

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

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

5823/05-06 AS File Number

H. T.
Child's Name

Xx/xx/xx
Date of Birth

10/28/05
Date of Hearing

Closed
Type of Hearing

For the Student:

Parent

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For the Pittston Area School District:

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Date of Hearing:	October 28, 2005
Receipt of Transcript:	November 2, 2005
Date of Decision:	November 17, 2005
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is a [teenaged] old resident of the Pittston Area School District (School District) with attention deficit hyperactivity disorder (ADHD) and specific learning disabilities in the areas of basic reading and written expression. (N.T. 24) Although the parties expect to be able to program appropriately for Student's current school year, they disagree over whether or not the School District has appropriately programmed for Student's needs over the last five school years. For the reasons described below, I find that Student has been denied a free and appropriate public education (FAPE) since September 2000, but I further find that she is limited to compensatory education services since September 1, 2004.

ISSUE

Whether or not the Student has been denied a free and appropriate public education (FAPE) since September 2000?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a xx year old, 9th grade student of the School District. (SD 13; N.T. 23, 32)
2. After her 4th grade school year, Student moved to the School District from a public school system of [another state] where Student had been receiving learning support services in reading, language usage and spelling. (SD 2; SD 17; P 4; P 5; N.T. 72)

Fourth Grade, 2000-2001

3. When Student transferred into the School District in September 2000, her parent requested that Student repeat 4th grade without learning supports and the School District admits that, "for some reason the School District agreed to do that." (N.T. 171-172)
4. At the end of that school year, the School District issued an evaluation report, concluding that Student was eligible for special education as a child with a specific learning disability, and that she had needs in basic reading skills, reading comprehension, writing skills, math skills, focus and organizational skills. (SD 1; SD 2; N.T. 26-27, 75)
 - a. A Wechsler Intelligence Scale for Children, 3rd Ed. (WISC-III) indicated that Student's IQ scores were in the Low Average range, with a Verbal

References to "P," "SD" and "HO" are to the Parent, School District, and Hearing Officer exhibits, respectively. References to "N.T." are to the transcript of the October 28, 2005 hearing session.

standard score of 84 (14th percentile), a Performance standard score of 86 (18th percentile) and a Full Scale IQ standard score of 84 (14th percentile.)

- b. Student's Woodcock Johnson — Revised (WJ-R) achievement scores included the following:

	S.S.	%ile	Grade Equiv.	Age.Equiv.
Word Attack	62	1	1.3	6-7
Broad Written Language	63	1	2.1	7-7
Broad Reading	65	1	1.8	7-4
Reading Skills	65	1	1.6	7-1
Writing Skills	65	1	2.1	7-7
Letter-Word ID	66	1	1.8	7-4
Writing Samples	66	1	1.7	7-3
Passage Comprehension	68	2	1.7	7-4
Reading Comprehension	69	2	1.9	7-5
Written Expression	71	3	2.4	7-10
Quantitative Concepts	77	6	3.2	8-7
Spelling	77	6	2.9	8-6
Math Skills	80	9	3.9	9-4
Broad Math	86	18	4.3	9-8
Math Reasoning	88	21	3.6	9-3
Applied Problems	88	21	3.6	9-3
Calculation	89	23	4.7	10-1

Fifth Grade, 2001-2002

5. On June 14, 2001, Student's multi-disciplinary team (MDT), including her parent, developed Student's 5th grade IEP. (SD 3; SD 4; 28)
- The IEP contained no present educational levels in written expression and simply stated that Student was at Level 3 in the "Soar to Success" reading program.
 - The first goal was "To improve language arts and reading skills." Short term objectives or benchmarks for this goal were:
 - To read Soar to Success Level 4 passages smoothly and without hesitation.
 - Use word attack skills in pronouncing unfamiliar words.
 - Recognize and pronounce a list of words from a story.
 - Answer various comprehension questions and complete worksheet and workbook pages; and
 - Pronounce and define each word from a particular Spelling Book.
 - The second goal was "To improve language arts and writing skills." Short term objectives or benchmarks for this goal were:
 - To alphabetize a weekly word list;
 - To use word list words in sentences with correct meaning and punctuation;
 - To score 85% on weekly pretests and 90% on weekly post-tests;
 - To organize thoughts into a story;

- v. To identify and explain various parts of speech; and
 - vi. To write cursive upper and lower case alphabets.
 - d. The annual goals contained no base lines or expected end points.
 - e. Although the June 2001 ER (SD 2) stated that Student's needs included focus, math and organizational skills, this IEP contained no goals related to those needs.
 - f. The supports for school personnel listed in the IEP include an educational assistant for science and social studies. An educational assistant means a helper is an adult helper in the classroom whose presence permits students extended time, reading direction and review of work. (N.T. 55)
(SD 3; N.T. 37, 165-166, 169, 174-176)
6. On or about July 25, 2001, Student was assessed at a summer reading clinic at [redacted college], which concluded that Student was an independent reader at the primer level, instructional at the first grade level, and frustrational at the second grade level. She was observed to be weakest in phonemic awareness skills, needing intense, consistent instruction in the sounds of phonemes. The assessment also recommended instruction in comprehension strategies as well as strategies to increase Student's sight word vocabulary. (SD 5; SD 17)

Sixth Grade, 2002-2003

7. On May 16, 2002, Student's IEP team, including her parent, developed Student's 6th grade IEP.
- a. That IEP indicated that Student's KTEA scores were

	GE
Spelling	<u>3.2</u>
Reading	<u>3.3</u>
Math	<u>4.4</u>
 - b. That IEP had only one goal: "To improve basic reading and language arts skills."
 - c. The annual goal and its short term objectives or benchmarks contained no base lines or expected end points.
 - d. Although the June 2001 ER (SD 2) stated that Student's needs included focus, math and organizational skills, the IEP contained no goals related to those needs.
(SD 6; N.T. 29, 37, 180-182)
8. Student's 6th grade teacher taught phonics, but not phonemic awareness. (N.T. 180)
9. On April 22, 2003, a Kaufman Test of Educational Achievement (K-TEA) indicated the following scores:

	SS	%ile	GE	AE	Level
Reading Decoding	75	5	2.7	8-0	Well below average
Spelling	84	14	3.8	9-3	Below average

	SS	%ile	GE	AE	Level
Reading Composite	84	14	3.8	9-3	Below average
Reading Comprehension	96	39	5.8	10-9	Average

(SD 7)

Seventh Grade, 2003-2004

10. On May 30, 2003 Student's IEP team, including her parent, developed Student's 7th grade IEP for 2003-2004. (SD 8; N.T. 29-30)
- The first goal was "To improve reading decoding and comprehension skills."
 - The second goal was "To improve language arts skills." Short term objectives or benchmarks for this goal were, 90% of the time:
 - Match words to definitions, and spell and use them correctly; and
 - Identify grammatical components of texts.
 - The annual goals contained no base lines or expected end points.
 - Although the present educational levels section of the IEP notes that Student gets upset in stressful situations at times, the only strategy for addressing such stress appears to be individualized testing for district-wide assessments.
- (SD 8; N.T. 184-186)

11. Student's end of year grades for this 7th grade school year were: Social Studies- F; Math – D; Science – D; Language Arts – C; and Reading – B. (SD 17)

Eighth Grade, 2004-2005

12. On May 27, 2004, Student's IEP team, including her parent, developed Student's 8th grade IEP for 2004-2005.

- a. That IEP indicated that Student's KTEA scores were

	GE
Reading Decoding	3.2
Spelling	3.5
Reading Comprehension	3.6
Math Applications	4.3
Math Computation	6.0

- The first of five goals was to "demonstrate proper application of Language Arts topics in Reading, writing, and spelling..." There were no short term objectives or benchmarks for this goal and it is not measurable.
- The second goal was to "demonstrate knowledge in math..." There were no short term objectives or benchmarks for this goal and it is not measurable.
- The third goal was to "improve his or her decoding and reading comprehension skills."

- i. This goal had eleven short term objectives/benchmarks, all of which relate to reading comprehension, and none of which address decoding skills.
 - e. The fourth and fifth goals were Science and American History goals with 11 and 14 short term objectives or benchmarks, respectively, that simply appear to describe science and history chapters in those classes.
 - f. The IEP concludes that Student will need accommodations when taking the state PSSA assessment test. More specifically, Student is guaranteed "any accommodations available at the time of testing." The School District admits that this is the lazy person's version of listing accommodations. (SD 9, p.12; N.T. 202)
 - g. The IEP states that "when it is appropriate [Student] can be included into more classes." The IEP, however, does not define "appropriate." (SD 9, p.10; N.T. 203)
- (SD 9; N.T. 30, 194, 202-203)

13. Student's end of year grades for 8th grade were: Language Arts - F, Integrated Algebra - D, Reading - C, Social Studies — C, Science - B. (SD 17)

Ninth Grade, 2005-2006

14. On May 10, 2005, the School District proposed a program and placement for Student's 9th grade, 2005-2006, school year. a. That IEP indicates that Student's KTEA scores were

	GE
Reading Decoding	3.5
Spelling	3.2
Reading Comprehension	3.6
Math Applications	5.2
Math Computation	4.2

- b. The first goal is that Student will increase her vocabulary skills.
 - c. The second goal is that she will be prepared for all classes by having all materials needed.
- (SD 11; SD 13; N.T. 36, 207, 211-212, 219) (SD 13; N.T. 23, 32)
15. On May 17, 2005, the School District requested permission to reevaluate Student. (SD 15; N.T. 33)
16. On September 1, 2005, Student's lawyer requested a due process hearing. (SD 16; N.T. 11, 3)
17. On October 16, 2005, Dr. B evaluated Student. (P 1; P6; N.T. 62-63)
- a. Dr. B received a degree in Psychology in 1962, cum laude, and a Ph.D. in Education and Child Development from Bryn Mawr College. She has been certified in school psychology since 1972, and licensed as a

psychologist since 1978. She has served as a public school psychologist for 26 years' experience, has taught Psychology at Rosemont College, and has maintained an independent private practice since 2003. During her career, she has written several thousand educational evaluations. (N.T. 59-62)

- b. Dr. B found that Student has average cognitive ability, poor spelling skills, very low decoding and encoding skills and higher reading comprehension skills than her decoding/encoding skills would suggest. Emotionally, Student has exhibited a consistently negative self-concept, including making inappropriate, attention-seeking statements in class related to drugs, alcohol and sex. (N.T. 73, 78-79, 84, 90, 92)
- c. Dr. B believes that Student needs intensive, multi-sensory, structured reading intervention such as the Wilson Reading Program, as well as math tutoring and social skills development. (MT. 92-94, 142)
- d. After reviewing the School District's records, Dr. B believes that the School District has never addressed Student's phonemic-graphemic needs, and therefore Student's reading skills have stagnated for the last three years. (N.T. 80-81)
 - i. Dr. B does not believe that the School District's past IEPs are appropriate. Among their deficiencies are:
 1. The 5th grade IEP is too general, with only two goals, no special education, and with present education levels that do not coincide with the June 2001 ER. (N.T. 102-106)
 2. The 6th grade (May 2002) reading goal is general and says nothing about teaching decoding skills. (N.T. 108-109)
 3. The 7th grade (May 2003) IEP is very general, lacking measurable goals, very little specially designed instruction, and while the reading goal refers to decoding and comprehension, it does not indicate how those needs will be addressed. (111-112)
 4. The 8th grade (May 2004) IEP present education levels are confusing. (N.T. 112)

18. On October 17, 2005, the School District issued a reevaluation report (ER.) (SD 17; N.T. 33)

- a. A WISC-IV indicates that Student's Full Scale IQ standard score is 83, which is quite similar to the 2001 WISC-III Full Scale score of 84.
- b. Student's Wechsler Individual Achievement Test – 2nd edition (WIAT-II) scores included the following:

	ss	%ile	Category
Written Language	62	1	Extremely Low
Reading	65	1	Extremely Low
Math	83	13	Low Average
Listening Comprehension	90	25	Average

	Predicted	Actual
Word Reading	87	58
Reading Comprehension	87	87
Pseudoword Decoding	89	63
Numerical Operations	88	87
Math Reasoning	87	83
Spelling	88	69
Written Expression	88	66
Listening Comprehension	87	90
Reading Composite	87	65
Math Composite	87	83
Written Language Composite	87	62

- c. This ER concluded that Student has a specific learning disability in Reading and Written expression, with relatively weak skills in pseudoword decoding, spelling, word reading and written expression. (SD 17)
 - d. Dr. B believes that this October 2005 ER is Student's first truly comprehensive ER. (N.T. 121)
19. The parties intend to have an IEP meeting to develop a new IEP for Student's 2005-2006 school year. Thus, the parties agree that the only issue in this case is the appropriateness of Student's past programs. (N.T. 67)
20. It has, at all times relevant, been the School District's practice to issue procedural safeguards with its permissions to evaluate and IEPs. (N.T. 27) The record contains no mitigating circumstances establishing that Student's parent could not have filed her request for due process hearing sooner than September 1, 2005.
21. The School District's current Director of Special Education started in her position on July 1, 2005. (N.T. 223)
- a. She is a certified special education teacher, has been a classroom teacher for 14.5 years, has served as a special education director in another school district, and has written IEPs. (N.T. 156-157, 220)
 - b. She feels that Student's teachers have been providing the types of experiences that promoted progress, but that they did not keep a good paper trail. (N.T. 39)
 - c. She believes that the School District's provision of FAPE to Student should be measured, not by Student's reading level, but by Student's alacrity for learning and ability to integrate herself in a regular curriculum with strategies that she's been taught. (N.T. 39-40)
22. I conducted a hearing in this matter on October 28, 2005. I overruled the School District's objection to the relevance of Dr. B's testimony. (N.T. 69)

School District Exhibits 1 — 19 were admitted into the record without objection. (N.T. 228) Parent Exhibits 1 — 6 were admitted without objection. (N.T. 229)

23. This decision is issued:

- a. 77 days after the due process hearing request was filed;
- b. 63 days after my assignment as Hearing Officer to the case;
- c. 20 days after the last hearing session; and
- d. 15 days after receipt of the transcript.

DISCUSSION

An appropriate educational program is one that is provided at no cost to the parents, is individualized to meet Student's educational needs, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. Rowley v. Hendrick Hudson Board of Education, 458 U.S. 176, 102 S. Ct. 3034 (1982) The appropriateness of the IEP is based on information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993) While school districts are not required to provide the optimal level of services, a program that confers only trivial or minimal benefit is not appropriate. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), cert. denied, The IEP must be likely to produce progress, not regression or trivial educational advancement. Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986) While procedural violations do not automatically compel a finding that FAPE has been denied, such a conclusion is permissible where procedural violations result in the loss of educational opportunity. In re the Educational Assignment of A.H., Spec. Ed. Op. No. 1240, n. 11 (2002); In re the Educational Assignment of T.M., Spec. Ed. Op. No. 1110 (2001)

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. Schaffer v. Weast, __U.S. __, Dkt. No. 04-698 (Nov. 14, 2005) Because Student seeks relief in this matter, she bears the burden of persuasion regarding the essential aspects of her claims. In this case, Student has met her burden easily. It is hard to believe that any objective reviewer of the IEPs in this case would conclude otherwise.

The testimony of the School District's current Director of Special Education that her predecessors did not keep a very good paper trail is an understatement. (N.T. 39) Among the numerous deficiencies in the School District's paper trail are:

- Despite a diagnosis of ADHD and the provision of learning support services while in [another state's] schools, there is no record that the School District developed an IEP or provided FAPE to Student during her 4th grade, 2000-2001, school year. (SD 2; SD 17; P 4; P 5; N.T. 72, 171-172)
- Despite conclusions in the June 2001 ER that Student's needs included focus, math and organizational skills, Student's 5th, 6th, and 7th grade IEPs contained no goals related to those needs. (SD 3; SD 6; SD 8; N.T. 174, 185)

- None of Student's various IEP goals throughout the years was objectively measurable, nor did any of them appear to be based upon present educational levels of achievement. (N.T. 182, 186, 194, 198)
- Student's IEP goals retracted and expanded like an accordion, going from two goals (5th grade) to one goal (6th grade) back to two goals (7th grade) up to five goals (8th grade) and back down to two goals (9th grade), for no discernible reason. (SD 3; SD 6; SD 8; SD 9; SD 13)
- Only Student's 7th and 8th grade IEPs contained goals explicitly addressing Student's reading decoding needs (SD 8; SD 9). Her 9th grade IEP does not even contain a reading goal. (SD 13)
- Although Student is [of transition age], none of her IEPs suggest any transition planning. (N.T. 219)

The School District argues that, despite sloppy paperwork, it nevertheless provided a FAPE to Student through appropriate teaching practices. The School District argues that its provision of FAPE to Student should be measured, not by Student's reading level, but by Student's alacrity for learning and ability to integrate herself in a regular curriculum with strategies that she's been taught. (N.T. 40) This, however, is not supported by the record.

- If progress is compared by grades, the Student's flunking grades in 7th grade Social Studies and 8th grade Language Arts, and her D's in 7th grade Math and Science and in 8th grade Math, suggest inadequate progress. (SD 17; N.T. 34)
- If progress is compared by the KTEA grade equivalency scores that are cited throughout Student's IEPs, then her performance was too erratic to be considered "progress:"

	2002	2003	2004	2005
Spelling	3.2	3.8	3.5	3.2
Reading	3.3			
Reading Composite		3.8		
Reading Decoding		2.7	3.2	3.5
Reading Comprehension		5.8	3.6	3.6
Math Applications			4.3	5.2
Math Computations			6.0	4.2

(SD 6; SD 7; SD 9; SD 13)

- If progress can somehow be measured by a gross comparison of Student's 2001 WJ-R and her 2005 WIAT-III achievement test percentile scores, then she has not progressed:

WJ-R	WJ-R %ile	WIAT-III	WIAT-III %ile
Broad Math	18	Math	13
Broad Written Language	1	Written Language	1
Broad Reading	1	Reading	1

Nothing in the record supports the assertion of the School District's Director of Special Education that the School District provided any kind of meaningful educational benefit to Student. Thus, I find that, since her fourth grade, 2000-2001 school year, Student has not received a FAPE.

Compensatory education is an available remedy when a school district either fails to provide FAPE to a child with a disability, or simply fails to provide the services that it had agreed to provide. See Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238 (3rd Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir., 1996); Big Beaver Falls Area School District, 615 A.2d 910 (Pa. Commw., 1992); _____ In re the Educational Assignment of J.P., Spec. Ed. Op. No. 1132 (2001) In this case, the denial of FAPE is so obvious that I wonder whether the real reason this case went to due process is because the parties disagree over what they believe is the School District's maximum liability for compensatory education.

In a nutshell, the typical debate,² regarding a school district's maximum liability for compensatory education is whether a hearing officer should apply the "one year, two if mitigating circumstances exist" rule of Commonwealth Court in Montour School District v. S.T. 805 A.2d. 163 (Pa. 2003), or the "no time limits" rule of several federal district courts that have recently rejected the Montour analysis. Jonathan T. v. Lackawanna Trail School District, Dkt. No. 3:03 cv 522 (M.D.Pa. Feb. 2004); Jonathan H. v. Elizabeth Forward School District, Dkt. No. 03-1996 (W.D. Pa. March 2004); Amanda A. v. Coatesville Area School District, Dkt. No. 04-4184 (E.D. Pa. Feb. 2005); see also Kristi H v. Tri-Valley School District, 107 F.Supp.2d 628 (M.D.Pa. 2000)

Typically, proponents of the "no time limits" rule argue that only parental requests for tuition reimbursement have any time limitations. This is based upon the Third Circuit Court of Appeal's opinion in Bernardsville Board of Education v. J. H., 42 F.3d 149 (3d Cir. 1994), which limited to one year a claim for monetary relief for parents in a tuition reimbursement case, and upon which the Commonwealth Court based its Montour decision. Proponents of the "no time limits" rule argue that Bernardsville is limited to tuition reimbursement, and that any other claim for relief, such as a claim for compensatory education, is not time-limited. The basis for this argument, typically, is the Third Circuit's decision in Ridgewood Board of Education v. N.E., 172 F. 3d 238 (3d

² I refer to the "typical debate" because, in this particular case, the parties did not present argument. Both parties waived closing arguments, while the School District waived its opening statement and the Student presented a brief opening statement that, properly, lacked legal argument. (N.T. 15-16, 19, 229)

Cir. 1999), which was decided after Bernardsville, and which remanded to the lower court for a determination whether or not that student had been denied a FAPE for the nine school years prior to his July 3, 1997 complaint. 172 F.3d. at 251

For some reason, many people consider Ridgewood to be the Third Circuit's rejection of the idea that the two year state statute of limitations that the Ridgewood, New Jersey school board sought to apply in that case. See Amanda A. v. Coatesville Area School District, Dkt. No. 04-4184 (E.D. Pa. Feb. 2005) In fact, however, the Ridgewood Court concluded that, even if the two year statute of limitations applied, the student in that particular case had filed a timely appeal (because she had appealed within seven months of the underlying administrative decision.) 172 F.3d at 251 ³

I note that the Ridgewood decision cites, at 172 F.3d 251, to its previous decision in Tokarcik v. Forest Hills School District, 665 F.2d 443 (3d Cir. 1981). In Tokarcik, School District officials had refused to provide catheterization services to a child ("A.T.") with spina bifida. A.T. sought to require the school district to provide catheterization at school, and she also requested compensatory and punitive damages. The Pennsylvania hearing officer and the second tier administrative reviewer (at that time it was the state Secretary of Education) held for the school district. The federal district court, however, held for A.T. and ordered the School District to provide catheterization services. On appeal, the Forest Hills School District argued that A.T.'s federal district court complaint had been untimely because a 30-day statute of limitations applied, and A.T. had filed her complaint within 90 days of the second tier administrative review decision.

In the Third Circuit Court's Tokarcik decision, Judge Adams observed that Congress often does not provide a time limit for enforcing federally created rights, and in such cases, federal courts are expected to analyze the nature of the federal right in question, and then to apply the state statute of limitations applicable to that type of right. In Tokarcik, the Third Circuit had three state limitations statutes from which to choose: either a 30 day appeal period applicable to appeals of administrative decisions; or "...a two-year or six-year statute, which together control virtually all actions in Pennsylvania...." The Tokarcik Court rejected the 30 day choice, and then suggested that the most appropriate choice would be the two-year statute of limitations that applied to medical malpractice claims and which dovetailed with the Education of the Handicapped Act's biannual educational evaluation time line. Unfortunately, the Tokarcik Court also concluded that it was not actually necessary to decide the issue, presumably because A.T. had filed her federal district court action within 90 days of the second tier administrative decision.

As I noted earlier, the Ridgewood decision cites to Tokarcik. It also states, "We have previously held that IDEA claims closely resemble actions to recover damages for injuries caused by another.... Another analogous cause of action might be a basic personal injury claim, which also carries a two-year statute of limitations [in New Jersey.]" 172

³ "Because M.E. brought his claim for compensatory education within either [2 or 6 year] statute of limitations, we need not decide...." 172 F.3d at 251

F.3d at 251 (citations omitted) Once again, however, just as in the Tokarcik case, the Third Circuit did not actually have to choose between New Jersey's two-year and six-year statutes of limitations because the child, M.E., had filed her claim in federal district court within nine months of the New Jersey ALJ's decision.

Thus, I think both the Tokarcik and Ridgewood decisions tell us that the time limitation for seeking compensatory education in federal district court is either two-years or six-years, and if it is ever forced to decide between the two, the Third Circuit is leaning toward the two year limitations period.

But is there a different limitations period that applies to the filing of claims for compensatory education at the administrative level, i.e., before going to federal district court? In Bernardsville Board of Education v. J.H., 42 F.3d 149 (3d Cir. 1994), the Third Circuit Court of Appeals considered exactly that question and answered it with "Yes." In Bernardsville, J.H.'s parents sought three years of tuition reimbursement, and it appears undeniable that J.H. had in fact been denied FAPE by his public school district for that entire time. Observing that no regulations specified a time limitation within which to bring a due process hearing, and also observing "...the very nature and social significance of the education of children with disabilities...", the Third Circuit was "incline[d]...to equitable considerations." In other words, the Bernardsville Court appears to have concluded that the limitations period for filing for relief at the administrative level, i.e., before going to federal district court, is not governed by either the two-year or six-year choices applicable at the federal district court level, but rather upon a balancing of the equities. The Bernardsville court further advised that equity is "accomplished through the initiation of [administrative] review proceedings within a reasonable time of the unilateral placement for which reimbursement is sought. We think that more than two years, indeed, more than one year, without mitigating excuse, is an unreasonable delay." Thus, it was the Third Circuit that introduced the "one year, two if mitigating circumstances exist" rule to tuition reimbursement cases, and it was the Commonwealth Court that determined, in Montour, that the same rule applies to all other requests for relief at the administrative level.

I am not certain why any federal district courts believe that a "no time limits" rule should apply in any IDEA case. As I noted above, Tokarcik and Ridgewood indicate that federal district courts have only two choices at their level, either two or six years, and as for the administrative level, Tokarcik suggests that when Congress does not provide a time limit for enforcing federally created rights, federal courts are expected to apply the state statute of limitations. It seems clear to me that the Commonwealth Court has already determined what the applicable state limitations period is. Further, it is unclear to me what other state limitations period a federal court might rely upon for a "no time limits" rule.

⁴ It also seems that the Third Circuit believes the choice is only between the two-year and six-year statutes of limitations. There do not appear to be any other options, such as five years, ten years, or even eighteen years.

Accordingly, in the instant case I will apply what I believe to be the applicable state limitations period to Student's federally created right to compensatory education. That applicable state limitations period is the "one year, two if mitigating circumstances exist" rule announced by the Commonwealth Court.⁵

Here, Student's parent requested a due process hearing on September 1, 2005. No mitigating circumstances exist to explain why a due process hearing was not requested earlier. Thus, despite the fact that the School District has denied FAPE to Student for five years, Student is entitled to only one year of compensatory education. Although School Districts are entitled to computation of a grace period during which to remediate their FAPE denial, I assume that such grace period expired sometime between September 2000 and September 1, 2004. Accordingly, I will award Student a full year of compensatory education services. Student's IEPs consistently estimated that she would be in special education classes up to 60% of her school day. (SD 3; SD 6; SD 8; SD 9) Thus, I calculate Student's entitlement to be 60% of 180 six-hour days, i.e., 648 hours ($0.60 \times 6 \times 180 = 648$)

CONCLUSION

Although the parties expect to be able to program appropriately for Student's current school year, they disagree over whether or not the School District has appropriately programmed for Student's needs over the last five school years. I find that Student has been denied a free and appropriate public education (FAPE) since September 2000, but I further find that she is limited to compensatory education services since September 1, 2004.

⁵ For what it's worth, I believe this limitations period is consistent with statutory intent. Speaking from personal experience, MDT and IEP meetings can seem overwhelming even to well-educated parents, but the IDEIA and its predecessors offset that imbalance of power by placing a very high value upon frequent notification of procedural safeguards, constant parental opportunity to request IEP revision, and speedy adjudication of resulting conflicts. A "no time limits" rule for compensatory education claims seems inconsistent with these statutory values.

ORDER

For the reasons described above, I ORDER that:

- Student is entitled to 648 hours of compensatory education.

Daniel J. Myers
Hearing Officer

November 17, 2005

Re: Due Process Hearing
File Number 5823/05-06 AS
Student

School District