STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
06-EDC-1129

Student, by Parent)
or Guardian, *Father* and *Mother*)
)
Petitioner,)
v.) **FINAL DECISION**
)
CHARLOTTE-MECKLENBURG BOARD)
OF EDUCATION,)
Respondent.)
_____)

This contested case was heard before Julian Mann, III, Chief Administrative Law Judge, on August 28 and 29, 2006; September 28, 2006; and November 13-14, 2006 in the Office of Administrative Hearings, Vanguard Building, Hearing Room, 501 77 Center Drive, Charlotte, North Carolina.

APPEARANCES

For the Petitioner: Lisa Flowers
Council for Children's Rights
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For the Respondent: James G. Middlebrooks
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ISSUES

The parties framed the issues as follows:

1. Whether Petitioners are entitled to reimbursement for private school tuition and related transportation expenses for the 2004-05 school year.

2. Whether Petitioners are entitled to reimbursement for expenses incurred for private speech-language therapy, occupational therapy and physical therapy during the 2004/2005 school year.

3. Whether Petitioner are entitled to compensatory related-services for special education, occupational therapy, speech-language therapy, visually-impaired services and orientation and mobility services.

4. Whether Petitioner are barred by the applicable statute of limitations from seeking relief for matters arising prior to 60 days before April 27, 2006, the date Petitioners tolled the statute of limitations by formally requesting mediation.

Prior to the filing of this contested case petition, Petitioners filed a complaint with the North Carolina Department of Public Instruction (DPI) on essentially the same grounds as were raised in the contested case petition. Pursuant to a determination by DPI, the Respondent herein, announced before opening statements that it was reimbursing the Hawkins family $13,706.25 for private school tuition and transportation for the 2005-06 school year.

The Respondent contended that its payment of this amount, the sufficiency of which was not challenged by the petitioners, cut off any further claims for the 2005-06 school year and also removed any claim for prevailing party status for claims based on that year. The petitioners disagreed.

Based upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (OAH has jurisdiction of this contested case pursuant to Sections 115C of the North Carolina General Statutes and the Individuals with Disabilities Act (IDEA) and the Individuals with Disabilities Improvement Act (IDEA 2004), 20 U.S.C.§ 1400 et. seq. and implementing regulations (34 C.F.R. Part 300).

2. IDEA, 20 U.S.C. § 1400 *et seq.*, is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301. Although this case was filed after the reauthorization of IDEA, which took place in late December 2004 with an effective date of July 1, 2005, some of the issues here arose prior to the effective date of IDEA 2004.

3. The controlling state law for students with disabilities is found in Article 9 of Chapter 115C of the North Carolina General Statutes and the corresponding state regulations, including the Procedures Governing Programs and Services of Students With Special Needs. North Carolina's special education laws were substantially revised effective July 10, 2006. Those revisions became effective after this case was filed and have no bearing upon this decision.

4. *Student* is a child with special needs pursuant to N.C. Gen. Stat. § 115C-109 and is entitled to a free and appropriate public education (FAPE) pursuant to IDEA and IDEA 2004 (20 U.S.C. § 1412(a)(1); 34 C.F.R. 300.121), the North Carolina General Statutes, the North Carolina Procedures Governing Procedures Governing Programs and Services to Children with Disabilities (North Carolina Procedures). *Student*'s current area of eligibility under IDEA and IDEA 2004 is visually impaired (VI).

5. Petitioners have the burden of persuasion in this case. *Schaffer v. Weast*, U.S. (2005). Petitioners carried their burden of proof on all issues.

6. The IDEA defines FAPE as that which provides a disabled student with personalized instruction and sufficient support services to enable the student to benefit from the instruction. *Board of Education v. Rowley*, 485 U.S. 176, 203 (1982); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990).

7. North Carolina places great significance on education. The public policy regarding special education is "to provide full educational opportunity to all children with disabilities who reside in

the State." N.C. Gen. Stat. 115C-106.1 (2006). North Carolina law requires that special education must ensure that a child with special needs "has an opportunity to reach [his] full potential." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 983 (4th Cir. 1990).

8. The North Carolina Supreme Court has recognized a constitutional right to a "sound, basic education" for all students, whether disabled or not. *Hoke County v. State*, 358 N.C. 605 (2004) (quoting *Leandro v. State*, 346 N.C. 336, 347 (1997)).

9. IDEA 2004 explicitly states that the goal of the law is "to provide students with disabilities an education that is designed to meet their unique needs and prepare them for further education, employment or independent living." 20 U.S.C. § 1400(d)(1)(A) (2004).

10. The IDEA requires that children with disabilities be offered a FAPE. A child is deprived of FAPE if the school system violates the IDEA's procedural requirements to such an extent that the violations detrimentally impact upon the child's right to a free, appropriate public education or, if the IEP that is developed by the school is not reasonably calculated to enable the child to receive educational benefit. *Bd. of Educ. of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-7 (1982); *Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987). Respondent denied a FAPE to *Student*.

11. An LEA's failure to comply with the procedural requirement of IDEA can be adequate grounds to conclude that a school district failed to provide FAPE. *Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1206 (4th Cir. 1990).

12. Respondent Charlotte-Mecklenburg raised a statute of limitations defense to the claims in this case. The 60-day statute of limitations of N.C. Gen. Stat. § 150B-23(f) applied to actions occurring prior to the July 1, 2005 effective date of the reauthorized IDEA. (Tr. 28Aug06 at 44.) The North Carolina retained that 60-day limitations period until the new one-year statute of limitation became effective on July 10, 2006.

13. The relevant portion of the Administrative Procedures Act, N.C. Gen. Stat. § 150B-23(f), provides as follows:

> Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

14. In *CM v. Board of Education of Henderson County*, 241 F.3d 374 (4th Cir.), *cert. denied*, 534 U.S. 818 (2001), the Fourth Circuit determined that § 150B-23(f)'s 60-day period constituted North Carolina's statute of limitation for special education contested case petitions and that such a period was consistent with IDEA because of the accompanying notice requirements of the North Carolina statute.

15. Prior to the effective date of the IDEA 2004 on July 1, 2005, North Carolina's statute of limitations for special education contested case petitions was 60 days.

16. IDEA 2004 was signed into law in December 2004 and took effect on July 1, 2005. It now contains statute of limitations language at 20 U.S.C. § 1415(f)(2)(C):

> 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.

17. The North Carolina statute of limitations remained at 60 days pursuant to N.C. Gen. Stat. § 115C-116(d) and § 150B-23(f) until July 10, 2006, when the current one-year limitation came into effect. The new one-year limitations period is not at issue in this case because Petitioner challenges only actions (and failures to act) taking place prior to July 10, 2006.

18. N.C. Gen. Stat. § 150B-23(f) states that its 60-day limitations period is not triggered until the agency gives written notice (by personal delivery or United States mail) that (a) sets forth the action taken by the agency and (b) informs the recipient of the right, procedure, and time limit in which to file a contested case petition.

19. In its decision in *CM*, the Fourth Circuit considered what must happen before North Carolina's 60-day statute of limitations is triggered. There, the Court ruled that the written notice must fulfill the requirements of N.C. Gen. Stat. § 150B-23(f). It was not enough, the Court ruled, to just pass out copies of the *Handbook on Parents' Rights*. But, as the Respondent correctly pointed out at the hearing in this case, the Fourth Circuit's decision does not graft on any additional requirements. According to *CM*, the only trigger that matters is what is written into the express language of § 150B-23(f). Thus, the question in this case is whether the Respondent staff provided written notice to Petitioners that satisfied the requirements of that statute. Based upon the following discussion, Respondent cannot prevail on this defense.

20. The North Carolina Administrative procedure Act (APA) provides that the time limit for filing a contested case against a state agency commences when "notice is given of the agency decision to all persons aggrieved…. The notice shall be in writing and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition." N.C. Gen. Stat. § 150B-23(f).

21. Chapter 150B of the North Carolina General Statutes only describes the procedure for contesting a state agency's action and does not establish the right of a person to OAH review therefore it is subject to equitable tolling. *Batten v. N.C. Dept. of Correction*, 389 S.E.2d 35, 38 (N.C. 1990).

22. When the denial of benefits or services is based on the government's systematic procedural irregularity" that prevents the plaintiff from knowing of a violation of their rights, the statute of limitations is tolled until the plaintiffs have reasonable opportunity to learn the facts. *Bowen v. City of N.Y*, 476 U.S. 467 (1986). *See also*, *Nowell v. Great Atlantic & Pacific Tea Co*., 108 S.E.2d 889, 891 (N.C. 1959) (Statutes of limitation are a legal defense. "Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith.").

23. Petitioners relied on Respondent's representations regarding eligibility and evaluation requirements. However, Respondent violated procedures regarding those eligibility and evaluation decisions. Therefore, even if Petitioners failed to file within the required statutory scheme, the statute of limitations is tolled for the purposes of their claims.

24. IDEA requires that Prior Written Notice must be given to the parents of a child with a disability a reasonable time before the LEA proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child; or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).

25. The Prior Written Notice must include a description of the action proposed or refused by the LEA and the reason the action is being refused or proposed; a description of other options considered by the agency and why those options were rejected; a description of each evaluation procedure, test, record, or report the agency used as a basis for accepting or rejecting the proposed action; a description of other factors that are relevant to the LEA's decision, a statement regarding the parent's procedural safeguards and contacts parents can seek assistance from. 20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b). "Congress placed the onus upon school authorities to inform parents of their IDEA rights." *C.M. v. Bd. of Educ. of Henderson County*, 241 F.3d 374, 381 (4th Cir. 2001).

26. Virtually all of Respondent's Prior Written Notices were flawed and not in compliance with the requirements of IDEA. Most notably, the June 2004 Meeting DEC 5 does not address why *Student*'s writing was not assessed nor why Mr. McCarthy's recommendations regarding further evaluations were not followed.

27. *North Carolina Procedures Governing Programs and Services to Children with Disabilities* (*NC Procedures*) require that a LEA place a child with a disability in an appropriate program within 90 calendar days of receipt of a referral. *NC Procedures* .1505(4).

28. IDEA requires that:

> A. Children with disabilities residing in the State including . . . children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

29. 20 U.S.C. § 1412(a)(3)(A). The LEA, in carrying out this child find requirement, must undertake activities similar to the ones it undertakes with its public school children and should be completed in a time period comparable to that of students attending its public school children. 20 U.S.C. § 1412(a)(10)(A)(ii)(III) and (IV). See also *NC Procedures* .1502(A).

30. Respondent procedurally violated IDEA and *NC Procedures* numerous times in the referral process, identification processes and under its Child Find obligations. A referral is a written request for evaluation when a child is suspected of having a disability and might need special education services. A referral can be made by any "involved" person. *NC Procedures* .1503.

31. Respondent violated proper evaluation procedures continuously beginning with his first evaluation by Mr. McCarthy. Respondent only used the discrepancy model for determining eligibility and did not evaluate *Student* in all areas of suspected disability.

32. A state's failure to comply with the procedural requirement of IDEA can be adequate grounds to conclude that a school district failed to provide a FAPE. *Tice v. Botetourt County School Board,* 908 F.2d 1200, 1206 (4th Cir. 1990).

33. The Respondent's procedural violations were serious and caused *Student* to lose educational opportunity. *See Burke County Bd. of Educ. v. Denton,* 895 F. 2d 973, 982 (4th Cir. 1990)(finding school board's violation of notice requirement did not cause *Student* to lose educational opportunity).

34. The importance of parental participation in the IEP process is evident. *See* 20 U.S.C. §1421(a)(20)(inclusion of parents in IEP team); 34 C.F.R. §300.344(a)(3)(same). As the Supreme Court made clear in *Board of Education v. Rowley*:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process … as it did upon the measurement of the resulting IEP against a substantive standard.
>
> 458 U.S. 176, 205-06 (1982).

35. Respondent failed to provide *Student* a free and appropriate public education. It is well settled in the Fourth Circuit that failure to meet IDEA's procedural requirements is an adequate ground for holding that the public school failed to provide a free appropriate public education. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985)(citing *Rowley*, 458 U.S. at 206, n. 27); *accord, Bd. of Educ. of the County of Cabell v. Dienelt*, 843 F.2d 813, 815 (4th Cir. 1988); *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988); *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997).

36. Under IDEA, all decisions regarding a child's IEP or subsequent modifications to an IEP require parental participation and the participants at the IEP meeting should seek to reach agreement by consensus. 34 C.F.R. Part 300, Appendix A at Question 9 ("The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority 'vote'. If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposal or refusals or both, regarding the child educational program, and the parents have the right to seek resolution of any disagreement by initiation of an impartial due process hearing.")

37. Respondent violated the procedural requirements for parental participation numerous times. Petitioners maintained, throughout the four years, that *Student* needed assistance. However, Respondent did not consider this position in a meaningful time and in a meaningful way. Most notably at the IEP meetings that occurred during the 2004/2005 school year and the 2005/2006 school year where the only members of the IEP team who had any substantial knowledge regarding *Student*'s needs were Petitioners.

38. The LEA is required to provide a full and individual initial evaluation before providing special education and related services to a child with a disability. No single procedure is used as the sole criteria for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. The child must be timely assessed in all areas related to the suspected

disability and must be sufficiently comprehensive in order to identify all the child's special education needs even if they are not linked to the suspected disability. See including, when appropriate, health, vision, hearing social and emotional status, general intelligence, academic performance communicative status, and motor abilities.

39. The IDEA requires that an individualized education program (IEP) be "developed, reviewed, and revised" that includes, among other things, the child's present levels of educational performance and measurable annual goals that include benchmarks or short-term objectives. See 20 U.S.C.§1414(d)(1)(A). Present levels of performance should include "how the child's disability affects the child's involvement and progress in the general curriculum." *Id*. at 1414(d)(1)(A)(i). The free appropriate public education mandated by the IDEA must be designed for the specific needs of the child through the IEP, which is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *School Committee of the Town of Burlington v. Dept. of Educ*., 471 U.S. 359, 368 (1985). Instruction must be specially designed to meet the child's unique needs so that the child will learn. If the LEA fails and the child learns in another environment, the parents are entitled to be reimbursed for securing and paying for the education that did teach their child to read and write.

40. The IDEA emphasizes the parent's meaningful participation in the development of a child's IEP and evaluating its effectiveness. *School Committee of the Town of Burlington v. Dept. of Educ*., 471 U.S. 359, 368 (1985); citing 20 U.S.C. §§ 1400(c). 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2); 34 C.F.R. § 300.345 (1984). Respondent prevented Petitioners from meaningful and timely participation in *Student*'s education by not providing compliant Prior Written Notices (DEC 5s), Invitations to Conference, Summaries of Evaluations and generally misleading and delaying Petitioners regarding the prior written notices.

41. Respondent issued a prior written notice on June 1, 2004, indicating, "Your child is not eligible for special education related services." Petitioners were given appropriate notice of their due process rights that met the statutory requirement in the Parents' Handbook. The Petitioners within the 60 day time period did not appeal the Respondent's decision, making him ineligible for special education related services. (Pet. Ex. 19)

42. Dr. White, by report dated June 4, 2004, diagnosed *Student* as ADHD and provided this information directly to the Respondent on a form entitled "Physician's Report – Other Health Impaired." (Pet. Ex. 23.) This report was received by Respondent in proximity to its issuance date and Respondent is continuously bound by the information contained therein.

43. Petitioners provided to Respondent a document entitled, "Physical Therapy Evaluation."

In the summary typed 7-30-04 the following is noted:

> *Student*'s gross motor deficits are affected by vestibular processing issues, deficits in balance and an inability to produce fast, powerful movements. His short-term physical therapy is recommended to address his areas of specific deficits.

This report was prepared by Ms. A.S., PT. This report was received by Respondent in proximity to its issuance date and Respondent is continuously bound by the information contained therein. (Pet. Ex. 24)

44. In the report entitled, "Occupational Therapy Evaluation," date of evaluation 7/13/04, the following is found:

> When you take his visual-perceptual ability into consideration, there is a 2 year discrepancy between visual input and motor output." "He lags approximately one year behind, which puts him at risk for a learning disability and written expression.

This report was received by the Respondent in proximity to its issuance date and Respondent is continuously bound by the information contained therein. (Pet. Ex. 25.)

45. In the test entitled, "Comprehensive Psychological Evaluation" prepared by Jill Gottlieb, Licensed Psychologist, and Dawn S. Keller, M.Ed., Educational Specialist, the following is found:

> Immaturities in the area of visual-motor control and visual perception were raised in the observation of *Student*'s performance on the PPVT-III. This was further confirmed by the VMI development test of visual perception, which resulted in a performance at the 19th percentile and an age equivalent of 5 years-7 months… an even weaker showing was apparent in his visual-motor integration, as measured by the Slosson Visual-Motor Performance Test (SVMPT). … he obtained a standard score that was in the low average range at the 14th percentile, with age equivalent of four years – three months. These weak areas have prompted a more in-depth assessment of both fine motor and gross motor development. … immaturities were also observed in *Student*'s functional vision. He struggles to maintain careful visual attention to placement of letters on lines. He also skips lines when attempting to read and he loses his place when he must work with his eyes and hand in tandem. Immaturities and visual-motor or ocular-motor development are also suspect. It is well advised in this area to be examined to determine if visual immaturity may also be a confounding factor in *Student*'s progress.

This report was received by Respondent in proximity to its issuance date and Respondent is continuously bound by the information contained therein. (Pet. Ex. 26)

46. By letter from the Petitioners to Ms. E. dated August 9, 2004, Petitioners informed Ms. E., as agent of the Respondent, the following:

> We are working with Child and Family Development as well as both an auditory processing and visual processing specialist. The findings of these professionals thus far, are requiring that *Student* get specialized education for children with learning disabilities. *Student* will be attending Dore Academy this school year. We are advising that the Charlotte-Mecklenburg School system financially cover the tuition of $12,100 per year to this private special school until he is able to mainstream back into the public school system. We are expecting reimbursement for private professional evaluations, which we personally funded. It is very clear through past events, that David Cox Elementary is not an educational fit for *Student*'s needs.

Respondent received this document in proximity to its issuance date and is continuously bound by the information contained therein. (Pet. Ex. 27.)

47. On 8-11-04, *W.K.*, M.A. conducted an auditory processing evaluation through the Randolph Audiology and Hearing Aid Clinic. His summary conclusions, in part, reads:

> "*Student*'s results indicate an auditory processing problem."

Respondent received this document in proximity to its issuance date and is continuously bound by the information contained therein. (Pet. Ex. 28.)

48. On or about August 11, 2004 Steven H. Eyler, OD, FAAO, diagnosed *Student* with appropriate ICD-9-CM Codes as follows:

> "Saccadic eye movement disorder, ocular pursuit disorder, retinal dystrophy and developmental disorder (dyslexia)."
>
> Dr. Eyler notes, in part:
>
> "*Student* should be given extra time during testing situations and extra assistance when copying information from the board in classroom activities."

Respondent received this document in proximity to its issuance date and is continuously bound by the information contained therein. (Pet. Ex. 29.)

49. Respondent, through *Dr. M.M.*, Ed. D., Accountability Specialist for Respondent and as Respondent's agent, responded by letter to the Petitioners under the date September 21, 2004. He states, in part, the following:

> It would be appropriate for an IEP Team at *D.C. Elementary School* to be convened to review the results of the evaluations conducted during the summer to ascertain if *Student* would be eligible for services under NC Guidelines. If it is determined that he will be eligible for services, the IEP Team would develop an Individualized Educational Program (IEP) to meet the needs determined by the evaluation results. If the IEP can be appropriately implemented in a public school in Charlotte-Mecklenburg schools, either at *D.C. Elementary School* or elsewhere in our school system, then placement at a private school at public expense would not be necessary. If it is determined that a private school placement is necessary to meet the IEP needs then tuition reimbursement may be possible. If *Student* is determined not to be eligible for EC services after review of this new information, then there would be no statutory requirement for Charlotte-Mecklenburg School to provide tuition reimbursement for his placement at Dore Academy. Any decision regarding eligibility and provision of services would have to be made by an appropriate IEP Team.

Dr. M.M. further states that all of the expenses for the Petitioners' independent education evaluations that Petitioners obtained during the preceding month would be reimbursed. *Dr. M.M.* enclosed a handbook of Parents' Rights but did not explain the procedures by which these rights could be implemented for a due process hearing. This correspondence acknowledges that Respondent received, evaluated and reimbursed Petitioners for the costs of the aforementioned evaluations. Respondent is conclusively bound by the information received. Respondent did not timely evaluate *Student*, convene an IEP Team or place *Student* in an appropriate program within 90 days of mid August. (Pet. Ex. 30.)

50. *Ms. L.B.* and *Ms. C.L.*, both licensed Speech Language Pathologists prepared a "Speech Language Diagnostic Summary" dated 10-28-04, concluding as follows:

> In summary, *Student*'s performance falls significantly below average for his chronological age. *Student* experiences difficulty with remembering what he hears long enough to think about it, identifying critical details and expressing his answers verbally. Viewing *Student*'s performance with the knowledge that he experienced this level of difficulty in a one-on-one, quiet setting, it is easy to see that he will be significantly challenged in academic environment. He will fail to receptively process enough information to be successful. Direct intervention is recommended to equip *Student* for success in an academic as well as a community environment.

Respondent received this document in proximity of its issuance date and is continuously bound by the information contained therein. (Pet. Ex. 31.)

51. Based upon the information received by Respondent listed in the aforementioned Conclusions of Law, it was incumbent upon Respondent to evaluate *Student*, convene an IEP Team and identify *Student* for special education services. Respondent, through *Dr. M.M.*, acknowledged such in Respondent's correspondence of September 21, 2004. Respondent was aware that Petitioners were removing *Student* from Respondent school system based upon these evaluations. This removal was imminent and based upon evaluations that Respondent immediately acknowledged as valid and reimbursed Petitioners for the extraordinary work that they had voluntarily provided to the Respondent to assist them in identifying *Student* as a special needs *Student*. *Dr. M.M.* indicated that the decisions for identification and reimbursement could only be made in an IEP meeting. The majority of the information was received by Respondent on or about August 19, 2004. No IEP meeting was convened by Respondent for 203 days after receiving information that compelled them to consider reimbursement for private educational services at another institution and evaluate *Student* for special education services. The undersigned considers such a delay beyond what is permitted under construction of the law and a reasonable person would or should expect under the circumstances. Respondent inordinately delayed consideration of reimbursement and for special education services in the face of a plethora of private evaluations that were immediately perceived by Respondent as necessary and reimbursable as well as consideration of the issue for payment of tuition at an alternative school. Such a delay and inaction was a violation of Petitioners' procedural rights under IDEA and Respondent provided Petitioners no notice of this violation or their right to proceed immediately to a due process hearing for this procedural violation. A delay of 203 days before rejecting Petitioners' legitimate requests can only be characterized as a departure from any standard of reasonableness and a lack of good faith.

52. Respondents were in possession of Dr. Eyler's report of August 11, 2004 (Pet. Ex. 29) indicating four different categories of visual impairments and disorders. Petitioners, at the March 10, 2005 IEP meeting wherein services were denied, informed Respondent that during the interim between the August 11, 2004 date and the March 10, 2005 date, that *Student* had been diagnosed as *legally blind*. In categorically denying services as Visually Impaired, Respondent's IEP Team suggested the following:

> "That the team reconvene to discuss eligibility for services as visually impaired *Student*." (Pet. Ex. 37, p 2)

53. The 203 day delay in responding to Petitioners' request for services estopped Respondent from asserting equitably the statute of limitations, as cutting off the appeal rights of the Petitioners under this circumstance. Due to the grossly inadequate and untimely response to the Petitioners' letter of August 9, 2004, (Pet. Ex. 27) a reasonable time period to convene an IEP Team meeting would have been

no more than 30 days to ensure delivery of services within 90 days of notification and clear denial of identification and FAPE. The dilatory response to Petitioners' request cannot be justified under IDEA or state law and such delay amounts to bad faith. In the interim period of time, *Student*'s vision deteriorated to that of being legally blind. In addition to equitable estoppel applicable to respondent's defense, the undersigned concludes that Petitioners' request for services under visual impairment was preserved.

54. By letter dated April 12, 2005, Petitioners informed Ms. E., Respondent's agent of the following:

> Attached are the documents from my specialist outlining *Student*'s visual impairment. Unfortunately, the testing completed at Duke Hospital confirmed the doctor's diagnosis of cone rod dystrophy. During our last IEP meeting, *Dr. M.M.* indicated I could request private school reimbursement based on visual acuity numbers… We have been advised by *Student*'s doctors to start teaching him Braille. Please tell me the programs available to us for *Student* to be taught Braille.

Respondent received this document in proximity to its date of issuance and is continuously bound by the information contained therein.

55. Attached to this exhibit was a letter from Dr. Sharon F. Freedman, M.D., Associate Professor of Ophthalmology, Associate Professor of Pediatrics, Pediatric Ophthalmology and Strabismus, Glaucoma, Specialist at Duke University Hospital Medical Center, Department of Ophthalmology where she writes under letter dated March 25, 2005 the following:

> "This child should be considered legally blind."

Respondent received this document in proximity to its issuance date and is continuously bound by the information contained therein. (Pet. Ex. 38).

56. 170 days later, at Petitioners' continuous prompting, by letter dated September 19, 2005 to *Dr. M.M.*, agent of Respondent, the Petitioners write the following:

> It is unacceptable that this amount time has elapsed waiting for further information. Our last IEP meeting was held on March 10, 2005. I forwarded all doctor diagnoses to *Ms. K.E.* on April 12, 2005. On May 18, 2005, I sent *Ms. K.E.* an email asking for the status of my request. Her response was that all information was sent to you, as it was no longer in her realm of approval. By August 1, 2005, I sent you an email requesting some type of response and continued to request for another IEP meeting. On August 2, 2005, you responded that there must have been an oversight in communication. Here we are on September 19, 2005 and I'm not surprised that I have not yet heard from anyone within the school system.

Respondent is bound by its agent's admission of negligent delay. (Pet. Ex. 45).

57. An IEP Team meeting was assembled on October 11, 2005, 209 days after the previous IEP Meeting of March 10, 2005, 181 days after Petitioners' letter to Ms. E. under date of April 12, 2005, and 71 days after acknowledging on August 2 the extraordinary delay in processing the information by Respondent and then acting upon that information. This extraordinary delay by Respondent in responding to the Petitioners' request for services for a child that had been diagnosed at Duke University with rod cone dystrophy and as legally blind, preceded by and, thus, bound by other evaluations indicating rod

cone dystrophy and difficulty with visual processing, is an amount of delay that can only be found as beyond any standard of reasonableness, an act of bad faith, and equitably estopps the Respondent from asserting the statute of limitations. An evaluation should have been conducted within 30 days of notice, *Student* identified as Visually Impaired and services delivered no later than 90 days. Extraordinarily enough, the October 11, 2005 IEP noted the following:

> The team met and initiated an initial referral for VI services and eligibility. Petitioners have provided evaluations which may support such decision but all the required information is not present. CMS will need to conduct a hearing screening, a Braille skills inventory and additional educational testing. … the team will meet again after supplemental evaluations are completed to determine eligibility. … The team rejected determining VI eligibility at this time as more information is needed to meet N.C. requirements for initial evaluation for eligibility.

In addition to equitable estoppel from asserting the statute of limitations, the undersigned specifically finds that this IEP where due process rights and procedures are given to the Petitioners, the specific determination for *Student*'s eligibility for visual impairment was reserved to be later considered. The delay and failure to identify *Student* as Visually Impaired and provide services to *Student* was a failure to identify, an act of bad faith, and failure to provide FAPE.

58. The IEP Team reconvened again on March 9, 2006, 149 days after the October 11th IEP meeting, the IEP Team indicated:

> The team determined *Student* is eligible for services as Visually Impaired. He is not eligible for related services at this time. … The team decided to conduct a re-evaluation to determine eligibility for related services, O/M, and adaptive PE. … The Team rejected providing related services at this time, as there are no current evaluations to suggest eligibility for related services.

The team denied reimbursement for Dore Academy as follows:

> "CMS will not provide reimbursement for private school because *Student* has not been identified as a *Student* with special needs until today."

The IEP Team as documented in Petitioners' Exhibit 53 gave notice of appeal rights and due process hearing procedures to the Petitioners. A delay of 149 days to determine eligibility as Visually Impaired can only be found as beyond any standard of reasonableness when Respondent conclusively knew, almost a year earlier, that *Student* was legally blind. This diagnosis was made by a reputable medical institution and Respondent is continuously bound by this communication and equitably estopped from asserting the statute of limitations to cut off Petitioners right to protest Respondent's final determination of eligibility for *Student* as Visual Impaired, denial of related services and denial of private school reimbursement. In addition to the estoppel of the statute of limitations, the undersigned finds that the consideration of related services applying to classification as Visual Impairment was reserved to Petitioners in this document. (Pet. Ex. 23).

59. In the Respondent's document entitled "Summary of Evaluation Results Eligibility Determination," the following is quoted as to *Student*'s functional vision evaluation under date of 04/27/2006:

> Due to *Student*'s diagnosis of rod-cone dystrophy, his central vision is deteriorating. He has a very poor near and distance acuity which effects (sic) him

> in his school setting. His color vision is also being effected (sic) by his visual diagnosis. *Student* will need to begin three-Braille skills to prepare him to be a Braille reader. He also would benefit from assisted devices in the classroom setting."

Petitioners had requested Braille services in April of 2005.

This document also reflects under the date of 3-25-05:

> "Dr. Sharon Freedman, M.D. of Duke University Medical Center confirmed the diagnosis of rod-cone dystrophy." (Pet. Ex. 71)

Respondent relied on Dr. Freedman's diagnosis which it had received in April of 2005.

60. On May 18, 2006, the IEP team convened 57 days after the previous IEP meeting of March 9, 2006, wherein the IEP team noted the following:

> *Student* is eligible for related services in the areas of O&M, and M, OT and speech therapy. He is eligible for adaptive PE services. The team reviewed the IEP and added goals the new areas of related services. The team added accommodations to the IEP based on the evaluation results. The team discussed varied options for services and decided that it would be appropriate for *Student* to receive services at his home school as indicated on the IEP. The team discussed a settlement agreement that was presented to Petitioners in March, 2006 and decided to incorporate the following provisions of that document as part of today's decision.

This decision to treat *Student* under the category of Visually Impaired with related services came after a delay of over 14 months after a diagnosis by Dr. Freedman of Duke University and 21months after Dr. Eyler's initial diagnosis of visual disorders. By any standard of reasonableness, this delay in evaluating, convening an IEP Team Meeting, and providing related services constituted a denial of identification and FAPE for *Student*.

61. Reimbursement of special education expenses under IDEA is appropriate when the reviewing court finds that; (1) the public school's placement was not providing the child with a FAPE; and (2) the parents' alternative placement was proper under IDEA. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359. 369-70 (1985). In determining whether the public school has provided a FAPE, the court conducts a twofold inquiry: (1) has the State complied with the procedures set forth in IDEA; and (2) is the IEP reasonably calculated to enable the child to receive educational benefits? *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Weschester County v. Rowley*, 458 U.S. 176, 206-07 (1982). Failure to meet IDEA's procedural requirements is an adequate ground for holding that the public school failed to provide a FAPE. *Hall v. Vance County Bd. of Educ*., 774 F.2d 629, 635 (4th Cir. 1985). After deciding that reimbursement is proper upon a finding that the Respondent failed to provide a FAPE based on procedural defects, then it is a matter of determining whether the parents' placement was proper under IDEA. *See Burlington*, 471 U.S. at 369-70.

62. IDEA provides a civil cause of action for parents who disagree with a decision rendered by an SEA and specifically authorizes the district court to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e). The statute does not explicitly state what remedies are available to parents whose children have been denied a free appropriate public education, nor does the statute specify what entity shall be responsible for actually remedying the violation.

63. In *Burlington*, the Supreme Court held that a district court's authority to "grant such relief as the court determines is appropriate," see 20 U.S.C. § 1415(e), encompasses the authority to order school authorities "to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the [IDEA]."*Burlington*, 471 U.S. at 369. The Court found that the statutory language contained in § 1415(e) confers broad discretion on the district court and noted that IDEA contemplates the possibility that a child would be placed in a private school at public expense where a regular public school could not meet his or her needs and retroactive reimbursement of private placement costs is an available remedy under IDEA. *Id*. at 370; *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

64. Testimony from the Dore Academy teachers and administrators regarding the content of *Student*'s curriculum and the testimony of *Mother* regarding the improvement in *Student*'s attitude establish the appropriateness of the education *Student* received at Dore Academy. *See Gerstmyer v. Howard County Public Schools*, 850 F.Supp. 361 (Md. 1994).

65. Respondent violated both the procedural and the substantive requirements of the IDEA. "Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a *Student*." *G. v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

66. Petitioners are to be deemed prevailing parties and are entitled to prevailing party status. At the start of the hearing, the Respondent announced that it was providing tuition and transportation reimbursement for the 2005-06 school year pursuant to the DPI complaint process. Accordingly, because that relief occurred without regard to the contested case hearing, Petitioners are not entitled to prevailing party status on this issue.

67. This contested case filed by the Petitioners was not frivolous, unreasonable, or without foundation, and was not filed for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. 20. U.S.C.§1415(i)(3)(B).

68. The IDEA places an affirmative duty on states and requires that local educational agencies (LEA) ensure that all children with disabilities are identified, located and evaluated and FAPE offered to every eligible child with a disability. 20 U.S.C. § 1412(a)(3). The "child find" provision applies to, among others, children who are suspected of being a child with a disability. That is, the child find duty is triggered when the LEA has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. The child find duty requires children to be identified and evaluated within a reasonable time after school officials are on notice of behavior (or performance) that is likely to indicate a disability. *Cf. W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995). A state or LEA "shall be deemed to have knowledge that a child is a child with a disability if (among other things)…the behavior or performance of the child demonstrates the need for such services." 20 U.S.C. § 1415 (k)(8)(*B*). "Child find" is an affirmative duty of the public school, therefore parents are not required to ask school officials to evaluate the child suspected of having a disability. Furthermore it is an objective duty, in so far as ignorance-in-fact of a suspected disability (notwithstanding evidence to the contrary in this contested case) does not relieve the public school of liability under IDEA. *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F.Sup 1190 (D. HI 2001).

The undersigned concludes that the Respondent was in violation of IDEA's child find provisions. The preponderance of the evidence shows that the Respondent had, or should have had, reason to suspect serious Visual Impairment in August of 2004, (Pet. Ex. 29), when Dr. Eyler diagnosed four separate visual disorders, and that special education services may be needed to address that disability. The

threshold for suspicion is relatively low, and the inquiry is not whether or not *Student* actually qualified for services but rather, whether he should be referred for a visual evaluation. The record reflects numerous "warning signs," all ignored by Respondent even after *Student* was diagnosed with cone rod dystrophy and found legally blind.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following:

DECISION

1. Respondent shall reimburse the Petitioners for the costs of the private school education *Student* received at Dore Academy in the amount of $12,100.00 for the 2004/2005 school year and transportation expenses of $4,212.00 ($2,025 computed at 37.50¢ IRS rate and $2,187.00 computed at $40.5¢ IRS rate) for a total of $16,312.00 per the record.

2. The Petitioners are entitled to reimbursement for the costs of private related services in the amount of $752.00 for private speech therapy for 16 sessions at $47.00 per session and $340.00 for OT/PT services for 17 sessions at $20.00 per session for a total of $1,092.00 per the record.

3. The Petitioners are entitled to compensatory related and visual impaired services for the 2005/2006 school year as determined by a contract expert in Batten's Disease employed by the Cabarrus County Public School System.

NOTICE

In order to appeal this Final Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Final Decision. N.C. Gen. Stat. § 115C-109.9.

IT IS SO ORDERED.

This the 7th day of February, 2007.

Julian Mann, III
Chief Administrative Law Judge Presiding
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