STATE OF NORTH CAROLINA **BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO G.S. 115C - 109.9**

[Student] by PARENT or GUARDIAN, Father and Mother	)	
	)	
Petitioners	)	
	)	**DECISION**
v.	)	
	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION	)	**06 EDC 1129**
	)	
Respondent	)	

This is an appeal of the Decision of Chief Administrative Law Judge Julian Mann, III issued on February 7, 2007.

The records of the case received for review included:

1. Six (6) days of transcripts of the hearing conducted by Judge Mann between August 28 and November 14, 2006.
2. The Official Record of the case issued by the Office of Administrative Hearings; which included the Decision of Judge Mann, written arguments, procedural documents, and correspondence concerning the case
3. One (1) volume (loose-leaf notebook) of Petitioners' Exhibits
4. Additional written arguments submitted by both parties to the Review Officer.

The hearing of this case before Judge Mann was held in Charlotte, North Carolina over six (6) days: August 28 and 29; September 28 and 29; and November 13 and 14, 2006.

Appearances: For Petitioners - Lisa Flowers of the Council for Children's Rights, 601 East 5th Street, Charlotte, N.C. 28202
For Respondent - James G. Middlebrooks of Helms Mulliss & Wicker, Post Office Box 31247, Charlotte, N.C. 28231

To provide a document that does not have personally identifiable information regarding the Petitioners and/or for convenience, the following will be used to refer to the parties:

For Petitioners - Petitioners; Parents; Father; Mother;
For the Child - [Student]
For Respondent - Respondent; Charlotte-Mecklenburg Schools; CMS; LEA

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 Petitioners are entitled to compensatory related-services for special education, occupational therapy, speech-language therapy, visually-impaired services and orientation and mobility services.
4. Whether Petitioners 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 the contested case petition, Petitioners filed a complaint with the North Carolina Department of Public Instruction (DPI) on essentially the same grounds as raised in the contested case petition. Pursuant to a determination by DPI, the Respondent announced before opening statements that it was reimbursing the Petitioners $13,706.25 for independent evaluations, 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 accepted the payment as related to evaluations, tuition, and travel but disagreed regarding other claims for 2005-06.

The ALJ accepted testimony going back to the 2002-03 school year, much of which did not pertain to the issues above. Also, much of the ALJ's Decision was composed of a recitation of the testimony, a great deal of which was not relevant to the stated issues. To keep this decision from being too lengthy, the Review Officer will not comment on each of the ALJ's findings and conclusions. Having reviewed the records of the case, the Review Officer for the State Board of Education independently makes the following:

FINDINGS OF FACT

1. This case evolved from a disagreement concerning the identification of [Student] as a child with a disability and the provision of a free appropriate public education based on that identification. The case was heard by Chief Administrative Law Judge Julian Mann, III in Charlotte, North Carolina over six (6) days: August 28 and 29; September 28 and 29; and November 13 and 14, 2007. The hearing was held pursuant to Chapter 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et. seq.

2. The petition for the due process hearing was filed on June 26, 2006, soon after receiving a final report of a complaint resolution from the Exceptional Children Division of the North Carolina Department of Public Instruction. The due process petition sought essentially the same reimbursements and relief as requested in the complaint. As the complaint resolution provided only part of the relief sought, the Petitioners filed this petition. The complaint resolution was attached to the due process petition.

3. On June 8, 2006, [Student] was diagnosed with Juvenile Batten's Disease. Batten's Disease is a degenerative neurological disease that causes a general progression of motor and mental deterioration. Life expectancy for someone diagnosed with Batten's Disease is between the late teens and early 20's.

4. At the time of the hearing [Student] was nine years old. He entered kindergarten in one of Respondent's schools, D.C. Elementary, at the beginning of the 2002-03 school year. Early in the school year, his teacher noted that he had some behavioral problems in the classroom and conveyed this information to the mother. This came as a surprise to the mother as [Student] had not exhibited any such problems at home or in an earlier preschool experience.

5. [Student] continued to have problems, both behavioral and academic, throughout the kindergarten year. The teacher suggested that [Student] had some indicators of ADD or ADHD, but the mother did not initially agree. In February of 2003, the school held an intervention team meeting to develop and implement interventions to assist [Student]. The interventions had little effect. Near the end of the school year an ADHD Screening Report was developed by the school psychologist and sent home with the child on the last day of school. There was no conference with parents concerning the results of this screening. (Beginning a long series of procedural errors by school officials.)

6. The ADHD Screening Report noted that [Student] did have many indicators of ADHD and recommended that the parents share the report with [Student]'s pediatrician. The report also recommended that [Student]'s first grade teacher carefully monitor [Student]'s ability to sustain attention during instruction and his ability to develop academic skills, specifically reading. The Petitioners did provide a copy of the report to [Student]'s pediatrician, who did not initially diagnose [Student] with ADHD or think [Student] needed any medication. It was not until more problems developed during the first grade year that the pediatrician diagnosed [Student] with ADHD in December 2003 and placed him on medication.

7. [Student]'s first grade teacher did not even know of the ADHD screening until the mother brought it to his attention. No specific interventions were in place until the mother insisted. [Student] continued to have problems throughout the first grade year. He exhibited anxiety over school and cried whenever he could not perform as well as other children in his class. His performance definitely placed him in an "at risk" category. None of the interventions developed by the first grade teacher nor the medication had any significant impact on [Student]'s school problems. His first grade report cards indicated that his reading, writing, and math skills as well as his attention and ability to complete work on time were not at grade level.

8. On March 11, 2004 the parents referred [Student] for special education services by sending a letter to the principal requesting that [Student] be evaluated for a learning disability. Following this letter, the school finally began the Intervention Team process to assist [Student].

9. On April 22, 2004, an Intervention Team Meeting was held. [Student] had been recently seen by an optometrist. Abnormalities were noticed with [Student]'s macula. The optometrist referred Petitioners to a retinal specialist. [Father] informed the Intervention Team that there might be problems with [Student]'s vision.

10. On May 4, 2004 the first IEP meeting for [Student] was held. The parents, at this meeting, completed the referral documents and gave consent for evaluation. The parents, in the invitation to the IEP meeting, received their first copy of the *Handbook on Parents' Rights*. [Student] was formally referred by the team for learning problems, low academic performance, and behavioral-emotional problems. His areas of need were identified in the areas of concentration, reading skills, self-concept, math, work habits, following directions, working without supervision, and writing skills. His teacher stated that he continued to have difficulty staying focused and had academic problems in all subject areas. The referral document stated that [Student] had been diagnosed with ADHD and placed on medication by his pediatrician.

11. On May 21, 2004, the school psychologist completed an evaluation report in which he listed cognitive, academic, and visual-motor integration scores. He also stated observations and made recommendations. Scores reported were: Full Scale IQ score of 81 on the WISC-IV; Standard Scores of 76 on both the Test of Early Reading Ability and Test of Early Math Ability; and 92 on a visual-motor integration assessment. The psychologist made these statements regarding the WISC-IV:

> Testing conditions were good and [Student] seemed to want to try hard, but his impulsivity and distractibility prevented him fro doing his best work in completing the tasks that were resented to him. Therefore, the present test results are considered to be an underestimate of [Student]'s current cognitive abilities and should be interpreted with extreme caution. …… Behavioral observations during testing that have already been discussed make this examiner conclude that these results are invalid.

12. The evaluation report of the psychologist stated that the child did not appear to meet the eligibility criteria for specific learning disabilities. It was suggested that because his ADHD had such an effect on the evaluation results, more data might indicate that [Student] would meet the eligibility criteria for other health impaired (OHI). The report also recommended that the IEP Team consider the child for speech testing because of his articulation difficulties and for occupational therapy testing because of noted problems with the grip of the pencil.

13. Three forms were completed by the IEP Team on June 1, 2004: The Summary of Evaluation Results and Eligibility Determination (DEC 3); The Eligibility Report/Specific Learning Disabilities (Dec 3a); and the Prior Written Notice (Dec 5). These forms compiled by the Team included screening information for vision, hearing, and visual-motor integration. There was no speech-language screening. Cognitive evaluation results were provided. In the educational evaluation, reading and math were assessed. Despite noting that [Student] had significant difficulty writing, written language was not assessed. The medical information regarding [Student]'s ADHD diagnosis and medication was not included, though it was mentioned that he had been diagnosed and was on medication. Although a vision screening was conducted, there was no other vision

evaluation. The problem of declining vision had already been brought to the attention of the IEP Team by the Petitioners. Although the eligibility determination had been made that [Student] did not meet the criteria for specific learning disabilities, the team members did not check whether they agreed of disagreed with the eligibility determination. No information regarding interventions was included.

14. An IEP meeting was held on June 1, 2004. The Team reviewed the evaluation data and determined that [Student] was not eligible for services. The Team decided that [Student] did not meet the criteria for Specific Learning Disabilities because he did not exhibit a significant discrepancy between his cognitive abilities and his achievement. There was no explanation why the Team used cognitive scores that the psychologist (who was on the team) had determined to be invalid.

15. The Team checked that other disabilities had not been ruled out as the primary cause of the child's difficulties. The Team, however, decided that Other Health Impaired (OHI) was rejected because documentation had not been collected, even though the evaluation report of the psychologist had recommended that specific information be obtained to make this determination. Specifically, the psychologist stated that there was a need for a physician's statement documenting the ADHD diagnosis and a log of [Student]'s behavior.

16. The IEP Team did not explain why they did not follow through with the psychologist's recommendation for evaluations in speech language and occupational therapy, despite documented indications that there were problems in these areas.

17. Several days following the IEP meeting on June 1, 2004, a physician's report from [Student]'s pediatrician regarding the ADHD diagnosis and the need for OHI services was mailed directly from the pediatrician to the school. The parents did not receive a copy of this June 4 report and were surprised that it was found in [Student]'s school file during the discovery process for the due process hearing. This document was all that was needed at that time to determine OHI eligibility. There was no follow-up by the IEP Team, although Team had recognized during the June 1 meeting that this physician's report was missing and needed.

18. The Petitioners were provided notice that [Student] was not eligible for special education services at the June 1, 2004 meeting. They were also provided another copy of the *Handbook on Parents' Rights*.

19. The Petitioners expressed their dismay and dissatisfaction with the decisions made by the IEP Team but did not request due process at that time. They did write a letter to the principal expressing their dissatisfaction and requested a copy of [Student]'s records. The Mother met with the principal on or about June 14 and received the records. The physician's OHI report was not included and the parents did not learn of its existence until almost two years later. No actions were taken by school officials following this meeting.

20. As the Respondent's IEP Team was not following through with what the parents thought was necessary to serve [Student], the parents sought help elsewhere. An independent evaluation was conducted by Child and Family Development, a private agency in Charlotte. This

evaluation confirmed that [Student] should have been determined eligible for special education services, especially related to auditory and visual processing deficits. The parents on receipt of the initial information from the independent evaluation made the decision to enroll [Student] in Dore Academy, a private school in Charlotte that specializes in providing services for children with learning problems.

21. On August 9, 2004, the parents wrote the principal of David Cox a letter notifying the Respondent that [Student] would be attending Dore Academy during the 2004-05 school year and requested reimbursement for private school tuition ($12,100) and for the independent evaluations. The parts of the evaluations completed as of that time were attached. The principal of D.C. Elementary School took no action, simply forwarded the letter to CMS's Exceptional Children Accountability Specialist. The principal did not take the information to the IEP Team.

22. Two letters were sent to the parents on September 21, 2004, one from the Accountability Specialist for CMS and the other from the Assistant Superintendent for Programs for Exceptional Children. These letters denied their request for tuition reimbursement. These notices did not inform the parents of their due process rights pertaining to this denial, although a copy of the *Handbook on Parents' Rights* was enclosed in each letter. The parents were provided the procedure for reimbursement for $800 for independent evaluations obtained over the summer. The receipt of the evaluations was acknowledged. The parents were informed that it would appropriate for an IEP Team to be convened at David Cox elementary to review the results of the evaluations to determine if [Student] was eligible for services under North Carolina guidelines. The letters explained that if the IEP could be implemented in a CMS school then placement at a private school at public expense would not be necessary. The parent was asked to contact the Accountability Specialist if they would like to convene an IEP meeting and he would help arrange a meeting.

23. The parents continued with their independent evaluation after enrolling [Student] in Dore Academy. These evaluations were conducted and invoices presented to CMS:

a. Comprehensive psychological - July 30, 2004 by Child and Family Development
b. Occupational therapy - July 13, 2004 by Child and Family Development
c. Physical therapy - July 12, 2004 by Child and Family Development
d. Functional vision - August 11, 2004 by University Eye Associates
e. Audiological - August 11, 2004 by Randolph Audiology and Hearing Clinic
f. Speech language - October 28, 2004 by Catherine Leister and Associates

24. There were deficits reported in almost all these independent evaluations, such that identification as a child in need of special services would be a certainty. Even though CMS had acknowledged receipt of the evaluations, CMS staff made no attempt to convene an IEP meeting to act on these reports. The Respondent later refunded the costs of the independent evaluations.

25. After waiting for some time for CMS to convene an IEP meeting, on December 7, 2004 the parents requested an IEP meeting. CMS finally convened one on March 10, 2005. There was no explanation in the record of the delay.

26. The Petitioners did not receive the Invitation to Conference for the March 10 IEP meeting with sufficient time to respond. The Invitation to Conference noticed the meeting for 2:00 p.m. The Mother was contacted at work at approximately 8:35 am inquiring where she and her

husband were. When she expressed her confusion about the earlier time, she was informed that the meeting had been rescheduled and that, if she did not attend at the earlier time, the meeting would be postponed due to the Accountability Specialist's schedule. The Mother attended the March 10, 2005 meeting alone because the father was unable to change his schedule. Respondent presented no evidence to show any notification to Petitioners regarding the changed time for meeting.

27. The Petitioners had learned via a phone call on March 2, 2005 that [Student] has significant visual problems and that he would probably lose all of his sight due to the cone rod dystrophy. This information was conveyed to the IEP Team during the meeting although there was no written documentation at that point. [Student] was scheduled to go to Duke University Medical Center for further evaluation, and the Team stated that the Petitioner could request to reconvene after receipt of documentation from that evaluation to discuss eligibility for services as Visually Impaired (VI).

28. The IEP Team stated that they reviewed all the evaluations performed up to that time. There was no medical report noted and no indication that one had been requested by the Team. The pediatrician's report from the previous June was not noted. The Team determined that [Student] did not meet eligibility for special education services. The Team stated that eligibility criteria for Learning Disability, Other Health Impaired, Speech Impaired, and Visually Impaired were discussed and [Student] did not meet the criteria for any of these. The eligibility determination form for the participants to document their agreement or disagreement with a Learning Disability eligibility decision had been crossed out to indicate that learning disabilities was not considered. The Team, likewise, did not complete the required Multidisciplinary Report of Eligibility form for Specific Learning Disabilities.

29. The IEP Team on March 10, 2005 determined that [Student] was not eligible for special education services and provided the notification to the parents. The Team again notified the parents that there would be no reimbursement for private education.

30. On April 12, 2005, the Petitioners provided the documents from eye specialists concerning the extensive eye examinations up to that point. The letter alerted the principal that doctors had confirmed the diagnosis of rod cone dystrophy, that [Student] could be considered legally blind, and someone should start teaching him Braille. The letter also noted that the Governor Morehead School for the Blind was scheduled to conduct further evaluations. In this letter the parents again requested financial assistance from CMS to pay private school tuition, but this time for the 2005-06 school year in the amount of $13,200.

31. The medical reports provided to the Respondent on April 12, 2005 concerning the eye evaluations stated that [Student] had an visual acuity of approximately 20/300-400 in each eye as well as abnormal macula in each eye. The Duke report stated, "This child should be considered legally blind." The evaluation also noted that [Student] needed a Visually Impaired teacher and a number of visual adaptations. Also more follow-up was needed by a pediatric neurologist.

32. The Governor Morehead School for the Blind conducted a Functional Visual Assessment on May 18, 2005 and reported the results on June 9. Extensive recommendation were

made for adaptations and services that [Student] would need to optimize his learning opportunities. This report was forwarded to school officials.

33. Now CMS had all the information necessary to determine [Student] eligible for Visually Impaired services. No IEP meeting was scheduled. The Petitioners sent letters and/or email to the principal at D.C. Elementary and the Accountability Specialist on April 12, May 18, August 1, and September 19, 2005. Each time the Petitioners inquired about the status of the review of vision evaluation reports. CMS officials provided no legitimate reasons for the long delay in scheduling an IEP meeting. The Petitioners expressed their dismay in an email on September 19, in which the Petitioners stated that it was unacceptable that six months had elapsed since the last IEP meeting with no further review of the extensive documentation now in the hands of CMS.

34. An IEP meeting was held on October 11, 2005 which was almost seven months since the previous meeting and long after all the documentation of [Student]'s vision difficulties were available. At this meeting, the IEP Team treated this as an initial referral and reviewed the documents available and concluded that they could not determine eligibility because all the required information was not available. The Team stated that CMS still needed to conduct a hearing screening, a Braille skills inventory, and additional educational testing. As the Respondent had delayed the meeting for over seven months, some data was now too old. No reason was ever given for not performing the Braille skills inventory, even though it was known to be necessary in March.

35. Even with all the information in hand, the IEP Team on October 11, 2005 still rejected determining Visually Impaired eligibility and decided to meet again after obtaining the needed information. The parents were again provided notice of the decision and provided a copy of the *Handbook on Parents' Rights*.

36. The parents were now livid and could not understand why CMS was choosing not to provide services to their child.

37. On October 21, 2006 a Braille Skills Inventory was conducted. On October 24, a hearing screening was conducted. The child failed the screening because of problems with impacted tubes in his ears. The parents were notified and they arranged for surgery to correct the problem in December. According to CMS the audiologist was unable to clear [Student] for the necessary testing until February 7, 2006. Educational testing was done on February 16. These evaluations were in addition to the documentation already in [Student]'s record.

38. The IEP Team met on March 9, 2006 and reviewed the evaluation results. The Team finally determined that [Student] met the eligibility requirements as Visually Impaired but also determined that he was not eligible for related services or other special education services. The parents were given notice and another copy of the *Handbook on Parents' Rights*.

39. The IEP developed on March 9, 2006 was to provide services from March 9, 2006 through March 8, 2007. It included one 30 minute Special Education-VI session in the total school environment and five 180 minute sessions of special education per week in the regular/special education classes. Extensive accommodations were included, but no related services.

40. The parents would not sign permission to place. In testimony, they indicated that they did not want [Student] to have to change schools, with only several months left in the school year. During the meeting, the parents presented a document that had a list of items that they would like to have in the IEP along with a checklist of IEP services for parents of blind and visually impaired children. There was no explanation why this was not presented during the discussion of IEP components.

41. The Team agreed to conduct additional evaluations in the areas of occupational therapy, physical therapy, speech language, orientation and mobility, assistive technology, and adaptive PE.

42. Mediation was requested by the Petitioners on April 27, 2006. Mediation was held, but no agreement was reached.

43. An additional educational evaluation was conducted on March 6. On March 23, the following evaluations were conducted by CMS: an adaptive PE, physical therapy and occupational therapy. An orientation and mobility evaluation was conducted on April 4 and 27, a functional vision evaluation on April 27, and speech language evaluation on May 2.

44. An invitation to an IEP meeting scheduled for May 18 was mailed to the Petitioners but not returned. A note was written on a copy of the invitation that it had been mailed and a copy of the *Handbook* would be given at the meeting.

45. An IEP meeting was held on May 18, 2006 to review the additional assessments decided upon at the March 9 meeting. Based on the evaluations, [Student] was found eligible for special education services for visual impairment; related services of speech language, occupational therapy, orientation & mobility, and adapted PE; and extended year services. He was found not eligible for physical therapy services.

46. The IEP developed on March 9 was amended with additional goals and services. The IEP now called for these services in the regular class or in the total school environment:

visually impaired services for two 45 minute sessions each week
special education for four 90 minute sessions each week
adaptive PE for one 30 minute session each week
occupational therapy for one 30 minute session each week
speech/language for two 30 minute sessions each week
orientation & mobility for two 30 minute sessions each week

47. The IEP Team on May 18 decided to provide compensatory services through the extended school year of pre-Braille instruction from June 21 to July 26. The Team rejected providing reimbursement for private school, providing services at Dore Academy for the remainder of the school year, placement in a self-contained classroom, and the provision of special transportation. The team also rejected the specific request of the parents to provide a VI instructor as a case manager. Both parents signed the IEP, but it was never implemented by CMS. CMS did attempt to provide the compensatory education services during the extended school year, but the parents choose not to utilize those services.

48. Throughout the due process hearing there was no testimony regarding the IEP developed on May 18, other than it being used by Cabarrus County as the initial IEP to start the 2006-07 school year. The parents have now moved to nearby Cabarrus County.

49. Throughout the 2004-05 and 2005-06 school years, [Student] remained enrolled in Dore Academy. The parents at each IEP meeting during this time period informed the IEP Team that [Student] would remain at Dore Academy until such time that CMS provided the education that [Student] needed.

50. A formal written complaint concerning CMS's failure to identify and provide a program for [Student] was filed by the parents on April 21, 2006 with the Exceptional Children Division of North Carolina's Department of Public Instruction. The investigation concerning this complaint was completed and a Complaint Resolution Report was sent to parents and CMS on June 20, 2006. The investigation found CMS in violation of specific procedures and ordered CMS to take corrective action. Part of that corrective actions was for CMS to reimburse the parents for the remaining costs of independent evaluations and the tuition cost for Dore Academy for the 2005-06 school year. The Respondent announced in opening statements that this was being done along with transportation expenses for the school year 2005-06. The Petitioners agreed to accept this payment for tuition and transportation, but did not agree that it settled the issue for 2005-06. There was still the matter of private therapy obtained during that time.

51. As all of Petitioners' issues were not satisfactorily resolved by the complaint resolution, they filed for due process on June 26, 2006. The unresolved issues were tuition reimbursement for 2004-05, reimbursement for privately obtained therapy, and compensatory services.

52. During the 2004-05 school year the record of the case substantiates that Petitioner paid tuition at Dore Academy in the amount of $12,100.00. Transportation cost during that year were $4,212.00 ($2,025 computed at 37.50¢ IRS rate and $2,187.00 computed at $40.5¢ IRS rate).

53. The record substantiates that the Petitioners paid for private related services in the amount of $752.00 for private speech therapy (16 sessions at $47.00 per session) and $340.00 for OT/PT services (17 sessions at $20.00 per session) for a total of $1,092.00.

54. The due process hearing was held before Chief Administrative Law Judge Julian Mann, III in Charlotte over six days: August 28 and 29; September 28 and 29; and November 13 and 14, 2006.

55. During the case, all the testimony and exhibits were that of the Petitioners. Except for cross-examining witnesses and making oral arguments, the Respondent did not present its case. The Respondent argued strongly and repeatedly for the application of North Carolina's 60-day statute of limitations to this case. The application of the statute of limitations would prevent consideration of actions of the Respondent, that were duly noticed to the Petitioners, taking place more than 60 days prior to the filing of the due process request.

56. Judge Mann issued his decision on February 7, 2007. He concluded that the actions of the Respondent in systematically providing inadequate notice to the Petitioners provided an exception to the statute of limitations. Judge Mann's 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.

57. The Respondent filed Notice of Appeal on March 6, 2007 with the Exceptional Children Division of the North Carolina Department of Public Instruction.

58. The undersigned was appointed as Review Officer on March 6, 2007. A Request for Written Arguments was sent to the parties on March 9. Written Arguments were received from both parties on March 30, 2007.

Based on the Findings of Fact, the Review Officer for the State Board of Education makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and the Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 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 the reauthorization. Based on the issues, the changes made in the reauthorized IDEA had no impact on the case. IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. §1400(d)(1)(A).

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 North Carolina Procedures Governing Programs and Services of Students With Disabilities (Procedures). North Carolina's special education laws were substantially revised

effective July 10, 2006. Those revisions became effective after the time period covered by this case and have no bearing upon the substantive issues of this decision.

4. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 et seq. and the agency responsible for providing educational services in Mecklenburg County, North Carolina. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. § 1400 et seq.; 34 C.F.R. Part 300; N.C.G.S. 115C, Article 9; and the North Carolina Procedures. These acts and regulations prohibit discrimination because of disabilities and require the Respondent to provide a free appropriate public education (FAPE) for those children in need of special education residing within its jurisdiction.

5. [Student] and his parents were residents of Mecklenburg County during the period relevant to this controversy. [Student] is a child with a disability for the purposes of 20 U.S.C. § 1400 et. seq. and N.C.G.S. 115C, Article 9.

6. [Student] met the criteria of being a child with a disability as defined by 20 U.S.C. § 1401(3) and N.C.G.S. § 115C-106.3(1) and was entitled to be identified and provided with FAPE while living in the county served by the Respondent, N.C.G.S. § 115C-107.6. [Student]'s current primary area of eligibility under federal and state law is Visually Impaired (VI).

7. N.C.G.S. § 115C-109.6 - 109.8 provide the guidelines for the initial due process hearing. N.C.G.S. § 115C-109.9 provides the guidelines to be used in the administrative review process. The hearing by the ALJ and subsequent review by this Review Officer have been conducted in accordance with those provisions.

8. The burden of proof in this case falls on the Petitioners. Determining who has the burden of proof in due process hearings was decided by the Supreme Court in *Schaffer v. Weast* 546 U.S. 49 (2005). Under the IDEA, parents who challenge educational decisions made by schools have the burden of proof in the administrative process. Thus, the Petitioners have the burden of proof to show that the Respondent was not offering [Student] a free appropriate public education. The Petitioners have met this burden.

9. A free appropriate public education is defined by IDEA as that which provides a child with a disability with personalized instruction and sufficient support services to enable the student to benefit from the instruction provided. *Board of Education v. Rowley*, 485 U.S. 176 (1982); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990).

10. North Carolina's statutes in effect at the time of this matter declare that the State's policy is to "ensure every child a fair and full opportunity to reach his full potential" and to "provide a free appropriate public education to every child with special needs." N.C.G.S. §115C-106. North Carolina clearly intended to limit the effects of a child's disabilities, and required that each child be given "equal opportunity to learn if such is reasonably possible." *Harrell v. Wilson County Schools*, 58 N.C. App. 260 (1982). Under *Harrell*, disabled children "should be given the opportunity to achieve full potential commensurate with that given other children."

11. Regarding the claims in this case, the Respondent raised North Carolina's 60-day statute of limitations defense. As IDEA expressly states that the due process hearing is guided by state law, the applicable North Carolina 60 day statute of limitations applied. The North Carolina law in effect at the time of this controversy was N.C.G.S. § 115C-116(d), which established that any administrative review shall be initiated and conducted in accordance with N.C.G.S. 150B-23(f):

> 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 . . .

North Carolina changed its Special Education Act on July 10, 2006, to include an explicit one-year statute of limitations, eliminating the 60-day limitation previously in effect. This change, however, has no impact on this case. The Petitioners are challenging only acts, or failures to act, taking place prior to July 10, 2006.

12. The Fourth Circuit Court of Appeals held in *CM v. The Board of Education of Henderson County and M.E. v. The Buncombe County Board of Education* 241 F. 3d 374 (4th Cir. 2001), cert. denied 534 U.S. 818 (2001) that North Carolina's 60 day statute of limitations complied with the requirements of IDEA if parents are clearly notified when a decision was being made by a school system. In *CM*, the Fourth Circuit considered what must happen before North Carolina's 60-day statute of limitations is triggered. The Court ruled that written notice must be given that fulfills the requirements of N.C.G.S 150B-23(f). It was not enough to just pass out copies of the *Handbook on Parents' Rights*. According to *CM*, "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." *CM* does not provide all the requirements of the notice, only those from N.C.G.S. 150B-23(f). Other requirements of the notice are expressly stated in 20 U.S.C. 1415(c), 34 CFR 300.503, and Section .1512(D) of the Procedures. Thus, the question in this case is whether the Respondent provided written notice to Petitioners that satisfied all the requirements. There are many glaring omissions in the notices provided by the Respondent. In some instances, no notice was given at all to the Petitioners when they made proposals or requests concerning [Student]'s educational program. This is a major procedural violation. Other notices, when given, often did not have all the information required by 20 U.S.C. 1415(c), 34 CFR 300.503(b), and Section .1512(D) of the Procedures.

13. A good example of the systematic procedural violations of notice can be seen in the notice given at the IEP meeting of June 1, 2004. That notice specifically mentioned that documentation was not yet available to identify [Student] as eligible with the designation of OHI. A few days later, the Respondent received a Physician's report dated June 4, 2004 which provided this documentation. No follow-up IEP meeting was held, nor were Petitioners notified that this information was available. The notice provided at next IEP meeting, on March 10, 2005, nine months later still did not include reference this physician's report as required by 20 U.S.C. 1415(c), 34 CFR 300.503(b), and Section .1512(D) of the Procedures.

14. Statues of limitations can be tolled if there are sufficient reasons. The U.S. Supreme Court has determined that cases may arise where the equities in favor of tolling a statute of limitations are so great that deference to an agency's judgment is inappropriate, especially where an agency undertook action that misled. When the denial of benefits or services is based on the

government's systematic procedural irregularity that prevents individuals from knowing of a violation of their rights, the statute of limitations is tolled until the those affected have reasonable opportunity to learn the facts. *Bowen v. City of N.Y*, 476 U.S. 467 (1986). In that case, as in the present case, the Petitioners knew of the denial or benefit but they did not, and could not, know that the adverse decisions had been made on the basis of a systematic procedural irregularity.

15. In *Nowell v. Great Atlantic & Pacific Tea Co*., 250 N.C. 575 (1959), the North Carolina Supreme Court held that a defense based on a statute of limitation is a legal defense that can be denied:

> A statute of limitation operates as a complete defense, not for lack of merit, but for security against the attempt to assert a stale claim. The lapse of time, when properly pleaded, is a technical 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.

16. The Respondent, systematically over a period of over two years, violated procedures regarding eligibility and evaluation decisions. Therefore, even if Petitioners failed to file within the required 60-day statutory scheme, the statute of limitations is tolled for the purposes of Petitioners' claims.

17. These are examples (not an exhaustive list) of the Respondent's systematic violations of procedures regarding the identification of [Student] as a child with a disability and the provision of FAPE for [Student]:

a) The school staff at D.C. Elementary initiated an ADHD Screening Report near the end of the 2003-04 school year. There was no follow-up on this report.

b) The parents wrote a letter referring [Student] on March 11, 2004. The Respondent did not treat this letter as a referral as required by law. There was no serious attempt to evaluate, identify, and provide a program to meet [Student]'s needs within the 90 days mandated by law.

c) At the IEP meeting on June 1, 2004, the Team found [Student] ineligible for identification based primarily on a test score that the examining psychologist stated was invalid. The Team also gave no explanation why they did not perform the additional speech language and occupational therapy assessments recommended by the psychologist, despite notations that [Student] had difficulties in these areas. A physician's statement regarding [Student]'s ADHD diagnosis was listed by the psychologist as one of the items needed to determine eligibility for OHI. The Team ignored this recommendation also. These are but a few of the many procedural errors made the IEP team at this time. The Team did not provide notice to the parents that they had made these mistakes, had not performed all the required evaluations, and considered all the data necessary to make a decision regarding [Student]'s eligibility to be identified as a child with a disability.

d) On June 4, 2004 a physician's report concerning [Student]'s ADHD was mailed to the Respondent. The IEP Team did not reconvene to consider this important information. This physician's report was not placed in [Student]'s file, as evidenced by the fact that a complete copy of [Student]'s file was provided to the parents in mid-June. This report was not included. The Petitioners were not aware of the existence of this report until discovery in this case.

e) The Respondent denied the parents' request for private school tuition reimbursement by letter on September 21, 2004. The parents were not adequately informed of their rights following this denial. The parents were simply given a copy of the Parents Handbook on Parents' Rights.

f) The Respondent received the results of independent evaluations conducted in the summer and fall of 2004. Despite the fact that these evaluations gave clear indications of [Student]'s eligibility for special education services, the Respondent did not reconvene an IEP Team to consider these evaluations until there was a specific request from Petitioners. (One of these evaluations was the discovery by Dr. Eyler that [Student] had a serious eye disorder that eventually led to the diagnosis of Batten's Disease and the [Student]'s blindness.) No IEP meeting was convened by the Respondent until March 2005.

g) The Respondent unilaterally changed the meeting time for the March 10, 2005 IEP meeting without providing notice to Petitioners. This had the effect of preventing full parental involvement in the meeting.

h) On March 10, 2005, the IEP Team did not consider all the data available for identification purposes. The Team determined [Student] ineligible for identification as a child with disabilities, despite all the evidence to the contrary that [Student] met the requirements of being identified as LD and/or OHI.

i) On April 12, 2005 the Petitioners provided the Respondent documents from eye examinations that confirmed that [Student] had rod cone dystrophy that could lead to blindness. The report from Duke Medical Center stated that the child could be considered legally blind. The Respondent did not reconvene the IEP Team to consider this information.

j) On April 12, May 18, August 18, and September 19, 2005 the Petitioners sent letters and/or email to the Respondent. Each had specific requests. The Respondent did not act on these requests nor did it give the Petitioners the legally required notification regarding its refusal to act.

k) The Respondent convened an IEP meeting on October 11, 2005 - at least six months after having knowledge that [Student] could be considered legally blind. Despite having the documentation necessary, the Team decided that they could not identify [Student] as being Visually Impaired. The Team wanted more information, notwithstanding the fact that the Team had not gathered the information they had known necessary for almost six months.

l) The Respondent convened an IEP meeting on March 9, 2006 and finally found [Student] eligible for VI services, based primarily on the Duke University eye evaluation received almost a year previously.

m) The Respondent violated the procedural requirements for parental participation numerous times. Petitioners maintained, constantly, that [Student] needed assistance. The Respondent, however, did not consider this position at a meaningful time and in a meaningful way, most notably at the IEP meetings that occurred during the 2004-05 and the 2005-06 school years where the only members of the IEP team who had any substantial knowledge regarding [Student]’s needs were the Petitioners.

n) The Respondent prevented Petitioners from meaningful and timely participation in [Student]’s education by not providing compliant Prior Written Notices and

Summaries of Evaluations. These were often misleading, did not fully inform the Petitioners, and had the effect of delaying action by the Petitioners.

18. The inordinate delays by Respondent to consider information available to determine [Student]'s eligibility for special education services and its dilatory response to Petitioners' requests cannot be justified under IDEA and state law. Although the Respondent had an affirmative duty to have IEP meetings, the Respondent failed to do so in a timely manner, not once - but several times. These actions by the Respondent were reoccurring and systematic violations of the procedural requirements that have been clearly established by IDEA. The actions of the Respondent can only be characterized as a departure from any standard of reasonableness and a lack of good faith.

19. Respondent's actions over a period of several years, from 2004 to 2006, delayed the eventual and proper determination that [Student] was indeed a child with a disability. In the interim period of time, [Student]'s disability deteriorated steadily and rapidly to that of eventually being legally blind. During this time the Respondent continually had data that could have been used to determine eligibility for services. These actions had the effect of preserving the parents initial referral for services in 2004 and denying the application of North Carolina's statute of limitations in this case. The inordinate delays and inadequate notifications certainly qualify as actions, representations, or conduct that amount to a breach of good faith as found in *Nowell, supra*.

20. 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 Board of Education*, 774 F.2d 629, 635 (4th Cir. 1985)(citing *Rowley*, 458 U.S. at 206, n. 27); *accord, Board of Education 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).

21. 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 (4th Cir. 1990). The failure to comply with procedural requirements, however, is not a failure to provide FAPE if the failure does not cause the child to loose educational opportunity. In this case, [Student] did loose educational opportunity as a direct result of Respondent's procedural violations.

22. IDEA emphasizes meaningful parental participation in the process of identification and education of their child. The importance of parental participation in the IEP process is stressed in many parts of the applicable law: 20 U.S.C. §1421(a)(20); 34 C.F.R. §300.344(a)(3); N.C.G.S. §115C-109.3(a) and Section .1507(F) of the Procedures. 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 (1982)

The record shows that CMS did not allow meaningful parental participation. CMS also refused to respond to parental requests - both a denial of parental participation and a violation of notice requirements.

23. If an LEA does not meet its requirements under IDEA to identify and serve a child with a disability and parents must seek an appropriate education for child, the LEA can be required to reimburse the parents for the cost of private education. *School Committee of the Town of Burlington v. Dept. of Education*, 471 U.S. 359 (1985). The private education obtained by the parents (in this case, Dore Academy) does not have to meet all the requirements of that which should have been provided by the LEA. *Florence County School District Four v. Carter,* 510 U.S. 7 (1993).

24. The decision, on May 18, 2006, to provide services for [Student] under the category of Visually Impaired with related services came following a delay of over 14 months after a diagnosis by Dr. Freedman of Duke University and 21 months after Dr. Eyler's initial diagnosis of visual disorders. By any standard of reasonableness this delay in evaluating and identifying, convening IEP Meetings, and providing related services constituted a serious violation of the procedural requirements of federal and state law. It resulted in a denial of identification and FAPE for [Student].

25. The Respondent clearly violated the requirements of IDEA and state law. One type of relief available to the Petitioners is that of compensatory education. "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 (4th Cir. 2003). In his Decision, Judge Mann stated that 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. There is nothing in the record of the case regarding such a determination. As such, the undersigned can not uphold this portion of Judge Mann's Decision. Though compensatory education was certainly a possibility in this case, there was no evidence introduced that would aid one in determining such an award. The undersigned cannot, without more information, arbitrarily provide an award. The Petitioners had ample opportunity to present this information and failed to do so.

26. IDEA places an affirmative duty on states and requires that a local educational agency (LEA) ensures that all children with disabilities are identified, located and evaluated. FAPE must be 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. 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)([Student]). "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.

27. The undersigned concludes that the Respondent was in violation of IDEA's child find provisions. The evidence suggests that the Respondent had, or should have had, reason to

suspect that [Student] was eligible for identification as LD and/or OHI as early as the summer of 2004. The preponderance of the evidence shows that the Respondent had, or should have had, reason to suspect serious Visual Impairment in August of 2004, 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 thorough evaluation. The record reflects numerous "warning signs," all ignored by Respondent even after [Student] was diagnosed with cone rod dystrophy and found legally blind.

28. The Petitioner has met the burden of proof in this case, sufficient to show that the Respondent failed to identify [Student] as a child with a disability and provide FAPE. The Respondent's actions were systematic and flagrant violations of the requirements of law. The Respondent's actions were also beyond any standard of reasonableness and acts of bad faith. As such, the statute of limitations cannot be used as a defense by the Respondent.

DISCUSSION

Of the cases reviewed by this Review Officer, this is the most disturbing. The Respondent had many indications, possibly as early as the spring of 2003 and certainly by the spring of 2004 that [Student] may have a disability. The IEP Team did not obtain all the necessary data to make informed decisions. Even when the data was available, the Team often ignored it. When new information was available to assist the Team, there seldom was any attempt to reconvene to consider the information. One example was the physician's report concerning OHI of June 4, 2004. The Team, on June 1, 2004 stated that such documentation was needed, but after receiving this report never met to consider this information. If the Team had followed required procedures, [Student] would probably have been identified OHI before the beginning of the 2004-05 school year. Another glaring example (though there were many others) occurred when the information related to [Student]'s eye diagnosis of being legally blind was received. The IEP team essentially ignored this vital information. Even when it met, after repeated pleas by the Petitioners to consider the data, the Team still had the audacity to state that more information was needed. It had many months to obtain any such information, but did not do so. The Team acted as though it did not really want to identify [Student] or serve him as a child with a disability. The record clearly shows that he should have been identified as a child with a disability no later than June, 2004.

IDEA has very clear procedural and notification requirements. These requirements were supposedly known by those on the IEP Team and those who supervise. Yet, the procedural and notification requirements were violated by all concerned, repeatedly and systematically. Minor procedural errors and small lapses in notification can be overlooked if a child does not loose any educational opportunity. The many procedural errors committed by CMS in this case did cause [Student] to loose educational opportunity. From 2004 to 2006, CMS delayed the eventual and proper determination that [Student] was indeed a child with a disability. In the interim period of time [Student]'s disability deteriorated steadily and rapidly. He was entitled to special education services all during this time and lost a significant amount of educational opportunity.

The IEP Team, and especially those who served as LEA Rep on the Team at D.C. Elementary School, systematically failed to perform required functions. The actions of the Team

had the effect of delaying identification of [Student] as a child with a disability and the development of an IEP to serve him. Such actions are certainly lacking in good faith.

North Carolina has a statute of limitations that applies to special education due process cases. That statute of limitations serves the state well, by focusing on correcting immediate problems rather than those that are stale. It also serves children well, for it requires actions to correct problems in a timely manner. A statute of limitations, however, cannot be used as a defense when a school system systematically acts to deny educational opportunity over a period of several years. This is not acting in good faith. The North Carolina Supreme Court clearly held that a defense based on a statute of limitation is a legal defense that can be denied in *Nowell v. Great Atlantic & Pacific Tea Co*., 250 N.C. 575 (1959):

> A statute of limitation operates as a complete defense, not for lack of merit, but for security against the attempt to assert a stale claim. The lapse of time, when properly pleaded, is a technical 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.

CMS, in this case is denied the right to use the 60 day statute of limitations defense for it flagrant violations of the requirements of law. These violations do amount to a breach of good faith.

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

DECISION

Most of Judge Mann's decision is upheld. One portion is reversed.

1. The Respondent failed to identify [Student] as a child with a disability and provide a Free Appropriate Public Education for him. The Respondent's actions were systematic and flagrant violations of the procedural requirements of law. The Respondents actions were beyond any standard of reasonableness. They were breaches of good faith. As such, the statute of limitations cannot be used as a defense by the Respondent.

2. Judge Mann's order for Respondent to reimburse the Petitioners for the costs of the private school education [Student] received at Dore Academy for the 2004-05 school year is upheld. The Respondent is entitled to a reimbursement for tuition and mileage of $16,312.00

3. Judge Mann's order for Respondent to reimburse the Petitioners for the costs of private related services is upheld. The Petitioners are entitled to reimbursement for the costs of private related services for a total of $1,092.00.

4. The Petitioners may have been entitled to compensatory related and visual impaired services for the 2005-06 school year, but there is nothing in the record to substantiate the amount. Thus, none are awarded. There is nothing in the records of the case regarding a determination of compensatory services by a contract expert on Batten's Disease as stated in Judge Mann's Decision.

This the 4 th day of April, 2007.

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Joe D. Walters
Review Officer

NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C.G.S. § 115C - 109.9 or file an action in federal court as provided in 20 U.S.C. § 1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the court.

CERTIFICATE OF SERVICE

I hereby certify that this Decision has been duly served on the Petitioners, Respondent, and their counsels by certified U.S. Mail, addressed as follows:

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This the 4 th day of April, 2007.

_____

Joe. D. Walters
Review Officer