

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
SPECIAL EDUCATION APPEALS**

**In Re:** Student v.  
Pentucket Regional School District

**BSEA # 12-8636 R**

**DECISION**

The above-referenced matter comes to the BSEA on a Remand from the Federal District Court for the District of Massachusetts for exhaustion and fact finding purposes. The matter was bifurcated via a Ruling issued on March 26, 2015 (later amended via Order issued on April 27, 2015) and therefore, this Decision addressed only the first portion of the case. All issues addressing Student's substantive claims regarding the finding of no eligibility for special education services will be addressed at separate Hearing.

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

The Hearing in this matter was held on May 1, 2015, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings<sup>1</sup> were:

Student's Father<sup>2</sup>

Paige Tobin, Esq.

Julie Muse Fisher, Esq.

Colby Brunt, Esq.

Attorney for Pentucket Regional School District

Attorney for Pentucket Regional School District

Former Attorney Pentucket Regional School District<sup>3</sup>

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<sup>1</sup> Student did not attend the Hearing and did not communicate with the BSEA on that day. During the lunch break on the date of Hearing, the Hearing Officer was handed an email from Mother stating that she was not attending and noting that:

As indicated in my motion to stay, I am opposed to any further proceedings in this matter without the express opinion of the judge Woodlock regarding his decision in one –CV–11414 –DPW dated January 16, 2015 which defined the scope of the hearing on remand.

Due to the fact that the hearing officer's scheduling order dated March 26, 2015 allegedly violates the rights of myself and my children by denying without any explanation the motion to quash subpoena *duces tecum* and ordering a hearing on a contract claim which is not within the scope of our hearing request or the remand order by judge Woodlock, it appears that this hearing is on behalf of another interested party who has not provided me with any notice of their claim.

This violates my rights to due process in both the IDEA and the 14<sup>th</sup> amendment. I expected the Federal law, Federal statute and Federal privilege to apply in a hearing strictly upon Federal statutory law and IDEA and 504 and ADA.

<sup>2</sup> As used in the body of this Decision the word Parent shall refer exclusively to Student's mother, not her father.

<sup>3</sup> Attorney Brunt testified via telephonic conference.

Jonathon Seymour	Pentucket Regional School District
Michael Jarvis	Director of Special Education, Pentucket Regional School District
Jack Tiano	Former Director of Special Education for Pentucket Regional School District
Carol Kusinitz	Doris O. Wong Associates Inc., Court Reporter

The official record of the hearing consists of documents submitted by Pentucket Regional School District (Pentucket) marked as exhibits SE-1A, SE-1B, SE-2A, SE-3A through SE-3T<sup>4</sup>; recorded oral testimony, and Pentucket's oral closing argument.<sup>5</sup> Student/ Parent did not submit any exhibits. The record closed on May 1, 2015.

### **ISSUES FOR HEARING<sup>6</sup>:**

1. Fact finding regarding Parent's understanding and intent in dismissing "her BSEA case" per the agreement entered into by the Parties on December 3, 2012.
2. Whether Parent's December 20, 2012 letter should have been treated as a request for hearing relating back to and incorporating the content of Parent's May 23, 2012 Hearing Request?
3. Whether the statute of limitations regarding the "child find" issue should be tolled back to 2002?

### **POSITIONS OF THE PARTIES:**

#### **Parent's Position:**

In the May 2012 Hearing Request, Parent challenged Pentucket's finding of non-eligibility of Student for special education. Parent asserted that Pentucket had known about Student's disabilities since at least 2002.<sup>7</sup> To this effect, Parent asserts numerous procedural due

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<sup>4</sup> Pentucket's right to supplement exhibits and offer additional testimony at subsequent Hearings between the Parties was reserved.

<sup>5</sup> A copy of the transcript of the Hearing has been forwarded to Student/ Parent at the only address on record for them.

<sup>6</sup> See Order dated April 17, 2015.

<sup>7</sup> At paragraph 7 of the May 2012 Hearing Request, Parent wrote:

7.) A child find violation is the ultimate failure to identify a student under the requirements of a child find 34 CFR 300.8 and in need of special education even though they are advancing from grade to grade. Procedural safeguards violations: in 2002 parent had in fact referred student for eligibility determination for special education back in third grade. The school did not inform parents of any formal process that was required. The school psychologist did an "evaluation" based on questionnaires given to Parent and teacher in 2002, and produced a report for Parent with recommendations. However, no consent was ever requested or given and no procedural protections were afforded Parent or Student whatsoever. No prior written notice of anything was provided. Pentucket did not comply with any Federal or state laws, which effectively prevented Parent from participating in child's education in violation of 34 CFR 300.501, 300.503, 300.504. Records show that over the next three years Parent communicated with teachers over concerns about Student's difficulty in school with organizational skills, following directions, producing

process violations by Pentucket (i.e., child find violations and failure to provide Parent with procedural safeguards), which, according to Parent/Student, resulted in a denial of FAPE. Said denial of FAPE prevented Student from getting accepted to her universities of choice. Parent/ Student asserted that Student had no other option but to attend Landmark College where her disabilities could be addressed.

Student/ Parent seek compensatory education by way of funding/reimbursement for Student's education at Landmark College.

### **Pentucket's Position:**

Pentucket denies all of Parent's/Student's allegations. The district asserts that despite being a pro-se litigant, Parent is savvier in special education law than the average parent. She also consulted with an attorney knowledgeable about special education law during the negotiation stages of the December 2012 agreement. Therefore, Pentucket argues that she fully understood the terms of the 2012 Agreement when she signed it, which agreement extinguished all of Parent's claims and thus the requirement for her to withdraw her case: not just with respect to her reimbursement claim for the independent evaluation, but as to all other issues involving Parent. Only Student's claims, regarding the finding of non-eligibility and reimbursement survived the Agreement, hence the requirement for withdrawal of the BSEA case without prejudice.

Pentucket also denies all of the procedural transgressions asserted by Parent/Student. More importantly, Pentucket argues that the statute of limitations should not be expanded beyond two years to allow Parent's/Student's claims dating back to 2002 because Parent/ Student

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classwork and homework while the school notified Parent of similar concerns which it asserted were "attention" related. Parent received hand written notices from the school asserting that the school had initiated a "team meeting" to discuss Student but did not invite Parent to participate in violation of 34 CFR 300.322. Essentially the school district bypassed all legal requirements related to special education. 34 CFR 300.121.

8.) Student has been denied a FAPE: the school failed to follow special education regulations which resulted in a denial of FAPE and this extensive violations throughout Student's entire elementary and secondary education resulted in Student not achieving to her educational and functional potential. The failure caused Student years of unnecessary harm including a) ineligible to participate in extracurricular activities throughout her high school years due to her failing grades which resulted from her inability to access the curriculum; b) further harm resulted since Student was unable to achieve grades commensurate with her aptitude and educational potential, which barred her from gaining acceptance to a four year college program in her preferred area of interest and supported by her aptitude and potential; c) Student would have arguably received scholarships if she had been allowed to achieve her academic potential as she is in the High Average range both Verbal and Perceptual intelligence, and received advanced on her MCAS and very high on accommodated SAT. d) Eleven years of unnecessary emotional duress as a result of not being able to achieve her academic potential, enduring reprimands and accusations of being lazy and unmotivated by her teachers, and missed opportunities socially all resulted.

9.) This complaint has been filed in accordance with 34 CFR 300.507 (a)(1) as several of these violations could not have been known by the parent due to the significant extent of procedural safeguard violations. Also this hearing request is not intended to limit, but rather to secure the student's rights in accordance with the maximum applicable Federal and state laws afforded her.

have not shown either of the two exceptions required under the IDEA. While Student was a minor and Parent was her guardian, no teacher or provider ever saw reason to refer Student for special education services. Pentucket further asserts that at all times, it kept Parent informed of Student's progress as well as her challenges with organization and with completing homework. Pentucket asserts that, while a regular education student at Pentucket, Student passed the MCAS, placed within the average range of abilities in all Pentucket based testing, obtained credit for all necessary course work, was a candidate for and indeed graduated in 2012. Additionally, Pentucket complied with all other publication requirements regarding "child find" during each of the relevant years. As such, Pentucket disputes Parent's/ Student's allegations in this regard.

Moreover, Pentucket argues that Parent received and understood her Parent procedural due process rights and in fact asserted her rights on behalf of Student's sibling as far back as 2003. Additionally, regarding Student, Pentucket provided Parent the Notice of Procedural Safeguards in May, and in October 2011.

#### **FINDINGS OF FACT:**

1. Student is a twenty and a half year-old woman, whose Parent resided in Pentucket, MA, during all relevant time periods covered by this Decision. Student received all of her schooling at Pentucket, between 1999 and 2012. She reached the age of majority (18 years) in late July 2012 (SE-1A). At all times during her enrollment in Pentucket, Student received educational services as a regular education student.
2. Student's mother and father have been divorced since 2005 and while they shared custody of Student, educational decision making was left with Mother in whom Father had confidence in this regard. Between 2002 and 2005, Father lived with his family, helped Student with her homework from time to time and received her report cards. He was aware of Student's elementary and intermediate school reports but not high school reports (Father).
3. Father testified that he did not know the details of what was going on at home after the divorce but noted that he had not noticed Student having any major struggle in elementary or intermediate school. He also never requested a Hearing on behalf of Student with the BSEA (Father).
4. On November 18, 2003, at a Team meeting to ascertain Student's sibling's eligibility to receive special education services, Pentucket handed Parent the Parents' Rights Brochure containing IDEA procedural safeguards and related information for Massachusetts (SE-3H). The Narrative Description of School District Refusal to Act notes at the bottom

Parents have the the right to take advantage of any dispute mechanism available to refute the team's finding of no eligibility and contact information for the Bureau of Special Education Appeals (BSEA) and the Department of Education Problem Resolution System (PRS) is included in the Parents' Rights

Brochure. Alternatively, the parents may notify the district directly of their dispute with this finding, in which case the district will contact the BSEA. School district personnel remain committed to working with student and the student's parents to ensure school success (SE-3H).

5. Upon receiving notification from Mother and Father of their rejection of the finding of no eligibility for Student's sibling, Pentucket forwarded said rejection to the BSEA. On December 13, 2003, the BSEA forwarded a letter notifying them of their options for resolution of disputes through the BSEA, including mediation and Hearings (SE-3I).
6. The Parents' Right Brochure/ Notice of Procedural Safeguards was again provided by Pentucket to Parent on or about October 19, 2005, in connection with Pentucket's request for consent to evaluate Student's sibling, on or about November 15, 2007, pursuant to Parent's request for an evaluation of the aforementioned minor, and again on January 23, 2008 in conjunction with a review of a reading assessment for Student's sibling. Parent's disagreement with Pentucket triggered another BSEA dispute resolution letter on February 20, 2008 (SE-3I).
7. Michael Jarvis became the Director of Supplemental Intensive Services in Pentucket in 2012. Mr. Jarvis serves as the Administrator of Special Education and in that capacity he is the keeper of records relative to both Student and Student's sibling (SE-3K; Jarvis). At Hearing, Mr. Jarvis reviewed SE-3B (finding of no eligibility), SE-3D (permanent transcript), SE-3E (1<sup>st</sup> to 9<sup>th</sup> grade transcripts); SE-3F (MCAS results) and SE-3G (high school placement test). He testified that it is Pentucket's practice to hand parents the procedural safeguards at every Team meeting (initial eligibility, annual reviews and any other reconvening of the Team). According to Mr. Jarvis, the same practice continues to date (Jarvis).
8. Mr. Jarvis testified that a review of the Pentucket records showed that Parent had been provided the Parents Rights Brochure (containing the procedural safeguards information) as early as November of 2003 in connection with Student's sibling's first eligibility Team meeting (SE-3I). Thereafter, Pentucket's records showed that Parent had received Parents' Rights Brochures in 2005, 2007 and 2008 (Jarvis).
9. John Tiano was Pentucket's Administrator of Special Education for the period from July 2009 through June 2013. During his tenure, he oversaw the special education programs in Pentucket from pre-Kindergarten to twelfth grade, and there were no parental complaints regarding provision of procedural safeguards to parents during that time period (Tiano).
10. Mr. Jarvis and MR. Tiano testified that the Department of Elementary and Secondary Education (DESE, formerly known as "DOE") conducts periodic, onsite audits of school districts in Massachusetts to ascertain if the districts are complying with federal special education mandates, such as CFR 300.111; 300.131; 300.209, addressing Child Find, which appears as criterion number "SE 15" in the report (SE-3J). All of the Coordinated Program

Review reports containing DESE’s findings for criterion “SE 15”<sup>8</sup> covering the period from 1999 through 2011 note that Pentucket had “implemented” the requirements without the need for any further action (*Id.*). DESE’s Coordinated Program Review for the aforementioned time period also found implementation by Pentucket of legal standards pursuant to M.G.L. c. 71B §3, 603 CMR 28.04(1), CFR 300.503; 300.504(a)(1), appearing as report criterion “SE 25” et seq., as well as 603 CMR 28.07(1), CFR 300.300; 300.504, 603 CMR 28.08(3)(b), CFR 300.510, 603 CMR 28.02(21), CFR 300.322, 300.501, CFR 300.322(b)(1)(i), 603 CMR 28.07(8), CFR 300.322(e); 300.503(c), 603 CMR 28.03(1)(a)(4); 28.07(4), 603 CMR 28.05(4)(a) and (b), CFR 300.320(a)(1)(i) and a(2)(1)(A); 300.321(a)(4)(ii), report “criteria” “SE 27”, “SE 29”, “SE 32” and “SE 33” respectively (SE-3J). According to Mr. Jarvis, online and/or onsite reviews take place periodically to ensure Pentucket’s compliance with federal and state special Education mandates and Pentucket has consistently received an “implemented” rating for the period from 1999 through 2011 (Jarvis, Tiano). According to Mr. Tiano, implementation was 100% during his tenure (Tiano).

11. Mr. Jarvis and Mr. Tiano testified that Pentucket met its Child Find responsibilities by publishing annual Child Find Notices in the *Newburyport News* (or the *Daily News of Newburyport*) and/ or other local newspapers, as well as in physician’s offices. This was done every fall (SE-3L; Jarvis, Tiano).
12. Student’s Kindergarten to sixth grade report cards note that Student had difficulties completing work consistently and on time, and that she had difficulty organizing her time efficiently. However, it was further noted that over that time period her work habits and skills had improved (SE-3E). Every year, Student was promoted from one grade to the next as she completed the course credit requirements to pass her classes (*Id.*). In terms of work habits, it was noted in the Kindergarten, first and second grade report cards that Student needed time limits and reminders for task completion, that she chatted with others and did not take responsibility for homework. In Kindergarten, she also had a tendency to miss the first 10 minutes of the day (SE-3E). Improvement is noted in the third grade during which,

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<sup>8</sup> Criterion “SE 15” in DESE’s (a.k.a. DOE) Coordinated Program Review report addresses Outreach by the School District (Child Find) and notes that

When the district has annual or more frequent outreach and continues liaison with those groups below from which promotion or transfer of students in need of special education may be expected, or which would include students in need of special education:

1. Professionals in community
2. Private nursery schools
3. Day care facilities
4. Group homes
5. Parent organizations
6. Clinical/healthcare agencies
7. Early intervention programs
8. Private/parochial schools
9. Other agencies/organizations
10. The school or schools that are part of the district, including charter schools
11. Agencies serving migrant and/or homeless persons pursuant to the McKinney–Vento Education Act for Homeless Children (SE-3J).

despite being absent 19 days, “she made many academic strides” and was developing good work habits (SE-3E).

13. Letter grades appear beginning in fourth grade. During that year she obtained the following grades:

	1 <sup>st</sup> Term	2 <sup>nd</sup> Term	3 <sup>rd</sup> Term
Language Arts			
Reading	B-	B	B-
Writing	C+	C+	C+
Language Skills	C+	C	C
Mathematics	C+	C+	C
Science	B-	B-	B-
Social Studies	C	C-	B- (SE-3E).

The teacher noted that Student produced acceptable work but that her work habits were inconsistent. When focused, Student worked hard. Overall, she demonstrated understanding of concepts and could apply them in content areas (SE-3E).

14. In fifth grade Student was absent on 22 days, most during the second and third terms. The fifth grade report card showed the following grades:

	1 <sup>st</sup> Term	2 <sup>nd</sup> Term	3 <sup>rd</sup> Term
Language Arts			
Reading	B	B	B
Writing	C	C	C
Language Skills	B-	A-	A-
Mathematics	C+	C	A-
Science	B+	B+	B
Social Studies	D	C-	B+ (SE-3E).

15. Student’s attendance improved in sixth grade.

	1 <sup>st</sup> Term	2 <sup>nd</sup> Term	3 <sup>rd</sup> Term
Language Arts			
Reading	B-	B	B-
Writing	C+	C+	C+
Language Skills	B+	B-	C+
Mathematics	C+	C	C-
Science	C	B+	B-
Social Studies	C-	B+	A- (SE-3E).

Teacher notes that year reflect that Student demonstrated inconsistency in paragraph construction, organization, sentence completion and punctuation skills. However, Student scored 80% on the second term Reading Benchmark Comprehension test which

demonstrated her ability to perform at grade level. Areas needing improvement were: maintaining focus and attention, quality homework completion, effective test preparation, editing, following direction and accessing help (SE-3E).

16. In third grade, Student took her first MCAS examination in the area of Reading performing at the Proficient level (raw score of 34). The result of the fourth grade MCAS examinations placed Student in the Proficient range for English Language Arts (246) and Needs Improvement (236) in Mathematics. In fifth grade Student took the science and technology/engineering MCAS, scoring 240, which placed her in the Proficient level. Student's sixth grade MCAS scores for English Language Arts and Mathematics were 244 and 246 respectively, both within the Proficient level (SE-3F).

17. Student's seventh and eighth grade transcript reflects the following grades:

<b>Grade 7</b>	<b>Qtr 1</b>	<b>Qtr 2</b>	<b>Qtr 3</b>	<b>Qtr 4</b>	<b>FAV</b>
Art 7W			C+		
Computers II	C	B-	D	D	C-
English 7W	B	B	B	B+	B
French 7W			B+		
German 7W				C+	C+
Health 7W				C	C
Music 7W		C			
Physical Ed. 7W		A-			
Science 7W	B	A-	B	C	B
Social Studies 7W	B-	A-	A	B	B
Spanish 7W		B+			
<b>Grade 8</b>	<b>Qtr 1</b>	<b>Qtr 2</b>	<b>Qtr 3</b>	<b>Qtr 4</b>	<b>FAV</b>
AE 8R	A	A			
Art 8R Sec. 6				B-	
Computers IIB 8R A	C+	B	B	B	B-
English 8R	A-	B+	A-	A-	B+
Health 8R Sec.4			B		
Physical Ed. 8R		A			
Science 8R	B	B	A-	C	B
Social Studies 8R	B	B-	B-	B-	B
Spanish 8R	B-	B+	C	C	C+

In eighth grade Student was absent 9.5 times, tardy 12 times and Dismissed 9 times (SE-3D).

18. In seventh grade, Student's MCAS score in English Language Arts was 246 and in Mathematics 260, both within the Proficient level (SE-3F).

19. Student scored solidly within the high average and above average range of ability in her high school placement test administered while she attended eighth grade. This test assessed her



cognitive skills (verbal and quantitative abilities) and basic skills including reading, mathematics and language (SE-3G).

20. In high school, Student's Report cards show that Student displayed mostly satisfactory and excellent conduct and effort in ninth grade, during which Student was placed on Honor Roll in December 2008 (SE-3E). As time went on, while conduct remained excellent and/or satisfactory, effort levels decreased to the "needs improvement level" in tenth, eleventh and twelfth grade,s with even one "unsatisfactory" ranking in her junior year (*Id.*).

21. Student's grades and performance during her four years in high school varied widely<sup>9</sup> (SE-3E). During this time, she worked as a ski instructor, which she greatly enjoyed. (Student

<sup>9</sup> Student's high school transcript reflects the following grades:

		Final Gade Avg.	1st Quart	2 <sup>nd</sup> Quart	Mid-yr Exam	3 <sup>rd</sup> Quart	4 <sup>th</sup> Quart	Final Exam
2008-2009								
American Studies	9H	B	A	B-	C+	C+	B-	B
Biology	9H	C	C+	C+	C-	C	C-	B-
English	9H	B-	B	B-	C-	B-	B	C
Geometry	9H	C	A-	C	C+	C+	D+	D
Health Education	9	A		A				A-
Level II Spanish	CP	B-	A-	A-	C	B	D	C+
Physical Education	9	A+	A+					A+
World Foods I	CP	C+				C+	C-	A-
WR. LAB	9	C-				C-	C-	
2009-2010								
Advanced Algebra	H	C	C	C-	B	C+	C+	D+
AM Studies 10	H	C	B-	D	B	C+	D-	C
Basic Design	CP	C-	C-	C				C-
Chemistry 10	H	C	B-	C	C+	D	C-	B-
English 10	H	D+	D	F	C	B-	F	B-
Health Education 10	H	B					B	
Level III Spanish	H	F	D-	F	F	D+	F	F
Physical Education	10	A+				A+		
Technical Draft/Cadi	CP	B				B	C-	B
Teach Engineering	CP	A-	A	B+				B+
2010-2011								
Creative Writing	CP	D	B	F				C
Drawing	CP	C				C	C	E
English 11	CP	C-	C+	D-	A-	F	F	E
Level III Spanish	CP	C+	B-	C-	B+	C	C+	E
Physics	H	F	C	F	C-	F	F	-
Pre-Calulus	CP	C+	C	B+	C+	B	D+	E
Problem Solve/ Tech.	CP	B-				C+	B	E
S World History	CP	B	A-	B+	A-	B-	C	E
2011-2012								
Citizen/ Government	CP	B	B	B				C+
English 12	CP	C-	D+	F	A	D	C	B+
Film as Literature	CP	D-				F	F	A+
Health and PE 11	CP	A				A	A	A
Level IV Spanish	H	D-	D-	D-	C	D-	F	C+
Painting I	H	D	C	F			D	D
Painting II	H	C			D-	B-	B-	C

was able to choose her schedule and decide how much time she wanted to spend instructing skiing) (Father).

- 22. In 2008, Student obtained a score of 246 (Proficient level) in her English Language Arts MCAS, and a 260 (high range of the Proficient level at the cusp of the Advanced level) in Mathematics (SE-3F). Thereafter, Student’s MCAS performance increased in English Language Arts with the 2008 exam (score of 252) and in 2010 (score of 256). In Mathematics, in 2008, Student obtained a score of 262, placing at the Advanced level. In 2010, her Mathematics score (260) remained at the cusp of the Advanced level (SE-3F). In 2009, Student scored 248 (Proficient) in Biology (SE-3F). Student did not receive any accommodations when taking the MCAS or any other standardized testing in Pentucket (Jarvis; Tiano; Seymore).
- 23. Jonathan Seymore, High School Principal in Pentucket, has held several positions within the district including social studies teacher, assistant principal and principal since he began working for Pentucket in 1998 (SE-3K; Seymore). According to Mr. Seymore, Student’s MCAS results show not just improvement but a strong, solid performance. In reviewing the standard test administered at the end of middle school in connection with high school placement, he testified that Student’s scores in all areas were “pretty strong” (Seymore).
- 24. Mr. Seymore testified that he frequently saw Student in school. He remembered her smile and noted that school personnel never had concerns regarding Student’s educational needs. Similarly, he did not recall any conversations over the years in which Parents raised educational concerns regarding their daughter (Seymore).
- 25. Mr. Tiano testified that during his tenure at Pentucket (2009-2013) no teacher ever brought concerns regarding Student’s educational performance (Tiano).
- 26. In 2011, Parent, concerned about Student’s attentional difficulties inquired of Student’s pediatrician about the possible presence of ADHD, inattentive type. Student’s pediatrician requested that Student’s teachers complete a Vanderbilt Assessment. The results were inconclusive for an ADHD diagnosis (SE-3R; SE-3P).
- 27. On May 17, 2011, Parent wrote to Melissa C. McElaney (Special Education Coordinator in Pentucket) requesting a core evaluation for Student and noting

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Physics	CP	B	B	B	B	B-	B+	A
Robotics		A	A-	A				C-
Statistics & Prob.	H	D	C	D-	C	F	D	C

(SE-3D).

In the transcript above, “H” stands for “Honors” level courses, and “CP” for College Preparatory level course. Mr. Seymore testified that honors courses are more difficult than college preparatory courses but also stated that at Pentucket, the level of difficulty for college preparatory and honors level courses is greater than in the average school district (Seymore).

... I realize this is very late in her education to be requesting this, however, [Student's] performance has steadily declined since her 10<sup>th</sup> grade year, below what I believe is her intellectual ability. Given our family history of learning disabilities and [Student's] early education difficulties, I thought it made sense to have her evaluated (SE-3R).

Attached to the letter was an Evaluation Consent Form prepared by Parent specifically requesting that only certain tests be administered, namely: WAIS-IV, (Wechsler Adolescent Intelligence Scale); the Stanford-Binet Intelligence Scale; Woodcock Johnson III Test of Cognitive Ability; the CTOPP and the RAN RAS (SE-3R). Parent's May 2011 is the only parental request for an evaluation of Student received by Pentucket (Jarvis; Tiano). Mr. Tiano was surprised that Mother's request for evaluations included a Parental Consent Form listing the specific tests she desired (Tiano).

28. On May 26, 2011, Pentucket forwarded to Parent its proposal to evaluate Student noting the district's rejection of some of the tests requested by Parent as unnecessary to the determination of eligibility for special education services. Pentucket proposed to conduct the WAIS (cognitive testing), academic testing, and the WJ-III, Test of Cognitive Abilities (Executive Processes Cluster), the Conner's Rating Scales, classroom observation, a record review, and forms for teachers to complete (SE-3Q). The Notice of Procedural Safeguards was provided to Parent (SE-3Q; Jarvis). By then, Parent had received several notices of Procedural Safeguards in connection with both of children and was well aware of her rights and the laws concerning Child Find (Jarvis).
29. Sometime during the summer of 2011 Student underwent school-based evaluations to assess her eligibility. Jim Gordon (school psychologist) performed a WAIS-IV and Conner's Rating Scales teachers/self-report, Angela Bonfanty-Brown (special education teacher) performed selected achievement subtests of the Woodcock Johnson-III and the Woodcock Johnson-III Test of Cognitive Abilities, Executive Processes Cluster. Additionally, Ms. Bonfanty-Brown reviewed the Educational Assessment A and B (teacher forms), Student's report cards and her performance in class. Ms. Brown also obtained feedback from Parent and Student (SE-3B).
30. Pentucket convened a Team meeting on October 18, 2011 to discuss the results of Student's initial evaluation (SE-3B; SE-3T). Present at the meeting: Mathew Smith (guidance counselor), Luana Cavallaro (Spanish teacher), Mother, Student, Melissa McElaney, Jim Gordon, Danielle Oliva (speech and language pathologist), Angela Bonfanty-Brown (SE-3C; SE-3T). Parent and Student opined that Student's slower processing speed was an area of disability but the school-based Team opined that it was a "relative weakness that [did] not impact [Student] on a daily basis" (SE-3B).
31. Team meeting notes for the October 18, 2011 meeting indicate that the result of Student's testing placed her in the average range of intelligence and performance, but also showed that Student required extra time for task completion in math to focus on accuracy. Student's teachers commented on her performance in class, and Mr. Smith reviewed what a DCAP

plan was. Student stated during the meeting that she did not require extra time to complete tests, essays or class work but rather it was the studying and homework completion at home where she needed extra time. Parent attributed Student's challenges at home to a slow processing speed, and raised concern over the impact homework completion had on Student's grades. When discussing the colleges in which Student was interested, Mr. Gordon noted that Student's GPA was too low for admission. Overall, the school based Team did not find that Student presented with a disability that qualified her to receive special education services (SE-3P).

32. At the October 18, 2011 Team meeting Parent was again provided with a copy of the Procedural Safeguards, with contact information for the Bureau of Special Education Appeals and the DESE's Program Resolution System. Parent accepted the document (SE-3P; Jarvis; Tiano). Mr. Tiano and Mr. Jarvis testified that every step of the way they complied with the procedural notice requirements as well as with all other necessary action, such as forwarding the rejected finding of no eligibility/IEP(s) to the BSEA (Tiano, Jarvis).
33. On October 24, 2011 Pentucket issued a Notice of finding of No Eligibility. The document states that Parent had been provided with the Parents' Rights Brochure and further notes that the family may notify the district directly of their disagreement with the finding and Pentucket would contact the BSEA (SE-3B).
34. On November 2, 2011, Parent rejected the finding of No Eligibility for Student and, further noting her disagreement with the school-based testing and findings, she requested funding for independent speech and language, neuropsychological, developmental visual processing and academic/educational evaluations (SE-3O).
35. On or about November 3, 2011, Pentucket forwarded Parent's rejection of the finding of no eligibility to the BSEA (SE-3N).
36. On January 30, 2012, Pentucket sent an invitation to reconvene Student's Team. The purpose of the Team meeting, which took place on February 2, 2012, was to review the report of Student's independent evaluation and determine her eligibility for special education services (SE-3S).
37. On February 14, 2012, the BSEA forwarded a packet to Parent containing the letter explaining dispute resolution options, explanation of the mediation process, a Hearing Request Form, a directory of low cost legal and advocacy services, and information on SpedEx<sup>10</sup> (SE-3M).
38. By the end of the 2011-2012 school year, Student earned the course credit necessary to graduate from high school and in June 2012 received her diploma (Seymore). Mr. Seymore recalled Student walking across the stage and accepting her high school diploma (*Id.*).

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<sup>10</sup> The Hearing Officer took administrative notice of the packet forwarded to parents upon receipt of a school district's notification regarding parental disagreement with a school district's determinations.

39. Colby Brunt, Esq., attorney for Pentucket between 2006 and 2013, represented Pentucket when Parent filed her numerous Hearing Requests on behalf of Student and Student's sibling<sup>11</sup>. Parent appeared pro-se when she filed on behalf of both her children (Brunt).
40. According to Attorney Brunt, Parent's May 23, 2012 Hearing Request on behalf of Student challenged the 2011 finding of no eligibility, sought reimbursement for an independent evaluation, raised Child Find issues and sought compensatory services for Student (retroactive reimbursement and prospective relief). Attorney Brunt filed Pentucket's response denying Parent's requests regarding Child Find, eligibility and compensatory services, and agreeing only to pay the state approved rate for the independent educational evaluation (Brunt).
41. Following a pre-hearing conference with Parent and Pentucket during the summer of 2012, the Parties agreed to have the Hearing Officer decide the independent evaluation reimbursement issue on paper. According to Attorney Brunt, Parent was seeking \$4,000.00 reimbursement and the state rate setting rate was much lower. Parent knew this because she had raised the same issue in her previous Hearing Request involving Student's sibling (Brunt).
42. Attorney Brunt testified that during the several months prior to September 2012, she, Parent and Attorney Sean Goguen, with whom Parent was consulting relative to her BSEA cases for Student and Student's sibling, had numerous communications regarding settling both Student's and her sibling's cases. Thereafter, the negotiations between Attorney Brunt and Parent continued through December 2012. At the time Parent was appearing on behalf of Student at the BSEA, she had an ongoing case involving Student's sibling in Superior Court. Attorney Goguen is a practicing attorney in Massachusetts who concentrates in special education law. Attorney Brunt referred to the negotiations as protracted and noted that the greatest "road block" to finalizing resolution during that period was Parent's insistence that the Agreement not prevent Student from asserting her rights against Pentucket given that Student had reached the age of majority in the summer of 2012. Between August and December 2012, most of the negotiations involved the language regarding dismissal of Student's case without prejudice (Brunt).
43. Attorney Brunt testified that when compared to the average pro-se parent, Parent was well versed in legal research, fully understood her parental rights, and was savvier than other parents with whom Attorney Brunt had interacted before. Parent had also been very active in the cases involving her son and she consulted with Attorney Goguen on behalf of both students. According to Attorney Brunt, "Parent absolutely understood the process" (Brunt).
44. Mr. Tiano testified that he was acquainted with Student and Mother while Student was in high school, initially in conjunction with an OCR complaint filed by Mother on behalf of

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<sup>11</sup> Administrative notice of Parent's filings regarding Student's sibling reflect that Parent requested hearings on his behalf on April 23, 2010, (BSEA #10-6783), September 2010 (BSEA #11-0931) and on June 15, 2012 (BSEA #12-9569). Due to a system change in 2010, the BSEA is unable to readily track cases filed earlier than 2010.

Student's sibling. He and Mother spoke quite often during that time. Mr. Tiano described Mother as a very intelligent woman who understood her rights and was capable of discussing the needs of her children and advocating for them effectively (Tiano).

45. Communication between Attorney Brunt and Attorney Goguen ceased on or about September 2012 when Parent asked Attorney Brunt to stop communicating with Attorney Goguen because it was costing her money. By then the terms and language of the Agreement had been almost completely negotiated and drafted (Brunt).
46. On November 26, 2012, the BSEA received Parent's letter dated November 25, 2012 responding to an Order to Show Cause issued by the BSEA. (The Order to Show Cause was issued after the Parties informed the Hearing Officer that they were not proceeding to Hearing and that they were discussing the final terms of an agreement.) Parent explained in her letter that the Parties had not reached an agreement and she requested that the matter be placed back on the Hearing calendar (Administrative Record). Parent's last paragraph stated:

Lastly, since the hearing request was submitted before [Student] turned 18 on July 25, 2012, pursuant to BSEA Rule I (1) [Student] would like her name added to the hearing request and for me to represent her as her advocate pursuant to BSEA Rule I(6). I remain an aggrieved party, financially as a Parent so I will also continue to represent myself Pro Se (BSEA Rule I(2). If this is not allowable please advise us so that we may seek legal counsel to represent [Student] (Administrative Record).

This letter was signed by both the Parent and Student. According to Pentucket, it was not copied on this letter.<sup>12</sup> Pentucket learned of its existence during a telephone conference call with the Hearing Officer on February 14, 2013, after which a copy was forwarded by the BSEA to Pentucket's counsel. Parent produced no documentary confirmation that she had forwarded the letter to Pentucket. The BSEA received the hard copy of Parent's letter on December 10, 2012 (Administrative Record. See also *Ruling on Pentucket Regional High School's Motion To Dismiss*, BSEA #12-8636, issued on March 11, 2013).

47. Email communications between Attorney Brunt and Parent dated November 30, 2012, noted that following reviewing of Parent's most recent emails and after discussions with Pentucket, the district was making a "last offer" in an attempt to resolve all of Parent's claims with Pentucket. The email reflected Pentucket's offer to fund four years of residential placement for Student's sibling and reimbursement for his 2012 summer program and his independent educational evaluation, as well as reimbursement for Student's independent educational evaluation as previously agreed (\$4,418.83). The total offer amount reflected a larger sum than Pentucket would be presenting in an Offer for Judgment in superior court relative to dismissal of Student's sibling's case in that venue (SE-1B). The email further states,

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<sup>12</sup> Throughout the period of time during which this matter has been open at the BSEA, Parent has diligently sent her correspondence to the BSEA and Pentucket via fax and mail.

The agreement language is similar to the language we previously agreed upon back in August [2012] when you were working with Sean Goguen. We still require that all previous BSEA cases be dismissed as well as the superior court case...

In addition to signing the agreement, you would have to agree to submit the attached motion regarding the issue of continuing jurisdiction to the judge and let the judge decide this issue. However, you must know that if the judge has an issue with the continuing jurisdiction, as both the AG's Attorney and I understand that he will base [it] on our last hearing, that will in no way invalidate our agreement. As you know, the continuing jurisdiction language is a deal breaker for the AG (I informed Sean Goguen of this via email on or about September 18 [,2012]) (SE-1B).

48. According to Attorney Brunt, the settlement offer was intended to dispose of the entirety of Parent's case in both Student's and Student's sibling's matters, leaving only the issues regarding the finding of no eligibility and request for reimbursement alive for Student to pursue separately. Since all of Parent's claims *vis á vis* both students were being settled, Pentucket requested in exchange that Parent withdraw BSEA #12-8636 without prejudice. The Parties' understanding would appear at paragraph 9 of their Settlement Agreement discussed below (Brunt).
49. Attorney Brunt testified that when the Parties discussed dismissal/withdrawal of BSEA #12-8636 "without prejudice" the Parties specifically referred to disposing of all claims separate from the issue of reimbursement for Student's independent evaluation because that issue had already been verbally settled between the Parties. The "without prejudice" language discussions referred to the remaining claims appearing in Parent's May 23, 2012 Hearing Request (Brunt).
50. Mr. Tiano testified that during the settlement negotiations with Parent, he and Attorney Brunt discussed the terms of the agreement. According to Mr. Tiano, Pentucket was looking to settle all of Parent's claims for both children so that Pentucket could be "done with both cases at the same time" (Tiano). According to him, the final terms of the agreement were handled by the Superintendent and Attorney Brunt (*Id.*).
51. On Sunday, December 2, 2012, Parent responded that the terms of the agreement were acceptable to her but noted her opinion that filing of a motion in superior court as a requirement of settlement, would delay the signing of the agreement and defeat the purpose of expediency and not participating in further hearings. Parent expressed her desire to execute the settlement agreement the following day. In a subsequent email the following day, Parent clarified that she was willing to file the motion in superior court as she was not intending to complicate matters (SE-1B).
52. The Settlement Agreement noted at paragraph 8 Pentucket's agreement to reimburse Parent \$4,418.83, (the full cost of Student's independent educational evaluation) within sixty (60) days of execution of the Agreement, and further required

Upon execution of this document, Parent will immediately dismiss with prejudice [Student's sibling's] case pending with the Bureau of Special Education Appeals [BSEA #12-----] and the superior court case (Docket # [---]). Parent will also immediately dismiss without prejudice her BSEA case involving her daughter [Student], (DOB--)(BSEA12-8636) (SE-1A, paragraph 9).

53. The record reflects that the \$4,418.83 agreed to be paid by Pentucket to Parent exceeded the amount originally quoted by Parent in her May 2012 Haring Request for Student's independent educational evaluation. The amount reflected in Parent's Hearing Request was \$3,600.<sup>13</sup>

54. Paragraph 13 of said Settlement Agreement further states that

The parties to this agreement hereby acknowledge that they had the opportunity to consult with an Attorney or other representative of their choice throughout these proceedings, that they have read this entire agreement, and signed this agreement voluntarily with full understanding of its terms and without any other inducements or promises except for those set forth herein (SE-1A).

55. Via the December 2012 Settlement Agreement Parent would also receive approximately \$60,773.95 in connection with Student's sibling's tuition to a private school (SE-1A).

56. On December 3, 2012, a Settlement Agreement was executed between Parent (acting for herself and Student's sibling who was a minor) and Pentucket. Student was not a participant in any of the discussions regarding the Settlement Agreement and she was not a signatory to this contract (SE-1A).

57. On December 20, 2012, Parent filed an Amended Hearing Request (Amendment) for Student's remaining claims seeking to remove the issue of Parent's reimbursement for Student's independent educational evaluation as it had been settled. Parent, thus believed that Pentucket would not object to amending the Hearing Request so as to enable Student to proceed on her remaining issues. Parent noted that since Student had reached the age of majority, the balance of the Hearing should proceed in Student's name and she sought amendment of the Hearing Request "to reflect the substitution of parties", while Parent would continue to appear as Student's representative. Parent clarified that since Student had begun attending Landmark College, the Hearing Request should be further amended to reflect Student's request for reimbursement and prospective funding of the Landmark program inclusive of "transportation, room, board, supplies, books, etc." The timing of the

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<sup>13</sup> "VII. PROPOSED RESOLUTION OF THE PROBLEM: 1.) Pentucket reimburse Parent in full for the IEE which cost \$3,600 and which documentation has already been provided to Pentucket." Parent's Hearing Request further sought funding for one year transition services at Landmark College as well as damages.



Hearing would determine whether Parent would be the individual to be reimbursed (SE-2A). As such, Parent noted,

5.) Depending on whether a decision reaches the conclusion as requested, the timing of that decision would determine whom payment would need to be directed to as well as the amounts to be paid so we are also requesting Joinder of Mother since Mother is financially responsible for Student until she is emancipated according to Massachusetts law; and if prospective payment is determined to be appropriate, then Landmark College would also need to be joined in order to facilitate fashioning appropriate relief in accordance with the BSEA hearing rule I(J)<sup>14</sup> (SE-2A).

58. Parent did not forward a copy of the December 20, 2012 Amendment to Attorney Brunt (SE-2A; Brunt). Upon learning of the letter and Parent's intentions, Attorney Brunt testified that she became quite surprised and very frustrated because her understanding as per the Settlement Agreement was that Parent's case regarding Student was then closed (Brunt).
59. During the 2012- 2013 school year Student attended Landmark College. She now attends University of Massachusetts, Dartmouth. According to Father, she is struggling with college life and the demands of the courses she is taking (Father). Student is interested in the field of engineering and is currently taking math and science courses which also require laboratory participation several days a week. Owing to her college schedule, she was only available to participate in BSEA proceedings on a limited basis, for example, after 3:00 p.m. on Tuesdays, or all day on Fridays.

## CONCLUSIONS OF LAW:

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<sup>14</sup> This request to Join Parent and possibly Landmark College solely for purposes of payment was and continues to be unnecessary. Other relevant clauses in the Amendment read:

2- As [Student] has reached the age of majority since the original hearing request, in accordance with Massachusetts Special Education Regulations 603 CMR 28:02 (15), legal authority of the Parent shall transfer to the student when the student reaches 18 years of age, the balance of the hearing request should proceed in Student's name. While in Massachusetts this process is automatic, because neither Parent nor Student have received any notice regarding this transfer of legal authority, we are requesting the hearing request be amended to reflect the substitution of parties.

3- Additionally, this [Amendment] serves as written notice that [Student] has authorized Mother to appear on her behalf as Authorized Representative in accordance with [the] Standard Rules of Practice and Procedure 801 CMR 101(3)(a)(b).

4- The postponement(s) of the hearing date further requires us to amend the hearing request to reflect that the student has since begun placement [at] Landmark College and just completed her first semester. As a result, the hearing request should reflect that Student and Parent are now seeking retroactive reimbursement in addition to prospective funding of her program there and all related costs (transportation, room, board, supplies, books, etc.). Since this is not a new issue being brought, we do not believe it will prejudice Pentucket nor require new deadlines (SE-2A).

Parent/ Student and Pentucket disagree on virtually everything regarding the events that transpired during the relevant periods covered by this Decision. The Parties further disagree as to their understanding of the Settlement Agreement as to the applicable statute of limitations and as to Student's eligibility for special education under the Individuals with Disabilities Education Act<sup>15</sup> (IDEA) and state law<sup>16</sup>. Lastly, Parent/ Student dispute that Student made effective progress/reasonable gains while receiving regular education at Pentucket as a result of which they seek public funding/reimbursement for Student's year at Landmark College.

Pentucket denies all of Parent's/ Student's allegations and states that it has never been responsible to offer Student a free, appropriate public education (FAPE)<sup>17</sup> consistent with the IDEA as Student did not meet eligibility criteria for same, nor did it ever violate any procedural due process rights. Specifically, Pentucket denies any violation of its "child find" responsibilities or responsibility to provide Parent notices of procedural due process rights, and as such disputes extending the statute of limitations beyond two years as Parent/Student request.

I note that Parent/ Student carry the burden of persuasion consistent with *Schaffer v. Weast*, 126 S.Ct. 528 (2005), and must prove their case by a preponderance of the evidence.<sup>18</sup>

In rendering my decision, I rely on the facts recited in the Facts section of this Decision and incorporate them by reference. I also took administrative notice of Parent's May 2012 Hearing Request, information contained in the BSEA database, as well as the correspondence, orders and rulings issued in this case since its remand in January 2015.

I further note for clarification purposes that Parent and Student were consulted when originally setting the Hearing date, and while the date was later confirmed via Rulings and Orders,<sup>19</sup> neither, Parent nor Student, appeared at the Hearing or submitted any exhibits or witness lists. Instead, Parent and Student have consistently challenged the authority of the Hearing Officer regarding framing of the issues and the determinations rendered via Rulings and Orders. Parent/ Student have consistently asserted that jurisdiction over the issues to be heard by the Hearing Officer rests with the Federal District Court Judge and not with the BSEA. As a result, Parent and Student chose not to participate in the Hearing.

This Decision is based on the evidence presented at Hearing, Parent's May 23, 2012 Hearing Request, and the guidance provided by Federal Court, and given bifurcation, adjudicates only the three issues delineated in the Issues Section *supra*. The instant Decision however, does

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<sup>15</sup> 20 USC 1400 *et seq.*

<sup>16</sup> MGL c. 71B.

<sup>17</sup> MGL c. 71B, §§1 (definition of FAPE), 2, 3.

<sup>18</sup> *Schaffer v. Weast*, 126 S.Ct. 528 (2005) places the burden of proof in an administrative hearing on the party seeking relief.

<sup>19</sup> A BSEA staff also left telephonic messages for Parent and Student informing them that the Hearing was proceeding on May 1, 2015, as scheduled.

not address Student's challenges regarding eligibility and compensatory services, which will be decided at a later Hearing.

Regarding the three issues before me, the record supports a finding in favor of Pentucket. Parent/Student failed to meet their burden of persuasion pursuant to *Shaffer* in this regard. As such, I find that Parent's claims are extinguished by the Settlement Agreement in 2012, Pentucket did not violate Parent's/ Student's procedural due process rights regarding Child Find or provision of Parental Safeguards, and the record is lacking in evidence that would otherwise support extension of the statute of limitations beyond that established by the IDEA. My reasoning follows:

**I. Parent's understanding of the terms of the 2012 Agreement:**

As stated before, this matter comes to the BSEA as a remand from the Federal District Court for the district of Massachusetts with specific instructions regarding administrative exhaustion and fact finding, among which were instructions regarding what Parent understood and meant when she agreed to "dismiss her case" in the 2012 Settlement Agreement. As noted earlier parent failed to attend the hearing as a result of which, the record lacks her testimony regarding her state of mind and her understanding of the terms of the 2012 Agreement. There is however, as explained below additional evidence presented by Pentucket which provides persuasive insight as to Parent's state of mind. My findings in this regard are limited to the evidence presented by Pentucket at Hearing, documents contained in the record, Parent's Hearing Request, her Amended Hearing Request, and her letters and Amendment of the fall of 2012.

The first indication of Parent's state of mind is found in her written request that BSEA #12-8636 proceed in her daughter's name and that Parent's name be substituted for Student's, with Parent remaining as Student's advocate. This letter was forwarded to the BSEA at the time Parent was negotiating the terms of the 2012 Settlement Agreement and, less than a month prior to signing it. The plain language of the November 26, 2012 letter shows Parent's intention to keep all claims, except her claim for reimbursement of the independent evaluation, alive after she signed the agreement. This became even more clear in her December 20, 2012 Amendment (See Facts #46 and #57). Parent's knowledge of the result such a transfer prior to signing the Settlement Agreement would ultimately have in the case was gained by her personal study and understanding of special education law, as well as her consultation with Attorney Goguen (a Massachusetts attorney well versed in Special Education matters) with whom Parent consulted at least through late summer of 2012 on behalf of both children (Brunt). The record is persuasive that Parent consulted with and benefitted from his counsel.

The record shows that following her signing of the Settlement Agreement, Parent was the first to raise the fact that Student had not been a signatory to the Agreement and as such, the Agreement had no impact on BSEA #12-8636 except as to the issue of reimbursement of the independent evaluation. Parent's assertions in the letter are contrary to the credible evidence provided by Attorney Brunt that during her discussions with Parent, *all* of Parent's claims

regarding Student were intended to be dismissed (except for any money due her as reimbursement for her financial contribution to Student's Landmark College placement if Student prevailed on her claim). It was further understood and agreed by the Parties that the Settlement Agreement would not impact Student's ability to proceed with her BSEA claim regarding eligibility and compensatory services by way of reimbursement for Landmark College.

Parent was correct that in transferring the case to Student, not directly involving Student in the settlement negotiations, and in dispensing with her signature she would achieve her desired result as stated in her letter of December 20, 2012; that is, that BSEA #12-8636 remain open so that Student could proceed with her claim without possibly being penalized regarding the statute of limitations. Parent also attempted to keep her own claims alive by attaching them to Student's case. According to Attorney Brunt, Parent, who is savvier than the typical pro-se Parent, knew exactly what she was doing, though this was not what Parent and Pentucket had discussed and agreed (Brunt). According to Attorney Brunt, the Settlement Agreement was intended to resolve all of Parent's claims and dismiss BSEA # 12-8636 without prejudice as to any other claim that could be asserted by Student.

Paragraph 9 of the Settlement Agreement reflects the agreement of the Parties as supported by their understanding reflected in SE-1B, delineating Pentucket's final written offer to Parent which included dismissal of all of Parent's BSEA cases, including Student's.

According to Attorney Brunt, when the Parties discussed dismissal of the case "without prejudice" they were specifically referring to all claims separate from the issue of the independent evaluation because that issue had already been verbally settled between them. The "without prejudice" language discussions referred to all other claims appearing in Parent's May 2012 Hearing Request (Brunt). It is therefore understandable that Pentucket would have felt blindsided by Parent's subsequent refusal to withdraw the case after signing the Settlement Agreement in which she specifically agreed to do the opposite. Given the protracted negotiations between the Parties, Parent had ample opportunity to express exactly what she was willing or not willing to do and specifically reflect so in the language of the Settlement Agreement.

The Settlement Agreement set out the understanding between Parent and Pentucket. I note that the amount agreed to be paid by Pentucket to Parent (regarding BSEA #12-8636) in exchange for Parent's withdrawal of her claim, is greater than the amount initially quoted by Parent for the independent educational evaluation in her May 23, 2012 Hearing Request. It would appear that Pentucket was indeed making Parent whole for all of her claim, as Pentucket argued.

Attorney Brunt testified that in her conversations with Parent and with Attorney Goguen in August 2012 she made it clear that Pentucket wanted all of Parent's claims to be dismissed with prejudice, leaving only Student's claims outstanding (Brunt). Attorney Brunt testified that she continued to speak with Attorney Goguen about Student's case through the fall of 2012 (Brunt). The negotiations lingered because of the "with prejudice" requirement as to

both of Parent's cases (Student's and Student's sibling), because of Parent's concern that Student's claims should survive and she wanted it understood as such. It was then that the discussions of "without prejudice" ensued (Brunt). By the time the Settlement Agreement was finalized several months after negotiations had started, Parent had become concerned that Student's sibling's placement could be jeopardized if that matter was not finalized soon because it was very costly for the family (Brunt). This would support Pentucket's understanding that separate from Student's case, Parent and Pentucket intended to exhaust the portion of the claims owed to Parent via the Settlement Agreement.

As such, as far as Pentucket was concerned, all of Parent's claims were extinguished by virtue of the 2012 Settlement Agreement (except the right for reimbursement of allowable expenses related to Student's placement at Landmark College if Student prevailed in her eligibility/compensation case).

The Settlement Agreement further reflected the fact that the Parties had the opportunity to consult with counsel or a representative of their choice at paragraph 13. Parent had in fact consulted with Attorney Goguen during the negotiation and drafting of most of the language of the Settlement Agreement (Brunt).

However, in light of the District Court's finding that requiring Student to re-file a claim was equivalent to holding "form over substance", BSEA #12-8636 could only be dismissed as to Parent, not Student. Thus, while the Agreement extinguished Parent's claims, it had no effect on Student's claims and therefore, Parent was correct that Student's case (all that remained to be decided in BSEA #12-8636) had survived.<sup>20</sup>

**II. The effect of Parent's December 20, 2012 letter and whether it should be treated as a request for hearing relating back to and incorporating the content of Parent's May 23, 2012 Hearing Request:**

Little evidence except for what documents exist in the record address this issue. I am persuaded that Parent's letter of November 26, 2012, requesting that Student's name be added to the Hearing Request operated to revert the date of receipt of Student's Hearing Request to May 23, 2012. Parent and Student's intention was further clarified in the December 2012 Amendment which sought "party substitution" and removed Parent as a Party to the proceedings in light of the Settlement Agreement (See Facts #46 and #57). Therefore, even when Student had not yet reached the age of majority at the time the Hearing Request was filed, addition of her name following her eighteenth birthday, and subsequent name substitution, preserved her claims back to the original date of filing as the Parties had intended in their Settlement Agreement.

**III. Tolling the statute of limitations to 2002 regarding Child Find:**

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<sup>20</sup> The intention to allow all of Student's claims to survive the Settlement Agreement despite Parent's agreement to withdraw BSEA #12-8636 was the reason that the aforementioned case was initially dismissed without prejudice; that is, so that Student could cleanly proceed with her own claims.

Parent's allegations of procedural due process violation regarding Student were first articulated in 2011 when she wrote to the District on November 2, 2011 that Pentucket was responsible to identify children eligible to receive special education services under the Child Find requirements of the IDEA. As a result of Pentucket's alleged transgressions, Parent's/ Student's May 2012 Hearing Request sought to set aside the statute of limitations asserting that Pentucket violated the Child Find provisions of the IDEA and had known that Student was disabled as far back as 2002. Parent/Student further argued in their Hearing Request that Pentucket violated their due process rights by failing to notify Parent of the procedural safeguards (Parent's May 23, 2012, Hearing Request).

In resolving these issues I first turn to 20 USC 1415§(f)(3)(C) which establishes the timelines for requesting a due process hearing

Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part [20 USCS §1411 et seq.], in such time as the state law allows.

Massachusetts has adopted the federal standard regarding statute of limitation issues. 603 CMR 28.01(2). Under federal law, pursuant to 20 USC 1415§(f)(3)(D), there are only two exceptions to the timelines described in paragraph (C) above that could trigger setting aside of the two year limitation. Those limited exceptions involve instances where the parent was prevented from requesting a 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 [20 USCS §1411 et seq.] to be provided to the parents.

While the statute and regulations fail to state exactly what the standard for the above exceptions is, these exceptions have been interpreted as imposing a very strict and high standard not easily overcome. See *D.K. v. Abington School District*, 696 F.3d 233 (2012). Several federal courts have interpreted subsection (i) above to mean that parents must show that the district intentionally or flagrantly misled the parents or knowingly deceived them as to issues such as the progress made by the student.<sup>21</sup> The type of misrepresentation must be

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<sup>21</sup> *D.K. v. Abington School District*, 696 F.3d 233 (2012) quoting *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 775 (M.D. Pa. 2012) at 775 (“[A]t the very least, a misrepresentation must be intentional in order to satisfy [this exception].” (second alteration in original) (quoting *Evan H.*, 2008 WL 4791634)); *School District of Phila. V. Deborah A.*, No., 08-2924, 2009 WL 778321 (E.D. Pa. Mar. 24, 2009); *Evan H.*, 2008 WL 4791634 (“[T]o show a specific misrepresentation, Plaintiffs must establish not that the [school’s] evaluations of the

“akin to intent, deceit, or egregious misstatement”. (*Id.*). Otherwise, any allegation that the student was denied a FAPE or that the Child Find requirement was not met would suffice to toll the statute of limitations, unintentionally turning the exceptions into the rule. *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 775 (M.D. Pa. 2012) at 775. Regarding the exception noted at (ii) some courts have interpreted this to mean that

[O]nly the failure to supply mandated disclosures can toll the statute of limitations. In other words, plaintiffs can satisfy this exception only by showing that the school failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulations [Emphasis supplied]. *D.K. v. Abington School District*, 696 F.3d 233 (2012).

As such, a district withholding information required under the exception, such as failing to provide parents with the notice of procedural safeguards, would satisfy this exception.<sup>22</sup> Additionally, the Court in *D.K. v. Abington School District* reasoned that

Establishing evidence of specific misrepresentations or withholding of information, is insufficient to invoke the exceptions; a plaintiff must also show that the misrepresentations or withholding caused her failure to request a hearing or file a complaint on time. The terms “prevented from” and “due to” denote a causation requirement. Thus, where the evidence shows, for example, that parents were already fully aware of their procedural options, they cannot excuse a late filing by pointing to the school’s failure to formally notify them of those safeguards. [Emphasis supplied].

With this guidance I turn to the facts in the case at bar.

As argued by Pentucket, the record shows that during Student’s tenure at Pentucket, Mother and Father received information regarding Student’s class performance, grades, report cards, test performance, MCAS results and other placement testing. The reports offered information regarding Student’s strengths and weaknesses (SE-3E; SE-D; Father).

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student’s eligibility under IDEA were objectively incorrect, but instead that the [school] subjectively determined that the student was eligible for services under IDEA but intentionally misrepresented this fact to the parents.”); but see, *J.L. ex rel. J.L. v. Ambridge Area sch. Dist.*, No. 06-1652, 2009 WL 1119618 (W.D. Pa. Apr. 27, 2009) (finding negligent misrepresentation sufficient), abrogated on other grounds by Stevens J., 618 F. 3d 411. See also *In re Educ. Assignment of C.C.*, Sec. Ed. Op. No. 1866, at 10 & n.64 (Mar. 5, 2008).

<sup>22</sup> “See *I.H.*, 842 F. Supp. 2d at 775; *Deborah A.*, 2009 WL 778321; *Evan H.*, 2008 WL 4791634; see also *Evan H.*, 2008 WL 4791634 (concluding that subsection (ii) ‘refers solely to the withholding of information regarding the procedural safeguards available to a parent,’ including ‘filing a complaint and requesting an impartial due process hearing’ (quoting *D.G. v. Somerset Hills sch. Dist.*, 559 F. Supp. 2d 484, 492 (D.N.J. 2008); *D.G.*, 559 F. Supp. 2d at 490, 492 (applying the exception where the school failed to provide parents who had repeatedly requested a special-education evaluation with either ‘written notice explaining why [it] refused to evaluate’ the student or a procedural safeguards notice, both of which are required by 20 U.S.C. 1415(b)(3)(B) and (c)(1)(A)-(C) when a school refuses to evaluate or change a student’s educational placement).” *D.K. v. Abington School District*, 696 F.3d 233 (2012).

Student's report cards from Kindergarten through twelfth grades demonstrate that she was capable of accessing the school material presented to her. Her grades in mid-term and final exams as well as MCAS show that she made effective progress in elementary, middle school and at least through the beginning of high school. In elementary school she became proficient in reading, writing, listening, speaking, math, science and social studies. She was able to understand and apply the aforementioned skills independently. Except for fifth grade (22 absences and frequent tardiness), her attendance was otherwise good. Student's report card offered Parents information about Student's difficulties with attention, organization and completing work on time starting in elementary school, yet despite these challenges, she received passing grades and progressed effectively from one year to the next (SE-3E; SE-D). Student's high school placement test placed her in the average to above average range of performance in math, reading and language skills (SE-3G). In high school, Student took college preparatory (CP) and honor (H) courses, which, according to Mr. Seymore, presented demands and involved a higher level of difficulty than the equivalent courses in other districts (SE-3D; Seymore). Student's MCAS results further offer persuasive evidence of Student's solid growth in reading, English language arts, mathematics, biology, and science/technology and engineering during elementary, middle and high school (SE-3F).

Moreover, Parent did not refer Student for special education until the end of eleventh (11<sup>th</sup>) grade, noting only in her first request that Student's grades had been declining since the tenth (10<sup>th</sup>) grade and that the grades did not reflect Student's true intellectual capability (SE-3R). The record contains no other referral or request for intervention initiated by Parent prior to May 17, 2011, as Pentucket correctly argued. Similarly, no administrator or staff member in Pentucket raised concerns that student should be referred for special education services or a Section 504 plan in elementary, middle or high school. As such, the record does not support a finding that Student presented with a disability that required special education services in elementary, middle or through the beginning of high school. Student's issues with organization and completing work on time did not rise to the level of requiring special education interventions. The evidence further shows that Parents were kept abreast of Student's progress and challenges in a timely manner and that no relevant information was ever concealed from them by Pentucket. As such, the evidence is convincing that Parent cannot meet the first prong of the IDEA exception to the statute of limitations.

Similarly, Parent/Student have not met the second prong, that is, their allegation that procedural safeguard notices were not provided are unsubstantiated. In contrast, Pentucket consistently provided information about procedural safeguards to Parents in connection with Student and Student's sibling as early as 2003, and multiple times thereafter including in conjunction with her filings on behalf of Student. Parent received procedural safeguards in 2005, 2007 and 2008 (SE-3B; SE-3D, SE-3E; SE-F; SE-G; Jarvis). Parent also received procedural safeguards information through the BSEA in connection with both her children. The notices provided for both children set forth the same rights and complied with the federal and state requirements in effect at the time they were provided. In fact, Parent filed Hearing Requests on behalf of Student's sibling in April 2010, September 2010 and June 2012 in which she also appeared *pro-se*. Mr. Tiano, Mr. Seymore and Mr. Jarvis offered persuasive testimony that information about parental rights was shared with Parent on



multiple occasions throughout the years she represented her children, including the period in 2012 and 2013 when she represented Student after the latter reached the age of majority. Attorney Brunt also offered credible testimony regarding Parent's prowess as a special education advocate. For Parent/Student to argue that procedural safeguard notices were not provided is disingenuous, and contrary to the credible evidence.

Pentucket also offered credible, persuasive evidence that it met its federal and state mandates with regard to the Child Find requirements (SE-3L; SE-3J; Jarvis, Tiano).

Pentucket presented persuasive, convincing evidence that discredited Parent's allegations regarding Child Find requirements and transparency with respect to information-sharing about Student's progress and challenges during her tenure at Pentucket. Parent/Student offered no evidence to refute Pentucket's evidence.

Having failed to meet either of the exceptions to the timelines for filing a Hearing found at 20 USC 1415§(f)(3)(D), there is no reason to extend the statute of limitations beyond the two years prescribed under 20 USC 1415§ (f)(3)(C).

Lastly, I note that the record lacks information regarding any other alleged procedural transgression not specifically articulated in Parent's Hearing Request or in her Amendment and therefore, Parent is precluded from raising such at a later time.

The evidence is convincing that Pentucket did not violate the Child Find requirements between 2002 and 2011, and that it did provide Parent with the notice of procedural safeguards multiple times throughout the years and specifically in connection with Student's case. Similarly, the record contains no evidence to support a finding of specific misrepresentations that caused a deprivation of FAPE, thereby warranting tolling of the statute of limitations.

Parent/ Student have not met their burden of persuasion pursuant to *Shaffer* regarding issues I and III of this Decision. As to issue II, May 23, 2012 shall be considered the operative date of receipt of the Hearing Request in Student's case. A Hearing regarding the substantive matters involving Student's challenge to the finding of no-eligibility and her request for funding of Landmark College may proceed. This case is referred to the BSEA Schedule Coordinator for scheduling the second part of this bifurcated Hearing.

**ORDER:**

1. All of Parent's claims are deemed extinguished by virtue of the 2012 Settlement Agreement, except the right to reimbursement of allowable expenses related to Student's placement at Landmark College if Student prevails in her eligibility/compensation case.
2. The controlling date for purposes of the statute of limitations is May 23, 2012. A Hearing regarding the substantive matters involving Student's challenge to the finding of no-eligibility and her request for funding of Landmark College may proceed.
3. The two year statute of limitations is controlling.

By the Hearing Officer,

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Rosa I. Figueroa

Dated: May 21, 2015

May 21, 2015

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
BUREAU OF SPECIAL EDUCATION APPEALS**

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**PENTUCKET REGIONAL SCHOOL DISTRICT**

**BSEA # 12-8636 R**

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**BEFORE**

**ROSA I. FIGUEROA  
HEARING OFFICER**

**PARENT, PRO-SE  
PAIGE TOBIN, ESQ., ATTORNEY FOR  
PENTUCKET REGIONAL SCHOOL DISTRICT**