Pennsylvania

Special Education Hearing Officer

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INTRODUCTION

Student is a xx year old eligible child residing in the School District of Philadelphia (District). (NT13-18 to 14-16.) The District considers him to be in ninth grade, although he has been hospitalized repeatedly since March 2005 and has received education at different grade levels. (NT14-16 to 15-11.) The Student has been diagnosed clinically with Disruptive Behavior Disorder, Adjustment Disorder and Mood Disorder. Educationally, he has been identified with Emotional Disturbance and Specific Learning Disability in Reading, Mathematics and Written Expression. (S-42.) He is currently placed in Full Time Emotional Support provided through an Alternative Special Education Setting, a full time emotional support school operated through a contract with the District. (NT830-25 to 831-1, 905-23 to 906-7, 913-11 to 16; S-42 p. 46.

The Student's Grandmother, (Parent), requested this due process proceeding. Parent contends that the District failed to identify the Student as in need of special education services when he was in second grade, during the 1998-1999 school year, in violation of its Child Find obligations. As a result, the Parent contends, the Student failed to learn commensurate with his abilities and developed an emotional disturbance that further interfered with, and continues to interfere with, his learning. The Parent requests an award of compensatory education for two periods: 1) from the beginning of the school year, 1998, to the end of the 2000-2001 school year, when the Parent withdrew the Student from the District; and 2) from the beginning of the 2003 school year until September 23, 2005, when the Student was hospitalized.[1]

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[1] The parties stipulated that the relevant period for the compensatory education claims ended on the date of the Student's September 2005 admission to [redacted], an

The District contends that the claim is barred by the limitations period established in the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C.§1415(b)(6)(B), 1415(f)(C),(D)(2004). In addition, it argues that an evaluation issued by the District in June 2004 correctly found that the Student was not learning disabled, and that therefore, there was no denial of FAPE.

PROCEDURAL HISTORY

The Student received early intervention services before enrolling in the District at age 5 in 1995. (NT583-22 to 584-23; P-43.) He received speech and language services in the early grades, (NT587-23 to 588-1; P-12 p. 3), but these services ceased when the Parent removed the Student from the District after his fourth grade year in September 2001. (NT588-14 to 18; P-12 p. 3, P-22.) He returned to the District for his seventh grade year in September 2003. (NT593-3 to 19; P-4.) The District evaluated him, issuing an Evaluation Report in June, 2004, which was discussed with the Parent in October 2004. (FF 16, 17, 23.) The Student was transferred to the District's [redacted] Middle School in November 2004, and was provided with learning support services through the District's CSAP program, commencing in February 2005. (FF 31, 39.) In January 2005, District personnel completed a Behavior Performance Review pursuant to a series of disciplinary incidents. (FF 42.) In March 2005, the Student was hospitalized and remained hospitalized until the summer of 2005. (FF 49.) The District reevaluated the Student on August 9, 2005, identifying him with Emotional Disturbance, but finding that additional information was necessary. (FF 54.) The District issued an IEP dated August 31, 2005, placing the Student in full Time Emotional Support. (FF 55.) The Parent filed for due process in June, 2005. This request was dismissed in August 2005. The Parent filed again for due process on July 26, 2006.

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inpatient behavioral health program. NT39-3 to 22, 939-5 to 20.) This date was September 23, 2005. (S-40 p. 27.)

ISSUES

1. Did the District waive application of the two year limitation period of the Individuals With Disabilities Education Improvement Act, 20 U.S.C. §1400 et seq. (IDEIA) through its attorney's oral agreement during a resolution meeting on June 14, 2005?

2. Does the two year limitation period set forth in the IDEIA preclude the Parent from requesting compensatory education for any denial of FAPE earlier than two years prior to the filing of this due process request on July 26, 2006?

3. During the period from July 26, 2004 until September 23, 2005, did the District fail to comply with its Child Find obligations in failing to identify the Student as eligible for special education under the IDEIA?

4. During the period from July 26, 2004 until September 23, 2005, did the District fail to provide an appropriate evaluation to the Student?

5. During the period from July 26, 2004 until September 23, 2005, did the District fail to offer FAPE to the Student through an appropriate IEP?

6. During the period from July 26, 2004 until September 23, 2005, did the District fail to provide FAPE to the Student?

7. During the period from July 26, 2004 until September 23, 2005, did the District fail to provide FAPE to the Student by subjecting him to discipline contrary to the requirements of the IDEIA?

8. During the period from July 26, 2004 until September 23, 2005, did the District fail to provide FAPE to the Student by failing to comply with the procedural requirements of the IDEIA?

FINDINGS OF FACT

1. The District's appointed counsel in the previous due process request, filed in June 2005, orally entered into an understanding with Parent's counsel, during a resolution meeting on June 14, 2005, in the context of a continuation of that due process hearing.

2. District counsel agreed not to object to the Parent's raising compensatory education claims, in such a way that the Parent would forfeit claims for a period equal to the period of delay between the filing date in June 2005 and the resubmission of such claims after the start of the school year.

3. District counsel at that time was not authorized to agree to an indefinite extension of time within which to recommence the due process hearing for purposes of raising compensatory education issues. He did not agree to such an open ended extension and he did not waive the District's statute of limitations defenses. (NT886-19 to 889-22, 1232-22 to 1233-4.)

4. The Student received early intervention services before enrolling in the District at age 5 in 1995. (NT583-22 to 584-23, 1026-9 to 20; P-43.)

5. The Student received speech and language services in the early grades, (NT587-23 to 588-1; P-12 p. 3, P-47 p. 2), but these services ceased when the Parent removed the Student from the District after his fourth grade year in September 2001. (NT588-14 to 18; P-12 p. 3, P-22.)

6. The District's records indicated that the Student was withdrawn from the District's special education rolls when the Parent withdrew him from the District. No NOREP was issued. (NT878-14 to 879-10, 829-2 to 12, 933-20 to 934-8; P-12, P-22.)

7. The Student returned to the District for his seventh grade year in September 2003. (NT593-3 to 19; P-4.)

8. The Student entered the District's [redacted] School in September 2003, to begin seventh grade. (NT593-3 to 19; P-4.)

9. The Parent signed the registration form but did not indicate on it that the Student had received special education services. (NT595-2 to 17; P-4.)

10. From the beginning of the 2003-2004 school year, and throughout the year, the Student's teachers were aware or that the Student was exhibiting behavior problems and performing poorly in class. (NT597-1 to 598-17, 609-10 to 16; P-9 p. 3, P-12 p. 4, P-20, P-33.)

11. During the 2003 to 2004 school year, the Parent repeatedly brought to the attention of the District's staff that the Student had difficulty reading, was reading below the seventh grade level, and needed assistance in order to learn. (NT596-19 to 599-5, 609-25 to 610-22,940-8 to 945-1.)

12. During the 2003 to 2004 school year, the Student was excessively absent and became involved with drug dealers, and the Parent brought this to the attention of the principal and security staff at [redacted] School. (NT602-11 to 606-23, 946-7 to 949-8; P-9 p. 1.)

13. Although the principal promised to have the Student escorted while at school to ensure his safety, this service was never provided. (NT949-1 to 21.)

14. Subsequently, the Student was assaulted several times. (P-1.)

15. On March 31, 2004, the Parent asked the school counselor to intervene and the school psychologist decided to evaluate the Student.

The Parent signed the Permission to Evaluate on that date, and received Procedural Safeguards. (NT574-4 to 575-7, 616-22 to 618-4, 1032-14 to 1036-13; P-4 p. 1, P-5, P-43, S-9, S-11, S-29, S-35.)

16. On March 31, 2004, the psychologist interviewed the Parent, eliciting from her information concerning the Student's functioning at home and self care skills, as well as the Parent's concern that the Student was having difficulties with reading and was reading below grade level. (NT958-4 to 962-13.)

17. On April 4, 2004, a District psychologist began testing the Student, and on June 9, 2004, the District issued an Evaluation Report. (NT574-4 to 576-15, 846-3 to 6, 854-24 to 855-860-9, 974-2 to 13, 1028-17 to 1031-14; P-5, P-17, P-18.)

18. The District failed to provide the Parent with an Evaluation Report within ten days of issuing the Evaluation Report, contrary to District policy; rather, the Parent did not receive a copy until October 2004. (NT574-4 to 576-15, 846-3 to 6, 854-24 to 855-860-9, 974-2 to 13, 1028-17 to 1031-14; P-5, P-17, P-18.)

19. The evaluation was performed and the Evaluation Report was issued pursuant to an improper procedure which was not subjected to the District's established quality improvement system. (NT856-7 to 860-6.)

20. The evaluation report found the Student to be non-exceptional without the participation of the Parent in that decision, contrary to District policy. (NT854-24 to 860-9, 860-16 to 861-7.)

21. The Evaluation Report found that the Student was functioning in the deficient to borderline range in intellectual functioning, and the deficient range in adaptive functioning. (P-17 p. 3, 6.)

22. The evaluation report found that the Student was not a disabled student in need of special education services, because "environmental influences cannot be ruled out as the cause of these deficiencies." However, it did not assess the Student's emotional functioning. (NT 85-15 to 18, 86-24 to 89-19, 962-14 to 963-15; P-17.)

23. School personnel scheduled a meeting to discuss the evaluation report on October 22, 2004, after the Student sustained a head injury when he was hit by a rock while walking home from school. (NT963-16 to 964-2; P-1 p. 2 to 3, P-18 p. 1, S-38.)

24. At the meeting on October 22, 2004, the Parent communicated to the school personnel that the Student had a history of problems in school and her belief that he had a reading problem. (NT 967-6 to 17, 969-16 to 970-23.)

25. The school personnel indicated to the Parent that additional information was needed to determine whether or not a reevaluation would be appropriate. District policy required that a reevaluation should have been initiated at that time, and completed within sixty school days. This was not done, contrary to District policy. (NT865-1 to 11, 970-10 to 971-4, 1141-11 to 1142-4, 1146-14 to 1148-9; P-17 p. 17 to 18.)

26. Contrary to District policy, no NOREP was issued as a result of the meeting. (NT862-8 to 863-4.)

27. From the first day of the 2004-2005 school year until he was hospitalized in March, 2005, the Student's academic performance and behavior was significantly interfering with his learning, requiring a multidisciplinary evaluation. (NT868-13 to 25, 438-1 to 439-10; P-19 p. 4, 6.)

28. Under these circumstances, the District's Child Find policy required referral to the District's learning support program, known as the Comprehensive Student Assistance Program, CSAP. (NT52-3 to 56-12, 131-11 to 132-14.)

29. While referral to the District's learning support program, known as the Comprehensive Student Assistance Program, CSAP, had been contemplated by at least one school staff member, the student did not receive CSAP services while at [redacted] School in September 2004 through the beginning of November 2004. (NT983-4 to 987-16, 995-17 to 25; P-1 p. 2, P-19 p. 3, 6, 8, P-29 p. 2 to 4, S-15.)

30. Due to the continued incidents in which the Student was assaulted and the serious head injury he sustained when hit with a rock, the Parent held him back from school for safety reasons from October 6, 2004 until November 16, 2004. (NT975-14 to 976-17; P-1 p. 3, P-13.)

31. The Student was transferred to the District's [redacted] Middle School on November 16, 2004. (NT975-14 to 976-7, 522-11 to 25; P-14, P-26 p. 4.)

32. The Middle School counselor, who is the coordinator of the school's CSAP learning support program, provided no services to the Student in the month between the date upon which the truancy court appointed case manager brought the Student to her attention, and the date of the first CASP meeting on February 1, 2005. (NT378-7 to 379-380-21, 390-24 to 394-12; P-28.)

33. During the period from November 16, 2004 until April 4, 2005, the Parent repeatedly requested of the Middle School principal, counselor and teachers that they provide the Student with a reevaluation, which she believed had been promised at the October 2004 meeting at [redacted, former school]. (NT533-4 to 534-7, 869-11 to 15, 870-17 to 22, 984-1 to 987-16, 988-20 to 990-7; P-19 p. 4.)

34. District policy required that an evaluation process be started under these circumstances. (NT56-7 to 58-14.)

35. The Middle School school counselor responded to these requests by indicating that she believed that the Student's poor attendance was the cause of his poor school performance, and she did not facilitate the Parent's request for reevaluation or advise her to put it in writing. (NT984-1 to 987-11, 433-16 to 439-17, 476-4 to 477-12.)

36. The Middle School counselor had inadequate knowledge of special education concepts and procedures to ensure that the District would meet its Child Find obligations. (NT363-5 to 364-7, 364-14 to 365-23,374-9 to 375-25, 420-18 to 421-3, 430-25 to 431-13.)

37. In November and December 2004, and in January 2005, the case manager appointed by the truancy court repeatedly brought to the school counselor's attention that the student had failed academically at his previous school and that the Parent was concerned that the Student had a problem with reading. (NT558-15 to 567-9.)

38. The District did not offer to provide a reevaluation in response to the information and requests it received until April 2005. (NT534-23 to 536-7; P-29.)

39. In January 2005, the District placed the Student in its learning support program, known as the Comprehensive Student Assistance Program, CSAP, and the first meeting was on February 1, 2005. (NT983-4 to 987-16, 995-17 to 25; P-19 p. 3, 6, 8, P-29 p. 2 to 4, S-15.)

40. Between January 13, 2005 and February 23, 2005, the Student was charged with seven violations of school rules, including bringing a knife to school, cutting classes and running in school halls, stealing, and throwing a rock through a classroom window. (NT991-16 to 7, 993-9 to 997-15, 1002-9 to 1005-13;P-19 p.8.)

41. The student was suspended for at least thirteen nonconsecutive days as a result of these infractions. (P-19 p. 8, 13.)

42. Pursuant to District policy, a Behavior Performance Review Team issued a Behavior Performance Review on January 25, 2005. (P-19 p. 1.)

43. The Review failed to recognize that the Student's academic performance and behavior was significantly interfering with his learning, requiring a multidisciplinary evaluation. (NT868-13 to 25; P-19 p. 4.)

44. The review failed to recognize that the Student's history and behavior indicated the need for a multidisciplinary evaluation. (NT869-2 to 10; P-19 p. 4.)

45. The review failed to recognize that the Parent had expressed concern that the Student might have a disability. (NT869-11 to 15; P-19 p. 4.)

46. The review failed to recognize that the Parent had requested a multidisciplinary evaluation prior to the disciplinary incident of January 13, 2005. (NT870-17 to 22; P-19 p. 4.)

47. The District concluded that the Student was not thought to have a disability, and provided none of the protections that the law required at that time for children thought to be children with disabilities. (P-19 p.1 to 5.)

48. The Student continued to do poorly in classes, but Middle School did not enter grades for him. (NT992-9 to 13; P-26 p. 1, 10, P-34.)

49. In March 2005, the Student was hospitalized at the [redacted] Hospital for dangerous behavior. On March 12, 2005, the Student was hospitalized at a behavioral health center known as [redacted], where he remained until shortly after March 21, when he went to a partial care program. (NT1009-9 to 1011-15, 1124-6 to 1125-2; S-23, S-28.)

50. On April 4, 2005, the District offered to reevaluate the Student. (NT893-1 to 897-5, 1012-6 to 1015-6; S-26, S-27, S-34.)

51. The Parent refused to allow reevaluation in part because she was angry with the District and intended to sue them. (NT1012-6 to 1013-11, 1018-22 to 1021-19, 1046-8 to 13 1052-13 to 24, 1055-5 to 21, 1120-5 to 1121-2; S-28.)

52. After the Student was discharged from the hospital, and until a prehearing conference in July 2005, the Parent did not cooperate with the District in its efforts to plan an educational program for the Student. (NT1063-24 to 1069-2, 894-6 to 901-25; S-27, S-28.)

53. From the date of the prehearing conference in July 2005 until September 23, 2005, the District offered evaluations, tutoring and placement in full time emotional support classes. (NT902-1 to 907-3.)

54. The District issued a reevaluation report dated August 2005, identifying the Student with Emotional Disturbance, but finding that additional information was necessary. (S-34 p. 13.)

55. The District issued an IEP dated August 6, 2005, placing the Student in full Time Emotional Support. (S-35 p. 2.)

DISCUSSION AND CONCLUSIONS OF LAW

SCOPE OF HEARING AND LIMITATIONS PERIOD

Parent’s claims extend back for eight years, beginning in 1998 when the Student entered second grade. The District filed motions to dismiss in which they argued in the alternative: 1) that the IDEIA limitations period must be applied to limit claims to a two year period from the date of filing on July 26, 2006, 20 U.S.C.§1415(b)(6)(B) and 20 U.S.C.§1415(f)(3)(C) ; and 2) that the Montour one

year equitable limitations period survives the effective date of the IDEIA and should be applied to limit claims to a one year look back from the filing date. The Parent argued alternatively in response:1) the IDEIA limitations period does not apply because the District, in partial settlement of a previous request for due process filed on June 4, 2005, had waived its application by agreeing that the filing date of the first due process request would control; 2) that the IDEIA limitations period was subject to the "continuing violations" doctrine and therefore claims should be allowed dating back to 1998 when the continuing violation commenced; and 3) that the statutory exceptions to the limitation period apply.

The principal argument[2] is that there was an agreement to "toll" the running of the statute of limitations as of the filing date of the previous request for due process, on June 6, 2005. Because this filing date was about three weeks prior to the effective date of the IDEIA, on July 1, 2005, counsel argues that the agreement to "toll" the statute removes this due process proceeding from the operation of the IDEIA's statute of limitations altogether. Secondarily, counsel argues that, prior to the IDEIA, there was no statute of limitations at all, in that the Montour decision was contrary to federal law and void, as determined by several federal courts.

The Parent argued that this agreement came as the parties decided to focus on prospective relief rather than on compensatory education claims during the summer of 2005. The parties held a resolution session on the day before the scheduled date of hearing, as a result of which Parent's counsel wrote to the hearing officer and requested that the matter be continued indefinitely pending evaluation and implementation of a new IEP in September 2005. Parent's counsel proposed that the due process request be suspended until the parties could obtain and review historical documents and "properly assess the compensatory issues … ."

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[2] The hearing officer does not agree with the District that Montour survives the IDEA 2006 amendments. The Appeals Panel has rejected this argument. In re: The Educational Assignment of C.H., a Student in the Souderton Area School District, Spec. Educ. Op. No. 1750 at 9 n. 45 (2006). In C.H., the Panel held that Montour is not "an explicit time limitation" within the meaning of section 1415(f)(3)(c). Therefore, issues governed by the IDEIA will not be limited to the Montour one year look back, but the two year statutory limitation period will apply.

The hearing officer wrote back by email on June 13 that it was clear that the parties were not prepared to proceed with the compensatory issues, adding that she would dismiss the compensatory issues "without prejudice" in a forthcoming letter. Neither party objected, and in a letter dated July 25, 2005, the hearing officer dismissed the due process complaint "without prejudice."

To demonstrate the existence of a tolling agreement, Parent's counsel offered several pieces of correspondence which purported to reflect the alleged agreement between counsel. However, none of this correspondence asserted directly the existence of such an agreement. The correspondence consisted of a number of email messages and letters that Parent's counsel wrote to the attorney previously representing the District in June 2005, and to other persons who represented the District subsequently. These messages, written by Parent's counsel, allude to the agreement, but none of the messages written to the District's previous counsel asserts that the "tolling" agreement existed; moreover, none even alludes to the scope of such an agreement, and none suggests that it was intended to preserve the Parent's claims from the operation of the IDEIA limitations period.

On the contrary, the correspondence casts doubt upon the existence of such an agreement, because in several messages, Parent's counsel requests that the District's previous counsel agree or confirm agreement to treat the claim as having been filed in June 2005. On July 25, 2005, apparently before receiving the hearing officer's letter relinquishing jurisdiction, Parent's counsel wrote to District counsel offering to withdraw the matter, on condition that "[t]he District will stipulate that our original filing date controls in the event that we have to go forward with a comp ed claim … ." Similarly, on September 9, 2005, counsel again wrote to new counsel for the District, offering to desist in filing again for due process, on condition that the District stipulate "to preserve our original filing date with regard to the compensatory issues." This correspondence implies that there was not an outstanding agreement spanning the time from June 14, 2005 to September 9, 2005, to "preserve … the original filing date."

The attorney who represented the District during the resolution meeting of June 14, 2005, testified in the hearing pursuant to a subpoena. He testified that counsel did reach an oral understanding on June 14, 2005: "[S]ince [Parent's counsel was not] ready to go forward, we agreed

to just move into the fall." (NT1219-11 to 13.) He described the understanding: "The hearing scheduled in July … was being postponed and there was not a new date set, but the agreement was, yeah, of course, your original filing date is still going to control, because that case is still outstanding." (NT1233-5 to 11.) This agreement was limited to the context of the continuance of the existing due process request. (NT1232-4 to 6.)

This discussion was "like a one or two-sentenced discussion between Lorrie and I … ." (NT1252-1 to 13.) There was no agreement to toll any limitations period, nor was there any discussion of the effect of such an agreement on the application of any statute of limitations. (NT1248-4 to 21, 1253-8 to 9.) There was no agreement to allow the Parent's original filing date to control for all purposes if she were to file over one year later raising the same claims. (NT1248-22 to 1249-2.) District counsel was not authorized to make such an agreement to toll a statute of limitations. (NT1254-24 to 1255-6.)

The hearing officer finds that the parties did not reach a meeting of minds encompassing the notion that the IDEIA limitations period would not apply to a refiling of the due process request for compensatory education. While the argument can be made from an agreement that the "original filing date controls", it is not reasonable to extend that expression as far as the Parent would have us extend it. Here, the agreement was in context of an existing due process request that was dismissed subsequently. The testimony was equivocal as to whether or not the agreement even applied to a subsequent filing. In addition, [District's former counsel] made it very clear that he never contemplated a revisiting of the compensatory education issue over a year later; it is unreasonable to interpret his agreement as having that effect. Most important, there was never any thought to the effect of this agreement on the application of the IDEIA limitations period. In fact, the record suggests that the intention was only to hold the Parent harmless for the period of delay – to allow her to assert a claim for the applicable limitations period without forfeiting the months between the agreement date in June and the resumption of the compensatory education that was expected in the beginning of the school year. It was clear that the District's counsel at the time never considered that he could be waiving the application of the new two year limitations period. Indeed, he clearly stated that he never considered his agreement to be a "tolling" of a limitations period,

nor was there any mention of statutes of limitations per se. Subjectively, there was no meeting of minds regarding the applicable limitations period. Objectively it is not reasonable to impute such a meeting of minds under these circumstances.

Such an inference would be especially unreasonable since the District's previous counsel testified that he was not authorized to waive the application of the statute of limitations. The district's special education regional coordinator, testified that she never granted such authority. It cannot be inferred that District counsel waived such a fundamental legal interest of his client when he was clearly not authorized to do so.

The hearing officer also finds that there is no basis in the IDEA to permit parties to waive the IDEIA limitations period. There is no explicit language in the Act to empower parties to do so. The hearing officer has not been made aware of anything in the Act that suggests a legislative purpose to allow parties to circumvent the limitations period by agreement. Although the limitations period is seen to benefit school districts, the limitations period serves to reduce the cost to the system overall, and to encourage more amicable, less litigious problem solving by all parties – societal benefits that neither party would be entitled to waive.

In conclusion, the hearing officer rejects the Parent's theory that the IDEIA limitations period does not apply to her because of the agreement between her counsel and the District's previous counsel. The agreement never went that far, and this hearing officer doubts that it legally could.

The Parent argues that any delay in filing for due process was due to the District's failure to provide documents that they were obligated to keep and disclose. However, there was insufficient evidence to prove that this caused a delay in filing from June 2005 until July 2006. Moreover, the records were inadequate before the original filing date, and counsel represented the Parent as of at least May 2005; the absence of records was a constant backdrop to the case, and the Parent was able to file for due process in June nevertheless. Thus the evidence suggests that this did not prevent filing for due process, though counsel obviously chose to attempt to review records going back eight years before proceeding with a second request for due process. Nothing in the IDEIA indicates that absence of records provides an exception to the

limitations period, unless it actually prevents the parent from filing a due process request.

The hearing officer does not accept the Parent's "continuing violation" argument. There is no basis in the IDEIA for imputing such an exception to the two exceptions already set forth. The IDEIA sets forth two exceptions:

> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to –
>
> (i) specific misrepresentation by the local educational agency that it had resolved the problem forming the basis of the complaint; or
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> (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.
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> [20 U.S.C.§1415(f)(3)(D)(i), (ii).]

The regulations contain identical operative language. 34 C.F.R.§ 300.511(f). Nowhere is there an indication that Congress intended a third exception for "continuing violation."

Parent relies upon several cases governed by the law as it existed before the IDEIA; none of these cases squarely applied the continuing violation doctrine to a complaint notice filed after the effective date of the IDEIA. In particular, the Parent cites the decision in Robert R. v. Marple Newtown School District, 2005 WL 3303033 (E.D. Pa. Nov. 8, 2005), in which the federal court suggested that the Congress intended application of the continuing violation doctrine as an exception to the IDEIA limitations period. The court based its analysis upon a Senate committee report, which stated:

> In essence, where the issue giving rise to the claim is more than two years old and not ongoing, the claim is barred; where the conduct or services at issue are ongoing to the previous two years, the claim for compensatory education services may be made on the basis of the most recent conduct or services and the conduct or services that were more than two years old at the time of due process or the private placement.
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> [S. Rep. No. 108-185 at 1 (2003).]

The court in Robert R. read this language to permit expansion of "the period which the hearing officer could

consider when a due process hearing was timely brought". Robert R., 2005 WL 3003033 at 4.

The hearing officer finds this language instructive, but not binding. Rather, as an administrative officer, the hearing officer is bound by the language of the statute and regulations. These do not expressly create a "continuing violation" exception to the IDEIA's limitation period.

Pennsylvania's Special Education Appeals Panels have refused repeatedly to recognize exceptions to the two-year limitation period for reasons other than those explicitly set forth in the statute itself, and they have expressly declined to apply the "continuing violation" doctrine. In the Matter of the Educational Assignment of C.M., A Student in the Pocono Mountain School District, Spec. Ed. Opinion No. 1765 (August 2006); In the Matter of the Educational Assignment of P.P., A Student in the West Chester Area School District, Spec. Ed. Opinion 1757 (August 2006).

In P.P., the Panel rejected the argument that the legislative history compels a determination that the "continuing violation" doctrine should be read into the IDEIA's limitations period. Id. at 12. In C.M., the Panel found the comments to proposed IDEIA regulations more authoritative:

> We agree with the District that the "continuing violation" reasoning was specifically and purposefully omitted from the statute and regulations. This view is supported by the comments to the regulations, which were included by the District and state:
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> * * *
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> One commenter suggested that the regulations allow extensions of the statute of limitations when a violation is continuing or the parent is requesting compensatory services for a violation that occurred not more than three years prior to the date the due process complaint is received.
> Discussion: Section 615(f)(3)(D) of the Act provides explicit exceptions to the timeline for requesting a due process hearing. Section 300.511(f) incorporates these provisions. These exceptions do not include when a violation is continuing or where a parent is requesting compensatory services for a violation that occurred not more than three years from the date that the due process complaint was filed. Therefore, we do not believe that the regulations should be changed.

Changes: None.

Alleged failures to provide FAPE can be conceptualized easily as "continuing." The doctrine lends itself to such broad definition that the exception would swallow the limitations rule itself. See Vandenberg v. Appleton Area School District, 252 F.Supp.2d 786 (E.D. Wis. 2003). In sum, this hearing officer will not read such an exception into the IDEIA.

Next, the Parent argues that her claims arise under Section 504, which does not have a statutory limitations period. However, all of the Parent's claims are framed under the IDEIA, and the Parent points to no distinct additional issues under Section 504. All claims arise out of the same facts alleged pursuant to the IDEA claims. Thus, there is no basis to apply standards that differ from those governing the application of the IDEIA to these facts. In the Matter of the Educational Assignment of P.P., A Student in the West Chester Area School District, Spec. Ed. Opinion 1757 (August 2006). Moreover, federal cases instruct that the Pennsylvania two year statute of limitations for personal injury is to be imputed to section 504 claims. Sutton v. West Chester Area School District, 2004 U.S. Dist. LEXIS 7967 at 25 (E.D. Pa. 2004). Therefore, this hearing officer will not extend the applicable limitations period based upon the characterization of the claims as arising under §504.

Finally, the hearing officer has considered whether or not either of the explicit exceptions to the two year limitations period applies in this case. The first exception applies when the parent is "prevented" from filing a complaint notice due to the district's "specific misrepresentation" that the problem is resolved. 20 U.S.C.§1415(f)(3)(D)(i). The hearing officer finds no evidence in this record that the District ever made such misrepresentations, or that the Parent was "prevented" from filing due to any such misrepresentations.

However, the second exception bears closer examination. It provides for extension of the limitations period when the parent is "prevented" from filing due to the district's "withholding of information … required … to be provided to the parent." 20 U.S.C.§1415(f)(3)(D)(ii). The Parent argues that this language broadly dispenses with the limitations period whenever the district fails to provide any information to the parent, including a failure to provide a correct evaluation or a failure to advise the parent that the district's own actions contravene the IDEA.

However, this is not a plausible reading of the language creating the exception.

The exception arises only when the district withholds information improperly. The word "withholding" imports something more than nonfeasance. As this hearing officer understands it, "withholding" implies some level of conscious decision not to convey the information. One authoritative dictionary definition is: "to refuse to give or grant or allow .. to hold back, to restrain … ." Oxford American Dictionary (Oxford Universty Press 1980). Webster's Universal Dictionary (1936) defines it: "to hold back; to restrain; … to retain; to keep back; not to grant … ." It certainly does not imply that any IDEIA violation that involves a failure to provide information is somehow transformed into an exception to the limitations period; this would obviate the limitations period altogether.

In addition, the "withholding" of required information must "preven[t]" the parent from filing a complaint notice. At the very least, this language suggests the need for proof of a direct and substantial relationship between a specific "withholding" and the failure to file.

The Parent argued that an incident in 2001 rises to this level. On September 24, 2001, the District changed its records and apparently removed the Student from special education placement. (NT932-13 to 934–8; P-22.) The Parent never signed a paper to remove the Student from special education, and her overall testimony makes it clear that she has no recollection of this event. (NT934-5 to 8.) The general tenor of the testimony was that the Parent did not and would not ever agree to remove services from the Student. Thus, the hearing officer asked the parties to address whether or not a statutory exception would be made out as a matter of law if there were evidence that the Parent did not receive prior notice of the District's intention to withdraw the Student from special education, 20 U.S.C. §1415(b)(3), with its mandatory reference to procedural safeguards, 20 U.S.C. §1415(c)(1)(C), (D).

The hearing officer has considered the parties' extensive letter briefs and determines that this chain of events would not trigger the statutory exception to the limitations period under the circumstances of this case. As discussed above, a mere omission to provide notice, though arguably a violation of the IDEIA, is not per se a "withholding" that triggers the statutory exception.

There was no explanation of the document that recorded the Student's removal from special education, and as a whole the Parent's exhibits indicate that this document was

created in conjunction with the Parent's removal of the Student from the District when she sent him to private school. (P-12 p. 3, 22.) There simply is no evidence to suggest that the District consciously decided not to issue a NOREP before removing the Student from special education. While this would have been required, (NT838-14 to 21), these documents do not reveal whether the failure to do so was advertant or inadvertent. Under these circumstances, it will never be known whether or not the District was "withholding" notice of the Parent's rights as required in the statutory exception; rather, the circumstances suggest that this event was inadvertent, though improper.

Second, the record shows, if anything that the Parent was not "prevented" from filing for due process. In removing the Student from the District, the Parent evidenced a choice, not to pursue her rights with the District, but to seek services from a private school instead.

Even if there were evidence showing that the statutory exception might apply in 2001, that evidence is negated by events on March 31, 2004. On that day, the Parent received notice that she was entitled to receive an Evaluation Report within sixty days of her signing of a Permission to Evaluate, as required by law, 22 Pa.Code §14-123(b). (NT574-4 to 575-7; P-5.) The Permission to Evaluate makes reference to due process remedies, and indicates that Procedural Safeguards were provided at that time.[3] Thus, as of March 31, 2004, the Parent was on notice of her rights,

[3] The documents show that the Parent did in fact check off the boxes that assert her receipt of procedural safeguards, because numerous documents, obviously filled out in whole or part by the Parent, show the same unusual right-to-left check mark that appears on the Permission to Evaluate indicating receipt of the Safeguards. (NT574-4 to 575-7; P-4 p. 1, P-5, P-43, S-9, S-11, S-29, S-35.) One witness testified that the Parent did in fact place those checks on the form. (NT1141-11 to 15.) While the Parent addressed this issue obliquely in testimony, she never directly testified to the contrary. (NT980-25 to 982-3.) Given, the Parent's deficits of memory regarding procedural details, as discussed below, the hearing officer finds that her testimony does not provide preponderant evidence in support of the claim that she did not receive procedural safeguards.

and the applicable statute of limitations started to run.[4] Under the limitations period as defined in the IDEIA, even if the Parent had been prevented from filing a complaint from 2001 to March 31, 2004, she was no longer prevented as of that date, due to "withholding" of information, and she would have been obligated to file a request for due process within two years of that date.[5] She waited until more than two years had passed before filing this case, and would be barred by the IDEIA limitations period as a result, for all claims of which she had notice as of March 31, 2004.

The Parent argued that the District's failure to provide an evaluation report to the Parent for four months also triggered the exception for "withholding" information. The District completed an Evaluation Report in June 2004, but did not transmit it to the Parent until October. (FF) Thus, during the four months before the Parent received notice of the District's ER, she was effectively prevented from contesting it, as she ultimately, but belatedly, did. It is also clear from the record that the ER was not forwarded to the Parent because it was lost from June 2004 until October 2004, when it was found by happenstance in the Special Education room of the [redacted] School. (NT1138-3 to 16, 1143-25 to 1144-22.) While this failure to forward the ER appears to have been a violation of the Act, it does not rise to the level of "withholding" information within the meaning of the IDEIA exception to the two year limitations period. In this case the failure to provide information was inadvertent, not a conscious decision. Moreover, the record demonstrates that the Parent was on notice during this entire period that she was entitled to go to due process to complain about the District's failure to provide a copy of the ER. Thus, the

[4] The applicable limitation period is the two year period under the IDEIA. Since this due process request was filed after the effective date of the IDEIA, it is governed by that Act's provisions.

[5] This assumes that the Parent "knew or should have known" that the District had failed to identify the Student as in need of special education services. 20 U.S.C. §1415(b)(6)(B). As discussed below, this hearing officer is satisfied that the Parent was on notice that the District was failing to provide needed services to her son, long before she signed the Permission to Evaluate form. Thus, the Parent was on notice of the "alleged action that forms the basis of the complaint." 20 U.S.C.§1415(f)(3)(C).

record shows that the Parent was not "prevented" from filing on account of the District's failure to provide the ER.

In sum, the hearing officer finds that the record does not support the application of the statutory exceptions to the IDEIA limitations period in this matter. Further, the hearing officer finds that the Parent "knew or should have known" that the District had failed to properly identify the Student as learning disabled long before July 26, 2004, the date two years prior to her filing of the complaint notice in this matter. Consequently, the Parent's right to file a complaint had expired for every day prior to that date, and this hearing officer will consider compensatory education claims only for the two years prior to the date of filing.

CREDIBILITY

The hearing officer finds the Parent's testimony to be credible, based upon her demeanor during the hearing, the content of her testimony, corroboration by other witnesses, prior consistent statements, and corroboration by documentary evidence. See, e.g., (FF 31)(parent's recollection of a delay between the Student's actual transfer to Middle School and Middle School's entry of the admission date corroborated by business record entry and testimony of court truancy case manager); (NT509-1 to 512-4)(prior consistent statement by Parent); (NT514-11 to 515-3)(court case worker impression the Parent was involved with Student's education and had made numerous contacts with [redacted] School); (NT513-18 to 514-1)(Parent's prior consistent statement regarding Middle School counselor's unresponsiveness); (NT533-4 to 534-3)(court case manager witnessing discussion of evaluating Student for reading problem); (NT538-2 to 539-23)(independent agency investigation corroborating Parent's testimony about the Student being targeted for bullying at school.)

However, the hearing officer accords reduced weight to the Parent's testimony concerning dates, names, procedures and sequences of events. The hearing officer finds that the Parent's memory for such details is faulty. (NT981-3 to 6, 1032-17, 1033-4 to 25, 1041-5 to 24, 1047-8 to 18, 1048-15 to 21, 1049-1 to 10, 1050-22 to 1052-3, 1060-18 to 1061-1, 1074-15 to 10775-1, 1079-13 to 20, 1086-10 to 25, 1087-11 to 17) Thus, he gives her testimony less weight on these procedural details.

The hearing officer does not credit the testimony of the Middle School counselor, or that of the assistant principal at Middle School. These witnesses had created a letter stating that the parent "and advocate" were satisfied with "all proper safeguards and terms of notification" provided by Middle School. (P-28.) This was contradicted by the credible testimony of the court case manager assigned to the Student's truancy case (referred to as "advocate" in the letter). (NT545-12 to 546-1.)

The hearing officer does not credit the testimony of the Middle School assistant principal to the effect that the Parent never communicated with him concerning the Student's academic needs. This individual testified that he did not remember any conversations with the Parent about the Student's academics, although he had dealt with some of the disciplinary incidents in early 2005. (NT1099-3 to 1103-3.) He directly denied that he had ever told the Parent that he could put the Student in special education without an evaluation, or by a "back door" procedure. (NT1101-4 to 8, 1101-18 to 23.) However, most of the questions he was asked and all but one of his answers were based upon a lack of recollection, rather than a firm denial of having those conversations, and this hearing officer declines to infer from this witness' lack of memory that the conversations did not take place, at least to the extent of notifying this vice principal that the Parent wanted something done about the Student's reading and academic problems.

Any such inference from the witness' lack of memory of those conversations is contradicted by the testimony and business records in evidence from the court appointed truancy case manager. This witness' case log credibly documented that both the Parent and the Middle School counselor told the witness in November 2004 that the Parent had spoken to the assistant principal about the Student, prior to the date of any disciplinary matters. (NT521-521-13 to 20, 524-9 to 20; P-29 p. 3.) Moreover, this assistant principal attended the CSAP meeting on February 1, 2005, at which the Student's academic needs were discussed. (NT529-1 to 534-7; P-19 p. 27.) The assistant principal apparently did not recall this meeting during his testimony. (NT1100-2 to 1101-1.) Thus, his lack of memory did not reliably contradict the Parent's account of events.

The hearing officer also does not credit the testimony of the Middle School counselor. Her demeanor and manner of answering questions were so guarded and uncooperative that the hearing officer must question her credibility. At

various points it was obvious that she was trying to avoid answering questions. (NT369-23 to 370-22, 389-14 to 18, 393-4 to 394-23, 411-17 to 414-12, 423-9 to 14, 425-4 to 426-3, 430-25 to 431-3, 462-4 to 464-5.) She also was contradicted by documentary evidence and credible testimony about how long it was before she became aware of the Student after he arrived at Middle School. (NT381-11, 382-23 to 383-15; P-32 p. 3.)

RELATIONSHIP OF THE ISSUES TO CHILD FIND ISSUE

Since the only request for relief is for compensatory education, the remaining issues in this case boil down to the overarching issue of whether or not the District denied the Student FAPE during the relevant period, by failing to identify the Student. The adequacy of the June 2004 evaluation is relevant only to whether or not the District discharged its Child Find obligation by issuing it. The appropriateness of the disciplinary proceedings likewise is relevant only insofar as the failure to classify the Student as Thought to Be Disabled contributed to or extended the District's failure to identify and provide special education supports. Similarly, the procedural irregularities surrounding the delay in providing the 2004 evaluation report to the Parent, and the participation of the Parent, are relevant only insofar as they impinged upon the validity of the ER and consequently the District's discharge of its Child Find obligation. Therefore, the hearing officer will discuss all these issues together, with the single focus on whether or not the District failed to identify the Student when it should have done so, with consequent denial of FAPE.

FAILURE TO IDENTIFY

Under the IDEA in effect in July 2004, the District had an obligation to assure that "all children … who are in need of special education and related services, are identified … and evaluated ... ." 20 U.S.C. §1412(a)(3)(A). This obligation applied to children who are "suspected" of having a disability even though advancing from grade to grade. 34 C.F.R. §300.125(a)(2)(ii). Districts were and are obligated to maintain and carry out a system of screening to seek out

and identify students who "may" need special education services and programs. 22 Pa. Code §14.122(a)(4). This process must be "comprehensive." Id. at (b). It must include, for students with behavioral concerns, "a systematic observation of the student's behavior in the classroom … ." 22 Pa. Code §14.122(c)(2). It must also provide "an intervention" based upon the results of the assessment. 22 Pa. Code §14.122(c)(3). Moreover, the district must assess the response to the intervention, and ultimately the district must determine whether the student's needs exceed the capacity of the regular education system. 22 Pa. Code §14.122(c)(4), (6). The district must encourage parental participation. 22 Pa. Code §14.122(c)(6). It must not extend the instructional support or screening process more than sixty days. 22 Pa. Code §14.122(d). The process must not bar the parent from insisting upon an immediate evaluation. 22 Pa. Code §14.122(e).

In this matter, the hearing officer finds that the District failed to perform these obligations with regard to the Student. The record is clear that the Student had a history of identification and receipt of special education services, and that the District terminated his special education status without notice or rationale. (FF 4, 5, 6.) In the 2003 to 2004 school year, which is the year prior to the relevant period for this decision, the record shows that the Student exhibited a spiraling deterioration in his attendance, school behavior, anger control, and social relationships; moreover, the record is clear that the Student's uniformly very poor grades also showed de minimis educational progress. (FF 7, 8, 10, 14, 23.) The Parent repeatedly brought these facts to the attention of school personnel, including administration. (FF 11,12,13.) While clearly on notice that the Student "may" need special education services during this school year[6], the District did not place the Student in its instructional support program, "CSAP". It was not until April 2005 that the District finally evaluated the Student. (FF 15, 16.)

EVALUATION

[6] The record suggests that the Student may have been referred to the District's CSAP program, but the evidence was inadequate to determine this. The evidence was clear, however, that the Student did not receive CSAP services during the 2003-2004 school year.

The District argues that the ensuing evaluation discharged its Child Find obligation, thus obviating any award of compensatory education within the period relevant to this case, which commenced in July 2004, as discussed above. The hearing officer finds that the evaluation failed to identify the Student because it was inadequate, and thus did not discharge the District's Child Find obligation. Ultimately, in August 2005, the District did identify the Student with emotional disturbance,(S-34), and in November 2005, it identified the Student with specific learning disabilities in written expression, reading comprehension and mathematics, (S-37). Thus, the question is whether or not the District's identification was untimely because it performed an inadequate evaluation, based upon the information available to it in June 2004.

Federal regulations in effect at the time of this evaluation required that evaluations employ "a variety of assessment tools and strategies … to gather relevant functional and developmental information about the child, including information provided by the parent … ." 34 C.F.R. §300.532(b). These must be "documented and carefully considered." 34 C.F.R. §300.535(a)(2). However, the psychological report, upon which the Evaluation Report was based almost verbatim, disclosed no developmental information at all, and only two background facts from the Student's entire developmental and school history, even though the Parent was available to provide such information and had interviewed with someone at the school for purposes of the evaluation. (FF 16, 17.) The report did not take into account the private clinical psychological report obtained shortly after the Student had been retained in first grade, which reported a history of anger, aggression and two hour tantrums when the Student was seven years old. (NT98-21 to 99-1.) Moreover, the report, although it stated that a parent input form was employed, reported only the scores from teacher rating forms. (P-17 p. 2, 3.) Thus, the report's testing and other assessment strategies disclosed a failure to utilize a "variety" in information gathering sources.

The regulations required that the child be "assessed in all areas related to the suspected disability, including … social and emotional status … ." 34 C.F.R. §300.532(g). However, the 2004 report did not assess the Student's emotional status at all, although the referral questions included behavioral difficulties in school, and the Parent had communicated a numerous and serious behavioral problems to school staff. (FF 10, 12, 14, 15, 16, 22.) When asked

about this, the District's school psychologist supervisor, who countersigned the psychological report, indicated that the entire emotional assessment was based upon observation during testing and "clinical judgment." (NT 88-2 to 23, 139-7 to 13, 140-12 to 22.)

The regulations required a classroom observation by "[a]t least one team member other than the child's regular teacher … ." 34 C.F.R. §300.542(a). The report disclosed no evidence of such an observation. (NT136-1 to 9.)

The Parent called the supervisor of the psychologist who tested the Student. (NT43-1.) This psychologist was not able to fill the information gaps left by the report itself. (NT77-19 to 24.) The supervisor was unaware of any data derived from the Student's private school experience in his fifth and sixth grade years. (NT81-1 to 22.) This is significant to this hearing officer because the report was based upon an analysis of the learning trajectory of the Student over time, and it appears questionable that such an examination would be valid when two years of a child's educational history are unknown. (NT83-21, 97-2 to 5.) The supervisor was unable to fill in substantial detail about adaptive functioning data received from the Parent. (NT113-21 to 115-16.) She could not testify as to the observations made during testing, because she did not do the testing. (NT66-10 to 67-1.)

The applicable regulations require the participation of the parent in the ultimate decision of whether or not the student is eligible for special education services. 34 C.F.R. §300.534(a)(1), 300.540. However, the Evaluation Report was prepared without that participation. The Parent was excluded from that decision. The entire process proceeded outside the District's established quality improvement system, and did not conform to District policies regarding disclosure of evaluation results to the parent. (FF 18, 19, 20, 23, 24, 25, 26.)

The private neuropsychologist's report, by contrast, documented a broad range of data from the Student's history, including two psychological evaluations with testing, and hours of interviews with the Parent. (NT 221-10 to 222-2). Contrary to the District's evaluation report, the private evaluator documented third grade achievement testing scores that placed the Student in the Below Basic level of achievement in reading comprehension, mathematics and problem solving. (NT242-18 to 243-9; P-47, P-49.) The evaluator reported data from fourth grade, again documenting below basic achievement. (P-50.)

In sum, the hearing officer finds that the District's evaluation of April to June 2004 fell below the standards set by the applicable federal regulations, and was therefore inadequate. Its finding of nonexceptionality did not absolve the District of its Child Find obligation on the contrary, it was but another example of the District's failure to provide adequate Child Find.

FAILURE TO PLACE IN INSTRUCTIONAL SUPPORT

The District argues that there was not enough data to justify a finding of exceptionality at that time. This argument ignores a number of facts. First, the report failed to gather what data was available, because it used minimal strategies for data gathering and failed to obtain all the information that the Parent could have provided. Second, to the extent that records were unavailable, this was due to the District's own lack of adequate record keeping. Third, even if it were wiser to err on the side of non-identification, the ER itself concluded that more information was needed; under District policies, the proper course was to initiate a reevaluation and seek out more data. (FF 25.) This the District did not do. Fourth, even if the finding was correct, the proper course – especially with a finding that more data was needed – was to place the Student in the instructional support program for observation, at the beginning of the 2004-2005 school year. (FF 27, 28.) This was not done.[7] (FF 32.) Thus, for months at a time, the District failed to provide the Student with any alternative program to address his lack of academic achievement and behavioral problems. (FF 27, 28, 29.)

When the Student was transferred to Middle School in November 2004, the District again failed to provide any intervention in his ongoing academic and behavioral difficulties. (FF 31, 32, 33, 35, 36.) It was not until

[7]There was evidence that the Student was referred In the Fall of 2005 to a tutoring program for after school hours, called "Power Hour" – which is not the CSAP program. However, the Student and his Parent did not know how to access this program and he never attended. Regardless of whose fault this was, the hearing officer concludes that, with the Student's known history, the District should have made greater efforts to facilitate the Student's admission to the tutoring program, and should have enrolled him in the CSAP program immediately at the start of the 2004-2005 school year.

January 2005 that the Student was formally placed in the CASP program at Middle School, and the first meeting was not held until February 1. (FF 39.) Meanwhile the Student was receiving no learning support services.

Also during this time, both the Parent and the Truancy Court appointed case manager were repeatedly requesting a reevaluation. (FF 33, 37.) Contrary to District policy, the school personnel failed to initiate a reevaluation for months. (FF 34, 35, 36, 38.) The Student's behavior and academic difficulties continued to escalate during this time. (FF 27, 35, 48.) In January and February 2005, the Student was charged with seven violations of school rules, and disciplinary procedures were instituted. (FF 40.) The District convened a team to conduct a Behavior Performance Review. (FF 42.) At this juncture, the District again had an opportunity to identify the Student's emotional disability by recognizing that he was thought to be a child with a disability, and to intervene. Instead, the team made materially incorrect findings and did not intervene, instead suspending the Student for several non consecutive periods. (FF 41 through 47.) Finally, the Student was hospitalized in March 2005 and the mental health system began managing his care for the next several months. (FF 49.)

CONCLUSION

The hearing officer finds that the District failed to identify the Student and consequently failed to provide him with FAPE, during the period from the beginning of the relevant period based upon the statutory limitations period until March 12, 2005. Compensatory education may be awarded when a district identifies a student belatedly, in violation of its Child Find obligations, as a result of which the student makes de minimis educational progress. In the Matter of the Educational Assignment of R.M., A Student in the Pocono Mountain School District, Spec. Ed. Opinion 1714 (April 2006); In the Matter of the Educational Assignment of F.M., A Student in the North Penn School District, Spec. Ed. Opinion 1503A (January 2006). The hearing officer finds that this is the case here.

Compensatory education may be awarded from the time that the district knew or should have known that the IEP is inappropriate or that the student was not receiving FAPE. M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). In this matter, the period of time for

compensatory education will begin on the first date for which the Student is entitled to claim it under the applicable statutory limitations period: July 26, 2004. In light of the evidence that the District was on notice of the Student's need for intervention, (FF 4 through 14), and that the beginning of this period of responsibility is artificially created by statute, the hearing officer sees no reason for according the District the customary sixty days for evaluation and planning; that should have commenced long before July 26, 2004.

Although the parties stipulated that the relevant period for compensatory education purposes would end on September 23, 2005, the hearing officer will not award compensatory education for two periods during which it was obstructed or prevented from providing services. First is the period from October 6, 2004 until November 16, 2004, when the Student was kept home in the aftermath of his head injury. (FF 30.) Second is the period after March 12, 2005. From this date until April 4, 2005, the Student was hospitalized and it was impossible for the District to provide services to the Student. April 4, 2005 is the date on which the District offered to evaluate the Student, an offer that was spurned by the Parent. (FF 38, 50, 51.) After this, it was also impossible for the District to provide services. Although the Parent argued that she refused because the student was still in crisis and the doctors did not want him evaluated at that time, the record makes clear that by that time, the Student was no longer hospitalized, and therefore was no longer in the level of psychiatric crisis that would necessarily preclude an educational evaluation. (NT1009-9 to 1011-15, 1124-6 to 1125-2; S-23, S-28.) The hearing officer concludes that the Parent did not remember correctly the sequence of events at this time, another example of her poor memory for times and names and procedural sequences. This does not reflect upon her veracity, but does lead the hearing officer to disregard her testimony in this particular. The Parent further admitted that she was angry with the District and that this was part of her reason for refusing to cooperate at that point in time. (FF 51.) The psychologist who spoke frequently with the Parent on behalf of the Regional Director of Special Education testified that the Parent also indicated to her that she intended to sue the District. (FF 51.) Thus, the Parent's motive for non-cooperation appears to have been predominantly to preserve her claims for court. From that point until a prehearing conference in July 2005, the Parent did not

cooperate with the District, and after July, all accommodations were by agreement of counsel. (FF 52, 53, 54, 55.) Under these circumstances, the hearing officer finds that it would be inequitable to award compensatory education beyond the date of March 12, 2005.

When finally identified in August 2005, some five months after the end of the period of compensatory education, the Student was assigned to full time emotional support. This had been recommended previously in independent reports. Therefore, the hours of compensatory education will be full school days, five hours per day. In the Matter of the Educational Assignment of D.H., A Student in the Kiski School District, Spec. Ed. Opinion 1672 at 13 n. 86 (December 2005).

ORDER

1. The District shall provide compensatory education in the form of educational services or activities.

2. The number of hours of compensatory education services or activities shall be calculated as follows:

Five hours per day for every day in which the District's middle schools were in session from July 26, 2004 until October 6, 2004 and from November 16 2004 until March 12, 2005.

3. The compensatory education ordered in this paragraph four shall not be used in place of services that are offered in the current IEP or any future IEP. The form of the services shall be decided by the Parent, and may include any form that the Parent decides is appropriate for educational purposes. The services may be used after school, on weekends, or during the summer, and may be used after the Student reaches 21 years of age. The services may be used hourly or in blocks of hours. The hourly cost to the District shall not exceed the reasonable and customary average cost of one hour's salary for a special education teacher hired by the District. The District has the right to challenge the reasonableness of the hourly cost of the services.

William F. Culleton, Jr.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

February 3, 2007