DECISION

Due Process Hearing for SI

ODR File No. 7632/06-07 LS

Date of Birth: xx/xx/xx

Dates of Hearing: June 22, July 25 and 26, 2007 – Closed Hearing

Parties to the Hearing:

Mr. & Mrs.

Representative:

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Hearing Officer: Debra K. Wallet, Esq.

Record Closed: September 10, 2007

Date of Decision: September 25, 2007

BACKGROUND:

Parents, on behalf of Student who has since graduated from high school with a diploma, initiated a due process hearing by filing a May 1, 2007 request seeking compensatory education for the period from Student's 1997-1998 school year to the present for the School District's alleged failure to provide a free appropriate public education [hereinafter FAPE]. While in school, Student was identified as having learning disabilities, particularly in reading and language arts.

This Hearing Officer previously entered an Interim Order dated July 23, 2007 (Exhibit HO 8) determining that the Parents, not the School District, bears the burden of proof on the statute of limitations issues and holding that the "continuing violations" doctrine did not apply to this matter. The Hearing Officer took testimony and other evidence on June 22, July 25 and 26, 2007 relevant to the statute of limitations and any exceptions thereto, as well as the graduation issue. After receiving briefs on the legal issues of whether or not an exception to the statute of limitations has been established by the Parents and whether or not Student was "improperly graduated" from the School District, this Hearing Officer entered a Second Interim Order (HO 20) resolving these two issues.

These two interim orders were not intended to be final orders. It had been expected that the remaining testimony and other evidence would be presented at the hearings scheduled for September 10 and 11, 2007. On September 7, 2007, the parties reported that the remaining issues had been "resolved" and requested a brief telephone conference. During this September 10 conference, the parties requested that the record be closed and that the Hearing

Officer issue findings of fact and conclusions of law in support of the interim orders. Hence this decision.

FINDINGS OF FACT:

Background

1. Student is a 20-year-old (D.O.B. xx/xx/xx) whose Parents initiated a due process hearing by filing a May 1, 2007 request.

2. Student has learning disabilities in a number of areas but most particularly in reading and language arts. (*See, e.g.*, P-9; N.T. 198).

3. Parents seek compensatory education for the period from Student's 1997-1998 school year to the present for the School District's alleged failure to provide FAPE. (HO 14).

4. The School District filed a timely response to the due process request raising a number of affirmative defenses including, *inter alia*, that the claims are barred by the applicable statute of limitations and are barred as a result of Student's graduation from high school. (HO 15).

5. The Hearing Officer took testimony and other evidence on June 22, July 25, and July 26, 2007 relevant to the statute of limitations and any exceptions thereto, as well as the graduation issue.

6. The following exhibits were admitted: P-1 through P-3; P-5 through P-23; S-1 through S-80. (N.T. 182). A package of documents marked P-24 was stipulated to be "authentic documents." (N.T. 541). During the hearings, the Hearing Officer marked and introduced exhibits HO 1 through HO 15. Subsequent to the July 26, 2007 hearing, the Hearing Officer marked and admitted the following on her own motion:

> HO 16 – Motion in Support of Parents' Claims That the Statute of Limitations in IDEA is not Applicable and Student was Improperly Graduated from the District;
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> HO 17 – Respondent, Central Bucks School District's Memorandum in Opposition to Petitioners' Claims Regarding the Statute of Limitations and Graduation Issues;

HO 18 – Parents' Response to School District's Brief in Opposition to Parents' Claims Regarding the Statute of Limitations and Graduation Issues;

HO 19 – Reply Memorandum of Law of Central Bucks School District in Opposition to Petitioners' Claims that the IDEA Statute of Limitations is not Applicable and That Student was Improperly Graduated from the District;

HO 20 – Second Interim Order with Respect to Parents' Motion: (1) That the Statute of Limitations is not Applicable and (2) That Student was Improperly Graduated.

7. Five witnesses testified at hearing: the guidance counselor who monitored Student's graduation credits; twelfth grade teacher; tenth through twelfth grade learning support teacher and IEP case manager; Mother; and the Supervisor of Special Education.

Educational Program

8. Parents wrote a letter to the School District dated July 28, 1997 in which Parents contended that Student "can't read" and that he "cannot write a paragraph." (S-59, pp. 2-3).

9. The IEP team determined in June 2000 that Extended School Year services were required for Student. The Wilson Reading Program (16 hours) was provided to him during the summer of 2000. (S-30, p. 4).

10. The goal for this Extended School Year was "to improve reading skills to a third-grade level." (S-31, p. 1).

11. The May 17, 2001 IEP listed Student's strengths as auditory and mathematical skills. His needs are written language skills, reading comprehension, organizational and time management skills, and assignment completion. This IEP listed reading levels significantly below grade level. (S-27, p. 3).

12. The School District consistently reported failing grades over the course of Student's education and reported achievement scores indicating borderline functioning in reading, writing, and mathematics. (S-2; S-7; S-12; S-23; P-8; N.T. 409).

13. The School District told Student's parents during the tenth, eleventh, and twelfth grade school years that Student was making educational progress. (N.T. 206, 226, 302).

14. The Hearing Officer accepts as true the opinion of [the] English and study skills resource room teacher who supervised Student's IEP from 2002 to 2005, that Student made progress every year. (N.T. 196, 226).

15. This record contains no statements that Student's reading problems had been resolved. To the contrary, the School District continually told Parents that Student was struggling academically. (N.T. 408).

16. Mother testified credibly that while she believed there was some educational progress, she was concerned about how much progress Student was making. (N.T. 417).

17. Mother testified that the School District was not misrepresenting anything. She simply questioned the level of achievement reported by the School District. (N.T. 417).

18. Parents knew that Student did not pass the PSSA in eleventh grade and that he was not proficient with respect to basic skills. (N.T. 391).

19. The December 2004 IEP referenced an evaluation by the certified school psychologist done in August 2004. This evaluation showed a full scale IQ of 89 with a difference between non-verbal and verbal reasoning abilities. The IEP reported, based on this evaluation, that "achievement in the areas of reading and written expression is significantly discrepant from his ability. His reading comprehension and sight vocabulary skills were well below the average range." (S-12, pp. 4-5).

20. The December 2004 IEP reported that Student's "absences are a major part of his low grades in class." (S-12, p. 4).

21. Student had only four unexcused absences during his ninth, tenth, and eleventh grade school years. He had 59.5 excused absences but only 15.5 unexcused absences during the twelfth grade year. (S-2).

22. Based upon Mother's testimony, the Hearing Officer finds that the psychologist called Mother to explain this 2004 reevaluation and mailed Mother the full report. (N.T. 405-407).

23. By at least February 2005, Parents knew that their son was not proficient in basic skills. (S-7; N.T. 390-391).

24. At least by December 21, 2004, Mother knew that Student was making little educational progress because the certified school psychologist's re-evaluation conclusions were contained in the December 2004 IEP. Mother was in attendance at this meeting. (S-12 pp. 3-5, S-23).

25. Mother received many procedural safeguard notices between 1997 and June 2005. (N.T. 419-424).

26. The School District made no "specific misrepresentation" that it had resolved Student's problems in reading and writing.

27. Based upon the testimony of Student's IEP case manager, educational records such as progress reports on IEP goals and objectives were prepared and regularly mailed to Student's mother. (N.T. 274-276).

28. The School District never denied Mother any documents. (N.T. 376-377).

29. The School District did not withhold information from the Parent that was required to be provided by IDEIA.

30. Parents have failed to establish either exception to the two-year limitations period contained in IDEIA.

Graduation

31. The IDEIA did not become effective until July 1, 2005, after Student had graduated on June 17, 2005. (S-8; P-1).

32. Based upon the testimony of [the] eleventh and twelfth grade guidance counselor, Student had all of the required credits in English, social studies, science, math, arts and humanities, electives, gym, and technology. Student had done both a ninth grade assessment and an eleventh grade graduation project. In her opinion, he satisfied the requirements to receive a regular high school diploma. (N.T. 88).

33. Student received the requisite number of course credits in English, science and social studies to graduate with a regular high school diploma. (S-2; N.T. 43-50, 88).

34. Student was graduated based, in part, upon a portfolio review process. (N.T. 588-591; 583-584).

35. The School District found Student's portfolio containing specific written work by Student to be satisfactory and to comply with its local assessment system adopted pursuant to the Pennsylvania Code, 22 Pa. Code §4.52. (S-3; N.T. 601).

36. The School District requires that two individuals evaluate the Student's portfolio. In addition to the teacher providing the portfolio assignment, [redacted name] also reviewed the portfolio. (N.T. 53-55).

37. By June 2005, Student had demonstrated skills necessary for post-graduate life. (N.T. 204).

38. Mother had ample notice that her son was slated to graduate. (N.T. 387).

39. Mother was advised at IEP meetings in both the eleventh and twelfth grade years that Student could remain at school after the conclusion of his twelfth grade year, instead of graduating. (N.T. 389-390).

40. Parents knew that Student was receiving credit for his resource room classes throughout his high school career. (N.T. 365-367).

41. Parents were sent a May 20, 2005 letter advising them of the June 17, 2005 graduation. Any senior not planning to attend the graduation ceremony was to advise the principal in writing on or before May 31. (S-6).

42. The School District sent a Notice of Recommended Educational Placement (NOREP) in June 2005 indicating the graduation and the discontinuation of specially designed instruction. (S-5).

43. There is no indication in the written records or by testimony that Parents either approved or disapproved this NOREP. (S-5, p. 3).

44. Student properly received a regular education diploma on June 17, 2005.

45. Based upon a xx/xx/xx date of birth, Student turned age 18 on xx/xx/xx. If he filed a due process request within two years of his eighteenth birthday, such a request would have been required on or before xx/xx/xx.

46. Even if the concept of minority tolling were applicable to IDEIA, minority tolling would provide no relief in this case.

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction over the provision of a Free Appropriate Public Education [FAPE] to Student.

2. This case has been brought under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.,* and Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §793.

3. The limitations period contained in IDEIA is applicable to this due process request filed May 1, 2007.

4. Parents bear the burden of proving that they have filed a request for an impartial due process hearing within the limitations period contained in IDEIA.

5. Having failed to present evidence of a specific misrepresentation by the local educational agency that it had resolved the problem forming the basis of the complaint or the local educational agency's withholding of information from the Parent, Parents were required to request an impartial due process hearing within two years of the date the Parents knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. §1415(f)(3)(C)(D).

6. A two-year statute of limitations is applicable to Section 504. *Zankel v. Temple University*, 2006 U.S. Dist. LEXIS 22473; *Barclay v. Amtrak*, 343 F. Supp. 2d 429, 433 (E.D. Pa. 2004) (quoting *Saylor v. Ridge*, 989 F. Supp. 680, 686 (E.D. Pa. 1998).

7. The continuing violations doctrine does not apply to due process hearing requests brought under the IDEIA.

8. The continuing violations doctrine does not apply to Section 504 claims.

9. Parents bear the burden of establishing that Student was not entitled to receive a regular high school diploma.

10. Neither IDEIA nor Section 504 permit the filing of a claim by Student after Student reaches the age of majority, age 18 in Pennsylvania.

DISCUSSION

The Hearing Officer incorporates herein the Interim Order and Second Interim Order in their entirety. These interim orders are attached for the convenience of the parties.

ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Parents are not entitled to any relief for the due process hearing request filed May 1, 2007.

Date: September 25, 2007

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Debra K. Wallet, Esq.
Hearing Officer
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Camp Hill, PA 17011
(717) 737-1300

PENNSYLVANIA SPECIAL EDUCATION DUE PROCESS HEARING

In re SI.	**:**	**ODR No. 7632/06-07 LS**
		:
a student in the		**:**
Central Bucks School District		**:**

SECOND INTERIM ORDER
WITH RESPECT TO PARENTS' MOTION:
(1) THAT THE STATUTE OF LIMITATIONS IS NOT APPLICABLE AND
(2) THAT STUDENT WAS IMPROPERLY GRADUATED

Introduction

Parents, on behalf of Student who has since graduated from high school with a regular education diploma, initiated a due process hearing by filing a May 1, 2007 request seeking compensatory education for the period from Student's 1997-1998 school year to the present for the School District's alleged failure to provide a free appropriate public education (hereinafter FAPE). While in school, Student was identified as having learning disabilities in reading, math, and language arts. The School District filed a timely response to the due process request including the affirmative defense that the statute of limitations bars any claims prior to May 1, 2005, two years prior to the filing of the due process request.

This Hearing Officer previously entered an Interim Order dated July 23, 2007 (Exhibit HO 8) determining that the Parents, not the School District, bears the burden of proof on the statute of limitations issues and holding that the "continuing violations" doctrine did not apply to this matter. The Hearing Officer took testimony and other evidence on June 22, July 25 and 26, 2007 relevant to the statute of limitations and any exceptions thereto, as well as the graduation issue. The parties have fully briefed the legal issues of whether or not an exception to the statute of limitations has been established by the Parents and whether or not Student was "improperly graduated" from the School District.

This second Interim Order is not intended to be a definitive ruling on all of the issues in this case under The Individuals with Disabilities Education Improvement Act of 2004 [hereinafter IDEIA], 20 U.S.C. §1400 *et seq*. or Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §793 [hereinafter Section 504]. However, the parties have had a full opportunity to present any relevant testimony, documentary or other evidence related to the exceptions

concerning specific misrepresentations or the withholding of information specifically set forth in 20 U.S.C. §1415(f)(3)(C) and (D). In order to set the parameters for the balance of the testimony in this case, the Hearing Officer issues this second Interim Order.

Applicability of Exceptions to the Statute of Limitations

The legal analysis concerns the following statutory provision:

> (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.

Section 1415 of the IDEIA, 20 U.S.C. §1415(f)(3)(C) and (D).

As decided by the first Interim Order, the burden of asserting and proving exceptions to the timeline under subsection (D) falls upon the Parent. *See, e.g., Velez v. QVC, Inc.*, 227 F. Supp. 2d 384 (E.D. Pa. 2002). This Hearing Officer will address individually the two broad

exceptions contained in IDEIA. Parents generally argue that they are entitled to a remedy because the School District repeatedly failed to address Student's learning disabilities and because Student failed to make meaningful educational progress and may, in some subject areas, have regressed during his school years.

Specific Misrepresentations

Parents contend, further, that specific misrepresentations consisted of the following:

- When Student's parent expressed concerns about Student's progress, the District advised it was working on these concerns and going to fix any problems, and Student's parents believed their concerns were being addressed. N.T. 306-307, 459. Student's parent agreed that she believed the District was responding to and addressing her concerns. N.T. 380, 459. The District admitted that even though Student's parents were under the belief that concerns raised by parents were going to be addressed, Student received many failing grades over the course of his educational career and his achievement scores indicated borderline functioning in reading, writing, and math. S-23; N.T. 306.

- When Student completed Kindergarten in 1993, he was functioning academically below a readiness level. S-71. By his fourth grade school year in 1997, Student was functioning at a primer/low first grade level in reading and first grade level in language arts. S-66. Indeed, Student demonstrated regression in reading and language arts over the 1994-1995 and 1996-1997 school years (second through fourth grades). S-60; S-66. Specifically in 1995, Student's CER represented he was functioning on the first grade level in reading and beginning second grade in language arts, but by 1997, his CER demonstrated he regressed to the primer/low first grade level in reading and first grade level in language arts. S-60; S-66. Incredibly, in a letter to Student's parents, dated August 14, 1997, the District specifically misrepresented to Student's parents that Student was making academic progress. S-57. In response to parents' July 28, 1997 letter expressing concerns about Student's lack of progress, the District's Supervisor of Special Education stated "In looking back over Student's IEPs, I have noted he has made progress in many, many areas…" S-57.

- The District also responded to parents' July 28, 1997 letter by moving Student to another District elementary school, and Student's parents were led to believe that the problem was corrected. N.T. 452-453, 464.

- Despite Student's demonstrated regression over his 1994-1995 to his 1996-1997 school years (second to fourth grades) indicated in the District's CERs (April 24, 1995 CER and April 4, 1997 CER), Student's fourth grade progress report indicated Student was making steady progress in reading. S-60; S-66; P-16.

- By November of 1998, Student's parents again expressed their concern to the District about Student's lack of progress. However, once again, the District's Supervisor of Special Education responded in a letter to Student's parents dated December 4, 1998, "I believe [Elementary] and the school district have done more than provide an appropriate educational program for Student. He is making educational progress and he seems to be happy with his schooling at [Elementary]." S-40; S-41. The District's response to parental concern reflected another specific misrepresentation to Student's parents. At the time the District claimed Student was making progress, Student was actually functioning at the pre-primer level in reading which was six years behind his grade level. S-43; S-52. What is more disturbing is that in October, 1997, one year earlier, Student was functioning four years behind his actual grade level placement in reading, reading comprehension, and spelling, and three years below grade level in written expression. S-52. Thus, Student actually regressed two years, and the gap between his grade level and achievement levels continued to dramatically widen from Student's fifth grade school year in 1997 to his sixth grade school year in 1998 while the District astonishingly maintained Student was making educational progress. S-40; S-43; S-52.

- Student's mother testified that, during the 1998-1999 to the 2000-2001 school years, the District specifically misrepresented on at least two occasions that Student was reading at a higher level than he actually was, based on a curriculum based assessment. N.T. 435-436.

- In the April 30, 2001 ER, the District continued to maintain Student was making educational progress, stating "Student has demonstrated satisfactory performance in school [and] Student continues to make steady progress in the Wilson Reading Program." S-28. This statement made to Student's parents represented yet another specific misrepresentation on behalf of the District. Student was actually

functioning at least four years behind his actual grade level placement in reading at the time this representation was made. S-27.

- The District's May 17, 2001 IEP unbelievably contradicted itself in the present education levels by indicating Student's reading level of at least four years below grade level, but then specifically misrepresented to Student's parents that "he is making satisfactory progress." S-27.

- The District made another specific misrepresentation to Student's parents in the present education levels of the May 19, 2003 IEP, stating "Student has been demonstrating satisfactory performance in his classes." S-20. Student's final grades for his 2002-2003 school year, however, consisted of two F's, three D minuses, two D's**,** and two D pluses, which did not reflect "satisfactory performance in his classes**.**" S-2.

- Over Student's elementary, middle, and high school years, the District repeatedly made statements that Student was making academic progress when parents expressed their concerns regarding Student's progress. N.T. 465.

- The District continually made specific misrepresentations to parents that Student was making educational progress at IEP meetings, in report cards, and in progress reports over the years. N.T. 417-418, 437-439.

- The District admitted that Student's parents were told during his tenth, eleventh, and twelfth grade school years that Student was making educational progress. N.T. 206, 226, 302.

- When Student's mother attempted to address the results of the District's August 2004 ER which clearly indicated Student's failure to make educational progress, the District advised her that she was misinterpreting the results of the report. S-23; N.T. 459-460, 469, 471-472.[1]

Because of the statutory language, Parents must show that they were "prevented from requesting the hearing" because of either misrepresentations or a withholding of information by

[1] These specific allegations are quoted verbatim from the Motion in Support of Parents' Claims That the Statute of Limitations in IDEA is not Applicable and Student was Improperly Graduated from the District, pp. 5 through 9.

the School District. Subpart (i) requires both a "specific misrepresentation" and a showing that the misrepresentation resolved "the problem forming the basis of the complaint." The Hearing Officer has carefully considered each of these 13 bullet points. Not one of these bullet statements (even if assumed true) meets the statutory requirement. There is no doubt that the School District told the Parents that the Student was making educational progress. Parents may now dispute this progress, but such reporting cannot reasonably be construed as a specific misrepresentation that any "problem was resolved."

The Hearing Officer must agree with the School District that many communications between the school and the Parent demonstrated that Student had ongoing educational struggles, particularly in the area of reading. Parent admitted that she received these communications and she knew that Student was struggling academically. (N.T. 408). None of these communications would have "prevented" the Parent from requesting a due process hearing. 20 U.S.C. §1415(f)(3)(D).

Nearly all of the Parents' bullet statements attempt to establish that Student failed to make *any* educational progress. However, Mother credibly testified that while she believed there was *some* educational progress, she was concerned with how much Student was making. (N.T. 417). Further, she testified that she did not think that the School District was intentionally misrepresenting anything; she knew that her son was making progress, but she questioned the level of achievement reported by the School District. (N.T. 417).

If Mother repeatedly questioned the progress made by her son, she has given this Hearing Officer no reasons why she could not have requested a due process hearing at the time she was questioning his progress. This case is not at all like the situation in *Lauren P. v.*

Wissahickon School District, 2007 U.S. Dist. LEXIS 44945, in which the Court explained that a school district may not rely upon parental approval to disclaim its responsibilities because parents may not be "sufficiently sophisticated" to deal with complicated educational matters. When analyzing a failure to file a timely claim, the words of the statute limit the reasons sufficient to excuse a failure to file. The statute of limitations applies to both the unsophisticated and the sophisticated parent. Mother here must show reasons which "prevented" her from requesting a due process hearing.

The Hearing Officer is persuaded by the fact that the School District consistently reported failing grades over the course of Student's education and certainly reported achievement scores indicating borderline functioning in reading, writing, and mathematics. (S-2; S-7; S-12; S-23; P-8; N.T. 409). Parents knew that Student did not pass the PSSA in 11th grade and that he was not proficient with respect to basic skills. (N.T. 391). There is no doubt that the School District may have made comments relating to the fact that it was working on these problems (*see e.g.* N.T. 305-307), but there is absolutely no testimony of record suggesting that the School District had "resolved the problem."

The Hearing Officer is further persuaded by Parents' letter dated July 28, 1997 in which Parent contends that Student "can't read" and that he "cannot write a paragraph" and has an ineffective teacher. (S-59, pp. 2-3). It is difficult, if not impossible, to ignore the July 28, 1997 letter as a date on which the Parent "knew or should have known about" the School District's failure to provide FAPE. Parents' counter to this letter is that when Student was moved to another school Parents believed that the "problem was corrected." (Petitioner's Motion, p. 6). The "problem" is allegedly ineffective teaching and the denial of an

appropriate educational opportunity. The Hearing Officer simply cannot accept that the Parent had been led to believe that the "problem" had been resolved or, more precisely, that there were any misrepresentations suggesting that the "problem" had been resolved. If the Parents knew or should have known that their son was making little or no educational progress, they had the statutory responsibility to file a timely request for due process. Mother acknowledged having received many procedural safeguard notices between 1997 and June 2005. (N.T. 419-424).

While the Hearing Officer may be sympathetic to the plight of this Student, she is unable and unwilling to bend the statutory language to allow for an exception based on "specific misrepresentations." The exceptions contained in IDEIA must be strictly, not broadly, construed. *See Givens v. Kyler*, 2004 U.S. Dist. LEXIS 20325.

Withholding of Information

Parents contend that even if the Hearing Officer fails to find specific misrepresentations, then the School District withheld information that was required to be provided to the Parents sufficient to satisfy subpart (ii) of the statute. In support of this argument, they give the following examples of incidents in which the District withheld necessary information:

- While Student demonstrated regression in reading and language arts over the 1994-1995 and 1996-1997 school years, the District inaccurately maintained Student was making satisfactory academic progress in a letter to his parents from the District's Supervisor of Special Education dated August 14, 1997. S-40; S-60; S-66. Thus, the District withheld accurate information from Student's parents regarding Student's lack of progress toward his annual IEP goals for reading and language arts during that time period. S-50; S-53; S-63; S-65; S-67.

- In response to parental concern in December of 1998, the District's Supervisor of Special Education inaccurately reported to Student's parents that Student was making educational progress when, in fact, Student was functioning four years below grade level in reading. S-40; S-41; S-43. The District, yet again, withheld information with respect to Student's progress that it was required to provide to parents.

- None of the District's IEPs for Student over the years, with the exception of the May 10, 2002 and May 19, 2003 IEPs, which are nevertheless woefully inadequate, included any information regarding Student's progress on his annual IEP goals. S-12; S-19; S-20; S-24; S-25; S-27; S-32; S-35; S-43; S-50; S-53; S-63; S-65; S-67.

- The District's IEP progress reports provided to Student's parents during his high school years did not accurately reflect Student's lack of progress, whereby the District withheld information from Student's parents it was required to provide. The District testified that the minimal and inaccurate IEP progress reports included in the May 19, 2003 IEP are representative of the types of progress reports Student's parents received during high school. S-19; N.T. 307.

- The District admitted that it withheld information pertaining to Student's expected rate of progress in all of the District's ERs, IEPs, and progress reports developed for Student over the years. N.T. 553.[2]

Again, the Hearing Officer has carefully considered each of these bullets. These arguments also fall short of the proof of "withholding of information" which would excuse a late request for a due process hearing. Parent testified that the School District never denied her any documents. (N.T. 376-377). The Student's IEP case manager, stated that educational records such as progress reports on IEP goals and objectives were prepared and regularly mailed to Student's mother. (N.T. 274-276). The arguments made by Parents that the School

[2] These specific allegations are quoted verbatim from the Motion in Support of Parents' Claims That the Statute of Limitations in IDEA is not Applicable and Student was Improperly Graduated from the District, pp. 10 through 11.

District "admitted" that it withheld information is simply not supported by the testimony of record at N.T. 553.

Another piece of compelling testimony came from Mother. She was aware of a re-evaluation conducted by the District when a certified psychologist called her to explain that his 2004 report identified that Student's achievement in reading and written expression was significantly discrepant from his ability, that his reading comprehension and sight vocabulary skills were well below the average range, and that he read very slowly and required much more additional time to complete grade level reading assignments. He mailed her the full report. All of this information was also referenced in the December 2004 IEP. (S-12, pp. 4-5; S-23; N.T. 405-407). According to Mother, she knew her son was struggling in the 12th grade. (N.T. 408). This is not the testimony of a parent who was prevented from requesting a hearing because of the withholding of information.

Parents make the novel argument that the School District "withheld" information advising Parent of the statute of limitations. The problem with this argument is that the IDEIA did not become effective until July 1, 2005, admittedly *after* the Student had already graduated. One must wonder how a school district could have advised a parent of a limitations period during the years before Student's June 2005 graduation when the statute failed to contain any specific limitations period at that time. Had the Parents promptly complained and requested a hearing during those years he was in school, there would be no limitations issue. However, Parents waited to complain and are now subject to a two-year limitations period in effect at the

time they finally filed their due process request. It was not in effect at the time Student was in school.[3]

The Parents have failed to show that any "withholding of information" prevented them from making a due process hearing request.

The Statute of Limitations Relative To Section 504 of the Rehabilitation Act

Although Section 504 does not contain a statute of limitations, the federal courts have applied that state statute which is most analogous to the federal claim. In Pennsylvania, courts have held that a two-year statute of limitations for personal injury claims is applicable to Section 504. *Zankel v. Temple University*, 2006 U.S. Dist. LEXIS 22473; *Barclay v. Amtrak*, 343 F. Supp. 2d 429, 433 (E.D. Pa. 2004) (quoting *Saylor v. Ridge*, 989 F. Supp. 680, 686 (E.D. Pa. 1998). The Hearing Officer specifically rejects any legal argument that a period longer than two years should be recognized to file a claim of discrimination under Section 504. This holding includes any argument that the minority tolling statute gives Student here a longer period in which to file a claim which is essentially one for relief under the IDEIA. It is the adult parent who is bringing this due process hearing request, not a minor.

"Unlawful" Graduation

The IDEIA requires that a student receive FAPE until the student reaches 21 years of age or, having obtained a regular education high school diploma, is no longer in need of

[3] This Hearing Officer rejects any argument that the limitations period in IDEIA is being applied "retroactively." Having filed a due process request on May 1, 2007, some 22 months after the effective date, this due process

specially designed instruction. 34 C.F.R. §300.122(a)(3)(ii). This Hearing Officer believes that it is the Parent who must bear the burden of establishing that Student was not entitled to receive a high school diploma. Although Parents attempt to shift the burden to the School District, the Hearing Officer maintains that the burden is properly placed upon the Parents who are the moving party in this due process hearing request.

Parents allege that Student failed to meet either the state or the District graduation requirements in the following respects: (1) Student's absences prevented him from completing the required hours of instruction; (2) the District's alternative local assessment was invalid; and (3) Student failed to receive the requisite number of credits to graduate.

Student's absences prevented him from completing the required hours of instruction.

The flaw in Parents' argument is that it fails to recognize that the overwhelming number of Student's admittedly frequent absences was excused. (*See* S-2). Student had only four unexcused absences during his ninth, tenth, and eleventh grade school years. He had 59.5 excused absences but only 15.5 unexcused absences during the twelfth grade year. (S-2). It does not appear that these absences violate 22 Pa. Code §11.23 and §11.25, permitting the excusing of compulsory school attendance under certain conditions.

The School District certainly complained about Student's failure to attend school, but the Parents continued to provide excuses for his absences. (S-16 pp.5-6; S-17; S-18; S-19).

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request is without question subject to the limitations period in IDEIA.

The District's alternative local assessment was invalid.

The gist of this argument is that the School District improperly evaluated Student's written work contained in a portfolio to satisfy graduation requirements. A school district is permitted to adopt a local assessment system. 22 Pa. Code §4.52. In this case, the School District offered testimony regarding how the academic content standards were utilized as an alternative assessment. This took the form of a portfolio review process. (N.T. 588-591; 583-584). It is undisputed that the School District found Student's portfolio containing specific written work by Student to be satisfactory and to comply with its local assessment system adopted pursuant to the Pennsylvania Code. The Hearing Officer finds the Parents' arguments to the contrary both legally unsound and not based upon the record evidence.

Student failed to receive the requisite number of credits to graduate.

The only testimony of record is that Student received the requisite number of course credits in English, Science, and Social Studies to graduate. He had sufficient credits to receive a regular high school diploma. (S-2; N.T. 43-50, 88). This testimony based upon Student's transcript confirms that credits were given for the required number of courses. It is undisputed that he was awarded a regular education diploma. (N.T. 64-65). Mother testified that she had ample notice that her son was slated to graduate. (N.T. 387). She was advised at IEP meetings in both the 11th and 12th grade years that Student could remain at school after the conclusion of his 12th grade year, instead of graduating. (N.T. 389-90). The burden, once

again, is upon the Parents to show that the School District improperly awarded a regular education diploma.

Underlying the entire argument is the premise that awarding credit for resource room classes is unlawful and inappropriate. However, Parents cite to no legal authority for this proposition and Parents knew that Student was receiving credit for his resource room classes throughout his high school career. (N.T. 365-67). The argument that Student failed to receive the requisite number of credits must be rejected.

Conclusion

Having concluded that the Parents have failed to meet their burden of establishing an exception to the two-year limitations period contained in IDEIA, the Hearing Officer will entertain only those claims arising after May 1, 2005. Further, the Hearing Officer finds that the Student was lawfully graduated on June 17, 2005.

Debra K. Wallet
Debra K. Wallet, Esq.
Hearing Officer

Date: September 6, 2007

In re SI	**:**	**ODR No. 7632/06-07 LS**
	:	
a student in the	**:**	
Central Bucks School District	**:**	

INTERIM ORDER WITH RESPECT TO:
(1) PARENTS' MOTION TO PLACE THE BURDEN OF PROOF ON THE SCHOOL DISTRICT WITH RESPECT TO THE STATUTE OF LIMITATIONS AND (2) APPLICABILITY OF THE CONTINUING VIOLATIONS DOCTRINE

Introduction

Parents, on behalf of Student who has since graduated from high school with a diploma, initiated a due process hearing by filing a May 1, 2007 request seeking compensatory education for the period from Student's 1997-1998 school year to the present for the School District's alleged failure to provide a free appropriate public education (hereinafter FAPE). While in school, Student was identified as having learning disabilities in reading, math, and language arts.

The School District filed a timely response to the due process request including the affirmative defense that the statute of limitations bars any claims prior to May 1, 2005. In response, the Parents request that this Hearing Officer determine who bears the burden of proving the facts necessary to establish the relevant limitations period. In addition, the parties have briefed the "pure legal issue" of whether or not the continuing violations doctrine should be applicable to cases under The Individuals with Disabilities Education Improvement Act of 2004 [hereinafter IDEIA], 20 U.S.C. §1400 *et seq*. or Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §793 [hereinafter Section 504].

This Interim Order is not intended to be a definitive ruling on all of the statute of limitations issues raised in this case. The Hearing Officer has agreed to hear any relevant testimony and other evidence related to when the parent "knew or should have known about the alleged action that forms the basis of the complaint" or the exceptions in the IDEIA concerning specific misrepresentations or withholding of information. *See* 20 U.S.C. §1415(f)(3)(C) and (D).

Burden of Proof With Respect to the Statute of Limitations

In *Schaffer v. Weast,* 126 S. Ct. 528 (2005), our United States Supreme Court established that the party seeking relief bears the burden of persuasion under IDEIA. In accordance with *Schaffer*, Parents will bear the burden of going forward to establish their entitlement to compensatory education or any other relief warranted for violations of IDEIA. Parents now assert that because the statute of limitations is an affirmative defense, the burden of proof on this issue (as opposed to persuasion) should fall upon the Defendant, citing *Richard B. Roush, Inc., Profit Sharing Plan v. New England Mutual Life Insurance Co.*, 311 F.3d 581, 585 (3d. Cir. 2002).

Specifically, Parents contend that it is the School District's burden to prove "the start date of the statute of limitations." The Hearing Officer rejects this argument. The legal analysis concerns the following statutory provision:

> (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.

(E) 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.

Section 1415 of the IDEIA, 20 U.S.C. §1415(f)(3)(C) and (D).

It should be obvious from the language of IDEIA that if Parent wishes to assert exceptions to the timeline under subsection (D), the burden would clearly fall upon the Parent to plead and prove the misrepresentation or the withholding of information. *See, e.g., Velez v. QVC, Inc.*, 227 F. Supp. 2d 384 (E.D. Pa. 2002). Similarly, it is incumbent upon the Parents to plead specific incidents of violations of IDEIA such that the due process hearing request has been made within two years of the date of those incidents. The Hearing Officer finds that it would turn the statute on its head to impose upon the School District the requirement to show a lawful start date when it must be the Parent who "knew or should have known about the alleged action."

The reliance on *Roush*, *supra*, is misplaced. The Third Circuit Court of Appeals in *Roush* placed the burden of proof on the party moving for summary judgment with respect to a statute of limitations issue. As the moving party, the defendant was required to prove that

actual knowledge of a breach of fiduciary duty occurred more than three years before the action was filed and that because of this the action was necessarily barred by the statute of limitations. This is not the same as requiring the School District to show a "start date"[4] for a timely due process request.

The Hearing Officer agrees with the School District that the burden of pleading and proving facts to establish that a timely due process request has been brought here must fall squarely upon the parents who have made the due process request. The motion to place the burden on the School District is denied.

Applicability of the continuing violations doctrine on the statute of limitations

The Parties agree that the United States Court of Appeals for the Third Circuit has not yet ruled on whether the continuing violations doctrine applies to actions brought under the IDEIA, its predecessor the Individuals with Disabilities Education Act [hereinafter IDEA], or Section 504. The continuing violations doctrine refers to the concept that when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period. In such instance, a court may grant relief for the earlier related acts that would otherwise be time barred. *Brenner v. Local 514*, 927 F.2d 1283, 1295 (3d Cir. 1991), citing *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1129 (3d Cir. 1988).

[4] Parents also cite *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007) as support for their statement that "proof of the expiration of the statute of limitations clearly requires proof of the lawful start date for the limitations period." While the Hearing Officer generally agrees with the statement, she can find nothing in this case which even remotely addresses this issue.

The question, as this Hearing Officer sees it, is whether or not those cases applying the continuing violations doctrine to IDEA (before IDEIA added specific timeliness language) should now be applicable to cases brought after the effective date of IDEIA on July 1, 2005. If, as the School District contends, the continuing violations doctrine is in the nature of an exception to a given statute of limitations, then it is difficult to reconcile that IDEIA included two specific exceptions but did not incorporate the concepts of continuing violations. On the other hand, if it is more in the nature of an equitable consideration, then these concepts could still apply to IDEIA.

Frankly, *Robert R. v. Marple Newtown School District*, 2005 U.S. Dist. LEXIS 27093, much debated by the parties here is not helpful in this decision. At best, any analysis about "ongoing" claims in *Robert R.* must be considered dicta because the case involved IDEA, not the IDEIA. Moreover, the dicta in *Robert R.* is neither analytical nor persuasive.

This Hearing Officer is more persuaded by the analysis of the Wisconsin Court in *Vandenberg v. Appleton Area School District*, 252 F. Supp. 2d 786, 789-93 (E.D. Wis 2003) writing about IDEA as well but explaining that a "student's education, if defective, fits all too easily into the category of a 'continuing violation' and thus the application of an exception would swallow the rule itself. Under Plaintiffs' theory, a parent could, upon student's graduation from eighth grade, seek a due process hearing to remedy the entire eight years of inadequate education merely because the entire education was a continuing violation." *Id.* at 793.

Congress addressed the problem of a lack of a specific limitation on claims under IDEA and imposed a two-year timeline in IDEIA. A state is permitted to impose a different

time limitation, but Pennsylvania does not have one. The Congressional mandate is not without two specific exceptions for misrepresentation or the withholding of information. Yet, allowing a continuing violation doctrine would make it quite easy to defeat the very intention of a two-year limitation. This Hearing Officer believes that application of a continuing violations doctrine would, indeed, eviscerate the limitations period itself. Consequently, as a matter of law, the continuing violations doctrine will not be applied.

The analysis with respect to Section 504 is more difficult. As a nondiscrimination statute, at first blush, it is more akin to the employment discrimination statutes in which the continuing violations doctrine is applied by the Third Circuit Court of Appeals and most other circuits. *See, e.g., West v. Philadelphia Electric Co.*, 45 F.3d 744 (3d Cir. 1995) and the cases cited therein.

Courts have held that a two-year statute of limitations for personal injury claims is applicable to Section 504. *Zankel v. Temple University*, 2006 U.S. Dist. LEXIS 22473; *Barclay v. Amtrak*, 343 F. Supp. 2d 429, 433 (E.D. Pa. 2004) (quoting *Saylor v. Ridge*, 989 F. Supp. 680, 686 (E.D. Pa. 1998).

Parents allege that the Eastern District of Pennsylvania has applied the continuing violations doctrine to Section 504 in *Sutton v. West Chester Area School District*, 2004 U.S. Dist. LEXIS 7967. The language is not precise, but upon close reading, this case does not apply continuing violations to claims under Section 504 but only to pleaded claims of abuse of process, which it appears to consider claims under common law. Even if it had directly applied the doctrine to Section 504, the Court gives no analysis or reasoning regarding the applicability of the continuing violations doctrine to Section 504.

In the absence of any case law and because it would make little sense to deny relief under IDEIA but grant that same relief under Section 504, the continuing violations theory will not be applied to Section 504. By the same reasoning, the application of a continuing violations doctrine in an education context where education is, by nature, a continuous process would eviscerate the statute of limitations.

Debra K. Wallet
Debra K. Wallet, Esq.
Hearing Officer

Date: July 23, 2007