State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
OAL DKT. NO. EDS 09480-21
AGENCY DKT. NO. 2022-33482

J.M. AND E.M. ON BEHALF OF E.M.,
Petitioners,
v.
SUMMIT CITY BOARD OF EDUCATION,
Respondent.

Thomas J. O'Leary, Esq., for petitioners (Walsh, Pizzi, O'Reilly, Falanga, attorneys)

John B. Comegno II, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: July 27, 2023 Decided: August 2, 2023

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or around October 10, 2021, J.M. and E.M. on behalf of E.M. (petitioners) filed a request for a Due Process Petition with the Department of Education, Office of Special Education (OSE). The OSE transmitted the matter to the Office of Administrative Law, where it was filed on November 16, 2021, and the matter was assigned to the undersigned in June 2022. Petitioners filed an Amended Due Process Petition on or around July 5, 2022. The parties subsequently entered a Stipulation in which they acknowledge that the

Amended Petition contains twelve separate causes of action, and agree that the Office of Administrative Law (OAL) lacks jurisdiction over the claims asserted in Counts I, II, and VI through XII of the Petition, and that those counts should be dismissed without prejudice when the OAL issues a Final Decision with respect to claims asserted in Counts III, IV, and V of the Petition.

Several prehearing conferences were held, and a hearing was initially scheduled for December 5, 12, and 21, 2022, but adjourned at the request of the respondent due to witness unavailability. The hearing was rescheduled for February 8 and 28, and March 1, 2023, but adjourned at the request of the petitioners, and rescheduled to April 17, 18 and 20, 2023. Those hearing dates were adjourned at the request of the respondent in light of the filing of this dispositive motion, and the hearing was rescheduled for September 14, 15 and 18, 2023.

The parties stipulated that the hearing would be limited to the claims contained in Counts III, IV, and V of the Amended Due Process Petition. The Prehearing Order, which no party has objected to, also specifically identifies the issues to be addressed at the hearing: "whether the District denied E.M. a FAPE since September 2019 by not permitting E.M. to attend school; failing to conduct a timely manifestation determination; failing to evaluate E.M. in all areas of suspected disability; and by failing to provide an appropriate [individualized education program (IEP)] in the fall of 2019."

On or around May 3, 2023, the respondent filed a Notice of Motion to Dismiss, asserting that all claims asserted by the petitioners were untimely filed. The petitioners filed an opposition to the motion on or around May 15, 2023, the respondent filed a reply on May 23, 2023, and the petitioner subsequently filed a sur-reply. Oral argument on the motion was held on July 26, 2023.

FINDINGS OF FACT

Based on the undisputed facts presented by the parties, as well as my consideration of the record and information obtained during oral argument, I **FIND** as **FACT** the following:

E.M. enrolled as a first-grade student in the Summit Public School District in September 2018. In December 2018 the District referred E.M. to the Intervention and Referral Services Committee due to her distractibility, anxiety, and difficulty with reading and writing.

The petitioners had E.M. undergo a private neuropsychological evaluation in or around January 2019, and Carolyn McGuffog, Ph.D., Ed.D. (Dr. McGuffog) diagnosed E.M. with Autism Spectrum Disorder—Social Communication—Level 1 and Restricted Repetitive Behaviors—Level 1; Generalized Anxiety Disorder; Attention Deficit Hyperactivity Disorder—Combined Presentation Specific Learning Disorder with impairment in reading (word reading accuracy, rate, fluency and comprehension), impairment in written expression (grammar, punctuation, clarity, organization of writing), and impairment in mathematics (fluent calculation).

On March 13, 2019, E.M. was referred to the District's Child Study Team (CST) for evaluations to determine eligibility for special education and related services.

On March 26, 2019, the parents and members of the District's CST met for an Initial Identification and Evaluation Planning meeting, and the District proposed that certain evaluations were warranted. The District identified the following areas of suspected disability: autistic, other health impaired, and specific learning disability. The District proposed, and the parents consented to, five assessments: an Educational Evaluation; a Psychological Evaluation; a Social History Assessment; a Speech/Language (S/L) Evaluation; and an Occupational Therapy (OT) Evaluation. Petitioners allege in their Petition that the District should have had E.M. assessed for autism and for her attention deficit hyperactivity disorder (ADHD) prior to issuing the initial draft IEP and final proposed IEP.

The Educational Evaluation on E.M. was conducted on April 23, 2019, and May 3, 2019. A Psychological Evaluation was conducted on April 30, 2019, and May 3, 2019. An OT Evaluation was conducted on May 7, 2019. A Social History Assessment was

conducted in May 2019, and a Speech and Language Evaluation was conducted over the course of several days in May 2019. Reports were prepared for each evaluation.

An Initial Eligibility Determination and IEP Development meeting was scheduled on or around May 31, 2019, for June 17, 2019. The CST, the petitioners, and Dr. McGuffog attended the meeting. At the meeting, the CST determined that E.M. was eligible for special education and related services under the classification category of "specific learning disability" (SLD), as she exhibited a significant discrepancy between her overall cognitive abilities and her academic achievement in reading fluency, reading comprehension, and written expression, which impacts her progress within the general education setting. The IEP also notes that E.M. also qualifies under the disability category of "other health impaired" due to a medical diagnosis of ADHD and generalized anxiety disorder by Dr. McGuffog, as well as "autistic."

The CST prepared and proposed an IEP for E.M., dated June 17, 2019 (i.e., the draft IEP), with a projected IEP start date of September 3, 2019.

On August 12, 2019, Doreen Babis (Babis), the District's director of special services, contacted petitioner E.M. when the District had not received consent to implement the IEP. On August 13, 2019, petitioner responded by requesting that the parental-concerns section of the IEP be updated to include certain information.[1] By email

[1] Petitioner requested that the June 17, 2019, IEP be updated to include the following:

> We are concerned that none of the goals in the IEP are aligned with grade level standards.
> We are concerned that despite E's intelligence, the goals are not designed to help her reach grade level.
> We are concerned that there is insufficient home/school communication. Every three months is not sufficient to monitor the progress of a student that is so far behind grade level.
> We are concerned that E.'s teachers are not sufficiently trained in autism, anxiety in children, or dyslexia.
> We are concerned that the program being offered to E. does not include a research-based reading program.
> We are concerned that there is no research-based writing program being offered to E.
> We are concerned that despite being told by E.'s teacher that E.'s sensory needs are interfering with her learning, no evaluation of sensory needs has been performed.
> We are extremely concerned that most of the goals in the IEP, E. has already met.
> We are concerned that despite E. being diagnosed with a specific learning disorder in math, not a single goal for math has been included in her IEP.
> We are concerned that the IEP goals do not address any of E.'s attentional issues which have interfered with her learning.
> We are concerned that the goals do not address E.'s needs.

dated August 30, 2019, the District's case manager, Angelica DaSilva (DaSilva), sent the petitioner an updated IEP which the District asserts, and petitioners dispute, addressed the parental concerns shared with Babis.

In her August 30, 2019, email, DaSilva also responded to petitioner E.M.'s concern that the District's proposed IEP included a "draft" label. DaSilva explained that it is the District's policy and recommended best practice to label IEPs as "drafts" until they receive consent. Despite the District's explanations, petitioner E.M. repeatedly raised this issue until the District agreed to modify their practice to accommodate petitioner E.M.'s request.

On September 2, 2019, petitioner E.M. informed DaSilva that the petitioners were "not comfortable" with the draft IEP, and requested an IEP meeting. They specifically informed the District in the email that they had concerns about the goals in the IEP, and the programs used to teach E.M. reading and writing. The District responded to the email on September 4, 2019, with an invitation for a meeting on September 10, 2019.

On September 10, 2019, the IEP team and petitioners met to collaborate on the draft IEP for E.M. Following the meeting, DaSilva sent petitioners an updated IEP on September 10, 2019. The updated IEP incorporated what the District asserts were the changes agreed upon during the September 10, 2019, meeting, although the petitioners dispute that it addressed all of their concerns. In DaSilva's email, she notes that the petitioners may be emailing additional questions or concerns with the modification/accommodations section.

The petitioners and District subsequently exchanged several emails concerning the proposed IEP. On September 20, 2019, petitioner E.M. emailed DaSilva with specific comments and concerns regarding the proposed IEP. By letter dated September 26, 2019, petitioners summarized the concerns that were underlying the majority of the comments set forth in the September 20, 2019, email. Specifically, they asked for more information on (1) "what the District's plan is to close the gap and how long the District anticipates it will take to get [E.M.] up to grade level," and (2) "how the District is going to determine in the short term if its plan is working." They also questioned whether the goals were appropriate, requested "some sort of protocol for communicating with [E.M.'s]

teachers and therapists," and requested further clarification concerning three of the modifications listed in the proposed IEP.

On October 1, 2019, DaSilva responded to petitioners' email, and provided a revised IEP, i.e., the Final proposed IEP, and she asked that petitioners let her know as soon as possible whether they are providing consent for implementation. In their Amended Petition, the petitioners also identify the IEP emailed on October 1, 2019, as the "Final proposed IEP." Two days later, the petitioners again expressed concems regarding the IEP, and the District provided them with another response to their concerns. The parent continued to express concerns about the Final proposed IEP on October 7, 2019.

By letter dated October 9, 2019, petitioner E.M. emailed DaSilva notifying the District of the petitioners' decision to remove E.M. from the District schools and place her in a private school, noting also that petitioners "intend to seek reimbursement from the District for all costs that [they] incur that are related to [E.M.'s] education." She notes in her letter: "as you know from my October 3rd and October 7th emails, [petitioners] have concerns about [E.M.'s] IEP and do not think it [is] acceptable as currently drafted."

The parents unilaterally placed E.M. at The Winston School on October 25, 2019.

About a month prior to the unilateral placement, on September 20, 2019, E.M. stated "I wanna die" to the teacher leading a pull-out math lesson for second-grade students who, like E.M., were struggling with math. E.M. stated, a second time, "I wanna die"—loud enough for her classmates to hear her. Immediately after the math class, in accord with Board Policy 5350, titled "Student Suicide Prevention," E.M.'s teacher alerted school principal Dr. Lauren Banker of E.M.'s statements. Dr. Banker contacted school psychologist DaSilva and the Special Education Services supervisor and directed them to conduct a suicide-risk assessment on E.M. A suicide-risk assessment was conducted that day, and based on the findings of the suicide-risk assessment the school psychologist immediately attempted to contact petitioners. That afternoon, petitioner E.M. was informed that she needed to come to the school to discuss E.M.'s statements made during

class, the statements E.M. made during the risk assessment, and E.M.'s need for a medical clearance before she could return to school.

Petitioner E.M. subsequently took E.M. to Overlook Medical Center's emergency room, where E.M. was assessed by Constance Booth, LCSW (Booth), who consulted with a psychiatrist.

On Monday, September 23, 2019, petitioners produced a "Report to Schools of Assessment of Psychiatric Hospitalization" (the Report) from Overlook which concluded that E.M. did not require hospitalization. In the Amended Petition, the petitioners concede that they did not provide Booth with a hard copy of the suicide-risk assessment that had been conducted by the District. The report states that E.M. was evaluated "to determine if her behavior requires hospitalization," and that recommendations had been made. The report did not state that E.M. was cleared to return to school, and petitioners did not produce a copy of the clinical recommendations that may have been made.

On September 23, 2019, the District informed petitioners that the report received from Overlook was insufficient to clear E.M. to return to school because it indicated that the suicide-risk-assessment paperwork had not been provided to the clinician who assessed E.M. The District also advised, "it is critical that the paperwork the school provides to the parents regarding the completed risk assessment be shared with the evaluating clinician. The purpose of this is to give the evaluating clinician a clear understanding of the situation that resulted in the need for psychiatric clearance." The petitioners assert that the report was sufficient for E.M. to return to school.

In the petitioners' letter to Babis dated September 26, 2019, they note that the District has refused to allow E.M. to return to school for four days and that the District is denying E.M. a FAPE each day that it refuses to allow her to return to school. The letter states: "[I]f the District continues to refuse to allow her to return to school, we will have no choice but to unilaterally place her in a private school and seek retroactive reimbursement from the District . . . ."

On October 3, 2019, Dr. Gruber, the Board-appointed physician, requested that petitioners provide one or more of the following to ensure E.M. was cleared and safe to return to school: consent for the District physician to speak with the physician who evaluated E.M.; the recommendations shared by Overlook for follow-up treatment and documentation that the recommendations are being followed up on; and/or consent to speak with E.M.'s then-current physician or therapist regarding the school's concerns for her safety and her follow-up care. The petitioners objected to this request. Since the District had not received the consent or information requested, and in light of the school days E.M. was missing, on October 8, 2019, the District offered to provide home instruction for E.M.

By letter dated October 9, 2019, the parent informed the District's director of special education: "In light of the District's continued refusal to allow [E.M.] to return to school, we are removing her from the Summit Public Schools and plan to place her in a private school. We intend to seek retroactive reimbursement from the District for tuition costs and the costs of any therapies that we provide to [E.M.] . . . ."[2] Babis responded by email on October 16, 2019, reiterating her request for documentation to have E.M. cleared to return to school, and the petitioners continued to exchange emails with the District on this issue through the end of October 2019.

E.M. did not receive home instruction from the District, nor has she attended school in the District since September 20, 2019. On October 25, 2019, petitioners enrolled E.M. at The Winston School.

The petitioners make various claims in the Amended Petition, including constitutional violations, most of which the parties stipulated were not within the OAL's jurisdiction and should not be addressed by this tribunal. The parties stipulated to limit the scope of the hearing to the claims contained in Counts III, IV, and V. These Individuals with Disabilities Education Act (IDEA) claims generally involve the District's alleged refusal to allow E.M. to attend school (Count III); its failure to conduct a manifestation

[2] In the letter, the parent also states that E.M. "is fine and is not (and never was) suicidal," and that despite their obtaining "a standard clearance letter," the District improperly refused to accept the letter and allow E.M. to return to school, and that as the parents indicate in earlier emails dating back to September 26, 2019, they assert that the District is not entitled to E.M.'s private medical information and they refuse to grant the Board's physician access to that information.

determination (Count III); its failure to evaluate E.M. in all areas of suspected disability (Count III)[3]; and its failure to offer E.M. a FAPE through the Final proposed IEP[4] (Count IV). Relying on the same facts as in their IDEA claims, the petitioners also allege that the District violated Section 504 by denying E.M. a FAPE (Count V).

In the Amended Petition, petitioners seek, in part, retroactive reimbursement for tuition and other expenses incurred in educating E.M.

MOTION

Respondent's Motion

In its motion, the District asserts that the petitioners' Amended Petition is barred by the applicable two-year statute of limitations, that the claims do not fit within the exception to the IDEA's statute of limitations, and that the Amended Due Process Petition should, therefore, be dismissed. Specifically, the District asserts in its brief that the last date by which petitioners could have timely stated a complaint with regard to the failure to evaluate E.M. was June 17, 2021, since the petitioners' Amended Petition specifies that the alleged failure to evaluate occurred prior to issuing the June 17, 2019, proposed IEP, and that they knew or should have known at that point if any claim existed for failure to evaluate. During oral argument, counsel for the District argued that since petitioners agreed to the specific evaluations conducted on March 26, 2019, the "failure to evaluate" claim should have been filed by March 26, 2021.

[3] With regard to Count III, the Amended Petition notes that in light of the District's receipt of Dr. McGuffog's report, and prior to issuing the draft IEP and Final proposed IEP, the District had an obligation to assess E.M. for autism and ADHD; that the Present Levels of Academic Achievement and Functional Performance section of the draft IEP and Final proposed IEP failed to contain certain information; and that the District denied E.M. a FAPE since September 23, 2019, because it has refused to allow her to attend school, and by "effectively removing her from school . . . without contemplating whether removing E.M. equated to a change of placement," without conducting a manifestation determination or evaluating her in all areas of suspected disability.

[4] The Amended Complaint specifically alleges that the Final proposed IEP failed to offer a FAPE by failing to provide specifically designed instruction and failing to adapt and modify the consent, methodology, and delivery of instruction to address E.M.'s unique needs, and by failing to include in the IEP measurable annual goals and short-term objectives relating to her unique needs. The Amended Petition notes that their letter dated October 9, 2019, provided the District with written notice of their concerns about the Final proposed IEP. Earlier emails with the District also reflect the petitioners' specific concerns about the Final proposed IEP.

The District argues that the "refusal to allow E.M. to attend school" claim in Count III should have been filed by October 9, 2021, at the latest, as October 9, 2019, was when the petitioners disenrolled E.M. from the District for allegedly refusing to allow her to return to school. At oral argument, counsel also asserted that on September 23, 2019, the parents were informed that E.M. would not be permitted to return to school without the alleged appropriate documentation and that the documents/information provided to them by the parents at that time was insufficient. Therefore, that claim should have been filed by September 23, 2021.

While the District maintains that E.M. was not entitled to a manifestation determination because the District never sought to discipline E.M., it argues that petitioners knew of any alleged inaction by the District by October 4, 2019, ten days after E.M.'s "removal" on September 20, 2019. The District also asserts that the claims involving the alleged failure to offer an appropriate IEP were filed beyond the two-year statute of limitations given the numerous exchanges between the parties after the IEPs were offered, and that the petitioners should have filed the petition by October 9, 2021, at the latest, two years after the parents notified the District of their intent to unilaterally place E.M. in a private school due to concerns with the IEP. Finally, with regard to the Section 504 claims (Count V), since the petitioners incorporate the paragraphs from Counts III and IV of their Petition to support this claim, petitioners had knowledge of every fact constituting the Section 504 claim over two years prior to their October 10, 2021, filing date.

Petitioners' Opposition

The petitioners oppose the Motion to Dismiss by arguing that their Amended Petition specifically alleges in Counts III and IV that they were asserting their denial of FAPE claims "since October 11, 2019," as the petitioners had numerous conversations with the District that post-date October 11, 2019, upon which their claims are based. Petitioner E.M. maintains in her certification that: "While the communications that I had with the District prior to October 10, 2019, provide a background of the dispute that my husband and I have with the District, the claims that are asserted in our Amended Petition are based on the actions that the District took after October 10, 2019." Petitioners assert

that to the extent that Count III is predicated on the District's refusal to allow E.M. to attend school, the claim is timely because petitioners filed their original petition on October 10, 2021, and their claims are based on the actions that the District took between October 11, 2019, and October 31, 2019, and specifically the email exchanges between Babis and the petitioners between October 16, 2019, and October 31, 2019, in which the District refuses to allow E.M. to return to school. Petitioners also assert that Count III is also timely because the District continues to refuse E.M. access to school. In response to the District's position that any claim concerning a failure to conduct a manifestation determination (Count III) should have been filed by September 20, 2021, to be considered timely, the petitioners assert that this does not apply since petitioners are not asserting a claim for compensatory education for a deprivation of FAPE between September 20, 2019, and October 10, 2019, but a claim for retroactive tuition reimbursement, and because the failure to conduct a manifestation determination continued "throughout the entire time that E.M. has been precluded from attending school." With regard to the Count III claim, petitioners assert that that the District failed to offer a psychiatric evaluation of E.M. before excluding her from school, and that the District violated the IDEA by failing to offer this evaluation, and that since the District never offered to provide a psychiatric evaluation of E.M. from September 20, 2019 through the present, this claim is timely.

Moreover, the petitioners assert that Count IV of the Amended Petition is timely because the claims in Count IV are predicated on, among other things, the actions that the District took between October 11, 2019, and October 31, 2019, referencing certain emails exchanged around that time. Petitioners also assert that Count IV is also timely because the District has not issued an IEP for E.M. since September 2019, and they allege a failure to issue an IEP for E.M. for the 2020–2021 academic year and each year thereafter. Regarding Count V, petitioners simply assert generally that because Counts III and IV were timely filed, the claims under Section 504 were also timely filed.

Respondent's Reply

In its reply brief, the District writes that at issue here is the date that petitioners knew or should have known ("KOSHK") of their claims for the failure of FAPE arising out of two sets of facts: (1) regarding the proposed IEP; and (2) claims arising out of E.M.'s

"suicidal ideation" and the District's September 2019 decision that E.M. ought not return to school until she was medically cleared to do so. The KOSHK date bars claims arising out of E.M.'s Final proposed IEP of October 1, 2019, and sets the date for the evidentiary record as to all other of petitioners' claims. The District asserts that the petitioners try to avoid the implementation of the KOSHK date by setting the start date for their claims at October 11, 2019, because their initiating Petition dated October 10, 2021, was untimely. The District adds that the petitioners have known of the IDEA claims arising out of E.M.'s proposed IEP at least since August 26, 2019, when in a separate federal matter the petitioners allege that E.M. was denied a FAPE.[5] Those claims for failure to offer FAPE were dismissed by the federal court in May 2020, and petitioners delayed another seventeen months to bring those claims before this tribunal. The District adds that the petitioners were aware of their right to unilaterally place E.M. as early as September 26, 2019, four days after E.M.'s suicidal ideation when they alleged a right to unilateral placement and asserted that they are removing E.M. from the District schools as a result of their dissatisfaction with E.M.'s IEP. The District continues to assert that the claims are time-barred, and that none of the caselaw cited by petitioners supports a conclusion different than the one urged by the District.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The rules of administrative procedure do not specifically detail the criteria governing motions to dismiss. Rather, the Office of Administrative Law typically applies the law and standards governing motions for summary decision to motions to dismiss. Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary-judgment rule

[5] The District attaches as an exhibit to its reply brief a copy of the Amended Class Action Complaint, filed August 26, 2019, listing the petitioners as one of several plaintiffs. Regarding the petitioners, it states under paragraphs 130 and 131: "[Petitioners] also believe that their LEA has denied E.M. a FAPE . . . . Even though E.M. continues to be enrolled in her local public school and receives special education, [petitioners] are currently providing her with remedial instruction in reading which the LEA should be providing so that E.M. does not have to wait years to get the help she requires . . . . If [petitioners] knew that a due process hearing would be resolved within forty-five days, they would have considered requesting a due process hearing for an Order declaring that the LEA had not offered E.M. a FAPE and compelling the LEA to reform her IEP so that she could have obtained the appropriate instruction in reading that she required from her local public school."

embodied in the N.J. Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
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> [Citation omitted.]

The District filed a Motion to Dismiss asserting that the Amended Due Process Petition is barred by the statute of limitations. Given the findings of fact above, which were decided in the light most favorable to the petitioners, I **CONCLUDE** that there is no genuine issue as to any material fact challenged. The dates of events contained in the Findings of Fact are not disputed; petitioners do not challenge the KOSHK dates asserted by the respondent; and petitioners' counsel recognized at oral argument that the facts are not disputed, rather the interpretation of the applicable law, including two specific cases relied on by petitioners—G.L. v. Ligonier Valley School District Authority, 802 F.3d 601, 604 (3d Cir. 2015), and D.K. v. Abington School District, 696 F.3d 233, 244 (3d Cir. 2012).

The IDEA requires states that receive federal education funding to ensure that disabled children receive a FAPE. If a child in New Jersey is eligible for IDEA services, the school district is required to create and implement an IEP based on the student's disability and needs. If a school district fails to offer or provide a FAPE, the parents may file a due process petition on behalf of their child, and they are entitled to a hearing. 20 U.S.C. § 1415(b)(6), (f)(1)(A).

A due process petition under the IDEA must be brought within two years after the date that the party "knew or should have known" [KOSHK] about "the alleged action that forms the basis of the complaint, unless state law specifies a different applicable limitations period. Specifically, 20 U.S.C. § 1415(f)(3)(C) states: "A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part . . . , in such time as the State law allows." Petitioners have the same two years to file an administrative complaint alleging a violation of Section 504 of the Rehabilitation Act. 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2) (2023); D.K., 696 F.3d at 244.

In G.L. v. Ligonier Valley School District Authority, the Third Circuit addressed the interpretation of the IDEA's statute-of-limitations provisions, sections 1415(b)(6)(B) and 1415(f)(3)(C), that were not always interpreted consistently, and "[the] effect they have on the courts' authority to remedy IDEA violations, in particular, through the award of compensatory education." 802 F.3d at 604. For the threshold issue, the court concluded that the "discovery rule" applied, and that both provisions "reflect the same two-year filing deadline for a due process complaint after the reasonable discovery of an injury." Id. at 613, 605. In G.L., the court ruled that the parents' January 9, 2012, filing was timely, as it was within the two-year statute of limitations based on an undisputed KOSHK date of March 9, 2010, for an alleged denial of FAPE that began in 2008. Id. at 607, 636. For the remedial issue, however, the court concluded that neither provision "alters the courts' broad power under the IDEA to provide a complete remedy for the violation of a child's right to a [FAPE]." Id. at 605. The parents in G.L. sought compensatory education for September 2008 through March 2010, the entire period that G.L. was allegedly denied a FAPE, and the court held that G.L.'s right to compensatory education upon proof of a violation was not curtailed by the statute of limitations.

The court in G.L., therefore, held that:

> absent one of the two statutory exceptions found in §1415(f)(3)(D), parents have two years from the date they knew or should have known of the violation to request a due

> process hearing through the filing of an administrative complaint and that assuming parents timely file that complaint and liability is proven, Congress did not abrogate our longstanding precedent that "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem."
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> [Id. at 626 (quoting D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 499 (3d. Cir. 2012)).]

The two statutory exceptions to the IDEA's two-year statute of limitations, pursuant to 20 U.S.C. § 1415(f)(3)(D)(i)–(ii), are:

> i. If the parent was prevented from requesting the hearing due to specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint; or
>
> ii. If the parent was prevented from requesting the hearing due to the local education agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

In D.K. v. Abington School District, the Third Circuit ruled that the two statutory exceptions are exclusive, thus precluding common-law tolling doctrines, including the "continuing violations" doctrine. 696 F.3d at 248. I **FIND** that the two statutory exceptions do not apply here given the events of which petitioners complain in the Amended Petition, and the petitioners cannot invoke equitable tolling doctrines to avoid the IDEA's statute of limitations. While petitioner E.M. states in her Certification that they would have liked to have filed for due process prior to October 10, 2021, but did not do so because they could not afford to incur additional attorney's fees, the inability to pay counsel fees does not toll the statute of limitations.

D.K., like G.L., illustrates the application of the statute of limitations to child find. In D.K., after the Third Circuit rejected the applicability of the exceptions under the facts of the case, it also rejected the parents' asserted continuing-violations theory, but

preserved their child-find claim for the two-year look-back period from the date of filing. D.K., 696 F.3d at 247–48.[6]

I am persuaded by the respondent's assertion that petitioners are only trying to avoid the implementation of the KOSHK date by indicating under Counts III and IV in the Amended Petition that the deprivation of FAPE started on October 11, 2019. It is evident from the seventy-seven-page Amended Petition that the acts or omissions that form the basis of the IDEA claims asserted here (i.e., the District's alleged refusal to evaluate E.M. prior to issuing the IEP; the District's failure to conduct a manifestation determination within ten days of the September 20, 2019, incident; the District's failure to offer an appropriate IEP; and its refusal to allow E.M. to attend school) all occurred prior to October 9, 2019, when petitioners informed the District that they were removing E.M. from the District school because the District refused to allow her to return, and because the IEP allegedly failed to offer her a FAPE. In their opposition to the Motion to Dismiss, the petitioners now assert that Counts III and IV of the Amended Due Process Petition are based on actions taken by the District after October 11, 2019, and that claims begin on October 11, 2019. To support this position, petitioners refer to "numerous communications with the District" after October 11, 2019, "upon which their claims are based." Petitioners also assert that the District continues to violate the IDEA to this day by continuing to bar E.M. from attending school and by not issuing an IEP. While there were email communications between the petitioners and the District between October 16, 2019, and October 31, 2019, as referenced in paragraphs 181–191 of the Amended Petition, the action taken by the District upon which the claims are asserted here is the same—the District's refusal to allow E.M. to return to school when the petitioners did not provide the documentation requested by the District. These emails between Babis and petitioners simply reiterate the District's position and requirements to clear E.M. to return to school that had been shared with the parents well before E.M. disenrolled from the District. There was no new action on the part of the District between October 11, 2019 through October 31, 2019—The District took action by refusing to allow E.M. back into the school on September 23, 2019 when it asserted that the parents provided inadequate

[6] In D.K., the parents requested a due process hearing on January 8, 2008, after finalizing D.K.'s IEP, and requested compensatory education for September 2004 through March 12, 2008. The hearing officer denied the parents' claims, the appeals panel affirmed, and the District Court also affirmed, concluding that the IDEA's statute of limitations barred the parents from seeking relief for any of the District's conduct prior to January 8, 2006, i.e., two years before the filing for due process. D.K., 696 F.3d at 242.

documentation from Overlook, and when it requested that the parents provide additional documentation/information. These are the actions upon which the petitioners assert their claim. Nothing changed after E.M. left the District. After the petitioners announced that they were disenrolling E.M. from the District schools, the District did not take any additional action—it only responded to the petitioner's emails, reiterating its previously-stated position. Moreover, nowhere in the Amended Petition does it even suggest that the District failed to comply with the IDEA by failing to offer E.M. a new IEP after petitioners removed her from the District and enrolled her in a private school. The IEP-related claims in the Amended Petition relate only to the alleged inappropriate or inadequate content of the Final proposed IEP.

To successfully oppose this Motion to Dismiss, pursuant to G.L., the petitioners had to have filed for due process within two years of the KOSHK date for each claim in the Amended Petition.

Claims Under Count III

In Count III of the Amended Petition, petitioners allege violations of the IDEA for: (1) the District's failure to evaluate E.M. in all areas of suspected disability; (2) the District's failure to conduct a manifestation determination on E.M; and (3) the District's alleged refusal to allow E.M. to attend school.

With respect to the "failure to evaluate" claims, the Amended Petition specifically asserts that "[p]rior to issuing the draft IEP and its proposed Final proposed IEP, the District failed to have E.M. evaluated for autism by a physician trained in neurodevelopmental assessment . . . [and failed to have] a medical assessment performed on E.M. to determine if she had ADHD."

On March 13, 2019, E.M. was referred to the CST for evaluations to determine eligibility for special education and related services. The CST and petitioners met for an Initial Identification and Evaluation Planning meeting on March 26, 2019. The CST identified the following areas of suspected disability: autistic, OHI, and SLD. The CST also proposed, in part, a review of records, including Dr. McGuffog's Neuropsychological

Evaluation report (which had diagnosed E.M. with ASD in January 2019), and five separate assessments (Educational Evaluation, Psychological Evaluation, Social History, S/L Evaluation, and OT Evaluation). Petitioner E.M. consented to these assessments on March 26, 2019. These evaluations were completed by late May 2019, and on June 17, 2019, the CST, petitioners, and Dr. McGuffog met for an Initial Eligibility Determination and IEP Development meeting. At the meeting, E.M. was deemed eligible for special education under the classification category of SLD, and the draft IEP also identified E.M. eligible under the categories of OHI and "autistic." It is undisputed that as of March 26, 2019, petitioners not only knew but consented to the assessment proposed by the CST to evaluate E.M. in all identified areas of suspected disability, and that on June 17, 2019, petitioners were on notice that the CST found E.M. eligible under the SLD classification, with the IEP also noting eligibility under OHI and autistic based on E.M.'s earlier diagnoses of autism, ADHD, and generalized anxiety disorder. I agree with the District that as the Amended Petition clearly alleges that the alleged action or inaction of the District with regard to the "failure to evaluate" claim occurred prior to issuing the June 17, 2019, proposed IEP, the petitioners knew or should have known as of that date whether any claim for failing to evaluate existed. I, therefore, **FIND** that the KOSHK date for petitioners' "failure to evaluate" E.M. claim was June 17, 2019. Petitioner E.M. does not assert an alternative KOSHK date for the "failure to evaluate" claims in her Certification. Consequently, I **CONCLUDE** that petitioners' claims for failing to evaluate E.M., which were initiated on October 10, 2021, are barred by the statute of limitations.

Regarding the petitioners' claim that the District denied E.M. a FAPE by failing to conduct a manifestation determination following the September 20, 2019, incident, the Amended Petition specifically asserts that "the District violated 20 U.S.C.A. § 1415(d)(1) by failing to conduct a manifestation determination, by the tenth day of removal, to determine if E.M.'s statement 'I wanna die' was caused by, or had a direct and substantial relationship to [her] disability." While the District disputes that a manifestation determination was even warranted, it also asserts that the claim is time-barred. Recognizing that the alleged violation underlying their claim would have occurred ten days after E.M.'s alleged "removal" on September 20, 2019, which would have been October 4, 2019, the District asserts that this claim should have been asserted by October 4, 2021, to comply with the statute of limitations. Petitioner E.M.'s Certification does not

even reference this claim, nor does she assert an alternative KOSHK date for this claim. Petitioners assert in their brief that since the District never conducted a manifestation-determination meeting to determine if E.M.'s statement "I wanna die" on September 20, 2019, was a manifestation of her disability, it continued to deny E.M. access to school, and that if this motion were granted, the District would effectively be able to bar E.M. from school indefinitely. Petitioners do not assert an alternative KOSHK date, and I am not persuaded by the petitioners' argument and the suggestion during oral argument that the KOSHK dates are not significant to this motion. I, therefore, **FIND** that the petitioners knew or should have known by October 4, 2019, that the District allegedly failed to conduct a manifestation determination within ten days after E.M. was "removed" from school on September 20, 2019. Consequently, I **CONCLUDE** that petitioners' claim alleging a failure to conduct a manifestation determination is time-barred as it was filed more than two years after the KOSHK date.

The third claim asserted under Count III alleges that the District violated the IDEA by refusing to allow E.M. to return to school. This claim is at the heart of the Petition.

On September 20, 2019, after E.M. stated in school "I wanna die," the District, following Board Policy 5350, conducted a suicide-risk assessment and ultimately informed petitioner E.M. that E.M. would need a medical clearance in place for her to return to school. Petitioners took E.M. to Overlook Medical Center, where she was assessed by a licensed clinical social worker who consulted with a psychiatrist. On September 23, 2019, petitioners provided the District with a "Report to Schools of Assessment of Psychiatric Hospitalization" from Overlook which concluded that E.M. did not require hospitalization. On September 23, 2019, Babis (director of special services) informed petitioners that the form provided from Overlook was insufficient to clear E.M. to return to school because it indicated that the suicide-risk assessment paperwork prepared by the District staff had not been provided to the clinician who assessed E.M., and Babis explained the need for further documentation and requested this from petitioners. On October 3, 2019, the Board-appointed physician requested that petitioners provide one or more of the following to ensure E.M. cleared and safe to return to school: consent for the District physician to speak with the physician who evaluated E.M.; the recommendations shared by Overlook for follow-up treatment and

documentation that the recommendations are being followed up on; and/or consent to speak with E.M.'s then-current physician or therapist regarding the school's concerns for her safety and her follow-up care. The petitioners objected to the requests to provide additional information, asserting that the information provided to the District was sufficient to allow her to return to school, and that the information sought by the District constituted private medical information.

By letter dated September 26, 2019, the petitioners wrote to Babis stating that the District has refused to allow E.M. to return to school for four days and that the District is denying E.M. a FAPE each day that it refuses to allow her to return to school. By letter dated October 9, 2019, the parents informed the District that they were removing E.M. from the school in light of the District's continued refusal to allow her to return to school, and that they intend to seek retroactive reimbursement from the District for tuition costs and the costs of any therapies that they provide E.M. I **FIND** that as of September 23, 2019, petitioners knew that the District deemed the form from Overlook insufficient and that petitioners would have to provide additional information for E.M. to return to school. I also **FIND** that by October 3, 2019, the petitioners were aware of what documentation or information the District sought in order to clear E.M. to return to school, and that she would not be allowed back without that information. The District never changed its position concerning the information needed to clear E.M. to return to school.

I **FIND** that by October 3, 2019, petitioners were aware of the facts underlying their claim concerning the District's refusal to allow E.M. to return to school. Less than a week later, the petitioners informed the District of their decision to disenroll E.M. from the District due to its refusal to allow her back in school. I **CONCLUDE** that petitioners' claim alleging a denial of FAPE for refusing to allow E.M. to return to school was untimely filed because the Petition was filed after October 3, 2021.

Claims Under Count IV

In Count IV, petitioners allege that the District violated the IDEA because the Final proposed IEP was inappropriate and deprived E.M. of a FAPE. Specifically, petitioners allege that the Final proposed IEP was not reasonably calculated for E.M. to receive

meaningful educational benefits; it fails to provide E.M. with specially designed instruction; and it fails to provide measurable annual goals and objectives relating to her needs. Again, the two-year statute of limitations begins to run once the petitioners discover the facts constituting the violation.

Here, the first proposed IEP was dated June 17, 2019, and during the IEP meeting that day the petitioners informed the IEP team of their concerns. The parents never consented to the implementation of this IEP, and on August 13, 2019, they provided Babis with a list of their specific concerns with the draft IEP. An updated draft IEP was sent to petitioner E.M. on August 30, 2019, and a couple of days later petitioner E.M. again expressed disapproval with the IEP. The parties met on September 10, 2019, to collaborate on the IEP, and later that month petitioner E.M. sent the District additional comments and questions concerning the revised IEP. DaSilva responded to the petitioners on October 1, 2019, and forwarded the Final proposed IEP. Petitioner E.M. and the District continued to have exchanges concerning the Final proposed IEP in early October, and on October 9, 2019, petitioner E.M. sent the District a letter stating their intent to disenroll E.M. from the District, referencing her October 3 and October 7 emails and stating that she still had concerns about the IEP and that they did not think it was acceptable.

I **FIND** that by October 9, 2019, the petitioners demonstrated their knowledge of the alleged violation, i.e., that the IEP proposed by the District was inappropriate and failed to offer E.M. a FAPE. Therefore, I **CONCLUDE** that petitioners' claims relating to the Final proposed IEP are barred by the statute of limitations because the Petition was filed more than two years after the October 9, 2019, KOSHK date.

Claims Under Count V

In Count V, petitioners, incorporating the paragraphs from Count III and Count IV, allege that the District violated Section 504 by failing to provide E.M. a FAPE. Petitioners have the same two years to file an administrative complaint alleging a violation of Section 504 of the Rehabilitation Act, and as found and concluded above, the petitioners had knowledge of every fact constituting the Section 504 claims more than two years prior to

the October 10, 2021, filing date. Consequently, I **CONCLUDE** that the petitioners' Section 504 claim is barred by the two-year statute of limitations.

For the reasons set forth herein, I **CONCLUDE** that as petitioners' claims under the IDEA and Section 504 are barred by the statute of limitations, the Amended Petition must be dismissed as untimely.

ORDER

It is, therefore, hereby **ORDERED** that this matter be **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2023) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2023). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

August 2, 2023
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

jb