

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

Child's Name: [REDACTED]

Date of Birth: xx/xx/xxxx

Dates of Hearing: January 9, February 3, February 4, and February 5, 2009

CLOSED HEARING

ODR No. 9467/08-09 LS

Parties to the Hearing:

Parents:
[REDACTED]

School District:
Steven E. Lee, CEO
Chester Community Charter School
302 East 5th Street
Chester, PA 19013

Parent Attorney:
Dean Beer, Esq.
McAndrews Law Office
30 Cassatt Avenue
Berwyn, PA 19312

School District Attorney:
Leo A. Hackett, Esq.
300 West State Street
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Media, PA 19063

Date Record Closed: March 9, 2009

Date of Decision: March 20, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

[REDACTED]¹ (Student), a former student of the Chester Community Charter School² (Charter School), contends that Charter School failed to provide Student a free appropriate public education (FAPE) from the 2002-2003 (2nd grade) school year through April 2008 by failing to evaluate and program appropriately for Student's disabilities, as well as by allowing years of repeated bullying. The Charter School denies Student's allegations and further argues that Student's claims are limited by statute to a maximum of two years. Due process hearing sessions were conducted in January and February 2009, and the record was closed on March 9, 2009 with the parties' written closing arguments. Both parties submitted additional materials after March 9, 2009, which have not been admitted into the record because they were untimely.

ISSUES

- Did the Charter School fail to address the "disability harassment," or bullying, that Student continuously endured during Student's years at the Charter School?
- Were the Charter School's annual IEPs inappropriate?
- Was the Charter School's 2006 reevaluation report inappropriate?
- Did the Charter School deny FAPE by illegally disenrolling Student?

¹ All future references to [REDACTED] will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

² When Student was first enrolled, the Charter School was named "Archway Charter School." Charter School later changed its name to "Chester Community Charter School."

- Are any of Student's claims for compensatory education back to the 2002-2003 school year precluded by time limitations?

FINDINGS OF FACT

1. Student is a [REDACTED] year old adolescent (date of birth is xx/xx/xxxx) with low average nonverbal intellectual skills and borderline range verbal intellectual skills. (P11,p.13)³ Student demonstrates strength in sustained attention and in nonverbal reasoning and memory skills, but poor expressive and receptive language skills and slow processing speed. (P11,p.13) Achievement test scores using both age-based and grade-based norms indicate pre-kindergarten level word decoding skills, 2nd grade word reading skills, 3.8 grade level reading comprehension skills, and 4th grade level math skills. (P11,pp.14,20) As Student advanced in age, Student exhibited increasing behavioral difficulties, particularly in dealing with peers. (P11,p.5; P7,p.5; P10)

2002-2003 (2nd Grade)

2. On September 11, 2002, Student's IEP team observed frustration, difficulty with attention, and 1st grade functioning in reading and math. (SD37,p.2) The team developed an IEP with reading, math and attention goals, as well as occupational therapy (OT) and counseling services. (SD37,p.6; SD22; SD33; P18)

2003-2004 (3rd Grade)

3. During 3rd grade, Student was reevaluated due to problems with retention, difficulty keeping up with class work, behavioral problems, and aggression in the

³ References to "P," "SD," and "HO" are to the Parent, Charter School, and Hearing Officer exhibits, respectively. References to "NT" are to the transcripts of the due process hearing sessions.

- classroom. (SD10; SD11; SD29; SD30) Student's November 24, 2003 IEP indicated a 1st grade level in math, reading and writing, and provided for OT, physical therapy, speech language therapy and counseling. (SD36; SD23)
4. In May 2004, Student's IEP for the upcoming school year provided a one-to-one aide for academics, a goal to improve Student's reading/language arts skills to a 1.5 grade level by September 2005, and a goal to improve Student's math skill to a 2.0 grade level. (SD35; SD62; SD65; SD24)

2004-2005 (4th Grade)

5. Student's June 17, 2005 IEP indicated that Student's reading level was on a beginning 2nd grade level, math was at the 3rd grade level, and writing was at a second 2nd grade level. (SD5, p.4; NT 493) Student's attention to non-preferred tasks had improved, but Student was reported to shut down if someone hurt Student's feelings. (SD5, p.5)

2005-2006 (5th Grade)

6. Student exhibited behavioral problems during this school year, including non-compliance with non-preferred tasks, fist fights with peers, and refusal to leave homeroom. (SD71) Although a mental health evaluator did not observe teasing or poor social skills during a school observation, it was reported that Student would stay in class as a safe haven rather than go out to play with other children. (NT 60-61, 356-357; P6, pp.3,4,6; P35) Student began receiving wrap around behavioral health services at school to address inattention to task and teasing/poor social skills. (P6; P8) In addition, the parties developed a plan for daily home-

- school communication, more active interventions during recess and lunch, and social skills counseling and support. (SD57)
7. Around January 2006, Student's Parent retained an attorney to represent Student. The parties stipulate that, if the attorney had testified at the due process hearing, she would have testified that a portion of her practice has involved special education representation since 1994, and she represented the Student's family for a period of time regarding special education matters concerning Student. (SD56; NT 89-91, 129, 699)
 8. On January 11, 2006, the Charter School issued a reevaluation report at parental request to assess Student's current learning ability and social development that may be adversely affecting Student's academic performance. (SD1) Student's mother told the Charter School that Student could not add, subtract or tell time. (NT 59) The reevaluation report recommended a psychiatric evaluation to further examine Student's inappropriate or problematic behavior, social/emotional development and inattention. (SD1, p.5) It recommended techniques for reinforcing appropriate behaviors, teaching new material, and maintaining attention to task. (SD1, pp.5-6; SD17; NT 215)
 9. May 9, 2006 progress reports appear to indicate that Student was at the 3rd grade level in reading and at the 2.5 grade level in writing. (SD46) In addition, Student is reported to have improved in social skills from being argumentative with peers and being reclusive and not wanting to go out during recess in the beginning of the year, to rarely arguing with peers and wanting to go outside at the end of the school year. (SD45)

10. On June 15, 2006 the Charter School conducted a functional behavioral analysis (FBA) based upon a ½ hour observation of Student by a school psychologist and an earlier, November 15, 2005 teacher observation. (SD16; NT 201-203)
11. At the end of the school year, the parties agreed that the Charter School would pay for tutoring services from a commercial tutoring service. (SD50; SD56; SD72; SD73; SD74) Beginning in the summer of 2006 and continuing throughout the 2006-2007 school year, Student received 12 hours per week reading and math tutoring services from the Huntington Learning Center at Charter School expense. (SD51) Huntington Learning Center reported that Student's phonics level on September 14, 2006 was at the kindergarten level. (SD53)

2006-2007 (6th Grade)

12. A September 2006⁴ Charter School reevaluation report found relatively weak skills in math, reading and writing, signs of severe auditory processing deficits and distractibility, problems relating to others, and significant personal uncertainty. (SD3) The report further indicated that Student had difficulty forming positive social relationships in and out of the classroom and continued to show signs of overall emotional delay. (SD3; NT 190, 198)
13. Although Student's IEP indicated that Student's reading level was at the beginning 3rd grade level, Student's 6th grade teacher testified that Student began that school year at pre-primer to first grade reading levels. (NT 512) Student's

⁴ Although the first and seventh pages of this report state that the date of the report is September 22, 2005, I conclude that it is actually a September 2006 report because it consistently refers to Student as being in 6th grade and it references January 2006 assessment data.

- parent observed that Student was still having trouble counting money, telling time and reading. (NT 49-50, 52, 53, 58-59, 560)
14. On December 15, 2007, Huntington Learning Center reported that Student's phonics level had progressed to the 2.0-2.9 grade level, with an overall reading level at the 3.0-3.9 grade level. (SD53)
15. Student's May 22, 2007 IEP indicates that Student's reading level had progressed to the 4th grade level, Student's writing skills had progressed to the 3rd grade Level "C," and math was at the CMC level, B-2 (2nd grade). (SD19, p.4) Student's speech and language goal, however, was reduced from remaining on topic for 10 minutes to remaining on topic for 5 minutes. (NT 672-673)
16. Student's regular education 6th grade teacher testified that Student was instructed on modified 6th grade level materials. (NT 461, 469) Student's mother expressed excitement about the progress that the Student was making and the academic initiative that the Student was taking at home. (NT 463, 514-515, 570)
17. Student's final grades were: 83 in Reading; 82 in Writing; 82 in English/Spelling; 91 in Mathematics; 87 in Social Studies; 89 in Science; and Student's personal development assessments were all outstanding or satisfactory. (SD61, p. 1)
- Teacher comments to Student's 2006-2007 report card included, "Student has shown outstanding progress in all areas of academics especially in math" (SD61, p. 2) A mental health reevaluation states that Student progressed impressively during the 2006-2007 academic year, improving from a K-1 reading level in 2006 to a 3rd-4th grade reading level at the end of the school year. The reevaluation

attributes this progress to a fairly effective teacher and 1:1 aides for 2006-2007.

(P10, p.3)

18. There were no bullying or teasing problems reported in the classroom. (NT 470, 509-510, 458) Student's 6th grade regular education teacher observed teasing and bullying of Student to the same extent as all children received. (NT 458, 470-472) This is confirmed in a mental health behavioral health services reevaluation report that states that Student had transferred to a new school (the Charter School has several buildings) for the 2006-2007 school year, where video cameras confirmed Student's allegations that peers were picking on Student, and consequently where Student's principal and teacher sided with Student, rather than with Student's peers, and addressed the bullying. This is in contrast to Student's previous school, where authorities did not address bullying complaints because they routinely believed that Student was initiating peer conflicts, and where Student's 1:1 aide was ineffective, both behaviorally and academically. (P10, p.3)

2007-2008 (7th Grade)

19. A September 26, 2007 mental health services reevaluation report observed that Student was overwhelmed and frustrated with much higher academic expectations and apparently no meaningful accommodations. (P10, p.3)
20. Student's parent alleges that Student experienced more, not less, bullying in 2007-2008, coming home with headaches and constant complaints of children hitting and teasing Student. (NT 96-97)
21. Sometime in early December 2007, while Student was in regular education class and with Student's 1:1 aide, Student was hit by a pencil and a rubber band thrown

- by someone in the class. (NT 526, 542) Student then walked out of that classroom and into the special education classroom. (NT 544) The special education teacher then walked Student back to the regular education classroom. (NT 96-97, 527, 528) The whereabouts of Student's 1:1 aide during this incident is unclear. Student's mother alleges that the aide was gone, doing work for Student's special education teacher. (NT 97) The special education teacher believes the aide was still in the regular education classroom. (NT 528) The aide has no recollection of this day. (NT 615-616, 626) It is undisputed, however, that the aide did not accompany Student when Student walked out of the regular education classroom. (NT 528)
22. On or about December 12, 2007 Student's Parent withdrew Student from the Charter School but did not enroll Student elsewhere. The parties met in December to discuss Student's return to school, but Student never returned. (NT 346, 366, 368-369) On January 10, 2008, the Charter School sent notice to Student's parent of an IEP meeting to be conducted the following day. (P5, p.3) On January 15, 2008, Charter School initiated disenrollment and truancy proceedings. (P3; SD39; NT 370) On January 20, 2008, Student's physician recommended, based upon parental report that Student was not safe at school, that Student be "home schooled" pending a psychiatric evaluation. (P4)
23. On February 19, 2008, Student's parent filed a complaint with the Division of Compliance, Bureau of Special Education, Pennsylvania Department of Education (DOC). On April 17, 2008, DOC concluded that the Charter School had provided the 1:1 support required by Student's IEP, but did not provide sufficient notice of

- the January 11, 2008 IEP meeting, did not follow proper truancy procedures, and improperly disenrolled Student. (P5)
24. On March 27, 2008 a privately secured psychiatric evaluation, apparently based upon a limited records review and interviews with Student and Student's mother, recommended that Student requires a smaller classroom, restricted setting with comprehensive structure, reasonable controls, and resource room with other students with similar limitations. (P21)
25. In April 2008, Student's parent enrolled Student in the local public school district, where Student apparently is achieving satisfactorily.
26. Although it is not in the record, the parties agree that Student's parent requested a due process hearing on June 9, 2008. (Charter School Brief at 1) No due process hearing was conducted in response to this request.
27. In September 2008, a privately secured neuropsychological evaluation recommended that Student remain eligible for special education services under the classifications of specific learning disability and speech and language impairment, and that Student receive all academic instruction in a special education setting. The evaluation report concludes that Student has not made meaningful progress in academic skill development, with very weak phonemic awareness, decoding, word recognition and comprehension skills. The report also recommended emphasizing functional academic skills. (P11, p.15) It further recommended doubling Student's speech/language therapy to twice weekly, with goals in vocabulary, word finding and formulation, and language comprehension.

(P11, p.16) It also recommended social skills training to improve Student's peer interaction skills. (P11, p.17)

28. On November 18, 2008, Student's parent filed the due process hearing request that results in this decision. The Charter School, thereafter filed an Answer with New Matter to the Due Process Complaint in which it raised, among other things, the issue of the applicability of the IDEA-2004 statute of limitations as well as an estoppel argument. Due process hearings were held on January 9, 2009; February 3, 2009; February 4, 2009, and February 5, 2009. The record was closed with submission of written briefs on March 9, 2009. Subsequently, on March 17, 2009 Student submitted an additional document, and on March 18, 2009 the Charter School submitted an "answer," neither of which additional materials will be considered in this decision because the record was closed on March 9, 2009.

29. Exhibits admitted into the record are as follows:

Exhibit No.	Admitted without objection	Admitted over objection	Admission Refused	Exhibit No.	Admitted without objection	Admitted over objection	Admission Refused
HO1	✓			SD23	✓		
P1	✓			SD24	✓		
P2	✓			SD25	✓		
P3	✓			SD32	✓		
P4	✓			SD33	✓		
P5	✓			SD34	✓		
P6	✓			SD35	✓		
P7	✓			SD36	✓		
P8	✓			SD37	✓		
P9	✓			SD38	✓		
P10	✓			SD39	✓		
P11	✓			SD40		✓	
P14	✓			SD43	✓		
P22	✓			SD45	✓		
P24	✓			SD46	✓		
P25	✓			SD47	✓		
P27	✓			SD48	✓		

Exhibit No.	Admitted without objection	Admitted over objection	Admission Refused	Exhibit No.	Admitted without objection	Admitted over objection	Admission Refused
P33	✓			SD50	✓		
P34	✓			SD51	✓		
SD1	✓			SD52	✓		
SD2	✓			SD53	✓		
SD3	✓			SD54	✓		
SD4	✓			SD56	✓		
SD5	✓			SD59	✓		
SD6	✓			SD60	✓		
SD7	✓			SD61	✓		
SD8	✓			SD62	✓		
SD9	✓			SD65	✓		
SD10	✓			SD66	✓		
SD11	✓			SD69	✓		
SD12	✓			SD70	✓		
SD13	✓			SD72	✓		
SD14	✓			SD73	✓		
SD15	✓			SD74	✓		
SD16	✓			SD76			✓
SD17	✓						
SD18	✓						
SD19	✓						
SD20	✓						
SD21	✓						
SD22	✓						

DISCUSSION AND CONCLUSIONS OF LAW

Student argues that, from the 2002-2003 school year until Student's enrollment in the local public school district in April 2008, the Charter School violated IDEA and Section 504 of the Rehabilitation Act by failing to provide FAPE and a safe school environment to Student. Student further contends that there is no time limitation barring this claim. The Charter School contends that it met its legal obligations throughout Student's tenure, and that Student's claims concerning school years prior to 2006-2007 are both untimely and equitably estopped.

Burden of Proof

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006); In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763 (2006) If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court’s ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence. In this case, Student bears the burden of persuasion because Student contends that the Charter School failed to provide a safe school environment and FAPE under IDEA and Section 504 of the Rehabilitation Act.

IDEIA’s Filing and Claims Limitations Periods

There are two IDEIA⁵ limitations provisions at issue here:

(C) **TIMELINE FOR REQUESTING HEARING.**—A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.

20 USC §1415(f)(3)(C) (emphasis added) and

b) **TYPES OF PROCEDURES.**—The procedures required by this section shall include the following:

6) An opportunity for any party to present a complaint—

⁵ The underlying federal statute is the Individuals with Disabilities Education Improvement Act (IDEIA), which is a revised version of its predecessor, the Individuals with Disabilities Education Act (IDEA). Some refer to the IDEIA as “IDEA 2004” because it was revised in 2004.

...

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows....

20 U.S.C. §1415(b)(6)(B) (emphasis added)

I refer to §1415(f)(3)(C) as a “filing limitation” and I refer to §1415(b)(6)(B) as a “claim limitation.” Neither of these statutory provisions explicitly limits Student’s claim to two years prior to the date of filing. Instead, the underlined portions of the statutory provisions above make it clear that the date that is critical to determining both the filing limits and the content limits of Student’s due process claims is the date upon which the filing party “knew or should have known” (KOSHK) of the alleged action forming the basis of the complaint.

IDEIA’s Exceptions to the Filing and Claims Limitations periods

The IDEIA also contains two exceptions to the filing and claim limitations:

(D) EXCEPTIONS TO THE TIMELINE.—The timeline described in subparagraph [1414(f)(3)](C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local educational agency’s withholding of information from the parent that was required under this part to be provided to the parent.

20 USC §1415(f)(3)(D); and

b) TYPES OF PROCEDURES.—The procedures required by this section shall include the following:

...

6) An opportunity for any party to present a complaint—

...

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

20 U.S.C. §1415(b)(6)(B) (emphasis added)

Neither the statute nor applicable regulations (34 CFR §§300.507(a)(2) and 300.511(e)) define either “specific misrepresentations” or “withholding of information.” In fact, the drafters of the federal regulations declined to provide such definitions, believing instead that such matters were within the purview of the hearing officer. 71 Fed.Reg. 46540-01 at 46706 (August 14, 2006); See P.P. v. West Chester Area School District, 557 F. Supp. 2d 648 (E.D. Pa 2008) I agree with the Court in Evan H. v. Unionville-Chadds Ford School District, 2008 WL 4791634 (E.D. Pa. 2008) that, while the Third Circuit has yet to define either a "specific misrepresentation" or “withheld information” in this context, the misrepresentation must be intentional and the withheld information refers solely to the withholding of information regarding the procedural safeguards available to a parent. E. W. v. Chester Community Charter School, ODR No. 8960-07/08 KE (2009)

Section 504’s Two Year Statute of Limitations

Section 504 of the Rehabilitation Act of 1973 does not contain its own statute of limitations. It borrows Pennsylvania’s two year state statute of limitations applicable to personal injury claims. 42 Pa.C.S.A. §5524; P.P. v. West Chester Area School District, 557 F. Supp. 2d 648 (E.D. Pa 2008)

Timeliness of Student's Pre-June 9, 2006 Claims under IDEA

Any inquiry into the application of the statute of limitations, as well as the exceptions, requires a series of highly factual determinations. J.L. v Ambridge Area School District, 2008 509230 (W.D. Pa. 2/22/2008) Thus, I will first determine the facts necessary to resolve the parties' disputes regarding the timeliness of each of Student's claims.

There is no argument that Student's June 9, 2006-and-later claims are timely. Thus, I will limit this timeliness analysis to Student's claims that are based upon actions that occurred prior to June 9, 2006. These claims are that: 1) the Charter School failed to address the "disability harassment," or bullying, that Student continuously endured during Student's pre-June 9, 2006 time at the Charter School; 2) the Charter School's 2nd, 3rd, 4th, and 5th grade IEPs were inappropriate; and 3) the Charter School's January 2006 reevaluation report was inappropriate.

Pre-June 9, 2006 Bullying Claims

To determine the timeliness of Student's bullying claim, I must determine when Student's parent knew, or should have known, about the alleged action that forms the basis of the complaint. Student contends that, in 3rd grade Student daily came home from school with dirt and sticks in Student's hair (NT 63), and in the 5th grade Student stayed in the special education classroom as a safe haven rather than go out to play with other children. (NT 60-61) Student exhibited behavioral problems during 5th grade, including non-compliance with non-preferred tasks, fist fights with peers, and refusal to leave homeroom. (SD71) Although a mental health evaluator did not observe teasing or poor social skills during a 5th grade school observation, it was reported to that evaluator that

Student would stay in class as a safe haven rather than go out to play with other children. (NT 60-61, 356-357; P6, pp.3,4,6; P35; P36)

Student argues that, “Through all this abuse, [Student’s] mother continuously expressed her concerns to the Charter School. N.T. 214,343,470-472.” (Student’s Brief at 3) I agree. Thus, the record in this case demonstrates that Student’s parent knew, contemporaneous with the alleged events, about the bullying actions that form the basis of this complaint. In other words, Student’s parent knew about the 2003 bullying actions back in 2003, and she knew about the 2005 bullying actions back in 2005. Each time that Student’s parent knew about a bullying action, she had two years within which to file a due process hearing request regarding that action. After two years passed following each bullying action, the filing date for that bullying action elapsed.

Thus, by the time of Student’s June 9, 2008 due process hearing request,⁶ the filing dates had passed for any bullying actions older than two years. Student’s June 9, 2008 complaint, therefore, is timely only with respect to claims concerning bullying that occurred on June 9, 2006 and after. This result is the same under Section 504. Student has two years within which to file Section 504 claims. Any Section 504 claim regarding bullying, therefore, is limited to bullying that occurred on June 9, 2006 and after.

Pre-June 9, 2006 Reevaluation Report Claim

Student claims that the Charter School’s January 11, 2006, reevaluation report (SD1) was inappropriate. The action forming the basis of this complaint is the creation of an inappropriate reevaluation report. That action occurred on January 11, 2006, i.e., the

⁶ Although a June 9, 2008 complaint is not in the record, the parties apparently accept June 9, 2008 as the determinative filing date for limitations purposes.

date of the report. Student's parent knew of that report on January 11, 2006 when it was created. (SD1, pp.5-6; SD17; NT 59, 215) Therefore, under IDEA, Student had two years, or until January 11, 2008, by which to file a due process hearing with respect to that report. This result is the same under Section 504. Any Section 504 claim regarding the January 11, 2006 reevaluation report had to have been filed by January 11, 2008.

Pre-June 9, 2006 IEP Claims

With respect to the appropriateness of each of Student's annual IEPs, the question under IDEA is when Student's parent knew, or should have known, about the action that forms the basis of the complaint. The action at issue with each annual IEP is the development of an inappropriate IEP. Student's parent was an active participant in each IEP's development and, consequently, knew or should have known of the action complained of (i.e., IEP development) at the time the action occurred. (SD37,p.2) (SD35; SD62; SD65; SD24) (SD5, p.4; SD63; P14; NT 493) (SD5, p.5; P37; P39; SD59)

It could be argued that Student and Parent might not know of an IEP's inappropriateness at the time of its development, and therefore it is unfair to expect the filing and claim limitations clocks to start running as soon as the IEP is developed. The "knew or should have known" language in both of the IDEA limitation 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 on a claim on the date the injured party "discovers" or, in others words, "knew or should have known" of the injury underlying the complaint. D. D. v. Chester Community Charter School, ODR #9097/08-09 LS (2009) That language introduces an element of uncertainty into the statute of limitations question. See, e.g., Campbell v. Conrail, 1988 U.S. Dist. LEXIS 6551 (E.D.

Pa. Jul. 1, 1988) I note, however, that IDEA's limitations provisions are based upon knowledge, or constructive knowledge, of the alleged action that forms the basis of the complaint, not of the filing party's realization that she has a cause of action. Further, when I review the appropriateness of a student's IEP, I must do so in terms of the IEP's appropriateness at the time it is created and not at some later date when one has the benefit of the child's actual experience. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 3rd Cir 1993) Thus, it seems appropriate that the "discovery" at issue in the IDEA's limitations provisions is the discovery, real or constructive, of the physical action that forms the basis of the complaint, and not the later discovery, or realization, or awakening, that eventually prompts a filing party to file a due process hearing request.

In this case, Student's parent participated in the development of each pre-June 9, 2006 IEP. (2002 IEP: SD37,p.6; SD12; SD22; SD33; P18) (November 24, 2003 IEP:SD36; SD23) (May 2004 IEP:SD35; SD62; SD65; SD24) (June 17, 2005 IEP: SD5, p.4; SD63; P14; NT 493) Thus, Student's parent knew, contemporaneous with the event, about the actions that form the bases of the complaint regarding pre-June 9, 2006 IEPs. By the time of Student's June 9, 2008 due process hearing request, the filing dates had passed for any complaints regarding IEPs older than two years. Student's June 9, 2008 complaint, therefore, is timely only with respect to claims concerning IEPs that were developed on June 9, 2006 and after. This result is the same under Section 504. Student has two years within which to file Section 504 claims. Any Section 504 claim regarding IEP appropriateness, therefore, is limited to IEPs developed on June 9, 2006 and after.

Exceptions to IDEA's Filing Limitations

I find no basis for applying IDEIA's exceptions to the limitations provisions in this case. While bullying may have occurred, and while the January 2006 reevaluation report and the 2nd through 5th grade IEPs may have been inappropriate, there is no evidence that the Charter School knew those facts and nevertheless decided to lie about them intentionally, thereby preventing Student's parent from requesting due process. I conclude that the record does not support findings of intentional Charter School misrepresentations regarding any pre-June 9, 2006 bullying, the January 2006 reevaluation report, or the 2nd through 5th grade IEPs.

In addition, there is no evidence that procedural safeguards were withheld from Student's parent. Evan H. v. Unionville-Chadds Ford School District, 2008 WL 4791634 (E.D. Pa. 2008) Thus, I find no Charter School withholding of information that might justify an exception to the IDEA's limitations provisions.

In summary, I have found all of Student's pre-June 9, 2006 claims regarding bullying, the January 2006 reevaluation report, and 2nd through 5th grade IEPs to be untimely filed under both the IDEA and Section 504. For IDEA purposes, I found the relevant KOSHK dates to be contemporaneous with the dates of the actions complained of, and I found that no exceptions to the IDEA's limitations permit untimely filing in this case. For Section 504 purposes, I find that all claims not filed within 2 years are barred.

Substance of Student's Timely Claims

Having disposed of the timeliness of Student's claims, I now will review the substance of Student's timely claims. Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize

a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. 20 U.S.C. §1412; Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002)

In Pennsylvania, an IEP must: 1) be crafted to identify strengths and needs and then provide programs and services that address the student's needs and enhance the student's strengths; 2) be designed well, with goals and objectives that are not vague (there must be objective criteria against which progress can be measured; and 3) contain present levels of educational performance that describe the student's present performance in the program to provide a "blueprint" for the IEP's goals and objectives. TH v Pittston Area School District, Special Education Opinion No. 1680 (2005); LS v Upper Darby School District, Special Education Opinion No. 1538A (2004); AH v Warwick School District, Special Education Opinion No. 1240 (2002) An IEP is "fatally flawed" when: 1) the goals are stated in terms that are so vague that any measurement of progress is impossible; 2) goals include the word "improve" but there is no objective baseline measure against which to measure progress; and 3) objectives are not particularized to the goal statements and there are no baseline measures associated with the goals and objectives. TG v East Stroudsburg School District, Special Education Opinion No. 1642

(2005)

Bullying

The record does not support Student's claims that the Charter School inappropriately tolerated the bullying of Student in the 6th and 7th grades. Most persuasive is a mental health behavioral health services reevaluation report indicating that Charter School attitudes toward bullying changed when Student transferred to a new school building for the 2006-2007 school year. (P10) Video cameras confirmed, while peers were picking on Student, Student's principal and teacher sided with Student, rather than with Student's peers, and addressed the bullying. (P10, p.3)

Further, the only evidence of alleged bullying in 7th grade was vague testimony that Student came home with headaches and constant complaints of children hitting and teasing Student (NT 96-97), and the incident in early December 2007 when Student was hit by a pencil and a rubber band thrown by someone in the class. (NT 526, 542) This may be evidence of a chaotic educational environment that might have prevented Student from receiving appropriate instruction, but it does not establish either bullying or the Charter School's failure to address bullying.

The record as a whole convinces me that Charter School attitudes toward bullying in Student's 6th and 7th grade building were different from those attitudes experienced by Student in earlier grades. (P10, p.3) Thus, I conclude that the record does not support Student's claims that the Charter School violated either IDEA or Section 504 in 2006-2007 and 2007-2008 by permitting Student to be bullied by peers.

2006-2007 (6th Grade) IEP

The record does support a finding that the Charter School denied a substantive

FAPE to Student during this school year. It is true that Student's mother expressed excitement about the progress that the Student was making and the academic initiative that the Student was taking at home. (NT 463, 514-515, 570) In addition, a mental health reevaluation states that Student progressed impressively during the 2006-2007 academic year, improving from a K-1 reading level in 2006 to a 3rd-4th grade reading level at the end of the school year. The reevaluation attributes this progress to a fairly effective teacher and 1:1 aides for 2006-2007. (P10, p.3)

I conclude that the positive comments of Student's parent and the mental health report are reflective of instructional efforts despite inappropriate programming. In other words, while the IEP was inappropriate, Charter School personnel worked hard to overcome that deficiency. This does not equate to the provision of FAPE, however.

FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit, and they must accurately identify a student's present levels of educational performance so as to provide a "blueprint" for the IEP's goals and objectives. In this case, Student's 2006-2007 (6th Grade) IEP lacked critical information that the Charter School knew was important, but did not obtain appropriately. A psychiatric evaluation of Student was recommended in the Charter School's January 11, 2006 reevaluation report (SD1), but the Charter School never followed up with further evaluation. Although Student's behaviors were acknowledged to have a negative impact upon Student's education, a June 2006 FBA upon which the IEP was based lacked appropriate observations of Student over different settings, at different times and in different locations (NT 202-203), and the recommendations and strategies from even that insufficient FBA were not contained in Student's June 13, 2006 IEP. (SD8) Further,

Student's 6th grade teacher testified that Student began that school year at pre-primer to first grade reading levels, even though Student's IEP indicated that Student's reading level was at the beginning 3rd grade level. (NT 512)

From this evidence, I conclude that Student's IEP was not reasonably calculated to enable Student to achieve meaningful educational benefit. Accordingly, the Charter School denied FAPE to Student for the 2006-2007 school year.

2007-2008 (7th Grade)

Similarly, Student's October 23, 2007 IEP (SD21) goals were not changed from Student's May 22, 2007 and June 15, 2006 IEPs. SD-19; SD-21; SD-8. SD-21, p12. SD-21, p14 In speech and language, Student's goals actually was reduced from remaining on topic for 10 minutes to remaining on topic for 5 minutes. (NT 672-673) In addition, a privately secured neuropsychological evaluation report credibly concludes that Student has not made meaningful progress in academic skill development, with very weak phonemic awareness, decoding, word recognition and comprehension skills. The report also recommended emphasizing functional academic skills, doubling Student's speech/language therapy to twice weekly, with goals in vocabulary, word finding and formulation, and language comprehension, and providing social skills training to improve Student's peer interaction skills. (P11, p.15-17)

Further, while the early December 2007 incident in which Student was hit by a pencil and a rubber band thrown by someone in the class (NT 526, 542) does not, by itself, establish a FAPE denial, the Charter School's inability to place Student's 1:1 aide during that incident is quite troubling. That aide was required to accompany Student and yet that aide's whereabouts are unclear. (NT 97, 528) Yet, the aide has no recollection of

the incident at all even though it is undisputed that Student walked out of the regular education classroom unaccompanied. (NT 528, 615-616, 626)

From this evidence, I conclude that Student's IEP was neither reasonably calculated to enable Student to achieve meaningful educational benefit, nor appropriately implemented. Accordingly, I conclude that the Charter School denied FAPE to Student for the 2007-2008 school year.

Disenrollment Proceedings

Student claim that the Charter School denied FAPE to Student by disenrolling Student is not clear to me. The Charter School did not actually disenroll Student, but merely tried and failed. (P3; SD39; NT 370) It does not seem to me that an unsuccessful attempt to disenroll a child with a disability constitutes a FAPE denial. Further, this may be an unnecessary claim in the end because I have already found that Student was denied FAPE during the 2007-2008 school year, which is the year when the Charter School unsuccessfully tried to disenroll Student. In any event, I conclude that the Charter School did not deny FAPE to Student simply by trying to disenroll Student.

The Charter School Did not violate Student's Section 504 Rights

To the extent that the FAPE requirement under Section 504 differs from that under IDEIA, the difference appears to be a difference between merely failing to meet statutory and regulatory requirements (IDEIA) and either intentionally or deliberately indifferently failing to provide FAPE (Section 504). Mark H. v Department of Education, 513 F.3d 922 (9th Cir. 2008); K.R. v. School District of Philadelphia, 50 IDELR 190 (E.D. Pa. 2008); L.T. v. Mansfield Township School District, 48 IDELR 156 (D.N.J. 2007) After reviewing the record in this case, I cannot point to specific evidence

that the Charter School's FAPE denials occurred either with intention or with deliberate indifference. Accordingly, I find that the Charter School did not violate Student's Section 504 rights in either 2006-2007 or 2007-2008.

Relief

Compensatory education may be awarded for the period of time that a school district deprives an eligible student of FAPE, with an offset for the period of time reasonably needed to discover and remedy the deficiencies in the school district's services to the student. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996); R.M. v. Pocono Mountain School District, Special Education Opinion 1714 (2006); F.M. v. North Penn School District, Special Education Opinion 1503A (2006) In this case, I will award compensatory education for both the 2006-2007 and the 2007-2008 school years through March 2008, after which time Student enrolled in the public school district. I will reduce the award by a 30 day remedial period.

The actual amount and type of compensatory education award shall be based upon evidence that Student benefited from 12 hours per week reading and math tutoring services from the Huntington Learning Center at Charter School expense. (SD51) Based upon this testimony, I will order 432 hours (12 hours x 36 weeks) of compensatory education for 2006-2007, and 336 hours (12 hours x 28 weeks) of compensatory education for 2007-2008. The sum (768 hours) shall be reduced by a 48 hour (12 hours x 4 weeks) remedial period, for a total of 720 hours of compensatory education.

Equitable Estoppel

Noting that an award of compensatory education is an equitable remedy under IDEA-2004, Ferren v. School District of Philadelphia, 2009 WL 222376 (E.D. Pa. 2009), the Charter School argues that Student should be precluded from asserting a claim for compensatory education in this case under the doctrine of equitable estoppel. Foster v. Westmoreland Casualty Co., 604 A.2d 1131 (Pa.Cmwlt. 1992); Nesbitt v. Erie Coach Co., 416 Pa. 89, 204 A.2d 473 (1964) The Charter School contends that it was induced to take action or to refrain from acting to its detriment in justifiable reliance upon the position taken by Student's parent.

More specifically, the Charter School argues that Student's Parent was an active participant in Student's special education programming and, by January 2006, had obtained representation by counsel experienced in the field of special education law. The Charter School alleges that it relied upon the representations of the Parent and Student's attorney that the programming and services for the Student were appropriate and that there was no challenge to any 2006 evaluation report. The Charter School further alleges that it relied upon the participation of Student's parent and attorney in developing both the June 2006 IEP as well as the Huntingdon Learning Center tutoring program. The Charter School contends that, had there been any disagreement expressed at that time by either Student's parent or attorney, the Charter School would have addressed those concerns and obtained additional evaluations, if necessary.

I reject this argument. The Charter School did not first conduct an appropriate FBA and then revise it in reliance upon representations by Student's parent or lawyer. (SD8; NT 202-203) There is no evidence that the Charter School's first offered appropriate goals in the October 23, 2007 IEP (SD21) and then reverted back to previous

goals in detrimental reliance. Nor is there evidence that Student's aide started to accompany Student out of the classroom during that December 2007 rubber band / pencil throwing incident, but decided not to do so in reliance upon representations from Student's parent or lawyer. (NT 528, 615-616, 626) Accordingly, the record does not support the Charter School's equitable estoppel argument.

CONCLUSION

Student's pre-June 9, 2006 claims are barred by the IDEA's limitations provisions and by the statute of limitations applicable to Section 504. The Charter School's disenrollment attempt did not deny FAPE to Student and the Charter School did not violate Section 504. Student's claims are not barred by equitable estoppel. The Charter School's 2006-2007 and 2007-2008 IEPs were inappropriate and denied FAPE under IDEA to Student. Consequently, Student shall be awarded compensatory education for 2006-2007 and 2007-2008.

ORDER

- The Charter School DENIED FAPE to Student for the 2006-2007 school year.
- The Charter School DENIED FAPE to Student for the 2007-2008 school year.
- The Charter School shall provide to Student 720 hours of compensatory education.
- Student's claim that the Charter School violated Student's Section 504 rights in either 2006-2007 or 2007-2008 is DISMISSED as unsupported by the record.
- Student's IDEA and Section 504 claims concerning bullying, inappropriate evaluation report(s), and IEPs prior to June 9, 2006 are DISMISSED as untimely.
- Student's claim that the Charter School denied FAPE by inappropriately tolerating the bullying of Student in the 6th and 7th grades is DISMISSED as unsupported by the record.
- Student's claim that the Charter School denied FAPE to Student by trying to disenroll Student is DISMISSED as unsupported by the record.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

March 20, 2009