This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 1631-1011AS

Child's Name: L. B.

Date of Birth: [redacted]

Dates of Hearing: 7/22/11, 9/15/11, 9/27/11, 10/6/11

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents [Parents]	Parent Attorney Michael Gehring, Esq. McAndrews Law Offices 30 Cassatt Avenue Berwyn, PA 19312
School District Colonial 230 Flourtown Road Plymouth Meeting, PA 19462-1252	School District Attorney Karl Romberger, Esq. Sweet, Stevens, Katz & Williams 331 Butler Avenue, P.O. Box 5069 New Britain, PA 18901 -0934
Date Record Closed:	October 28, 2011
Date of Decision:	November 12, 2011

Hearing Officer: Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

This case centers on events that occurred during Student's high school, from [redacted] school years. Early in 9th grade Student [acted responsibly and informed staff about a potentially dangerous situation]. Afterward, however, Student was ostracized by peers and began struggling academically. In the middle of the school year, in an apparent effort to gain peer acceptance, Student [incurred some legal involvement including brief juvenile detention]. At the time of Student's release, the District considered an evaluation to explore IDEA eligibility but did not issue a permission to evaluate (PTE).

Student's difficulties in school continued and increased during 10th and 11th grades. In February [of] 11th grade, the District identified Student as IDEA eligible in the OHI category due to ADHD and offered two IEPs to address ADHD symptoms and behavior/emotional issues. Nevertheless, Student's difficulties in school and other settings increased, ultimately resulting in Parents' placing Student in an out of state residential program in December [of] 12th grade.

In [the following] March, Parents initiated a due process complaint alleging denial of FAPE beginning in the spring of [9th grade], seeking compensatory education from that time until Student left the District, reimbursement for the private placement and appropriate services until age 21. The hearing was held over four sessions in July, September and early October 2011. For the reasons that follow, Student is awarded full days of compensatory education from March [of 10th grade] until leaving the District, including ESY services for two summers. Reimbursement for the private placement is denied because it is a residential treatment program that does not directly provide educational services. By agreement of the parties, present and

future program/placement issues were removed from consideration at the hearing due to an ongoing District reevaluation.

ISSUES

1. Did the School District timely evaluate and identify Student as IDEA eligible?

2. Did Student suffer substantive harm to educational progress due to an untimely evaluation/delay in identification or because of a lack of appropriate services at any time during the period in dispute?

3. Is the School District required to provide Student with compensatory education, and if so, for what period, in what amount and in what form?

4. Is the School District required to reimburse Parents for the costs of a private residential program they provided to Student from December [of 12th grade] through the end of the [Student's 12th grade][1] school year?[2]

FINDINGS OF FACT

1. [Student name] (Student) is [a teen-aged] child, born [redacted]. Student is a resident of the Colonial School District and is eligible for special education services. (Stipulation, N.T. pp. 15, 16)

2. Student has a current diagnosis of Other Health Impairment (OHI) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 16)

3. Just before entering 3rd grade, Student was evaluated by the District but found not to be IDEA eligible because Student was making appropriate progress in the regular education curriculum. Student had been diagnosed with ADHD, but medication effectively controlled the symptoms. (N.T. pp. 57, 505; S-5, p. 5; S-6)

[11] In the REDACTED version prepared for posting on the website, references to the specific calendar years were removed to help protect Student's privacy, and the calendar years are only identified by Student's grade at the time.

[2] A 5th issue was identified on the record at the initial due process hearing session, *i.e.*, what would be an appropriate program/placement for Student in the future? (N.T. p. 54) Because of an unavoidable gap between the first hearing session and the subsequent sessions, the parties were ordered to have an IEP meeting to try to resolve that issue prior to the second hearing session, or at least provide a specific program/placement to assess at subsequent hearing sessions. The parties later agreed, however, to delay an IEP meeting until completion of a new evaluation of Student. Since those processes were ongoing when the hearing concluded, the issue of prospective program/placement was removed from this case by agreement of the parties.

4. Student entered the District high school for 9th grade in [redacted] school year as a regular education student. (N.T. pp. 58)

5. Early in the school year, Student became aware of a [potentially dangerous situation and revealed it]. After Student revealed it, Father contacted police, who interviewed Student, and acting upon the information provided, prevented [the potential danger]. (N.T. pp. 58—60, 237—239, 245)

6. Although Student's courageous act was praised by school and [others including the media], peers soon began to criticize and ostracize Student for [the revelation]. (N.T. pp. 59, 60, 62, 64, 242—244; P-1, p. 1)

7. Because of [redacted] Student had also endured teasing for many years, which prompted Father to contact Student's high school guidance counselor just before Student entered high school to attempt to forestall bullying. (N.T. pp. 284, 285; S-16, pp. 2—4)

8. Within a few weeks of the incident [referenced in FF #5 above], Parents requested assistance from Student's guidance counselor in finding a community counselor to help Student cope with the aftermath of the incident, especially peer reaction. (N.T. pp. 61, 62; P-1, p. 2)

9. Student's difficulties with peers continued in the fall and winter of 9th grade and appeared to become more bothersome to Student. (N.T. p. 62)

10. In [late winter of 9th grade], Student and two others [engaged in illegal conduct which was] reported to the high school principal; Student was arrested and committed to a juvenile detention facility for 21 days. (N.T. pp. 63, 64; S-16, p. 1)

11. A psychological assessment ordered by the juvenile court judge was completed at the detention center and resulted in a generally positive report, concluding that Student was "extremely bright and extremely likeable with exceptional potential for a successful adult life." The juvenile court psychologist specifically noted Student's supportive family, good attitude, motivation to succeed and the absence of substance abuse. (N.T. p. 64; S-16, pp. 2—6)

12. Cognitive testing on the WISC-IV yielded a full scale IQ in the high average range of cognitive functioning, but with a pattern typical of a child with ADHD in that the processing speed index score was much lower than other index scores, demonstrating a weakness on tasks that required "sustained vigilance." (S-16, pp. 3, 4)

13. The evaluating psychologist also noted symptoms of post-traumatic stress disorder and diagnosed a Depressive Disorder NOS in addition to ADHD. The psychologist recommended that Student continue seeing a psychiatrist and psychologist. Parents provided the juvenile detention center psychological report to the District in -[spring of 9th grade]. (N.T. p. 65; S-16, pp. 5, 6)

14. In early March, while still at the detention center, Student was referred to the high school student assistance program, known as the C.A.R.E. team. The C.A.R.E. team included Student's guidance counselor and a school psychologist, along with a school administrator and other relevant District staff. Notes of the C.A.R.E. team discussion of Student's situation were made on a form designated C.A.R.E Log. It included an Action Plan that identified two goals for Student: a) improve emotional stability; b) identify a placement upon release. In addition to goals, [an early March] C.A.R.E Log entry described interventions selected by the C.A.R.E team, specifically, out of school counseling provided by Parents, an evaluation by the school psychologist and counseling by the guidance counselor and the school-based community counselor upon Student's return to school. (N.T. pp. 293—296, 510; P-4, p. 1)

15. Before Student was released from the juvenile detention center, Parents met with District staff to discuss Student's return to school. Parents believed that a period of homebound instruction would ease Student's transition back to the high school. The District believed that Student should not return to the high school for the remainder of the school year, and recommended placement in one of several alternative schools with a therapeutic environment designed to meet the needs of regular and special education students with disruptive behaviors, attention/distractibility or substance abuse issues that interfere with progress in a regular classroom environment. (N.T. pp. 65, 66, 189—191, 247—252, 254—257, 287, 288—291, 579—583; P-3, p. 18, P-5, S-17)

16. After discussion with Student's treating psychologist, and after visiting some of the schools, Parents rejected the alternative schools as inappropriate options for Student. Parents and the District agreed to homebound instruction. (N.T. pp. 66—69, 71, 72, 210, 211, 249, 250, 288, 289; S-17, S-19)

17. Although Parents did not remember it, the District's then-Director of Pupil Services recalled asking Parents, verbally, during the discussions of Student's re-entry into the District, whether they wanted an evaluation of Student. The Director recognized that Student's situation throughout 9th grade, including academic struggles and difficult peer relationships raised a number of "red flags" for the District that warranted an IDEA evaluation. (N.T. pp. 71, 509, 579, 583, 585, 590, 592—595)

18. In their conversation with the Director of Pupil Services, Parents neither accepted nor refused an evaluation. At some point, the District Superintendent instructed the Director of Pupil Services not to issue a permission to evaluate (PTE) for Student, directive contrary to the Director's conclusion that the District should proceed with an evaluation,. (N.T. pp. 588—590)

19. Parents, particularly Mother, had become angry at the exclusion of Student from the high school after release from the detention center, and met with the District Superintendent about that issue in early May. Although the District did not believe it was advisable for Student to return to the high school on a full-time basis, after the meeting between Parents and the Superintendent, Student began participating in [one] class at the high

school, as well as [another] class that had begun several weeks before. (N.T. pp. 72, 289—291; S-22, S-23, S-24)

20. Notwithstanding significant concerns about math due to skill/knowledge gaps created by the amount of instructional time Student had missed, Student generally did well with homebound instruction, finishing 9th grade with a 3.33 grade point average for the second semester, and a 3.16 cumulative average. Student's lowest final grades for the year were "Cs" in math and French. (N.T. pp. 299—301; S-25, S-26, S-27, S-28, S-29, S-30, S-31, S-32, S-33, S-34, S-35)

21. The plan for Student's 10th grade year was to transition back to the high school for all classes, receiving in-school counseling support to assure a smooth transition. In early October, Student was returned to the C.A.R.E. team. Although there may have been an automatic referral due to the circumstances at the end of the previous school year, academic and emotional concerns arose at the beginning of the new school year. (N.T. pp. 301, 302, 510, 531, 532)

22. The C.A.R.E. Log for 10th grade, dated - [in mid-October], listed several issues as the reason for referral: poor academic performance, lack of participation in class, withdrawn, weight loss, lack of social support, poor attention to social cues. The Action Plan listed two goals: a) Increase academic performance; b) increase emotional stability and five interventions: a)Extended learning time; b) meetings with the school and community counselor; c) consult with parents for possible referral for side counseling and medical/health issues; d) classroom observation; e) possible mentor assignment and involvement in school activities. There was one subsequent C.A.R.E. Log entry for the remainder of the school year, [in late October], noting a meeting with the community counselor and the guidance counselor. (P-4, p. 2)

23. To address Student's academic problems, particularly in math, Student was reassigned to a lower level math class with a modified curriculum and assignment to extended learning time was recommended. Student's difficulties, however, increased as the school year progressed. Teachers noted Student's exhausted appearance and lack of motivation. Student's psychologist expressed concerns about posttraumatic stress depression, which Parents shared with the guidance counselor in February [of 10th grade]. The guidance counselor considered that information a "red flag" for an evaluation. (N.T. pp. 73—75, 305—307, 511, 512; P-2)

24. Student met regularly with the guidance counselor, who noted Student's continuing social isolation and concerns about [physical issues]. The guidance counselor thought depression was the source of Student's lack of confidence and increasing problems. (N.T. pp. 308, 309)

25. Student's 10th grade GPA was 2.45 for the first semester and dropped to 1.75 at the end of 10th grade. Student's final grades dropped from "As", "Bs" and a few "Cs" in 9th grade to primarily "Ds" in 10th grade. (P-2, p. 9, S-46)

26. Student's downward spiral continued and worsened in 11th grade. Parents and teachers communicated frequently concerning Student's low grades and failure to complete homework assignments. Parents also met with the guidance counselor. In Student's meetings with the guidance counselor, Student expressed anger and other negative feelings, spoke openly about drug use and began expressing suicidal thoughts. (N.T. pp. 77—79, 313, 314, 317, 321, 515; P-3, pp. 1—14)

27. The initial C.A.R.E. log for 11th grade, dated [in early October], included the same goals as 10th grade, but the issues listed under "Reason for Referral" increased in number and severity, adding depressive symptoms, hopelessness, conflicts with peers and Parents in addition to academic concerns. (N.T. pp. 313, 314, 515 ; P-4, p. 3)

28. [In late October of 11th grade] the District a Permission to Evaluate (PTE), seeking Parents' permission to conduct cognitive and achievement testing, a review of records, classroom assessments, observations and behavior rating scales assess Student's strengths and needs and determine Student's eligibility for IDEA services. (N.T. pp. 80, 535, 536; P-7, p. 1)

29. On the same date, the school psychologist and Student's guidance counselor conferenced with Student's Father and the high school assistant principal to discuss Student's significant and worsening problems, to develop strategies to address Student's academic problems pending completion of an evaluation, and to discuss Parents concerns about the proposed evaluation. (N.T. pp. 533, 534; S-54[3])

30. On the advice of Student's treating psychologist, Parents requested, and the District agreed to fund, an independent educational evaluation (IEE). Parents approved the District's PTE, but with stipulations that included limiting the District's evaluation to observations and teacher consultation in order to reserve standardized testing for the IEE. Parents subsequently signed releases permitting the District's educational psychologist to speak to Student's psychologist and psychiatrist. (N.T. pp. 81, 82, 85—87, 195—197, 538—540; P-7, p. 2, P-9, p. 7, S-60)

31. The IEE Parents intended to obtain was initially delayed for several months because the evaluator recommended by Student's treating psychologist was not immediately available. In the interim, Student's negative behaviors escalated, resulting in Student's admission to a crisis center and then a partial hospitalization program in February [of 11th grade] after threatening suicide. (N.T. pp. 82—84, 319, 320)

32. The District school psychologist spoke with Student's treating psychologist, who noted that Student was open to and benefited from talking with counselors, was sensitive to the perceptions of others, valued relationships with teachers, and could have "black and

[3] Parents objected to the admission of pp. 2 & 3 of S-54, consisting of copies of handwritten notes, contending that the origin of the notes had not been identified. The ruling was reserved pending review of all the testimony. The objection is now overruled and the entire document admitted into the record of this case. Student's Father testified that the notes are in his handwriting, and the school psychologist testified that the notes had accompanied Parents' signed PTE. (N.T. pp. 197, 534)

white" thinking. The psychologist made recommendations to address those issues, such as helping Student develop strategies to foster taking the perspectives of others; positive feedback from teachers who check-in periodically to ask how Student is doing and offer help; assistance with problem-solving when frustrated; assistance with organization and planning; encouragement to stay after school for additional help. (N.T. pp. 541—543; S-57)

33. The recommendations were incorporated into a conference report produced after a meeting between Student's guidance counselor, the school psychologist and Student's teachers [in November of 11th grade]. (N.T. pp. 544, 545; S-57, S-59)

34. The school psychologist's evaluation report (ER) was issued [in February of 11th grade]. The teacher input from Student's first semester teachers did not reflect academic, emotional or social concerns as significant as identified in the C.A.R.E. Log and conference reports. The school psychologist's classroom observations, reflected task avoidance behaviors and the need for frequent re-direction and prompts to stay on task. Student's second semester teachers noted Student's intelligence and ability to do well academically, but identified problems with lack of motivation, focus, organization, class participation and a sad, withdrawn demeanor, (N.T. pp. 641; P-4, p. 3, P-10, pp. 2—5, 18, S-54, S-54, S-59)

35. Results of the rating scales completed by Parents and at least two teachers [BASC-II (Behavior Assessment System for Children-Second Edition) BRIEF (Behavior Inventory of Executive Functions) and Connors (Third Edition.)] revealed that both Parents and teachers identified difficulties with attention and executive functioning skills (P-10, pp. 11—14)

36. Although it was clear that Student struggled with emotional issues, the school psychologist did not identify Student as IDEA eligible in the category of Emotional Disturbance (ED), concluding that limitations Parents placed on the scope of the evaluation did not permit a conclusive determination of Student's eligibility in that category. The school psychologist concluded that Student should be identified as IDEA eligible in the OHI category based on the ADHD diagnosis and provided with specially designed instruction via an IEP to address attention, focus and executive functioning deficits. (N.T. pp. 638, 639; P-10, p. 19)

37. The school psychologist recommended strategies to address Student's areas of difficulty and suggested that the IEP team consider incorporating a positive behavior support plan into the IEP to address specific behaviors of concern. (N.T. pp. 639, 640; P-10, pp. 19, 20)

38. The IEP developed at an IEP meeting [in March of 11th grade] included goals for improving completion of assignments, time spent in class and ability to share feelings and develop coping strategies. The IEP included a transition plan and provided specially designed instruction (SDI) to be used in all academic classes, such as preferential seating, extended time for tests/assignments, assistance with organizing/chunking long term

assignments, repetition of directions, meetings with the community counselor, check-ins with the itinerant support/mentor teacher and a behavior plan tied to the IEP goals, with replacement behaviors identified and specified consequences (rewards) for engaging in desirable behaviors. (N.T. pp. 90; P-11, pp. 5—7, 9—12)

39. The accompanying NOREP provided for an itinerant support placement, with an opportunity to meet with a case manager experienced in dealing with ADHD issues who would provide organizational support and monitor assignment completion. (N.T. p. 659—662; P-12)

40. Within a few days, it became apparent that the IEP was ineffective, since Student's emotional state and behaviors of concern continued, and actually increased, while academic performance further declined. Student failed to report for the designated appointment with the mentor teacher and had more disciplinary referrals. [In March of 11th grade] the school psychologist shared with the C.A.R.E. team that she was going to contact Student's case manager to schedule another meeting. A conference meeting was held on April 15, followed by a formal IEP meeting on May 6. (N.T. pp. 93, 656—658; P-3, pp. 42—52, 54, 55—57, 62—67, 441; S-97, S-99, S-107)

41. At the conference and the IEP meetings, Parents and District staff shared their concerns and discussed assigning Student to the emotional support classroom, known as the Educational Success class. To accomplish that, however, Student had to be removed from an SAT prep course. Although it was a no credit pass/fail class, Student was successful in it and was reluctant to relinquish it. (N.T. pp. 98—101, 326, 327, 446, 663-666; P-18, S-107)

42. For the remainder of the [11th grade] school year, Student attended the Educational Success class to work on assignments for the academic classes and did well in that class. The Educational Success class is designed to support the substantive academic classes (N.T. pp. 101, 446—450)

43. Student failed math and an [elective] class in 11th grade, and ended the school year with a 1.17 grade point average. (N.T. pp. 103, 454; P-3, p. 98, S-139)

44. Although Student began 12th grade in the District, again spending part of the day in the Educational Success class, problems with substance abuse surfaced very early in the year, prompting Parents to place Student in a mental health facility for a few days and then into drug treatment facility for several weeks. (N.T. pp. 104—106; 464, 465)

45. Because Parents believed that Student would need additional emotional and behavior support after leaving the drug rehabilitation program, they arranged for Student to be escorted to an out of state program to continue working on behavioral and emotional issues. (N.T. pp. 109—113; P-27, P-28)

46. The facility where Student spent most of the [12th grade] school year is a life skills learning program licensed by the Department of Health and Human Services in the state

where it is located. It is designed to foster independence in gender-specific older adolescents/young adults (Ages 17½--24) with a history of poor decision-making, behavior issues, and often, substance abuse. (N.T. pp. 125—127, 165; P-28)

47. Participants in the program may need psychiatric or psychological care, evaluations, job skills, support for activities of daily living or academic services. Behavior and emotional support is available around the clock. (N.T. pp. 126—130; P-28)

48. Residents in need of academics have the opportunity to enroll in local secondary or post secondary schools, or take correspondence courses, to earn a high school diploma or GED or to take college courses. The facility is not accredited by the department of education in the state where it is located, and since there are no teachers and no academic curriculum at the facility, residents may leave the facility to attend school only when they have earned the privilege of leaving the grounds without supervision, which takes a minimum of 90 days. (N.T. pp. 128, 129, 146, 147, 165, 181, 182)

49. Student ultimately enrolled in a public school program near the treatment facility and satisfactorily completed all requirements for a high school diploma but on the advice of counsel declined to accept it. (N.T. pp. 138, 139)

50. Parents chose the life skills learning program for Student based upon the information they gathered, that convinced them that it was a good option to address Student's emotional and executive decision-making issues and behavioral support needs. (N.T pp. 208, 209)

DISCUSSION AND CONCLUSIONS OF LAW

Scope of Claim—Child Find

Parents' complaint sought an award of compensatory education for the District's alleged denial of FAPE beginning with [elementary] school year[s]. By the time of the hearing, however, Parents had limited their claim to alleged IDEA violations beginning in March [of 9th grade], when the District C.A.R.E. team first discussed Student and identified an evaluation by the school psychologist as an appropriate intervention to address Student's needs upon return to the District after release from the juvenile detention center. (N.T. p. 36; FF 14; Parents' Closing Argument, p. 42) Since the period in dispute, even as now limited, still exceeds the two (2) year

IDEA limitations period, it is necessary to determine the amount of time for which relief may be granted.

Although in most cases, whether the record provides any basis for extending the two rear period is the first issue to be determined—often before substantive evidence concerning the claims begins—that is not the case here. Parents' first substantive claim centers on when the District's "Child find" responsibility imposed by the IDEA statute and regulations arose with respect to Student. 20 U.S.C. §1412(a)(3), 34 C.F.R. §300.111. If that date is set at March [of 9th grade] or later, or if the District did not violate its child find obligation at all, Parents' claims are within the 2 year period.

In accordance with 34 C.F.R. §300.301(b), either the District or Parents may initiate a request for an evaluation to determine whether a student meets IDEA eligibility standards. To fulfill its child find obligation, school districts have an affirmative duty to propose an evaluation if it suspects, or should suspect, that a disability may be interfering with a student's functioning and progress in the regular education curriculum. The threshold question in this case, therefore, is pinpointing when the District should reasonably have proposed an initial evaluation of Student.

School District Responsibility to Student Arising from the October [of 9th grade] Incident

Parents fault the District for failing to provide effective support for Student from the time peer difficulties arose soon after the October [of 9th grade] incident that triggered the dispute in this case. Parents tacitly recognize, however, that there was an insufficient basis to suspect a disability before February[of 9th grade], when Student engaged in a criminal act. (FF 10) Nevertheless, a District special education supervisor testified that she recognized the difficulty and emotional risk a young adolescent would experience from the decision to [report a

potentially dangerous situation]. (FF 5; N.T. pp. 244, 245) Consequently, when Student acted out [redacted] with a criminal act a few months after the October [of 9th grade] incident, the District should have immediately prepared to take action to assess whether the negative effects on Student from the underlying incident rose to the level of triggering a disability—or exacerbated the effects of Student's ADHD.

The District was aware of Student's ADHD from a very early initial evaluation that resulted in a non-eligibility determination. (FF 3) Although that condition had not previously interfered with Student's educational progress, the upheaval caused by the extraordinary event early in the 9th grade school year (FF 6), combined with Parents' concerns about Student's transition to high school even before that incident (FF 7), and Parents' request for assistance soon after the event, (FF8) should have been sufficient to initiate a PTE addressed to Parents in order to prepare to determine whether Student then had a disability, and "by reason thereof need[ed] special education and related services." 34 C.F.R. §300.8(a)(1)

Based upon both the C.A.R.E. Team discussion and the testimony of the former Director of Pupil Services, the record establishes that in March [of 9th grade], the District did, in fact, recognize the need to undertake an evaluation of Student, yet failed to do so. (FF 14, 17) The District attempted to excuse its inaction in the spring of [9th grade] by arguing that Parents initially rejected an evaluation, and ultimately became so angry that they involved the superintendent to interrupt the process. *See e.g.*, N.T. pp. 584, 585, 588. In the next breath, however, the only witness called to testify who had actually spoken to Parents about an evaluation at that time, also testified that Parents may not have been in agreement themselves, and that they never made a final decision as to whether they would accept an evaluation. *See e.g.*, N.T. pp. 587, 590, 591. Although several witnesses testified to their understanding that Parents

did not want a special education evaluation, their conclusions were based upon information conveyed to them by a person who testified very inconsistently at the hearing about her conversations with Parents.

Although it is possible that Parents were also inconsistent in their conversations with the former Director of Pupil Services, the more reasonable inference is that Parents were upset about the District's suggestion that Student should not return to the District high school for the remainder of the school year after the juvenile detention ended. (FF 15, 16, 19) There is documentary support for that scenario in e-mail messages between Student's guidance counselor and the District Superintendent and none with respect to the Parents' purportedly adamant refusal to consider an evaluation. *See* S-22.

It is also quite possible that if the Director of Pupil Services implied that the primary—or only—reason for the District to propose an evaluation at that time was to find a basis for sending Student to an alternative school, Parents may very well have reacted negatively to an evaluation proposal, and the Superintendent may have prohibited further discussion of an evaluation on that basis.

As interesting as it may be, however, to find ways that testimony might plausibly fit together even when it appears hopelessly contradictory, even if Parents verbally rejected an evaluation, such response does not alter the District's legal obligations to Student under IDEA. Notwithstanding the circumstances, however extraordinary, it was the District's obligation to put all other considerations aside and notify Parents, in writing, that it believed an evaluation was needed, provide a written description of the proposed evaluation, seek consent and provide a procedural safeguards notice in accordance with 34 C.F.R. §§300.300, 300.503 and 300.504.

Parents, of course, would have been perfectly free to decline the evaluation by refusing consent or by taking no action at all, and in that event, the District would have had no further legal obligation to Student at that time, since it is not required to use the IDEA procedural safeguards procedures to override a parental decision not to permit a District evaluation. 34 C.F.R. §300.300(a)(3). The District is not free, however, to conclude that Parents would not likely provide consent for an evaluation, and further conclude that it is not, therefore, obligated to offer a written PTE that would include its reasons for seeking an evaluation and would further require providing Parents with procedural safeguards.

Because the District recognized that an evaluation was needed in March[of 9th grade], (FF 14, 17), but did not provide Parents with a PTE, the District violated its child find duty at that time.

Scope of Claim/ Limitations Period

Having concluded that the District's first IDEA violation occurred three years prior to the date Parents' due process complaint was filed, and thereby denied Student FAPE from that time until the District corrected its error, the next question is whether there is some basis for extending the IDEA limitations period to permit an award of compensatory education from the date the violation occurred.

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).

The "knew or should have known" language in the IDEA limitations provisions is stated in the same terms as the legal principle known as the "discovery rule," which generally 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. *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.[4] 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,

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

> 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.

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.

Parents in this case assert, with no real factual basis, that they could not have known of the District's child find violation until the District issued a PTE in September [of 11th grade], one and a half years after Student's problems in school first arose. As noted above, however, the question is not when a violation becomes obvious, but when a party acquires sufficient knowledge to undertake an investigation to determine whether there was a violation.

The record in this case demonstrates that Parents were clearly unhappy with the District's treatment of Student at the time of the initial child find violation in the spring of [9th grade]. (FF 16, 19) Parents may not have been aware of the specific nature of the violation that occurred, *i.e.,* that the District should have proposed an evaluation, but that specific knowledge is not

necessary. Moreover, the steady downward trend in Student's academic performance began in 10th grade [redacted] (FF 23, 24, 25) and the record suggests that Parents actually suspected at that time that there might be a basis for legal action, since Student's Father testified that he "probably" consulted counsel when student was in 10th grade. (N.T. p. 207)

Moreover, even assuming that receiving the procedural safeguards when the PTE was issued in late October [of 11th grade] was the first time Parents could possibly have realized that they should investigate to determine whether the District's prior conduct might have violated Student's rights under the IDEA, the 2 year limitations period had not yet run on the claim that the District had failed to evaluate and identify Student as IDEA eligible in the spring of [9th grade].

In enacting a 2 year time limit on IDEA claims, Congress most surely did not intend to permit a party to delay initiating a complaint on a claim that could be brought within the 2 year limitations period. Nothing in the record of this case suggests that any lack of knowledge by Parents or action of the District that prevented Parents from timely asserting a claim for the entire period in dispute, *i.e.*, filing a due process complaint by March 25, [year redacted] for the District's child find violation that accrued [two years prior], and the consequent denial of FAPE to Student from the time allowed for the District to complete an evaluation and develop an IEP to the date Student left the District in December [of 12th grade]. Since Parents did not do that, the period for which they may be awarded compensatory education will begin on [redacted] two years before the complaint was filed. *Steven I. v. Cent. Bucks Sch. Dist.*, 618 F.3d 411 (3d Cir.2010); *L.G. v. Wissahickon School Dist.*, 2011 WL 13572, 7 (E.D.Pa. 2011). (Under IDEA's amended statute of limitation**s**, a court may consider alleged denials of a FAPE occurring for a two-year period <u>prior</u> to parents' request for a due process hearing).

Denial of FAPE Prior to District Evaluation

Since the District did not complete an evaluation of Student and propose an IEP until March [of 11th grade], but should have done so in the spring of [9th grade], Student was receiving no special education services from the date the appropriate recovery period began in March [of 10th grade], until at least March [of 11th grade], when the District first proposed an IEP. (FF 36, 37, 38) During that period, Student's academic performance decreased steadily. (FF 25, 26, 27) Although a number of serious concerns were listed on the C.A.R.E. log for 10th grade, and although the guidance counselor met with Student regularly, noted continuing issues and concerns, and suspected depression as the underlying cause, (FF24), there is no evidence that additional—or effective -supports were provided to Student. From the C.A.R.E log, it appears that Student was not included as a subject in any C.A. R.E. meeting after October [of 10th grade], the only additional C.A.R.E. log entry for Student. There is no question here that Student did not receive effective educational services from March [of 10th grade] to March [of 11th grade].

Denial of FAPE After District Evaluation

Parents description of the District's evaluation and subsequent IEPs in March and May [of 11th grade] as too little and too late is justified. By the time the March [of 11th grade] IEP was implemented, Student's academic performance and ability to function in a setting that required some responsibility from Student, such as meeting with the case manager for assistance was badly compromised. Student could not benefit from the interventions in the IEP, as evidenced by the almost immediate need to revise it to address deteriorating conduct and academic performance. (FF 38, 39, 40) Although it appeared that placement in the Educational Success class was beneficial, it occurred too late in the school year to have a positive effect on Student's academic performance. (FF 42, 43)

The District argues that the limits Parents placed on its evaluation prevented development of an effective IEP from the outset. The District was not specific, however, with respect to the standardized tests that would have made a difference in identifying Student's needs in order to develop a more effective IEP. With the possible exception of math, Student's school problems had always been behavioral/emotional and/or related to ADHD. The school psychologist administered several behavior rating scales to both Parents and Student's teachers designed to identify those kinds of issues.

The underlying problem with effectively addressing Student's needs in this case was the delay in identifying Student as IDEA eligible and providing services before Student's conduct and academic performance had declined so far. It is true, as the District suggested, that it is impossible to determine whether more serious behavior and substance abuse problems could have been avoided—and similarly impossible to determine that the situation would not have spiraled so far out of control had the District's early response to Student's problems been more effective. Attempting to predict what might have been, however, is not the point. Student was entitled to a timely evaluation and that did not occur, thereby assuring that Student did not receive effective services when that first should have occurred. For that lapse, Student will be awarded full days of compensatory education

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.

Moreover, 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).

In this case, Student had not been properly identified as IDEA eligible before the summer [following 10th grade]. Compensatory education for that summer, therefore, will depend on whether ESY should have been offered during the summer [following 11th grade]. It is clear from the record that regression/recoupment was the only factor considered by the District (N.T. pp. 871, 872) and it did not take into account the underlying federal standard. Because the District had provided services for such a short time, and had denied FAPE for so long, Student needed additional services during the summer to receive FAPE.

Tuition Reimbursement

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 has provided significant guidance for 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.

2. Legal Standards Specific to Residential Placements

In addition to discussing the general standards for tuition reimbursement claims, the legal standards applicable to residential placements under the IDEA statute have been further explained in the *Mary Courtney T. v. School District of Philadelphia* decision.

In a much earlier case, *Kruelle v. New Castle Count School District,* 642 F.2d 687 (3rd Cir. 1981), the Court of Appeals established a standard for assessing whether a local educational agency is obligated to pay for a residential placement for an eligible student based upon whether the residential services designed primarily to address non-academic issues are educationally necessary, *i.e.*, required to fulfill a district's obligation to provide a free, appropriate public education. 642 F. 2d at 693. The court explained that a residential placement meets that standard if a child's medical, social or emotional needs so pervasively affect all aspects of functioning that it is not reasonably possible to sever his/her educational needs from other needs, and the additional services provided by the residential placement are, therefore, necessary to provide special education. 642 F. 2d at 694.

In *Mary Courtney T.*, the Court of Appeals further refined the standard, emphasizing that because virtually any service that addresses an area of significant need relates to a child's ability to learn, the inquiry must focus on the substantive goal to which a particular method, service or strategy is directed. 575 F.3d at 245. In order to impose the costs of residential services upon a school district, the purpose of the services must be closely linked to an eligible student's unique learning needs, in other words, "intended" and "designed" to address educational needs. *Id.* Another significant factor is whether the services provided by the residential placement are of the kind traditionally available in a public school setting. *Id.* Finally, the court returned to the basic

principle enunciated in the *Kruelle* decision, looking to whether a student's educational and non-educational needs are "severable." 575 F.3d at 246. Where Parents seek a residential placement, the issue for a special education due process hearing is not to determine the best treatment setting for Student, but whether Student's ability to function in a classroom is so adversely affected by his/her disability that education is not possible unless combined with treatment outside of school hours.

In this case, however, the legal standards are almost beside the point in light of the evidence concerning the facility in which Parents placed Student for the [12th grade] school year establishing that it is clearly not a placement that directly provides academic services. (FF 46, 47, 48,) Moreover, Parents chose the program to address emotional/behavior issues, not for academic/educational services.

Parents' claim for tuition reimbursement, therefore, is denied. Although the District denied Student FAPE and it is uncertain, but not likely that the District could have effectively addressed Student's significant needs had Student not left the District, Parents chose a therapeutic program with no educational component. The District is not required to fund Student's enrollment in that type of facility.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Colonial School District is hereby **ORDERED** to take the following actions:

1. Provide [student] with full days of compensatory education for every day that school was in session and Student was present:

a. From March 25 [of 10th grade] through the last day of the [10th grade] school year;

b. From the first day through the last day of the [11th grade] school year;

c. From the first day of the [12th grade] school year through December 6, [of the 12th grade school year];

2. Provide [student] with compensatory education for the summers [following 10th grade] and [following 11th grade]

as measured by the number of days and hours/day provided in the District's usual ESY program for IDEA eligible secondary students, or, if there is no such standard program, the number of days/hours the District provides a regular education secondary summer school program.

3. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that will assist Student in overcoming the effects of [student's] disability symptoms. The compensatory education shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided by the School District to assure meaningful educational progress for as long as Student remains IDEA eligible.

4. Compensatory education services or devices may be purchased/used at any time after school hours, on weekends and/or during the summer months when convenient for Student and Parents. The hours of compensatory education/fund for compensatory education services/products/devices created by this provision may be used at any time from the present to a date three (3) years after court reviews of this decision and order, if any, are concluded or three (3) years after the date the District submits the assurance form acknowledging its obligation to begin providing the compensatory education.

5. Parents may decide how the hours of compensatory education are spent, provided, however, that the compensatory education award may not be used to fund tuition for a two year or four year college program, or otherwise for primary tuition and other expenses associated with

enrollment and attendance in a school or other facility that provides post-secondary education or training program unless the District explicitly agrees to the specific program proposed by Parents.

The award may, however, be used to provide transition services, tutoring, test preparation services and similar services.

It is **FURTHER ORDERED** that Parents' claim for tuition reimbursement is **DENIED**.

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

November 12, 2011