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

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

FINAL DECISION AND ORDER
ODR File No. 3355-1213AS

CLOSED HEARING

Child's Name: J.K.[1]
Date of Birth: [redacted]

Hearing Date(s):
09/21/2012, 09/24/2012

Parties to the Hearing	Representative
Parent	Jennifer M. L. Bradley, Esquire McAndrews Law Offices, P.C. 30 Cassatt Avenue Berwyn, PA 19312
Annville-Cleona School District 520 South White Oak Street Annville, PA 17003	Christopher J. Conrad, Esquire Marshall, Dennehey, Warner, Coleman & Goggin, P.C. 4200 Crums Mill Road, Suite B Harrisburg, PA 17112

Record Closed: 10/05/2012

Date of Decision: 10/19/2012

Hearing Officer: Brian Jason Ford

[1] Other than this cover page, the child and parent(s)' names are not used to protect their privacy - even if the parent(s) requested an open hearing. "Parent" and "Student" is used instead. Other identifying information is omitted to the extent possible. Citation to the notes of testimony (transcript) are to "N.T.". Citations to exhibits, as applicable, are "P-#" for Parents' exhibits, "S-#" for the school's exhibits, and "J-#" for joint exhibits.

Introduction and Procedural History

This hearing was requested by the Parent against the Annville-Cleona School District (District) pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. (IDEA), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq*. (Section 504) and their federal and state implementing regulations.

In the Complaint, the Parent alleged that the District denied the Student a free appropriate public education (FAPE) between the start of the 2009-2010 school year through June of 2011. A number of correspondences and pre-hearing motions concerning the scope of this hearing followed. Ultimately, in a pre-hearing order, I decided that I would hear evidence and testimony concerning the IDEA's statute of limitations and the exceptions thereto during the hearing. In the same pre-hearing order, I determined that if the statute of limitations applies, claims arising on or before February 24, 2010 are time barred.

In substance, the Parent alleges that the District breached its Child Find obligations under both the IDEA and Section 504 by failing to identify the Student as a child with a disability in need of special education. More specifically, the Parent alleges that the Student is IDEA-eligible as a student with an Emotional Disturbance, which manifested itself in school in a number of ways.

In response to the Parent's substantive allegations, the District avers that it did not breach its Child Find duties and responded appropriately to all of the Student's behaviors.

For reasons detailed below, I find that the exceptions to the IDEA's statute of limitations have not been triggered, that the IDEA's statute of limitations applies, that the District violated Child Find, and that compensatory education is owed.

Issues[2]

1. Are claims arising on or before February 24, 2010 time-barred by the IDEA's statute of limitations?
2. Did the District breach its Child Find obligations to the Student, resulting in a denial of FAPE?

[2] *See* NT at 26.

Findings of Fact

I. Placement Chronology

1. For reference, and by stipulation:
   a. The 2009-2010 school year was the Student's 7th grade year.
   b. The 2010-2011 school year was the Student's 8th grade year.
   c. The Student attended the District's Junior/Senior High School in both 7th and 8th grade.
2. The Student attended school in the District from the start of [the Student's] academic career through the end of 8th grade. (S-12, NT at 33).
3. June 5, 2011 was the Student's last day enrolled in the District. (S-12)

II. The 2009-2010 School Year (7th Grade)

4. The Parent first started noticing symptoms of depression and a decline in grades during the 2009-2010 school year. (NT at 37).
5. According to the school nurse's logbook, the Student visited the nurse 54 times during the 2009-2010 school year. (S-15). During these visits, the Student presented with various complaints ranging from hunger to illness and personal care issues. (S-15).
6. The school nurse testified that she perceived the Student to be hungry, and she often gave the Student some food. (S-15; NT at 373, 379).
7. The Student's hunger and occasionally seasonally inappropriate dress prompted the District to contact the Parent about the District's free-and-reduced lunch program (NT at 379). The same concerns ultimately prompted the District to contact Children and Youth Services. (NT at 55, 261). None of the investigations resulted in further action.
8. Many of the Student's visits to the nurse were to receive "moral support." (S-15). This was described through testimony as a brief pep talk.
9. The school nurse consulted with the school guidance counselor about the Student. The guidance counselor was available to the Student, and the Student sometimes met with the guidance counselor, but meetings were not formally planned. (*See, e.g.* NT at 299-231).
10. The Student participated in a number of negative peer relationships during the 2009-2010 school year. There is preponderant evidence to find that the Student both perceived [the Student's self] as the victim of bullying and that the Student was actually harassed by peers. (*See, e.g.* NT at 193-200).[3] There is also preponderant evidence to find that the meanness in the Student's peer group was reciprocal and cyclical. *Id.*
11. During one incident, the Student was hit by a book bag. (S-8, S-15). The Student perceived that another student intentionally dropped the book bag onto [the Student]. (NT at 48-48, 109). It is more likely that the other student accidentally

[3] This is just one of many examples throughout the record of this case.

dropped the book bag when placing it into a locker above the Student's. Whatever happened, the Student's perception of the incident is not in dispute and was communicated to the District at the time of the incident. *Id.*

12. The Parent testified to other incidents in which the Student was [physically assaulted]. District witnesses who testified about the incident described it differently. Again, whatever happened, the Student's perception of the incident is not in dispute and was communicated to the District at the time of the incident. (NT at 49, 69, 163, 274-275).
13. The Student also reported bullying to the Parent, who contacted both the school principal and the police. (NT at 47, 51).
14. School officials investigated every incident of bullying that they were aware of. (NT at 78, 108-109, 271, 275).
15. On April 27, 2010, the Student [injured Student's self]. (S-15 at 6; P-4; NT at 47, 52).
16. Immediately after the [redacted] incident [when the Student injured the Student's self], the Student was taken to the school nurse's office. The schools' Assistant Principal and Guidance Counselor were also informed. The Assistant Principal and Guidance Counselor then called the Parent, explained what happened, and told the Parent to take the Student to crisis intervention at a nearby hospital. The Assistant Principal and Guidance Counselor also called the hospital so that the hospital would be expecting the Student. (*Id,* NT at 259).
17. The Parent took the Student to the hospital, as instructed. (NT at 52; P-4, P-16).
18. The individuals who treated the Student at the hospital concluded that the Student's symptoms were consistent with depression and recommended a psychiatric evaluation, counseling, and Mobile Therapy. (P-16).
19. At the time of the [redacted] incident [when the Student injured the Student's self], the Student's sibling was receiving wraparound services from another agency. In response to the hospital's recommendations, the Parent contacted the wraparound agency in an effort to obtain counseling for the Student. (NT at 55; P-4, P-16).
20. The Student was discharged from the hospital the same day (the Student was not held at the hospital for observation or for any other reason).
21. Very shortly after the Student was discharged from the hospital, the wraparound agency evaluated the Student to determine eligibility for counseling services and Mobile Therapy. (NT at 55).
22. As indicated, the purpose of this evaluation was not to determine the Student's IDEA eligibility. However, the evaluator diagnosed the Student with Adjustment Disorder with Depressed Mood and Depressive Disorder, Not Otherwise Specified. (S-16). The evaluator also diagnosed a "rule out" math disorder.[4]
23. The Parent received an evaluation report from the wraparound agency, but did not share that report with the District. The District did not request a copy of the report either, and was unaware that such reports must be generated in order for a student to receive mobile therapy. (NT at 61, 233-234, 321).
24. The Student received Mobile Therapy. The Student's Mobile Therapist attended meetings with the Parent and school administration, visited the Student in school

[4] The District suggests that the "rule out" indicates that the evaluator concluded that the Student does not have a math disorder. The term "rule out" however, indicates that a disorder is suspected and that additional evaluations are warranted because not enough information exists to confirm a diagnosis.

(particularly at lunch time) and worked with the Guidance Counselor. (*See, e.g.* NT at 60, 196).

25. The Parent signed releases so that school district employees could communicate with the Mobile Therapist, but the District neither requested nor received the Student's Mobile Therapy Treatment Plan, which included behavioral goals. (NT at 70-71; S-19)
26. The school nurse noted scratches on the [Student after the incident when the Student injured the Student's self], but the Student attributed those scratches to a new kitten and denied "any self infliction." (S-15) This, and other documents of follow-up visits with the nurse suggest that the [incident when the Student injured the Student's self] was an isolated incident. (S-15, S-16).
27. The Student was not the only one in [the Student's] peer group to engage in [redacted] behavior around this time. Testimony concerning [this behavior], and the contagious nature of such behavior was both disturbing and credible. (NT at 283-285, 378).

III. The 2010-2011 School Year

28. The Student continued to frequently visit the nurse from the start of, and throughout, the 2010-2011 school year. (S-15; P-6). By the end of the school year, the Student visited the nurse on 113 separate occasions. For the most part, the nurse provided "moral support."
29. The Student's grades continued to decline throughout the 2010-2011 school year. The Student received an "F" in Reading in the third quarter but brought that grade up to a "D" by the end of the year. (P-6). The Student also received a "D" in Algebra and failed Science for the year.
30. Much of the decline in grades was due to the Student's incomplete and untimely homework assignments. (S-13, NT 267).
31. The Student took the 8th grade PSSA in the spring of 2011 and was assessed as "Proficient" in Mathematics and Reading, "Basic" in Writing, and "Below Basic" in Science (historically the Student's weakest subject). (S-11; NT at 120). This is a decline from the Student's 7th grade PSSA, taken in the spring of 2010, in which the Student was assessed as "Advanced" in Mathematics and "Proficient" in Reading. (S-10, NT 113-114).
32. The Student continued to be eligible for and receive Mobile Therapy, sometimes in school, during the 2010-2011 school year. (S-17). More specifically, the Student was again diagnosed with Adjustment Disorder with Depressed Mood and Depressive Order, Not Otherwise Specified. *Id.* The reevaluation also includes a "rule out" reading disorder.[5]
33. The revaluation report was neither requested by nor provided to the District.
34. The Mobile Therapist targeted coping skills, depression and self-esteem issues. (S-17).
35. Subsequent reevaluations by the outside agency added a diagnosis of Post-Traumatic Stress Disorder ("PTSD"), attributable to in-school bullying, in addition to the earlier diagnoses. S-18, NT at 133.

[5] See footnote 4.

36. The Student's absences increased during the 2010-2011 school year. (S-12).[6]
37. The record, as a whole, unambiguously supports a finding that the Student continued to participate in a negative peer culture and experienced bullying during the 2010-2011 school year.
38. The District offered a "Positive Peer Pressure" group and encouraged the Student to participate in it. (NT at 63; S-17). The Student resisted participation in such groups, and no evidence was presented regarding their effect, if any, upon the Student.
39. District personnel had meetings with the Parent and the Mobile Therapist. Some of those meetings were acrimonious – particularly meetings and telephone calls with the Parent and the school principal. During these meetings, the Parent was prone to foul and threatening language. (NT at 338-339).
40. During these meetings, the District agreed to monitor the situation and encouraged the Student (both directly and through the Parent and Mobile Therapist) to participate in peer mediation and student community groups. (*See, e.g.* NT at 233, 290, 336).
41. On occasion, the Student sought assistance from the School's administrators in ending the negative peer relationships – at one point going so far as to request and receive four reciprocal "No Contact" orders that prohibited association with negative peers. By the District's own account, these No Contact orders were not effective. (NT at 203-204; S-3, S-4, S-5, S-6).
42. The school's Guidance Counselor met with the Student on a regular basis, although no formal plan to meet with the Guidance Counselor was drafted and no goals for the meetings were set. (NT at 193).
43. The school's Guidance Counselor destroyed all notes and records of her meetings with the Student. (NT at 223).
44. The Student expressed thoughts of self-harm to the Guidance Counselor, and the Guidance Counselor understood that the Student had difficulty maintaining positive peer relationships. (NT at 193-199, 210-211; S-18).
45. The Guidance Counselor explained that she did not refer the Student for a special education evaluation because the Student was making academic progress and did not present behavioral problems (the sort that would warrant discipline) in school. *Id.*
46. The school's Assistant Principal was also aware of the bullying and negative peer relationships. The Assistant Principal was involved with the Student's request for an receipt of the "No Contact" orders.
47. The Assistant Principal testified that she did not think that the Student should be evaluated for a potential emotional disturbance because the Student did not require placement in an emotional support classroom.[7] (*See, e.g.* NT at 296).
48. On January 13, 2011, while in school, the Student verbalized a desire to [injure Student's self]. In response, the District informed the Mobile Therapist. (N.T. 219-221, P-2).

[6] Some of the Student's absences were for a planned trip but, after repeated, unexcused absences, the District fined the Parent for truancy. (P-3). The Parent correctly notes that the District did not engage in the type of truancy elimination plan recommended by the Pennsylvania Department of Education. That fact is not relevant to the ultimate issues in the case, but does underscore the District's awareness of and concern about the Student's absenteeism.

[7] The Assistant Principal's testimony indicates that the only Emotional Support classroom that would have been available to the Student was an out-of-district class run by the local Intermediate Unit.

IV. The 2011-2012 School Year

49. Based on concerns for the Student's mental health and safety, and a perceived unwillingness or inability of the District to do more, the Parent removed the Student from the District and placed the [Student] in a public cyber charter school. (NT at 97-99).
50. After enrolling in the cyber charter school, the Student was evaluated using instruments such as a Child Depression Inventory and a BASC-2. After the evaluations, the cyber charter school determined that the Student suffered from depression and was eligible for IDEA services as a student with an Emotional Disturbance. (NT at 97-99; S-21).
51. An IEP was developed for the Student by an IEP Team at the cyber charter school, and was subsequently implemented. (S-21). That IEP includes organizational and executive functioning goals to increase the Student's work completion. The Student also receives counseling, 30 minutes per week, though computer video conferencing. (NT 154-155; S-21).

V. The Student's Sibling

52. The Parent's other child (the Student's younger sibling), was evaluated by the District for special education in November 2007. The request for evaluation was made by a child advocate working with the Parent, and the Parent signed a Permission to Evaluate form. (NT at 137, 346).
53. The District determined that the Student's sibling was eligible for special education and developed an IEP for that included emotional support services and a positive behavior support plan. (NT at 138, 140, 346, 347).

Discussion

I. The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

II. New Case Law

The parties submitted written closing briefs on October 5, 2012. Six days later, on October 11, 2012, the United States Court of Appeals for the Third Circuit issued a

decision in *D.K. v. Abington School District*, --- F.3d ---, 2012 WL 4829193 (3rd Cir., 2012). The issues in *D.K.* are essentially identical to the issues in this case. In *D.K.*, the court "delineate[d] for the first time the scope of the statutory exceptions to the IDEA's statute of limitations." *Id* at *1. The court also provided a complete description and analysis of the IDEA's Child Find obligations, providing a cogent synthesis of current jurisprudence. As binding precedent, *D.K.* must serve as the cornerstone for analysis of the issues presented in this matter.

III. Applicability of the Statute of Limitations

A. The IDEA's Statute of Limitations and Exceptions Thereto

The "IDEA statute of limitations applies to § 504 claims premised on IDEA obligations, such as those invoking Child Find and FAPE duties." *D.K.* at *4 *citing P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 735-37 (3d Cir.2009). As such, the IDEA's statute of limitations applies to the Parent's Section 504 claims in this case.

As noted in the Pre-Hearing Order, the IDEA was amended in 2004 to include, *inter alia*, the following provision at 20 U.S.C. § 1415(f)(3)(C):

> 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 subchapter, in such time as the State law allows.

For reasons fully detailed in the Pre-Hearing Order, the IDEA's statute of limitations bars claims arising on or before February 24, 2010.[8] The Parent argues, however, that the IDEA's statute of limitations does not apply in this case because both codified exceptions to the statute of limitations do apply. Indeed, the statute of limitations "shall not apply ... if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent."

20 U.S.C. § 1415(f)(3)(D)(i)-(ii); *accord* 34 C.F.R. § 300.511(f)(1)-(2).

[8] The Pre-Hearing Order, in part, addresses the timeliness of the District's use of the Statute of Limitations as an affirmative defense. After the Pre-Hearing Order was issued, the parties confirmed that timeliness was a non-issue, given agreements between the parties. Any such agreement does not alter the ultimate conclusion of the Pre-Hearing Order: that the IDEA's statute of limitations, if applicable, bars claims arising on or before February 24, 2010.

B. The Misrepresentation Exception

Taken in order, the first exception concerns misrepresentations by the local educational agency (LEA) – the District in this case. 20 U.S.C. § 1415(f)(3)(D)(i). Previously, in other due process hearings, I had relied upon cases like *J.L. ex rel. J.L. v. Ambridge Area Sch. Dist.*, No. 06–1652, 2009 WL 1119608 (W.D.Pa., 2009) to conclude that 'negligent misrepresentation' is the proper standard to apply to the misrepresentation exception. Under that standard, an LEA need not have *actual* knowledge of the inaccuracy of communicated information to trigger the exception. Bluntly, through *D.K.*, the Third Circuit has now rejected such analysis.

As opposed to negligent misrepresentation, the Third Circuit has now articulated a standard under which the misrepresentation must be "akin to intent, deceit, or [an] egregious misstatement" and that "a rule demanding at least a school's knowledge that its representations of a student's progress or disability are untrue or inconsistent with the school's own assessments best comports with the language and intent of the provisions." *D.K.* at *6. Even more explicitly:

> in order to be excused from the statute of limitations based on § 1415(f)(3)(D)(i) because the school "specific[ally] misrepresent[ed] ... that it had resolved the problem," plaintiffs must show that the school **intentionally misled** them or **knowingly deceived** them regarding their child's progress.

D.K. at *6 (bold added for emphasis).

In this case, the foregoing standard is not met. It is not clear what evidence the Parent points to in support of the misrepresentation exception. This ambiguity notwithstanding, the District told the Parent that it would monitor the Student's social situation and offer supports. This may have left the Parent with the impression that the District would work to resolve the problem that is the subject of the Parent's Complaint. Yet telling the Parent that the District would work to resolve a problem is not the same thing as telling the Parent that the problem was resolved. Moreover, these facts do not evidence intentional misleading or knowing deceit.

C. The Withholding Exception

The second exception concerns an LEA's withholding of information from parents. 20 U.S.C. § 1415(f)(3)(D)(ii). As explained by the court in *D.K.*:

> The text of subsection (ii) plainly indicates that only the failure to supply *statutorily mandated* disclosures can toll the statute of limitations. In other words, plaintiffs can satisfy this exception only by showing that the school

> failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulations.

D.K. at *6 (italics original).

The court went on to explain that "District courts in this Circuit have properly limited this [withholding] exception to such circumstances" in which LEAs have failed to provide statutorily mandated disclosures. *D.K.* at *6. The difficulty with this part of the decision is that the district court opinions cited with approval in *D.K.* do not all say the same thing about what disclosures are mandated by statute.

The IDEA, as a whole, requires school districts to send information, notices, forms and paperwork to parents under various circumstances and at various times. One such notice is the procedural safeguards notice, which is described at 20 U.S.C. § 1415(d). In *D.K.*, the court approvingly cites to cases concluding that an LEA's failure to provide the § 1415(d) procedural safeguards notice is the only thing that can trigger the withholding exception. *See D.K* at *6 *citing I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F.Supp.2d 762, 775 (M.D.Pa. 2012) and *Evan H. ex rel. Kosta H. v. Unionville–Chadds Ford Sch. Dist.*, No. 07–4990, 2008 WL 4791634, at *7 (E.D.Pa. Nov.4, 2008). In *D.K.*, the court also approvingly cites to a case concluding that other types of notices, such as those required by 20 U.S.C. § 1415(b)(3) and (c)(1), could trigger the withholding exception. *See D.K.* at *6 *citing D.G. v. Somerset Hills Sch. Dist.*, 559 F.Supp.2d 484, 492 (D.N.J.2008).

The subtle difference between cases like *Evan H.* and *D.G. v. Somerset Hills* notwithstanding, the court rejected arguments that the withholding exception could be triggered by an LEA's failure to provide any of the documents or information that the IDEA as a whole requires. *See D.K.* at *7-8. For instance, the court rejected the parents' argument that the exception was triggered by the LEA's failure to provide permission to evaluate forms, despite the fact that the IDEA and its regulations require LEAs to issue such forms in certain circumstances. *See D.K.* at *7. In rejecting this argument, the court refers to the requirements under § 1415(d) that obligate an LEA to provide a procedural safeguards notice only in limited circumstances. *Id.* This tends to suggest that the court is leaning to the side of limiting the withholding exception to the § 1415(d) notice – but this conclusion is not explicitly reached.

The Third Circuit has said clearly that the withholding exception should be narrowly construed; that the exception was "properly limited" by district courts that look only to the § 1415(d) notice to establish the exception. *D.K.* at *6. As such, an LEA's withholding of any document will not trigger the exception absent an unambiguous statutory mandate, contained within the Procedural Safeguards section of the IDEA (*i.e.* 20 U.S.C. § 1415), to provide the specific document in question.

In this case, the Parent argues that the District was obligated via Child Find to propose evaluations and ultimately offer services. The IDEA requires LEAs to send various forms and paperwork to parents as part of the screening and evaluation process that is

part and parcel to Child Find. Specifically, the § 1415(d) procedural safeguards notice must be sent "upon initial referral or parental request for evaluation." 20 U.S.C. § 1415(d)(1)(A)(i). As part of the Child Find violation, the Parent argues that the District should have proposed an initial evaluation, but failed to do so. If the District was required to propose an initial evaluation, it was also required to send a procedural safeguards notice. It is conceivable, therefore, that a Child Find violation necessarily includes withholding of the § 1415(d) notice – which can trigger the exception even under the strictest district court cases.

The court in *D.K.* found that there was no Child Find violation, so the relationship between Child Find and the withholding exception is not defined by that case. In this case, for reasons set forth below, I find that the District did breach its Child Find duties. *D.K.* is inconclusive as to whether such a breach triggers the withholding exception. Despite this, *D.K.* clearly requires a determination as to whether any withholding prevented the Parent from requesting a hearing.

D. Causal Connection Between the Exceptions and the Untimely Filing

In *D.K.*, the court recognizes that both exceptions allow parents to avoid the IDEA's statute of limitations only if the misrepresentations or withholdings prevented the parents from requesting a due process hearing. *See D.K.* at *7 *citing* 20 U.S.C. § 1415(f)(3)(D). More specifically, the Third Circuit now requires parents claiming either or both exceptions prove causation: "a plaintiff must also show that the misrepresentations or withholding *caused* her failure to request a hearing or file a complaint on time." *Id* (italics original). Consequently, parents who are "already fully aware of their procedural options" may not be able to establish either exception. *See id*.

In *D.K.*, it is particularly telling that the court looked to the parents' overall knowledge of IDEA safeguards to conclude that they were not prevented from filing. Specifically, the parents in *D.K.* requested an evaluation. This suggested to the court that the parents knew of their right to request an evaluation. *See D.K.* at *8. More importantly, however, the parents' knowledge of their right to request an evaluation suggested that they were aware of other rights, like the right to request a hearing. *Id*.

The causation analysis in *D.K.* is fact-specific and lends itself to a case by case determination. It is, however, the Parent's burden to prove causation, and that the Parent's overall familiarity with the IDEA's procedural safeguards is a factor in the analysis.

Said simply, neither party presented compelling evidence of causation or a lack thereof. The District attempted to highlight the fact that the Student's sibling was identified and had an IEP. This fact, by it self, does not prove that the Parent was generally knowledgeable about the IDEA's procedural safeguards. The fact that the Parent requested an evaluation for the Student's sibling draws a closer-but-imperfect analogy to the facts of *D.K.*

There is a similar lack of evidence on the Parent's side to prove causation. The Parent testified that he did not know that students who have emotional disturbances, but have no disciplinary issues, could be entitled to special education services. This testimony was credible. However, the Parent was otherwise knowledgeable of IDEA procedures and safeguards though experiences with the Student's sibling. The Parent did not claim to be ignorant of the IDEA's protections, rather the Parent claimed that he was unaware that the protections could apply to the Student.[9]

To whatever extent the Child Find violation necessarily includes withholding of statutorily mandated information, the foregoing facts – as seen through the lens of *D.K.* – do not constitute proof that the withholding prevented the Parent from filing. For this reason, I find that the withholding exception has not been triggered. Consequently, the IDEA's statute of limitations applies in this case.

IV. Child Find

In *D.K.*, the Third Circuit provided a clear, comprehensive description of an LEA's Child Find obligations by synthesizing and summarizing the applicable laws and jurisprudence. I cannot write a better or more concise explanation than what the court has already provided:[10]

> "School districts have a continuing obligation under the IDEA and § 504"—called "Child Find"—"to identify and evaluate all students who are *reasonably suspected* of having a disability under the statutes." *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 738 (emphasis added); *accord* 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111. A school's failure to comply with Child Find may constitute a procedural violation of the IDEA. *E.g., D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir.2010)(calling the Child Find requirement a "procedural regulation[ ]"); *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir.2007) (characterizing noncompliance with Child Find as a procedural violation).
>
> Child Find extends to children "who are suspected of [having] ... a disability ... and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1); *accord Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007); *Taylor v. Altoona Area Sch. Dist.*, 737 F.Supp.2d 474, 484 (W.D.Pa. 2010). As several courts have recognized, however, Child Find does not demand that schools conduct a formal evaluation of every struggling student. *See, e. g., J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635, 661 (S.D.N.Y.2011)("The IDEA's child find provisions do

[9] For testimony concerning the Parent's knowledge, or lack thereof, regarding the IDEA's procedural safeguards, see NT at 99, 132-133, 137-138, 141.
[10] I have expanded certain citations as necessary.

> not require district courts to evaluate as potentially 'disabled' any child who is having academic difficulties."). A school's failure to diagnose a disability at the earliest possible moment is not *per se* actionable, in part because some disabilities "are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all." *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221, 226 (D.Conn.2008).

D.K. at *9.

In this case, the District had reason to suspect that the Student had a disability. The IDEA defines the disability category of Emotional Disturbance to include an "inability to build or maintain satisfactory interpersonal relationships with peers and teachers," "inappropriate types of behavior or feelings under normal circumstances," "a general pervasive mood of unhappiness or depression" and/or a "tendency to develop physical symptoms or fears associated with personal or school problems." 34 C.F.R. § 300.8(c)(4)(i)(B)-(E). The transcript is replete with examples of the Student exhibiting all of these symptoms and behaviors (misperceiving certain events - i.e. the book bag falling - as bullying, persistently poor peer relationships, an inability to form positive peer relationships, many trips to the nurse - not just for snacks but for 'moral support,' and a depressed mood). It is well established that the District was aware of the same, and held meetings with the Parent about the Student to discuss these problems.

Though testimony, District personnel suggested that, despite the foregoing, the Student could not qualify as a student with an Emotional Disturbance because the Student was compliant with teachers and did not need an Emotional Support placement. This testimony is troubling because it evidences a clear misunderstanding of both the disability category and the Child Find obligation itself. Special education – including special education for emotionally disturbed students – is a service, not a place. Speculation that a student may not require any particular *placement* neither negates the Child Find obligation nor sheds any light on whether that student is entitled to a special education *program*.

To qualify for the protections of the IDEA as a student with an Emotional Disturbance, the symptoms must persist "over a long period of time and to a marked degree that adversely affects a child's educational performance." The term "education" as used in the IDEA means much more than pure academics. Some assessment to determine whether the Student needed individualized specially designed instruction to help the Student overcome social deficits was in order. But even looking at the Student's academic performance in light of the Student's behaviors should have triggered an evaluation.

The District argues that the Student's grades did not decline significantly. I respectfully disagree and, as explained above, progression from grade to grade does not reduce the District's Child Find obligation. More importantly, the District's testimony taken as a whole paints a picture of a capable but underperforming child, whose poor grades were

a result of incomplete and late assignments. The Student's academic underperformance only heightened the District's obligation to determine if the Student's emotional state was affecting educational performance. Said differently, the Student's underperformance tends to suggest an additional element of the Emotional Disturbance, which should have underscored the need for an evaluation.

The Parent points to the fact that the District knew that the Student was receiving Mobile Therapy but never requested copies of the Student's evaluations. The District points to the fact that the Student was evaluated but those evaluations were never shared. Strictly speaking, the District was under no obligation to request the evaluations, but the District certainly had reason to know that evaluations were completed. The District knew that the Student was sent to the hospital after the [incident when Student injured Student's self]. The District also knew that the Student was receiving Mobile Therapy. Were it determinative in this case (it is not) I would not hesitate to find that the District had constructive knowledge that the Student was evaluated and that evaluation reports were drafted. Regardless, the Parent's failure to share the evaluations does not diminish the District's Child Find duties.

In sum, the District had actual knowledge that the Student was exhibiting all of the symptoms of an Emotional Disturbance in school, but never proposed an evaluation. I note that the District had no obligation to propose an evaluation the moment that the symptoms were expressed, but the Student was symptomatic from the beginning of the 2009-2010 school year. Under these circumstances, the District's failure to propose an evaluation is a Child Find violation.

The Parent claims that the Child Find violation gave rise to a substantive violation of the Student's right to receive a FAPE, and that compensatory education is an appropriate remedy for that denial. The court in *D.K.* characterizes Child Find violations as procedural in nature, but procedural violations can give rise to substantive denials of FAPE for which compensatory education may be owed. *See* 20 U.S.C. § 1415(f)(3)(E)(ii). In *D.K.,* the court recognizes this principle in the context of a potential Child Find violation. *See D.K.* at *9 *citing P.P.,* 585 F.3d at 739 (quoting *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 272 (3d Cir.2007)) *and M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 391–92 (3d Cir.1996).

Preponderant evidence supports the Parent's argument that the Student was denied a FAPE as a result of the Child Find violation. The non-individualized, non-specially designed instruction and services that the District offered were ineffective. As a result, the Student suffered both socially and academically. It is not clear what the Student's IEP should have contained, and I do not suggest that the services provided through the cyber charter school's IEP would have been appropriate in a traditional school setting. But the evidence in this case compels the conclusion that the Student was eligible and in need of services that were not provided.

V. Compensatory Education

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

> It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id*. In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that the would have occupied but for the school district's violations of the IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

M.J. v. West Chester Area Sch. District, ODR No. 01634-1011AS (Skidmore, 2011).

In this case, the Parent has proven that the District has violated its Child Find duty and that this procedural violation gave rise to a substantive denial of FAPE. Compensatory education is, therefore, an appropriate remedy.

Neither party presented any evidence as to what amount of compensatory education is needed to put the Student in the position that the Student would be in but for the denial of FAPE. Therefore, an hour-for-hour approach is necessary. But even an hour-for-hour calculation is difficult in this case. As noted above, the Parent proved that the Student needed services, did not receive services and was harmed as a result. The Parent did not present evidence as to how many hours of services the Student should have received. I note again that the cyber charter school's IEP is not necessarily indicative of the services that the Student should have received in school. Unfortunately, in this case, no better evidence was presented.

Currently, the Student receives 30 minutes of counseling once per week. *See* S-21 at 15. The cyber charter school's IEP includes other goals and services to target organizational and executive functioning issues, but the only service in the IEP directly applicable to the Student's Emotional Disturbance is counseling. With no better

evidence, I will use the cyber charter school's IEP as a basis to calculate compensatory education. Therefore, I award 30 minutes of compensatory education for each week that school was in session between February 24, 2010 and the last week that school was in session during the 2010-2011 school year.[11]

Conclusion

For the foregoing reasons, the Parent has not proven either exception to the IDEA's statute of limitations. As a result, for reasons articulated in the Pre-Hearing Order, claims arising on or before February 24, 2010 are time-barred.

The District violated Child Find by failing to identify the Student as a student with a disability and in need of special education. The District's Child Find violations resulted in a substantive denial of FAPE for which compensatory education is owed.

An order consistent with the forgoing follows.

[11] Ordinarily, this award would be reduced by the amount of time that it could have taken to identify and program for the disability. It is unclear whether that principle should apply in a Child Find case but regardless, the Student started signaling the need for an evaluation at the start of the 2009-2010 school year. By late February of 2010, the District should have recognized the need for an evaluation.

ORDER

And now, October 19, 2012, it is hereby order as follows:

1. Per the Pre-Hearing Order of September 11, 2012, the IDEA's statute of limitations precludes claims arising before February 24, 2010.
2. The District violated the IDEA's Child Find duties by failing to evaluate the student after it should have reasonably suspected that the Student was a student with a disability.
3. The District's Child Find violation resulted in a substantive denial of FAPE.
4. The Student is hereby awarded 30 minutes of compensatory education for each week that school was in session between February 24, 2010 and the last week that school was in session during the 2010-2011 school year.
5. The Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP to assure meaningful educational progress

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER