06-068

CASE CLOSURE SUMMARY REPORT

Public Schools
School Division

Name of Parents

Name of Child

October 10, 2006
Date of Decision or Dismissal

Counsel Representing LEA

Lois N. Manes
Counsel Representing Parent/Child

Parents
Party Initiating Hearing

LEA
Prevailing Party

Hearing Officer's Determination of Issue(s):

Reimbursement/Statute of limitations/Exceptions to the SOL Private placement.

Hearing Officer's Orders and Outcome of the Hearing:

Written decision. IDEA statute of limitations applies to this case. Ore tenus hearing on the exceptions issue only. LEA made a Motion to Dismiss/Motion to Strike at conclusion of Petitioners' case on the exceptions issue. Granted motion. Case dismissed w/ prejudice.

This certifies that I have completed this hearing in accordance with regulations. I have advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Sarah Smith Freeman
Name of Hearing Officer

Sarah S. Freeman
Signature

VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING REPORT

SCHOOL DIVISION: PUBLIC SCHOOLS ("LEA")
LEA COUNSEL: ROBERT J. BARRY, ESQUIRE ("LEA COUNSEL")
LEA REPRESENTATIVES: & ("LEA REPRESENTATIVES")
NAME OF PARENTS: MR. & MRS. , "PARENTS" & "PETITIONERS")
NAME OF STUDENT: ("STUDENT" and "PETITIONER")
NAME OF COUNSEL: LOIS N. MANES, ESQUIRE ("PETITIONERS' COUNSEL")
NAME OF ADVOCATE: CHERYL A. POE ("ADVOCATE")

VDOE EVALUATOR: REGINALD B. FRAZIER, ESQUIRE, ("EVALUATOR")

PARTY INITIATING HEARING: PARENTS AND STUDENT, ("PETITIONERS")

HEARING OFFICER: SARAH SMITH FREEMAN ("HEARING OFFICER")
PRIOR HEARING OFFICER: F. MATHER ARCHER ("PRIOR HEARING OFFICER")

INTRODUCTION

This matter came for hearing on May 15 & 16, July 26, August 24 & 29, and on September 26, 2006 at the , located in , Virginia before a duly appointed Hearing Officer. Present in person, in addition to the Hearing Officer and the Court Reporter, were the father and mother, ("Parents"), their son, ("Student"), collectively referred to as the "Petitioners", Counsel for Petitioners, the Advocate, Counsel for the LEA, LEA Representatives, and the Evaluator who reviewed these proceedings. Plaintiff's exhibits Nos. P-1 through P-41 and Defendant's exhibits Nos. D-1 through D-36 were admitted into evidence at the hearing of this matter.

This request for due process hearing was requested in writing. The request for due process was received by the LEA

on March 23, 2006 and this Hearing Officer was duly assigned to hear this matter on June 28, 2006. A prior Hearing Officer was assigned to hear this matter on March 24, 2006, however, as a result of a conflict, he recused himself from this hearing by his Order dated June 16, 2006.

Prior to the hearing of this matter fully, on the merits of the case, the prior Hearing Officer ruled on May 16, 2006, in response to the LEA's Motion In Limine and Motion To Dismiss, that the IDEA two-year statute of limitations had tolled and that this due process hearing request is time-barred.

This hearing was convened, however, pursuant to Petitioners' request for ore tenus hearing on the grounds that Petitioners are entitled to exception from the limitation ruling.

Petitioners testified and they also called their witnesses to testify on their behalf, Dr. L. Matthew Frank, M.D., and Ms. Erica Smith-Llera, M. Ed., exclusively on the issue of exceptions to the applicability of the IDEA two-year statute of limitations.

Specifically, Petitioners asserted, by their responsive remarks to the LEA's motions, that exceptions are applicable to the IDEA statute of limitations because of the LEA's misrepresentations to Petitioners and the LEA's failure to observe IDEA procedural requirements: Student did not sign off on the procedural due process requirements notice, informing him of his right to challenge the IEP by filing due process, when he attained the age of majority. Further, Petitioners

assert that the transfer of rights to Student at the age of majority, (18 years), required by IDEA, never occurred.

Counsel asserts that the Parents were not fully informed of their procedural rights by the LEA and that the LEA misinformed them of their child's potential, his capacity and, ultimately, the LEA misrepresented to them that their child had "learned all that he could learn," effectively depriving their son of a FAPE. Parents also assert that they were unable to bring the action earlier because they were unaware of the "inappropriateness" of Student's program at the LEA, unaware that the harm done to Student was legally attributable to the LEA, and unaware of their right to relief from the LEA, all of which they attribute to LEA wrongdoing. (Petitioner's Response, at 1)

Parents allege that they removed their son from this LEA upon their realization that their son would receive a Certificate of Program Completion (D-1) instead of a Standard Diploma. When the Parents discovered this fact, Parents allege, they removed their child and unilaterally placed him in a private school, , which was recommended to them by their child's medical doctor, Dr. Frank. offers an academic curriculum for learning disabled children and for children with ADHD. (T.IV, 8) Petitioners now seek reimbursement and compensatory post-secondary educational services for the Parents' tuition expenses at the private school and for their son's additional special education needs.

Student is now 22 years of age and he has earned a Standard Diploma (which is not identical to a public school diploma) from the private school.

Parents allege that, over the years, the LEA misrepresented their child's special education progress. Misrepresentations by the LEA, Parents allege, deprived their son of the opportunity to complete the academic requirements which would have entitled him to receive a Standard Diploma upon graduation from the LEA. Parents assert that Student was prevented from taking required SOL's or difficult high school courses, and that he was kept in an inappropriate placement in a classroom for the educable mentally retarded ("EMR") for years. Subsequent educational evaluation completed by the LEA on May 27 & 28, 2003, by , M. Ed., School Psychologist, (D-21) concluded that Student was learning disabled, not EMR. Parents assert that when they finally understood the ramifications of the EMR label to their son's academic program at this LEA, it was too late for Student to receive appropriate remedial effort. Their son would never be able to complete the requirements for a Standard Diploma by the age of 22 years, the age when he is generally no longer eligible for special education services through IDEA.

Parents allege that their son, who was an identified special education student in this LEA, did not receive a "free and appropriate education," a "FAPE," pursuant to federal special education law, the Individuals With Disabilities

Education Act (the "IDEA"), 20 U.S.C. §1400 et seq., the regulations at 34 C.F.R., Part B, §300 et seq., (1994), the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, Title I, 118 Stat. 2647, the Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, Title I, 111 Stat. 37, and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, ("Virginia Regulations"), at 8 VAC 20-80-10 through 8 VAC 20-80-190. (2001/2002)

At the outset of this due process hearing, the prior hearing officer having ruled on the applicability of the IDEA two-year statute of limitations to this matter, also ruled that the operative date for accrual of this cause of action was March 2 or 3, 2004, the dates of Student's admission application and diagnostic assessment at the private school. (T.II, at 134)

LEA counsel asserts that the LEA has never misrepresented this child's academic status to the Petitioners. The LEA asserts that it is now "too late" to make a request for reimbursement. "Virginia cases make clear that a student's rights under the IDEA are meant to be vindicated promptly." (Defendant's Motion To Dismiss, at 6) Petitioners, the LEA states, either knew or should have known of their dissatisfaction with this LEA and could have requested reimbursement long ago.

The LEA asserts that the Parents were informed of their right to seek due process on many occasions and, specifically,

at the time of creation of the last IEP on May 8, 2003. Further, if Student had attained the age of majority and did not "sign off" on the last IEP, it was not a significant procedural error to omit his signature from the forms. Student admits that he did participate in the May 8, 2003 IEP meeting, along with his mother. It was not a significant procedural defect either, the LEA asserts, to fail to obtain his signature evidencing his consent to implementation of the last IEP.

LEA counsel asserts that Student's mother consented to all of her son's IEP's, including the final IEP dated May 8, 2003 which assigned Student to an EMR classroom.

LEA counsel asserts that the LEA has not misrepresented Student's educational status, academic aptitude, progress or potential to the Parents or to Student. Therefore, the applicable two year IDEA statute of limitations, without exceptions, should bar this matter as untimely.

An LEA Motion To Determine This Matter Resolved was overruled by this Hearing Officer on August 10, 2006. LEA counsel made a Motion To Strike at the conclusion of Petitioners' presentation of the facts pertinent to the issue of exceptions to the applicability of the statute of limitations, namely, failure to inform the Parents and the Student of their procedural due process rights and the assertion of misrepresentations by the LEA alleged to have prevented these parties from timely filing for due process.

FINDINGS OF FACT

1. Dr. L. Matthew Frank, M.D., of the Children's Specialty Group, Division of Child & Adolescent Neurology, Children's Hospital of the King'a Daughters, provided expert witness testimony in this matter. Dr. Frank is highly qualified in pediatric neurology. He is a physician certified in pediatrics with special competence in child neurology; he is on the full-time staff at Children's Hospital of the Kings Daughters and he is an associate professor of neurology and pediatrics at Eastern Virginia Medical School. (T.I, 65)

2. Dr. Frank testified that he has treated this Student since the age of three years. Student's medical history revealed that Student was born prematurely at about 3 weeks gestation, however, Student's medical problems did not become apparent until, at three years, Student's mother reported Student's "behavioral spells" which were later diagnosed as seizures caused by epilepsy. (T.I, 66)

3. Dr. Frank testified that Student's epilepsy presented a "major impediment" to Student who experienced "very frequent seizures" until he underwent brain surgery in 1998 (right frontal lobotomy) when the epileptic part of Student's brain was removed. (T.I, 66) Miraculously, Student has been relatively "seizure free" since his operation at the age of fourteen years. (T.I, 66) Dr. Frank encouraged the Parents to pursue because "[Student] might get better attention to his needs" and the private school focuses on "learning disabilities." (T.I, 87) Dr. Frank admitted

that he did not review Student's 2003-2004 IEP. (T.I, 90).

4. School records indicate that the school first evaluated Student in 1991. Although Student exhibited average verbal reasoning skills, there were significant deficits in perceptual motor abilities. (D-21)

5. In 1994, Student's verbal reasoning skills continued to be average, however, deficits were revealed in visual and quantitative reasoning skills. Later evaluations completed in 1997 and 2000 revealed a decline in verbal reasoning skills and Student's testing reflected cognitive abilities in the moderately mentally deficient range. (D-21) Student's IDEA classification since March 15, 2000 was EMR.

6. An IEP was completed on May 8, 2003 which reflects that Student and his Parents were advised upon the face of the IEP documentation that Student would receive a Certificate of Completion for his academic effort upon graduation from high school. (D-1)

7. Present levels of performance completed at the time of the last IEP indicate that NEAT (general skills assessment) (D-1) assessed student's abilities and "all areas of skill development were consistent with expectancy for a student of [Student's] age and estimated ability." (D-1, P-5 & P-7) The PLOP and IEP appear to have been made in good faith because the skill levels reflected are similar to Student's then performance. Student's skill levels and learning capacity would soon far exceed the skill levels reflected on the NEAT assessment, however, IEP notes indicate that re-evaluation

might alter Student's future placement. Bad faith or misrepresentation by the LEA cannot logically be inferred from these results. (D-1)

8. Student's abilities, at the time of testing, do not appear to have been intentionally depressed because the report reflects that his performance in the EMR classroom was commensurate with these grades - English B, Math B, History D, Food Occupation C. NEAT results revealed that Student performed at the fourth grade level in Math and Spelling, Oral reading comprehension at the sixth grade level, Reading comprehension at the eighth grade level. (D-1)

9. Student testified at the hearing of this matter that no LEA employee had ever said anything "untrue" to him or had done anything "harmful" to him. (T.IV, 95)

10. The IEP dated May 8, 2003 recites that the mother and son participated in its creation. At the hearing, the mother and her son testified that they could not remember various important details of the document (D-1), however, the document itself is the best evidence that active parental and student participation occurred. Both mother and son have "signed off" on this IEP indicating "participation." The mother has executed consent to the IEP which recommends placement again in the EMR classroom. (D-2)

11. Although the "Transfer of Rights at the Age of Majority (Age 18)" portion of the "last" IEP dated May 8, 2003 has been left "blank," the "Cover Page" of the IEP indicates that on April 26, 2003, Student's classroom teacher,

affirmed on the face of the document that "at least one year prior to turning 18, that the IDEA procedural safeguards (rights) transfer to Student at age 18 years had been completed by the teacher. Also, the teacher's affirmation provides the statement that the teacher explained the import of the procedural safeguards to Student. (D-1) Student's mother testified that she did not remember whether or not her son was given an opportunity to sign the IEP or if he was given a copy of his procedural due process rights. (T.IV, 108)

12. Student's mother, who candidly admitted that she did not have an exact memory of May 8, 2003 (T.IV, 108), testified that she did understand her right to refuse to execute consent to the last LEA IEP (D-1 & T.IV, 132) upon her realization that Student would not receive a Standard Diploma. Regarding due process rights, Student's mother testified that she had received the procedural rights packet from the LEA at "... every IEP for ten years." (T.IV, 132)

13. Upon cross-examination, Student's mother testified that the LEA has made no "specific action or statement" to her that she believes to be "untrue when it was made." (T.IV, 95)

14. Student's father expressed anger toward LEA personnel for his perception of their dismissive attitude toward him and his son's education. He testified that an LEA administrator responded to his complaint about his son's progress, ["Student] has learned all that he can learn." (T.IV, 143-144) Student's father is quite passionate in his beliefs. He is an honest, hard-working man who appears to care profoundly for his

family. Having listened to the testimony of Student and his mother, it is easy to understand why Student's father is so protective and cares so deeply for their welfare. Parents' assertion of an unkind remark alleged to have been made by an LEA administrator is regrettable but an educator's opinion of this nature is not a misrepresentation within the context of IDEA. (T.IV, 142-144)

15. Petitioners' testimony reflected that the primary issue with this LEA is placement. (T.IV, 13) After the Parents noted the "dramatic increase" in their child's skill level at , they questioned the validity of his education at the LEA. (T.IV, 13)

16. Student's father infers "bad faith" on the part of the LEA. He believes that the LEA keeps students in an EMR classroom to avoid negative results on the SOL's by less competent students. (T.IV, 46)

17. The above theory is contradicted by the LEA's endeavor in May, 2003, to re-evaluate Student and to change his classification and placement, if necessary, from EMR to LD, at age 19, based upon new testing data. Further, Student was permitted to take the SOL's and did pass one of them, and failed another one. (P-13, T.IV, 28)

18. Psycho-educational report by , M.Ed., School Psychologist, recommends that Student's classification change from EMR to SLD because "[Student's] overall profile no longer appears consistent with EMR setting." The report was dated May 27 & 28, 2003 and Petitioners were not uniform

in their familiarity with the report. (D-4) Testimony revealed that the Parents were advised of the report. (T. IV, 40)

19. Parents fully discussed and agreed to keep student in the EMR classroom "till the end of the school year." (T.IV,40) There is an e-mail in the academic record which confirms that the mother wanted to keep Student in the EMR class after he the SLD change had been recommended. She desired that he stay in the class because Student had "done well in that program" and the teacher was also LD certified. (D-17)

20. At the core of Parents' complaint is the fact that Student was deemed to have "more potential" at the private school. (T.IV, 44) "Potential," by definition, is a matter of conjecture, speculation.

21. Student testified that he does not recall having his due process rights explained to him. (T.IV, 73) Student also testified that he does not remember discussing the classroom change from EMR to SLD. Student admittted, however, that he discussed major decisions with his parents, "If they were going to make a big decision, they would talk about it with me." (T.IV, 91)

22. Student testified his work books were the "same every year" with the "... exact same thing. So I got to a point where I memorized the answers." (T.IV, 80) In response to LEA questioning, Student admitted that he had not made A's, only B's, "... nothing lower than a C." (T.IV, 80)

23. Student testified that his teacher admitted to him that he had to keep everyone in the class "on equal level." Student believes that he was prevented from doing "more challenging work" because his teacher would not let him. Student's grades do not reflect mastery. (T.IV, 82-83)

24. Ms. , Upper School Principal, , testified at the hearing of this matter. Ms. has an M.Ed. in Educational Leadership from Old Dominion University and a B.A. in Elementary Education and English from the College of William & Mary. Ms. is licensed to teach K - 8th grade. She has been the Principal of for five years and taught school there for five years. (T.V, 5-7)

25. Ms. testified that does not provide a program for mentally retarded students. (T.V,10)

26. Ms. was not qualified to render an expert opinion in this matter because, although she demonstrated competence, Ms. has not yet attained state licensure as a school administrator and has only recently completed courses in her M.Ed. program. Ms. , therefore, was not permitted to render an expert opinion on any matter regarding Student's prior education. (T.V, 21) Ms. testified from personal observation only.

27. Ms. testified regarding Student's motivational level: "I've just never seen a more driven student." (T.V, 41)

28. Ms. testified that Student's IQ scores (93)

on the WIAT indicated greater "potential" than his entry level subtests showed (70-85). Ms. conceded, however, that upon entry into Student's subtests reflected borderline EMR/LD scores. (P-10, P-11, T.V, 45)

29. Parents provided verbal notice of withdrawal only to the LEA on February 23, 2004 of their intent to withdraw Student from this LEA. (T.I, 12)

30. By March 2, 2004, Student had applied to and the school had begun to assess him. (T.V, 52 & P-22) On March 3, 2004 the private school had completed the assessment and created a new IEP. (T.V, 6)

31. Student was formally withdrawn from this LEA on March 31, 2004. (T.I, 7)

32. Procedural rights packet provided to Parents and to Student appears to be complete with required notices contained in it. (D-7)

ARGUMENTS RAISED

Petitioners' due process request states:

"(7) Description of the nature of the problem:

Public School District (PS) violated IDEA when they did not provide Student a free and appropriate public education that would further his education, employment and independent living needs. PS failures and denial of FAPE have caused Student continued harm, prevented him from making educational and adaptive skills progress and has led to regression in his adaptive, academic and functioning skills. PS denied him the opportunity to progress in these areas when they wrongfully placed him in the most restrictive environment, and did not appropriately provide for his identified disabilities and misidentified his area of disability. This has caused him grave harm which will take him years to repair and which may not be fully repairable. Student was also wrongfully removed

and denied OT services. This has caused him to retain severe graphomotor deficits and be unable to appropriately produce assignments which will have long lasting implications and limitations on his academic and vocational performance and future.

Student is now in a private, VIRGINIA STATE LICENSED appropriate placement which addresses his disabilities appropriately through trained staff, research-based, academically sound programs tailored to his individual and unique disabilities and needs, where he is making great progress in his academic, adaptive and functioning skills that PS failed to teach. He is anticipated to graduate with a Virginia standard diploma, June, 2006.

PS failures leave Student and his family with school debt, continued need for academic remediation, transitional living skills, vocational training and NEEDED psychological counseling services to overcome the harm bestowed upon him by PS.

Public Schools failed to provide Student with the required elements of FAPE and should be required to belatedly provide FAPE by reimbursement of the costs of private education and compensatory services for the PS wrongful denial of FAPE and consequent harm to [Student]. PS must be held financial[ly] responsible to correct their errors. PS has made both Substantive and Procedural Violations."

"9. A proposed resolution of the problem to the extent known and available to the Parents:

The parents request reimbursement for the years of private educational placement until graduation;
PS to pay for post secondary educational and vocational services;
PS to pay for private research based reading, math and writing instruction;
PS to pay for private occupational therapy, vocational counseling, evaluation, training services and psychological services; and
Reimbursement for all advocacy and legal fees.

DISCUSSION AND CONCLUSIONS OF LAW

Based upon all of the evidence presented, applicable regulations, case law, and the arguments presented by the parties, the Hearing Officer makes the following conclusions of law;

1. (Student) is handicapped, having

been identified as "Learning Disabled" and comes within the purview of IDEA.

2. Prior to ineligibility at the age of 22 years, on August 1, 2006, required specific conditions and related services in order to derive benefit from his education.

3. At all times relevant hereto, Student and his Parents have resided in Virginia, and the local educational agency (the LEA) has been responsible for educating this Student and providing him with a FAPE.

4. I find that the Parental and Student notice requirements were satisfied by the LEA.

Accordingly, I find that:

5. The IDEA statute of limitations (two years) has been tolled, grounds for exceptions to the running of the statute not having been proven by the facts in this case.

6. The LEA provided this Student with a FAPE during his special education at this LEA, Petitioners' ability to challenge FAPE having become a moot issue by operation of law on March 3, 2006, the date by which a request for due process in this matter could have been filed, this request for due process having been untimely filed on March 23, 2006.

7. Exceptions to the IDEA statute of limitations are not applicable in this matter on the following grounds:

Pursuant to the IDEA, parents are afforded procedural rights and each school district must provide parents of diasabled children these protections 20 U.S.C. §1415 (b)(1)(D). Parents of a disabled child must receive notice of the right to challenge a child's educational placement by bringing

an impartial due process hearing. (Id. § 1415 (b)(2)

In Sellers v. School Board of the City of Manassas, 141 F.3rd 524, at 526-528) (1998), the 4th Circuit ruled that reimbursement is available as a remedy pursuant to the IDEA, compensatory and punitive damages are not. The Court distinguished between the IDEA's provision of relief for failure to provide a FAPE and a cause of action requesting relief for educational malpractice. IDEA, the court reasoned, was not designed to create a remedy for "tort-like" claims.

Courts may reimburse parents for funds spent on their child's education if the parents can prove that the particular school district did not provide a FAPE to the disabled child. (Id. at 527, citing Sch. Comm. of Burlington v. Dept. of Education, 471 U.S. 358, at 370 (1985) and also Florence County school District Four v. Carter ex rel, 510 U.S. 7, at 15 (1993). According to the Florence County case, reimbursement will be provided to parents who place their children, as a unilateral placement, in private school if:

(1) The LEA's proffered placement did not provide a FAPE pursuant to IDEA.
(2) The proffered placement was appropriate.

In this case, Petitioners filed a request for due process on March 23, 2006 pursuant to the IDEA for reimbursement of the parents' funds for tuition expenses at private school, , and for other services. The LEA has filed a Motion To Dismiss this matter in its entirety as untimely. By Interlocutory Order entered on May 16, 2006, this matter was dismissed as time barred, the statute of limitations set forth in 20 U.S.C. §1415 (f)(3)(C) applies to this case, however, the interlocutory order also required the Hearing Officer to "... receive evidence relating to those exceptions raised by the Parents in their argument." The hearing of this matter was continued for the taking of evidence on the exceptions set forth in §1415 (f)(3)(D)(i) and (ii).

Applicable law pursuant to the IDEA 2004 states as follows regarding the statute of limitations at 20 U.S.C. §1415 (f)(1)(A) & §1415 (f)(3)(A)-(D):

(a) **Timeline for requesting a hearing.** A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the state has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by the state law.

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

(1) Specific misrepresentions 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.

Petitioners' counsel argues that parents' "unawareness" tolls the statute of limitations and asserts the holding of Jaynes v. Newport News School Board, 13 Fed. Appx. 16, U.S. Court of of Appeals, 4th Cir. (2001) In that case the parents had signed off on IEP's indicating that they had received their due process procedural rights. In reality, they had not received their rights packet and were "unaware" of their right to file for due process relief. The court asserted that the IDEA statute of limitations did not foreclose their claim as untimely because the LEA had not properly informed the parents of their procedural right to file for due process to oppose LEA action.

Petitioners also maintain they were unable to bring the action earlier because they were not cognizant of the their son's defective program and provision of services by the LEA until a date much later than March 31, 2004 (withdrawal date). Petitioners assert, they did not become "aware" of the harm to their son caused by the LEA's deficiencies until after they became convinced that their son had significantly improved after privately placing him at .

Petitioners assert that misrepresentations made by the LEA should exempt them from applicability of the above statute of limitations. Further, they argue, there is no evidence that the LEA informed Student of his right to file for due process, if he objected to implementation of the last IEP, dated May 8, 2003, to be denied a standard diploma, to request more challenging work, to request re-evaluation from the LEA, or to file any other complaint with the LEA or VDOE, as an adult when he became 18.

At the age of majority, (18 years), federal and Virginia law requires transfer of all parental rights to the student at age 18. (8 VAC 20-80-72)

Pursuant to the IDEA, a transfer of rights is made from the parents to the student at age 18. The LEA must document the transfer of rights within the IEP. Applicable IDEA regulation states as follows at 34 CFR §300.517:

(A) All rights accorded to the parent or parents under the IDEA

(20 USC §1400, et seq.) transfer to children upon the age of majority. (age 18), including those students who are incarcerated in an adult or juvenile, federal, state, regional or local correctional institution.

and:

(b)(2) The local educational agency shall include a statement on the IEP (beginning at least one year before the student reaches the age of majority) that the student has been informed of the rights that will transfer to the student on reaching the age of 18. (34 C.F.R. §300.347(c)

(3) The local educational agency shall provide any further notices required under the Individuals with Disabilities Education Act (20 USC §1400, et seq.) to both the student and the parent or parents.

In this case, there is little disagreement that the parents were adequately notified of their procedural due process rights. As the mother stated, she recalled having amassed numerous procedural rights packets over the past ten years with this LEA. Student's mother has endorsed the consent portion of the last IEP dated May 8, 2003. It was evident during the hearing that Student's mother participated fully during the last IEP meeting of May 8, 2003.

At issue was the transfer of rights to Student at age 18. Although Student testified that he remembers going to the last IEP meeting of May 8, 2003, he testified that he does not remember receiving a copy of his procedural due process rights at age 18 from the LEA nor does he remember when his classroom teacher, Mr. , claims to have reviewed Student's due process rights with him at age 18.

The last IEP dated May 8, 2003, however, certified that Mr. did provide the procedural rights packet to Student and reviewed Student's due process rights with him on April 26, 2003. On the May 8, 2003 IEP, the portion indicating that Student has affirmed receipt of his procedural due process rights, at age 18, has been left unsigned or "blank." Student has endorsed the IEP, however, indicating that he has participated in the May 8, 2003 IEP meeting. He has not executed his consent on the signature page of the IEP though his mother participated at the meeting and executed her consent to the document.

Petitioners assert that because of these procedural omissions, the LEA cannot not prove that Student assented to the last IEP and that, if he did not consent, he was not also informed of his procedural right to file for due process.

Student testified that he discussed with his family all of the educational decisions he has made.

Petitioners assert that Student's due process request should proceed for additional taking of testimony by the LEA and the motions should not be granted. Petitioners assert that there are material issues of fact in dispute, evidence is not insufficient, and that this Hearing Officer should not grant a Motion To Dismiss or A Motion To Strike pursuant to the ruling of DiBuo v. Board of Education of Worcester County, 35 IDELR 248, (U.S. District Court of Md. (2001) because this is not a case in which the parties "solely dispute the law." (Petitioner's Response, at 2)

Petitioners have asserted that misrepresentations have been made to the parents by this LEA. Petitioners refer to certain portions of the LEA re-evaluation effort on May 27 & 28, 2003, the evaluation, which recommended a change from EMP to LD, to prove that Student has always been incorrectly classified.

These issues are viable placement issues, not evidence of misrepresentation: Statements alleged to have been made by the LEA and their exhibits reflect educational opinions based on Student's current status. In retrospect, Student's skill level would begin to align with his potential at the private placement. No evidence has been presented by Petitioners, however, showing that LEA educators acted intentionally to misrepresent Student's capacity to his parents. In Gorski v. Lynchburg Sch. Bd., 1988 U.S. District Lexis 18210, 4th Cir. (1988), the Court held there must be a finding that the school has "deliberately misled" a Parent for there to be actionable wrongdoing, misunderstanding by Parents is not enough.

Further, the LEA was willing to change classification from EMR to LD after Student's intelligence began to reflect greater discrepancy with his skills. When the re-evaluation was completed, confirming the LEA's belief that Student's classification as EMR was no longer appropriate for him, the LEA recommended creation of a new IEP. Parents left the LEA at a time when all of these changes were being suggested in response to the re-evaluation of May 27 & 28, 2003. Also, other factors assisted student's accelerated progress in the private placement: natural maturity, motivation level, post surgical improvement after the anti-seizure operation of 1998. Student left the LEA in March, 2004. It would be speculation for this hearing officer to infer, by hind sight, that the LEA had misrepresented Student's "potential" to his parents or to Student because of his later academic success.

Misrepresentation must relate to fact, not opinion and ".. the misrepresentation ... cannot ordinarily be predicated on mere expressions of opinion, unfulfilled promises or

statements as to future events. (Michie's Jurisprudence, West Virginia & Virginia, Fraud and Deceit, (II)(A)(2), §10, at 384)

Parents' claim supports a due process request on grounds of placement alone: Parents' reimbursement for an alleged improper placement, provision of FAPE, and the subsequent unilateral removal and placement of their son at . Clearly, these placement issues are time-barred by the IDEA statute of limitations (2 years).

Regarding the severability of Student's claim from his parents' claim, first of all, it is not likely that Student was not advised of his due process rights. He simply does not remember these events. Mr. 's affirmation, which appears on the face of the May 8, 2003 IEP, states that he did advise Student of the IDEA transfer of rights and that Student's due process rights were explained to him. It is a minor error that the Student has not endorsed the transfer of rights section or consented independently to the IEP. These facts have not prevented Student from filing for due process. As Student stated, he discussed all of his decisions with his family. He participated at the May 8, 2003 IEP meeting and if he had objected to the IEP proposed, he would have discussed challenging the IEP with his parents. Student did not timely challenge the IEP.

Further, the ruling of Emery v. Roanoke City School Board, 432 F.3d 294, 300 (4th Cir. 2005) is controlling in this matter. As in the Emery case, Student has no independent standing in this matter. In that case, the court stated "Standing doctrine requires that reimbursement should flow only to those who actually expend the resources, whether it be the parents ... or the child." In this case, Student has not suffered "an injury in fact" because "he suffered no out-of-pocket loss himself" for the private educational expenses incurred." (Id., at 8)

The Emery case also clarifies definitively when the cause of action in an IDEA matter accrues: "The statute of limitations further bars plaintiff's parents from requesting a due process hearing for retroactive reimbursement." A cause of action in an IDEA case accrues when the plaintiff knows of "an allegedly faulty IEP or a disagreement over the educational choices that a school system has made for a student." (Emery, at 9, quoting from R.R. ex rel. R. v. Fairfax County School Board, 338 F.3d 325, 332 (4th Cir. 2003) In the instant case, Student's allegedly faulty IEP was created on May 8, 2003.

In Emery the Court concluded that IDEA encourages claimants to timely file due process claims. The Court stated, "In most instances, parents and their disabled child will jointly bring suit under the IDEA in diligent fashion. A disabled child will be able to require a school district to provide him a FAPE

when he can still realize its benefits, and parents who incur costs will be able to obtain appropriate reimbursement." (Id.,at 9) The Court further held that "... plaintiff sought to fasten a substantial obligation on a public school district long after the fact. This delay proved detrimental to his claim, because he no longer has an interest in injunctive relief to compel a suitable education. And his parents could no longer seek reimbursement for their expenses because of the applicable statute of limitations." (Id., at 9)

In Schaffer v. Weast, 126 S.Ct. 528 (November 14, 2005), the United States Supreme Court has ruled that, in an administrative hearing, the burden of proof is properly placed on the party seeking relief. Because Petitioners are time-barred from challenging Student's placement, the burden of proof falls on Petitioners to persuade this hearing officer that the Petitioners are excepted from applicability of the IDEA statute of limitations. For the above rationale, Petitioners have not met this burden.

8. The LEA's earlier Motion To Dismiss followed by Motion To Strike made at the conclusion of the parties' ore tenus hearing on the motion, prior to presentation of evidence on the full merits of this case, is hereby **GRANTED**, the Petitioners have not met the burden of proof on the exceptions issue and this matter is **DISMISSED** with prejudice.

9. Petitioners are not entitled to challenge the provision of FAPE to this Student and are not entitled to relief sought by reimbursement of educational expenses, secondary educational and vocational services, private instruction, occupational therapy, vocational counseling, evaluation, training and psychological services, attorney's fees or advocacy fees.

Date of Decision:

_____
Sarah S. Freeman

IDENTIFICATION OF PREVAILING PARTY

Pursuant to 8 VAC 20-80-76(K)(11) this Hearing Officer has the authority to determine the prevailing party on each issue that is decided. Having found that the LEA provided with a FAPE and that City Public Schools afforded notice and procedural safeguards, and that his eligibility determination was in compliance with Virginia regulation provided in 8 VAC 20-80-54(D)(1)(a), the Hearing Officer identifies the LEA as the prevailing party on all issues.

Dated: October 10, 2006 Hearing Officer

APPEAL INFORMATION

8 VAC 20-80-76 0.1 states:

1. This decision shall be final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state court within one year of the date of this decision.

2. The appeal may be filed either in a state circuit court or in a federal district without regard to the amount in controversy.

3. If a hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change of placement is appropriate in accordance with Subsection E of this section. In those cases, the hearing officer's order must be implemented while the case is being appealed.

IMPLEMENTATION PLAN

The LEA is responsible to submit an implementation plan to the parties, the hearing officer, and the Virginia Department of Education within 45 calendar days.

Date: October 10, 2006 Hearing Officer