

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

Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number:

23631-19-20

Child's Name:

A.M.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parent:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

August 5, 2020

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹, is currently [redacted] years old and just completed the [redacted] grade in the (District). Although the Parent filed the due process complaint in April 2020, the parties stipulated to January 12, 2020, as the filing date.² The Parent raised claims under the Individuals with Disabilities Education Act (IDEA), as well as the federal and state regulations implementing those statutes.³ In the complaint, the Parent contended that the District denied Student a free appropriate public education (“FAPE”) for the failure to evaluate Student promptly after a February 2019 request. The Parent also alleged that the District failed to identify Student's disability before November 2019, although exhibiting signs of academic struggle since the 2016-2017 school year. Parent seeks compensatory education as a remedy.

In response, the District sought to limit claims to the period of February 2019 through January 12, 2020. Alternatively, the District proposed limiting claims for the two years preceding the Complaint filing (from January 12, 2018, onward).⁴ An evidentiary hearing occurred with the party's filings incorporated into the hearing record.⁵ A ruling on the District's Motion was deferred until the issuance of the final decision. For reasons that follow, the District's Motion to Limit Claims is moot.⁶

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² By agreement of the parties, the filing date for the due process hearing is January 12, 2020 (S-15, p.1)

³ 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

⁴ The District also challenged the sufficiency of the Parent's Complaint and requested dismissal of any claims without specific factual averments or an evidentiary hearing to establish the date that Parent knew or should have known (KOSHK) of the claims at issue. The evidentiary hearing sufficiently developed the factual averments, which the District defended.

⁵ In its Offer of Proof, the Parents suggested February 2019 or alternatively Fall 2018 as the KOSHK date. The District simply requested that claims be limited to no greater than January 12, 2018. (S-15).

⁶ After the evidentiary hearing, the parties both proposed KOSHK dates that were within two years preceding the complaint filing in effect nullifying the timeliness dispute. Findings of fact in this decision that address school years before January 12, 2018, are outlined for purposes of resolution of the FAPE issues.

This case proceeded to a due process hearing convening over four sessions.⁷ The following exhibits were admitted into the hearing record: P-1 through P-3; S-1 through S-10; S-12, S-14 through S-15. The parties agreed to the following joint stipulations: Student's date of birth is [redacted]. Student is a resident of the District and is eligible for special education services.

Based on the evidence presented, the District did not violate its child find responsibility toward this Student. However, the District committed a procedural violation for not promptly responding to Parent's request for an evaluation. This procedural violation constituted a denial of FAPE. The District owes compensatory education to Student.

ISSUES

- 1) Following the Parent's request, did the District evaluate the Student promptly?
- 2) Did the District violate its child find obligations in failing to evaluate and identify Student as eligible for special education?
- 3) If the District failed in its Child Find is Student entitled to compensatory education and, if so, in what form and in what amount?
- 4) When did the Parent know or when should they have known of any action and/or omission by the District that formed the basis of their complaint?

FINDINGS OF FACT

1. Student has attended school in the District since kindergarten. (N.T.23)
2. Student is currently enrolled in the [redacted] grade and is eligible for and receives special education. (S-10)
3. Student is athletically active and plays on both District and travel [redacted] teams. (N.T. 41, 112)

⁷ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number.

4. Parent is actively involved in Student's academic, athletic, and emotional life. (S-10, p. 14; N.T. 87, 96, 129, 159, 178, 183, 209)
5. Parent has a B.S in Chemistry, a Master's in Business Administration, and is employed in the private sector. (N.T. 23, 77)

2015-2016 School Year – Fifth Grade

6. During the 2015-2016 school year, Student was enrolled in the fifth grade and attended a District elementary school. (S-10)
7. On the Foursight Benchmark Assessment, Student received scores in the below basic range in Math and basic in Reading. (S-10, p.14; N.T. 31, 141)
8. Parent requested and received from the District an exemption from Student's participation in PSSA testing during the 2015-2016 school year. (S-10, p.14; N.T. 158)

2016-2017 School Year – Sixth grade

9. During the 2016-2017 school year, Student was enrolled in the sixth grade and attended a District middle school. (S-2)
10. The District's middle school uses a multi-tiered system of support (MTSS) process to identify and monitor students for academic, social, and behavioral concerns and additional referral for assistance if needed. (S-15; N.T. 97, 159, 166-175)
11. During the sixth grade, Student received math instruction in a regular education, non-supplemental Level two class. (N.T. 142)
12. The academic workload increased for Student during the sixth [redacted] grade with Parent claiming to render upward of four-plus hours an evening on homework assistance. (N.T. 39, 84, 86)
13. Student's sixth-grade math teacher distributed classroom, grading, and homework policies, along with teacher contact information to all parents. (N.T. 153)
14. Other than a conversation with Parent about a peer issue, the middle school assistant principal had no recollection of having a discussion with Parent about Student's academic sixth grade academic performance in any class. (N.T. 157, 160, 163)
15. In Math, Student received quarterly grades of 78, 95, 80, and 84, resulting in a final grade of 84. (S-2, p.2; N.T. 134, 137)

16. None of Student's Math grades were modified, assignments were unadjusted, and the scores received were based primarily on individually completed classwork and not homework or group projects. (N.T. 137, 146-148)
17. Student's sixth-grade math teacher did not recall speaking with Parent during the school year. (N.T. 33, 130, 131-133)
18. In sixth grade, Student received final grades of Science -89, World Cultures-89, English-89, Level 2 Reading-91, Math - 84. (S-2, p.1; N.T. 42)
19. The Parent requested and received an exemption from Student's participation in PSSA testing during the 2016-2017 school year. (S-10, p. 14; N.T. 129, 159)

2017-2018 School Year – Seventh Grade

20. During the 2017-2018 school year, Student was enrolled in the seventh grade and attended a District middle school. (S-2)
21. During Student's seventh grade year, the District offered a Level 1, above grade level reading class, a Level 2 grade level reading class, or a language option. (N.T. 103-104)
22. From August 2017 through December 2017, Student received reading instruction through the Level 2 reading class. (N.T. 95, 103, 202)
23. During Reading, Student was uncooperative with the teacher and expressed the desire to enroll in Spanish. (N.T. 204, 208-209)
24. In early Fall 2017, Student and Parent approached the middle school principal seeking to drop Reading and enroll in Spanish. (S-2; N.T. 95)
25. After receiving the request to enroll in Spanish, the District referred Student to the reading specialist for a Qualitative Reading Inventory (QRI) to determine whether a class change was academically appropriate. (S-3; N.T. 96, 178, 183, 209)
26. On November 17, 2017, the District's reading specialist administered a Qualitative Inventory (QRI) to Student. (S-3; N.T. 183)
27. Based on the QRI, the reading specialist determined that the results presented no educational concerns and that no further testing of Student was needed. (N.T. S-3; 183-185-188, 190-191)
28. After consultation with the middle school principal, the Parent disenrolled Student from the seventh grade Reading class to take Spanish. (N.T. 51, 87,95, 103, 203)
29. After the 2017-2018 school year, Student earned final grades of Science-88, English -82, Health-93, Math -80, History-93, Spanish-91.

30. On the seventh grade PSSA administered during the 2017-2018 school year, Student received a score of below basic in Math and proficient in Reading. (S-10, p. 14)

2018-2019 School Year - Eighth grade

31. During the 2018-2019 school year, Student was enrolled in the eighth grade and attended a District middle school. (S-2)
32. In eighth grade, Student was enrolled in Prealgebra 8, English 8, Computer Science, US History, Science, Health, and Art. (S-2, p.5)
33. Based on the District's observation, Student had no academic, behavioral, or emotional concerns that warranted intervention or referral to the MTSS. (N.T. 97, 99-101, 103, 107, 115, 167)
34. On October 12, 2018, Parent contacted Student's Prealgebra teacher with concerns about the previous year's PSSA math scores and requested an assessment test "to pinpoint grade level/math age/capability" and a plan to raise proficiency level. (P-2, p.2; N.T. 60, 216)
35. In response, the Prealgebra teacher referred Parent's concerns to the District's math specialist. (N.T. 216)
36. On October 16, 2018, the District's math specialist contacted Parent and proposed Student's placement into a Math Plus class and a Classroom Diagnostic Tools (CDT) assessment of Student's sixth through eighth-grade skills. (P-1, p.2; N.T. 217, 229)
37. Math Plus, is a non-daily, small, supplemental math class for students on the cusp of proficient math performance, providing extra help, no tests, quizzes or homework, and grades are pass/fail. (N.T. 61,134, 240, 246)
38. The CDT determined that Student had areas of need in number/operations, algebraic concepts, geometry and measurement, data, and probability. (P-1, p.2; N.T. 217-218)
39. Student enrolled in Math Plus while remaining in Prealgebra. (S-2)
40. Parent never communicated any concerns to the Math Plus teacher about Student's eighth-grade math performance. (N.T. 244)
41. Parent first heard the term "504/IEP" from a family member and thought Student might need that intervention. (N.T 26)
42. In mid-February 2019, an optometrist diagnosed Student with a Convergence Insufficiency disorder. (S-5, pp. 5-8; N.T. 27, 250)
43. To treat the convergence disorder, Student's optometrist recommended twelve to twenty-four in-office sessions, daily home therapy, and offered an excellent prognosis. (S-5, p. 5)
44. The examining optometrist suggested to Parent that Student may benefit from an IEP. (N.T. 27)

45. In February 2019, Parent left a voicemail for the middle school principal requesting 504 or IEP intervention for Student. (S-5; N.T. 64-67)
46. In Spring 2019, Parent enrolled Student at Huntington Learning Center for additional educational support, and they suggested that Student may benefit from in-school intervention. (N.T. 28, 80-81)
47. On April 17, 2019, Parent emailed the middle school principal, referencing a February voicemail that “verbally request[ed] 504 and IEP intervention” and advised that Student was diagnosed with “learning-related vision disorders” that required a “504 plan at a minimum” and requested a “comprehensive evaluation.” (S-5, p.3; N.T. 231, 249)
48. The April 17, 2019 email to the middle school principal referenced a contemporaneous voicemail left for the guidance counselor. (N.T. 231, 249)
49. The middle school guidance counselor did not recall receiving an evaluation request in February or March from Parent. (N.T. 251)
50. The April 17, 2019 email subject line from Parent to the District was entitled” 504/IEP for Student”. (S-5, p.3)
51. On April 17, 2019, the middle school principal emailed Parent, acknowledged speaking with Parent two weeks before about a behavioral incident involving Student, and requested that Parent provide “all recent assessments so that we do not repeat any assessments completed thus far.” (S-5, p. 3)
52. On April 26, 2019, Parent emailed the middle school principal and guidance counselor expressing concerns that Student was experiencing anxiety and depression and requested “a 504 in place ASAP” and an “IEP moving quickly as well.” (S-5, p. 1)
53. On April 29, May 2, and May 14, 2019, the guidance counselor attempted to schedule an MTSS meeting with Parent to discuss accommodations possibly related to vision. (S-6, S-7; N.T. 253, 256)
54. On June 6, 2019, the guidance counselor emailed Parent that no assessments were completed. (S-7, p.1)
55. In Prealgebra 8, Student earned quarterly grades of 78, 81, 81, and 83 with a final grade of 81. (S-2, p. 6)
56. Student’s Prealgebra grades were not modified or adjusted in any manner. (N.T. 225)
57. In English, Student earned quarterly grades of 90 and 85. (S-2, p.5)
58. After the 2018-2019 school year, Student earned final grades of Math Plus-86, Health-95, Pre-Algebra-81, US History-87, Science-90, English-85.
59. On the PSSA administered during Student's eighth grade school year, Student received a score of below basic in Math and basic in Reading and Science. (S-10, p.14)

2019-2020 School Year – Ninth Grade

60. During the 2019-2020 school year, Student was enrolled in the ninth grade and attended a District high school. (S-10, p.5, N.T.23)
61. On September 13, 2019, the District issued to Parent a request to evaluate the Student. (S-10, p.1-2)
62. On September 17, 2019, Parent consented to an initial evaluation of Student. (S-10, p. 4)
63. On November 16, 2019, the District issued its evaluation report concluding that Student was eligible for special education as a child with a specific learning disability. (S-10)
64. On December 16, 2019, Parent approved the provision of special education to Student. (S-11, p.58)
65. The December IEP provides Student with a supplemental level of support with 1.5 hours of pull-out learning support per school day. (S-12 p.58; NT. 25)

DISCUSSION AND CONCLUSIONS OF LAW

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence that the moving party is entitled to the relief requested. The burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the hearing officer. The burden of persuasion, in this case, was borne by the Parent, the filing party. Application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here. Whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. *Id.*

It is the responsibility of the hearing officer, as factfinder to determine the credibility and reliability of witnesses' testimony. 22 Pa. Code §14.162 (requiring findings of fact); *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings.

Hearing officers, as factfinders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying to the best of his or her ability and recollection concerning facts necessary to resolve the issues presented.

KOSHK DISCUSSION

Under the IDEA, children who are eligible for special education based on a disability are entitled to a free, appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.28, §300.101. Parents and school districts are entitled to file due process complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free and appropriate public education of such child. 20 U.S.C. §1415(b)(6)(A)). The IDEA expressly provides that a party “must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint.” 20 U.S.C. § 1415(f)(3)(C); *see also* 34 C.F.R. § 300.511(e).

In terms of the scope of the denial-of-FAPE evidentiary record in this matter, the Parent's complaint was filed in January 2020. The acts/omissions that formed the basis of the complaint range back to the outset of the 2016-2017 school year. Strictly, then, the scope of the denial-of-FAPE evidentiary record would potentially extend to a point beyond two years prior to the filing of the complaint (January 2020). In such cases, the IDEA requires fact-finding related to the date(s) on which parent knew or should have known (KOSHK) of the action(s) which form(s) the basis of the complaint to determine if the claim(s) in the complaint is/are timely filed. (34

C.F.R. §§300.507(a)(2), 300.511(3); *G.L. v. Ligonier Valley School Authority*, 801 F.3d 602 (3d Cir. 2015)). The IDEA statute of limitations also applies to claims under Section 504. *D.K. v. Abington School District*, 696 F.3d 233, 244 (3d Cir. 2012); *P.P. v. West Chester Area School District*, 585 F.3d 727, 737 (3d Cir. 2009). The statute of limitations is tolled if the educational agency makes specific misrepresentations that it resolved the problem forming the basis of the due process complaint or withholds information from parents to which they are statutorily entitled.⁸ The Parent does not argue that any specific misrepresentations occurred in this matter.

Counsel submitted Offers of Proof outlining their respective positions concerning the operative KOSHK date, followed by a brief evidentiary hearing. The Parent suggested either Fall 2018 or February 2019 as the KOSHK date; both dates are within two-years of the filing of the complaint. In its Offer of Proof, the District did not suggest a specific KOSHK date but requested that all claims be limited to January 2018. Based on the evidence adduced at the hearing, February 20, 2019, is determined to be the date that Parent knew or should have known the of the action(s) which formed the basis of the complaint. It is within this time frame that Parent claims to have first heard the term, “504/IEP”, from a family member and thought Student might need that intervention. That event was followed by a mid-February 2019, optometric examination where Student was diagnosed with Convergence Insufficiency, and the optometrist suggested to Parent that Student may benefit from an IEP. In Spring 2019, Parent enrolled Student at a learning center for educational support, and again a suggestion was made that Student may benefit from additional in-school intervention. These events culminated in an April 2019 email request to the District for Student to receive a “504 and IEP” intervention. Parent filed for due process on January 12, 2020, within two years of the established and ultimately agreed upon KOSHK date. The complaint was timely, and the District’s Motion to Limit Claims in this matter is moot.

FAPE DISCUSSION

The first issue is whether the District erred in failing to identify Student as eligible under the IDEA. The IDEA and its implementing state and federal regulations obligate LEAs to locate,

⁸ 20 U.S.C. §1415(f)(3)(D)(i), (ii)

identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as “child find.” Under the IDEA’s “child find” requirement, a local education agency has a “continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability.” *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012)(citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Perrin v. Warrior Run Sch. Dist.*, 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015).. Districts are required to fulfill the child find obligation within a reasonable time after notice of behavior that suggests a disability. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). School districts are not, however, required to identify a disability “at the earliest possible moment.” *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). The courts will assess the reasonableness of an agency's response to such information on a case-by-case basis, in light of the information and resources possessed by the agency at a given point of time. *Ridley*. A Parent’s failure to request an evaluation does not absolve the local education agency of its “child find” duties. Because child find is an affirmative obligation of an LEA, a parent is not required to request that an LEA identify and evaluate his or her child, and more importantly, a parent's failure to make such a request does not relieve the LEA of its child find obligations. *M.C. v. Central Reg. Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996)(child’s right to FAPE not dependent upon the vigilance of parents). See also *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 18 247 (3d Cir. 1999); *Matthew D. v. Avon Grove School Dist.*, 2015 WL 4243471 (E.D. Pa. July 13, 2015)

Section 504 imposes a similar obligation.⁹ In the context of education, Section 504 and its implementing regulations require LEAs to “provide a free appropriate public education to each qualified handicapped person[.]” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); see also *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). This FAPE obligation includes a child find duty of under Section 504. 34 C.F.R. § 104.32; *Ridgewood* at 253.

⁹ Section 504 imposes a “child find” obligation on school districts analogous to that which they shoulder under the IDEA. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

The Parent's claims have two aspects—an alleged failure of the District in its child-find obligation and that it disregarded Parent's request to evaluate the Student. Specifically, the Parent contends that the District failed concerning its child find responsibilities because it knew or reasonably should have known that Student needed special education intervention since the sixth grade. Instead, the Student was not determined eligible until the 2019-2020 school year, in the ninth grade. The ignored academic needs cited by Parents stems from a Math score received on a fifth-grade assessment, alleged communication about homework struggles, and below basic Math scores on the PSSA. Additionally, the Parent claims to have requested an evaluation of Student, in February 2019, which did not commence until September 2019. The District contends that Student's consistently strong academic performance through the years and the lack of other factors were never indicative of an educational need unmet through the regular education curricula. I agree. For the following reasons, the Parent has failed to establish that the District failed to fulfill its child find obligations as no reasonable suspicion existed that Student was a child with a disability. I also conclude that the District committed a procedural violation by failing to commence the evaluation process of Student in a timely manner, although the Parent made a specific request.

As a sixth grader during the 2016-2017 school year, Student was enrolled in English, Reading, and Math as well as other required middle school courses. Fifth-grade scores on the Four Sight Benchmark Assessments were below basic in Math and the basic range in Reading, resulting in Student receiving Math instruction in a regular education, non-supplemental program, Level two-class. According to the testimony and documentary evidence, the District observed no signs of academic struggle. The Parent contended that excessive hours were spent on homework, and those concerns were communicated to the District. I find more persuasive, the convincing testimony from the Math teacher that Student was not struggling, math assignments were unmodified, and the quarterly and final grades received were based primarily on in-class effort. Student's lowest grade was 78 with a final grade received of 84. Additionally, the math teacher and middle school Principal had no recall, record of a note, email, or phone call with Parent about academic concerns. In Reading or other areas, the Parent presented no evidence supporting the contention that the District should have identified the Student as a child with a disability. Accordingly, the Parent has failed to establish that the District had any reason to

suspect that Student was a child with a disability. The District did not fail with respect to its child find responsibilities during the 2016-2017 school year.

Next, Parent contends that the District violated its child find responsibility during the 2017-2018 school year. Again, the Parent has failed to meet its burden of proof concerning this contention. During seventh grade, the District offered both above and on grade-level reading classes or the option to enroll in a foreign language. Although making progress in the grade-level Reading class, Student's behavior was non-compliant with complaints that enrollment in Spanish was preferred. When approached by Parent about dropping Reading, the District appropriately referred Student to its reading specialist, who, after testing determined, grade-appropriate reading skills were in place. The District presented credible testimony from both the reading specialist and assistant principal that although no educational concerns were present and further testing was unwarranted, continued enrollment in Reading was preferable. Parent decided to replace the Reading class with Spanish. Parent presented no persuasive evidence that the District failed with respect to its child find obligations. In seventh grade Math and other academic areas. Student started, maintained, and ended this school year academically strong with grades indicative of success, certainly not struggle. Student was not denied a FAPE.

Parent contends that by the 2018-2019 school year as an eighth-grader, Student's academic struggles were so dramatic that the District should have suspected this could have been a child with a disability. Parent also contends that although an evaluation was requested, the District failed to act within the legally requisite timeframe. With respect to the child find allegation, the Parent cites the seventh grade below basic Math PSSA score. Based on the totality of the evidence, in this case, the District had no basis to suspect that Student was a child with a disability. In Fall 2018, after the Parent expressed concern about Student's math abilities, the District promptly responded with a referral to its math specialist for assessment. Student did have skill deficits, and the District recommended placement in a regular education supplemental math class. Student's Prealgebra teacher credibly testified that additional evaluation by the District was unwarranted at that stage. I agree. Although the previous year's math PSSA score was below basic, multiple other data points, suggested Student was proficiently and successfully functioning within the expectations of the curriculum. No red flags of struggle were present. In fact, Student did enroll in the supplemental math class and went on to experience academic

success in the regular education Prealgebra class, with unmodified, unadjusted, quarterly grades between 78 and 83. Concerning other academic areas, the Student experienced similar success. Parent has failed to preponderantly establish that the District failed with respect to its child find obligations toward this Student.

Based on the totality of the record in this matter, the Parent has not preponderantly established that a child find violation occurred in this case. No red flags were present that should have alerted the District and raised a reasonable suspicion that Student was a child with a disability. On the contrary, when Parent expressed concern, the District responded promptly with a referral to the reading specialist for assessment during the seventh grade and the math specialist the following year. The academic information these assessments yielded served to allay concerns of the Parent and strengthen the knowledge of the District for subsequent programmatic recommendations. Throughout middle school, Student's overall academic performance was consistently devoid of signs of struggle. Every school year in question, Student did well in every class, never earning a final grade below an 80 in any subject while balancing a full athletic schedule. Parent is actively involved in Student's life. However, Parent presented no evidence of unaddressed behavioral, social, or emotional concerns that warranted referral and intervention, although those District-based resources were in place and fully accessible. For the reasons stated, I conclude that the District did not fail to fulfill its child find responsibilities toward this student.

The final issue for consideration is whether the District promptly evaluated the Student after receiving Parent's request in February 2019. The definite answer to this question is no. Under both the IDEA and Chapter 14, a child's parent may initiate a request for an initial evaluation to determine if their child is a child with a disability. The initial evaluation must be conducted within 60 days of receiving parental consent.¹⁰ The Parent has preponderantly established that despite a request, the District failed to initiate an evaluation process for this Student. Of course, this issue is fraught with conflicting recollection about the series of events that transpired up to the issuance of the PTE that the District finally provided to Parent in September 2019. The evidence is clear that on April 17, 2019, via an email to the middle school principal, with the subject line, "504/IEP for [Student]", the Parent referenced, in the body of the email, a previous verbal request made through voicemails for "504 and IEP intervention". Parent contends that this

¹⁰ 34 CFR §300.301(b); 22 Pa. Code §14.123(c)

was merely a follow up to an evaluation request made to the District in February 2019. I determine Parent's contention that contact was made in February 2019 to be credible and supported by the evidence. Although the Parent did not present evidence of the precise day the voicemail was left for the District, I conclude that the verbal evaluation request was made on February 20, 2019, sometime after the "mid-February" optometric examination. Although the special education evaluation outcome was unknown at the time of the request, as it turned out, Student was found eligible and in need of special education. The evaluation process was a necessary first step for this Student to receive FAPE. Had the evaluation commenced in a timely, legally responsive manner, this Student might have been identified sooner, and programming could have been in place for the start of high school. Instead, the permission to evaluate the Student was not issued until September 13, 2019 with the finalization of the IEP occurring in December 2019. This was a procedural error. However, this violation impeded this Student's right to FAPE and resulted in a loss of educational opportunity.¹¹

The final question is whether compensatory education is owed this Student from the denial of FAPE that resulted from the District's procedural violation. A procedural error can only be the basis of remedy when the procedural violation results in a denial of FAPE, which has already been determined. (34 C.F.R. §300.513(a)(2)). Compensatory education is an appropriate remedy that accrues from the time when an LEA knows or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central. Regional; Ridgewood*; P.P. (quoting *Lauren W. v. DeFlaminis*, 480 F.3d 259, 272 (3d Cir. 2007)). The "child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem." *M.C. v. Central. Regional; Ridgewood*. Compensatory education is an equitable remedy and is appropriate for a procedural violation. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

1120 U.S.C. § 1415[f][3][E]; 34 C.F.R. §300.513(2)

There are two methods by which a compensatory education remedy may be calculated. One method is the quantitative/hour-for-hour calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a quantitative calculation given the period of deprivation. The second method is the qualitative/make-whole calculation. Having proven a denial of FAPE, the compensatory education remedy is calculated based on a qualitative determination to place the student in the position where he/she would have been absent the denial of FAPE. Both methods of calculating compensatory education are a matter of proof. In this case, Parent presented no evidence regarding calculation of compensatory education. As an equitable remedy, a quantitative calculation will be employed. Under the IEP currently in place, Student receives a supplemental level of support with 90 minutes of pull-out learning support per school day. For the deprivation of FAPE, the Student is owed a commensurate award of compensatory education.

ORDER

In accordance with the preceding findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District did not fail in its Child Find obligations to Student under the IDEA or Section 504.
2. The District did commit a procedural violation by failing to initiate the Parent requested evaluation process promptly.
3. The District's procedural violation resulted in a denial of FAPE to this Student.
4. Student is entitled to compensatory education from February 20, 2019; the day Parent is determined to have requested an evaluation of Student until September 13, 2019, the day the District issued the permission to evaluate.
5. The compensatory education shall be in the amount equal to 90 minutes per day of educational services for every day Student's school was open for students from February 20, 2019, to September 13, 2019.
6. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parent, and may be provided at any time, including after school hours, on weekends, or during summer months when convenient for Student or Parent.

7. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.
8. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service within a radius of fifty miles from the District administration building.

It is **FURTHER ORDERED** that the parties may alter the terms of this Order by agreement of the District and Parent.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and Order are denied and dismissed.

Joy Waters Fleming, Esq.

Joy W. Fleming
JOY WATERS FLEMING, ESQ.
HEARING OFFICER

Dated: August 5, 2020