IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KEVIN AND DENISE CULLEY, *on behalf of their minor son, J.C.*,	:	1:15-cv-857
Plaintiffs,	:	Hon. John E. Jones III
v.	:	
CUMBERLAND VALLEY SCHOOL DISTRICT,	:	
Defendant.	:	

MEMORANDUM AND ORDER

November 6, 2017

Presently pending before the Court are cross-Motions for Judgment on the Administrative Record. (Docs. 38, 40).[1] Defendant Cumberland Valley School District filed its motion on April 7, 2017, and Plaintiffs Kevin and Denise Culley filed their motion on behalf of their minor son J.C., ("Plaintiffs" or, when appropriate, "parents" and "J.C."), on April 7, 2017 as well. The motions have been fully briefed and are therefore ripe for our review. (Docs. 39, 41, 42, 43). For the following reasons, we shall grant the Plaintiffs' motion in part and grant Defendant's motion in part.

[1] Docs. 38 and 40 will be referred to as Defendant's motion and Plaintiffs' motion, respectively.

I. FACTUAL BACKGROUND

J.C. was diagnosed with Crohn's disease in 2004. (Doc. 16-1, AR HOD, p. 3; Doc. 16-12, P-20, p. 1).[2] Plaintiffs put the District on notice of the diagnosis in October 2007 via a note written by J.C.'s mother. (Doc. 16-1, AR HOD, p. 3; Doc. 16-5, AR S-1, p. 1). Until 2013, J.C.'s physician had only recommended liberal bathroom privileges in response to J.C.'s diagnosis. (Doc. 16-5, AR S-5, p. 1; AR S-3, p. 3). As J.C. progressed into high school, his academic performance declined and his attendance worsened. (Doc. 16-2, AR Transcript of Proceedings, p. 148, Doc. 16-3, AR Transcript of Proceedings, pp. 193, 195). In the 2011-2012 school year, J.C. had 16 absences, eight unexcused tardies, and a 73.96 grade point average. ("GPA"). (Doc. 16-9, AR P-6, pp. 8-9). In 2012-2013, J.C. had 22.5 absences, 17 tardies, and a 74.52 GPA; J.C. also had 28 nurse visits, and was sent home nine times, in part because of gastrointestinal problems. (*Id.*). J.C.'s GPA for 2012-2013 was 74.52. (*Id.* at p. 9). In his last year at Cumberland Valley High School, J.C. was absent for 43 of 135 days, visited the school nurse five times, and was sent home once. (*Id.* at pp. 9-10).

On January 17, 2014, J.C. and school officials had an altercation that led Defendant to initiate disciplinary proceedings against J.C. (Doc. 16-1, AR HOD,

[2] The Court is following the parties' lead in identifying specific portions of the administrative record as AR. All exhibits are filed under seal at Doc. 16, with multiple exhibits as attachments. Each cite will reference the docket number, attachment, and specifically reference the corresponding exhibits as identified by the parties and in the administrative hearing.

p. 3). J.C. and three other students attempted to leave campus during school hours, in violation of school rules. (Doc. 16-1, AR HOD, p. 3 ¶ 7). The other students fled and J.C. was walked back into the school, where he became uncooperative. (*Id.* at ¶¶ 7, 8). The Defendant initiated disciplinary hearings and filed disorderly conduct charges against J.C. (Doc. 16-1, AR HOD, p. 4 ¶ 11; Doc. 16-9, P-3, p. 1). J.C. was the only student disciplined in this incident. (Doc. 16-1, AR HOD, p. 16). On January 29, 2014, Plaintiffs filed their initial due process complaint, alleging Defendant had failed to evaluate J.C. for eligibility for special education services under the Individual with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (hereinafter "IDEA"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq*. (hereinafter "Section 504").[3] (Doc. 39, p. 5). In response to Plaintiffs' complaint, Defendant placed the disciplinary hearings in abeyance and proceeded to conduct evaluations regarding J.C.'s IDEA and Section 504 Eligibility. (Doc. 16-1, AR HOD, p. 4).

On February 21, 2014, Defendant sought permission to conduct an IDEA eligibility evaluation and Plaintiffs consented on March 12, 2014. (Doc. 16-5, AR S-13). Contemporaneously, Defendant also sought to evaluate J.C. for Section 504 eligibility and Plaintiffs consented on March 10, 2014. (Doc. 16-5, AR S-16, p. 2

[3] A hearing was scheduled on this initial due process complaint, but was later cancelled due to pursued settlement discussions. The initial complaint was dismissed on February 3, 2014 (Doc. 16-13, AR Dismissal p. 1). An amended due process complaint was filed on July 3, 2014 (Doc. 16-9, P-2, p. 1)

S-17). Plaintiffs met with Defendant to develop Section 504 accommodations for J.C., which both parties initially agreed upon. (Doc. 16-5, AR S-16; S-17). Plaintiffs did not consent to, or failed to respond to, Defendant's request to conduct a psychiatric evaluation, exchange information with J.C.'s doctors, or enroll J.C. in a drug/alcohol evaluation and Student Assistance Program. (Doc. 16-1, AR HOD, pp. 5-6, ¶¶ 22, 23, 25).

Shortly after Plaintiffs signed the 504 agreement, on April 4, 2014, Defendant received a letter from J.C.'s physician recommending half of J.C.'s day be in homebound instruction and the other half in vocational school. (Doc. 16-5, AR S-2, p. 4). Defendant attempted to provide J.C. with homebound instruction with mixed results; J.C. was unmotivated, difficult to instruct, and sometimes not even present for the homebound sessions. (Doc. 16-7, AR S-27, pp.6-10). On May 8, 2014, the school district psychologist submitted an evaluation concluding that J.C. was not eligible for special education services under IDEA, but eligible to receive accommodations under a Section 504 agreement. (Doc. 16-7, S-33, p. 3). Plaintiffs obtained contrary Independent Educational Evaluation ("IEE") results from Dr. Margaret Kay, who found J.C. to be eligible under the IDEA for his Crohn's Disease, Attention Deficit Hyperactivity Disorder/Inattentive type diagnosis, and his Specific Learning Disabilities of math calculation and listening comprehension. (Doc. 16-9, AR P-6, pp. 28-31).

For the 2014-2015 school year, Plaintiffs enrolled J.C. in East Pennsboro Area High School in neighboring East Pennsboro Area School District. ("EPASD"). (Doc. 35, EPASD Evaluation Report, p. 18). East Pennsboro Area High School conducted its own evaluation of J.C. and also determined J.C. was eligible for IDEA services as a student with Other Health Impairment based on his Crohn's Disease and inattention. (Doc. 35, EPASD Evaluation Report, p. 21).

II. PROCEDURAL HISTORY

Plaintiffs filed an amended due process complaint on July 3, 2014. (Doc. 16-13, AR Amended Complaint, p. 1). Hearing officer Brian Jason Ford, Esq. presided over the administrative due process hearings on August 7, October 8, and December 12, 2014. (Doc. 16-1, AR HOD, p. 1). A total of five different witnesses and 89 exhibits were presented. (Doc. 39, p. 5). On February 3, 2015, the hearing officer determined that J.C. was not eligible for: (1) special education services and compensatory education pursuant to IDEA; (2) Section 504 services prior to March 2014; and (3) Section 504 compensatory education services. (Doc. 16-1, AR HOD, p. 17). The hearing officer further found that J.C. was not discriminated against pursuant to Section 504 of the Rehabilitation Act of 1973. (*Id.*).

Plaintiffs initiated this action on May 3, 2015 to appeal the hearing officer's decision. (Doc. 1). Defendant filed a Motion to Dismiss for failure to state a

claim, which the Court granted on January 30, 2017 with leave to amend. (Docs. 7, 8). Plaintiffs filed an Amended Complaint on March 21, 2016. (Doc. 23). Defendant filed an answer to the Amended Complaint on April 6, 2016. (Doc. 24). Plaintiffs filed a motion to supplement the record with additional evidence[4] on November 18, 2016, which we granted. (Docs. 30, 34). Now before the Court are cross motions for judgment on the administrative record. (Docs. 38, 40).

III. STANDARD OF REVIEW

In reviewing a hearing officer's decision pursuant to § 1415(i)(2)(C) of the IDEA, a court shall: 1) receive the record of the administrative proceedings; 2) hear additional evidence at the request of a party; and 3) based upon a preponderance of the evidence, grant such relief as the Court deems appropriate. 20 U.S.C. § 1415(i)(2)(C)(i-iii). "Judicial review in IDEA cases differs substantively from judicial review in other agency actions, in which the courts are generally confined to the administrative record and are held to a highly deferential standard of review." *Jana K v. Annville-Celona Sch. Dist.*, 39 F. Supp. 3d 584, 594 (M.D. Pa. 2014) (quoting *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 757 (3d Cir. 1995)).

[4] The additional evidence included: 1) East Pennsboro School District's evaluation report; 2) IEP developed by East Pennsboro School District; and 3) the Notice of Recommended Educational Placement from East Pennsboro School District.

The Court of Appeals for the Third Circuit has described this standard as "modified *de novo*" review, under which the district court must give "due weight" to the findings of the hearing officer. *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 734 (3d Cir. 2009). In addition to affording the hearing officer's findings "due weight," the Supreme Court requires federal district courts to afford "due deference" to state administrative proceedings in evaluating claims under the IDEA. *Board of Education v. Rowley*, 458 U.S. 176, 207 (1982); *S.H. v. State-Operated School District of the City of Newark*, 336 F.3d 260, 269-70 (3d Cir. 2003). Pursuant to this standard, the hearing officer's factual findings should be considered *prima facie* correct; if the district court does not accept those findings, the court is obligated to explain its reasoning. *S.H. v. State-Operated Sch. Dist. Of Newark*, 336 F.3d 260, 270 (3d Cir. 2003); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 527 (3d Cir. 1995).

A district court must also accept the hearing officer's credibility determinations "unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." *S.H.*, 336 F.3d at 270 (quoting *Carlisle*, 62 F.3d at 529). If the district court accepts additional evidence, it may "accept or reject the agency findings depending on whether those findings are supported by the new, expanded

record, and whether they are consistent with the requirements of the [IDEA]." *Id.* (quoting *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1220 (3d Cir. 1993)).

A hearing officer's application of legal standards and conclusions is subject to plenary review by the district court. *Jana K.*, 39 F. Supp. 3d at 270 (quoting *Carlisle*, 62 F.3d at 259). The hearing officer's conclusions regarding compensatory education are accordingly subject to plenary review. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 608 (3d Cir. 2015) (citing *P.P.*, 585 F.3d at 735). However, this plenary review is not an invitation for the reviewing court to "substitute its own notions of sound educational policy for those of local school authorities." *S.H.*, 336 F.3d at 270. Subject to the foregoing standards, the district court may make findings by a preponderance of the evidence and grant appropriate relief, including attorneys' fees and compensatory education. *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564 (3d Cir. 2010).

IV. DISCUSSION

The parties proffer a variety of arguments and reasoning in support of their respective motions. The pertinent issues on appeal are: (1) whether the hearing officer erred in finding that J.C. was not IDEA eligible; (2) whether the hearing officer erred in failing to evaluate if Defendant properly fulfilled its Child Find Duty; (3) whether the hearing officer erred in finding that J.C. was not eligible for Section 504 services prior to March 2014; (4) whether the Defendant discriminated

against J.C. pursuant to the Americans with Disabilities Act; and (5) whether the hearing officer erred in finding J.C. is not entitled to compensatory education from January 29, 2012 until the time he left Cumberland Valley High School. We will analyze each issue in turn.

A. IDEA Eligibility

The purpose of the IDEA is to ensure all students receive a "fair, appropriate public education." 20 U.S.C. § 1400 (d)(1)(A). To qualify for special education services under IDEA, the student must satisfy two prongs of analysis; merely having a disability alone is insufficient. *Perrin on behalf of J.P. v. Warrior Run Sch. Dist.*, 2015 WL 6746306, at *15 (M.D. Pa. Sept. 16, 2015); *Perrin v. The Warrior Run Sch. Dist.*, 2015 WL 6746227 (M.D. Pa. Nov. 4, 2015). "In its IDEA-implementing provisions, Pennsylvania law provides a two-part test for determining whether a student is entitled to an IEP [Individualized Education Plan]. First, the student must have a qualifying disability, and, second, the student must 'need special education.'" *W. Chester Area Sch. Dist. v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002).

The hearing officer found that J.C.'s Crohn's disease was a qualifying disability, but concluded the Plaintiffs failed to prove that J.C. required special education by reason of his disability. He based these findings on evaluations conducted by Defendant's psychologist, who concluded that J.C. was not eligible

for IDEA educational services but was eligible for Section 504 educational accommodations. Additionally, the hearing officer discredited Dr. Margaret Kay's Independent Education Evaluation ("IEE"), which concluded to the contrary that J.C. was a student with a qualifying disability and IDEA eligible. Ultimately, the hearing officer felt "the evidence presented does not link [J.C.'s] poor performance in the 2013-2014 school year to Crohn's Disease." (Doc. 16-1, AR HOD, p. 14). Having reviewed the record carefully, we take issue with some of the hearing officer's factual determinations, and pursuant the standard of review shall proceed to explain our differences.

First, the hearing officer discounted Dr. Kay's IEE at least partly due to her conclusion that J.C. had a math disability because of his finding that J.C. showed strong math performance over the years.[5] This determination is a poor logical connection and the hearing officer ignored conflicting evidence, which showed J.C. had exhibited some struggles in math as early as 2010. Based on J.C.'s school records, a copy of which can be found directly in the district psychologist's evaluation, J.C. had scored "below-basic" on several mathematical benchmark tests in 2010, 2011, and 2013. (Doc. 16-7, AR S-31, p. 15). J.C. first scored "below-basic" on a mathematical proficiency benchmark test in the year 2010,

[5] The hearing officer stated the "private evaluation included much testing but offered conclusory results." (Doc. 16-1, AR HOD, p. 14). The hearing officer went on to state "[t]*he strongest example* of this is the conclusion that [J.C.] has a math disability…." (*Id.*) (emphasis added.) The hearing officer failed to give other examples of why he dismissed Dr. Kay's evaluation as conclusory, so we will only focus on his "strongest example."

which also coincides with the beginning of the decline in J.C.'s grades across the board. (Doc. 16-7, AR S-31, p. 10; Doc. 16-1, AR HOD, p.6, ¶ 32). The following school year, in 2011-2012, J.C. risked not even advancing to high school due to failing math, among other subjects, as evidenced by a letter from his middle school principal. (Doc. 16-11, AR P-13). It seems likely that as the disability progressed and the difficulty of the material increased, J.C. may have developed new struggles with the subject.

These facts should have provided a nexus for the hearing officer to square Dr. Kay's results with J.C.'s past performance and, at the very least, not deem the entire report conclusory. Indeed, past performance is not always indicative of future results; the hearing officer erred in discounting Dr. Kay's entire evaluation because he found one of Dr. Kay's findings "impossible to square with…[J.C.]'s strong performance in math over many school years." (Doc. 16-1, AR HOD, p. 14). Although the hearing officer claimed Dr. Kay's results were too conclusory, it appears that the hearing officer's acceptance of the district's own evaluation was conclusory itself and ignored evidence supporting Dr. Kay's conclusions.

The hearing officer found the district psychologist's report to be "well-supported by the evaluation itself," but by the district psychologist's own admission she had "insufficient evidence to determine eligibility based on the category of Other Health Impairment (OHI)." (Doc. 16-7, AR S-31). This

statement inherently creates a situation where the conclusion *cannot* be well-supported by the evaluation itself because the evaluation is admittedly lacking in critical and necessary evidence. Essentially, the district psychologist only conducted a partial evaluation. Because of the inconsistency and incompleteness of the district psychologist's evaluation, we disagree with the hearing officer's finding that the district psychologist's conclusions were "well-supported" by her evaluation.

The hearing officer was also not persuaded by Plaintiffs that J.C.'s Crohn's disease affected his attendance and academic performance more measurably in high school than it did in previous school years. The facts indicate the hearing officer severely discounted the possibility of the disability progressing. Most notably, the hearing officer specifically comments that the Parents "affirmatively argued that the [J.C.] performed well in school, earning good grades and PSSA test scores from 1^{st} – 5^{th} grade," as evidence that "[s]ubsequent to the diagnosis, [J.C.] performed well in school with no accommodations." (Doc. 16-1, AR HOD, p. 13). However, J.C.'s struggles seemed to manifest themselves most noticeably in 2010, which correspond with the time J.C. was in the 7^{th} grade. J.C.'s absences commenced steadily increasing in the 2009-2010 school year. (Doc. 16-7, AR S-31, p. 10). The portion of testimony the hearing officer relied on to discredit the possibility of J.C.'s Crohn's disease worsening did not even reference the years

that J.C. began to show signs of failing classes, struggling in specific subjects, and increasing absences. We disagree with the hearing officer on this point as well, and find it reasonable and logical that a disability that affects a person's health may worsen with age and can affect someone differently as the disability progresses. Further, the decline in grades and attendance support the notion that J.C.'s Crohn's disease affected him differently as the disease evolved.

In March 2014, J.C.'s doctor sent a note to the school specifically stating "[J.C.] has moderate disease severity...[and] may miss school when he has a flare of the disease, as well as for his routine remicade infusions that are every four weeks, and his visits to our clinic." (Doc. 16-5, AR S-12). Yet, the hearing officer stated he "cannot assume…[J.C]'s absences were a result of Crohn's disease," and further went on to describe J.C.'s doctor's description of J.C.'s Crohn's disease as "symptoms that the Student (or any person with Crohn's) may exhibit." (Doc. 16-1, AR HOD, p. 13-14).

School officials were aware of these remicade infusions even before J.C.'s doctor's note; in 2013, emails show J.C.'s father explained to district officials that J.C. receives these remicade infusions and informed them of the possibility of absences. (Doc. 16-12, AR P-28). A response to this email indicates that district officials "[were] aware of [J.C.]'s *ongoing* medical treatment." (Doc. 16-12, AR P-31) (emphasis added). The hearing officer disregarded these warnings as

"general," and even referred to the doctor's note as an "eleventh hour, Spartan note." (Doc. 16-1, AR HOD, p. 14). The hearing officer's choice of adjectives is telling and conflicts with the record. Contrary to the hearing officer's findings, the doctor's notes were more than a general description, and referenced specific manifestations that J.C. had to endure due to his Crohn's disease.

Plaintiffs were tasked to establish that it is more likely than not that J.C.'s declining performance and attendance was attributed to his disability. The hearing officer held that Plaintiffs had failed to meet their burden that J.C.'s absences and declining performance was caused *solely* by reason of Crohn's, claiming "I cannot assume…[J.C]'s absences were the result of Crohn's disease. That is for the Parents to prove, and they have not satisfied their burden in this regard." (Doc. 16-1, AR HOD, p. 13). While we must assume, *prima facie*, that the hearing officer's factual determinations are correct, his legal conclusions are subject to a plenary review. After a studied review, we hold that the hearing officer erred by placing an unnecessarily high burden on the Plaintiffs, in effect requiring them to eliminate all other possibilities for J.C.'s academic struggles. As the hearing officer even acknowledged, "[s]urely, at least *some* absences are attributable to Crohn's." (Doc. 16-1, AR HOD, p. 14).

The hearing officer further ignored the possibility that, even if outside factors contributed to J.C.'s declining performance, J.C.'s Crohn's disease was also

negatively affecting his education. The hearing officer definitively states there was *no* evidence that suggested special education was required as a result of Crohn's disease, and that the poor performance is not linked to Crohn's disease "at all." (Doc. 16-1, AR HOD, p. 14). The Court disagrees, because, as aforestated, the record indicates that J.C. struggled in math as early as 2010, increased his visits to the school nurse several times for complications from his Crohn's disease, and other school officials were aware of J.C.'s diagnosis, and difficulties with attendance and punctuality due to his diagnosis.

To further bolster our conclusion, we note that this Court had difficulty finding any relevant and comparable case law where a student exhibited declining academic performance, was found to have a qualifying disability, and yet was deemed ineligible for special education services. Therefore, the Court finds the hearing officer erred in adopting the Defendant's conclusion that J.C. is not IDEA eligible.

B. Child Find Duty

Because the hearing officer found that Defendant's evaluation of J.C. was valid and correct, he did not assess the alleged Child Find Duty violation. (Doc. 16-1, AR HOD, p. 15). The hearing officer based part of his decision to deny J.C. IDEA eligibility on the "asserted failure of the parents to provide sufficient information to the [Defendant] about their son's disabilities." However, this is not

a duty or burden that is placed on the parents, but should have been on the school district. The IDEA's Child Find Duty requires states to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. § 1412(a)(3). These evaluations and reevaluations must be "sufficiently comprehensive to identify all of the child's special education, and related services, needs," and provide "relevant information that directly assists in determining the child's educational needs." 20 U.S.C. §§ 1414(a)(1)(C)(i)(II), 1414(a)(2)(A), 1414(b)(2)(A)(ii), 1414(b)(3)(B); 34 C.F.R. §§ 200.304(c)(1)(ii-iv), (2), (4), (6), (7).

School districts have a "continuing obligation" under the IDEA to identify and evaluate all students who are reasonably suspected of having a disability. *P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009) (internal citation omitted); 20 U.S.C. § 1412(a)(3). A child who is suspected of having a qualifying disability must be identified "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability," *W.B.*, 67 F.3d at 501, even if the child is advancing from grade to grade. *D.K.*, 696 F.3d at 249 (citing 34 C.F.R. § 300.111(c)(1)). A school district's failure to timely evaluate a child who it should reasonably suspect of having a disability constitutes a procedural violation of the IDEA. *Id.* However, this identification requirement does not

impose a duty on school districts to evaluate every struggling student. *D.K.* 696 F.3d at 249. A school district may not be absolved of this duty by failure of the child's parents to identify the deficiencies in their child's educational services. *Jana K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 602 (M.D. Pa. 2014) (quoting *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996)).

This Court finds that Defendant should have known that J.C. required an evaluation sooner than March 2014, and thus violated its Child Find Duty. As the record establishes, Defendant was on constructive notice of J.C.'s diagnosis as early as 2007, through a note by J.C.'s mother. (Doc. 16-5, AR S-1, p. 1). Numerous teacher evaluations and correspondence between teachers and principals indicate these officials were aware that even when J.C. was present in class, he was inattentive, disengaged, and unmotivated. (*see* Doc. 16-8, AR S-47). J.C. was also increasingly absent, with at least some indication from his parents and doctor that the absences were in part due to his medical diagnosis and routine treatment. (*see* Doc. 16-12, AR P-28, P-31). The hearing officer considered J.C.'s D average to be a "strong performance" because he was (barely) passing. (Doc. 16-1, AR HOD, p. 13). Case law establishes a school district has a continuing duty, even when student is passing grade to grade. *D.K.*, 696 F.3d at 249 (citing 34 C.F.R. § 300.111(c)(1)). A grade point average of "D" is hardly a strong performance, and,

in the Court's view, required further inquiry by Defendant, despite J.C.'s narrow advancements from grade to grade. We find the hearing officer placed an undue burden on the *parents* to identify J.C. as a qualifying student, when that is a burden properly borne by the Defendant.

Accordingly, this Court finds that Defendant violated its Child Find Duty, and that the hearing officer erred in failing to address this duty.

C. Section 504 Discrimination

Plaintiffs allege Defendants discriminated against J.C. in violation of Section 504 of the Rehabilitation Act by failing to provide him with free, appropriate, public education ("FAPE") and by expelling him for manifestations of his disability without meeting certain procedural safeguards.

Section 504 of the Rehabilitation Act states "no person, on the basis of their handicap, shall be excluded from participation in, or denied the benefits of [FAPE], or otherwise subjected to discrimination." 34 C.F.R. § 104.4(a). Under Section 504, a "handicapped person" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 34 C.F.R. § 104.3(j). "Discrimination" as defined in Section 504 can include failing to '[a]fford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that

afforded others," or failing to "[p]rovide a qualified handicapped person with an aid benefit, or service that is not as effective as that aid provided to others." 34 C.F.R. §104.4(b)(1)(i-ii). Unlike the IDEA, which requires that schools provide special education to qualifying students with disabilities, Section 504 requires schools to simply provide *accommodations* so that students with disabilities can access and benefit from regular education.

Plaintiffs allege that Defendant failed to provide J.C. with effective aids, benefits, and services, and failed to afford him an opportunity to participate in educational service that was equal to those afforded others, because Defendant failed to evaluate J.C. prior to March 2014. The hearing officer concluded that "there is no dispute [J.C.] is protected by Section 504," and that he was protected from disability-based discrimination at all times under *federal* regulations. (Doc. 16-1, AR HOD, p. 15) (emphasis added). However, the hearing officer concluded that under Pennsylvania regulations, J.C. was "not entitled to a written service agreement *until* the disability substantially limited or prohibited participation in or access to an aspect of the school program." (Doc. 16-1, AR HOD, p. 15) (emphasis added). Pennsylvania regulations require a school district to "provide each protected…student … services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program." 22 Pa. Code § 15.3.

The hearing officer concluded that Defendant "put a Service Agreement in place long before [J.C.]'s doctor indicated that [J.C.] may have trouble attending school." (Doc. 16-1, AR HOD, p. 15). The record shows the parents approved the 504 Agreement on March 27, 2014. (Doc. 16-1, AR HOD, p. 5 ¶ 19). The hearing officer stated "[a]t the time the agreement was drafted, the only information available to [Defendant] suggest that [J.C.] would need long and frequent bathroom breaks." Once again, we part company with the hearing officer's conclusions.

The district's health record for J.C. indicates that his physician sent a note to Defendant as early as 2011 requesting liberal bathroom breaks for J.C., which the school accommodated. (Doc. 16-5, AR S-3, p. 3). In the 2012-2013 school year, the administrative record illustrates J.C.'s multiple visits to the nurse for gastrointestinal reasons, with no further changes, accommodations, or inquiries into J.C.'s medical status. (Doc. 16-5, AR S-6, pp. 3-5). Between August of 2012 and May of 2013, the school nurse had at least four notes specifically referencing J.C.'s Crohn's disease, and twice acknowledging J.C. had been admitted to the hospital due to his Crohn's, including an extended stay of six days. (Doc. 16-7, AR S-31, p. 11). In January 2014, J.C.'s physician sent another note, indicating the need for a Section 504 plan. (Doc. 16-5, AR S-12). *All* of this information was available to Defendant, in addition to school officials and teachers' firsthand

experience with J.C.'s difficulties, absences, and poor performance in school. Yet the hearing officer concluded that prior to the March 2014 note, there was no indication that J.C. would require special education services.

The Court finds a combination of all facts and circumstances should have led the hearing officer to a different conclusion. The only circumstance that was different from the time before the Section 504 evaluation and after the Section 504 evaluation was the physician's specific recommendation that Defendant conduct this evaluation. The Court finds that J.C. required Section 504 Accommodations prior to March 2014, and that the Defendant's failure to conduct any evaluations prior to March 2014 denied J.C. access to a free, appropriate public education.

Alternatively, Plaintiffs allege discrimination also occurred when J.C. was expelled for manifestations of his disability. (Doc. 41, p. 18) Plaintiffs base this allegation on the fact that J.C. was "clearly eligible for…Section 504 at the time the District took steps to expel him." (*Id.*). Plaintiffs argue that because J.C. was subject to Section 504 protection at the time the disciplinary hearings were conducted, J.C. was subject to procedural safeguards laid out in Section 504. (Doc. 41, p. 18). The procedural safeguards include "notice, an opportunity for parents or guardians…to examine relevant records, an impartial hearing with an opportunity for participation by the person's parents or guardians," with respect to

"actions regarding the identification, evaluation, and educational placement." 34 C.F.R. § 104.36.

Defendant held an expulsion hearing April 1, 2014, after the parties failed to reach a settlement. (Doc. 16-9, P-2, p. 4 ¶ 13). J.C.'s parents received notice of several disciplinary actions stemming from the January 17 incident on March 31, 2014. (Doc. 16-11, P-11, pp. 1-9). The record also indicates Defendant notified J.C.'s father of the pending disciplinary actions by phone on March 27, 2014. (Doc. 16-9, P-11, p. 15). Records show Plaintiffs filed two motions in the expulsion hearing, which were denied. (Doc. 16-13, AR Amended Complaint, p. 4 ¶ 4). This evidence shows notice of the hearing, and participation by the Plaintiffs in the hearing.

Further, District officials testified that J.C. was the only child who was disciplined simply because the other students got away. (Doc. 16-1, AR HOD, p. 16). It is plausible that based on J.C.'s prior run-ins with school officials, J.C. was more easily and readily identifiable, and not singled out solely due to his disability. We are not presented with anything that suggests J.C. was singled out specifically due to his disability, which is the required standard in a Section 504 claim of discrimination.

As such, the hearing officer did not err in holding that J.C. was not discriminated against in violation of Section 504 when J.C. was the only student

disciplined for the January 17 incident. However, the hearing officer did err in finding that Defendant did not violate Section 504 by failing to conduct evaluations of J.C. prior to March 2014.

D. Americans with Disabilities Act Discrimination

Alternatively, Plaintiffs allege discrimination in violation of the Americans with Disabilities Act. (Doc. 23, p. 17 ¶ 67). Plaintiffs allege J.C. was "intentionally, purposefully, and with deliberate indifference" discriminated against in violation of the ADA and its implementing regulations. (Doc. 23, p. 17 ¶ 67(a-c)). Plaintiffs did not raise the issue of discrimination under the ADA at the administrative level, and the hearing officer never considered the potential claim. (Doc. 16-1, AR HOD, p. 2). Although Plaintiffs raise this issue in their complaint, they have not requested any relief in relation to this alleged violation. Regardless, we will provide a brief analysis of whether or not Defendant violated the ADA.

Plaintiffs allege Defendant violated the ADA in three different ways: 1) by subjecting J.C. to discrimination on the basis of his disabilities; 2) by denying J.C. the opportunity to participate in and receive the benefits of educational services that are as effective and meaningful as those delivered by Defendants to other students in the District; and 3) by failing to make reasonable modifications in policies, practices and procedures to enable J.C. to participate in Defendants' services and programs. The Third Circuit has failed to adopt a standard for the

level of intent necessary for a showing of intentional discrimination. *Baker v. S. York Cnty. Sch. Dist.*, No. 1:08-CV-1741, 2012 U.S. Dist. LEXIS 177915, at *12 (M.D. Pa. Dec. 17, 2012). However, several circuits have adopted a "deliberate indifference" standard. *Id.* at *12. "Under the deliberate indifference standard, intentional discrimination may be 'inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights.'" *Id.* at *14 (quoting *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999)).

Plaintiffs allege Defendants displayed deliberate indifference by recognizing that J.C. had a debilitating medical condition that caused some absences, yet failing to evaluate J.C. to determine if his disabilities made J.C. eligible for services prior to March 2014. (Doc. 23, p. 17 ¶ 68). Plaintiffs also allege the disciplinary measures J.C. faced for "symptoms and manifestations of his disabilities" constitute deliberate indifference and discrimination against J.C. (*Id.*). However, the evidence before the Court fails to present any insight to the state of mind of the school officials as to why they repeatedly failed to evaluate J.C. The evidence shows Defendant may have been negligent in ignoring the red flags and signs presented to them throughout J.C.'s academic career, but "mere negligence on the part of school officials is insufficient to establish liability for compensatory damages." *Baker* at *17. This Court cannot say that Defendant acted with

deliberate indifference without this evidence, and in any event, as aforestated Plaintiffs have not requested any relief related to this allegation. The Court therefore denies Plaintiffs' allegation of discrimination under the ADA.

E. Compensatory Education and Damages

Because we find that Defendant violated the IDEA, 20 U.S.C. § 1412(a)(3), we also conclude that Defendant violated J.C.'s substantive right to a free, appropriate public education, and an opportunity to receive a meaningful benefit from education. It is well established that the remedy for such a violation is compensatory education. *M.A. ex rel. E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335, 341 (3d Cir. 2003); *M.C. v. Central Regional H.S.*, 81 F.3d at 392. Having made that finding, the Court does not have the requisite information to calculate the proper amount of compensatory education. Therefore, we shall give both parties an opportunity to brief the issue of damages, including how they should be calculated.[6]

V. CONCLUSION

The Court holds that there was no error in the hearing officer's conclusion that J.C. was not discriminated against in violation of Section 504, specifically when he was the only student punished for the January 17 incident. Further, the

[6] Both parties should take this opportunity to brief attorney's fees or other costs as well, to the extent claimed by Plaintiffs. We encourage both parties to pursue agreements regarding all damages, fees, and costs and the calculation method thereof. Should the parties desire a referral to a mediator, they are urged to promptly notify the Court.

Court finds that the Defendant did not discriminate against J.C. in violation of ADA, even though the hearing officer did not analyze this claim. We thus award judgment in favor of the Defendant on those claims.

However, the Court holds that the hearing officer erred in concluding that Defendant did not violate the IDEA. The hearing officer also erred in failing to evaluate whether Defendant violated the Child Find duty and in finding Defendant did not violate Section 504 when Defendant failed to evaluate J.C. prior to March 2014. As detailed in the foregoing analysis, the Court bases these holdings on evidence in the administrative record that contradicts the hearing officer's findings of fact. We also find that the hearing officer erred in his legal conclusions, most notably as to Plaintiffs' burden. Accordingly, we award judgment in favor of the Plaintiffs as to these claims.

NOW THEREFORE IT IS ORDERED THAT:

1. Plaintiffs' Motion for Judgment on the Administrative Record (Doc. 40) is **GRANTED**, in part, and **DENIED**, in part:
    a. The Motion is **GRANTED** to the extent that we find that the hearing officer erred in concluding that Defendant did not violate the IDEA, that Defendant did not violate its Child Find duty, that Defendant did not violate Section 504, and that Plaintiff is not entitled to compensatory education.

b. The Motion is **DENIED** in all other respects.

2. Defendant's Motion for Judgment on the Administrative Record (Doc. 38) is **GRANTED**, in part, and **DENIED**, in part.

    a. The motion is **GRANTED** to the extent that we find that the Defendant did not discriminate against Plaintiff under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act.

    b. The motion is **DENIED** in all other respects.

3. Within thirty (30) days of the date of this Order, Plaintiffs **SHALL FILE** a brief setting forth their calculation of damages for compensatory education, as well as any fees and costs claimed.

4. Within twenty (20) days from the time of Plaintiffs' filing, Defendant **SHALL FILE** a brief in response.

5. Should the parties desire to mediate the issue of damages, fees, and costs, they should jointly notify the Court, in which event any briefing may be suspending during the mediation process.

s/ John E. Jones III
John E. Jones III
United States District Judge