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

ODR No. 0090-0910AS

Child's Name: Student

Date of Birth: xx/xx/xx

Dates of Hearing: 12/8/09; 2/1/10, 2/2/10, 2/3/10, 2/22/10, 3/11/10, 3/19/10, 4/9/10, 4/20/10

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Parent Attorney Frederick Stanczak, Esquire 179 N. Broad Street, 2nd Floor Doylestown, PA 18901
School District Nazareth One Education Plaza Nazareth, PA 18064	School District Attorney Kristine Marakovits-Roddick, Esquire King, Spry One West Broad Street Suite 700 Bethlehem, PA 18018
Date Record Closed:	May 14, 2010

Date of Decision: May 29, 2010

Hearing Officer: Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student) is a post-teen age resident of the Nazareth Area School District who has attended the Private School, an approved private school, at District expense for the past three years. Student was identified as IDEA eligible in the early school years due to a combination of disabilities that has only recently been determined to arise from a genetic disorder. The effects of Student's underlying condition seriously impact language, learning, motor and social skills, as well as Student's physical health.

Despite Parents' general satisfaction with Student's academic and social progress at Private School, they contend that the District inappropriately terminated physical therapy for a period, denied necessary ESY services for the summer of 2009 and inordinately delayed providing other services necessary for Student's successful transition to competitive employment and independent living as an adult. In their due process complaint filed in July 2009, and at the due process hearing in this matter, conducted over nine sessions between December 2009 and April 2010, Parents contended that the District's alleged delay and denial of services had a pervasively detrimental effect on Student's transition progress, justifying an award of full days of compensatory education for the entire period of Student's enrollment at Private School, and a determination that the District should remain Student's LEA for an additional three years past age 21so Student can continue to receive transition services in the Private School program to complete preparations for post public school employment and independent living.

Because the record in this case does not support Parents' claim for compensatory education beyond the two year IDEA limitations period, or their claims of a pervasive delay/denial of necessary services, Parents' requests for full days of compensatory education and extension of the District's LEA status beyond the 2010/2011 school year, when Student reaches Student 21st birthday, are denied. Student will, however, be awarded compensatory education for denial of ESY services during the summer of 2009.

ISSUE

Did the Nazareth Area School District provide Student with sufficient appropriate instruction, transition services and related services to permit Student to make meaningful progress toward obtaining employment and living independently after Student eligibility for special education ends at age 21?

FINDINGS OF FACT

1. Student (Student) is a post-teen aged child, born xx/xx/xx. Student is a resident of the Nazareth Area School District and is eligible for special education services. (Stipulation, N.T. pp. 15, 16)

2. Student has a current diagnosis of in Other Health Impairment (OHI) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 15)

3. In accordance with an agreement between the parties, Student has been enrolled in the Private School, an approved private school (APS), at School District expense since the 2006/2007 school year. (Stipulation, N.T. pp. 15, 16; S-168)

4. A reevaluation consisting of a review of records, including updated testing conducted by a private neuropsychologist in May 2007, was commenced in August 2007, after Student's first year at Private School. Before the reevaluation evaluation (RR) was finalized and accepted by Parents in October 2008, Student's IEP team had met to review existing data on 6 occasions, at least 6 drafts of the RR had been passed between the parties, and a transition evaluation had been completed by the same private neuropsychologist in July 2008. (N.T. pp. 356, 934, 947—963; P-3, P-4, P-5, P-6, P-7, P-8, P-10, S-110)

5. Student's well-documented medical problems have adversely affected Student educational progress since the early school years. For much of the time, Student's cluster of speech/language, motor, learning, visual, auditory and social skills difficulties were attributed to brain damage arising from an in-utero stroke. In 2006, however, Student was diagnosed with a genetic disorder, Prader-Willi Syndrome,[1] which is now believed to

[1] As described by the neuropsychologist who evaluated Student several times, beginning when Student was a young child, Prader–Willi Syndrome is

be the underlying cause for most, if not all, of the disabilities that adversely affect Student's academic and functional skills. Student has also been diagnosed with diabetes. (N.T. pp. 111, 112, 940, 963—968, 977; S-110, pp. 4, 36, 38)

6. The impairments associated with Student's Prader-Willi diagnosis that most severely impact Student's school performance and prospective ability to work in a competitive employment setting and live independently include learning disabilities in the areas of reading, math and writing; difficulties with non-verbal, abstract reasoning; auditory and visual processing deficits; expressive and receptive language, pragmatic language and social skills deficits; gross and fine motor skills deficits; attention/executive functioning and memory deficits. (N.T. pp. 936, 939, 943, 958, 961, 962; S-110, p. 39)

7. After Student's first school year at Private School, Parents' neuropsychologist noted that Student had "blossomed" and was happy, concluding that the School "is organized in exactly the manner that Student needs." The evaluator also noted that Student "benefited immensely" from the equine program, which improved Student's physical status and mobility, leading to improvements in balance and gross motor skills (riding a bike), ability to travel independently in the community and fine motor skills (ability to tie Student shoes). (N.T. pp. 974, 978, 979; S-110, p. 58)

8. In the May 2007 report, Parents' evaluator recommended that Student receive individualized instruction/coaching to improve executive functioning skills, *i.e.*, strategies for regulating and managing life activities, such as developing and following daily routines, setting goals, taking proper steps to achieve them, assessing progress and determining whether the goals are achieved. (N.T. pp. 939, 983, 984, 1022; S-110, pp. 60, 71—73)

9. In July and August 2007, Private School's school psychologist conducted a clinical services evaluation to assess Student's difficulties with peer social interactions and lack of emotional control. After several observations, interviews with Parents and teachers and meetings with Student, the psychologist recommended 30 minute weekly sessions of individual counseling to develop coping strategies, interpersonal problem-solving, perspective-taking and self-monitoring skills. (N.T. pp. 1086—1101; P-79. p. 7)

> a genetically based disorder that's related to a chromosome defect [characterized by]… a spectrum of difficulties. The most prevalent and pressing one would be an insatiable --- a desire to eat, where hunger is viewed as, you know, a sharp and overwhelming pain that can't be resisted. And what happens to these kids is they don't have what you would call an appetite control. In other words, they don't know when they're satiated. They don't know when they've had enough. … Many of the students when they hit school age have learning disabilities,…in early years it's associated with hypertonia, which is low muscle tone and what we call failure to thrive. … As it progresses it looks different at different ages. It's also related to some obsessive compulsive behaviors, which have to do with skin picking or hair pulling. It also has an emotional component. The kids are short in stature. They tend to have a flat, sort of square feet. They have certain facial characteristics, tend to have motor problems, but the eating behavior is the one that stands out because they will eat until it could damage them. And it impacts on their behavior in the sense that they will actually feel (sic) food sometimes, and that gets into other kinds of difficulties.
>
> N.T. pp. 964, 965

10. At the beginning of the 2007/2008 school year, Student began receiving the counseling services directed primarily toward developing the ability, particularly in social situations, to think of alternatives to Student's immediate perceptions and accept others' ideas, which fall under the broad categories of emotional regulation and social interactions. (N.T. p. 1105; S-110 p. 70)

11. After an Executive Functions Screening in March 2009, the time for the individual counseling sessions increased and the focus shifted from developing social and emotional skills to more explicitly addressing Student's needs for organization, planning, goal setting and decision-making. There is, however, substantial overlap between the skills addressed in the earlier and later counseling sessions. (N.T. pp. 1105, 1106, 1109—1126, 1129; P-78, P-81)

12. The sessions with the school psychologist, including going into community settings to practice skills, have been effective in helping Student recognize Student's role in difficult peer interactions and improve peer relationships, as well as in improving executive functioning skills, such as planning and organization and emotional regulation. (N.T. pp. 1022—1024, 1040, 1101, 1127, 1128; P-81, S-110, p. 71)

13. In July 2008, the same neuropsychologist produced a transition plan report based upon prior evaluation data and upon questionnaires completed by Parents and by four of Student's teachers. The report essentially discusses how Student's impairments affect Student's potential for maintaining employment and living independently, and included recommendations to continue successful interventions, such as executive functioning counseling and travel training. (N.T. pp. 991—1005; S-110 pp. 63—73)

14. In December 2008 an independent educational and rehabilitation consultant completed a transition assessment relying largely on the same data used by the neuropsychologist, as well as Student completed report. The consultant also examined the Private School transition curriculum, finding that it addresses the areas specified in the IEP he reviewed. (S-118, p. 14)

15. The consultant questioned whether the Private School transition program is individualized and specific enough to assure that Student can function independently after leaving public school, given Student's significant needs and the challenges of community life. He also questioned whether Student has sufficient opportunity to generalize the skills Student develops in the small, insulated environment of Private School and believes that the skills should be taught in the community where Student will live after leaving public school. The consultant agreed with the neuropsychologist concerning Student's need for travel training and executive functioning counseling, and also recommended physical and occupational therapy, all services to be delivered in the natural environment to the extent possible. There was also a recommendation for rehabilitation counseling, to be provided by the Private School transition coordinator until the Office for Vocational Rehabilitation (OVR) becomes involved during Student's last year in school. (S-118, pp. 13, 14, 19)

16. The District contracted with the Delaware County Intermediate Unit (DCIU) for a travel training assessment in December 2007 to determine Student's ability to independently get around in community settings. Student also received four sessions of travel training instruction from DCIU during the spring of 2008 and spring of 2009, and is expected to receive similar instruction in 2010. (N.T. pp. 346, 348, 349, 499 ; P-64, P-65, P-67)

17. Student was enthusiastic and motivated to succeed with the travel training, made good progress in each year and retained the skills Student learned from year to year. (N.T. pp. 1018, 1019, 1040; P-64, P-66, P-68, S-110, pp. 16, 17)

18. In September 2008, a Private School occupational therapist began working with Student in a group setting, and also began seeing Student individually in September 2009. The group setting during the 2008/2009 school year was conducted with the physical education teacher and focused on introducing activities and games in a social setting. The groups gave Student the opportunity to practice motor planning, an area of difficulty, as well as engage in facilitated social interactions. (N.T. pp. 1451—1454)

19. During the current school year, the group activity is a twice weekly walk around the Private School campus. Because Student sees the other participants in the walking group more frequently, there are more instances of interpersonal conflict and a greater opportunity for practicing conflict resolution and social repair skills. (N.T. pp. 1454—1456, 1464, 1465)

20. Individual sessions are held in the occupational therapy gym for 30 minutes each week, working on balance, balance awareness, tolerance, strengthening and safety awareness, which is also an important component of the group sessions. (N.T. pp. 1457, 1458, 1462, 1463)

21. The individual OT sessions address needs for motor planning, postural stability, postural control, body awareness gravitational concerns, as recommended in a private OT evaluation completed at the end of February, 2008. Items and activities to address sensory needs, especially during periods of anxiety or stress, are also available to Student, who requests them as needed. (N.T. pp. 1460—1462, 1467; P-45, pp. 11, 12)

22. The only agreed IEP for the period at issue in the hearing, which the parties began drafting soon after Student first enrolled at Private School, in October 2006, was intended for the 2006/2007 school year, but was not finalized until May 2007. (N.T. pp. 379, 790; P-23, S-28)

23. Transition services in that IEP included academic preparation, affective preparation, such as improving peer and supervisor interactions and career introduction, all with IEP goals. Transition services also included exploratory career introduction, which did not have an IEP goal. (P-23, pp. 15, 16)

24. The proposed IEP for the 2007/2008 school year included the same services and activities, and added on-campus employability skills training, travel training, self advocacy skills and discussion of citizenship rights and obligations. (P-26, pp. 14, 15)

25. A physical therapy evaluation was conducted in June 2007 by the PT/OT provider who contracted with the District for evaluations and services, followed by an August 2007 report noting that Student did not need physical therapy to function successfully in the school environment. The District did not provide direct physical therapy services during the 2007/2008 school year. (N.T. pp. 531, 891, 928; P-58, pp. 2—5, 7, S-32)

26. In October 2008, as part of a mediation agreement between the parties, the District agreed to fund the physical therapy evaluation that had been completed in February 2008 by an evaluator chosen by Parents. In April 2009, the District agreed to provide 60 min./week of physical therapy services from a provider selected by Parents, which satisfied Parents' request for physical therapy services. (N.T. pp. 420—423; S-109, S-134, S-136,)

27. The IEP proposed for the current school year adds additional activities, including formal assessments such as the SAGE, practice completing job applications, participation in the school the mall program to practice employability skills in a natural environment and continuation of successful program, such as the Equilibrium equine program, travel training and executive functioning counseling. (N.T. pp. 706, 707, 712—737; S-148, S-166)

28. During the summer of 2009, the District agreed to fund the day component of the Private School ESY program for Student but refused Parents' request to pay for the transitional living overnight program. Based upon Private School regression/recoupment data, the District concluded that Student was not eligible for ESY services for 2009, but agreed to partially fund the program because the summer program is directed toward independent living skills important for Student's transitional program (N.T. pp. 355, 356, 464, 612—614; P-36a, S-142)

DISCUSSION AND CONCLUSIONS OF LAW

A. Legal Standards/Issues

1. FAPE Standards

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, *et seq,.* a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child

progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009). "Meaningful benefit" means that an eligible child's program affords him or Student the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/Student unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, however, an LEA is <u>not</u> required to provide an eligible student with services designed to provide the "absolute best" education or to maximize the child's potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

2. <u>Burden of Proof</u>

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parents challenged the appropriateness of the District's provision of services, Parents must establish that the District's actions with respect to providing services to Student resulted in a denial of meaningful educational benefit.

Since the Court limited its holding in S*chaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

3. Statute of Limitations

In their complaint, filed on July 22, 2009, Parents sought compensatory education from the District from the time Student was first enrolled in Private School in the 2006/2007 school year through the present. The District immediately sought to limit Parents' claims to the two years preceding the filing of the complaint, *i.e.*, July 23, 2007 forward.

The IDEA statute and the federal regulations provide that a proper due process complaint "must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the complaint." 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. §300.507(a)(2). The regulations further provide that "A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or public agency knew or should have known

about the alleged action which forms the basis of the complaint." 34 C.F.R. §300.511(e), based upon 20 U.S.C. § 1415(f)(3)(c). The two year limits on the subject matter of a due process complaint and on the time for submitting a complaint, however, are subject to the exceptions found in §300.511(f): "...The timeline does not apply to a parent if the parent was prevented from filing a due process complaint due to (1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint or (2) the LEA's withholding of information from the parent that was required under this part to be provided to the parent." 34 C.F.R. §300.511(f); 20 U.S.C. Section 1415(f)(3)(c).

The "knew or should have known" language in the IDEA limitations provisions is stated in the same terms as the legal principle known as the "discovery rule," which generally provides that, "the statute of limitations begins to run when a person knows, or through the exercise of reasonable diligence should know" of the injury underlying the complaint. *Vitallo v.* v. *Cabot Corporation*, 399 F.3d 536, 538 (3rd Cir. 2005). In *Vitallo* the Court of Appeals noted that "the touchstone" of the discovery rule "is reasonable diligence by the plaintiff." 399 F.3d at 538, 539. The court also provided substantial guidance in applying that standard:

> We have construed this objective reasonableness requirement to mean that the statute of limitations begins to run when plaintiffs come to possess "sufficient critical facts to put [them] on notice that a wrong has been committed and that [they] need to investigate to determine whether [they are] entitled to redress." *Zeleznik v. United States*, 770 F.2d 20, 23 (3d Cir.1985).
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> A plaintiff seeking the shelter of the discovery rule bears "a duty to exercise 'reasonable diligence' in ascertaining the existence of the injury and its cause." *Bohus*, 950 F.2d at 925.[2] What does reasonable diligence require? It requires that putative plaintiffs "exhibit[ ] those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others." *Cochran v. GAF Corp.*, 542 Pa. 210, 666 A.2d 245, 249 (1995). Proof of a plaintiff's subjective knowledge is insufficient to invoke the discovery rule; a defendant can inquire what a reasonable plaintiff should know or should know to check. *See id.* (explaining that reasonable diligence is an objective, rather than a

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

> subjective, standard). Put simply, clues indicating to a reasonable person an injury or its cause cannot be ignored.

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

The general legal principles applicable to the discovery rule coincide with the mandate found in 20 U.S.C. §1415(b)(6)(B) and 34 C.F.R. §300.507(a)(2), which limit the substantive contents of a due process complaint. In addition, the statute and regulations explicitly require that a request for a due process hearing on a complaint must be made "within two years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R §300.511(e), 20 U.S.C. § 1415(f)(3)(c). Both the mandatory language of the IDEA statute and regulations and common law standards relating to the discovery rule place the burden of proving when the limitations period begins to run on the party seeking the benefit of the rule.

District courts applying the "knew or should have known" language in the IDEA context have stated that "any inquiry into the application of the statute of limitations requires a highly factual determination as to whether the parent 'knew or should have known' of violations that formed the basis of their complaint." *J.L. v. Ambridge Area School District,* 2008 U.S. Dist LEXIS 13451 (W.D. Pa. Feb. 22, 2008) at *21. Similarly, a parent who asserts that claims dating back more than two years from the filing of the due process complaint are not time-barred because one of the statutory/regulatory exceptions applies bears the burden of proving the exception(s) asserted. That is likewise a factual inquiry which cannot be determined without a full record. *See P.P. v. West Chester Area School District,* 557 F. Supp. 2d 648 (E.D. Pa 2008);

2008 U.S. Dist LEXIS 42536 (E.D. Pa. May 30, 2008) at *27: "Any inquiry into the application of the statute of limitations requires a highly factual determination as to...whether the parents were prevented from filing a due process complaint due to the alleged misrepresentation of, or the withholding of information by the Defendant." (*quoting J.L. v. Ambridge Area School District* at *21.)

Accordingly, the determination when Parents knew or should have known of their injury was based upon the testimony of Student's Father, who was the first witness, and a ruling was made at the conclusion of his direct examination at the February 1, 2010 hearing session limiting the scope of the claims considered in this case to the period beginning in July 2007. N.T. pp. 329—332 As noted in the ruling on the record, Parents were continuously dissatisfied with the services provided by the District as far back as 2005. The placement at Private School, in fact, arose from a settlement agreement between the parties in the spring of 2006. (S-168) Additional problems arose as the parties began the process of developing a new IEP for Student in October 2006, soon after enrollment at Private School. *See* letter from Parents dated 12/4/06, referencing discussions with the District concerning "numerous problems with the IEP developed at the October 27, 2006 meeting held at the Private School." (S-11, p. 1) The letter went on describe in detail the problems Parents perceived. Clearly, therefore, Parents believed then that the District was not providing FAPE to Student. There is no suggestion anywhere in the record, in either testimony or documents, that the District prevented Parents from filing a due process claim by withholding information required to be provided or by misrepresenting that the problems had been resolved. To the contrary, the record establishes that Parents frequently expressed their dissatisfaction with many aspects of Student's program beginning in the early part of the 2006/2007 school year, and certainly never believed that the issues they raised had

been resolved by the District. Consequently, in order to obtain compensatory education for most or all of the 2006/2007 school year, Parents needed to file a complaint in the fall of 2008 rather than nearly a year later.

4. Extension of Student's IDEA Eligibility/School District's LEA Status Past Age 21

Rather than simply requesting that Student be permitted to access any award of compensatory education past age 21, Parents seek an order extending Student's eligibility for special education for three years past age 21 as compensatory education, contending that the District's pervasive failure to provide appropriate services justifies the remedy of requiring the District to remain Student's LEA and continue to provide special education services beyond the end of the 2010/2011 school year, when Student will reach Student 21st birthday. (S-152, p. 2; Parents' Closing Argument, p. 26)

A preliminary ruling on legal issues implicated by this claim was issued via e-mail message prior to the February 1, 2010 hearing session. (HO-1) In their written closing arguments, however, the parties appear to be somewhat unclear on the legal ruling, warranting further explanation. In addition, there is now a full record on which to base a final ruling on this claim.

The notion that a District can be ordered to serve as LEA for an eligible student past the age of 21 arose in the case of *Ferren C. v. School District of Philadelphia*, 595 F.Supp.2d 566 (E.D. Pa. 2009), where the district court concluded, first, that there is no basis in the IDEA statute for extending eligibility for special education beyond age 21. 591 F.Supp. 2d at 574. The court further concluded, however, that the authority to fashion broad equitable

relief includes the power to order a school district to continue serving as LEA for an eligible student for the purpose of administering a compensatory education award.[3] Based upon *Ferren C.*, the relief Parents seek is not really an extension of IDEA eligibility, but additional equitable relief of extended District responsibility to Student to accompany an award of full days of compensatory education.

Determining that in an appropriate case, there may be an equitable basis for ordering an LEA to continue to provide services to a child past age 21, however, is only a small first step toward actually imposing that obligation. The decision in *Ferren C.* suggests that such an equitable award is appropriate only in very limited circumstances, where the record supports the conclusion that the student in question cannot fully benefit from a substantial compensatory education award unless the district remains involved, or where the district's past conduct had an egregiously adverse effect on the student's progress. Both of those circumstances existed in *Ferren C.*, but neither justifies requiring the District to remain Student's LEA past age 21 in this case.

As discussed in more detail below, Parents here have consistently refused to permit Student to participate in transition services and activities offered by the District and Private

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[3] The District asserts that even if the district court was correct concerning its own power to award such relief, it may not be ordered by a hearing officer in an administrative hearing decision. As stated in the preliminary ruling, however, that position is not justified

Although it is true that in 1415(g)(2)(C)(iii), the IDEA statute speaks in terms of "the court" granting "such relief as the court determines is appropriate," that provision was cited by the court in *Ferren C.* as the source of the court's power to award compensatory education and tuition reimbursement. The court noted that extending an LEA's responsibility to administer an award of compensatory education for a student past the age of 21 is within the same statutory power that permits awards of compensatory education and tuition reimbursement. There is no reasonable basis for interpreting the statutory provision to apply to the court alone for this particular aspect of equitable relief, when all other forms of equitable relief purportedly reserved to the courts have consistently been granted by hearing officers as well as by the court. Accepting the District's argument would suggest that hearing officers likewise lack the authority to award compensatory education or tuition reimbursement.

The District reiterated its position that the hearing officer lacks the same authority to fashion equitable remedies granted to the court, but did not explain how or why hearing officers have the authority to grant some equitable remedies but not this particular remedy.

School that do not conform to Parents' views concerning the appropriate nature and timing of such services and activities. In addition, Parents have been aggressive in both finding and rejecting evaluators and service providers for Student, as well as in their insistence that the District contract with their preferred providers. *See, e.g.,* F.F. 4, 26 Parents' insistence on controlling how and when Student participates in evaluations and recommended services creates a situation in this case that is the polar opposite of the circumstances in *Ferren C.* that led the court to conclude that equity required the district to remain involved to assure that the student fully benefited from the very significant compensatory education award. The record concerning Parents' involvement in planning Student's program in this case does not come close to supporting a conclusion that they would be incapable of choosing appropriate compensatory services without the District's continued involvement.

In addition, contrary to Parents' arguments, the District's conduct in this case was far from egregious. As fully explained below, the record supports only one minor lapse in the District's obligation to provide appropriate services to Student, denial of payment for the transitional living/residential component of ESY services during the summer of 2009.

This case, therefore, does not present any circumstances that justify an equitable remedy of extending the District's responsibility to Student beyond age 21, other than, possibly, to distribute the limited compensatory education award if not used prior to the end of the 2010/2011 school year.

B. Specific Claims Re: Denial of FAPE

Despite the length and intensity of the dispute between the parties and the extensive record generated by the due process hearing in this case, Parents' claims do not implicate the academic aspects of Student's program at Private School. (Parents' Closing Argument at p. 6)

The dispute concerns, in essence, whether the District, through services provided by Private School and otherwise, has sufficiently prepared Student to work and to live independently once Student leaves the public education system. Moving into adulthood, Student's disabilities adversely and primarily affect the skills necessary to function effectively in an adult world, including social, communication, planning and organizational abilities necessary to manage a home, obtain and keep a job, monitor and care for Student's serious health needs.

Before discussing each aspect of the District's program that Parents contend was either inadequate, inappropriate, or inordinately delayed, the underlying issue that generated and permeates the conflict in this case must be addressed.

The fundamental dispute between the parties centers on whether a free, appropriate public education, including effective parental participation in the process of developing an appropriate program for an eligible student, requires a school district to accede to every parental desire, and wholly adopt parents' definitions of appropriate services. Obviously, that is not the case. Numerous court decisions have noted that although Parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it, and unreasonable conduct may relieve a school district of responsibility for delays and other procedural flaws. *See, e.g., Kasenia R. ex rel. M.R. v. Brookline School Dist*., 588 F.Supp.2d 175, 190 (D.N.H. 2008):

> The record shows that while Kasey's parents attended her IEP team meetings and were allowed to raise their ideas, issues, and concerns, they unreasonably withheld their cooperation in developing her IEP: they objected to all of the evaluations proposed by the District;…they insisted upon unreasonable conditions that the District could not agree to.... Based on the evidence in the record, this court concludes that the parents acted unreasonably during the IEP process. As any delay in the development of Kasey's IEP is substantially attributable to Student parents' conduct, this alleged procedural flaw did not violate the IDEA.

See also,

> *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives" and that failure to agree on placement does not constitute a procedural violation of IDEA); *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) ("[P]arents who seek public funding for their child's special education possess no automatic veto over a school board's decision"); *Rouse v. Wilson*, 675 F.Supp. 1012 (W.D.Va.1987); 34 C.F.R. Pt. 300 App. A, at 105 ("The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive [a free appropriate public education]."

Quoted in Tammy S. v. Reedsburg School Dist., 302 F.Supp.2d 959, 976 (W.D.Wis. 2003).

S.M. v. Weast, 240 F.Supp.2d 426, 436 (D.Md. 2003):

> [B]efore they can fairly argue that the best the school authorities had to offer was or is not good enough, the critical pre-requisite is that the parents must have cooperated with the school authorities in good faith to try to develop the IEP. Good faith cooperation includes reasonable and timely cooperation with the school authorities

In short, the "team" designation for the group ultimately responsible for developing a program assumes give and take among the members, and willingness to compromise on the part of all team members, including Parents. In this case, however, Parents refused to agree to anything that was not entirely in accordance with their beliefs and desires, including the sequence and every component of instruction in living and employment skills. Parents' specific claims and allegations must be considered in light of their insistence that evaluators, evaluations and IEPs meet with their approval in every aspect, include everything they believe to be important and exclude anything with which they do not entirely agree. The record does support Parents' argument that there was "profound delay" in providing Student with important services, available at Private School or otherwise, from which Student could have benefited. (Parents' Closing Argument at p.12) Such delays, however, arose from Parents' unwillingness to move at all from positions that they adopt. Parents' reference to having "prevailed on all" the issues considered at the October 2008 mediation session is a telling reference to the approach Parents

have taken with the District and Private School since Student enrolled. (Parents' Closing Argument at p. 25) Neither mediation nor IEP meetings, however, are meant to be adversarial, resulting in a "prevailing" party. Winning is not, or should not be, the objective. The point of both mediation and IEP team meetings is to reach a reasonable consensus, not vanquish an opponent and assure that the final document reflects only one point of view.

Parents argue that before they filed their due process complaint, the District never expressed concerns about Parents "impeding the IEP process." (Parents' Closing Argument at p. 24) The real issue, however, is whether Parents did, in fact, delay the process. The record in this case discloses that Student's reevaluation, begun in August 2007, required at least 6 IEP team meetings, more than a calendar year, and numerous drafts, to finalize the RR. (F.F. 4) Moreover, despite Student having entered Private School as a new student in the fall of 2006, it took nearly the entire school year, until May 2007, to finalize the first—and only—IEP that Parents accepted. (F.F. 22) Despite the IDEA requirement that IEPs should be reviewed periodically, but at least annually, (20 U.S.C. §1414(d)(A)(i); 34 C.F.R. §300.324(b)), the process of reviewing and updating Student's May, 2007 IEP, has been virtually continuous since that time. (F.F. 24, 27) The draft IEP offered in November 2009 that constitutes the District's final offer of an IEP is more than 75 pages long. Both before and after the mediation held in October 2008, there were numerous meetings and attempted meetings of the IEP team and meetings between Parents and one or more District representatives. The amount of time and number of meetings to resolve Parents' disagreement with, primarily, activities of daily living, transition and related services, is excessive notwithstanding the undoubted importance of these issues in light of Student's complex cluster of disabilities arising from genetic anomalies leading to serious medical and functional problems. The amount time expended on these matters, the

extensive correspondence and number of meetings between these parties is highly unusual and supports the conclusion that any delays in providing Student with an appropriate IEP, particularly with respect to transition services directed toward preparing for post high school employment, are attributable to Parents, who have inordinately lengthened and complicated the process of developing a current IEP to guide Student's educational program for the 2007/2008, 2008/2009 and 2009/2010 school years.

1. Delay in Providing Services

Parents' primary contentions with respect to Student's transition plan are that assessments and services were delayed. The record establishes, however, that Student has made significant progress in all areas identified as transition needs. Student has been provided with individual counseling services the beginning of the 2007/2008 school year. (F.F. 10) Although the description of those services changed to executive functioning counseling, the emphasis shifted and the time increased, Student still received appropriate services that addressed executive functioning needs from the beginning of the 2007/2008 school year, as soon as practicable, given the need for the psychologist to more specifically identify Student's counseling needs. (F.F. 10, 11)

Travel training was provided during the spring of 2008 and 2009, and was expected to resume in the spring of 2010. (F.F. 16) There is no doubt that Student has made significant progress since an initial evaluation in December 2007. (F.F. 17; P-64, P-66, P-68)

Parents did not suggest that Student failed to make meaningful progress with respect to independent travel and improved executive functioning skills, but only, and somewhat vaguely, that Student would have made greater progress with increased services. There is also little doubt that any student would make greater progress when more services are provided, but as explained

above, the District's obligation is to provide appropriate, not optimal services, and to assure that Student makes meaningful progress, not the best possible progress. Parents fell far short of establishing that the District did not meet that standard.

3. Transition Plan—Assessments/Services

Parents' contentions with respect to the need for a multi-year transition plan, and earlier vocational and assistive technology assessments are similarly unsupported by evidence that the delays of which Parents complain resulted in a lack of meaningful benefit to Student from Student's transition plan. The District provided a coordinated set of transition activities, beginning with the first and only agreed IEP, and added more services and activities to the transition plan in each successive school year, thereby fulfilling its transition obligations to Student. (F.F. 23, 24, 27) The District was not required to accede to Parents' preference for a complete, multi-year plan from the beginning rather than a sequential series of transition plans that together constitute a multi-year plan. The District was also not required to assure that vocational assessments were conducted in accordance with Parents' preferred timing.

4. Denial of Physical Therapy and ESY Services

a. Physical Therapy

Although the District discontinued Student's physical therapy for a time in terms of providing direct services from a physical therapist, the district adequately addressed Student's physical therapy needs through the Equilibrium equine program. Testimony from both Parents and their expert witness described Student's ability to accomplish motor tasks that Student had not mastered with years of direct physical therapy after participating in the equine program. (F.F. 7) Again, Parents produced no evidence of a detriment to Student from the interruption of direct physical therapy services.

b. ESY Services

During the summers of 2008 and 2009, Student's ESY program at Private School included the transitional living experience. (S-92, S-143) As the parties prepared for the summer of 2009, however, the District concluded that Student was not eligible for ESY services. The reason given for that decision was Private School regression and recoupment data. (F.F. 28) Nevertheless, the District also determined that Student should receive the daytime component of Private School's ESY services because "Student was learning transitional skills we felt were important for Student." (N.T. p. 613; F.F. 28)

The District's position with respect to ESY services for the summer of 2009 is confusing. First, there is no record of the data that purportedly supported the determination that Student was ineligible for ESY services, and no record that such data was ever shared or discussed with Parents. Second, under 22 Pa. Code §14.132, regression/recoupment cannot be the only basis for determining ESY eligibility. The Pennsylvania regulation requires the District to consider a total of seven potential factors, including the importance of the skills included in the ESY program for meeting Student's "IEP goals of self-sufficiency and independence from caretakers," and the severity of Student's impairments. §14.132(a)(2)(v), (vii) The regulation further provides that "no single factor will be determinative." §14.132(a)(2)

Consequently, assuming that there was regression/recoupment data that did not support ESY eligibility, the District could not appropriately base denial of ESY services on that alone. The District tacitly recognized that by offering some ESY services. It is difficult to understand, however, why the District concluded that it could chose to provide only the daytime services, component and refuse to fund the overnight portion of the program, a part of the ESY experience that is obviously an excellent means of fostering self-sufficiency and independence.

Since there was no factual or legal basis for the District not to provide the overnight portion of the 2009 ESY program, the District will be required to reimburse Parents for the amount they paid for that part of the program.

5. Proposed IEP

In the course of the due process hearing, the District questioned Parents' expert neuropsychologist, who knows Student well after evaluating Student four times, beginning when Student was a young child, concerning the goals and specially designed instruction offered by the District for the current school in the IEP proposed in September 2009 and updated in November 2009 (S-148, S-166) The psychologist agreed that the goals would address Student's and foster development of skills necessary for employment and independent living, suggesting only two that could be shortened and/or clarified. (N.T. pp. 1054—1059) The psychologist also agreed that virtually all of the proposed specially designed instruction comports with Student recommendations and are appropriate. (N.T. pp. 1059—1061)

Parents provided no reason for rejecting the IEP in its entirety, specifically disagreeing only with the proposal to have Student participate in School in the Mall program to develop employability skills by working at a department store under the supervision of school staff. Parents initially rejected that proposal because of their discomfort with another student's participation in the same group. Now that the other student no longer attends Private School, Parents only reason for refusing to accede to Student's participation in the School in the Mall program is Student expressed interest in working in child care or with animals after graduation. (N.T. pp. 304, 305) Parents prefer that the District provide only that type of work experience for Student, apparently even with respect to only an initial, exploratory experience to assess and develop the kinds of skills that would be needed in any job.

Parents' position concerning the School in the Mall program, specifically, and the IEP in general is an example of their refusal to agree to District proposals unless every aspect meets with their approval. As discussed above, that position has resulted in unreasonable delays in providing Student with services that are appropriate and likely to be highly beneficial to Student. The School in the Mall program certainly falls into that category.

The District, through Private School, is permitted to implement all aspects of its proposed IEP entered into the record of this case as S-166, and that IEP will be considered pendent should the parties again try and fail to reach agreement on a revised and updated IEP for the 2010/2011 school year.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Nazareth Area School District is hereby **ORDERED** to reimburse Parents. for the cost of the overnight component of the Private School's transitional living program that Student attended during the summer of 2009, as well as other out of pocket costs, if any, incurred by Parents as a direct result of Student's participation in that aspect of the transitional living program.

It is **FURTHER ORDERED** that the Nazareth Area School District is permitted to implement the final proposed IEP entered into the record of this case as S-166, which will be considered Student's pendent IEP until such time as the parties mutually agree to a new IEP.

It is **FURTHER ORDERED** that all other claims in this matter are **DENIED**.

Anne L. Carroll

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Anne L. Carroll, Esq.
HEARING OFFICER

May 29, 2010