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: HR

Date of Birth: xx/xx/xxxx

Dates of Hearing: 3/16/09, 3/17/09

CLOSED HEARING

ODR No. 9646/08-09 KE

Parties to the Hearing:	Representative:
Parents	Parent Attorney Yvonne Husic, Esq. Husic Law Office 2215 Forest Hills Drive Harrisburg, PA 17112
School District District P.O. Box 38 Lehman, PA 18627-0038	School District Attorney Charles Coslett, Esq. Coslett & Coslett 312 Wyoming Avenue Kingston, PA 18704
Date Record Closed:	April 6, 2009
Date of Decision:	April 21, 2009

Hearing Officer: Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student is presently enrolled in 10th grade at [Redacted private residential school] in [Redacted state], a private residential college preparatory school for students with learning disabilities. Student was unilaterally placed at [Redacted private residential school] by her Parents beginning in the 2007/2008 school year after completing her third year as a District student. Parents enrolled Student in the District in the 2004/2005 school year after becoming dissatisfied with the private school for learning disabled students Student had previously attended for several years. A District evaluation conducted in April 2004 concluded that Student was an IDEA eligible student due to learning disabilities in reading, math and writing, confirming the results of several private evaluations obtained by Parents.

Parents filed a due process complaint in January 2009 in which they sought reimbursement for past tuition at [Redacted private residential school] , payment of tuition for Student 's next two school years, reimbursement for three years of summer programs as ESY services, compensatory education for the three school years Student was enrolled in the District and reimbursement for the services of their educational consultant. Parents also asserted a claim for discrimination under §504 of the Rehabilitation Act of 1973.

In addition to defending on the substance of Parents' claims, the District contended that Parents had failed to provide the required notice of their intent to withdraw Student from the District and enroll her in private school and that Parents'

claims are time-barred. A two day hearing session was held in March 2009 concerning the tuition reimbursement claims and the number of years for which Parents could assert their claims in light of the IDEA time limit provisions. Substantive evidence concerning claims which date back more than two years from the date the due process complaint was filed were reserved pending a decision on the time limitation issues.

ISSUES

1. Is the District required to reimburse Student Parents for past private school tuition and pay Student 's tuition for the remaining two years of high school in her current private placement?

2. For what period of time may Student's Parents assert claims for the District's alleged failure to provide her with appropriate special education services?

3. Is Student entitled to an award of compensatory education while enrolled in the District between January 25, 2007 and the date she left the District, and if, so in what amount and form?

4. Is the District required to reimburse Student's Parents for the services provided by Andrew Klein?

Was Student subjected to discrimination by the District on the basis of her disabilities?

FINDINGS OF FACT

1. Student is a 17 year old child, [Redacted]. She is a resident of the District and is eligible for special education services. (Stipulation, N.T. p. 18)

2. Student has a current diagnosis of specific learning disabilities, speech/language impairment and other health impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9), (10), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 18, 19)

3. Prior to enrolling in the District for 7th grade in the 2004/2005 school year, Student attended two private schools, The [Redacted private school] from kindergarten through mid-4th grade, and [Redacted 2nd private school] for the

remainder of 4th grade through the end of 6th grade. (N.T. pp. 426, 427; P-7, P-12, P-35, P-54)

4. Student 's Parents obtained private evaluations of her when she was in kindergarten, 1st grade and 2nd grade to determine why she was having early academic difficulties. They obtained additional private evaluations when Student was nearing the end of 6th grade, and in the middle of the 2006/2007 school year, when she was in 8th grade, several months before she was to enter high school. (N.T. pp. 29—35, 68, 69; P-4, P-5, P-6, P-7, P-8, P-9, P-54)

5. At Parents' request, the District evaluated Student in June 2004, to determine IDEA eligibility in preparation for her transition to public school. The District also complied with Parents' request to re-evaluate Student in December 2006, the middle of her 9th grade year. The re-evaluation included separate speech-language and occupational therapy evaluations, along with standardized achievement tests, social/emotional behavior rating scales and assessments for early transition planning. (N.T. pp. 36—38, 78—84; P-12, P-33, P-34, P-35)

6. The independent and District psycho-educational evaluations conducted just before and during Student 's enrollment in the District are consistent with each other and with the earlier evaluations in identifying significant learning disabilities in reading, writing and math, a speech/language impairment and ADHD, with attention issues predominating, along with visual-motor and visual-perceptual deficits. (N.T. pp. 31, 33, 34, 68, 81, 82; P-7, P-9, P-12, P-35)

7. As measured by the WISC-IV, Student has average to low average cognitive potential overall, with average verbal reasoning ability and low average to borderline-deficient perceptual reasoning abilities. (N.T. pp. 34, 35; P-7, P-9, P-12, P-35)

8. In the April 2004 independent evaluation, processing deficits were identified as the root of Student 's difficulties with language, sensorimotor and visual spatial functioning. Those deficiencies, along with severe attention deficit disorder, resulted in her reading and writing disorders. (P-7, p. 6)

9. In the 2006 independent evaluation, Student 's processing speed was noted to be a particularly serious deficit, in the borderline impaired range. (P-9, p. 3)

10. Due to Student 's language deficits, Parents' 2006 independent evaluator recommended that consideration be given to exempting Student from foreign language study. (P-9, p. 12)

11. The reading assessments included in the District's evaluations found Student 's recognition of sight words and decoding skills to be instructional at the 7th grade level and frustrational at the 8th grade level in 2004. The same skills measured in 2006 placed Student 's instructional level at 6th grade and her frustration level at

7th grade. According to the District's assessments, Student 's reading comprehension and ability to read words in context were "thought to be" at the 2nd to 3rd grade reading level in 2004 and at the 4th to 5th grade level in 2006. Student 's reading fluency was poor in both assessments. (N.T. p. 82; P-12, p. 3, P-35, p. 10)

12. In the summary of prior evaluation data included in the District's 2006 Reevaluation Report (RR), the District's school psychologist noted that in 2003, Student 's Broad Reading score on the Woodcock-Johnson, Third Edition standardized achievement test (WJ-III) was at the Grade 3.0 level and her Broad Math at the Grade 2.9 level. (P-35, p. 2)

13. In the District's 2006 reevaluation, Student 's Broad Reading score on the W-J III placed her at the Grade 3.7 level. Her W-J III Broad Math score was at the 3.4 Grade level and her Broad Written Language at the 3.5 Grade level. The District's 2006 RR noted that Student was not performing in the range that would be expected based upon her cognitive abilities. (P-35, p.10, P-37, p. 5)

14. The District RR identified Student 's reading needs as fluency, recognition and use of punctuation when reading, reading for facts, retaining facts, sight word development, high frequency word accuracy in context, self-monitoring for word errors, evaluating text, making inferences with materials read, word knowledge (meanings) and comprehension. (P-35, p. 11)

15. Student 's math needs were identified as fluency, memorizing basic math facts, care and checking when completing paper and pencil math tasks, two digit multiplication and division, three digit subtraction with re-grouping, simple fractions and decimals, actively using problem-solving with word problems and reduced guessing. (P-35, p. 11)

16. The District's RR identified one writing need for Student , to improve her writing skills, including expressive writing and spelling in context. (P-35, p. 11)

17. With respect to Speech/Language, the District administered the Comprehensive Assessment of Spoken Language (CASL) as part of the reevaluation. The results of that standardized assessment placed Student well above her age level with respect to the Nonliteral Language and Pragmatic Judgment subtests, just below age level with respect to the Synonyms subtest, and approximately a year and a half below her age on the Gramaticality Judgment subtest. Student 's primary Speech/Language needs were identified as expressive writing, development of receptive language skills and completing assignments and assuring that she has all class notes. (P-33, P-35)

18. As part of the occupational therapy assessment, the District administered The Test of Visual-Perceptual Skills, Upper Level-Revised (TVPS-UL), which yielded results that placed Student in the average range for her age level, and the Beery-

Buktenica Developmental Test of Visual-Motor Integration (Beery-VMI), on which she scored in the low range. Needs in the areas of handwriting and keyboarding skills were identified. (P-34, P-35)

19. After the District's reevaluation was completed in December 2006, Student 's IEP team met in January 2007 to revise her educational program based upon the reevaluation results. The District's RR noted explicitly that "The scope and sequence of Student 's IEP, modifications, and specially designed instruction are not appropriate at this time. Additional modifications and specially-designed instruction should be added to Student 's IEP as determined by his (*sic*) IEP team in order to help meet Student 's Reading, Math and Writing needs." No one on Student 's IEP team disagreed with that conclusion. (N.T. pp. 337, 340; P-35, p. 8; P-37)

20. After reviewing the results of the assessments administered to Student in the course of her reevaluation, the District school psychologist explicitly stated that "[I]f the [April 2006] IEP is designed to address Student 's needs and to assure that she makes progress, then we've failed on the second part. According to my testing she has made little to no achievement progress in Reading and Math…We MUST revisit her IEP and design a program that will allow success for Student ." (P-36, p. 1)

21. The IEP revision proposed for Student by the District included one annual goal for math, knowledge and use of Algebra skills, and one short-term math objective, perform and practice basic math operations including subtraction with re-grouping, math facts, two digit multiplication and division, fractions and decimals and word problems. (P-37, p. 11)

22. The proposed IEP included one annual goal for reading, increase fluency and word recognition by reading 100 words per minute with 85% accuracy for two consecutive weeks. An annual goal for English was directed toward increasing Student 's vocabulary by 10 new words/week from a pool of 200 by creating a catalog of definitions and writing complete sentences with 80% accuracy. A Speech/Language annual goal included providing the main idea, details and answer questions about reading material with 90% accuracy. (P-37, pp. 13, 16)

23. Writing goals were listed under both English and Speech/Language and included identifying parts of speech, creating sentences, paragraphs and letters using proper grammar and punctuation with 80 % accuracy; utilizing target vocabulary from the curriculum to develop a short paragraph and writing grammatically correct sentences and short paragraphs. (P-37, pp. 13, 16)

24. Under the January 2007 proposed IEP, Student would have received learning support for Math and English and participated in the general curriculum for History, Science, PSSA prep, physical education and "semester courses." Student

would have been in learning support and outside of the regular curriculum for a total of 8.8 hours/week out of 36.3 school hours/week. (P-37, p. 22)

25. During the 2006/2007 school year, when the District's most recent evaluation was completed and its most recent IEP proposed, Student was in the 9th grade and was taking PSSA Prep/Reading, Basic Algebra (a learning support class),French I, Basic English (a learning support class) and Earth Science. (N.T. pp. ; P-35, P-37, P-41, p. 5)

26. Student 's Parents did not return a signed NOREP approving the IEP proposed by the District in January 2007. (N.T. pp. 431, 432; P-40)

27. The last IEP approved by Parents was the April 2006 IEP, which, in the absence of a signed NOREP permitting implementation of the January 2007 proposed IEP, remained in effect and continued to be implemented for the remainder of the 2006/2007 school year. (P-26)

28. In accordance with that IEP, Student 's placement was part-time learning support. She received math and English outside of the regular education curriculum and was to be included in regular education classes for semester courses and physical education. Her time outside of the regular curriculum was calculated to be 22.6 hours/week out of 36.1 school hours. (N.T. pp. 87, 88; P-26, p. 20, P-54)

29. Student 's IEP for 9th grade included one math goal, utilizing basic math skills to calculate percentages off merchandise, number rounding, estimating, measuring, monetary calculations, fractions and decimals at a level of 80% accuracy. (P-26, p.11)

30. There was no reading goal in the April 2006 IEP. The English, Speech/Language and Occupational Therapy goals were identical in the April 2006 IEP and the IEP proposed in January 2007. (N.T. pp. 73, 86; P-26, pp. 12—15, P-37, pp. 12—16, P-54)

31. After the January 2007 IEP meeting, Parents decided to enroll Student at [Redacted private residential school] in [Redacted state], a private, residential college preparatory school for high school students with learning disabilities. Academic class sizes range from 1:1 tutorials to six students. An IEP is developed by each student's academic adviser for each student based upon the student's needs and objectives identified by the student's teachers. Teachers are expected to modify instruction to meet the needs of each child (N.T. pp. 191, 192, 198, 205, 206, 257, 278, 419—422, 434)

32. Although Parents hoped Student could complete the 2006/2007 school year at [Redacted private residential school] , there was no opening, so Student remained in the District for the remainder of 9th grade. (N.T. pp. 194, 434)

33. Via e-mail message to Student 's learning support case manager dated February 1, 2007, Student 's Father notified the District that Parents were "firming up arrangements for Student 's attendance at the [Redacted private residential school] School…beginning in the fall." That decision was based upon their "unassailable conclusion that [the District] is not capable of addressing the educational needs of our [student]." (N.T. pp. 434, 435; P-41, pp. 1, 2)

34. Parents signed an enrollment agreement with [Redacted private residential school] dated February 21, 2007. By letter dated June 4, 2007 to the District's Director of Special Education, Parents confirmed that Student would attend [Redacted private residential school] in the fall of 2007 and repeat 9th grade there. By letter dated June 15, 2007 Parents requested that the District pay Student 's tuition for four years of full-time attendance at [Redacted private residential school] , as well as provide reimbursement for the three summer programs Student had attended at [Redacted private residential school] to that point, as well as the upcoming 2007 summer program that Student was required to attend. (N.T. pp. 436; P-42, pp. 1, 3, 4)

35. The District did not respond to either letter, prompting a June 27, 2007 letter from Parents' counsel requesting an immediate response, which the District provided by letter dated July 2, 2007. The District denied public funding for Student 's out of District placement and noted that it was "currently exploring other placement options" and was "considering additional programs for students with learning disabilities within District ." (N.T. pp. 315, P-43, pp. 5, 6)

36. The District did not convene Student 's IEP team or contact Parents again prior to Student 's departure for [Redacted private residential school] to begin the 2007/2008 school year, or at any time after that concerning a program and placement for Student , until Parents filed their due process complaint dated January 25, 2009. (N.T. pp. 317, 318, 321, 438 P-1)

37. The District's Director of Special Education reviewed the [Redacted private residential school] records concerning Student 's program and progress there and found them to be appropriate, but believes that the District can provide an appropriate public school program for her. (N.T. pp. 326, 328)

38. Student 's math and English teachers each completed a "Teacher Recommendation Form" for [Redacted private residential school] dated January 18, 2007. In response to the question of how they imagined the student would benefit from very small, structured classes, both of Student 's learning support teachers noted that they would expect her to derive significant benefit from that type of instruction. (P-41, pp. 7, 9)

39. The District concluded that Student was not eligible for Extended School Year (ESY) services during the summer of 2007 due to lack of data indicating that she

had difficulty recouping skills and evidence of adequate progress in reading and math. (N.T. pp. 352, 353; P- 26, p.18, P-37 p. 20)

40. Because Parents believed that Student needed to maintain her academic skills over the summer months, and would regress without a constant program, Parents enrolled her in [Redacted private residential school] summer programs from 2004 through 2007. Parents discussed their ESY concerns with the District during IEP meetings and conversations, but never made a formal demand for ESY. (N.T. pp. 390, 396, 397; P-44, P-45, P-46, P-47)

41. During the summer of 2007, Student had a 1:1 tutorial in reading and a writing workshop. She also had courses in literature, Algebra, French and zoology, as well as intrapersonal pragmatics, focusing on effective communication and listening skills, and study skills/time management. (N.T. pp. 171—174, 202, 203, 276, 277; P-47)

42. When Student began full time classes at [Redacted private residential school] in the fall of 2007, she also had a reading tutorial with the same teacher, working on the same phonemic awareness skills she had begun during the summer program. Student experienced a significant regression in skills she had learned over the summer but improved approximately 5% on the objectives set for her each quarter during her first full year at [Redacted private residential school] with a more intensive program and a longer time to work on the skills. (N.T. pp. 174—179, 184, 185, 188; P-48, P-49)

43. Student demonstrated slow, steady progress in math during the summer of 2007, and slow but steady progress in all of her classes during the 2007/2008 school year and continuing in her classes during the current school year (N.T. pp. 204, 208—212, 231, 243, 253, 277, 287, 291, 295, 300; P-47, P-49, P-50, P-51, P-52)

44. Student 's memory issues continue to affect her ability to retain skills and information she previously learned to mastery. Student 's memory deficits are addressed at [Redacted private residential school] by repetition and helping her to develop strategies to remember information previously learned. (N.T. pp. 208, 209, 282, 284, 285, 304)

45. Because of the severity of Student 's learning disabilities, her teachers do not expect dramatic leaps in academic progress. Student has, however, recently shown an increase in reading progress after the slow building of skills over a year and a half of intensive daily reading instruction (N.T. pp. 213, 214, 246, 251, 281)

46. Learning to read effectively has been a particularly arduous process for Student . In addition to deficits in phonemic awareness, significant gaps in Student 's knowledge base make improving her reading comprehension especially difficult.

These issues also adversely affect her literature and writing classes. (N.T. pp. 231—234, 253, 254, 263, 283, 285, 286, 292—294)

47. The Orton-Gillingham reading program used at [Redacted private residential school] addresses Student 's memory issues by building connections and relationships to decrease reliance on remembering discrete, randomized bits of information, as well as repetition, analytical strategies and direct, sequential and individualized instruction designed to develop understanding. (N.T. pp. 232—239, 242)

48. The Orton Gillingham method uses a multi-sensory approach that involves auditory, visual, kinesthetic and tactile modalities. (N.T. pp. 236, 237)

49. Since Student left, the District acquired the Wilson reading program and believes that it could appropriately address Student 's needs through Wilson reading instruction. Student 's Orton Gillingham instructor at [Redacted private residential school] noted that although Wilson is based upon Orton Gillingham principles, it is not the same in that the Wilson program does not permit variation in the scope and sequence of instruction based upon student needs and does not emphasize building connections and relationships. Although the District's Director of Special Education believes that Wilson is "in some respects better than Orton Gillingham" the advantages of Wilson for Student 's needs were not explained. (N.T. pp. 239, 240, 309, 350, 351)

50. Parents requested Orton Gillingham reading instruction for Student from the District in September 2006. Acknowledging that such instruction would benefit Student , the District attempted to locate an Orton Gillingham or Wilson instructor but was unsuccessful. (N.T. pp. 350, P-28, p. 3)

51. Parents' frustration with Student 's reading program, in particular, began in earnest in September 2006, when they requested a reevaluation, as well as Orton Gillingham reading instruction. Parents had no confidence that the PSSA Prep reading program the District was providing for Student would meet her reading needs and believed that an evaluation would at least determine where Student was functioning at that point. (N.T. pp. 410—412; P-27)

52. Parents also expressed concerns about the failure to implement some of the specially designed instruction required to be provided in accordance with Student's 9th grade IEP, centered particularly on the failure to implement some of the specially designed instruction required to be to be provided in accordance with the April 2006 IEP. (N.T. p. 348; P-26, P-36, p. 3)

53. Parents agreed with the statement in the District's 2006 evaluation report that Student 's IEP was not appropriate, since they already believed it was not meeting her needs. (N.T. p. 418; P-35, p. 8)

54. Parents were dissatisfied with aspects of Student 's IEPs and/or the District's implementation from the beginning of her enrollment in the District, and were concerned about her lack of progress as early as Student 's first year in the District, when Parents did not agree that Student was making adequate progress toward the goals in her IEP. Such concerns persisted throughout Student 's enrollment in the District. Parents discussed their concerns, informally, at IEP meetings and in the course of conversations, and in one instance, Student 's Father wrote notes on an IEP questioning various aspects of it. (N.T. pp. 388—392, 395, 399—403, 406—409, 419, 420, 459, 460; P-22)

DISCUSSION AND CONCLUSIONS OF LAW

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 child's right FAPE, to due process protections, or to any other remedies provided by the IDEA statute and regulations, by unilaterally selecting a placement other than that offered by the District. Parents do, however, place themselves at financial risk. Although parents are always perfectly free to decide upon the program/placement they believe will best meet their child's needs, to obtain public funding for that choice, they must meet well-established legal requirements

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon the *Burlington School Committee* case. The first step is to determine whether the program and placement offered by the district is appropriate for the child. Only if that issue is resolved against the 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. *See also, Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

Standards for an Appropriate Educational Program

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Appropriateness of the District's Program/Placement

Based upon the admission of the District, through the school psychologist who conducted the December 2006 reevaluation of Student , the IEP in place at the time of the reevaluation was not appropriate for her. *See* F.F. 19, 20 The District's Director of Special Education also agreed that the last agreed IEP, dated April 2006, was inappropriate, at least as of the date of the reevaluation report. N.T. 337, 341, 343. The Special Education Director's contention that the IEP was appropriate until the reevaluation report was shared with Student 's IEP team is unsupportable. First, contrary to the suggestion in her testimony that the reevaluation uncovered information about Student not previously available to the District in terms of new or undiagnosed needs, all prior evaluations, whether completed by the District or by private evaluators, were consistent in identifying Student 's disabilities and educational needs. F.F. 6, 7, 8 The only new information revealed by the 2006 reevaluation came from the achievement assessments which established in stark and unequivocal terms that Student had made no progress, particularly in reading, since enrolling in the District. F.F. 11, 12, 13

Even more damaging to the District, however, was its lack of effective response to the reevaluation data. The IEP proposed by the District in January 2007 was nearly identical to the IEP the Special Education Director admitted was inappropriate as of December 2006. F.F. 21, 22, 23 In its proposal to revise the IEP, the District added math short term objectives that tracked, in part, the needs identified in the reevaluation report, and added a single reading goal to the IEP, which addressed one area of need identified in the RR.. F.F. 21, 22, P-26, P-35, P-37 Notwithstanding the school psychologist's alarmed call to action after completing the reevaluation, only two minor

changes were made to the proposed IEP, and Student 's time in learning support was to be substantially decreased. F.F. 24, 28

The Special Education Director expressed the belief that the District could provide an appropriate program for Student going forward. F.F. 49 There was, however, no testimony or other evidence suggesting that the District had attempted to develop an appropriate IEP for Student at any time since she left the District, including the period since the complaint was filed. Consequently, nothing in the record supports that optimistic assertion, and there is no basis to believe that the District would or could fulfill such a promise.

Appropriateness of the Private School Placement

There is extensive evidence in the record detailing the intensity of the educational services Student is receiving at [Redacted private residential school] , and establishing that such services are responsive to Student 's needs. F.F. 42, 44, 47, 48 In addition, the District did not dispute that [Redacted private residential school] provides an appropriate educational program for Student . F.F. 37, 38

The District's only argument with respect to [Redacted private residential school] is that it is an optimal program, which IDEA does not require a District to provide. *See* District Written Closing Argument. Although it is true that a district is not required to develop and deliver an optimal program to an eligible student, that legal principle is not applicable in this context, where the District failed to provide or propose an appropriate program for Student . When that occurs, Parents are permitted to select a private school that meets the eligible student's needs and to obtain reimbursement from their school district of residence in lieu of the FAPE which the district is obligated to provide. The

IDEA regulations explicitly provide that a district may be required to reimburse parents for private school tuition if it failed to make FAPE available to an eligible child, subject to 34 C.F.R. §300.148(c), which does not limit a parent's choice of a private placement based upon either the expense or superior quality of the private school.

Equitable Considerations

Although the District took the position that tuition reimbursement must be denied if Parents do not fulfill the notice provision found in 34 C.F.R. §300.148(d)(ii), the regulation states only that tuition reimbursement **may** be denied or reduced under those circumstances. It is appropriate, therefore, to consider this issue in the context of equitable considerations.

There was testimony at the hearing from both sides with respect to whether Parents' e-mail to Student 's special education case manager in February 2007, and/or Parents' letters in June 2007 met the notice requirement. F.F. 33, 34 The notice issue, however, is not a factor in this case.

There is no doubt that after the February 2007 e-mail the District should have been well aware of Parents' dissatisfaction with the District's proposed IEP and of their intent to send Student to private school. "Firming up" plans indicates to any reasonable person that the process is underway. Moreover, the District certainly does not dispute that Parents' letter of June 15, 2007 removed all doubt as to the Parents' intentions. The source of the District's argument that the letter failed to provide proper notice is not entirely clear, since it was certainly given more than 10 business days before Student was removed from the District as provided in §300.148(d)(ii). A "business day" is defined in the IDEA regulations as "Monday through Friday except for Federal and State

Holidays." 34 C.F.R. §300.11(b). There is no requirement that notice be given within 10 school days, as the District appears to suggest.

There are no other equitable considerations suggesting that an award of tuition reimbursement should be denied or reduced. Consequently, all factors considered in the *Burlington-Carter* test support Parents' tuition reimbursement claim. Student 's Parents will be awarded reimbursement for the tuition they paid to date for Student 's attendance at [Redacted private residential school] during the 2007/2008 and 2008/2009 school years.

In the absence of any effort on the part of the District to develop an appropriate program for Student since she enrolled at [Redacted private residential school] , (F.F. 35, 36), and in the absence of any real evidence that the District can and will provide an appropriate program for Student for the 2009/2010 school year, I will also award tuition for the upcoming school year. Finally, I will award reasonable costs of transportation for Parents and Student to travel to and from [Redacted state] three times each school year, at the beginning and end of the school year and for one extended break.

Parents' Right to Assert Claims for Violations Which Occurred More than Two Years Before Their Due Process Claim Was Filed

The IDEA Statute and Regulations

When the Individuals with Disabilities Education Act (IDEA) was re-authorized in 2004, it included amendments limiting due process claims. First, the statute provides that any party must be provided with "an opportunity to present a complaint…which sets forth a violation that occurred not more than two 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." 20 U.S.C. §1415(b)(6)(B). The corresponding federal regulation uses

mandatory language, providing that a 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." 34 C.F.R. §300.507(a)(2). The foregoing statutory/regulatory provisions set forth a pleading requirement relating to the contents of a special education due process complaint. The statute and regulations further provide, however, for the application of two exceptions to the timeline described in later provisions, statutory subsection 1415(f)(3)(D) and regulatory section 300.511(f).

In 20 U.S.C. §1415(f)(3)(C), the IDEA statute provides a limitation on the time for filing a due process claim:

> TIMELINE FOR REQUESTING HEARING.--A parent or agency shall request an impartial due process hearing 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 complaint.

The IDEA regulations state the same time limit for filing a complaint:

> Timeline for requesting a hearing. 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 that forms the basis of the complaint.

34 C.F.R. §300.511(e).

The foregoing sections set forth the statutory/regulatory provisions limiting the time for commencing IDEA due process hearings.

Like the limitation on the subject matter of a due process complaint, the time limit for submitting a due process complaint is subject to the exceptions found in 20 U.S.C. §1415(f)(3)(D) and 34 C.F.R. §300.511(f):

> EXCEPTIONS TO THE TIMELINE--The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting a

due process hearing due to

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the due process complaint; or

(ii) the local education agency's withholding of information from the parent that was required under this part to be provided to the parent.

20 U.S.C. Section 1415(f)(3)(D).

Exceptions to the timeline. The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--

(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)

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.[1] 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

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

> protection of their own interests and the interests of others." *Cochran v. GAF Corp.*, 542 Pa. 210, 666 A.2d 245, 249 (1995). Proof of a plaintiff's subjective knowledge is insufficient to invoke the discovery rule; a defendant can inquire what a reasonable plaintiff should know or should know to check. *See id.* (explaining that reasonable diligence is an objective, rather than a subjective, standard). Put simply, clues indicating to a reasonable person an injury or its cause cannot be ignored.

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

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.

In a recent case applying the "knew or should have known" language in the IDEA context, the court stated that "any inquiry into the application of the statute of limitations requires a highly factual determination as to whether the parent 'knew or should have known' of violations that formed the basis of their complaint." *J.L. v. Ambridge Area School District*, 2008 U.S. Dist LEXIS 13451 (W.D. Pa. Feb. 22, 2008) at *21,

Similarly, a parent who asserts claims and/or seeks relief for a period more than two years prior to the date on which the due process complaint was filed based upon the applicability of one of the statutory/regulatory exceptions bears the burden of proving the exception. The applicability of the exceptions is likewise a factual inquiry which cannot be determined without a full record. *See P.P. v. West Chester Area School District*, 557 F. Supp. 2d 648 (E.D. Pa 2008); 2008 U.S. Dist LEXIS 42536 (E.D. Pa. May 30, 2008) at *27: "Any inquiry into the application of the statute of limitations requires a highly factual determination as to...whether the parents were prevented from filing a due process complaint due to the alleged misrepresentation of, or the withholding of information by the Defendant." (*quoting J.L. v. Ambridge Area School District* at *21.)

Parents' Arguments Concerning Application of the "Knew or Should Have Known" Date Under 20 U.S.C. §1415(b)(6)(B) and 34 C.F.R. §300.507(a)(2)

Parents agree that once they "knew or should have known" that the District was neither providing nor offering an appropriate IEP for Student , they had two years to initiate a complaint in accordance with 20 U.S.C. §1415(f)(3)(C). Parents further contend, however, that under 20 U.S.C. §1415(b)(6)(B), they are entitled to assert claims going back an additional two years, providing, in effect, a four year limitations period.

Although it is conceptually difficult to reconcile the two statutory provisions, there is no doubt that in enacting the amendments to the IDEA statute which added the limitations provisions, Congress unequivocally intended to limit both the substantive contents of the due process complaint and the issues which may be asserted at a due process hearing to actions which occurred not more than two years before the filing party knew or should have known of the facts underlying the complaint. The focus of the IDEA procedural safeguards provisions is to resolve complaints quickly. Once a parent

has either actual knowledge of an action by a school district which constitutes a violation of an IDEA obligation, or a parent is on inquiry notice that a violation may have occurred, the two year period for requesting a hearing as provided in §1415(f)(3)(C) begins with respect to that violation. If the parent chooses to file a due process complaint immediately, parent is permitted to examine the district's conduct going back two years and may include in the complaint any other violation in that period in accordance with §1415(b)(6)(B). In an ongoing relationship between parents and district, these provisions encourage efforts to work out problems for up to two years while preserving a parent's right to obtain redress if the problem cannot be resolved.

Parents also argue that the "knew or should have known" language in §1415(b)(6)(B) is intended to refer to the date the District knew or should have known of the alleged violation, and requires a determination whether/when a violation occurred before determining the period for which Parent may assert claims. There is, however, no logical reason for making the timeliness of one party's claim dependent upon the other party's knowledge or notice. It is far more reasonable to construe the "knew or should have known" language as applying equally to parent and public agency in both §1415(b)(6)(B) and §1415(f)(3)(C). Such language logically refers in both sections to the knowledge of the party asserting the claim, which may be either the parent or the agency. *See* 34 C.F.R. §300.507(a)(1): "A parent or a public agency may file a due process complaint.." Since Parents asserted the claim in this case, the "knew or should have known" date for each claim that arose more than two years prior to the due process complaint filing date will be based upon when Parent knew, or should have known of the action constituting the alleged violation

The District's Limitation Argument

District contends that Parents knew about the "alleged action that forms the basis of their complaint," no later than January 17, 2007, and, therefore, that all claims filed more than two years later, on January 25, 2009 are time-barred. This is too rigid an interpretation of the IDEA limitations period and does not take into account Parents' right to assert claims that accrued within two years of the filing of the due process complaint. Here, Parents' testimony at the due process hearing establishes that they were well aware of many District actions underlying their claims for both tuition reimbursement and compensatory education more than two years before their due process complaint was submitted. *See*, F.F. 51, 52, 53, 54. Nevertheless, the District violation on which Parents' claim for tuition reimbursement for both the school years since Student enrolled at [Redacted private residential school] and for the summer of 2007 could not have accrued until Parents suffered a loss, *i.e.*, denial of their request for tuition payments either when due or after the bills were paid by Parents. The District was, and is, subject to a continuing duty to offer FAPE to Student , an IDEA eligible District resident. As the court noted in *Laura P. v. Haverford School District*, 2008 WL 500461 (E.D. Pa. 2008), a new violation occurs each time a district fails to fulfill an obligation to an eligible student. In this case, Parents notified the District in their February 2007 e-mail message and in letters sent in June 2007 that Parents claimed the District had failed to offer Student FAPE, yet the District took no action to rectify the situation. The District's failure to make any attempt to convene Student 's IEP team and propose a new program after notice of Parents' intention to withdraw Student from the District due to their

dissatisfaction with the District's program constituted new violations of the District's FAPE obligations that occurred well within the IDEA limitations periods.

Exceptions

Parents assert that both of the IDEA statutory/regulatory exceptions apply to extend the statute of limitations on their compensatory education claims for the 2004/2005, 2005/2006 and the entire 2006/2007 school year, as well as for reimbursement of Student 's summer programs for 2005 and 2006. Parents contend that the District misrepresented Student 's lack of progress and that they did not receive procedural safeguards notices. Applicability of the exceptions, however, is not supported by the record. Parents were clearly not misled by any statement on the part of the District that Student was making progress. Student 's Father's testimony was replete with statements concerning Parents' dissatisfaction with the educational services the District was providing to Student . F.F. 51, 52, 53, 54. Moreover, the record also establishes that Parents were well aware of the procedural safeguards available to them, including their right to file a due process complaint, which they referenced in both their June 15, 2007 letter and the letter from their counsel dated June 27, 2007. P-42. Nothing the District did prevented Parents from filing a due process complaint and seeking a hearing prior to January 25, 2009.

I conclude, therefore, that the IDEA exceptions do not apply to extend the time for which Parents can assert claims that arose prior to January 25, 2007.

Compensatory Education/ESY

Parents sought compensatory education for three school years that Student was in the District, and reimbursement for the summer programs she attended at [Redacted

private residential school] . In light of the limitations decision, the only periods left for consideration are the period after January 25, 2007 to the end of the 2006/2007 school year and the summer of 2007.

Student is entitled to an award of compensatory education for the second half of the 2006/2007 school year based upon my conclusion in connection with the tuition reimbursement issue that both the April 2006 IEP and the IEP proposed in January 2007 were inappropriate. I will award full days of compensatory education for each school day from January 25, 2007 to the date the District dismissed its students for the summer of 2007, measured by the daily cost to educate a student in the District.

With respect to ESY, I cannot credit the District's bare assertion that Student 's academic skills did not regress over the summer, given its cursory treatment of Student 's needs in both the April 2006 IEP and the January 2007 proposed IEP and the lack of evidence concerning how and why the ESY determination was made. Given Student 's low level of reading, math and writing skills while enrolled in the District, as well as her focus and memory deficits, it is impossible to believe she would not have regression and/or recoupment issues over an entire summer. Moreover, the only direct evidence of Student 's ability, or rather, inability, to retain skills after even a brief break supports the conclusion that she did experience regression. According to the testimony of an [Redacted private residential school] reading instructor who taught Student during the summer of 2007 and during the 2007/2008 school year, Student experienced a significant loss in skills she had learned to mastery during the summer by the beginning of the 2007/2008 school year. F.F. 42.

I will, therefore award reimbursement for the 2007 summer program at [Redacted private residential school] .

Reimbursement for Andrew Klein Services

Parents engaged Andrew Klein, an independent educational consultant, to review Student 's evaluation reports from both the District and private evaluators, to review Student 's District IEPs, to observe Student in her educational program at [Redacted private residential school] and to render opinions concerning the appropriateness of the District's and [Redacted private residential school] 's educational programs for Student . (N.T. pp. 24, 28, P-53, P-54) The family had been referred to Mr. Klein through their attorney for those purposes. (N.T. p. 28; P-54). Characterizing Mr. Klein's services as an "independent educational evaluation" and his expert report as an "evaluation report," Parents request reimbursement of his fees pursuant to 34 C.F.R. §502, which provides for publicly funded IEEs under certain circumstances.

It is apparent, however that labeling Mr. Klein's services an "educational evaluation" is an attempt to avoid the unequivocal decision of the U.S. Supreme Court in *Arlington Central School District v. Murphy*, 548 U.S. 291, 126 S. Ct. 2455, 165 L.Ed. 2d 526 (2006), in which the Court held that the IDEA provision providing for attorneys' fee awards to prevailing parents does not authorize recovery of fees for services provided by experts in IDEA actions. 20 U.S.C. §1415(i)(3)(B); 548 U.S. at 296, 297, 304.[2] Parents' attempt to obtain reimbursement for Mr. Klein's services and report despite the expert fee preclusion is unavailing. Parents' request for reimbursement of Mr. Klein's services will be denied for several reasons.

First, in accordance with 34 C.F.R. §502(b), Parents only have the right to an IEE at public expense when they disagree with an evaluation provided by a public agency and

[2] If expert fees were recoverable under §1415(i)(3)(B), such expenses like attorneys' fees, could not be awarded in an administrative proceeding.

request an IEE due to such disagreement. Neither of those circumstances exists in this case. There was no suggestion in the record that Parents sought Mr. Klein's services as an independent educational evaluator based upon their disagreement with the District's December 2006 reevaluation. Moreover, Mr. Klein's report included only minimal disagreement with the District's 2006 evaluation. Although Mr. Klein's report notes that the District did not administer a measure of intellectual functioning, there was no detailed discussion of how or why such lapse would have rendered the evaluation report inappropriate, just the bare conclusion that the District's failure to administer the WISC-IV was a "fatal flaw in the reevaluation." *See* P-54, pp. 6, 11, 12.

In his report, Mr. Klein described psycho-educational evaluations of Student that Parents had obtained privately but did not disclose when the most recent independent evaluation had occurred. The Klein report also referred generally to the inclusion in the latest evaluation of "a measure of intellectual ability" but did not name the specific standardized test. (P-54, p. 5) It is, therefore, not disclosed in the Klein report that Parents obtained their most recent independent evaluation of Student in January 2006, less than one year before the District's December 2006 re-evaluation, and that the latest independent evaluation had included administration of the WISC-IV. (P-9) Recent information about Student 's intellectual functioning derived specifically from that test was fully available to Parents and would have been available to the District had Parents provided their most recent independent evaluation report. Neither Mr. Klein's report nor his testimony provided a factual basis for repeating that test in the District's re-evaluation, other than inclusion of the WISC-IV on the permission to reevaluate that Parents had signed, and that the District's omission of that test meant that the District

"did not fulfill a mandate placed upon itself and that the family would have expected." N.T. p. 84. Most important, however, Mr. Klein testified explicitly that the 2006 District evaluation was appropriate in documenting Student 's lack of progress during the time she was enrolled in the District. N.T. p. 84. In general, therefore, Parents' expert witness agreed with the most recent District evaluation. There is, therefore, no basis for concluding that Parents would be entitled to a publicly funded IEE based upon disagreement with the most recent District evaluation. Even if Parents' failure to request an IEE after receiving the District's evaluation report were ignored, and even if Mr. Klein's services were accurately characterized as an independent educational evaluation, Parents simply do not meet the legal standards for IEE reimbursement under the circumstances of this case, where the District's evaluation was not inappropriate.

In addition, both the record in this case and the legal analysis set forth in *Mary Courtney T. v. School District of Philadelphia*, 2009 WL 185426 (E.D.Pa. 2009), which involved a situation nearly identical to this case, establish that Parents are not entitled to reimbursement for Mr. Klein's services. As in the recent district court case, Mr. Klein "provided his services as an expert witness on key liability issues in this matter, not as an IEE challenging the School District's evaluation." 2009 WL 185426 at *6. Here, in addition to the absence of a direct challenge to the District's most recent evaluation and lack of evidence that the District's evaluation was inappropriate, Mr. Klein's services were directed toward establishing the District's liability in this matter, not toward identifying or measuring Student 's needs and deficits. *See* P-54. Mr. Klein is not a school psychologist, speech/language, or other kind of therapist trained to identify or assess disabilities. Mr. Klein's training and experience, albeit extensive and impressive,

is as an educator, school administrator, due process hearing officer and consultant. *See* N.T. pp. 24—26; P-53. He was hired to determine the appropriateness of the services both the District and [Redacted private residential school] provided to Student "from the perspective of the IDEA, and then also from the perspective of Section 504 of the Rehabilitation Act of 1973." (N.T. p. 28) Student 's Father testified that Mr. Klein had been engaged after Student began attending [Redacted private residential school] in order to determine whether it was an appropriate placement for her which, of course, Parents must establish in order to succeed on a claim for tuition reimbursement.[3] (N.T. pp. 449, 450)

For all of the foregoing reasons, I conclude that Mr. Klein's services are not reimbursable as an independent educational evaluation.

§ 504 Claims

Parents' §504 claim was based entirely upon the same facts that they asserted in support of their IDEA claims. They produced no evidence of intentional discrimination against Student , and would, in any event, be entitled to no more relief than they will obtain on the IDEA claims that will be allowed.

CONCLUSION

For the reasons set forth above, Parents will be awarded tuition reimbursement for the 2007/2008, 2008/2009 and 2009/2010 school years and for the summer of 2007, as well as reasonable transportation costs. Student will be awarded compensatory education from January 25, 2007 to the end of the 2006/2007 school year. Parents' remaining claims will be denied.

[3] The timing of Mr. Klein's hiring further supports the conclusion that his services were not sought because of Parents' disagreement with a District evaluation, which is the threshold step for obtaining a publicly funded IEE, since Student was no longer even enrolled in the District at that point.

ORDER

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

1. Reimburse Student's Parents for the tuition they paid to [Redacted private residential school] for the 2007/2008 and 2008/2009 school years, for the summer of 2007 and any amount paid to date for the 2009/2010 school year.

2. Pay Student's tuition at [Redacted private residential school] for the 2009/2010 school year.

3. Reimburse Student's Parents for reasonable transportation costs as follows:
   a. For three trips to and from [Redacted private residential school] during the 2007/2008 school year, the 2008/2009 school year and the 2009/2010 school year;
   b. Transportation costs shall include mileage at the rate of $0.55/mile and accommodations for no more than one night for each trip, not to exceed $150.00, each time, if any, that the trip took more than one day.

4. Provide Student with full days of compensatory education for each school day from January 25, 2007 to the date the District dismissed its students for the summer of 2007 as follows:
   a. The compensatory education award shall be based upon the daily cost of educating a high school student in the District as measured by the average daily compensation of a high school teacher in the District during the 2006/2007 school year, including salary and fringe benefits.
   b. Parents may decide how the compensatory education hours/compensatory education fund is used. 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 her disabilities.

It is **FURTHER ORDERED** that in all other respects, Parents' claims are **DENIED**.

Anne L. Carroll

_____

Anne L. Carroll, Esq.
HEARING OFFICER

April 21, 2009