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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: Student
ODR # 5968/05-06 AS

Date of Birth: xx/xx/xx

Dates of Hearing: 2/17/06; 2/23/06; 3/24/06, 4/3/06,
5/1/06, 5/3/06, 6/7/06, 6/8/06 ¹

CLOSED HEARING

Parties to the Hearing:
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Representatives:
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Date Transcript Received:

June 13, 2006

Date of Decision:
Hearing Officer:

July 20, 2006
Marcie Romberger, Esquire

¹ The parties requested written closings which were due July 5, 2006. The delay in the deadline for closings was as a result of medical issues regarding one of the attorneys. In addition, at least one other hearing session was scheduled but canceled due to weather.

FINDINGS OF FACT

1. Student completed 8th grade in the Pocono Mountain School District during the 2005-2006 school year. S-7.
2. Student, his mother, and father were born in [another state]. NT 716.
3. Student entered the District in Kindergarten. S-15. The home language study completed by Student's family during registration stated English was the language frequently used at home by both adults and children and English was the language Student learned when he began to talk.² S-14. This information is consistent with an ESL Family Survey completed by Student's mother in March, 2002. S-20. In 2003, Student's Mother again completed the ESL Family Survey stating she sometimes speaks [another language] to Student. S-24.
4. Student's Kindergarten Report Card shows no educational concerns. S-15.
5. For the first two marking periods in 1st grade, Student received extended time to complete his work and additional individualized supports including reading support. S-15, 26. Student also had difficulty writing sentences, although he received "progressing" or "commendable" symbols under the communications section of his report card. S-15.
6. Student's 2nd grade Terra Nova score in reading was two standard deviations from the mean. NT 566. In the opinion of the independent evaluator, the District should have requested to evaluate Student for special education services on the basis of this score. NT 566-567.
7. In 2nd grade, Student received reading support and English for Speakers of Other Languages class (hereinafter "ESOL"). S-26; NT 85-86. The current Director of Special Education believed this was due to Student having difficulty progressing academically and needing additional supports. S-15; NT 84.
8. A referral to an ESOL class can occur from responses on a home language survey or from teacher discussions with Students and their parents, or a Student's academic performance. NT 148-149, 150; S-14.

² It is important to know Exhibit 17 which purports Student's home to be bi-lingual was alleged by Student's family not to be a record of Student's and the District cannot refute the parent's assertion. NT 412-413, 718-719.

9. Once a student is referred to ESOL, he/she is given a series of Language Assessment Scales which comprise of reading, writing, and oral fluency components. NT 147-148.
10. Student was at an exiting level in English Acquisition Stages for both speaking English and listening to English, but at the Intermediate levels for reading and writing English, i.e., he was having difficulty reading and writing English. NT 180; S-19.
11. Student's 2nd grade report card clearly stated Student was receiving "English to Speakers of Other Languages" class during the third and fourth marking period. S-15.
12. Comments from Student's 2nd grade report card show Student needing to continue to practice his reading skills. S-15. Student was also having difficulty with written expression. S-15.
13. Student received accommodations in 2nd grade: tests read to him with answers provided in verbal form rather than in writing; extra time to complete tasks and tests; and retests. S-26.
14. In 3rd grade, Student was given alternate assignments, directions, and grading scales. He also continued to receive ESOL services and reading support. S-4, 22, 26.
15. In 4th grade, Student received numerous accommodations in class, including study guides and groups, class notes, extended time, alternative assignments, directions and grading scales, adapted tests, and material in reading and math on Student's instructional level. S-26. He was still receiving ESOL services and reading support. S-4, 26.
16. Student's 5th grade teachers considered Student an average student who sometimes had issues with motivation. NT 209, 247. One of Student's 5th grade teachers believed Student's language skills were fine – no difficulties understanding direction, answering questions, participating in class, or with beginning, middle or ending conversations. NT 247.
17. In 5th grade, Student was given a Stanford English Language Proficiency Test which found Student performing at the proficient level for listening, speaking, writing conventions, and social and productive communication skills in English. S-21. Student was found to be at a basic level for reading and writing English, and intermediate in reading comprehension and academic communication skills. S-21.
18. Student again received additional reading services and ESOL in 5th grade because he continued to have difficulties. S-4, 22, 26; NT 227, 229.

19. Also in 5th grade, Student received peer tutoring for extra practice with basic math facts because he was one of the lowest 10 children in basic math facts in the class. NT 210, 221; S-26. In science, Student was graded on an alternative grading scale. NT 210-211; S-26.
20. One of Student's 5th grade teachers did not list the extra accommodations of untimed tests, lesson notes, and instruction on his level -- accommodations provided to Student in 4th grade -- on Student's 5th grade accommodations chart because every student in that class received those accommodations, including Student. S-26; NT 224. Another of Student's 5th grade teachers did provide retesting, extra time for test taking, and an alternative grading scale to Student. S-26; NT 251.
21. Student's 5th grade teachers did not refer Student for a special education evaluation because they did not feel Student needed to be referred. NT 221, 250-251.
22. In the beginning of Student's 6th grade year, Student's grade equivalent scores on a Gates test were 4.9 for vocabulary, 3.8 for comprehension, and an overall score of 4.3. S-23.
23. Student's ESOL teacher in 6th grade believed Student showed language interference through his incorrect sentence structure, subject/verb agreement, and adding improper suffixes when writing. NT 192-193. She did not refer Student to the Instructional Support Team because she believed he was making progress with the limited accommodations she was making. NT 164.
24. Student's 6th grade writing PSSA score was below basic. S-4.
25. In 6th grade ESOL class, Student read books which supplemented the regular curriculum reading program. NT 182. The levels of the books were at a beginning 5th to middle 5th grade level during the course of that year. NT 182-183.
26. Student did not receive a systematic, research based reading program while in the ESOL class. NT 186.
27. Although Student's report cards from 4th to 6th grade do not show consistent difficulty with reading, mathematics, or language arts/English, Student did get an occasional "D+" in those classes. S-16.
28. Student began questioning why he was in ESOL in 6th grade. NT 818. By 7th grade, he wanted to get out of ESOL class because it was no longer fun, and he felt he was doing work that was not as cognitively stimulating as it could have been. NT 819.

29. In 7th grade, Student received all “D” or “F” grades in reading. S-15. Comments on his report card were negative: does not work to ability and fails to do homework. S-4.
30. Student’s 7th grade ESOL teacher did not feel Student’s language was interfering with his class work. S-4; NT 376.
31. In 7th grade, Student was disciplined three times for aggressive behavior. S-1. In May, 2005, Student was caught in school with [an object]. S-1; NT 50. It was alleged that Student threatened another student with the [object]. S-1.
32. Student, a regular education student, was going to be disciplined for the possession of the [object] when Student’s parents requested an evaluation to determine if Student was eligible as a child with a disability under the Individuals with Disabilities Education Act (hereinafter, “IDEA”). S-2; NT 50. Student’s Parents believed Student may have a learning disability. NT 51.
33. An Evaluation Report was issued in August, 2005. NT 52; S-4. At the meeting to discuss the Evaluation Report, Student requested an Independent Educational Evaluation. S-5; NT 62. The District inevitably agreed to fund the independent evaluation. NT 68.
34. Also at the meeting, placement for Student during his 45 day discipline exclusion from school for possession of the [object] was discussed. NT 63-64. It was agreed that Student would receive educational services at his home until approximately November, 2005, and then return to the District. S-3; NT 66.
35. Prior to an evaluation being conducted by the District, a test to determine language dominance was conducted. S-4. Student was deemed to have a very limited understanding of [the other language] and to not be a [speaker of that language]. S-4.
36. Testing by the school psychologist noted Student “laboriously working” during educational testing while struggling through the reading and writing portions of the test. S-4; NT 272. It became obvious to her that he was having difficulty doing the academic tasks he was asked to do. NT 272.
37. Student told the school psychologist he always had difficulties reading. NT 272. He did not know any reading strategies to assist him in reading. NT 272. He also said writing was hard for him as he could not get down on paper what was in his head. NT 272-273.

38. Student also performed in the well below average to below average range in visual motor integration. S-4. As a result, the school psychologist suggested an occupational therapy screening. S-4.
39. Student's teachers rated Student as having difficulty managing his emotions and behaviors, inhibiting impulsive responses, and adjusting to changes in routine or task demands. S-4. His ESOL teacher also believed Student had difficulty sustaining working memory, monitoring his own behavior, and planning and organizing his approach to problem-solving tasks. S-4.
40. Most of Student's teachers identified Student as At-Risk in his study habits. S-4. He only sometimes or rarely completed his homework, was well organized, and had good study habits. S-4.
41. In testing, Student rated himself in the clinically significant range for his attitude towards teachers and at-risk for his sense of inadequacy, relationship with parents, and focus of control. S-4; NT 282. The school psychologist interpreted these findings to show a student feeling hopeless because he felt his teachers did not support him and inadequate due to social and familial stresses. S-4; NT 282. This interpretation is somewhat consistent with the independent evaluator's finding of learned helplessness. S-12.
42. Student has a strong oral vocabulary. NT 285.
43. Student had previously learned how to read by memorizing sight words. NT 288. As the words became longer and harder, he had difficulty reading because he could not decode them. NT 288.
44. The school psychologist suggested a behavioral plan because Student was not using appropriate coping skills in situations. NT 300. The independent evaluator agreed Student has ineffective coping techniques. S-12.
45. The school psychologist believes Student has a specific learning disability in reading and written expression with weaknesses in word reading and decoding. S-4.
46. Although not identified with a specific learning disability in mathematics, the School psychologist stated, "[i]t is likely that [Student] requires additional exposure to acquire skills in math." S-4. This is consistent with the findings of the independent evaluator. S-12.
47. Both evaluations show a weakness in executive functioning. S-8, S-12. Although the school psychologist agreed Student had weaknesses in

monitoring his behavior, transitioning between activities, and unorganized thinking, she, did not find Student eligible because of his executive functioning alone. NT 346, 347. She believed that an executive functioning weakness was part of Student's learning disability. NT 347.

48. The school psychologist recommended that Student's goals include improving decoding, encoding, and written expression. S-4. "Emphasis on use of spontaneous writing to address punctuation, capitalization, idea development." S-4. She also recommended strategies to improve whole word reading, working on blends for decoding, behavioral support plan for assistance with attending to class, reduction of distracting behavior, inappropriate distractions towards peers to improve social interactions. S-4.
49. The independent evaluator agreed with the identification of Student as a child with a specific learning disability in basic reading and written expression. S-12. He also believes Student has difficulty with reading comprehension, reading fluency, and math skills. S-12.
50. The independent evaluator found Student had inefficiencies in language processing skills. S-12. As a result, the District conducted a speech and language evaluation of Student to see if this was another area of disability. NT 316-317.³
51. Although Student used age appropriate vocabulary in his speech and language assessment, he did make minor grammatical errors "characteristic of some cultural differences." S-8; NT 429. He substituted "hissself" for himself, "was" for "were," and the "f" sound for the "th" sound. S-8; NT 429. Otherwise he had no articulation issues. NT 430.
52. The speech and language therapist believes Student's language is "impacted upon and interfered with this combination of both English and [the other language] and English that is not the same English that I have been brought up with." NT 663.
53. The independent evaluator did not believe Student's grammatical errors were as a result of cultural differences because Student does not speak [the other language]. NT 516.
54. The speech therapist acknowledges that the incorrect speech pattern used by Student is seen in other "cultures" whose native and primary language is English. NT 673-676. She also agrees that growing up in [another state] could affect Student's speech patterns. NT 683-684.

³ It is important to note the independent evaluator did not determine that Student has a language disability. NT 471.

55. Student's scores on the speech and language assessment were all in the average range except for an isolated weakness in his ability to understand oral passages which the evaluator deemed related to Student's learning disability. S-8; NT 433, 434. The independent evaluator testified that this weakness would affect Student's recalling sentences and paragraphs said in class which might affect his ability to follow directions. NT 518. The speech/language therapist also noticed Student had an auditory working memory weakness which she also deemed related to Student's learning disability. NT 435.
56. The speech and language evaluator determined that Student did not have a language processing disability. S-8; NT 435. This appears to be consistent with the independent evaluator's determination that Student does not have a language disability. NT 471.
57. The school psychologist agrees with the independent evaluator that Student has weaknesses in executive functioning, exhibits faulty thinking, ineffective coping skills, and learned helplessness. NT 381. However, she disagrees with the independent evaluator that these things are a different category of eligibility. NT 381. She believes they are all related to or can stem from a learning disability. NT 382.
58. The independent evaluator believes Student will need repetition to acquire certain information. NT 472. He also had difficulty with mental organization of information, including categorizing information. NT 472, 476-477.
59. Student has weaknesses in attending to uninteresting tasks, difficulty shifting from one task to another, and is inhibited. S-8; NT 527-528, 529.
60. Student is at-risk for problems with his study skills. S-8. The independent evaluator believes that Student should be taught study skills. NT 534.
61. Student is also at risk for aggressive behaviors and clinically significant or conduct problems. S-8. The independent evaluator believes this is because Student does not have a way of handling his problems. NT 537.
62. Both evaluators agree Student has a specific learning disability in basic reading and written expression. NT 579. The independent evaluator would have also included reading comprehension as one of Student's learning disabilities. NT 579. He believes Student should be instructed in reading comprehension strategies and if he cannot learn them, offer Student assistive technology to help with reading comprehension. NT 579.

63. The independent evaluator also believes Student should be identified as Other Health Impairment under IDEA because his executive functioning weakness is an “outward manifestation of neurological dysfunction” which interferes with Student’s functioning in the academic setting. NT 582-583, 792, 794. The school psychologist does not agree that Student is Other Health Impaired. NT 1016, 1017.
64. The independent evaluator recommended Student attend school in another school district to give him a fresh start. S-12. The District did not agree with that recommendation because starting in a new District would require him to learn more things. NT 319. The District believes Student should work on his coping/perception issues with people who know him. NT 319.
65. Student wants to attend a different school district for the upcoming school year. NT 823-824. He feels he would be able to concentrate on school more in a different school since he would not have to worry about getting in a fight. NT 824. However, kids in his neighborhood who go to a different school district give Student a hard time. NT 827-828.
66. Student had a few incidents of fighting in the District. NT 844-845. The teachers were there to stop anything from happening. NT 844.
67. The independent evaluator was led to believe by the school psychologist that he would have input into the integrated evaluation. NT 496-497. Instead, the school psychologist integrated both her evaluation and the evaluation of the independent evaluator without any input from the independent evaluator. S-8; NT 325, 497. The information incorporated from the independent evaluation is in italics. S-8; NT 329.
68. On September 27, 2005, a meeting occurred to discuss the Individualized Education Program (hereinafter “IEP”) offered to Student by the District for homebound instruction. NT 69. This IEP does not contain goals for decoding and encoding. S-7. Nor does the written expression goals detail Student’s writing narrative, informative, or persuasive writing assignments. S-7. The specially designed instruction does not state that Student will be receiving a research based reading program or any specially designed instruction in written expression. S-7. Student’s IEP also does not offer counseling to Student to teach him coping skills and behavior management, or to work on Student’s entrance back into the District after his 45 day placement. S-7.
69. A plan to transition Student back to school after his homebound instruction ended was also discussed in September, 2005. NT 77.

70. Student did not transition back to school. Another meeting occurred on November 22, 2005 to discuss the Evaluation Reports completed by the District and by the independent evaluator. NT 93. During that meeting, the District wanted Student to return to the district rather than continue on homebound instruction. NT 97-98. Student raised concerns about returning to school; he did not want to face questions regarding his absence from school. NT 106. An agreement was made that Student would continue on homebound instruction until a merged Evaluation Report was completed. Id.
71. On January 17, 2006 a meeting was held to discuss the combined Evaluation Report and to develop an IEP. NT 98. Student again raised concerns about facing questions about his absence from school. NT 102. Student also raised concerns about returning to the District because of other students “bullying” Student. NT 100.
72. However, the students “bullying” Student were not just from the District, but also from surrounding districts. NT 101.
73. The IEP offered to Student on February 13, 2006 does not have a Behavior Management Plan to address Student’s difficulties with following directions, distractibility, anger management, and behavior in unstructured settings. P-2.
74. The February 13, 2006 IEP’s writing goal does not identify whether Student will learn narrative, informative, or persuasive writing assignments. P-2. It also does not have goals for decoding and encoding. P-2.
75. The specially designed instruction in the February, 2006 IEP does not identify that a research based reading program, graphic organizers, or other items to assist Student with organizing his writing will be provided to Student. P-2.
76. Assistive technology, including using a keyboard, is not addressed in the February, 2006 IEP. P-2; NT 910-911. Although an adult contact person is included in the IEP, counseling to assist Student with his coping skills and his anger management is not provided. P-2. Nor does it specify whether the mentor will be trained in social skills, behaviors, or academics in order to assist Student. P-2.
77. Another IEP meeting occurred on April 10, 2006. S-42. This IEP has a goal for decoding and encoding. S-42. The writing goal, however, still does not identify whether Student will learn narrative, informative, or persuasive writing assignments. S-42. The IEP has no math goals previously offered in other IEPs. S-42.

78. Although an adult contact person is included in the IEP, counseling to assist Student with his coping skills and his anger management issues is not included. S-42. Nor does it specify whether the mentor will be trained in social skills, behaviors, or academics in order to assist Student. S-42.
79. The April 10, 2006 IEP does have a Behavior Management Plan, but it does not address Student's issues in unstructured environments. P-4; NT 942.
80. The Specially designed instruction in the April 10, 2006 IEP does have graphic organizers and agenda planners to assist Student with writing, homework, and organization. S-42.
81. As a result of a letter written by Student on May 2, 2006, the April 10, 2006 IEP was revised. S-43, 44; P-4. Although some changes were made, the majority of the IEP is the same as the April 10, 2006 IEP. S-42, 44; P-4.
82. All IEPs have Student returning to the District. S-7, 42; P-2. In fact, the District denied Student's request to attend another school district or a different high school in the District. S-42; P-3.
83. An occupational therapy screening, recommended in August, 2005, was never completed because Student was on homebound instruction. S-4, 7. NT 1064-1065.
84. Student's mother testified that she thought the ESOL class was extra reading help. NT 706-707. She did not ask what "ESOL" stood for nor did anyone tell her. 708-710.
85. Student's mother contends that the first time she learned what ESOL meant was when other parents told her when Student was in 7th grade. NT 723-724, 725.
86. Student does not speak [the other language] nor does he understand [the other language]. NT 815-816. His parents only taught him English because it was an important family value. S-8. His parents speak [the other language] among themselves infrequently. NT 815-816.
87. Student says he was the only one in his ESOL class whose repertoire consisted of only the English language. NT 818. Student told the independent evaluator that he knew he did not belong in ESOL. S-12.

ISSUES

1. Did the District fail in its Child Find requirement under the Individuals with Disabilities Education Act by not diagnosing Student with a learning disability earlier?
2. Was Student's placement in an English for Speakers of Other Languages Class rather than identifying Student as learning disabled inappropriate?
3. Was the Student inappropriately disciplined because the District knew or should have known that Student was a child with a disability?
4. Was the Evaluation Report produced by the District inappropriate for failing to identify all of Student's disabilities, specifically Other Health Impaired for his weakness in Executive Functioning?
5. Did the District fail to appropriately consider and integrate the Independent Evaluation into the District's Evaluation Report?
6. Were the Individualized Education Plans offered by the District inappropriate?

If the answer to any of the above is in the affirmative, should the Student:

1. receive compensatory education from March, 2000 to June, 2005 when he was placed in ESOL and not evaluated?
2. receive a new reevaluation that considers the Independent Educational Evaluation and integrates its considerations?
3. receive a new Individualized Education Plan including placement outside the District?
4. receive compensatory education for the 2005-2006 school year for the failure of the District to offer an appropriate IEP to Student?

DISCUSSIONS AND CONCLUSIONS OF LAW

Burden of Proof

Following Schaffer v. Weast, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (Nov. 14, 2005), and L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006), the burden of proof is now borne by the party bringing the challenge. As Student filed for this due process hearing, he has the burden of proof for the above issues.

Child Find

Student raises a few allegations in relation to his claim that the District violated its Child Find mandate under the Individuals with Disabilities Education Act (hereinafter, “IDEA”). First, Student alleges the District placed Student in ESOL incorrectly. Second, Student asserts the District should have evaluated him earlier to determine eligibility under the IDEA instead of placing him in ESOL. Student also claims that he was disciplined inappropriately because the District should have known at the time he possessed an [object] on school property that he was eligible as a child with a disability under IDEA.

Prior to discussing any of the above issues, a review of existing law regarding any time limitations in bringing these claims needs to occur. Section 1415 of the amended IDEA states:

(C) **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 the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.

(D) **EXCEPTIONS TO THE TIMELINE.**—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 misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local educational agency’s withholding of information from the parent that was required under this part to be provided to the parent.

20 U.S.C. §1415. The gist of Student’s argument is that the District violated Child Find and did not provide a free appropriate public education to Student since March, 2000, because it placed Student in ESOL rather than evaluating him for a disability and providing him special education services. I will discuss all of Student’s claims together and their relation to the limitations period under IDEA.

Student’s Mother testified the District told her Student’s ESOL class was not English for Speakers of Other Languages, but an extra reading course which she approved Student receiving “to give him the help that he needed.” NT 706-707, 709-710. However, a review of Student’s 2nd grade report card specifically states Student was receiving English for Speakers of Other Languages services in addition to reading support. S-15. Therefore, Student’s family knew or should have known Student was placed in an English for Speakers of Other Languages class when Student was in 2nd grade – approximately 6 years ago. In addition, Student told the independent evaluator that he knew he did not belong in ESOL because he was the only one who only spoke English. S-12.

In addition to Student's family knowing that Student was receiving ESOL services since 2nd grade, Student's family was also aware that Student needed extra reading assistance because they knew he was getting extra reading support. NT 706-707, 709-710; S-15. They were also aware of Student's academics difficulties since 2nd grade. S-15, 16. In addition to a decline in grades, Student remained consistent or declined in standardized test levels even with additional reading and ESOL services. S-15, 16, 27. Student's family was also aware Student continued to receive numerous accommodations in class.⁴ S-26. When he was in 5th grade, Student's family was aware of Student's performance on a basic level in reading and writing on the Stanford English Language Proficiency test although he spoke only English and in the beginning of 6th grade, Student's vocabulary was at a 4th grade reading level, comprehension was at a 3rd grade level. S-21, 23.

Student's parents were aware of Student's difficulties with academics, the standardized test scores, and the accommodations/services Student was receiving to assist him in class. S-15, 16, 21, 26, 27. They unfortunately trusted the District to provide Student with an appropriate education without asking questions. NT 709-710. As IDEA 2004 permits a hearing to be requested within two years from when the parents knew or should have known about the action that forms the basis of the complaint, Student did not bring the complaint regarding Child Find in a timely fashion. Although IDEA does allow exceptions to the 2 year limitation period for times when a District misrepresents or withholds information from a parent, in this matter, it was clear from the report card and accommodations checklists what Student was receiving. Therefore, I do not find any exception applies.

I dismiss the Child Find claim with much hesitation. Instead of placing Student in ESOL because of academic difficulties, the District should have evaluated Student for special education services. Although the District did conduct an assessment when Student was in 2nd grade, the assessment did not identify whether Student's difficulties with reading and writing were as a result of another language interfering with English or as a result of a learning disability. S-18, 19. In fact, it was not until 2005 that the District conducted any evaluation of Student's knowledge of [the other language]. S-4. Had it conducted an evaluation earlier, it would have realized Student did not know any other language. In addition, the District knew Student received numerous accommodations and supports since 1st grade but his standardized test results stayed below proficient and declined over time. It does not appear that anyone from the District reviewed Student's errors on his standardized tests to see if his errors were a result of language interference or a learning disability. NT 193-194. The District should have conducted an evaluation to determine Student's eligibility many years before 2005. However, in keeping with my reading of IDEA 2004, I must dismiss the Child Find claims.⁵

⁴ Each teacher determines what accommodations to provide to a student depending on progress and performance. S- 26; NT 127.

⁵ At the time this decision was written, there were no federal court cases to assist in an analysis of the language of Section 1415.

Discipline

Student argues that the District inappropriately disciplined him because the District either knew or should have known that he was a child with a disability. The IDEA 2004 states the following with respect to discipline and a child thought to be disabled:

A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

20 U.S.C. § 1415. Assuming that the District should have known Student was a child with a disability under IDEA, it had the right to discipline Student as per the IDEA:

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

“(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

20 U.S.C. § 1415. Removing Student from school to an interim alternative educational setting for 45 days is permitted under IDEA for a child thought to be eligible under IDEA who possesses an [object] on school premises. This removal is exactly what the District planned. S-1; NT 50, 63-64. It was agreed that Student would receive educational services at his home for 45 days and then return to the school. S-3; NT 66. It was Student who decided to remain at home after the 45 day placement. NT 97-98.

Therefore I find that the District did not inappropriately discipline Student.

Evaluation Report/Independent Educational Evaluation

Student claims the Evaluation Report prepared by the District is inappropriate because it did not find Student eligible as a child with an Other Health Impairment for his executive functioning weakness. Other Health Impairment is defined as:

Having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention

deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and adversely affects a child's educational performance.

34 C.F.R. § 300.7. The school psychologist agrees Student has a weakness in executive functioning, but she believes that his weakness is incorporated into his specific learning disability. NT 347. A specific learning disability is defined as:

a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

34 C.F.R. § 300.7. I agree with the school psychologist that at this time, a weakness in executive functioning is best addressed under Specific Learning Disability rather than Other Health Impairment. Therefore, I find that the Evaluation Report conducted by the District is appropriate without the eligibility criteria of Other Health Impairment.

Student also claims that the District failed to appropriately consider and integrate the Independent Educational Evaluation into the District's Evaluation Report. I assume the claim is based on the fact that the school psychologist did not corroborate with the independent evaluator to produce an integrated report.

It is clear that the District considered the independent educational evaluation. For the most part, the evaluations were consistent. Where they were not, the District need only consider the results or recommendations. The District was not required to agree with all the findings of the independent educational evaluation. 34 C.F.R. §300.502. In addition, although the report was not integrated in the manner in which the Student would prefer, there was nothing inappropriate in how the reports were integrated.

Therefore, I find the evaluation to be appropriate and the independent educational evaluation to be considered as required.

IEPs

Student claims that the IEPs offered to Student were inappropriate and cites to numerous reasons why the IEPs were faulty.⁶ P-6.

⁶ See testimony of Mr. B. NT 896-997.

The IEP is the cornerstone of the special education program of a student. The IEP must include comprehensive present educational levels; measurable annual goals which point toward the child's actual educational needs;⁷ benchmarks or short term objectives relating to the goals to address the child's disability and from which progress can be monitored;⁸ a statement of special education and related services and supplementary aids and services which meet the individual needs of the child as reflected in the CER and extend beyond mere classroom accommodations;⁹ and an explanation of the extent to which the child will be educated with non-disabled children. 20 U.S.C. §1414(d); Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171 (3d Cir. 1988).

An IEP which is inadequate in any material way is inappropriate as a matter of law. Rose v. Chester County Intermediate Unit, 1996 WL 238699, aff'd 114 F.3d 1173 (3d Cir. 1997). See Special Education Opinions 813, 854, 879, 885, 892. An IEP must be sufficiently specific to address all of a child's identified needs. Christen G. v. Lower Merion School District, 919 F.Supp. 793 (E.D. Pa. 1996).

The IEPs offered to Student did not address all of Student's identified needs. The September, 2005 IEP does not contain goals for decoding and encoding. S-4, 7. Nor does the written expression goals detail Student's writing narrative, informative, or persuasive writing assignments, or a goal to address punctuation, and capitalization. S-4, 7. The specially designed instruction does not state that Student will be receiving a research based reading program or any specially designed instruction in written expression. S-4, 7. Student's IEP also does not offer counseling to Student to teach him coping skills and behavior management or to work on Student's entrance back into the District after his 45 day placement. S-4, 7. Nor will Student be taught study skills. S-7, 8.

The IEP offered to Student on February 13, 2006 does not have a Behavior Management Plan to address Student's difficulties with following directions, distractibility, anger management, inappropriate distractions towards peers to improve social interactions, and behavior in unstructured settings. P-2; S-4. The writing goal does not identify whether Student will learn narrative, informative, or persuasive writing assignments or does it address punctuation and capitalization. P-2. The IEP also does not have goals for decoding and encoding. P-2. The specially designed instruction does not identify a research based reading program, graphic organizers, or other items to assist Student with the organization of his writing or methods to teach study skills will be provided to Student. P-2, S-4, 8. Assistive technology, including using a keyboard, is

⁷ 20 U.S.C. §1414(d)(1)(A), 34 C.F.R. §300.347. Bernardsville Board of Education v. J.H., 42 F.3d 149 (3d Cir. 1994); Battle v. Commonwealth 629 F.2d 269 (3d Cir. 1980); David P. v. Lower Merion S.D., 1998 U.S. Dis. LEXIS 15160 (E.D. Pa. 1998); Big Beaver Falls. See Special Education Opinion Numbers 736, 738, 745, 753, 761, 766, 783, 786, 790, 802, 813, 823, 824, 866, 879, 916, 924, 928, 929, 979, 992, 1027, 1042, 1046, 1053, 1090.

⁸ Kelsey B. v. Camp Hill School District, ___ F.Supp.2d ___ CV-01-1082 (M.D.Pa. 2003).

⁹ 20 U.S.C. §1414(d)(1)(A), 34 C.F.R. §300.347; 22 Pa. Code §14.32(f) and 342.32(d). Christen G.; Big Beaver Falls. See Special Education Opinion Numbers 723, 738, 739, 742, 743, 761, 766, 783, 786, 787, 790, 795, 866, 879, 885, 908, 916, 921, 928, 992, 1042, 1046.

not addressed in the February, 2006 IEP although it is agreed that Student's handwriting is poor. P-2; NT 910-911. Although a mentor was provided to Student, there is no indication that this person will be trained in social skills, coping skills, and other anger management/academic areas Student needs help. Counseling to assist Student with his coping skills and his anger management is also not included. P-2.

The April 10, 2006 IEP does have a goal for decoding and encoding. S-42. The writing goal, however, still does not identify whether Student will learn narrative, informative, or persuasive writing assignments. S-42. Although a mentor was provided to Student, there is no indication that this person was trained in social skills, coping skills, and other anger management/academic areas in which Student needs help. S-42. The April 10, 2006 IEP does have a Behavior Management Plan, but it does not address Student's issues in unstructured environments or inappropriate distractions towards peers to improve social interactions. P-4; NT 942. Counseling was also not provided to assist Student with these areas. S-42. The specially designed instruction in the April 10, 2006 IEP does have graphic organizers and agenda planners to assist Student with writing, homework, and organization. S-42. The IEP, however, has taken out the math goals which were in previously offered IEPs, although both evaluators recommended math goals. S-4, 8, 12, 42.

Although the District revised the IEP in May, 2006, the bulk of the IEP is the same as the April, 2006 IEP. Therefore it is also inappropriate.

As there were differences as to whether Student needed assistive technology, an assistive technology evaluation should have been performed to determine if Student would benefit from assistive technology. In addition, an occupational screening was never completed although it was requested by the school psychologist in August, 2005. The IEPs are inappropriate because Student's occupational therapy issues were never addressed. See, S-4, 8, 12.

What is appropriate in all of the IEPs is the team's recommendation that Student return to the District. There is nothing in the record that leads me to conclude that Student needs an out of district placement.

Compensatory Education

As I have determined that Student has met his burden of proof regarding the inappropriateness of the offered IEPs, I now turn to the question of whether Student is entitled to compensatory education.

Compensatory education is a remedy for a denial of a free appropriate public education. Millersburg Area Sch. Dist. v. Lynda T., 707 A.2d 572, 578 (Pa. Commw.), app. denied, 555 Pa. 748, 725 A.2d 1223 (1998); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999) ; M.C. v. Central Reg. Sch. Dist., 81 F.3d 389 (3d Cir. 1996), cert denied, 519 U.S. 866 (1996); Lester H v. Gilhool, 916 F.2d 865 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991). It "require[s] school districts to belatedly pay expenses that

they should have paid all along.” M.C., 81 F.3d at 397. An award of compensatory education requires a “finding that a child has received an inappropriate education.” Id. It is the denial of an appropriate education, not the mere denial of an appropriate IEP that creates the right to compensatory education. Ridgewood, 172 F.3d at 250.

Thus, the “right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education.” Ridgewood, 172 F.3d at 250. As to the timeframe, “[t]he school district, however, may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem.” M.C. v. Central Reg’l. Sch. Dist., 81 F.3d 389, 397. Thus, M.C.’s corollary:

A school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.

The matter before me is interesting in that Student is currently on homebound instruction because he was afraid of the possibility of bullying by other students. Taking into consideration the fact that the District wanted him to return to school but agreed to continue the homebound, I will provide compensatory education specifically for the services that Student should have received while on homebound. It was clear since August, 2005 when the District completed its Evaluation Report that Student was in need of a research based reading program, yet Student did not receive one while on homebound. Therefore, I will grant Student 3 hours and 45 minutes per week of compensatory education for the 2005-2006 school year for not being provided a research based reading program.¹⁰ In addition, it was also clear from the August, 2005 ER that Student had a disability in written expression. Student did work on written expression at home with his homebound instructor, but probably not for more than an hour per week.¹¹ Therefore, I will grant Student compensatory education for 2 hours and 45 minutes per week for the 2005-2006 school year. I will also give Student one hour per week of compensatory education for the lack of counseling provided to Student while on homebound. If he was provided the counseling, he might have been able to return to the District. I am not providing a full day of compensatory education because it was Student’s request to remain on homebound and not benefit from other classes and offerings at the school.

¹⁰ I am basing my award of compensatory education on the assumption that classes at the high school are 45 minutes in length.

¹¹ Student received 5 hours of homebound instruction per week to work on Algebra, Reading, Language Arts, Science, and American Cultures. S-42.

ORDER

1. The issue of whether the District failed in its Child Find requirement under the Individuals with Disabilities Education Act by not diagnosing Student with a learning disability earlier is dismissed as untimely.
2. The issue of the inappropriateness of Student's placement in an English for Speakers of Other Languages Class rather than identifying Student as learning disabled is dismissed as untimely.
3. Student was not inappropriately disciplined as a result of Student being a child with a disability or thought to be a child with a disability.
4. The Evaluation Report produced by the District was not inappropriate for failing to identify Student as a child with an Other Health Impairment for his weakness in Executive Functioning.
5. The District did not fail to appropriately consider and integrate the Independent Evaluation into the District's Evaluation Report.
6. The Individualized Education Plans offered by the District were inappropriate.

As a result of the above, Student

1. will not receive compensatory education from March, 2000 to June, 2005 when he was placed in ESOL and not evaluated.
2. will not receive a new reevaluation.
3. will not receive a new Individualized Education Plan which includes placement outside the District.
4. will receive compensatory education for the inappropriate IEPs and the inappropriate programming offered to Student for the 2005-2006 school year. Student will receive 3 hours and 45 minutes per week of compensatory education in reading, 2 hours and 45 minutes per week in written expression, and one hour per week of counseling services. The compensatory education will be limited to those areas and will be provided by qualified teachers and/or counselors.
5. If Student returns to the District for the 2006-2007 school year, the IEP team shall commence and develop an appropriate IEP for Student.

Marcie Romberger, Esquire