Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 01889-10-11KE

Child's Name: K.M.

Date of Birth: [redacted]

Dates of Hearing: 2/10/11, 3/17/11, 4/15/11, 5/4/11

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Heidi Konkler-Goldsmith, Esq. 30 Cassatt Avenue Berwyn, PA 19312
School District Abington 970 Highland Avenue Abington, PA 19001	School District Attorney Claudia Huot, Esq. Blue Bell Executive Campus 460 Norristown Road, Suite 110 Blue Bell, PA 19422
Date Record Closed:	June 8, 2011
Date of Decision:	June 15, 2011
Hearing Officer:	Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Parents in this case were concerned about Student's continuing struggles with reading despite regular education supportive services since 1st grade. Student was privately evaluated near the end of 2nd grade, followed by a School District evaluation at the beginning of 3rd grade, resulting in a determination that Student is IDEA eligible due to specific learning disabilities.

The District provided an IEP to address Student's difficulties with reading skills, primarily, particularly fluency and decoding, and with maintaining focus/attention. Dissatisfied with Student's progress at the end of the 3rd grade school year, however, Parents enrolled Student in a private school for the summer of 2009, as well as for the following two school years. Parents subsequently filed a due process complaint seeking compensatory education for 1st, 2nd and the beginning of 3rd grade for denial of FAPE based upon a child find violation; compensatory education for the second half of the 3rd grade school year for an allegedly insufficient and inappropriate special education program; compensatory education for the summer of 2009 in the form of reimbursement for the private school summer reading program Parents provided and based upon the District's failure to offer an ESY program; private school tuition reimbursement for Student's 4th and 5th grade school years.

After 2 hearing sessions limited to the evidence required for a determination whether the IDEA limitations period should be extended in this case, the District's motion to limit the scope of Parents' claims was granted, and the hearing proceeded without further consideration of the alleged child find violations. After review and consideration of the complete record, including the evidence taken at all four hearing sessions and the arguments of counsel, Parents' remaining claims are denied.

ISSUES

1. Is Student entitled to compensatory education for the School District's failure to provide Student with a procedurally and substantively appropriate special education program from December 13, 2008 through the end of the 2008/2009 school year, and if so, in what amount and what form?

2. Is Student entitled to compensatory education for the School District's failure to offer an ESY program for the summer of 2009, and if so, should Parents be reimbursed for the private school summer reading program they provided for Student?

3. Are Parents entitled to tuition reimbursement for the private school in which they enrolled Student for the 2009/2010 and 2010/2011 school years?

FINDINGS OF FACT

1. Student is a pre-teenaged child, born [redacted]. Student is a resident of the School District (District) and is eligible for special education services. (Stipulation, N.T. pp. 15)

2. Student has a current diagnosis of specific learning disabilities in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 15)

3. Parents first became concerned about Student's educational progress, particularly with respect to reading and attention/focus, during 1st grade. (Appendix, HO-1, p. 13[1])

4. During 1st grade, Student was provided with strategies and instructional accommodations in the regular education classroom, such as a behavior chart, reminders and rewards for staying focused and completing school work, as well as additional support for reading and math outside of the regular education classroom. (N.T. pp. 50—56)

5. Academic and behavior concerns about Student continued in 2nd grade. The additional supports in the regular education program also continued. (N.T. pp. 75—82)

6. In the spring of Student's 2nd grade year, Parents obtained a private evaluation of Student that identified a high average cognitive potential, difficulties with attention and a specific learning disability in reading. (S-15, p. 15)

7. The private evaluator made a number of recommendations for developing an educational program for Student, including: instruction with the Wilson Reading System; cognitive/metacognitive strategies to enhance comprehension of text; systematic

[1] The underlying facts concerning Student's early school years are set forth in the interim ruling on the IDEA limitations issues dated April 14, 2011, which was admitted into evidence as HO-1. (Tr. p. 376) For ease of reference, and because the interim ruling limited the scope of Parents' substantive claims, the interim decision is also attached as an appendix to this final decision.

instruction in comprehension strategies offered by programs such as Project Read or Benchmark, to include skills in the areas of focusing, information-gathering, memory, organizing, analyzing, "generating," i.e., drawing inferences, making predictions, elaborating, integrating, evaluating; use of a computer for spelling and grammatical construction support and a summer program. (S-15, pp. 15—17)

8. There were also recommendations for Parents to consider, specifically, a medical consultation to determine the need for support for ADHD (Attention Deficit Hyperactivity Disorder) in the form of medication, instruction and counseling; therapy to address Student's frustration and negative attitude toward school as reported by Parents. (S-15, p. 17)

9. After receiving and reviewing the independent evaluation, the District also conducted an evaluation of Student consisting of additional information gathered from Parents, information from Student's current teachers, instructional assessments and a classroom observation of Student. The District school psychologist did not repeat standardized ability and achievement tests included in the independent evaluation report. The District accepted the private evaluator's diagnosis of specific learning disability. (N.T. pp. 136—150; S-16, S-17, S-19)

10. In providing information for the District's special education evaluation, Student's 3rd grade teacher reported that Student was able to apply learned information quickly, performed best when information was presented in a variety of ways and with frequent repetition. The teacher provided instruction in accordance with the ways in which Student learned best (N.T. pp. 740, 741; S-19, p. 2)

11. Student's 3rd grade teacher noted from the beginning of the year that Student exhibited strengths in math, particularly computation, and had needs in the areas of reasoning, problem-solving , responding in writing to math problems, following multi-step instructions, and word problems. The teacher made adaptations for Student when needs were noted. (N.T. pp. 738, 739, 755—758)

12. Student did particularly well in the small group instruction the 3rd grade teacher used frequently in the classroom. (N.T. pp. 739, 747, 766)

13. In the regular education classroom at the beginning of 3rd grade, Student received 1.5 hr./day of directed reading instruction in the Macmillan, McGraw Hill Treasures Program, a multi-disciplinary program with multiple reading levels and materials for students at various instructional levels, *i.e.*, "approaching," "on," and "beyond" grade levels. Materials from Treasures that the 3rd grade teacher used for Student included the anthology (on level textbook); "approaching" leveled readers; practice, grammar, assessments, and spelling (which included phonics) instruction/worksheets. Key words for the week were repeated throughout the materials. (N.T. pp. 744—746)

14. Recognizing Student's problems with reading fluency and decoding, the 3rd grade teacher explicitly taught "word attack skills, encouraging Student to find prefixes, suffixes and base

words. The teacher also built background knowledge, reviewed specific vocabulary before beginning to read a story, and used general vocabulary building techniques. (N.T. pp.743, 744, 749)

15. Although Student did not volunteer to read aloud in groups, Student participated in on-level reading in groups when called on. Student continued with the "read aloud" component of the regular 3rd grade classroom throughout the school year. (N.T. pp. 750, 754)

16. In the regular education classroom, Student was instructed at the 3rd grade level using many of the materials at the "approaching" level of the Treasures Program. (N.T. pp. 770, 771)

17. At the beginning of 3rd grade, Student continued to receive additional reading instruction with the reading specialist for 3 30 minute periods/week. The 3rd grade teacher regularly consulted with the reading specialist about Student concerning accommodations for testing, providing instruction for specific skills to be assessed, and general instructional strategies. (N.T. pp. 428, 429, 746—748; S-14)

18. In addition to reading instruction, an additional hour of the day in 3rd grade was devoted to writing, daily edits and journaling, for a total of 2.5 hours of "Communication Arts" instruction each day. The teacher provided assistance to Student by means of graphic organizers and framing writing tasks, (*i.e.*, starting the first sentence on a topic). (N.T. pp. 746, 754, 763)

19. After the District's evaluation was completed, an IEP was developed and became effective on December 17. Soon after, Student began receiving pull-out learning support services for 120 minutes/day in reading and writing. (N.T. pp. 384, 399, 447; P-25)

20. Based on the QRI (Qualitative Reading Inventory)included in the District's ER, an assessment that measured fluency, decoding and vocabulary development, Student was independent in reading at the Primer level and instructional at Level 1 at the time special education services began. The special education teacher found Student to be instructional between Level 1 and Level 2 (N.T. pp. 390--392, 394; S-19, p. 5, S-25, pp. 4, 5)

21. For reading instruction, the special education teacher primarily used Triumphs, a comprehensive reading program designed to support students reading 2 years below grade level. Triumphs is the intervention program paired with the regular education Treasures program, and provides intensive instruction focused on priority skills. The special education teacher used Triumphs for all of the students in her learning support class through at least several assessments to determine whether it was appropriate for each student. (N.T. pp. 384—387, 391, 440)

22. The special education teacher also used the Wilson Fundations program for reading instruction and the Houghton-Mifflin handwriting program. (N.T. p. 385)

23. On a typical day, the communications arts instruction in the special education classroom included 15—20 min. whole group instruction for the daily edit and journal writing; 45—60

minutes of small group reading instruction using, as appropriate Triumphs, Treasures and Fundations; 45—60 min of small group or whole group writing instruction focused on a particular component skill and using graphic organizers. (N.T. pp. 400—403, 412)

24. Reading instruction with Fundations was not provided to Student for the publisher's recommended amount of time on a daily basis. The special education teacher used Fundations strategies along with other programs during reading instruction, not as separate instruction. The special education teacher did not see the need to use Fundations for the recommended amount of time for Student. (N.T. pp. 403, 404, 406, 407; S-52)

25. The special education teacher moved Student out of the Triumphs program after the 2nd marking period into Treasures, using the "approaching" leveled readers from Treasures because Triumphs was not sufficiently challenging for Student as indicated by high scores (80s and 90s) on assessments taken by independently reading passages and answering questions. (N.T. pp. 387, 391, 432, 433, 441, 442, 465, 466; S-28)

26. The 3rd grade teacher implemented the SDI (Specially Designed Instruction) in Student's IEP in the regular classroom, including reading the questions on math assessments and helping Student prepare for answering questions by providing pre-notice of when Student would be called on (N.T. pp. 758—760, 763; S-25, p. 9)

27. Both regular and special education teachers used multi-sensory instruction such as visual cues paired with oral presentation; physical movement and the techniques incorporated into the Fundations program. (N.T. pp. 478, 762)

28. Student's IEP included a goal for writing and three reading goals to address fluency, comprehension and drawing inferences and conclusions for which the special education teacher provided progress monitoring. (S-25, p. 8, S-39)

29. The writing goal was based upon the Pennsylvania open-ended writing rubric score. Student's baseline was set at 1 in November, and Student's score was listed as 2 at the end of marking period #2 in March of 3rd grade, the first full marking period in which Student received special education. At the end of the 3rd marking period in June, the special education teacher provided a narrative description of Student's progress, but did not include a rubric score (N.T. pp. 417, 424; S-39, p. 1)

30. Student's progress on the oral reading fluency goal was based on a DIBELS baseline score of 27/wcpm (words correct per minute) with a goal of 72 wcpm after 30 weeks of instruction. At the end of the 2nd marking period, Student had achieved a score of 43 wcpm, but fluency assessed with the Triumphs fluency measure, not DIBELS. At the end of the school year/3rd marking period, after app. 20 weeks of instruction, Student's fluency score was 56/ wcpm measured with DIBELS. For 3rd grade, the "at risk level" as measured by DIBELS is up to 79 wcpm. (N.T. pp. 418,419, 421, 456,457; S-39, pp. 1, 2)

31. For the nonsense word fluency goal, the progress monitoring provided by the special education teacher contained a qualitative description of progress, but no data was reported for marking periods, 2 and 3 to compare to the DIBELS baseline score. (N.T. pp. 422, S-39, p. 2)

32. There was significant difficulty establishing a baseline for the reading goal directed toward drawing inferences and conclusions, due to Student's limited oral reading fluency skills. At the end of marking period 2, progress toward comprehension in the Triumphs program was noted, but not quantified. For marking period 3, the teacher noted that comprehension improved toward end of marking period in the approaching leveled readers in Treasures, but was again not quantified (S-39, pp. 2,3)

33. Student's regular education teacher supplied the grades for the 1st marking period on Student's report card grades. Letter grades "B" (Basic") and "P" (Proficient) correlated specifically with assessments of the skills taught during the marking period The "Basic" level indicates grade level performance (N.T. pp. 764, 765, 772, S-1, p. 4)

34. Student's special education teacher noted that report card grades are measures of progress in the regular 3rd grade curriculum. For that reason, maintaining a "Basic" level as the work increases in difficulty through the school year indicated progress to her, since many special education students drop to below basic. (N.T. pp. 423—427, S-1, p. 4)

35. On the PSSA tests taken at the end of 3rd grade, with the accommodations specified in Student's IEP, Student scored in the proficient range in both math and reading. (N.T. pp. 483, 484; S-25, p. 7, S-33)

36. Student's 3rd grade teacher noted Student's needs for maintaining attention and focus, which she met with various successful strategies as specified in the SDI section of Student's IEP, such as placing a sticky note reminder on Student's desk for re-direction, oral prompts, positive reinforcements, timers to stay on task. Parents acknowledged that classroom strategies were used for keeping Student on task and focused. (N.T. pp. 706, 708, 742, 759—761, 775; S-25, p. 9)

37. Student's special education teacher successfully used similar strategies for maintaining attention and focus in the learning support classroom. (N.T. pp. 473, 474)

38. Parents saw attention issues at home, and assumed they would likewise manifest at school, but had no information indicating that attention issues were not appropriately and effectively addressed. (N.T. p. 718)

39. Data is ordinarily collected after the Christmas break to determine ESY eligibility, but that was not done for Student in 3rd grade because Student had been in a special education program for only a few days before the break started. Although the special education teacher was certain that she must have collected regression/recoupment data, she could not recall when that occurred. (N.T. pp. 436—438)

40. At the end of Student's 3rd grade year, after a half school year of special education, Parents saw no progress in Student's reading level. Parents' assessment was based upon her judgment of how poorly Student read material underlying tests on which Student had received good grades. Based solely upon Student's report of the learning support classroom, Parents also believed that no effective instruction occurred. (N.T. pp. 670, 679, 680)

41. Student's Mother never alerted the District to her belief that Student's reading level at home, as she observed and interpreted it, was not consistent with Student's scores on tests. (N.T. pp. 694, 695)

42. Student attended the private school's summer reading program between 3rd and 4th grades with language arts activities centered on an African Safari theme. The program included daily small group reading instruction and participated in guided reading activities. Student's difficulty with decoding unfamiliar words was noted. For the summer reading program, Student's instructional reading level was placed at 3rd grade. (P-29)

43. By letter dated June 17, 2009 Parents informed the District that Student would be enrolled in a private school for 4th grade and requested assistance with the tuition. By that time, Parents wanted Student to go to private school, and had no interest in looking at anything else that the District might offer. Parents were concerned that because the District believed Student was making progress, it would make no substantial change to Student's program despite Parents' belief that Student's progress was inadequate. (N.T. pp. 688—691)

44. By letter dated September 10, 2010, Parents informed the District that they were keeping Student in the private school for 5th grade, due to the meaningful progress Student made during 4th grade. (N.T. pp. 691—730; S-48)

45. When Student entered the private school for 4th grade, Student's instructional reading level was determined to be between 2.1 and 3. (N.T. pp. 584, 585)

46. As described by the Director of the private school Student attended for 4th and 5th grades, it provides small group, individualized instruction; accommodations such as preferential seating for attention issues; phonics instruction by means of the Wilson Reading-system, along with reading strategies such as highlighting/color coding various parts of stories to better identify significant parts; expressive writing support; a laptop computer and keyboarding instruction; directions provided in both oral and written form. (N.T. pp. 585—587)

47. Language Arts Instruction includes 90 min./day of reading instruction plus Wilson System instruction. The Wilson WADE assessment is not used to measure the progress of students or to select the initial level for beginning Wilson instruction. (N.T. pp. 587, 588, 646)

48. The additional reading instruction is provided in accordance with a system developed at Temple University known as Directed Reading Activity (DRA), a literature-based system that uses fiction and non-fiction books at Student's reading level combined with instruction in comprehension strategies. (N.T. pp. 545—547, 662, 663)

49. Assessments of Student's progress for both school years was provided to Parents by means of checklists describing skill development in various subject areas, designated by check marks under the following category headings: Consistently; Usually; Developing; Needs Support. According to the private school director, the progress reports accurately reflect Student's progress through the middle of the current school year. (N.T. pp. 589—592; P-30, P-31, P-32, P-33)

50. In the area of reading skills, Student's performance on all progress reports was in the "Consistently" category only with respect to homework completion. Otherwise, the progress reports showed no change in almost all categories, with only a few positive and a few negative movements between skill categories. (P-30, p. 3, P-31, p. 3, P-32, p. 3)

51. For the first semester of 4th grade, Student's reading level was placed at 3, moved to Level 4 for the second semester and remained at Level 4 for 5th grade. The informal Reading Inventory (IRI) completed by the private school at the end of 4th grade could not determine an independent reading level and concluded that "Based on [Student]'s performance this year, an analysis of this test, as well as …identified strengths and needs, it is recommended that [Student] be instructed at the 4th Level in the Fall." (P-30, p. 3, P-31, p. 3, P-32, p. 32, pp. 1, 3)

DISCUSSION AND CONCLUSIONS OF LAW

I. Legal Standards

Prior to evaluating the evidence relating to the issues in dispute, it is helpful to review the basic statutory/regulatory structure, as interpreted by court decisions, that provides the framework for determining whether the School District properly fulfilled its obligations to Student.

A. Relevant IDEA Requirements

The legal obligation to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

> The Individuals with Disabilities Education Act ("IDEA") requires that a state receiving federal education funding provide a "free appropriate public education" ("FAPE") to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP "must be 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light

> of the student's 'intellectual potential.' " *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009)

The term "meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, however, school districts are <u>not</u> required to provide an eligible student with services designed to provide the "absolute best" education or to maximize the child's potential. *Mary Courtney T. v. School District of Philadelphia*); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

B. Due Process Hearings/Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by

other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parents challenged the appropriateness of the District's special education services from the time Student was identified as IDEA eligible during Student's 3rd grade school year, as well as the District's ability to provide appropriate services, reasonably calculated to lead to meaningful progress, particularly in reading for the next two school years, it is Parents' burden to establish that the District did not, and could not, provide an appropriate program for Student from December 2008 through the current school year.

Since the Court limited its holding in S*chaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

With respect to a portion of Parents' claim for compensatory education, *i.e.*, the summer of 2009, this case represents that rare circumstance in which neither party's evidence is persuasive with respect to whether the District improperly determined that Student was not eligible for ESY services during the summer of 2009. As explained further below, because Parents bear the burden of persuasion, Parents' compensatory education claim based on denial of

ESY services in 2009, will be denied despite the District's less than persuasive evidence that it properly considered Student's ESY eligibility.

C. Tuition Reimbursement

1. Three Step Test

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible student's right to FAPE, to due process protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child's placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE or otherwise acted appropriately.

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof.

The Court of Appeals for the 3rd Circuit has provided additional, fairly recent guidance with respect to assessing the appropriateness of a unilateral private placement, noting that

A parent's decision to unilaterally place a child in a private placement is proper

> if the placement "is appropriate, i.e., it provides significant learning and confers meaningful benefit...." *DeFlaminis,* 480 F.3d at 276 (internal quotation marks and citation omitted). That said, the "parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA." *Ridgewood Bd. of Educ. v. N.E.,* 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a private school placement may be proper and confer meaningful benefit despite the private school's failure to provide an IEP or meet state educational standards. *Florence County Sch. Dist. Four v. Carter ex rel. Carter,* 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)

Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 242.

In this case, because there was no proposed IEP for the second school year for which Parents seek compensatory education, the question of tuition reimbursement turns more significantly on the appropriateness of the private school selected by Parents for Student's 5th grade school year than is ordinarily the case. The appropriateness of the private school placement has less significance for the 4th grade school year because the IEP in effect at the time Parents withdrew Student from the District met the standard for providing Student with FAPE. Nevertheless, for the reasons explained more fully below, had that not been the case, Student's minimal progress during the two years Student was enrolled in the private school as disclosed by the private school progress records would defeat Parents' tuition reimbursement claim.

II Nature of the Claims/Contentions of the Parties

A. Denial of FAPE Based Upon Special Education Services Provided During 3rd Grade

Parents contended that after the District evaluated Student and provided an IEP for approximately the second half of Student's 3rd grade year, the District failed to provide Student with appropriate educational services, particularly reading instruction and did not sufficiently address attention/focus issues.

1. Reading Instruction/Progress/Attention Issues

Parents strongly believed that Student did not make meaningful progress in reading skills after the District began providing learning support services, primarily because they believe that Student needed Wilson reading instruction, delivered in accordance with the publisher's protocols, in order to make progress in reading. The record of this case establishes that the District provided only minimal instruction in a Wilson program, Fundations, and primarily used a regular education reading program and the paired intervention program provided by the publisher. (FF 21, 22, 24) Despite Parents' contention that the District is liable for compensatory education for not providing Wilson reading instruction to the level Parents believed it was necessary, Parents' are not entitled to compensatory education on that basis.

School districts have significant discretion to choose the means and method of providing special education services. Even when services requested by parents might be equally appropriate or better than a public agency's program, the LEA is permitted to deny parents' preference and select its own program and services, as long as the LEA's selections appropriately meet the child's needs. *See, e.g., J.E. v. Boyertown ASD*, 2011 WL 476537 (E.D. Pa. 2011); *J.C. v. New Fairfield Bd. of Educ.* 2011 WL 1322563 at *16 (D.Conn. 2011); *D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F.Supp.2d 435 (N.D.N.Y. 2010); *Rosinsky v. Green Bay Area School Dist.*, 667 F.Supp.2d 964, 984 (E.D.Wis. 2009).

The record in this case establishes that Student made meaningful progress in reading during 3rd grade. When Student began receiving learning support services, evaluation data established that Student was instructional at Level 1, and the special education teacher placed Student's instructional level between 1 and 2. (FF 20) At the end of 3rd grade, when Parent enrolled Student in the private school summer reading program, Student's instructional level

was set at 3, and Student scored at the Proficient level in the PSSA grade level reading assessment taken in the spring of 3rd grade. (FF35, 42)

In light of the objective evidence, including the instructional reading level assigned to Student by the Parent-selected private school at the end of 3rd grade, Parents' subjective belief that Student made no progress in reading is entitled to no weight. Parents' conclusion is based entirely upon Student's Mother's subjective judgment that Student's oral reading skills did not meet her expectations. (FF 40)

Similarly, Parents have no reasonable basis for questioning the District's strategies and success with respect to addressing Student's needs in the area of attention/focus. Both of Student's 3rd grade teachers described the strategies they used in their classrooms for maintaining Student's attention and focus, and both testified that they were successful. (FF 36, 37) The teachers' testimony was entirely credible, particularly in light of Student's progress, which could not have occurred without adequate focus and attention. Moreover, Parents acknowledged their awareness that the teachers implemented classroom strategies to address Student's attention needs, and could not reasonably contradict the teachers' testimony, since Parents admitted to having no contrary information. (FF 36, 38)

In light of the conclusions above, that Student made meaningful progress in reading during 3rd grade, and that Student's difficulties with attention and focus were successfully addressed to the extent that Student was able to make appropriate progress in reading during the second half of 3rd grade, Student is not entitled to an award of compensatory education for 3rd grade. Moreover, the IEP in place for 3rd grade would have remained in effect until December of the following school year, and there is no reason to believe that Student would not have continued to make similar progress with the same type and level of instruction through the beginning of 4th

grade. Consequently, there is no basis for awarding tuition reimbursement for Student's enrollment in private school for 4th grade, even if the private school provided an appropriate alternative placement.

2. Progress-Monitoring

The District's program in this case was determined to be appropriate in spite of, not because of its written reports purporting to monitor progress toward Student's IEP goals. *See* FF 29, 30, 31, 322; S-39. It is fortunate for the District that other evidence established that Student made meaningful progress in the area of greatest need, reading. The significant lack of quantifiable data rendered the narrative progress monitoring reports subjective, suspect and useless with respect to determining whether Student was making meaningful progress. The District's lapse in that regard must be corrected in the future.

In this case, however, the poor progress monitoring data provided by the District is no more than a procedural violation, with no effect on either Student's receipt of FAPE or on Parents' right to participate in decision-making with respect to the District's provision of FAPE to Student, and, therefore cannot support either an award of compensatory education or other relief. *See* 34 C.F.R. §300.513(a). As noted above, there is adequate evidence of Student's overall progress in the areas of Parents' greatest concern to support the conclusion that Student made meaningful progress.

B. ESY

Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives FAPE. 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Those factors are:

(i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

(ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

(iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

(iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

School districts are not required to provide ESY based upon "The desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education." 22 Pa. Code §14.132 (c)(3).

As Parents pointed out, the evidence in this case did not establish that the District followed the foregoing Pennsylvania regulatory requirements and adequately considered Student's ESY eligibility for the summer of 2009. (FF39)

On the other hand, however, Parents provided no evidence that Student needed ESY services in order to receive FAPE, or that the services provided by Parents at the private school were anything more than a desirable, possibly enriching summer program. *See* FF 42; P-29. The private school provided no data from which it can be determined that the program attempted to address any of the factors that support the need for an ESY program. Consequently, Parents did not bear their burden of persuasion on that issue.

C. Tuition Reimbursement

As discussed above, the District provided Student with FAPE, thereby defeating Parents' tuition reimbursement claim at the level of the first element. In addition, however, the other factors would likewise defeat Parents' tuition reimbursement claim.

1. Appropriateness of the Private School Selected by Parents

Even if the District's special education services for Student's 3rd grade year had been lacking, there would be no basis for awarding tuition reimbursement because Parents have not established that the private school they selected provided adequate services. The record establishes that although the private school provided Wilson reading instruction as Parents wanted, the limited objective evidence concerning Student's progress indicates that Student made less progress than in the public school. After two years in the private school, Student remains at the Level 4 instructional level, to which Student advanced in the middle of 4th grade. (FF 50, 51) Moreover, the progress reports from the private school were no better than the District's progress monitoring reports in quantifying Student's progress, and certainly do not provide any basis for a conclusion that Student made any progress whatsoever in reading skills during the two years in private school. (FF 49) Indeed, when Parents' claim that Student made meaningful progress in academic skills, or even attitude toward school and homework, is examined carefully, it is obvious that the progress to which Parents testified was very recent. *See* FF 44; N.T. pp. 722—725, noting that the examples of progress to which Parents specifically testified began at approximately the middle of the current school year.

2. Equities

Although it is not truly necessary to consider whether tuition reimbursement should be denied or reduced for equitable considerations in light of the conclusions concerning the

appropriateness f the District's program and Student's lack of progress in reading in the private school program, the testimony nevertheless established that Parents were uninterested in working with the District to correct any perceived deficiencies in the District's program for Student's 4th and 5th grade years. (FF 41, 43, 44) In this case, therefore, none of the factors that support tuition reimbursement in an appropriate case provide a basis for such an award.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' claims in this matter are **DENIED.** The School District need take no action in this matter.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

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Anne L. Carroll, Esq.
HEARING OFFICER

June 15, 2011

APPENDIX

Pennsylvania
Special Education Hearing Officer

ODR No. 01889-10-11KE

IN RE: THE EDUCATIONAL ASSIGNMENT OF

K.M.

A STUDENT IN THE
ABINGTON SCHOOL DISTRICT

DECISION OF THE HEARING OFFICER

RE: SCHOOL DISTRICT'S MOTION
TO LIMIT THE SCOPE OF THE HEARING
BASED UPON THE STATUTE OF LIMITATIONS

Dated: April 14, 2011

Anne L. Carroll, Esq.
Hearing Officer

I. INTRODUCTION

In a January 21, 2011 motion, the School District contended that Parents' claims in this case must be limited to the two year period preceding the date Parents filed their due process complaint on December 14, 2010. The District, therefore, requested a ruling that Parents may not present evidence to establish an idea violation, and seek compensatory education, from the 2005/2006 school year as requested in the due process complaint.

Subsequently, Parents' claims were modified, and they now seek to prove an IDEA violation, and request an award of compensatory education, from September 2006 to the date of Student's withdrawal from the District to attend a private school at the beginning of the 2009/2010 school year. (N.T. p. 17) From the beginning of the 2006/2007 school year until Student was identified as IDEA eligible and began receiving services during the 2008/2009 school year, Parents' claims for denial of FAPE are based upon an alleged child find violation. From the time Student began receiving IDEA services through the summer of 2009, Parents' denial of FAPE claims are based upon the District's allegedly inadequate or inappropriate educational services. From the beginning of the 2009/2010 school year through the present, Parent is seeking reimbursement for private school tuition. Since the complaint was filed on December 14, 2010, Parents can pursue compensatory education from the time an IEP was first offered in December 2008 through the present. The only limitations question is whether Parents are permitted to seek compensatory education for the District's alleged child find violations for the 2006/2007, 2007/2008 and the beginning of the 2008/2009 school years.

The IDEA statute and the federal regulations provide that a proper due process complaint "must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the

complaint." 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. §300.507(a)(2). The regulations further provide that "A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 34 C.F.R. §300.511(e), based upon 20 U.S.C. § 1415(f)(3)(c). The two year limits on the subject matter of a due process complaint and on the time for submitting a complaint, however, are subject to the exceptions found in §300.511(f): "...The timeline does not apply to a parent if the parent was prevented from filing a due process complaint due to (1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint or (2) the LEA's withholding of information from the parent that was required under this part to be provided to the parent." 34 C.F.R. §300.511(f); 20 U.S.C. Section 1415(f)(3)(c).

In response to the District's motion, Parents made several legal arguments and also contended that the questions of when the limitations period begins to run, and whether either of the exceptions extends the two year period, is a factual inquiry that ordinarily requires a hearing. *See, See P.P. v. West Chester Area School District*, 557 F. Supp. 2d 648 (E.D. Pa 2008); *J.L. v. Ambridge Area School District*, 2009 WL 1119608 (W.D. Pa. Feb. 22, 2008) and 2008 WL 2798306 (July 18, 2008). *See also* 71 F.R. 45540-01, 2006 WL 23332118 (Aug, 14, 2006) at *46706:

> [I]n States using the timeline in § 300.511(e) (i.e., "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"), hearing officers will have to make determinations, on a case-by-case basis, of factors affecting whether the parent "knew or should have known" about the action that is the basis of the complaint
> …
> If the complaining party believes that the timeline in § 300.511(e) should not apply, the complaining party would need to ask the hearing officer to determine whether an untimely due process complaint can proceed to hearing based on misrepresentations by

an LEA. The hearing officer would then determine whether the party's allegation constitutes an exception to the applicable timeline.

Since evidence was needed to determine the facts underlying Parents' assertions concerning their "knew or should have known" date, and that the District withheld required information and made specific misrepresentations concerning Student, two hearing sessions were held to take evidence concerning when the two year limitations period began to run and whether either of the exceptions should extend it. Both parties have now submitted additional arguments in support of their respective positions. This discussion, based upon the evidence and the arguments of counsel, constitutes my ruling on the scope of the claims for which Parents may seek a remedy during the remainder of the hearing.

II. LEGAL STANDARDS

A. IDEA Timelines/Knew or Should Have Known Date/Burden of Proof

Parents argued that because the statute of limitations is an affirmative defense, the District has the burden of proving that the claims were not timely filed. Although it is certainly the District's burden to raise the issue, the District met that obligation by filing its motion to limit the scope of the claims. Under the statutory/regulatory language, and general legal principles, however, it then becomes the Parents' burden to establish that they may pursue claims that arose more than two years before their complaint was submitted by presenting evidence with respect to when Parents knew or should have known of the District's actions that they allege violated its obligation to identify Student as IDEA eligible and provide Student with FAPE.

The "knew or should have known" language in the IDEA limitations provisions is stated in the same terms as the "discovery rule," a legal principle used to determine whether a claim is timely asserted. In the absence of guidance in the statutory/regulatory language or in court decisions explicitly interpreting the meaning of the term "knew or should have known" in the

IDEA statute, it is logical to follow, generally, the legal principles applicable to the "discovery rule" which provides that, "the statute of limitations begins to run when a person knows, or through the exercise of reasonable diligence should know" of the injury underlying the complaint.[2] *Vitallo v. Cabot Corporation*, 399 F.3d 536, 538 (3rd Cir. 2005). In *Vitallo* the Court of Appeals noted that "the touchstone" of the discovery rule "is reasonable diligence by the plaintiff." 399 F.3d at 538, 539. The court also provided substantial guidance in applying that standard:

> We have construed this objective reasonableness requirement to mean that the statute of limitations begins to run when plaintiffs come to possess "sufficient critical facts to put [them] on notice that a wrong has been committed and that [they] need to investigate to determine whether [they are] entitled to redress." *Zeleznik v. United States*, 770 F.2d 20, 23 (3d Cir.1985).
>
> A plaintiff seeking the shelter of the discovery rule bears "a duty to exercise 'reasonable diligence' in ascertaining the existence of the injury and its cause." *Bohus*, 950 F.2d at 925.[3] What does reasonable diligence require? It requires that putative plaintiffs "exhibit[ ] those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others." *Cochran v. GAF Corp.*, 542 Pa. 210, 666 A.2d 245, 249 (1995). Proof of a plaintiff's subjective knowledge is insufficient to invoke the discovery rule; a defendant can inquire what a reasonable plaintiff should know or should know to check. *See id.* (explaining that reasonable diligence is an objective, rather than a subjective, standard). Put simply, clues indicating to a reasonable person an injury or its cause cannot be ignored.

399 F.3d at 542, 543. Moreover, "Plaintiffs seeking the benefit of the discovery rule bear the burden of establishing its applicability. *Dalrymple v. Brown*, 549 Pa. 217, 701 A.2d 164, 167 (1997) (as to the injury); *Cochran*, 666 A.2d at 250 (as to the cause of the injury)." 399 F.3d at 543.

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[2] In the context of an IDEA claim, however, in accordance with 20 U.S.C. §1414(b)(6)(B), (f)(3)(C) and 34 C.F.R. §§300.507(a)(2), 511(e), the "action that forms the basis of the complaint" must be substituted for the term "injury underlying the complaint."

[3] *Bohus v. Beloff*, 950 F.2d 919 (3d Cir.1991)

The general legal principles applicable to the discovery rule coincide with the mandate found in 20 U.S.C. §1415(b)(6)(B) and 34 C.F.R. §300.507(a)(2), which limit the substantive contents of a due process complaint. In addition, the statute and regulations explicitly require that a request for a due process hearing on a complaint must be made "within two years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R §300.511(e), 20 U.S.C. § 1415(f)(3)(c). Both the mandatory language of the IDEA statute and regulations and common law standards relating to the discovery rule place the burden of proving when the limitations period begins to run on the party seeking the benefit of the rule.

Similarly, parents who contend that the statutory/regulatory exceptions permit them to prove a substantive IDEA violation and/or seek relief for a period more than two years prior to the date the due process complaint was filed bear the burden of proving that the two year timelines do not bar such claims based upon the exception(s) asserted.

B. Specific Misrepresentation Exception to the IDEA Timelines

In determining whether the misrepresentation exception might extend the IDEA two year limits, the first step is to determine the meaning of the term "specific misrepresentations" in the context of IDEA claims. Since the statute and regulations do not define that term, it is necessary to look to other sources, such as court decisions. One judge in the Eastern District of Pennsylvania has interpreted the "specific misrepresentation" exception as applying only to intentional conduct on the part of a school district. *School District of Philadelphia v. Deborah A.*, 2009 WL 778321 (E.D.Pa. 2009) at *4; *Evan H. v. Unionville-Chaddsford Sch. Dist.*, 2008

WL 4791634 (E.D.Pa. 2008) at *5, 6. Also, in *A.B. v. Clarke County School District*, 2009 WL 902038 (M.D. Ga. 2009), the court noted that "misrepresentation refers to a 'misleading assertion with the intent to deceive." 2009 WL 902038 at *13. On the other hand, a judge in the Western District of Pennsylvania does not consider intentional conduct necessary for the IDEA exception. *J.L. v. Ambridge Area School District*, 2009 WL 119608 at *7 (W.D. Pa. 2009). In *J.L. v. Ambridge*, the judge adopted a more liberal interpretation of the exception based upon the elements of negligent misrepresentation as described in Restatement (2d) Torts §552 (1965):

> One who in the course of his business or profession supplied information for the guidance of others…is subject to liability for harm caused to them by their reliance upon the information if
>
> (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
>
> (b) the harm is suffered
>
> (i) by the person or one of the class of persons for whose guidance the information was supplied; and
>
> (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct.

Quoted in *Bilt-Rite Contractors, Inc. v. Architectural Studio*, 581 Pa. 454, 482, 866 A.2d 270, 287 (2005). In the context of the IDEA exceptions, the "information" refers to "the problem forming the basis of the complaint." 20 U.S.C. §1415(f)(3)(D)(i). The communication relates to a representation by the local educational agency that it had resolved that problem, thereby inducing parent to refrain from filing a due process complaint, or refrain from further investigation. Such an interruption of the due process hearing procedures constitutes the "harm" suffered by the class of persons (parents) expected to justifiably rely upon and act in accordance with the information. The "liability" to which a local agency is subject in this context is extension of the limitations period.

In adopting negligent misrepresentation as the appropriate legal standard for the IDEA misrepresentation exception, the court in *J.L. v. Ambridge* noted that the significant difference between negligent and intentional misrepresentation is that the party charged with a false representation of material fact "'need not realize that his words are untrue but must have failed to make a reasonable investigation of the truth of those words.'" 2009 WL 119608 at *7, *quoting, Bortz v. Noon*, 556 Pa. 489, 501; 729 A.2d 555 (1999).

Contrary to the District's argument, the decisions of a single judge in two of the federal district courts in Pennsylvania do not speak for the rest of the judges in each of those districts who have not yet ruled on the issue, so there is no Eastern District and Western District "rule." Moreover, even if there were a consensus in the various districts, district court decisions, whether consistent or not within each district, do not constitute binding precedent.

My use of the elements of negligent misrepresentation to assess parents' claims that the IDEA misrepresentation exception applies predates both the *Deborah A.* and *J.L. v Ambridge* decisions. My conclusion that negligent misrepresentation is the appropriate legal standard to apply to the specific misrepresentation exception is based upon the remedial purposes of the IDEA statute, and the role of due process hearings in assuring that school districts fulfill their affirmative duty to appropriately address disabilities that adversely affect educational progress by providing appropriate services to IDEA eligible and §504 protected children. Consequently, until and unless there is a binding decision with a different interpretation of the term "specific misrepresentation," I will continue to apply the negligent misrepresentation elements from the Restatement 2d of Torts, as described above, to determine whether the specific misrepresentation exception extends the limitations period. *See* 71 F.R. 45540-01, 2006 WL 23332118 (Aug, 14, 2006) at *46706, rejecting suggestions that the IDEA regulations provide a further explanation of

the statutory term: "We do not believe it is appropriate to define or clarify the meaning of "misrepresentations," as requested by the commenters. Such matters are within the purview of the hearing officer."

C. Withholding Information Exception to the IDEA Timelines

Like the definition of the term "specific misrepresentation," the meaning and parameters of the withholding information exception the 2 year limitations period is not explicitly defined in the IDEA statute or regulations. Again, a judge in the Eastern District of Pennsylvania has taken a restrictive view, concluding that this exception applies only when a school district fails to provide parents with procedural safeguards notices. *See, School District of Philadelphia v. Deborah A.*, 2009 WL 778321 at *5; *Evan H. v. Unionville-Chaddsford Sch. Dist.*, 2008 WL 4791634 at *7.

After further review of the statutory/regulatory language and the judge's basis for limiting the exception to withholding procedural safeguards notices, I have been persuaded that the very limiting interpretation of the exception is not warranted. The IDEA is codified in Title 20 of the United States Code, under the title "Education." 20 U.S.C.A. (Table of Contents)(West 2010). This title is divided into 78 chapters, including Chapter 33, "Education of Individuals with Disabilities." Subchapter II, "Assistance for Education of All Children With Disabilities," contains Part B of the IDEA. The two year limitations periods for IDEA claims, and the exceptions to the timeline are found in §1415, "Procedural Safeguards," specifically §1415(f)(3)(C) and (D). The description of the withholding information exception in the statute reads as follows:

> (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—

> …
> **(ii)** the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

The IDEA implementing regulations, Part 300 of Chapter 34 of the Code of Federal Regulations, describes the withholding information exception in nearly identical language:

> Exceptions to the timeline. The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to —
> …
> (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

34 C.F.R. §300.511(f)(2).

Reading the statutory/regulatory language literally leads to the conclusion that any information required to be disclosed under Chapter 33, Subchapter II, including all of Part B of the IDEA, and all information required to be provided under 34 C.F.R. Part 300 could, if withheld, support an exception to the two year timelines, provided that as a result of the withholding of any such information, "parent was prevented from requesting the hearing." 20 U.S.C. §1415(f)(3)(D), or "parent was prevented from filing a due process complaint." 34 C.F.R. §300.511(f).

In an early case concerning the application of the withholding information exception, a district court judge approved the hearing officer's conclusion that the withholding required information exception could extend the 2 year limitation period where the school district failed to assure that correspondence and notices concerning the student were provided to parent in understandable form, since the documents were provided in English and not always translated into parent's native language. *See, Rafael N. v. Marple Newtown School District*, 2007 WL 2458076 (E.D.Pa. Aug. 23, 2007) at *4, 5. That decision suggests that "required information" broadly includes all notices and reports concerning a student that should be provided under

IDEA. Under that interpretation, "required information" includes, *e.g.*, records relating to a child (20 U.S.C. §1415(b)(1)); parental permission for initial evaluations and reevaluations, including a description of the proposed evaluation procedures (20 U.S.C. §1414(b)(1); 34 C.F.R. §§300.300(A)(1)(i), 300.304(a)); copies of evaluation reports and documentation of eligibility (20 U.S.C. §1414(b)(4)(B), 34 C.F.R. §300.306(a)(2)); notice of IEP meetings and other matters concerning IEP meetings described in 34 C.F.R. §300.322(a),(b); due process complaints initiated by a local education agency (20 U.S.C. §1415(b)(7)(A)(i)); prior written notice and procedural safeguards notices (34 C.F.R. §§300.503 & 504).

An analysis of the court's reasoning in limiting the "information required to be provided" to procedural safeguards in *School District of Philadelphia v. Deborah A.* and *Evan H. v. Unionville-Chaddsford Sch. Dist.* suggests that the rulings were based upon a New Jersey district court decision, *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008). In that case, however, the court actually concluded that a school district's repeated refusal of parents' evaluation requests without issuing prior written notice, which would also have informed parents of the availability of procedural safeguards, constituted withholding "information required to be provided." 559 F.Supp.2d at 492. Nothing in the *D.G.* decision suggests that the court was limiting "required" information to procedural safeguards notices. The failure to issue prior written notice, including procedural safeguards, was the information that fit within the exception in the circumstances presented by that case.

III. PARENTS' SPECIFIC CONTENTIONS/CONCLUSIONS FROM THE EVIDENCE

A. Knew or Should have Known Date

Prior to Mother's testimony in this case, Parents argued that they had no reason to know that Student's difficulties in school indicated a potential disability until they received the District's evaluation report. The underlying premise that the two year limitations period began to run only when Parents learned from the District that Student had a learning disability is flawed because the statute and regulations do not require explicit knowledge that a disability exists.[4] The two year limitations period begins to run when Parents know, or in the exercise of reasonable diligence should know, of an action by the District that becomes the basis for Parents' belief that a violation occurred and ultimately leads to a due process complaint. In the context of a child find violation, the "action" can be the district's alleged failure to respond sufficiently and effectively to concerns expressed by parents about a child's functioning in school. Parents' constructive knowledge sufficient to begin the time period for initiating a complaint may reasonably begin when parents again express the same concern, signaling that they do not believe that the district's response has been effective.[5]

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[4] Similarly, there is no requirement that parents know or suspect that an LEA's actions violated IDEA requirements. *See J.P. and R.P. v. Enid Public Schools*, 2009 WL 3104014 (W.D.Okla. 2009 at *5, 6):

> The IDEA's two-year limitation on claims…is triggered when the parent **"**knew or should have known about the alleged *action* that forms the basis of the complaint" and not when the parent becomes aware that the school district's actions are actionable. 20 U.S.C. § 1415(f)(3)(C) (emphasis added); *see Bell v. Bd. of Educ.*, No. CIV 06-1137, 2008 WL 4104070 at * 17 (D.N.M. Mar. 26, 2008) (noting that the "IDEA's plain language states that the limitations period is two years from the date that the parents knew of the complained-of action, not two years from the date that the parents knew the action taken was wrong")

[5] Parents suggest that because the IDEA statute and regulations refer to filing a complaint within two years of the date the parents or school district knew or should have known of the action underlying the complaint, an assessment of when the District knew or should have known that it committed a violation also needs to be made in order to determine when the 2 year period began to run on Parents' claims. That language, found in 20 U.S.C.§1415(b)(6)(B) and 34 C.F.R. §300.507(A)(2), provides no logical reason for making one party's claim dependent upon the other party's knowledge or notice. The IDEA statute and regulations also provide that "A parent or a public agency may file a due process complaint…" *See* 34 C.F.R. §300.507(a)(1). It is far more reasonable to construe the limitations period, including the "knew or should have known" language, as applying to the party that filed the complaint, whether parent or public agency.

In this case, according to Parents' testimony, they began expressing concerns about Student's reading ability and behavior issues during first grade, and continued to do so into second grade. (N.T. pp. 176—178) Student's Mother also testified that during a meeting with District staff concerning Student's reading difficulties in February 2008, she became aware that Student could have an evaluation for special education services by the District. In addition, Parent testified that shortly before a teacher conference in April 2008, she was aware from an outside source, a friend who is a reading specialist, that Student might have a reading disability, and "after doing quite a lot of reading about it, I felt that that was what was going on with [Student]." (N.T. p. 180, l. 22—24) Consequently, using the latest possible knowledge date from Parent's explicit testimony, the record establishes that Parents had sufficient knowledge to suspect that the District had not adequately addressed Student's reading difficulties no later than February 2008. Parents had two years from that point, until February 2010, to file a complaint alleging a child find violation for the District's failure to conduct an evaluation to determine whether Student had a disability and needed specially designed instruction.[6] Parents' complaint, however, was not filed until December 14, 2010, barring all claims for alleged child find violations which occurred prior to mid-December 2008.[7] By November 26, 2008 the District had completed its initial evaluation and offered an IEP. Parents signed the NOREP on December 17, 2008. (S-24, S-26)

B. Specific Misrepresentation Exception

[6] Moreover, even if it were necessary for Parents to have an explicit understanding that Student's difficulties arose from a disability, they had that knowledge no later than early April 2008. (N.T. pp. 180, 181; S-11)

[7] At the time that Parents had sufficient knowledge in February 2008 to question the District's actions during the 2007/2008 school year, they also had reason to know that the District's past actions in providing classroom supports for Student but no evaluation for special education services, may have been inadequate and the limitations period also began to run on claims that might have been asserted for all prior school years. Since Parents did not file their complaint until after the District evaluated and identified Student as IDEA eligible, all prior child find claims were also extinguished.

The determination whether the specific misrepresentation exception applies is based upon whether there are sufficient facts to establish that the School District provided information that it had resolved Parents' concerns that 1) was misleading and 2) induced Parents to rely on such information to the extent that they were prevented from filing a due process complaint to assert child find violations by February 7, 2008.

Parents asserted that the District made several misrepresentations. Initially, Parents contended that the evidence would establish 1) that Parents had no reason to know of Student's possible educational disabilities until they received the District's evaluation report in the fall of 2008 because the District failed to alert them to such needs; 2) that the District had sufficient evidence to know of Student's educational needs much earlier, yet failed to alert Parents to those needs; 3) that the District's failure to identify Student's educational needs impeded Student's ability to receive an appropriate education; 4) that the District's failure to alert Parents to Student's educational needs caused them to not pursue evaluations that would have disclosed Student's disability. After the first two hearing sessions, Parents added the contention that the District provided Parents with conflicting or misleading information about Student's educational progress, academic and behavior difficulties, including Student' achievement in reading. Parents further argue that the District represented in November 2008 that Student was receiving reading instruction by means of the Wilson Reading Program, but the District was actually providing Fundations.

None of these contentions establish "specific misrepresentations" by the District that prevented Parents from timely filing a due process complaint. First, as discussed above, Parents were well aware of Student's educational difficulties, and even that such difficulties may have been caused by a disability, by the spring of 2008. In addition, Parents declined a District

evaluation in order to pursue a private evaluation of Student in the spring of 2008. (N.T. pp. 183, 184) Since Parents obtained an independent evaluation and received a diagnosis of disability from their private evaluator in mid-May 2008 (S-15, p. 15), it would be unreasonable to conclude that they continued to rely upon prior statements of the District after that point.

Second, the "misrepresentations" that Parents identify are really arguments that the District's actions during the 2006/2007, and 2007/2008 school years amount to substantive IDEA child find violations based upon negligence. Even assuming that the District's conduct could be considered both negligent and an IDEA violation, however, a negligent failure to identify Student as IDEA eligible prior to the fall of 2008, and thereby to provide necessary services during the prior two school years, does not constitute "specific misrepresentations" that the District resolved the problem that is the basis of the complaint and that the District's conduct prevented Parent from filing a timely due process complaint**.**

As explained in the legal standards discussion above, proving the elements of negligent misrepresentation requires much than an inquiry into whether a school district generally acted with reasonable care with respect to identifying, evaluating and/or providing appropriate educational services to a child. Rather, in order to extend the limitations period on the basis of the specific misrepresentation exception, Parents must produce sufficient evidence to prove 1) that the District carelessly or incompetently gathered and/or communicated information telling Parents that the District had solved the problems concerning Student's school performance that Parent previously raised; 2) that Parents relied on the District communication(s) to the extent that they believed that the problems they were concerned about were resolved, or that there were no problems with Student's performance; 3) that such reliance was justifiable in light of other information Parents had. The record, particularly Parent's testimony and the independent

evaluation Parents obtained during the spring of 2008, clearly does not support at least the second and third of those elements.

Parents' final argument with respect to specific misrepresentations appears to cover the period between the November 26, 2008 IEP meeting and December 13, 2008, which is also outside of the two year window for timely claims. Concluding that the District's statement that Student was receiving Wilson reading instruction was a specific misrepresentation would require acceptance of an erroneous underlying premise, *i.e.*, that Parents are entitled to a particular type of instruction that they prefer. The District, however, must provide an appropriate educational program, not a particular kind of instruction. Parents can certainly present evidence that the reading instruction the District provided was not appropriate for Student, but they cannot extend the limitations period based upon a purported misrepresentation that the District was providing Parents' preferred instructional methods but was actually providing something else. Parents have no viable claim for a District's failure or refusal to provide a program of instruction that they prefer over others.

More important, however, Student was receiving instruction via Wilson methods through the Fundations program. Parents requested that I take judicial notice that the District's website lists Wilson Reading and Fundations as separate programs. In addition, however, I am taking notice that the official Wilson Language Program website lists both Fundations and the Wilson Reading System, which is presumably what Parents believed Student was receiving from the District, as viable and recommended reading instruction for students in 3rd grade.[8]

[8] A copy of the relevant page from the Wilson Language Program website will be sent as an attachment to this ruling.

C. Withholding Required Information Exception

Parents argue that the two year limitations period does not apply if the District withheld any information required to be provided under Subchapter II of Chapter 33, the IDEA statute, and Part 300 of Chapter 34 of the Code of Federal Regulations, apparently at any time prior to the date Parents filed their complaint. That, however, is not an accurate statement of how the exception applies to extend the limitations period. In order to establish the withholding information exception, Parents must produce evidence that 1) the school district withheld information; 2) the information withheld was "required to be provided" by some provision of the IDEA statute and regulations; 3) that the absence of the information prevented Parents from filing a timely due process complaint—in other words, Parents must show that had they received the information withheld by the District, they would have initiated due process within the required two year period.

As they did with respect to the specific misrepresentation exception, Parents cite to lapses by the District that could support a substantive child find violation, such as not issuing a permission to evaluate form until September 2008. In addition, Parents assert that they did not receive a procedural safeguards notice until they received the PTE. Parents do not, however, suggest that such delays prevented them from filing a due process complaint until December 2010. Parents had all of the information that they contend is "required" information that was withheld by the District well before the 2 year limitations period expired in February 2010.

IV. CONCLUSION

Based upon the legal standards applicable to the IDEA limitations period and the evidence in this case, Parents may produce substantive evidence in support of the alleged violations that occurred no more than two years prior to the date the complaint was filed in December 2010.

Under the circumstances of this case, neither the specific misrepresentation nor the withholding information exception extend the two year limitations period, since nothing the District did or said, or failed to do or say, prevented Parents from timely filing a due process complaint.

The substantive claims in this matter are limited to whether the District denied Student FAPE from December 13, 2008 through the date Parents withdrew Student from the District, and, therefore, whether Parents are entitled to compensatory education from mid-December 2008 through the end of the 2008/2009 school year, and whether Parents are entitled to private school tuition reimbursement for the summer of 2009 and for 2009/2010 and 2010/2011 school years. All of those claims are based upon alleged violations that occurred no more than 2 years prior to the date the complaint was filed. As required by §§1415(b)(6)(B), (f)(3)(C) and 34 C.F.R. §§300.507(a)(2), 300.511(f).

Dated: April 14, 2011

Anne L. Carroll

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HEARING OFFICER