Consolidated Hearings #11.107H & 12.013H

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

Parents	)	
	)	
v.	)	**ORDER ON APPLICATION OF STATUTE OF LIMITATIONS**
	)	
RSU #51	)	
	)	
and	)	
	)	
RSU #51	)	
	)	
v.	)	

A hearing was held in the consolidated matters of Parents v. RSU #51, 11.107H, and RSU #51 v. Parents, 12.013H, on August 16, 2011, at the offices of Drummond Woodsum in Portland. In attendance were Parents, parents of student; Richard O'Meara, Esq., counsel for the family; Ann Nunery, director of special education for RSU #51; and Eric Herlan, Esq., counsel for the school department.

The limited purpose of the testimony was to present evidence related to the school department's affirmative defense that state and federal statutes of limitations limit the family's claim that the school district failed to refer, evaluate, and identify the student as eligible for services in a timely manner, which the parents allege began in the fall of 2007. The Parents testified for the family. Roberta Goodwin, school counselor at Greeley Middle School, and Penelope Wheeler-Abbott, assistant principal at Greeley Middle School, testified for the school district.

The parents submitted a brief on August 17, 2011; the school district submitted a responsive brief on August 22, 2011; and the family submitted a reply brief on August 24, 2011.

I. Factual Findings

1. The parents filed their due process hearing request on June 24, 2011. (Due Process Hearing Request.)

2. The student, is XX; he was born on XX/XX/XX. (Due Process Hearing Request.)

3. The student attended fourth grade (2005-2006) at Longfellow School within the Portland School District. The student was referred for special education in January 2006 due to difficulty completing independent academic work, difficulty following multiple step directions, inconsistent short term memory, difficulty remaining seated, difficulty maintaining focus, and weak organizational skills. (P. 18.) AT nearly the end of the school year, in May 2006, the referral and evaluation process culminated in the student being identified as eligible for special education services under the category of Other Health Impaired due to Attention Deficit Hyperactivity Disorder ("ADHD") and executive functioning deficits. (P. 35-36.) The student took part in special education services for the final approximately six weeks of the school year. (Testimony of student's mother.) His IEP included a series of classroom and homework accommodations as well as direct special education instruction for three and a half hours per week, special education consultation with the student's team, and occupational therapy. (P. 37-41.)

4. At the time that the student entered special education at Longfellow School, his mother signed a consent form allowing the school to conduct an evaluation of the student, which indicated that a Statement of Procedural Safeguards was attached. (P. 16-17.) The parents do not recall ever receiving a Statement of Procedural Safeguards from the Portland School District and have not been able to locate a copy of the procedural safeguards statement in their records. (Testimony of student's mother; student's father.)

5. The student attended a private school, the Breakwater School, in Portland for this fifth grade year (2006-2007). (Testimony of student's mother.) The student had a family-funded tutor attend school with him for much of the day during fifth grade. (Testimony of student's mother.) Despite the presence of a tutor, the student's teachers reported that the student had difficulty following multi-step directions, could lose sight of the overall goal of an activity, needed extra assistance in planning and organizing assignments, was easily distracted and influenced by other students, got distracted with the details of projects which hindered his ability to finish on time, became distracted in class which interfered with his ability to learn the material presented, and had difficulty maintaining focus for entire class periods. (S. 212-225.)

6. The student enrolled in RSU #51 in the fall of 2007, following his family's move to North Yarmouth. (S. 197.) He attended sixth grade (2007-2008), seventh grade (2008-2009), and eighth grade (2009-2010) at Greeley Middle School. (Testimony of student's mother.)

7. Roberta ("Bobby") Goodwin, school counselor at Greely Middle School, met with the student's mother in August 2007 to do general preparation for the student's transition to GMS. (Testimony of Goodwin.) The student's mother filled out a form that indicated that the student had been diagnosed with ADHD, had a tutor for fifth grade, and needed reminders to write down homework assignments, and that the family had the student's prior IEP and his March 2006 evaluation. (P. 61.)

8. When meeting with Ms. Goodwin, the student's mother shared the student's school history, reiterating his diagnosis of ADHD, and indicated some struggles in the past but did not appear worried about his transition. (Testimony of Goodwin.) Ms. Goodwin subsequently received the student's prior school records, including his records from Breakwater School; his IEP from Longfellow School, and his March 2006 evaluation by Marcia Hunter, Ph.D. (S. 237-258; Testimony of Goodwin.) Ms. Goodwin forwarded the information to Carol Nale, special education teacher at GMS. (Testimony of Goodwin.)

9. On September 18, 2007, Ms. Nale emailed the student's mother to inquire as to whether the student had a current IEP. (P. 64.) The student's mother responded that he did not, indicated that Breakwater did not offer such an "evaluation," and asked whether it would be appropriate to evaluate him again and how the family should move forward to obtain support for him at the school. (P. 64.)

10. Beginning in mid-September and continuing through October, the student's teachers observed that he required a great deal of adult support to complete in-class assignments, he had difficulty following instructions and required frequent check-ins and prompts, he would benefit from the use of a math tutor, and that he at times "shut down" when faced with difficult assignments, repeating that he would never be able to get it done. (P. 62-70.)

11. On September 25, Ms. Nale responded to the mother's query, indicating that because the student's IEP was expired and he had not received special education services at the private Breakwater School the prior year, the student was not receiving special education services at Greeley Middle School. (P. 66.) Ms. Nale's email went on to state that the student's teachers were working with him to meet his needs and that the parent could choose to meet with his team by contacting his team leader, Carol Pappas, one of the student's regular education teachers. (P. 66.) The email concluded that if the parent sought a team meeting, the team could then talk about how to best meet the student's needs and the need to refer him for special education services. (P. 66.) Ms. Goodwin believed that Ms. Nale's email indicated that if the family sought special education for the student, the school district would need to make a re-referral of the student to special education and evaluate him because his IEP had expired. (Testimony of Goodwin.)

12. The student's mother was in regular communication with Ms. Pappas and on September 26 asked to meet with the student's teachers. (P. 65.) At that point in time, the student's mother thought that the student did not qualify for special education without further evaluation but was amenable to the suggestion that the student's teachers be utilized as support for him. (Testimony of student's mother.)

13. On October 30, while meeting with the student's mother, Ms. Gooodwin emailed Penelope Wheeler-Abbott, the Assistant Principal at Greeley Middle School and the facilitator of most of the Individualized Education Programs ("IEPs") for

students attending school there. (P. 70-71; Testimony of Wheeler-Abbott.) In her email, Ms. Goodwin indicated that although Ms. Nale had understandably recommended reevaluating the student, she and the student's mother were concerned about the impact of testing on the student, identifying lost class time, invasive testing, and self-esteem issues as possible concerns. (P. 71.) Ms. Goodwin suggested a meeting to discuss providing the student with services under Section 504 without doing further testing. (P. 71.) Ms. Goodwin left the October 30 meeting with the student's mother with the feeling that the student's mother was hesitant to do a referral to special education because she did not want him removed from school for testing and she did not want him singled out for individual education. (Testimony of Goodwin.)

14. On October 31, Ms. Goodwin noted in an email that she had brought up the student at a "guidance/A-team meeting," and that the consensus was that there should be a team meeting to discuss him at more length. (S. 259.) Ms. Goodwin noted that the student's mother was "balking a little at a referral," but questioned whether bypassing a referral would result in the student not receiving all the services he needed. (S. 259.) Ms. Goodwin then asked to meet with Ms. Wheeler-Abbott and Ms. Nale to discuss the student. (S. 259.) Ms. Wheeler-Abbott perceived that because of the May 2007 expiration of the student's IEP, and his attendance at a private school the prior year, the student would need to be retested before he could be identified as in need of special education. (Testimony of Wheeler-Abbott.) Ms. Wheeler-Abbott expected that the process would consist of the parents consenting to an evaluation, the school conducting the evaluation within the 45 day time frame, the student's IEP Team meeting to review the evaluation, a decision being reached as to whether the student was eligible, and then creation of an IEP for the student if he were eligible for special education. (Testimony of Wheeler-Abbott.) She perceived that the student's mother had concerns about the impact of additional testing on the student and wished to explore other options that did not involve reevaluation. (Testimony of Wheeler-Abbott.)

15. On October 31, 2007, Ms. Goodwin emailed the student's mother to indicate that she and Ms. Wheeler-Abbott had decided that they could not determine whether the student should be referred to special education without having a meeting with his teachers. (P. 74.) Based on the information she had from Ms. Nale and Ms. Wheeler-Abbott, Ms. Goodwin assumed that more testing would be required to allow the school to determine if the student were eligible for special education and also that the purpose of the meeting was to determine if more testing would be pursued and whether the student should receive services through special education or pursuant to Section 504. (Testimony of Goodwin.)

16. From the school's perspective, the student arrived outside of eligibility for special education and needed to be considered as an initial referral for consideration if he was going to receive special education services. (Testimony of Wheeler-Abbott.) The school district did not discuss with the family the possibility of convening an IEP Team meeting for the student or of determining the student's eligibility based on prior testing and records. (Testimony of Wheeler-Abbott.)

17. On November 9, 2007, the student's parents met with Ms. Wheeler-Abbott, Ms. Goodwin, Ms. Pappas, and two other regular education teachers. (S. 260.) In addition, Dr. Hunter, who had conducted the 2006 evaluation of the student, attended the meeting at the invitation of the parents. (S. 260; P. 75.) No special educator from the school was present and the parents did not meet with anyone in the special education department during the fall of 2007. (Testimony of Wheeler-Abbott; student's mother; student's father.) The student's mother, when inviting Dr. Hunter, indicated that the student's team was meeting and that the parents' goal was to get him some support without going through another evaluation. (P. 75.) On November 9, the group discussed the student's performance at school, his anxieties, his difficulties, and his strengths and weaknesses at the "staffing" meeting. (S. 260.)

18. School staff perceived that one of the purposes of the meeting was to determine whether the student should receive Section 504 services or special education. (Testimony of Goodwin; Wheeler-Abbott.) Ms. Wheeler-Abbott testified that the options on the table would generally have been informal support, a Section 504 plan, and a referral for a special education evaluation in a given situation. (Testimony of Wheeler-Abbott.) Although her notes do not indicate that the group discussed the possibility of a special education referral, Ms. Wheeler-Abbott typically indicates that option to parents at similar meetings. (Testimony of Wheeler-Abbott.) Ms. Wheeler-Abbott does not recall whether she made such a statement at the meeting on November 9, and her meeting notes do not indicate whether she did or not. (Testimony of Wheeler-Abbott.) The student's mother did not recall any discussion of special education as an option. (Testimony of student's mother.) At the time, the parents did not understand the difference between services offered under Section 504 and those provided pursuant to special education laws. (Testimony of student's mother; student's father.) The parents did not recall any conversation that involved the school district providing services beyond accommodations under a Section 504 plan. (Testimony of student's father.) The parents' primary concern was that the student receive sufficient support to be successful in school. (Testimony of student's mother; student's father.) The student's father interpreted Section 504 accommodations to be an option involving special education that provided for fewer services but would not require retesting for the student. (Testimony of student's father.) The parents continued to believe that the student was not eligible for special education services without further testing based on the school district's statements. (Testimony of student's mother; student's father.)

19. Meeting notes taken by Ms. Goodwin, who was ultimately responsible for the student's Section 504 plan, indicated a list of accommodations that Dr. Hunter proposed for the student. (S. 492-93.) School staff at the meeting concluded that all of Dr. Hunter's proposed accommodations could be implemented. (Testimony of Goodwin.) Ms. Goodwin and Ms. Wheeler-Abbott perceived that everyone at the meeting, including Dr. Hunter, felt that the necessary accommodations could be accomplished through a Section 504 plan for the student. (Testimony of Goodwin; Wheeler-Abbott.)

20. Meeting notes taken by Ms. Wheeler-Abbott indicate that the group was "[l]ooking more for the 504 route and to provide the emotional and mental breaks during the day." (S. 261.) Ms. Wheeler-Abbott testified that this indicated that the group was looking at Section 504 rather than special education services as the appropriate vehicle for the student's needs. (Testimony of Wheeler-Abbott.) The student's mother believed that if the school provided services under Section 504, it would prevent the student from having to undergo additional testing. (Testimony of student's mother.) Throughout the student's sixth grade year, he struggled with academics and with depression and suicidal ideation. (Testimony of student's mother; P. 76; P. 78; P. 82, P. 84, P. 101.)

21. The Section 504 plan created for the student called for, among other things, the student to be given emotional, mental, and physical breaks; the student's teachers to implement a positive reinforcement program for focused attention; the student's homework assignments to be modified; the student to be allowed to use his computer on assessments and assignments wherever possible; the student to be placed in selective pairing with students who would work well with him; and the student to be invited to a social skills group with the school counselor. (S. 193.)

22. There were no substantive changes to the student's Section 504 plan during his seventh grade year (2008-2009). (S. 187.) The parents paid for a tutor throughout the student's seventh grade school year but the student continued to struggle academically. (Testimony of student's mother; student's father; P. 117.)

23. The student's Section 504 plan for his eighth grade year (2009-2010) contained no significant changes from the prior year. (S. 181.) The student's first report card of eighth grade (2009-2010) increased the parents' concern because he received three failing grades. (S. 311; Testimony of student's mother; student's father.)

24. The parent's mother sought the advice of Dr. Hunter. (P. 158.) The student's family requested additional support for the student, the student was referred for special education and reevaluated by Dr. Hunter, and he was identified in March 2010 as eligible for special education under the category of multiple disabilities, listed as autism, other health impairment, and a specific learning disability. (S. 56.)

II. Plain Language Application of Statutory and Regulatory Provisions

In 2004, the IDEA, which previously had no statute of limitations, was amended to provide:

> Timeline for requesting hearing. 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 that State has an explicit time limitation for

> requesting a hearing under this subchapter, in such time as the State law allows.

20 U.S.C. § 1415(f)(3)(C).

In addition, the IDEA sets forth a limitation on the filing of complaints such that a complaint must set forth:

> an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint . . . .

20 U.S.C. § 1415(b)(6)(B).

Maine special education regulations mirror the federal law, providing that a hearing request: "must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process hearing request." *MUSER* § XVI.5.A.2. Later, under the heading of "Timeline for Requesting a Hearing," the regulations state that a parent or agency "must request an impartial hearing on their due process hearing request within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process hearing request." *MUSER* § XVI.13.E. The Maine regulations also provide the same exceptions as the federal law at *MUSER* § XVI.13.F.

A. Family's Argument

The family argues that the plain language reading of the complimentary provisions in the IDEA and current Maine special education regulations allow for a family to file a claim that seeks relief for events that occurred up to two years prior to the point in time at which they knew or should have known that a violation occurred and which can be filed for up to two years after the point in time at which they knew or should have known that a violation occurred.

Applied to the facts of this case, the parents argue, the statute of limitations provisions do not bar their claims that the school violated its child find obligations back to the fall of 2007 because the point in time at which the family knew or should have known of the school district's violations came in October 2009, when the student was referred for special education after his first trimester report card included three failing grades. The parents assert that they were misinformed by Ms. Nale, Ms. Goodwin, and Ms. Wheeler-Abbott that if they sought special education services, a new referral and consent to a new initial evaluation would be required before the student's eligibility could be determined and an IEP created, a process that would take considerable time.

The parents argue that they had no way to know that the school district's actions would form the basis of a claim for violation of the student's IDEA rights and that they reasonably followed the school district's suggestion of a Section 504 plan of accommodations because it did not require additional testing for the student. The family

contends that the "action" that forms the basis of their complaint about the events from the fall of 2007 through the fall of 2009 is not the student's struggles in school or the existence of special education services, but rather the school district's concealment of its obligation to provide the student with a free appropriate public education, without requiring him to endure another IDEA referral and initial evaluation. The parents also conclude that their claim, filed in June 2011, was within the two years of the time at which they knew or should have known of the school district's violation in October 2009.

B. School District's Argument

The school district contends that the key determination is when the family knew or should have known of the underlying facts that form the basis of the family's claim, rather than the conclusion that the parents may have drawn from those facts regarding whether they may have a legal claim.

The school district asserts that the statutory and regulatory language distinguishes between the "violation" and the "action that forms the basis" of a complaint. As such, the school district asserts, the key point in time is that at which the family knew of the school's alleged illegal behavior, not the point in time at which they realized that alleged behavior could form the basis of a legal claim.

With regard to the family's interpretation of the statute of limitations provisions, the school district contends that federal regulators have rejected the family's interpretation of the statute of limitations provisions as addressing essentially two different questions – the first being how far back in time a claim can go and the second being how long a person has to file such a claim. The school district concludes that the plain language of the two statutory provisions, when read together, dictate that a family may file a claim for events that occurred up to two years before they knew or should have known of the violation, but only if they file the claim right away.

Applying its interpretation to the facts, the school district asserts that the key point in time was the fall of 2007, when the family enrolled the student in the school district and chose to utilize Section 504 rather than special education services. At that point in time, the school district asserts that the parents knew that: the student had a diagnosis of ADHD; the student was struggling in various areas of educational performance; the student's educational struggles were believed to be caused by his disability; a special education system existed at RSU #51; the student was not being served by the special education system in RSU #51; and the family had access to special education for the student. Therefore, the parents knew or should have known of the actions that formed the basis of their child find claim as of the fall of 2007, the school contends. The school concludes that therefore, because the family's complaint was filed in June 2011, it may not raise claims that arose more than two years prior, in June 2009.

C. Analysis

The plain language interpretation of the two provisions found in both state regulations and federal law shows that the provisions are not identical in impact when a family learns of the action that forms the basis of the complaint after it occurred. For example, if an action that is the basis of a complaint occurred on January 1, 2010, and the family knew about the action on the date it occurred, the family would have until January 1, 2012, to file a complaint in order to meet the requirements of both 20 U.S.C. § 1415(b)(6)(B)(*MUSER* § XVI.5.A.2) and 20 U.S.C. § 1415(f)(3)(C)(*MUSER* § XVI.13.E). If, however, an action that is the basis of a complaint occurred on January 1, 2010, and the parents did not learn of the action until January 1, 2012, they would satisfy both 20 U.S.C. § 1415(b)(6)(B) (*MUSER* § XVI.5.A.2) and 20 U.S.C. § 1415(f)(3)(C) (*MUSER* § XVI.13.E) if they filed a complaint by January 1, 2014. In the second example, where the family does not learn of the action until after it occurs, the two provisions diverge in their impact. By filing a hearing request by January 1, 2014, and alleging an action that occurred on January 1, 2010, which they learned of on January 1, 2012, the parents would have alleged a violation that occurred no more than two years before they knew about it and would have simultaneously requested a hearing within two years of the date they knew about it.

Although United States Department of Education regulators indicated that the two federal provisions were not the same, Federal Register Vol. 71, No. 156, at 46706 (Aug. 14, 2006), that interpretation is not subject to deference since the provisions are statutory not regulatory. See Grunbeck v. Dime Sav. Bank of New York, 74 F.3d 331, 341 (1st Cir. 1996) (stating that "[w]here an agency interpretation is based exclusively on its reading of the bare statutory language, no special deference is due"). Further, principles of statutory construction require that every word in a statute be given effect wherever possible. Duncan v. Walker, 533 U.S. 167, 174 (2001). As a United States District Court held in 2007, "read strictly," the two provisions create this dichotomy, although they were probably intended to mean the same thing. Somoza v. New York City Dep't of Educ., 475 F. Supp. 2d 373, 385 n.4 (S.D.N.Y. 2007) (reversed on alt. grounds, Somoze v. New York City Dep't of Educ., 538 F.3d 106 (2d Cir. N.Y. 2008)).

The key determinant of the impact of both the state regulations and federal statute in this case is the point at which the family knew or should have known about the alleged action that forms the basis of the child find allegation. The parties disagree as to the meaning of the governing language of "the action that forms the basis of the due process hearing request" as well as the point in time that the family "knew or should have known" about the action.

1. "Action that Forms the Basis of the Complaint"

In Murphy v. Timberlane Regional School District, 22 F.3d 1186 (1st Cir. 1994), decided ten years before the 2004 amendments to the IDEA, the First Circuit Court of Appeals held that a claim for compensatory education began to accrue when the parents knew or had reason to know of the "injury or the event" that was the basis for their compensatory education claim. Id. at 1995 (quoting Hall v. Knott County Bd. Of Educ., 941 F.2d 402, 408 (6th Cir. 1991)); see also James v. Upper Arlington City Sch. Dist., 228 F.3d 764, 769 (6th Cir. 2000) (holding that the parents' "initial claim accrued when they knew of the injury to their child [i.e., the inadequate education]").

Although the current statutory and regulatory language utilizes the term "action" rather than "injury," courts have interpreted the language similarly. In Draper v. Atlanta Independent School System, 518 F.3d 1275 (11th Cir. 2008), the Eleventh Circuit Court of Appeals held that the IDEA allowed parents to pursue claims for misplacement of a student in a restrictive classroom for a period of five years prior to the filing of their complaint because the parents "did not have the facts necessary to know that [the student] had been injured by his misdiagnosis and misplacement until they received the results of his evaluation" the year before they filed their complaint. Id. at 1288. The court discounted the school system's argument that the family should have known that the student was misdiagnosed and misplaced even before the school did and declined to conclude that the family should have been blamed for not being experts about learning disabilities. Id.

Most recently, a district court in Pennsylvania held that a complainant had "two years from the date she learned or should have learned of her injury to request that the School District provide her with a due process hearing." Bantum v. Sch. Dist. Of Philadelphia, 2011 WL 1303312, *4, n.7 (E.D. Pa., Apr. 5, 2011). The Second Circuit Court of Appeals has held that an IDEA claim accrues when the parents knew of the injury to their child. M.D. v. Southington Board of Education, 334 F.3d 217, 221 (2d Cir. 2003). Outside the context of special education, in Rakes v. United States, 442 F.3d 7, 20 n.8 (1st Cir. 2006), the First Circuit Court of Appeals held that "a claim can accrue before the plaintiff knows that the injury was the result of a breach of a legal duty; it is for this reason that we speak of the plaintiff's knowledge of the 'factual basis' and not his knowledge of the legal sufficiency of his claim." Id. at 20 n.8 (internal quotations omitted). As such, the statutory language and interpretive case law indicate that the "action that forms the basis of the complaint" refers to the action that creates an injury done to the student, not to a family's understanding of the potential liability of the school district.

2. "Knew or Should Have Known"

In Swope, a district court in Pennsylvania held that the inquiry into when a parent knew or should have known of the violations that formed the basis of the complaint requires a "highly factual determination." Swope v. Central York School District, 56 IDELR 286 (M.D. Pa., June 21, 2011).

Application of the statutory language to the facts of the case lead to a conclusion that the family knew or should have known of the school district's action when it occurred. The student's mother testified that as of October 2007 she knew about the existence of special education as a form of education, that a special education system existed in RSU #51, that the student could potentially be referred to special education, and that one of the purposes of the meeting in November 2007 was to determine whether the student should enter special education. The parents were aware that the student had taken part in special education at his prior public school, albeit briefly, and that the student had a tutor with him for much of the day during the previous year at a private school. Further, it was clear, as of October 2007, the student was struggling academically. The facts differ significantly from those in Draper, in which the parents

had no prior experience with special education, the student had not been previously evaluated, and the parents had no way of knowing that the student was being misdiagnosed and misplaced.

Although the parents may not have fully appreciated that these facts could potentially be the basis of a due process hearing request, the facts inevitably lead to the conclusion that the parents "knew or should have known" that the decision not to place the student in special education in October 2007 could be injurious. As a result, the family may assert child find claims against the school district starting in June 2009, unless an exception to the statutory and regulatory language or the continuing violations doctrine applies, discussed below.

III. Exception to Statute of Limitations when School District Withholds Information

Federal law and a state regulation set forth exceptions to the time restrictions on filing a complaint when:

> the parent was prevented from requesting the hearing due to -
> (i) specific misrepresentations by the 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); see also *MUSER* § XVI.13.F.2. The burden of proof lies on the family to show that the exception in part (ii) applied, which requires a "'highly factual inquiry.'" J.L. v. Ambridge Area School District, 2009 U.S. Dist. LEXIS 35403 at *14 (W.D. Penn. 2008) (quoting prior decision in same case).

A. Family's Argument

The parents argue that their referral and identification claims are exempted from the statute of limitations because the school district withheld information from them that was required to be provided, triggering the exception in Section 1415(f)(3)(D) and *MUSER* § XVI.13.F.2. The family argues that because the student had been identified as an eligible student with a disability in his former public school district within the prior three years, he remained an eligible student even though his IEP had expired, making it unlawful for RSU #51 to treat the student as ineligible or an unidentified student.

The family maintains that RSU #51 was obligated under the IDEA to hold an IEP Team meeting upon the student's enrollment at GMS and then either offer him a new IEP and placement for the school year or seek to terminate his IDEA eligibility using the requisite procedures. The family argues that the school district was required to treat the student as an IDEA-eligible student upon his transfer and provide the following: 1) an advance notice of an IEP Team meeting; 2) written notice of the IEP Team's determinations; and 3) a copy of the family's procedural safeguards, which would have indicated their right to challenge any determination with which they disagreed.

The family contends that the student did not automatically lose his IDEA eligibility because his IEP expired or because he enrolled temporarily in a private school. The family contends that the IDEA's triennial review process for eligibility applies to students whether they are attending public or private schools and implies that eligibility remains in effect for three years after identification unless a de-identification procedure is followed. The family notes that as of August 2007, the student was not even halfway through the triennial period following his identification as a student eligible for IDEA services in May 2006 and relies upon federal regulators' guidance that a school district must have an IEP in place for an IDEA-eligible student at the start of each new school year. The family argues that the school district effectively de-identified the student by informing the family that he would have to be rereferred for evaluation in order to receive any special education services, but did not utilize any of the IDEA's procedures that would have protected the family's legal rights in these circumstances. The family argues that it should not be faulted for accepting the district's misrepresentation that the student would have to endure a new referral and initial evaluation prior to gaining access to special education services.

The family disputes the school district's assertion that the term "withhold" requires intentionality on the part of the school district. The parents also dispute the relevance of whether they received procedural safeguards from Portland in 2006, arguing that the evidence that the family actually received the safeguards is inconclusive and that, in any event, the family was entitled to receive a copy of the safeguards from RSU #51. The family also concludes that the procedural safeguards alone would not have apprised the parents of their potential claim, but that it would have if combined with the other notifications that the district should have provided – namely a notice of the determination of the student's eligibility.

B. School District's Argument

The school district responds that the exception in the statute does not apply because the provision requires intentionality and the district did not intentionally withhold anything from the family. The school district argues that it was not required to provide a statement of procedural safeguards since the student was coming from a private school, that it did not de-identify the student as eligible for special education, and that the law is unclear as to the status of a child transferring from a private school to a public school.

The school district contends that the mother's signature indicating that she received procedural safeguards from Portland in 2006 moots the family's argument in this regard. The school district acknowledges that although it did not provide the family with a procedural safeguards notice in the fall of 2007, it did not intentionally withhold it. The district argues that it offered the family the choice of a special education referral, that the parents chose to forgo the referral, that the parties held a meeting to discussion the options available to the family, and that had the family chosen to move forward with a special education referral, they would have received the procedural safeguards.

The school district maintains that the law is unclear as to the treatment of a student who transfers into a public school from a private school who has been previously

identified as IDEA-eligible by a public school but whose IEP has expired. The school district maintains that the regulatory authority on this issue, found at *MUSER* § IX.3.A.5, addresses students who transfer from one public school unit to another and had an IEP that was in effect in the prior public school.

The school district responds that even if it withheld documents, such withholding did not prevent the family from pursuing due process for three reasons. First, the parents had received a statement of procedural safeguards from Portland in the past and as such should be imputed to have had knowledge of due process rights. Second, the family was content with the decision that the student would receive services under Section 504 rather than the IDEA and would not have filed a due process hearing request anyway. And third, the statement of procedural safeguards does not address the eligibility of transfer students and as such would not have resolved the issues the parents bring forth in their complaint.

C. Analysis

The exception has two predicates in order to be applicable. First, the school district must have withheld information it was required to provide to the family. Second, the withholding of information must have prevented the family from filing a due process hearing request.

1. Whether the School District Withheld Information

The statute does not reflect a requirement of intentionality. Although the school district argues that an intention to withhold information must be found before the statute applies, the only precedent it cites for this proposition is Evan H. v. Unionville-Chadds Ford School District, 2008 U.S. Dist. LEXIS 91442 (E.D. Pa. 2008). In that case, a district court held that with regard to the exception in the statute for misrepresentations found at 20 U.S.C. § 1415(f)(3)(D), a misrepresentation must be intentional in order for the exception to apply. Id. at *17-*18. While noting that the Pennsylvania Special Education Appeals Panel had concluded that a majority of appeals panels had held that both of the exceptions, for misrepresentation and withholding of information, required "intentional or flagrant" actions rather than "merely a repetition of an aspect of the FAPE . . . determination," the court concluded only that the exception for misrepresentation required intentional conduct. Id. As such, the school district does not cite any precedent to the effect that the withholding of information must be "intentional" in order for the exception to apply and the hearing officer declines to import additional requirements into the statutory and regulatory language that do not appear there.

Moving to the heart of the matter, the first requirement of the exception is that the school district withheld information.

With regard to a student transferring between public schools during a school year, state and federal regulations provide as follows:

> If a child with a disability (who had an IEP that was in effect in a previous SAU in the same State) transfers to a new SAU in the same state, and

> enrolls in a new school within the same school year, the new SAU (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous SAU), until the new SAU either adopts the child's IEP from the previous SAU; or develops, adopts, and implements a new IEP that meets the applicable requirements in 300.320 through 300.324.

MUSER § IX.3.B(5)(a)(i); see also 34 CFR § 300.323(e).

Federal law and state regulations further provide that a school district must have in effect an IEP for a student at the start of each school year. *MUSER* § IX.3.B(1); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a). Federal regulators have clarified that the federal provisions do not require school districts to implement the IEP of an IDEA-eligible student who transfers during the summer as long as the school district has an appropriate IEP in effect for the student at the start of the school year. U.S. Dep't of Education, Response to Comments on 2006 IDEA Regulations, 71 Fed. Reg. 46682 (Aug. 14, 2006).

In Letter to Anonymous, 25 IDELR 525 (OSEP Oct. 29, 1996), OSEP stated that the IDEA obligated a school district to ensure that FAPE was provided to a student who transferred in from another school district in the same state when the student had previously been evaluated as having a disability. Id. at 527. The letter goes on to state that if the student's prior IEP was not available or if the new school district or the parent felt that the prior IEP was inappropriate, an IEP meeting should be conducted by the new school district within a short time (normally a week) after the child enrolls. Id. The letter stated that it would be "inconsistent with the responsibility to provide FAPE, however, if the child were placed, even temporarily, without appropriate special education services." Id.

As such, it is clear that RSU #51 was not required to implement the IEP developed for the student by Portland, both because it had expired and the student transferred during the summer. It is also clear, however, that the student, if he remained IDEA-eligible, was entitled to an IEP at the start of the school year following his enrollment in the district in the summer of 2007.

The key question, therefore, is whether the student remained eligible for IDEA services when he transferred into the district without a current IEP and after spending a year in private school.

Even during his time at the private school, the student retained some IDEA rights. School districts are responsible for children with disabilities who are placed in private schools by their parents to the extent that a school district must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private schools within the school district. *MUSER* § IV.4.G(1)(b). A school district must develop and implement a service plan for each IDEA-eligible student that describes the specific special education and related services that the school district will provide. *MUSER* § IV.4.G(1)(h). A school district is not required, however, to pay for the cost of education, including special education and related services, for a student enrolled in a private school

if the school district made a FAPE available to the student. *MUSER* § IV.4.G(3)(a). Maine regulations envision public schools providing special education services to students parentally placed in private schools. *MUSER* § X.C(2)(h).

Nevertheless, the IDEA and Maine regulations do not specify how long a determination of eligibility lasts and whether it transfers from one school district to another within the state when a student transfers and the IEP has expired. Special education provisions require a reevaluation to occur not more frequently than once a year, unless the parents and the school district agree otherwise, but at least every three years. 20 U.S.C. §§ 1414(a)(2)(B); *MUSER* V.1.B(2).

Case law provides some additional insight. In L.G. v. Wissahickon School District, 2011 U.S. Dist. LEXIS 476 (E.D. Pa. 2011), a district court held that when a student was offered an IEP in April 2004, the parents rejected the IEP offer and enrolled the student in a private school for the 2004-2005 school year, but the student returned to the school district for the 2005-2006 school year, the school district was obligated to develop a new IEP for the student." Id. at *36. The district court noted that

> because IDEA requires that a public school district make a FAPE available to all disabled students residing within the district, school districts 'must be prepared to develop an IEP and to provide FAPE to a private school child if the child's parents re-enroll the child in public school.'

Id. (quoting 64 Fed. Reg. 12406, 12601 (1999)).

As shown in Wissahickon Sch. District, a student can retain eligibility in public school after returning from a year of attendance at a private school. Further, as the 1996 OSEP Letter to Anonymous shows, a student does retain eligibility after transferring in from another school where he had been identified as eligible for special education even if the prior IEP was not available or if the new school feels that the prior IEP was inappropriate. Letter to Anonymous, 25 IDELR at 527.

Under the circumstances present in this case, the student remained IDEA-eligible when he enrolled in RSU #51. The student's evaluation, leading to the special education designation, had occurred in March 2006, thus not requiring a reevlauation until March 2009, and the student's IEP resulting from his initial identification did not expire until May 2007, just three months prior to his enrollment in RSU #51. RSU #51 was aware that during the interim school year, the student had received significant tutoring. Further, the student exhibited difficulty with academics even during the prior year and the significant tutoring. And finally, very shortly after entering the sixth grade, as noted by several of his teachers and his parents, the student was struggling, and the parents sought additional support for him.

In effect, the school district then convened an IEP Team meeting to determine whether the student was IDEA eligible, one of the purposes of the meeting as described by school staff, but without including essential Team members and without following the prescribed protocol. The "staffing" meeting functioned as an IEP Team meeting, with

the group deciding whether the student was eligible for special education services mainly by hearing from the student's evaluator, Dr. Hunter. Although the evidence indicates that a specific conversation about whether the student should receive IDEA services did not take place at that meeting, largely because the school district had already indicated to the parents that the student could not receive services without a reevaluation,[1] the Team did conclude that the student would receive a series of Section 504 accommodations.

The parents did not receive an advance written notice of the Team meeting, pursuant to 34 C.F.R. § 300.322(b) and *MUSER* § VI.2.A. The Team also did not include a special education teacher, as required by 20 U.S.C. § 1414(d)(1)(B))ii) and *MUSER* § VI.2.B(3). Nor did the Team undertake the responsibilities outlined by statute and regulation at *MUSER* § VI.2.J (including making determinations of present levels of performance and educational needs and developing or revising an IEP for the student). In addition, written notice of the Team's determinations were not provided to the parents. 20 U.S.C. § 1415(b)(3); *MUSER* § VI.2.I.

Further, if the student's special education eligibility was to be changed, the law dictates the process for such a decision, which was not followed by the district. 20 U.S.C. § 1414(c)(5)(A); *MUSER* § VII.4. If the reason that the student was being de-identified was the parents' refusal to consent to a reevaluation, that information should have been provided to the parents as a written determination. 20 U.S.C. § 1415(b)(3); *MUSER* § VI.2.I. A school district is required to provide the family with a notice of procedural safeguards whenever it propose to initiate or change, or refuses to initiate or change, the student's identification, evaluation, placement, or the provision of FAPE. 20 U.S.C. § 1415(b)(3). Finally, the school district failed to provide the family with a notice of procedural safeguards. 20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504; *MUSER* Appendix 1.

As such, the school district did not provide the parents with documentation that contained "information . . . required under this part to be provided to the parent."[2]

2. Whether the Parents were Therefore Prevented from Filing a Hearing Request

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[1] Although the district suggests that the family was reluctant to enter into special education because it did not want the child to receive unwanted attention in school, the parents had apparently explored with the school district having a tutor provide services to him in school as the tutor had done at Breakwater School, but had been refused. (P. 68.) Further, the email from Ms. Goodwin to Ms. Wheeler-Abbott describing the mother's concerns did not reference uneasiness about the student receiving services at school but instead were focused on the impact of additional testing. (P. 71.)

[2] Caselaw also illustrates examples of what does not constitute withholding of information. In Natalie M. v. Department of Education, 2007 U.S. Dist. LEXIS 29034, a district court in Hawaii held that when a school district provided the parent with a newer version of procedural safeguards and told her it replaced the prior version, it did not withhold information under Section 1415. Id. at *16. Similarly, when a school district provided a parent with a letter of procedural safeguards as well as several notices that she had the right to request a due process hearing, the school district did not withhold information under the statute even though the notices did not provide information about the statute of limitations. School District of Philadelphia v. Deborah A., 2009 U.S. Dist. LEXIS 24505 at *15-*16. These two cases stand in contrast to the facts of the present matter.

The facts are inconclusive as to whether the family received statements of procedural safeguards from Portland in 2006. Although the student's mother signed documents that indicated that procedural safeguards were "attached" or "enclosed," (P. 17, P. 19, P. 44), the parents did not recall receiving the safeguards and could not locate them in their files and no one from the Portland school district testified at the hearing. Even if they had received the statements from another school district previously, in El Paso School District v. Richard R., 567 F. Supp.2d 918 (W.D. Tex. 2008), a district court declined to impute knowledge of due process rights to a family who had received statements of procedural safeguards in the years past but not at the point at which the family requested that the student be referred for special education. Id. at 948 (holding that when a school district failed to provide written notice of procedural safeguards, it denied the parents' knowledge necessary to request a due process hearing). Although the school district is correct that the court in El Paso was not making a determination as to whether the withholding of procedural safeguards prevented the family from filing a due process complaint, the decision is instructive on the question of whether the school district's failure to provide procedural safeguards is mooted by the family's prior receipt of such safeguards.

The school district's additional two arguments also fail. While the family was content with the decision that the student would receive services under Section 504 rather than the IDEA, based on the school's representations, the family believed that pursuing special education services would require a reevaluation of the student, which they wished to avoid. Finally, although the statement of procedural safeguards does not address the particular circumstances that the family found themselves in, it would have provided them with information to the effect that they had the right to file a due process hearing request or complaint investigation request if they challenged the school district's determination that the student was not eligible for special education on the basis of his current record. In combination with notice of the Team's written determinations, the information would have alerted the parents to their due process rights.

As such, the exception in the statute of limitations applies and the parents may pursue their claim that the school district failed to refer, evaluate, and identify the student from the period of September 2007 forward.

III. Additional Arguments

The family makes two additional arguments. The first is that the exception to the application of the statute of limitations that occurs when a state has its own explicit time limitations for requesting a hearing, 20 U.S.C. § 1415(f)(C), applies. In this regard, the family argues that although Maine special education regulations identify a two-year statute of limitations identical to that contained in federal law, it was not legally adopted by the Maine Department of Education, and as such the prior regulation, which allowed a four year period from when they knew or should have known of the violation, should be applied. Second, the parents contend that the IDEA's two year look-back provision was not designed to limit compensatory education claims based on continuing violations of a student's right to FAPE. The school district counters both of the family's additional arguments.

Because the prior analysis concludes that the family's claims are allowable from the period of September 2007 forward, the parents' additional arguments regarding exceptions to the statute of limitations are not addressed.

IV. Conclusion

The hearing officer underscores that this Order does not purport to address the merits of the case other than as applied to the statute of limitations defense to the family's identification claims. The family is permitted to pursue its claims against the school district for violation of its obligations to refer, evaluate, and identify the student beginning in September 2007.

Dated: September 1, 2011

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Rebekah Smith, Esq.
Hearing Officer