether the responses are direct or appear to be evasive, unresponsive or incomplete are important in determining persuasiveness. *Id.*

Section 504 or IDEA procedural safeguards. Although the guidance counselor was also the Section 504 Coordinator, she did not know that the Section 504 Agreement Form she gave the Parents included a procedural safeguards statement. No one seemed to know that the Section 504 Procedural Safeguards statement failed to include notice of the IDEA two-year statute of limitations. Furthermore, the District's Section 504 safeguards included inaccurate information on how to appeal a hearing officer's decision.[6] This overall lack of knowledge about everyday basic procedural processes, like how to refer a student for testing, when to provide "notice" or procedural safeguards, and which boilerplate Department of Education Forms to use, caused me to give the testimony of several District witnesses less persuasive weight.

## IDEA FAPE CLAIMS

The IDEA requires each state to provide eligible children with a "free appropriate public education" (FAPE) for special education services.[7] A FAPE consists of both special education and related services. In *Board of Education v. Rowley,* 458 US 176 (1982), the Supreme Court held that the FAPE mandates are met when an individual education program (IEP) provides personalized instruction and complies with the Act's procedural obligations. A district meets its FAPE obligation by providing an IEP which is "'reasonably calculated to enable the child to receive 'meaningful educational benefits in light of the Student's 'intellectual potential."[8] IEPs are "…. constructed only after careful consideration of the child's present levels of achievement, disability, and growth potential." *Id*. Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, a district is not obligated to "provide 'the optimal level of services,' or incorporate every

[6] The Chapter 15 safeguards advised the Parents that they must appeal this Decision to a panel of three (3) appellate hearing officers prior to proceeding to a court of competent jurisdiction. Pennsylvania stopped using the three person panel process long ago.

[7] 20 U.S.C. § 1412 *et seq.*

[8] *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

program requested by the child's parents." [9] All the law expects is appropriate services in light of a child's unique circumstances, not those necessarily sought after by "loving parents." *Id.*

The assessment of whether a proposed IEP meets the *Rowley* and *Endrew* standard is based on information "as of the time it was made;" this commonsense rule is commonly known as the "snapshot rule."[10] While an IEP must aim for progress, progress is not measured by what may be ideal. *Id*.

## IDEA EVALUATION STANDARDS AND REQUIREMENTS

The IDEA evaluations or reevaluations have twin purposes. First, the evaluation should determine whether or not a child is a child with a disability, and second, the evaluation must "determine the educational needs of such child."[11] The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of several specific disability classifications and, "by reason thereof, needs special education and related services."[12] An appropriate evaluation or a reevaluation includes a "[r]eview of existing evaluation data." Id. The review of the existing data must include all existing "evaluations and information provided by the parents," "current classroom-based, local, or State assessments, and classroom-based observations," and "observations by teachers and related services providers." *Id*. "Upon completion of the administration of assessments and other evaluation measures[,] the determination of whether the child is a child with a disability . . . and a team shall make the educational needs of the child of qualified professionals and the parent of the child."[13]

[9] *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).
[10] *Fuhrman v. East Hanover Bd. of Educ*. 993 F.2d 1031, 1041 (1993).
[11] 20 U.S.C. §1414(a)(1)(C)(i).
[12] 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a).
[13] 34 C.F.R. § 304(c)(4); 20 U.S.C. § 1414(b)(3)(B). A full IDEA evaluation must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]"

In Pennsylvania, districts must provide a reevaluation report to the parents describing the results within sixty (60) calendar days of receipt of the Parent's consent, excluding summers.[19] Once the report is completed, "[a] group of qualified professionals and the child's parent determines whether the child is a child with a disability … and the child's educational needs." Although the evaluation team should strive to reach a consensus, under 34 C.F.R. §300.306, the public agency is responsible for determining whether the child has a disability.

Parental disagreement with the conclusions of a district evaluation does not, in and of itself, establish that the District's evaluation is inappropriate. The usual remedy when an evaluation does not meet the requisite criteria is either a reevaluation or an independent educational evaluation (IEE) request. When an evaluation is conducted per 34 C.F.R. 300.304 through 34 C.F.R. 300.311, and the child was not assessed in a particular area, the Parent has the right to request an independent educational evaluation (IEE).[14]

**IDEA PRIOR WRITTEN NOTICE AND PROCEDURAL SAFEGUARDS**

Parents who believe their child is eligible for an IEP may request an initial evaluation to determine whether the child has a qualifying disability. 20 U.S.C. § 1414(a)(1)(B). When the parents make such a request, the educational agency must provide them [a] copy of the procedural safeguards. Id. § 1415(d)(1)(A). The procedural safeguards include mandated information like notice of parents' rights to examine their child's records related to the IDEA, participate in meetings, obtain independent educational evaluations, and file an administrative complaint. *Id*. An educational agency must also provide prior written notice (PWN) to the parents when it [r]efuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a)(2). Prior notice must include, among other things, a description of the action refused by the agency, an explanation of why the agency refused to

[14] 34 C.F.R. § 300.503.

take "action," a statement that the parents have procedural rights and sources for parents to contact to obtain assistance. 34 C.F.R. § 300.503(b).

## SECTION 504 NOTICE AND PROCEDURAL SAFEGUARDS

Districts must notify parents of its Section 504 child find process. 34 C.F.R. §104.32. In contrast to the detailed requirements of the contents included in a written notice under the IDEA, the Section 504 regulations require "a system of procedural safeguards that includes notice"; however, the regulations do not spell out what the "notice" must contain. Officer of Civil Rights (OCR) Letters interpreting this requirement state the "notice" must be given "with respect to actions regarding the identification, evaluation, or educational placement of persons, who, because of handicap, need or are believed to need special education or related services." 34 C.F.R. §104.36. In *Camdenton (MO) R-Ill Sch. Dist*. 20 IDELR 197 (OCR 1993), OCR determined that the district violated Section 504 by failing to provide parents with adequate notice of their procedural safeguards when the district decided not to evaluate their [child] for attention deficit disorder. In *Brewster (WA) Sch. Dist. No. 111*, 38 IDELR 247 (OCR 2003), OCR indicated that, at a minimum, the notice should be sufficiently detailed so that parents understand the proposed action and the reasons for the action. In *Fairfield-Suisun (CA) Unified Sch. Dist*., 21 IDELR 1007 (OCR 1994), OCR found that a district's notice, which included information about procedural safeguards and specific information about the right to review relevant records, assessment, and the right to appeal a decision concerning the identification, evaluation, and placement, complied with Section 504. *In Inglewood (CA), Unified Sch. Dist.*, 51 IDELR 21 (OCR 2008) OCR found that contradictory language and undefined terms prevented parents from understanding their child's program, thereby violating their procedural right to notice. Then in *Tuba City (AZ) Unified School District,* 76 IDELR 19, 119 LRP 47221 (January 16, 2019), OCR determined that the district violated Section 504 by failing to provide a parent a copy of her procedural safeguards when it changed the student's qualifying disability and modified her

accommodations. Similarly, 22 Pa. Code Chapter §§ 15.6 and 15.7 each include notice provisions that require districts to provide "notice" when they either grant, propose, refuse, or deny an evaluation, identification, or services. Therefore, as a whole, districts must provide parents with – "notice"- when rejecting or agreeing to provide FAPE services.

## SECTION 504 CHILD FIND REQUIREMENTS

"School districts have a continuing obligation under the IDEA and § 504 [of the Rehabilitation Act of 1973] -- called 'Child Find' -- to identify and evaluate all students who are *reasonably suspected* of having a disability under the statutes."[15] That obligation requires school districts to "identif[y] and evaluate[ ]" "children who are suspected of having a qualifying disability" "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." *Id.* The child find obligation is an affirmative duty, and therefore a public school "must do more than wait for an eligible disabled student to contact it."[16] Child Find requires district "to identify and evaluate all students who are reasonably suspected of having a disability under the statutes."[17] When a school district violates its child find obligation by failing to identify a student with a disability and provides no specialized instruction to the Student to meet the unique needs of their disability, the Student has been denied a FAPE."[18]

## SECTION 504 ONLY FAPE CLAIMS

[15] *W.B. v. Matula,* 67 F.3d 484, 501 (3d Cir. 1995), abrogated on other grounds, *A.W. v. Jersey City Pub. Sch*., 486 F.3d 791 (3d Cir. 2007).

[16] A school's Section 504 Child Find obligations exist independently from its child find obligations under IDEA. *Culley v. Cumberland Valley Sch. Dist.*, 758 F. App'x 301, 306 (3d Cir. 2018). "School districts have a continuing obligation under the IDEA and § 504 to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009).

[17] *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1066 (D.N.J. 2011).

[18] *Lauren G. ex rel. Scott G. v. W. Chester Area Sch. Dist., 90*6 F. Supp. 2d 375, 391 (E.D. Pa. 2012) (*citing Forest Grove Sch. Dist. v. T.A*., 557 U.S. 230, 238-39 (2009).

"To offer an 'appropriate education' under the Rehabilitation Act, a school district must reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and access to educational benefits."[19] If such an opportunity is denied to a disabled student, that student may have a FAPE claim under Section 504.[20]

While a FAPE under the IDEA is provided through an IEP, the Section 504 regulations do not require a writing; Chapter 15, however, does require a written "Service Agreement." Unlike the IDEA, the Section 504's regulations require that disabled students get a FAPE in "regular" or "special education" classes. Section 504 services can include direct instruction, related aids, related services, accommodations, modification, and auxiliary services, as implemented "by any appropriate means, including, but not limited to, an IEP" or a Service Agreement.[21] In deciding Section 504 FAPE claims, courts apply a "reasonable accommodation" analysis.[22]

Section 504 "accommodations" must offer the Student an opportunity for "significant learning" and "meaningful benefit."[23] Under this emerging standard, the student's education must be free, accessible, and offer an "equal opportunity

[19] *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012); *cf.* OCR believes that the reasonable accommodation analysis is limited to employment disputes. In *Letter to Zirkel,* 20 IDELR 134 (1993), OCR opined that 34 C.F.R. §104.33 does not incorporate a cost conscious "reasonableness standard into 504 requirements for elementary and secondary students." OCR opined that while the reasonable accommodation limitation expressly applied to postsecondary and vocational education, covered in Subpart E, said limitation was intentionally excluded from Subpart D, which covers elementary and secondary education. *Letter to Zirkel*, 20 IDELR 134 (1993). Simply put they noted Section 504 does not require "changes beyond those necessary to eliminate discrimination."

[20] *Karrissa G. v. Pocono Mountain Sch. Dist.*, No. 3:16-CV-01130, 2017 WL 6311851 (M.D. Pa. December 11, 2017; *Molly L. ex rel. B.L. v. Lower Merion Sch. Dist.*, 194 F. Supp. 2d 422, 425 (E.D. Pa. 2002).

[21] *Letter to Williams*, 21 IDELR (OSEP/OCT 1994), 22 Pa. Code 15.1 *et seq.*

[22] *Ridley* at 280; See also, *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 490 (E.D. Pa. 2011) (holding that to determine whether the student "was afforded an appropriate education," the court should consider "whether [the student] was provided significant learning and conferred a meaningful benefit").

[23] *Ridley* at 280; K.*K. ex rel. L.K. v. Pittsburgh Pub. Sch.*, 590 F. App'x 148, 154 (3d Cir. 2014)(not precedential); *T.F. v. Fox Chapel Area Sch. Dist.*, 589 F. App'x 594, 600 (3d Cir. 2014), and *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010); *T.R. v. Kingwood Twp. Bd. of Educ*., 205 F.3d 572, 577 (3d Cir. 2000); and *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010).

to participate in the school program and extracurricular activities to the maximum extent appropriate to the ability of the protected handicapped student in question."[24]

Tracking the Section 504 regulations, Chapter 15 further provides that "School districts are required to provide disabled students with the aids, services, and accommodations that are designed to meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met." 22 Pa. code 15.1(b). Any disagreements over whether the Student was excluded, denied benefits, or subject to discrimination requires the district to provide prior "notice" along with procedural safeguards, explaining the right to a hearing and review.[25]

## THREE TYPES OF DISCRIMINATION CLAIMS

Section 504 and Chapter 15 discrimination claims fall into three camps: disparate treatment, disparate impact, or failure to make a reasonable accommodation.[26] To establish a discrimination claim under Section 504, the Student must establish that (1) they are "disabled as defined by the Act"; (2) they are "'otherwise" qualified to participate in school activities; (3) the school "receives federal financial assistance"; and (4) they were "excluded from participation in, denied the benefits of, or subject to discrimination at, the school."[27] Under the first and fourth prongs, the district must know of or be reasonably expected to know of the disability.[28] The Student must also demonstrate that the alleged violation was committed by a

[24] 34 C.F.R. §104.33(c)(3).
[25] 34 C.F.R. §104.36 and 22 Pa. Code Chapter §§15.8, 15.9. 15.10.
[26] *D.A. v. Penn Hills Pub. Sch. Dist.,* No. 2:20-cv-1124-NR, 2021 U.S. Dist. LEXIS 91149 (W.D. Pa. May 13, 2021) *citing Payan v. Los Angeles Cmty. Coll. Dist*., 11 F.4th 729, 738 (9th Cir. 2021) (cleaned up) quoting *Davis v. Shah,* 821 F.3d 231, 260 (2d Cir. 2016); *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016); *Doe v. Perkiomen Valley Sch. Dist*., 585 F. Supp. 3d 668 (E.D. Pa. 2022) vacated by without prejudice, *Doe v. Perkiomen Valley Sch. Dist*., No. 22-cv-287, 2022 U.S. Dist. LEXIS 44246 (E.D. Pa. Mar. 14, 2022).
[27] See, *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007).
[28] *See, Nathanson v. Med. Coll. of Pa*., 926 F.2d 1368, 1380-81 (3d Cir. 1991).

program or activity receiving federal financial assistance.[29] "Students seeking legal relief for acts of intentional discrimination - disparate treatment - must prove "deliberate indifference." *Id.*

To demonstrate deliberate indifference, the Student must "present evidence that shows both: (1) knowledge that a federally protected right is likely to be violated ..., and (2) failure to act despite that knowledge."[30] "Deliberate indifference does not require a showing of personal ill will or animosity toward the disabled person.'" *Id.* at 263. It does, however, require a "'deliberate choice, rather than negligence or bureaucratic inaction.'" *Id*.[31]

Students seeking equitable relief on a failure to accommodate or a disparate impact failure to modify theory "need not establish that there has been an intent to discriminate to prevail under § 504. In *Ridgewood Board of Educ. v. N.E.*, 172 F.3d 238 (3d Cir. 1999), the court recognized the distinction between legal and equitable relief when it held that to state a Section 504 FAPE claim "a plaintiff need not prove that defendant's discrimination was intentional." *Id*. at 253. The same holds for disparate impact claims.[32]

In a disparate impact or failure to accommodate dispute, the focus is on the consequences of the recipient's practices rather than the recipient's intent.[33] Students in a Section 504 failure to accommodate or disparate impact dispute must prove a denial of meaningful participation, benefits, or access to services. *Id.* Students must further prove that the alleged discriminatory actions were the

[29] *Muhammad v. Ct. of Common Pleas of Allegheny Cty.,* Pa., 483 F. App'x 759, 762-763 (3d Cir. 2012) (citations omitted).

[30] *S.H. v. Lower Marion Sch. Dist.*, 729 F.3d 248, 265 (3d Cir. 2013) (*citing Duvall v. Cty. of Kitsap,* 260 F.3d 1124, 1139 (9th Cir. 2001); S.H. v. Lower Marion Sch. Dist., 729 F.3d 248, 265 (3d Cir. 2013) (citing Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001); *Shadie v. Hazelton Area Sch. Dist.*, 580 F. App'x 67, 70 (3d Cir. 2014)(non precedential); *D.E. v. Central Dauphin Sch. Dist*., 765 F.3d 260, 269 (3d Cir. 2014).

[31] *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104 (3d Cir. 2018) quoting *Loeffler v. Staten Island Univ. Hosp*., 582 F.3d 268, 276 (2d Cir. 2009); *Karrissa G. v. Pocono Mountain Sch. Dist.*, No. 3:16-CV-01130, 2017 WL 6311851 (M.D. Pa. December 11,

[32] *K.K. ex rel. L.K. v. Pittsburgh Pub. Sch.,* 590 F. App'x 148, 153 (3d Cir. 2014) (non precedential) (deliberate indifference need not be shown to obtain declaratory, injunctive, or equitable relief), *Matula*, 67 F.3d at 492; *S.H. v. Lower Marion Sch. Dist.,* 729 F.3d 248, 260 (3d Cir. 2013).

[33] *Lau v. Nichols,* 414 U.S. 563, 568 (1974).

"sole cause" of discrimination; an alternative "cause" is fatal to the claim.[34] Simply put, "Plaintiffs must prove that they were treated differently based on the protected characteristic, namely the existence of their disability." *Id*. Finally, unlike intentional discrimination claims, deliberate indifference need not be shown to obtain declaratory, injunctive, or equitable relief.[35]

## CALCULATION OF APPROPRIATE RELIEF UNDER THE IDEA AND SECTION 504

Both Parties seek "appropriate relief" within the meaning of the IDEA.[36] The Parents seek an award of a high school diploma, prospective and retrospective compensatory education, and reimbursement for their out-of-pocket cost in securing an independent educational evaluation. Under either the IDEA or Section 504, any award of compensatory education must make the Student "whole."[37]

The District instead desires a declaratory finding that its program and placement offered a FAPE.

## THE DISTRICT'S TWO-YEAR STATUTE OF LIMITATIONS DEFENSE

"The IDEA statute of limitations is triggered when the [filing party] knew or should have known about the action that forms the basis of the complaint." *Id.* The statute of limitations includes two specific exceptions to the two-year limitation period.[38]

The IDEA exceptions permit older claims to go forward provided that the parent can establish that they were prevented from requesting the hearing as a result of:

34 *C.G v. Pa. Dep't of Educ.,* 734 F.3d 229, 236 n.11. (3d Cir. 2013).

35 *K.K. ex rel. L.K. v. Pittsburgh Pub. Sch.*, 590 F. App'x 148, 153 (3d Cir. 2014)(non precedential).

36 *G.L. v. Ligonier Valley Sch. Dist. Auth*., 802 F.3d 601 (3d Cir. 2015); *K.H. v. N.Y.C. Dep't of Educ*., 63 IDELR 295 (E.D.N.Y. 2014) (potential liability for approximately 14 years of compensatory education).

37 *Ligonier Valley Sch. Auth*., 802 F.3d at 625–26 (interpreting timely and successful filings as entitling the student to "be made whole with nothing less than a "complete remedy" which in cases of compensatory education equates to the period of the denial of FAPE excluding the time reasonably required for rectification, the time frame for any exceptions and prospective relief until the violations are cured).

38 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f); P.P. ex rel. Michael P. v. West Chester Area School District, 585 F.3d 727, 737 (3d Cir. 2009).

(i) a specific misrepresentation by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local education agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.[39] For an exception to apply, a plaintiff must demonstrate that the misrepresentation or withholding of information "caused her failure to request a hearing or file a complaint on time." [40]

Parents can satisfy withholding subsection (ii) "only by showing that the school failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulation." *Id.* Therefore, some filing delays are not fatal if the parent can demonstrate due diligence.

Whether the IDEA exceptions apply in Section 504 FAPE dispute case law is unclear.[41]

## ANALYSIS, DISCUSSION, AND CONCLUSIONS OF LAW

## THE DISTRICT'S STATUTE OF LIMITATIONS DEFENSE

To resolve this dispute, I will now break down the Parties' disagreement into four (4) discrete stages for review. First, applying *G.L.*'s discovery rule, I will determine if the Student's IDEA and Section 504 FAPE claims are timely. Second, even if the claims are untimely, I will determine if either the withholding or misrepresentation exception causally prevented the parents from filing an action. Third, assuming the claim is timely, under the discovery rule or the exceptions, I will make Conclusions

[39] 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f).

[40] *D.K.*, 696 F.3d at 246-47.

[41] See, *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 775 (M.D. Pa. 2012); Evan H. ex rel. *Kosta H. v. Unionville-Chadds Ford Sch. Dist.*, No. 07-4990, 2008 U.S. Dist. LEXIS 91442, 2008 WL 4791634, at *6 (E.D. Pa. Nov. 4, 2008); (concluding that subsection (ii) "refers solely to the withholding of information regarding the procedural safeguards available to a parent," including "'filing a complaint and requesting an impartial due process hearing'" (quoting *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 492 (D.N.J. 2008))(applying the exception where the school failed to provide parents who had repeatedly requested a special-education evaluation with either "written notice explaining why [it] refused to evaluate" the student or a procedural safeguards notice, both of which are required by 20 U.S.C. § 1415(b)(3)(B) and (c)(1)(A)-(C) when a school refuses to evaluate or change a student's educational placement).

of Law if an alleged violation caused a denial of a FAPE. Fourth, and finally, if a violation caused a denial of a FAPE applying *G.L.* and *M.C.* I will award compensatory education. Before I complete the *G.L*. analysis, I must decide how to tackle the discrimination claims.

After *Perez*, a decision here on the intentional discrimination claim is outside of this hearing officer's area of expertise or, at best, an advisory opinion.[42] Applying *Perez*, I now conclude that I do not have the authority to grant a "remedy" or "relief" under 29 U.S.C. Section 794a - Section 504's remedy provision. Stated another way, after Perez, under Section 794a, while hearing officers can remedy equitable FAPE violations, only courts, after *Perez*, can grant legal or equitable "relief " or "remedies" for acts of discrimination.[43]

**THE STUDENT'S 2020 TO PRESENT FAPE CLAIMS ARE TIMELY**

The Parents began this action challenging the District's offer of services in February 2020, the [redacted]-grade year until the present. The District, applying the two-year statute of limitations, argues that all claims before January 2021, two years before the filing date, are time-barred. The Parents relying on *G. L*. or the IDEA exceptions to the statute of limitations argue the opposite.

After conducting a fact-intensive review of the testimony and the exhibits, I now find applying the discovery rule claims predating January 2021, two years before the January 2023 filing date, are actionable. I further find that the IDEA failure to provide mandated information exception also applies. Under the discovery rule or the IDEA withholding exception, the District's actions, inactions, and omissions

[42] See, e.g., *Axon Enter. v. F.T.C.*, 143 S. Ct. 890 (2023) (adjudications by impartial IDEA hearing officers who know a good deal about how to analyze statutory IDEA and Section 504 free appropriate public education disputes; are ill-suited to apply the applicable burden-shifting analysis or analyze the types of relief or remedies granted in Section 504 intentional discrimination claims under 20 U.S.C. §794 and §794a).

[43] *Luna Perez v. Sturgis Pub. Sch.*, 143 S. Ct. 859, 864, 215 L. Ed. 2d 95 (2023) ("The statute's administrative exhaustion requirement applies only to suits that 'see[k] relief . . . also available under' IDEA. And that condition simply is not met in situations like ours, where a plaintiff brings a suit under another federal law for compensatory damages—a form of relief everyone agrees IDEA does not provide.")

caused the filing delay. Based on the circumstances, I need not decide if the IDEA withholding exception applies to the District's failure to provide proper "notice" under Section 504.

It is black letter law, under 34 C.F.R. §300.503(a) and 34 C.F.R. §104.36, that the District must provide written notice to the parents when the District either "proposes to" or "refuses to" initiate an evaluation, provide a service, deny service, or makes a "significant change "in a Student's placement." The District ignored the mandated information requirements of Section 504 "notice," or IDEA "prior written notice" and provision of "procedural safeguards" on the following occasions.[44]

**THE KNEW OR SHOULD HAVE KNOWN DATE**

After a reasonable period of due diligence, the Parents discovered their FAPE injuries and filed a due process complaint on January 20, 2023. Applying the discovery rule, I now find that the knew or should have known date for filing this Complaint was November 30, 2021, when the Parents received the private evaluation results. In no uncertain terms, the examiner's report told the Parents, for the first time, that the Student was IDEA eligible and required special-designed instruction. Simply put, the IDEA injury was known. Stated another way the alleged failure to locate, identify, evaluate, and educate the Student in February 2020, after receiving a written request for an evaluation, was actionable. The Parents then found counsel and filed a Complaint within two years of the date; therefore, the IDEA and Section 504 FAPE claims are timely.

On July 20, 2022, the Parents provided the District with a private November 30, 2021 evaluation. The Parents' email made two requests; first, Parents asked the

44 *District of Columbia Pub. Schs*., 114 LRP 11560 (SEA DC 02/12/14) ("The IDEA regulations ... state that a copy of the IDEA procedural safeguards must be given to parents one time a school year, except that a copy must also be given to parents upon initial referral or parents' request for evaluation; upon receipt of the first State complaint or due process complaint in that school year; and upon request by a parent."); 34 CFR 300.504 (a); and 71 Fed. Reg. 46,692 (2006).

Section 504 Coordinator to set up a meeting to consider the report. Second, they asked what accommodations were needed for the Student to return for the 2022-2023 school year. After two additional emails requesting a meeting, the District responded sometime in mid-August 2022. The response stated that the District would get back to the family after it reviewed the information. After that August 2022 message, all communication stopped. I now find that this inaction by the District crystalized a second knew or should have known filing date about allegations that the District denied the Student a FAPE prospectively. Therefore, the Student's prospective FAPE claims are also timely. Applying the *G.L*. discovery rule, all claims from February 2020 to the present are actionable. Assuming a different discovery date, I conclude that the IDEA "withholding" exception extends the filing deadlines.

The record is preponderant that from February 2020 to August 2022, the District failed to provide IDEA-mandated information and Forms like prior written notice, consent to testing, or procedural safeguards. The record is also preponderant that the District failed to provide the Parents with an understandable "notice" of their Section 504 grievance and due process rights. It would be absurd to find Parents "knew" the District violated the Student's IDEA and Section 504 rights absent timely "notice" of those rights followed by a reasonable time to discover the FAPE injury.[45]

**THE FIRST FAILURE TO PROVIDE MANDATED INFORMATION IN [THE 2019-2020 SCHOOL YEAR]**

On February 6, 2020, Parents asked the District, in writing, for a special education evaluation. This request led to a meeting on February 10, 2020. When asked about the February 2020 meeting, the Special Education Compliance Monitor testified that she reached out to her supervisor for directions on what mandated

[45] G.L. relying upon, *Knopick v. Connelly*, 639 F.3d 600, 607 (3d Cir. 2011) and *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 (3d Cir. 1994)(KOSHK triggering event "is not the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff discovers that he or she has been injured". *G.L.* F.3d at 613.

information/Forms to complete and give to the Parents. After that phone call, the Special Education Compliance Monitor downloaded and provided the Parents a "Request to Evaluate" Form intermixed with several pages of a "Permission to Evaluate" Form. (P-7).

The "Request" and "Permission" Forms serve vastly purposes. The "Request to Evaluate" Form states that once signed, and the Parent signed the Form, the District would provide the parents with a "Notice of Recommended Assignment/Prior Written Notice" that explains how they can challenge the LEA's "refusal to evaluate [redacted child's name]." The next page of the same exhibit, given to the Parents at the same time, is a "Permission to Evaluate" Form; it states that if the Parents provide written consent on that Form, and they did, the District would evaluate the Student. (P-7 p.3 and p.4). The "Permission to Evaluate" Form further states that once the Parents consent to the evaluation, the District has 60 days to complete a comprehensive evaluation report. Once the Parents signed the "Permission to Evaluate," the District was required to provide the family with "Prior Written Notice" and a copy of their procedural. 34 C.F.R. §§300.503-300.504. The District never provided mandated IDEA procedural safeguards, prior written notice, or proper Section 504 "notice" of their rights.

In one breath, the District stated it would "not" test the Student; in another, it said it "would" test the Student. Then in a third breath, it offered Section 504 supports that it either knew or should have known, based on the Student's attendance, missing school work, and declining grades, did not offer a commensurate opportunity for "significant learning" or accommodate the Student's then-current circumstances. (P-7). Under these circumstances, the claims are actionable.

I further find that the Section 504 Procedural Safeguards Form and IDEA Forms presented to the Parents were not written in language understandable to the general public — 34 C.F.R. §300.503(c) (Notice in understandable language).

Based on the testimony and after carefully reviewing the Forms provided to the Parents at Exhibits # 3 and 7, the evidence is clear that the Parents were never given proper procedural safeguards. The District's Section 504 boilerplate procedural safeguards notice actively conveyed misinformation about how to appeal a hearing officer's Section 504 decision. (compare Notice of Appeal at 22 Pa Code §15.8 with P-3 p.4- Section 504 Notice of Judicial Appeals). The same Section 504 procedural safeguards omitted the two-year statute of limitations notice. (P-3 p.4-Judicial Appeals). The failure to provide the mandated information caused a delay in filing a due process complaint. Therefore, I now find the District's Section 504 Notice of Appeals is substantively and procedurally defective.

Each IDEA or Section 504 violation impaired Parents' participation in the IEP evaluation process. Each violation substantially interfered with the Student's right to a FAPE. Any argument that the COVID shutdown was an intervening circumstance is rejected.

Even assuming *arguendo*, the *G.L.* knew or should have known discovery date is incorrect, I now conclude that the IDEA withholding exception makes all FAPE claims otherwise timely. The following IDEA and Section 504 FAPE claims are also timely under the discovery rule or the withholding exception.

**THE SECOND FAILURE TO PROVIDE MANDATED INFORMATION IN [THE 2020-2021 SCHOOL YEAR]**

For the 2020-2021 school year, the Student's [redacted] grade year - the District offered only virtual instruction. In October 2020, the Parents informed the District the Student had regressed to the point that the Student then required services in all day intensive partial hospitalization program. Following the District's February 2020 practices, this disability-related regression should have prompted either an IDEA evaluation or a Section 504 reevaluation. IDEA-based mandated services were not offered, Section 504 "notice" was not provided, and IDEA prior written notice was overlooked.

In December 2020, before discharge from the intensive partial program, the Parents again requested an IDEA evaluation and a transition plan to reintroduce the Student back to school. The Section 504 Coordinator was aware the Student returned to online virtual learning, left school early to attend evening outpatient partial services, and nothing was done to offer "significant learning."

Despite a January 2021 letter from the treating psychiatrists requesting IDEA services to address a new disability - Obsessive Compulsive Disorder - the District failed to evaluate, reconvene the 504 team, offer new accommodations, issue prior written notice, distribute IDEA procedural safeguards or deliver Section 504 "notice." I now find these violations caused a failure to locate, identify, evaluate, and educate the Student.

Under these circumstances, after a manifestation of the anxiety disability, I would have expected, for an already identified Student, that a team of knowledgeable persons would have offered accommodations like homebound or instruction in the home. This District did not. Absent such fundamental accommodations, the likelihood of making up two-plus months of classwork in a virtual environment denied the Student a commensurate full educational opportunity for "significant learning."

To the extent that the District argues that the Section 504 Coordinator waived the requirement to make up the work was an accommodation, they are mistaken. One person, the Section 504 Coordinator, is not a team of knowledgeable individuals.[46]

[46] *Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak,* 76 IDELR 77 (EDU 2020). See also *Return to Sch. Roadmap: Development and Implementation of IEPs in the LRE under the IDEA*, 79 IDELR 232 (OSERS 2021); and *Questions and Answers on Providing Servs. to Children with Disabilities During an H1N1 Outbreak*, 53 IDELR 269 (OSERS 2009); *Sch. Dist. 45,* 122 LRP 9436 (OCR 01/26/22) (An assistant superintendent should have convened the IEP and Section 504 teams to make decision about homebound instruction with limited tutoring); F*redericktown (MO) R-I Sch. Dist*., 80 IDELR 112 (OCR 2021) (district should have included the parent as a member of the IEP team before it changed the student's placement); J*efferson County (CO) Sch. Dist*., 80 IDELR 26 (OCR 2021) (OCR reminded the district that it may not unilaterally pause a student's home instruction over safety concerns and should instead convene the IEP team).

Finally, although advised to do so by the United States and Pennsylvania Department of Education, when the Student did return, the District failed to determine if the Student needed Section 504 COVID-19 compensatory education services. I now find the Student's [redacted] grade claims are also timely. I also find the District's actions, inactions, and omissions interfered with the Parents' participation rights and denied the Student a FAPE.

**THE 2021 DENIAL OF A FAPE**

In February 2021, in [redacted] grade, the school counselor emailed the Parents stating that the psychologist wanted to review any psychological testing completed at the partial hospital setting. The timing and manner of the request is odd. No one from the District offered procedural safeguards, sent a "Permission to Evaluate" seeking consent, a Parent Input Form, or provided a "Prior Written Notice" telling the Parents that the District was then willing to evaluate the Student. The above Forms of mandated information and "notice" are required when identifying, evaluating, or considering a change in placement or IDEA eligibility, yet none were ever offered.

In March 2022, in the [redacted] grade, the Special Education Compliance Monitor emailed Parent and the guidance counselor to ask if the special education evaluation was progressing. At the time of the March email, the Special Education Compliance Monitor had not sent the family an updated IDEA-mandated "Permission to Evaluate" Form. The next day, the Parent emailed, "Yes, we do want to move forward with the evaluation." (P-17). Based on the Special Education Compliance Monitor's testimony about the February 2020 meeting, I would have expected that she would have sent out a "Request to Evaluate" Form or a "Permission to Evaluate" Form and safeguards, yet, she did not act. The psychologist, the Special Education Compliance Monitor, and the Section 504/guidance counselor knew nothing was scheduled, and no one took action. Apply either *G.L.* or the "withholding" exception the FAPE claims are timely. Lastly, the above actions, omissions, and inactions interfered with the Parents'

participation in the evaluation process, substantially interfered with the Parents' rights, and denied the Student a FAPE.

**THE [redacted] GRADE 2022 DENIAL OF A FAPE CLAIMS**

On March 10, 2022, in [redacted] grade, the school counselor emailed the Parent to tell her that Student had been out of school since February 24, 2022. The Parents responded, stating that the Student had further regressed and was "not doing well." The Section 504 Coordinator/guidance counselor's email is a classic "red flag" alert that should have prompted a Section 504 meeting or an IDEA evaluation, yet nothing was done.

On March 24, 2022, the Section 504 Coordinator/counselor emailed the Parents, telling them the Student was 4.5 credits short of graduating. The Parents asked if the District would allow the Student to make up the credits after walking at graduation. The Section 504 Coordinator denied both accommodations. The Section 504 Coordinator - ended the email with the following observation "Physical, mentally and emotionally. . . not sure [redacted] has it in [redacted] (P-23 p.2)." This statement by the Section 504 Coordinator is a "red flashing light" that the Section 504 Coordinator knew or should have known that the Student was not learning. Yet she did not act. The denial of the March 2022 accommodations should have been made by a team of knowledgeable people and triggered Section 504 procedural safeguards. It was not. The Coordinator's one-person decision-making violated the Student's Section 504 FAPE rights.[47]

[47] *North Kansas City (MO) #74 Sch. Dist*., 72 IDELR 166 (OCR 2017)(student's hospitalization due to depression and anxiety, coupled with a parent's request for an IEP or 504 plan, should have prompted the district to conduct an evaluation); *Flagstaff (AZ) Arts Leadership Acad*., 76 IDELR 157 (OCR 2019) (noting that a district should have proposed to evaluate a student after school officials received an email from the parent indicating that the student had been hospitalized and diagnosed with PTSD, depression, and anxiety).

## THE 2022 FAPE VIOLATIONS

During the Section 504 Coordinator's testimony, the Parents learned that between March 2022 and July 2022, the District unilaterally dis-enrolled the Student without "notice."[48] The decision to dis-enroll the Student was a "significant change" in placement that required "notice" and distribution of procedural safeguards.[49] I now find the decision to change the Student's program and placement violated the Student's substantive and procedural Section 504 rights. 34 C.F.R. §104.35 and §104.36.[50] These actions interfered with and disrupted the Student's FAPE until age 21.[51] Finally, I conclude the failure to accommodate the

[48] *R.B. v. Mastery Charter Sch.*, 113 LRP 30422 (3d Cir. 07/25/13, *unpublished*)(significant change in placement occurs when local education agency unilaterally dis-enrolls student pursuant to 22 PA Code §11.24 after student missed 10 consecutive days of classes); See also, *Frequently Asked Questions about the Rights of Students with Disabilities in Pub. Charter Schs under Section 504*, 69 IDELR 137 (OCR 2016) (Questions ## 13, 15, 31).

[49] *R.B. v. Mastery Charter Sch.*, 113 LRP 30422 (3d Cir. 07/25/13, *unpublished*)(significant change in placement occurs when local education agency unilaterally dis-enrolls student pursuant to 22 PA Code §11.24 after missing 10 consecutive days of classes); *Frequently Asked Questions about the Rights of Students with Disabilities in Pub. Charter Schs. under Section 504*, 69 IDELR 137 (OCR 2016).

[50] Students must be reevaluated prior to any significant change in placement. 34 CFR 104.35 (a); *Perry County (MS) Sch. Dist*., 53 IDELR 167 (OCR 2009 (district triggered a parent's right to procedural safeguards when it declines to conduct an evaluation requested by the parents); *Rockingham County (VA) Pub. Schs*., 69 IDELR 286 (OCR 2016) (district violated Section 504 by failing to provide notice and procedural safeguards when it evaluated and provided a health treatment plan to a child with asthma and a seizure disorder); *Norwich City (NY) Sch. Dist.*, 114 LRP 35076 (OCR 04/17/14) (district violated Section 504 when it failed to notify a father of his right to request an impartial due process hearing or provide him with a copy of procedural safeguards despite his disagreement with Section 504 team's decisions); *Tuba City Unified Sch. Dist*., 76 IDELR 19 (OCR 2019) (district violated Section 504 when it failed to provide a parent a copy of the procedural safeguards after it changed the student's qualifying disability and modified her accommodations); *Lewis-Palmer (CO) Sch. Dist.* #38, 75 IDELR 227 (OCR 2019) (even if a district appropriately provides a student with a disability the accommodations and services he needs to receive FAPE, the district's failure to provide parents a copy of procedural safeguards can amount to a violation of Section 504); *Las Virgenes (CA) Unified Sch. Dist*., 55 IDELR 83 (OCR 2010).

[51] *Commonwealth Charter Acad. Sch*., 118 LRP 30092 (SEA PA 05/25/18). (LEA denied FAPE to a student with anxiety disorder when school administrators did not promptly respond following communications with the parent, thereby, allowing two months to elapse before providing the parent with the necessary forms for what the district recognized as a likely need for accommodations and related services); *Los Angeles Unified Sch. Dist.*, 117 LRP 47485 (SEA CA 11/08/17)( student's anxiety and resulting physical symptoms caused him to miss "a significant amount of school days, Section 504 plan failed to address these issues, and the student required special education interventions that could be provided only through an IEP); *Pocono Mountain Sch. Dist. v. T.D.*, 72 IDELR 186 (M.D. Pa. 2018), aff'd in part, vacated in part, 75 IDELR 120 (3d Cir. 2019, unpublished) (student's behavioral difficulties like difficult interactions with his teacher and peers, struggling to complete assignments, and missed class time due to frequent visits to the

Student and review the independent evaluation in July and August 2022 denied the Student a prospective FAPE for the 2022-2023 school year. An **ORDER** for appropriate prospective equitable relief and remedies follows. [52]

The Parties are reminded that the following make whole equitable relief is what the District should have provided all along.[53] Any other legal relief or remedy for acts of discrimination under 29 U.S.C. 794a is beyond my authority.

## THE SCOPE OF THE APPROPRIATE RELIEF AND REMEDIES

## REIMBURSEMENT FOR THE INDEPENDENT EVALUATION

Initially, the Parents seek reimbursement for an independent evaluation. The request for this type of relief requires me to balance the equities between the Parties. First, in the District's favor, the report was not shared in a timely fashion. Second, in the District's favor, the evaluation did not include an observation in school. Third, and finally, in the District's favor, the evaluation did not include teacher input.

On the other hand, in the Parents' favor, the evaluations provided missing information about the Student's present levels, needs, and the scope of the alleged IDEA disability. In light of the withholding of mandated information, the lack of learning, the misinformation, and the extent of the FAPE denial, I now find that the evaluator's and Parents' omissions under these circumstances are harmless error.

After balancing the above equities, I now find that the District should reimburse the Parents for their out-of-pocket expenses. The frequency and duration of the substantive and procedural violations tip the scale in the Parents' favor. Absent the

nurse's office were enough to demonstrate a need for IDEA services despite the student's solid academic performance).

[52] *Jenkins v. Butts County School District*, 62 IDELR 142 (M.D. Ga. 2013) (court held that the Georgia district's failure to inform a parent of her procedural safeguards tolled the statute of limitations on her IDEA claim); *Centennial Sch. Dist. v. S.D.*, 58 IDELR 45 (E.D. Pa. 2011) (holding that the district's failure to seek consent for an evaluation delayed the start of the IDEA's two-year limitations period).

[53] *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996) *citing with approval*, M*iener v. Missouri*, 800 F.2d 749, 753-754 (8th Cir. 1986), (quoting *Burlington*, 471 U.S. at 370-71).

Parents' due diligence in getting the report, no one would have learned about the Student's alleged protected IDEA status.[54]

Any refusal on my part to not **ORDER** reimbursement would punish the Parents and Student and reward the District for its actions, inactions, and omissions that proximately caused the Student to [stop attending school]. Therefore, the request for reimbursement is **GRANTED**.

**THE REQUEST TO GRANT A HIGH SCHOOL DIPLOMA IS DENIED**

I disagree with the Parents that appropriate relief now calls for me to award a high school diploma. The District did not grade the Student's work for the last two marking periods of [2018-2019]. The Student was hospitalized from October through December of [2019-2020], participated in a partial after-school program five days a week, and participated in online education. The [2020-2021] transcript includes more failing than passing grades and also includes "red flag" attendance problems. While the record does not include a [2021-2022] transcript, it is safe to conclude the Student failed all courses. It is abundantly clear that from [2018-2022], the Student missed more school days than attended.

Absent a high school diploma, the goal of a postsecondary education or vocational training and their economic benefits may be out of reach. Granting a diploma will not address the loss of a chance to learn, enroll in college, or clean up gaps in the Student's transcript. To place the Student back on the path to a high school

[54] The usual remedy when an evaluation does not meet the requisite criteria is either a reevaluation or an IEE request. When an evaluation is conducted per 34 C.F.R. 300.304 through 34 C.F.R. 300.311, and the child was not assessed in a particular area, the Parent has the right to request an independent educational evaluation (IEE). *Letter to Baus*, 65 IDELR ¶ 81 (OSEP 2015) (observing that if disagreeing with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that the child needs, whereupon the district may file for a hearing to show that its evaluation is appropriate without that addition); P*enn Trafford Sch. Dist. v. C.F.*, 45 IDELR ¶ 156 (E.D. Pa. 2002); *D.H. v. Manheim Twp. Sch. Dist.*, 45 IDELR ¶ 38 (E.D. Pa. 2005).

diploma and transition to either a postsecondary school, vocational training, or work, I will now **ORDER** the following "make whole" relief and remedies.

## THE DISTRICT MUST FUND AN INDEPENDENT EVALUATION

To remedy the failure to evaluate violation, the District is **ORDERED** to pay for a comprehensive neuropsychological evaluation and a comprehensive transition from school to work or postsecondary assessment. The Student and the Parents can use these assessment results to identify the types of classes, related services, supplemental services, accommodations, or auxiliary aids needed to obtain a high school diploma and transition to school or work. The Parents and Student have the sole discretion to select the evaluators. The Parents and Student have the sole discretion to select the type of high school diploma experience.

## COMPENSATORY EDUCATION IS APPROPRIATE RELIEF

Applying *G.L.* and *M.C.,* once the denial of FAPE is established, the hearing officer must determine when the District either knew or should have known of the denial of a FAPE. Once the denial of a FAPE knew or should have known date is established, I must calculate and exclude the time reasonably required to rectify the violation. The District's complete defense denying all liability now requires me to find that the rectification period for all FAPE claims is zero.

The first compensatory education knew or should have known the date occurred on or about February 2, 2020, when the District failed to provide prior written notice, procedural safeguards and failed to complete the promised initial evaluation. The second knew or should have known compensatory education date is January 7, 2021, when the treating physician identified a second disorder. The third knew or should have known date is March 21, 2022, when the Student stopped attending school. Fourth, and finally, the District either knew or should have known in July 2022 and again in August 2022 when the District unilaterally dis-enrolled the Student and failed to consider the Parents' independent

evaluation. All of these FAPE losses are tangible and require the following equitable relief.

**PROSPECTIVE COMPENSATORY EDUCATION IS APPROPRIATE RELIEF**

The Student is entitled to attend school until age 21; failing to respond to the Parents in July and August 2022 interfered with that right. Therefore, the Student is now awarded prospective compensatory education.[55] The Parents and Student have the sole discretion to select or create the type of high school diploma experience necessary to compensate for the loss of a chance to learn, transition, and graduate.[56]

The Student may use the prospective education award to participate in a course of studies leading to a high school diploma. For example, the District offers juniors and seniors a "dual enrollment" option. The dual enrollment opportunity allows District students to dual enroll in high school and at an Institution of Higher Education while in high school.[57] The District's website describes its "dual enrollment" option as a career readiness experience that allows students to earn up to 24 college-level credits while in high school. Consistent with the commensurate opportunity provided to others, the District is directed to cover the cost of books, tuition, and transportation to and from the dual enrollment experience if selected.[58]

[55] *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1286 (11th Cir. 2008) citing *G ex. rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 308 (4th Cir. 2003) (compensatory education provides services "prospectively to compensate for a past deficient program").

[56] *G.L. v. Ligonier Valley Sch. Dist. Auth*., 802 F.3d 601, 630 (3d Cir. 2015) citing *Draper v. Atl. Indep. Sch. Sys*., 518 F.3d 1275, 1286-90 (11th Cir. 2008) (upholding an award of approximately five years of compensatory education for a child's long-undiscovered injury).

[57] **Senior Year Only Program (SYOP) – 2023/24, https://www.philasd.org/academics/syop/.**

[58] College & Career Readiness https://www.philasd.org/collegeandcareer/rigorous-coursework/dual-enrollment/

Alternatively, at their sole discretion, the Student can enroll in a private day or residential high school within 150 miles of the Student's current residence at District expense.

Provided the Student elects to participate in the above District-operated dual enrollment option, the District is now **ORDERED** to make any and all modifications and/or accommodations to enroll the Student in the Student selected option as soon as possible.[59]

## THREE YEARS OF RETROSPECTIVE COMPENSATORY EDUCATION IS APPROPRIATE RELIEF

Due to the lack of competent evidence, I now find the record does not support using a qualitative method described in *G.L*. to calculate the "make whole" remedy. Therefore, applying *G.L*. and *M.C.* I will now craft a blended equitable "make whole" remedy.

Based on the failure to complete the IDEA evaluation in February 2020 of [the 2019-2020 school year], the failure to identify, locate, and accommodate the Obsessive Compulsive Disorder impairment in [2020-2021], and the failure to accommodate the Student in [2021-2022], the Student was denied the chance to receive "significant learning" and "meaningful benefit."

The record, as a whole, leads me to conclude that an award of six and a half (6.5) hours a day for each day the District was in session from February 20, 2020, including the 2021 summer session, through the end of the 2022-2023 school year is appropriate relief. As the Student was otherwise unavailable to attend school and the partial program simultaneously, the total number of hours calculated above

59 Dual Credit Agreements between School Entities and Institutions of Higher Education, or Dual Credit Agreements 24 P.S. § 15-1525, https://www.education.pa.gov/Policy-Funding/BECS/Pages/default.aspx (Guidance and context for school entities implementing dual credit agreements with institutions of higher education under section 1525); Dual Credit Agreements https://www.education.pa.gov/Policy-Funding/SchoolGrants/Pages/DualCreditGrant.aspx.

should be equitably reduced by three (3) hours a day for each day the Student participated in the partial program.

Due to the District's refusal to consider the private evaluation, the Student was excluded from school during the 2022-2023 school year. Therefore, the retrospective award includes all 2022-2023 school year days. Assuming, the Student cannot enroll in a high school experience before the start of the 2023-2024 school year, the award of retrospective compensatory education continues until the Student enrolls in a high school diploma experience.[60] Accordingly, all school days for the 2022-2023 school year are included in this award.

Although the school was closed due to the COVID shutdown, the United States Department of Education informed districts that all FAPE timelines and FAPE requirements were unchanged. Other students were provided equal access to aids, benefits, and services during the closure. Therefore, equity requires that the time from March 13, 2020, to the end of the 2020 school year be included in the retrospective compensatory education calculation.

**USE, SELECTION, AND PAYMENT FOR ALL COMPENSATORY SERVICES**

The Student may use the retrospective compensatory education bank of time for any developmental, corrective, remedial, specially-designed instruction, supplemental aids, or accommodations, including but not limited to tutoring, teaching, transition services, related services, auxiliary aids and services, private evaluations/diagnostic testing, assistive technology supports/devices, or career/vocational counseling as defined in the IDEA or Section 504.

The Student may use the prospective award of compensatory education to pay for any course of studies at a public or private day, residential school, or provider that can grant a high school diploma upon completion. Consistent with the educational

[60] *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) (IEPs are forward looking and intended to "conform[] to . . . [a] standard that looks to the child's present abilities", whereas compensatory education is meant to "make up for prior deficiencies". c*iting with approval Reid*, 401 F.3d at 522-23 (An IEP "carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job." )Id.

opportunities offered to other peers in the District, the Student, under this **ORDER,** is permitted to enroll in a dual enrollment high school - a college-level program offered at an Institution of Higher Education.[61]

The Student, in their sole discretion, after consultation with the independent evaluators, can decide the scope and sequence of what classes are needed to make the Student "whole" and obtain a high school diploma. To ensure the Student has ongoing access to the prospective compensatory education supports, the prospective compensatory education period begins from the date the Student enrolls. The prospective compensatory award ends when the Student earns a high school diploma.[62]

**SELECTION OF AND PAYMENT FOR COMPENSATORY EDUCATION**

The Parents or the Student can select the prospective and retrospective compensatory education service provider(s) and the independent evaluator(s) at their sole discretion. The District should reimburse the Parent or Student selected provider(s) at the rate regularly charged for each service by each provider. To the extent the Student or the Parent incurs travel costs to and from the provider, the District should reimburse the Parent or the Student for all mileage or transportation expenses at the District's rate for travel reimbursement.

The mileage reimbursement is a separate award; therefore, the District should not reduce or offset the mileage charges from the funds used to pay for compensatory

[61] *Berks County IU/EI Program*, 117 LRP 9420 (PA 2017) (equal access to IDEA's promise of a free appropriate public education and the parallel promise of a full educational opportunity goal); 34 C.F.R. § 300.109; 20 U.S.C. §1412(a)(2)).

[62] *See, e.g.*, *Streck v. Board of Educ. of the E. Greenbush Cent. Sch. Dist*., 52 IDELR 285 (N.D.N.Y. 2009), vacated, remanded, 55 IDELR 216 (2d. Cir. 2010, unpublished) (a court or hearing officer may order a district to pay for college level services intended to remedy past failures to provide FAPE); *Doe v*. *East Lyme Board of Education,* 64 IDELR 45 (D. Conn. 2014)(the court held that the creation of an escrow account would allow the student to receive the services he required regardless of where he went to school including college); *Letter to Dude,* 62 IDELR 91 (OSEP 2013) (provided that state law allows, OSEP has advised hearing officers that IDEA Part B funds may be used to cover the cost of dual enrollment courses).

education costs. In January of each year, the District should report unused compensatory education hours to the Student and the Parent.[63]

## SUMMARY

The Student suffered a multi-year loss of a chance to receive a FAPE. The blended equitable relief awarded here is calculated to place the Student on the path otherwise disrupted by violating the Student's right to a FAPE. Applying *Perez,* I now find I lack subject matter authority to grant the requested relief.

## FINAL ORDER

**AND NOW,** this May 19, 2023, the District is now **ORDERED** as follows:

1. The Student's IDEA child find a claim is **GRANTED.**
2. The Student's IDEA and Section 504 denial of FAPE claims are **GRANTED**.
3. The equitable relief of compensatory education **ORDERED** herein makes the Student whole for any Section 504 or IDEA FAPE violations.
4. The Parents' request for reimbursement for the independent evaluation is **GRANTED**.
5. The District is **ORDERED** to fund an independent educational and transition assessment.
6. The Parents' request for an award of a high school diploma is **DENIED**.
7. To remedy the FAPE violations during the [2019-2020, 2020-2021, and 2021-2022] school years, the District is now **ORDERED** to fund a bank of

[63] *See generally, Board of Educ. of Oak Park v. Illinois State Board of Educ. et al.,* 79 F.3d 654, 660 (7th Cir. 1996) (noting "[c]ompensatory education is a benefit that can extend beyond the age of 21 the terminating FAPE age in Illinois"); *Murphy v. Timberlane Regional School Dist.,*22 F.3d 1186 (1st Cir.) (affirming award of two years of compensatory education to former student after student had reached the [otherwise terminating-FAPE] age of 21 given finding that FAPE had been denied to student), *cert. denied,* 115 S.Ct. 484 (1994); *Appleton Area School Dist. v. Benson,* 32 IDELR 91 (E.D. WI 2000) (authorizing award of compensatory education to a student who graduated with a regular high school diploma). *See also, School Comm. of Town of Burlington v. Department of Educ.,* 471 U.S. 359, 369-70, 105 S.Ct. 1996, 2002-03 (1985).

retrospective compensatory education services as described above. The Parties are directed to calculate the number of retrospective compensatory education hours as directed above.

8. As the Student is otherwise eligible to attend school until age 21, the District is now **ORDERED** to fund a bank of prospective compensatory education hours, including payment for dual enrollment college credit, if elected, as described above. The District is further **ORDERED** to pay the actual cost of the Student's participation, including books, fees, and transportation to and from the Student selected dual enrollment high school diploma program - transition to work or postsecondary experience if selected.
9. The District is next **ORDERED** to pay the cost of transportation to and from any compensatory education service, education, transition, or testing provider as described above.
10. The District is **ORDERED** to pay the total costs for all invoiced testing, retrospective, and prospective compensatory education services at the rate charged by the service provider selected by the Parent, at the rate charged for each service(s). All compensatory education services, evaluation, or travel invoices should be paid within 45 days of receipt of the invoice or demand. If the Parent or the Student advances or prepays for any part of the award, the District is **ORDERED** to reimburse the payor within 20 days of receipt of the expense or demand.
11. The Parent or Student can select the individual(s) or the provider for all make-whole retrospective or prospective compensatory education services, evaluations, and transportation.
12. This hearing officer cannot award legal or equitable relief or remedy the Student's Section 504 intentional discrimination claims; these claims are now exhausted and dismissed without prejudice.

13. All other claims for appropriate relief, causes of action, demands, or affirmative defenses not argued for in the Parents' or the District's closing statements and not discussed herein are now dismissed with prejudice.

Date: May 19, 2023

s/ Charles W. Jelley, Esq. L.M.
Hearing Officer
ODR FILE #27508-22-23