

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

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: Student

Date of Birth: xx/xx/xx

Dates of Hearing: 10/16/08, 12/15/08, 1/5/09, 1/6/09

CLOSED HEARING

ODR No. 8960-07-08 KE

Parties to the Hearing:

Parents:

Lorrie McKinley, Esq.
McKinley & Ryan, LLC
238 West Miner Street
West Chester, PA 19382

School District:

School District Attorney:

Chester Community Charter School
302 East 5th Street
Chester, PA 19013
Student Attorney:

Leo A. Hackett, Esq.
300 West State Street
Suite 301
Media, PA 19063

Date Record Closed:

February 10, 2009

Date of Decision:

February 22, 2009

Hearing Officer:

Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student)¹ is a teenage student with disabilities who attended the Chester Community Charter School (Charter School) from 2nd Grade until 8th Grade graduation. Student and Student's parents² brought this administrative action against the Charter School on June 3, 2008, alleging that the Charter School denied Student a free and appropriate public education (FAPE) from 4th grade through 8th grade. They were given a continuance of the July 2008 hearing in order to retain an attorney. Their attorney filed an amended due process complaint on August 21, 2008 and, after the mandatory resolution period, the first hearing was conducted on October 16, 2008. After four hearing sessions, the record was closed on February 10, 2009 with submission of the parties' written closing arguments. For the reasons described below, I find that the Charter School denied FAPE to Student from June 3, 2006 through the 2007-2008 school year.

ISSUES

- 1) Whether or not the Charter School provided FAPE to Student during 2004-2005?
- 2) Whether or not the Charter School provided FAPE to Student during 2005-2006?
- 3) Whether or not the Charter School provided FAPE to Student during 2006-2007?
- 4) Whether or not the Charter School provided FAPE to Student during 2007-2008?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, was a Charter School student from September 2001 (2nd Grade) until graduation from 8th Grade in June 2008. Charter School is a publicly funded charter school serving grades K-8, located within the Chester Upland School District of which Student and Student's family are residents. (N.T. 446)³

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

² The term "parents" in this decision will refer interchangeably to Student's father, mother, and grandmother, all of whom were, and are, involved in decisions regarding Student's education.

³ References to "N.T." are to the notes of transcripts of the hearings in this matter. References to "HO", "P" and "SD" are to the Hearing Officer, Parent, and Charter School exhibits, respectively.

2004-2005 (5th Grade)

2. Student's December 13, 2004 IEP reports that Student was reading and writing on a 2nd grade level and was performing math at a 3rd grade level. (P10; SD11) This IEP states that Student's eligibility for ESY is "to be determined." (SD11,p.11) ESY eligibility never was determined. (N.T. 492)
3. The Charter School did not follow up with any additional testing during the 2004-2005 school year despite a suspicion in the previous January 26, 2004 evaluation report (ER) that Student might have pervasive developmental disorder (PDD(or some other neurological disorder. (SD7; P6; N.T. at 28, 48-52,68-69) Instead, the Charter School suggested that Student's parents follow up with private evaluations and private enrollment in social skills programs. (P6, p.5; P7; N.T. 48-52, 68-69, 78)
4. Student's 2004-2005 report card indicates that Student's behaviors were improving and that Student had made great academic gains. (SD31)

2005-2006 (6th Grade)

5. Student's October 4, 2005 IEP is a nearly verbatim copy of the previous year's December 13, 2004 IEP, differing only in the reading and writing grade levels and in the sequential order of the goals. (SD11; SD14) Similar to the previous year, Student's October 4, 2005 IEP states that Student's eligibility for ESY is "to be determined" but eligibility was never determined. (P11,p.11)
6. The Charter School used the Direct Instruction methodology in reading and math, which requires that a student successfully complete certain lessons within a grade level book before moving on to the next lesson. In the event that a student does not successfully complete the test on each group of lessons the student must be re-taught the subject matter until Student or she can successfully pass the test. (N.T. 419-428) Phonological processing and phonetics awareness are part of the Direct Instruction curriculum. (N.T. 386-387) Phonetic awareness and phonics are addressed in the decoding books in Direct Instruction which are primarily in the earlier levels of the program (N.T.701)
7. Student's 2005-2006 report card indicates progress in reading, writing, spelling and mathematics. (SD32) Student went from a 3rd grade level in reading to a 4th grade level. (N.T. 421, 422)

2006-2007 (7th Grade)

8. Student's December 13, 2006 IEP indicates that Student was at a 4th grade level in reading, and a 3rd grade level in math and writing. (P13,p.4)

9. During this school year, Student's godmother, who had acted as a special education advocate for other children, started attending some of Student's IEP meetings. (N.T. 491, 710, 712, 782) She assisted Student's parents in requesting copies of Student's entire educational file (N.T. 714-716; P25) and she requested an independent educational evaluation (IEE) to rule out PDD. (N.T. 465-466, 737) The Charter School's Director of Student Support Services stated that additional assessments were the family's responsibility. (N.T. 465-466, 737)
10. The Charter School did, however, issue a reevaluation report on February 26, 2007. (SD19; SD20; P7)
- a. The school psychologist "skimmed over" the previous 2004 ER, but "not in depth." (N.T. 90)
 - b. Wechsler Individual Achievement Test scores indicated that Student was reading at between a 2nd and 3rd grade level, with word reading at the 3.1 grade level, comprehension at a 2.5 grade level, and decoding at 2.1. (P7, p.3)
 - c. A speech and language evaluation found Student eligible for speech and language services. (P7,p.11)
 - d. Although Student was failing regular education classes, the school psychologist never spoke to Student's regular education teachers and never observed Student in those classes. (N.T.144, 162)
 - e. The ER recommended a disability classification of Emotionally Disturbed (ED), based largely upon the report of Student's 7th grade teacher. (SD19; SD20, p.6; P43, p. 35-37; N.T. 111, 155, 181-182) The school psychologist did not observe Student in the classroom or confirm the teacher's reports of Student's behavior. (N.T. 105, 111, 144, 162, 184) The Charter School's Special Education Director, who replaced Student's 7th grade teacher for a portion of the school year, testified that Student was friendly, cooperative, pleasant, and presented no behavioral difficulties. (N.T. 415, 442)
 - f. The February 26, 2007 ER also recognized signs of a possible underlying neurological disorder and recommended that Student's family privately pursue additional evaluations to rule out PDD and to examine Student's emotional functioning. (P7,p.13)
11. The Charter School's school psychologist did conduct an FBA around this time in early 2007. At the time of the October 16, 2008 due process hearing, however, neither Student's parents nor any other Charter School personnel were aware of nor had seen the FBA. (N.T. 119, 454, 508, 720, 678; 775) The undated FBA purports to evaluate Student's avoidant and impulse control behaviors that allegedly occurred at multiple times throughout the school day in the resource classroom, the regular education classroom, hallways, and in unstructured settings during activities involving large and small groups. (P44) The school psychologist, however, had no specific documentation for the statement that Student's target behaviors occurred anywhere but in the Resource Room, and in fact, the school psychologist admitted that Student had received no complaints

about Student's behaviors in the regular education classroom. (N.T. 164-166)
The FBA was never reviewed by the IEP team. (N.T. 118, 148, 157, 360-361, 378-379, 502, 734)

12. For unknown reasons, the parties did not meet to discuss the February 26, 2007 ER until May 31, 2007. At that time, Student's parents, as well as the Charter School's reading specialist and guidance counselor disagreed with the ER's recommendation regarding Student's ED classification. (SD20,p.10; N.T. 502, 729-731) The Charter School agreed to provide an assistive technology (AT) assessment of Student, but no formal AT assessment ever occurred. (SD44; SD45; P45; N.T. 404, 407-408, 744) Nevertheless, the Charter School agreed to provide Student with AT devices including Write Out Loud, Books on Tape, and Spell Check (N.T. 349, 406)
13. Student's May 31, 2007 IEP indicates Student was at the 4th grade level in reading, the 4th grade level in math, and the 3rd grade level in writing. (SD21, p. 4; P21 p. 4; SD22) This IEP also states that Student is not eligible for ESY. (P21,p.17; N.T. 740-742) Charter School personnel contend that Student's parents rejected ESY services, preferring instead that Student's teachers prepare summer packets for Student to do at home over the summer. (N.T. 389, 530, 598) Student's godmother and grandmother credibly testified, however, that they accepted the summer packets because they had specifically requested, but never received, ESY services. (N.T. 530, 742)
14. Although the speech and language therapist testified that Student achieved IEP speech and language goals, all progress records are missing. (N.T. 557, 563, 567; P-57)

2007-2008 (8th Grade)

15. A November 15, 2007 IEP indicates Student was at a 5th grade level in reading, and a 4th grade level in mathematics and writing. (SD24, pp. 14-16) 8th grade Direct Instruction charts indicate that Student was working at the 2nd grade level in writing (language arts), 4th grade level in math, and 5th grade level in reading. (SD36; N.T. 693) Student's 8th grade teacher did not work on spelling because it was not part of the Direct Instruction curriculum. (N.T. 677) Student's November 5, 2007 IEP states, without explanation, that Student is not eligible for ESY although the specially designed instruction indicates that Student is to be provided with "summer packets for reading, writing, and math." (SD24, p.18, 19; N.T. 793)
16. During this 2007-2008 school year, Student also was receiving one-to-one reading instruction from the Charter School's reading specialist. (N.T. 587) When Student started working with the reading specialist, Student would simply look at a word and give up trying to read it. By the end of the school year, however, Student was taking more time and decoding words much better. (N.T. 589) The reading specialist's records are missing. (N.T. 591)

17. In 8th grade Student had very few behavior issues. (NT. 765, 771). The guidance counselor's records are missing, however. (N.T. 592, 776-777) During frequent classroom visits, the Charter School's Director of Special Education observed that Student's behaviors were appropriate and not out of control. (N.T.352)
18. On March 19, May 1, and May 27, 2008, Student's Parents requested mediation and pre-hearing conferences. (P299, P30, P31) On June 3, 2008, Student's Parents requested a due process hearing. (P32)
19. In June 2008, Student graduated from the Charter School upon completing 8th Grade and enrolled in a private school for 9th Grade. (N.T. 316, 611-613) The Charter School's Director of Student Support Services described Student as a model student who received the most applause from peers at the 8th grade graduation. (N.T. 316) Student's parents complain, however, that Student could not read a menu or a street sign when Student graduated from Charter School and that Student took the extraordinary step of finding a private reading tutor at the local [redacted] Club. (N.T. 445, 484, 516) They allege that Student shunned any activity associated with reading, and could not perform even simple tasks in daily life that involved reading. (N.T. 486) They allege that they completed Student's homework so that Student would have something to hand in. (N.T. 475)
20. Over the Charter School's objection, I permitted Student's 9th grade private school Head of School to testify regarding Student's educational levels upon entering the private school. The Head of School testified that Student began 9th grade writing at between the 2nd and 3rd grade level, with reading comprehension at less than a 4th grade level, and decoding skills at approximately a 1st grade level. (N.T. 617, 619, 621) The Head of School also testified that Student would require 5-7 years of education in a small environment, including three years, or 500-600 hours, of reading and mathematics instruction in order to complete high school. (N.T. 614, 622-625)
21. Student's parents have identified an evaluator to provide an independent neuropsychological evaluation through the [redacted] Institute at a cost of \$2500.00, and they have already secured an AT evaluation from [redacted] at a cost of \$2352.00. (P34; N.T. 735)
22. On August 15, 2008, Student's lawyer filed an amended due process hearing request seeking compensatory education for FAPE denials during the 2004-2005, 2005-2006, 2006-2007, and 2007-2008 school years. (P1) The Charter School filed an Answer to the Due Process Complaint and raised a New Matter regarding the applicability of the IDEA statute of limitations. Due process hearings were conducted on October 16, 2008, December 15, 2008, January 5, 2009 and January 6, 2009. Parties were granted an extension of time within which to file written

closing arguments, which were submitted on February 10, 2009. On February 10, 2009, the record in this matter was closed.

23. The following exhibits were admitted into the record:

| Exhibit | Admitted without objection | Admitted over objection | Not submitted | Exhibit | Admitted without objection | Admitted over objection | Not submitted |
|---------|----------------------------|-------------------------|---------------|---------|----------------------------|-------------------------|---------------|
| SD1 | ✓ | | | P1 | ✓ | | |
| SD2 | ✓ | | | P2 | ✓ | | |
| SD3 | ✓ | | | P3 | | | ✓ |
| SD4 | ✓ | | | P4 | ✓ | | |
| SD5 | ✓ | | | P5 | ✓ | | |
| SD6 | ✓ | | | P6 | ✓ | | |
| SD7 | ✓ | | | P7 | ✓ | | |
| SD8 | ✓ | | | P8 | ✓ | | |
| SD9 | ✓ | | | P9 | ✓ | | |
| SD10 | ✓ | | | P10 | ✓ | | |
| SD11 | ✓ | | | P11 | ✓ | | |
| SD12 | ✓ | | | P12 | ✓ | | |
| SD13 | ✓ | | | P13 | ✓ | | |
| SD14 | ✓ | | | P14 | ✓ | | |
| SD15 | ✓ | | | P15 | ✓ | | |
| SD16 | ✓ | | | P16 | ✓ | | |
| SD17 | ✓ | | | P17 | ✓ | | |
| SD18 | ✓ | | | P18 | ✓ | | |
| SD19 | ✓ | | | P19 | ✓ | | |
| SD20 | ✓ | | | P20 | ✓ | | |
| SD21 | ✓ | | | P21 | ✓ | | |
| SD22 | ✓ | | | P22 | ✓ | | |
| SD23 | | | ✓ | P23 | ✓ | | |
| SD24 | ✓ | | | P24 | ✓ | | |
| SD25 | ✓ | | | P25 | ✓ | | |
| SD26 | ✓ | | | P26 | ✓ | | |
| SD27 | ✓ | | | P27 | ✓ | | |
| SD28 | ✓ | | | P28 | ✓ | | |
| SD29 | ✓ | | | P29 | ✓ | | |
| SD30 | ✓ | | | P30 | ✓ | | |
| SD31 | ✓ | | | P31 | ✓ | | |
| SD32 | ✓ | | | P32 | ✓ | | |
| SD33 | ✓ | | | P33 | ✓ | | |
| SD34 | ✓ | | | P34 | ✓ | | |
| SD35 | ✓ | | | P35 | ✓ | | |
| SD36 | ✓ | | | P36 | ✓ | | |
| SD37 | | | ✓ | P37 | ✓ | | |

| Exhibit | Admitted without objection | Admitted over objection | Not submitted | Exhibit | Admitted without objection | Admitted over objection | Not submitted |
|---------|----------------------------|-------------------------|---------------|---------|----------------------------|-------------------------|---------------|
| SD38 | | | ✓ | P38 | ✓ | | |
| SD39 | | | ✓ | P39 | ✓ | | |
| SD40 | ✓ | | | P40 | ✓ | | |
| SD41 | | | ✓ | P41 | ✓ | | |
| SD42 | ✓ | | | P42 | ✓ | | |
| SD43 | ✓ | | | P43 | ✓ | | |
| SD44 | ✓ | | | P44 | ✓ | | |
| SD45 | ✓ | | | P45 | ✓ | | |
| SD46 | ✓ | | | P46 | ✓ | | |
| SD47 | | | ✓ | P47 | ✓ | | |
| SD48 | | | ✓ | P48 | ✓ | | |
| SD49 | ✓ | | | P49 | ✓ | | |
| SD50 | ✓ | | | P50 | ✓ | | |
| SD51 | ✓ | | | P51 | ✓ | | |
| SD52 | | ✓ | | P52 | ✓ | | |
| SD53 | ✓ | | | P53 | ✓ | | |
| SD54 | | | ✓ | P54 | ✓ | | |
| SD55 | | | ✓ | P55 | ✓ | | |
| SD56 | ✓ | | | P56 | ✓ | | |
| SD57 | ✓ | | | | | | |

DISCUSSION AND CONCLUSIONS OF LAW

IEPs

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student’s potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. 20 U.S.C. §1412; Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002)

ERs

At all times relevant to this case, federal regulations required the Charter School’s ERs to use a variety of assessment tools and strategies to gather relevant functional,

developmental, behavioral, and academic information about Student. 34 CFR §300.304(b) The Charter School’s ERs were required to be sufficiently comprehensive to identify all of Student’s special education and related services needs, whether or not commonly linked to Student’s disability category. 34 CFR §300.304(c)(4),(6) Such comprehensiveness includes review of existing evaluation data, current classroom-based, local, or State assessments, classroom-based observations, and observations by teachers and related services providers. It also includes any other evaluation measures necessary to produce the data needed to enable Student to meet the measurable annual goals set out in Student’s IEP. 34 CFR §300.305(a),(c)

Burden of Proof

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006); In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763 (2006) If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court’s ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence. In this case, Student bears the burden of persuasion because Student alleges that the School District has denied FAPE for the period of time between the 2004-2005 school year and the 2007-2008 school year.

IDEIA’s Filing and Claims Limitations Periods

There are two IDEIA⁴ limitations provisions at issue here:

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

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

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

...

⁴ The underlying federal statute is the Individuals with Disabilities Education Improvement Act (IDEIA), which is a revised version of its predecessor, the Individuals with Disabilities Education Act (IDEA). Some refer to the IDEIA as “IDEA 2004” because it was revised in 2004.

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

...

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

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

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

IDEIA’s Exceptions to the Filing and Claims Limitations periods

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

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

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

20 USC §1415(f)(3)(D); and

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

...

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

...

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

complaint under this part, in such time as the State law allows except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

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

Neither the statute nor applicable regulations (34 CFR §§300.507(a)(2) and 300.511(e)) define either “specific misrepresentations” or “withholding of information.” In fact, the drafters of the federal regulations declined to provide such definitions, believing instead that such matters were within the purview of the hearing officer. 71 Fed.Reg. 46540-01 at 46706 (August 14, 2006); See P.P. v. West Chester Area School District, 557 F. Supp. 2d 648 (E.D. Pa 2008) I agree with the Court in Evan H. v. Unionville-Chadds Ford School District, 2008 WL 4791634 (E.D. Pa. 2008) that, while the Third Circuit has yet to define either a "specific misrepresentation" or “withheld information” in this context, the misrepresentation must be intentional and the withheld information refers solely to the withholding of information regarding the procedural safeguards available to a parent.

Section 504’s Two Year Statute of Limitations

Student also argues that the Charter School has violated Student’s rights under both IDEA and Section 504. Those two statutes contain different statutes of limitations. As noted above, IDEA contains its own filing and claim substance limitations. Because Section 504 does not contain its own statute of limitations, it borrows Pennsylvania’s two year state statute of limitations applicable to personal injury claims. P.P. v. West Chester Area School District, 557 F. Supp. 2d 648 (E.D. Pa 2008)

Timeliness of Student’s Claims

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

The Charter School contends that this matter must be limited to the period two years prior to the August 15, 2008 amended due process hearing complaint, i.e., to the period from August 15, 2006 to August 15, 2008. Student counters with four points: 1) the filing date in this case is the date of the Parents’ original complaint, i.e., June 3, 2008; 2) parts of the complaint are timely even under the Charter School’s theory; 3) statutory filing limitations do not apply to the part of the complaint referring to the 2004-2005 school year; and 4) exceptions to the statutory filing limits apply to the part of the complaint referring to the 2005-2006 school year.

First, I agree with Student that the original claim for due process was filed on June 3, 2008. (P32) The first due process hearing, which was scheduled for July 24, 2008, was postponed to permit Student’s lawyer to file, on August 15, 2008, an amended due

process complaint. (P1) At the December 15, 2008 due process hearing, I combined the various allegations contained in Student's complaint and I listed the issues as follows, with no objection from the parties: 1) Whether or not the Charter School provided FAPE to Student for the 2004-2005 school year; 2) Whether or not the Charter School provided FAPE to Student for the 2005-2006 school year; 3) Whether or not the Charter School provided FAPE to Student for the 2006-2007 school year; and 4) Whether or not the Charter School provided FAPE to Student for the 2007-2008 school year. (N.T. 130-131, 578-579) I observed that these four issues included alleged failures to provide ESY services as well as requests for an AT evaluation and an IEE. (N.T. 131)

Timeliness of Student's First Claim, 2004-2005 (5th Grade)

Student first argues that, because the Charter School actions during the 2004-2005 school year occurred before the July 1, 2005 effective date of the IDEIA, that statute's limitations provisions cannot apply to those issues. See Tereance D. v. School District of Philadelphia, 570 F. Supp. 2d 739 (E.D. Pa. 2008); Anthony v. District of Columbia, 46 IDELR 278 (D.D.C. 2006) Student's argument would be more convincing if the due process complaint had been filed before July 1, 2005.⁵ I agree with the Court in P.P. v. West Chester Area School District, 557 F. Supp. 2d 648 (E.D. Pa 2008) that the determining factor regarding Student's retroactivity argument is the date the due process hearing was requested, not the date of the underlying events. See also Evan H. v. Unionville-Chadds Ford School District, 2008 WL 4791634 (E.D. Pa. 2008) This complaint was filed on June 3, 2008, nearly three years after the effective date of the IDEIA. Thus, I conclude that there is no retroactivity issue involved, and I must apply the IDEIA's filing and claim limitations to all portions of Student's complaint, regardless of when the underlying events occurred.

Student complains that the November 5 and December 13, 2004 IEPs failed to follow up with any additional testing despite observations in the previous January 26, 2004 ER that Student needed a speech and language assessment and possibly had PDD or some other neurological disorder. (SD7) Student also complains that, while those IEPs state that Student's eligibility for ESY is "to be determined" (SD11,p.11) ESY eligibility never was determined. (N.T. 472)

I find, however, that Student's parents were active participants in Student's education during this school year. (SD10; SD11; N.T. 446, 457-470)) Their complaints about procedural violations, the poor quality of IEPs, and lack of meaningful progress during the school year are all actions of which Student's parents knew, or should have known, during the 2004-2005 school year. I find, therefore, that the latest possible KOSHK date for any of Student's 2004-2005 claims was at the end of that school year, i.e., June 15,

⁵ In Anthony v. District of Columbia, 46 IDELR 278 (D.D.C. 2006), the due process hearing request was filed March 25, 2005. Frankly, because the due process hearing request in Tereance D was filed December 13, 2006, I do not understand why that Court ruled as it did.

2005.⁶ Thus, I conclude that, under IDEIA's filing limitation, Student had until June 15, 2007 to file a due process hearing request regarding the actions that form the basis of this complaint concerning the 2004-2005 school year. Student's June 3, 2008 complaint, therefore, is untimely.

I also find that IDEIA's exceptions to the limitations provisions do not apply. While there is plenty of indication of FAPE denial during the 2004-2005 school year, there is no evidence of Charter School intentional misrepresentations (i.e., that they knew something and intentionally lied about it) that prevented Student's parents from timely requesting due process. In addition, I find no withholding of information for limitations purposes, because the signature of Student's parent on the December 13, 2004 is directly beneath the acknowledgement that she received procedural safeguards. (SD11, p.2)

Student also contends that the 2004-2005 claims are timely under Section 504. That statute, however, borrows a strict two year personal injury statute of limitations. Because I have already determined that Student's parents knew or should have known by June 15, 2005 about the actions forming the basis of this complaint concerning the 2004-2005 school year, they were required to file a timely Section 504 complaint by June 15, 2007. Because Student's complaint was not filed until June 3, 2008, Student's Section 504 claim regarding the 2004-2005 school year is untimely.

Timeliness of Student's Second Claim, 2005-2006 (6th Grade)

Student's parents complain about the October 4, 2005 IEP's uncertainty regarding Student's eligibility for ESY (SD11,p.11), the lack of ESY for summer 2006 (N.T. 472) and Student's poor educational progress during this school year despite a report card indicating that Student's behaviors were improving and that Student had made great academic gains. (N.T. at 358; 488; 707; SD31) I conclude that the KOSHK date for claims concerning the October 4, 2005 IEP was October 4, 2005, and the KOSHK date for claims regarding Student's progress, or lack of progress, during the 2005-2006 school year was June 15, 2006. Based upon these KOSHK dates, Student had until October 4, 2007 to file a due process hearing request concerning the October 2005 IEP, and until June 15, 2008 to file a due process hearing request concerning the 2005-2006 school year. Thus, Student's June 3, 2008 complaint was untimely with respect to the October 2005 IEP, but timely with respect to all other alleged denials of FAPE during the 2005-2006 school year.

I also find that IDEIA's exceptions to the limitations provisions do not apply to Student's untimely claim concerning the October 2005 IEP. Again, there is no evidence of Charter

⁶ To the extent that Student suggests that the KOSHK date requires parental knowledge of legal liability, I disagree. While it is true that students and parents might not realize immediately that particular school actions violated their FAPE rights, IDEIA's limitations provisions are based upon the date of the filing party's knowledge, or constructive knowledge, of "the alleged action that forms the basis of the complaint," not the date of the party's realization that rights had been violated.

School intentional misrepresentations that prevented Student's parents from timely requesting due process regarding the IEP. Further, while there is no signature under the procedural safeguards provision of the IEP, (P11,p.2; SD14,p.2) as there was for the IEP the year before, this absence is not proof that the safeguards were not provided. I find that there is no evidence in the record indicating that the safeguards were not provided.

Finally, Student's Section 504 complaint with respect to the October 4, 2005 IEP had to be filed by October 4, 2007. Student's June 3, 2008 complaint therefore was untimely regarding that IEP. Student's Section 504 complaint with respect to an alleged denial of FAPE at the end of the 2005-2006 school year, however, was timely because the June 3, 2008 complaint was filed before the June 15, 2008 deadline for that claim.

Timeliness of Student's Third and Fourth Claims, 2006-2007 (7th Grade) and 2007-2008 (8th Grade)

Student's third and fourth claims are that the Charter School deprived Student of FAPE during the 2006-2007 and 2007-2008 school years. The actions upon which these claims are based had to have occurred after the September 2006 beginning of the 2006-2007 school year. Thus, Student's June 3, 2008 due process hearing request regarding these two school years, which was filed less than two years after the beginning of the 2006-2007 school year, is timely under both IDEIA and Section 504. For these school years, therefore, it is not necessary for me to determine either KOSHK dates or the applicability of any limitations exceptions.

Substance of Student's Timely Claims

Having disposed of the timeliness of Student's claims, I will review the legality of Student's claims. Student argues that I am required to determine first whether the Charter School complied with the procedural rights of Student and Student's parents, before determining substantively whether Student's IEPs were reasonably calculated to enable Student to receive a meaningful education. Board of Education of Hendrick Hudson Sch. Dist., v. Rowley, 458 U.S. 176, 206-7 (1982); N.B. v. Hellfire Elementary School, 541 F.3d 1202 (9th Cir. 2008). See also Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 890 (9th Cir. 2001) Student argues that the Charter School's failures to comply with the record-keeping and records-access provisions of the IDEA and Section 504 seriously infringed upon parents' opportunity to participate in the IEP formulation process, and/or caused a deprivation of educational benefits to Student. Ms. S. ex rel. G. v. Vashon Island Sch. Dist., 337 F.3d 1115, 1129 (9th Cir. 2003). M J v. Derry Township School District, 2006 WL 148882 (M.D.Pa.2006); Johnson v Lancaster-Lebanon IU-13 and Lancaster City School Dist., 757 F.Supp. 606 (E.D.Pa.,1991)

To support this argument, Student notes the numerous instances of missing documents, including speech and language records (N.T. 557), guidance records (N.T. 776-777) and reading specialist records. (N.T. 591) Student notes that the Charter School has only summary attendance data (SD-46) and no behavioral data that allegedly is required because Student's IEPs list behavior as a "special consideration." Student also notes that there are no records supporting the Charter School's perennial determination that Student

was not eligible for ESY. Student's parents testified at length as to the frustrations they encountered in attempting to secure copies of Student's school records. (N.T. 497-499, 715-719; P13; P25; P26; P27; P30; P31; P32; P35)

The documentation listed above is missing, and its absence is relevant to a substantive FAPE analysis. I disagree, however, that Student has established a case of procedural FAPE denial simply by listing these missing data. Student fails to identify the specific record-keeping and records-access provisions of the IDEA and Section 504 that the Charter School allegedly violated. Without citations to statutory or regulatory provisions that require the Charter School either to have the specific documents that are missing or to provide access to those specific documents, I will not find that their absence automatically constitutes procedural FAPE denials. Thus, this argument of Student's is rejected.

**The Student has not established that the Charter School denied
FAPE to Student during 2005-2006**

I have already determined that Student's claims regarding the October 2005 IEP for that School year are untimely. Student's 2005-2006 report card indicates progress in reading, writing, spelling and mathematics. (SD32) Student went from a 3rd grade level in reading to a 4th grade level. (N.T. 421, 422) From this evidence, I conclude that Student has not established a FAPE denial for the 2005-2006 school year.

The Charter School denied FAPE to Student during 2006-2007

The Charter School failed to provide appropriate evaluations of Student. Its evaluations were not sufficiently comprehensive to identify all of Student's special education and related services needs, whether or not commonly linked to Student's disability category. 34 CFR §300.304(c)(4),(6) They failed to include all evaluation measures necessary to produce the data needed to enable Student to meet the measurable annual goals set out in Student's IEP. 34 CFR §300.305(a),(c) They failed to use a variety of assessment tools and strategies to gather relevant functional, developmental, behavioral, and academic information about Student. 34 CFR §300.304(b)

The February 26, 2007 reevaluation report (SD19; SD20; P7) did not review previous data, but rather the school psychologist "skimmed over" the previous 2004 ER, but "not in depth." (N.T. 90) Although Student's parents, as well as the Charter School's reading specialist and guidance counselor disagreed with the ER's recommendation regarding Student's ED classification (SD20,p.10; N.T. 502, 729-731), the school psychologist neither observed Student in the classroom nor confirmed the 7th grade teacher's reports of Student's behavior. (N.T. 105, 111, 144, 162, 184) This is particularly egregious in light of testimony from the Charter School's Special Education Director, who replaced Student's 7th grade teacher for a portion of the school year, that Student was friendly, cooperative, pleasant, and presented no behavioral difficulties. (N.T. 415, 442)

In addition, the ER recognized signs of a possible underlying neurological disorder but recommended that Student's family privately pursue additional evaluations to rule out PDD and to examine Student's emotional functioning. (P7,p.13) The Charter School also agreed to provide an assistive technology (AT) assessment of Student, but no formal AT assessment ever occurred. (SD44; SD45; P45; N.T. 404, 407-408, 744)

Consequently, the May 13, 2007 IEP was inappropriate, and a FAPE denial, because it was based upon inappropriate evaluations. Finally, the Charter School denied FAPE to Student by losing or not reporting important data regarding Student's needs. Although the speech and language therapist testified that Student achieved IEP speech and language goals, all progress records are missing. (N.T. 557, 563, 567; P-57) Although an FBA was conducted sometime in early 2007, neither Student's parents nor any other Charter School personnel were aware of nor had seen the FBA. (N.T. 119, 454, 508, 720, 678; 775) The FBA was never reviewed by the IEP team. (N.T. 118, 148, 157, 360-361, 378-379, 502, 734)

From this evidence, I conclude that the Charter School denied FAPE to Student for the 2006-2007 school year.

The Charter School denied FAPE to Student during 2007-2008

Student's 8th grade teacher did not work on spelling because it was not part of the Direct Instruction curriculum. (N.T. 677) Despite years of Direct Instruction in reading, when Student started working with the reading specialist at the beginning of this school year, Student would simply look at a word and give up trying to read it. (N.T. 589) It was not until Student was receiving the reading specialist's one-to-one reading instruction that Student was taking time and decoding words much better. (N.T. 589) The reading specialist's records, unfortunately, are missing. (N.T. 591)

Student was also still considered ED even though the 8th grade teacher had very few behavior issues and the Charter School's Director of Special Education observed that Student's behaviors were appropriate and not out of control. (N.T.352, NT. 765, 771). The guidance counselor's records, unfortunately, are missing. (N.T. 592, 776-777)

Finally, Student's November 5, 2007 IEP states, without explanation, that Student is not eligible for ESY although the specially designed instruction indicates that Student is to be provided with "summer packets for reading, writing, and math." (SD24, p.18, 19; N.T. 793)

This evidence demonstrates that the Charter School did not provide to Student an educational program that was reasonably calculated to enable Student to achieve meaningful educational benefit. Accordingly, I conclude that the Charter School denied FAPE to Student for the 2007-2008 school year.

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

To the extent that the FAPE requirement under Section 504 differs from that under IDEIA, the difference appears to be a difference between merely failing to meet statutory and regulatory requirements (IDEIA) and either intentionally or deliberately indifferently failing to provide FAPE (Section 504). Mark H. v Department of Education, 513 F.3d 922 (9th Cir. 2008); K.R. v. School District of Philadelphia, 50 IDELR 190 (E.D. Pa. 2008); L.T. v. Mansfield Township School District, 48 IDELR 156 (D.N.J. 2007)

After reviewing the record in this case, I cannot point to specific evidence that the Charter School's FAPE denials occurred either with intention or with deliberate indifference. Accordingly, I find that the Charter School did not violate Student's Section 504 rights in either 2006-2007 or 2007-2008.

Relief

Student seeks compensatory education as well as an IEE and an AT evaluation.

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

The actual amount and type of compensatory education award shall be based upon testimony from Student's 9th grade Head of School that Student would require 5-7 years of education in a small environment, including three years, or 500-600 hours, of reading and mathematics instruction in order to complete high school. (N.T. 614, 622-625) Based upon this testimony, I will order 500 hours of compensatory education in reading, and 500 hours of compensatory education in mathematics. (N.T. 614, 622-625)

Student's parents have identified an evaluator to provide an independent neuropsychological evaluation through the [redacted] Institute at a cost of \$2500.00, and they have already secured an AT evaluation from [redacted] at a cost of \$2352.00. (P34; N.T. 735) On May 13, 2007, the Charter School agreed to provide an assistive technology (AT) assessment of Student, but no formal AT assessment ever occurred. (SD44; SD45; P45; N.T. 404, 407-408, 744) This is sufficient basis for an award of reimbursement for the Student's privately secured AT evaluation. Accordingly, I will award \$2352 reimbursement for the private AT evaluation.

The Charter School argues that Student is not entitled to an IEE because Student's Parents failed to request an IEE from the Charter School before filing for due process. D. S. v. Troy Area School District, Special Education Appeal Panel Decision No. 1857 (2007) The Charter School argues that, where the purpose of an IEE is to provide

additional information to the parties for the purpose of preparing an IEP for the Student, an IEE in this case would not serve that purpose because Student has graduated from the Charter School. I agree with the School District's argument that an IEE does not serve a compensatory education purpose in this case. Thus, I will not order either the requested IEE as compensatory relief.

CONCLUSION

Student's complaint concerning the entire 2004-2005 school year, as well as the October 2005 IEP, are untimely under both IDEIA and Section 504, and no IDEIA exceptions to the filing limitations apply. Student's other claims concerning denials of FAPE during the 2005-2006, 2006-2007 and 2007-2008 school years are timely under both IDEIA and Section 504. The record does not establish a FAPE denial for the 2005-2006 school year. The Charter School did deny FAPE to Student during the 2006-2007 school year through insufficiently comprehensive evaluation and an inappropriate IEP based upon the inappropriate evaluation. The Charter School denied FAPE to Student for the 2007-2008 school year through inappropriate programming, and an inappropriate IEP. Accordingly, I will award reimbursement of a privately secured AT evaluation and I will award 500 hours of compensatory education in reading, and 500 hours of compensatory education in mathematics. The evidence did not establish that the Charter School violated Student's Section 504 rights.

ORDER

Student's IDEIA claims concerning the entire 2004-2005 school year, as well as the October 2005 IEP, are untimely, and no IDEIA exceptions to the filing limitations apply. Accordingly, they are DISMISSED.

Student's Section 504 claims concerning the entire 2004-2005 school year, as well as the October 2005 IEP, are untimely. Accordingly, they are DISMISSED.

The record does not establish a FAPE denial for the 2005-2006 school year. Accordingly, Student's IDEIA and Section 504 claims regarding the 2005-2006 school year are DISMISSED.

The record does not establish that the Charter School denied Student's Section 504 rights during either the 2006-2007 or the 2007-2008 school year. Accordingly, Student's Section 504 claims regarding the 2006-2007 and 2007-2008 school years are DISMISSED.

The Charter School denied FAPE to Student under the IDEIA for the 2006-2007 school year.

The Charter School denied FAPE to Student under the IDEIA for the 2007-2008 school year.

The Charter School shall reimburse Student \$2352 for a privately secured AT evaluation.

The Charter School shall provide to Student 500 hours of compensatory education in reading.

The Charter School shall provide to Student 500 hours of compensatory education in mathematics.

Daniel J. Myers

HEARING OFFICER

February 22, 2009