

Received

SEP 17 2008
BY FAXDispute Resolution &
Administrative Services

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND
ADMINISTRATIVE SERVICES**

())	
)	
VS)	HEARING OFFICER DECISION
)	ON PS MOTION TO DISMISS
PUBLIC)	
SCHOOLS (PS))	

PS MOTION TO DISMISS IS GRANTED

By Motion To Dismiss dated August 22, 2008, PS contends that Parents' Request For a Due Process Hearing, dated August 8, 2008, contains claims for reimbursement for tuition at School, and other selected costs, for the 2006-2007 and 2007-2008 school years which are barred by the applicable statute of limitations. Parents disagree. For reasons set forth below, PS' Motion To Dismiss is granted.

1. Factual Background

The parties here jointly entered into stipulations of fact, which are attached hereto as Appendix 1. The Exhibits referenced in these stipulations will become a part of the case record and are not attached hereto, but references and extracts therefrom are cited herein.

Briefly, Parents' son, , is now thirteen years old and will be an eighth grade student during the 2008-2009 school year.

was first found eligible for special education by PS as a student with Other Health Impairment in 2001. attended

PS special education programs at Elementary School and

Elementary School, attending the latter in fifth grade during the 2004-2005 school year, pursuant to agreed upon IEPs.

Counsel for Parents states in the Request For Due Process Hearing, paragraph 11, dated 8/8/08, the following:

11. While at _____'s low self esteem was described by his teachers. The _____ were concerned about the erosion of _____'s self-esteem, reporting that he felt like a misfit at school, and had little confidence in his academic abilities as well as his apparent inability to learn and keep up with his peers. _____'s pride was easily wounded and he responded with intense frustration, rigidity, and withdrawal. _____ was identified as a student with special needs, however, PS did not understand the nature of _____'s needs and/or failed to provide appropriate services and instruction to meet Michael's needs. In short PS failed to provide _____ a free and appropriate public education ("FAPE"). _____ was underserved by PS. His needs were not identified consistently and went unmet during his tenure there. This failure to address his needs impacted him at every corner of his young life and the results were debilitating to him as well as to his family. (Emphasis added)

In paragraph 5 of this same Due Process Complaint, it is stated that during the period 2002 to the fall of the 2005-2006 grade school year " _____'s academic skills dropped and his Standard Score Measures also dropped in all areas measured during the period 2002-2005," and Parents "raised concerns with administrators in _____ about _____'s failure to make adequate progress in his academic functioning."

PS staff proposed a 2006-2007 IEP for _____ to his Parents during an IEP meeting on May 18, 2006, and Parents signed the IEP in agreement.

By letter dated August 11, 2006, Parents notified PS of intent unilaterally to place _____ in private school because

"has not made sufficient progress." The "special education support [redacted] has received since mid-first grade, and the intensive tutoring he has received, he [sic] has not been adequate - - - [redacted] also needs a more intensive, research, evidence based reading program that [redacted] PS has not been able to provide - - - We do not feel that [redacted] PS is able to provide an adequate program that is appropriate to [redacted]'s needs - - - "

PS sent a letter to Parents dated August 30, 2006, stating that "Staff is willing to work - - to resolve placement issues and pursue options within" PS.

During the 2006-2007 and 2007-2008 school years, beginning September 2006 and September 2007, respectively, [redacted] attended private [redacted] School, [redacted], VA, commencing September 2006 (Parents' Request for Due Process, p. 1).

On October 17, 2007, Mr. Nuzzo, an advocate of Parents contacted Dr. [redacted] of PS regarding reimbursement for [redacted]'s unilateral placement at [redacted]. In this letter references are made to many of the same difficulties, cited above that Parents and [redacted] allegedly experienced at [redacted], among others.

On June 12, 2008, PS IEP team convened and proposed an IEP for the 2008-2009 school year for [redacted]. Parents did not sign as being in agreement with the proposed 2008-2009 IEP.

At the 2006-2007 IEP meeting, Parents acknowledged receiving a copy of VA Department of Education Procedural Safeguards document,

which provided, among others, notice of Parents' rights to request a due process hearing.*

Thus, here the Parents before May 18, 2006, complained that FAPE was not given to , then on May 18, 2006, agreed with the IEP proposed May 16, 2006, and, less than three months later, with no intervening factual change, disagreed and contended that FAPE was not being provided.

2. Governing Law

The VA Code, §8.01-248, provides that Parents' claims here must be brought within a two year limitation period.** PS, as the moving party, has the burden of proving by a preponderance of the evidence that Parents' stated claims are barred by the statute of limitations.

A. PS Motion To Dismiss

PS contends that (a) Parents agreed to PS' proposed 2006-2007 IEP on May 18, 2006, and (b) thereafter, at some point, Parents changed their minds, and on August 11, 2006, provided notice of their intent to unilaterally place in private school and seek recovery of those costs from PS.

PS argues that Parents' claims set forth in their Request For A Due Process Hearing occurred at the time the IEP was signed on May 18, 2006, so that the applicable two year statutory period expired in May 2008. In support of its contention, PS relies

* This document also states that "The request for a hearing shall be made within 2 years of the date the parent or LEA knew or should have known about the alleged action that forms the basis of the request - - - " (Exhibit F, p. 8).

** 20 USC 1425(c)(3)(C) and regulation §300.507 provide that a due process complaint must allege a violation that occurred not more than two years before the date a parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.

upon: *RR v. FCPS*, 338 F.3d 325 (4th Cir. 2003); *Richards v. FCPS*, 798 F.Supp. 338 (ED VA 1992), *aff'd* 7 F.3d 225 (4th Cir. 1993); *Ian H. v. FCPS*, C.A. 97-168-A (ED VA 1997); and _____ v. *FCPS* (SEA VA 11/2/07)(Hearing Officer Towner decision); and *Manning v. FCPS*, 176 F.3d 235 (4th Cir. 1999).

In PS' rebuttal to Parents' Reply To Motion To Dismiss, PS affirmed and amplified its contention that May 18, 2006, the date Parents signed PS' IEP, was the date Parents' cause of action accrued. Thus, PS argues that the statute of limitations began to run May 18, 2006, and expired two years later on May 18, 2008. Parents were represented by counsel and could have requested a due process hearing any time during that 2-year period. By requesting a due process hearing on August 11, 2008, SP asserts that Parents' claims are untimely and barred.

B. Parents' Opposition To Motion

Parents contend in their Reply To PS' Motion To Dismiss that the two year statute of limitations did not begin to run prior to August 11, 2006, and that the request for due process was timely filed. Thus, Parents state that the Motion To Dismiss must be denied. Parents also filed a reply to PS' rebuttal argument amplifying their comments in their original reply.

Parents distinguish the cases relied upon by PS, argue that the discovery rule ("knew or should have know") requires the conclusion that the accrual date here was either when the IEP was rejected or when the Parents withdrew _____ from School. PS' IEP was agreed to, not rejected, here. Accordingly, the only

relevant date, Parents' contend, is 's withdrawal from PS school, which never happened before August 11, 2006.

3. Hearing Officer Rationale and Decision

Governing Law. The governing rule concerning accrual of an action is stated in *Richards v. FCPS*, 798 F.Supp. 338, 343 (ED VA 1992):

A cause of action accrues - - - when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Cox v. Stanton*, 529 F.2d at 50 [4th Cir. 1973]. In particular, 'federal courts generally construe the discovery rule' to mean when the plaintiff discovers, or in the exercise of reasonable diligence should discover, the facts giving rise to a claim. *Hamilton v. 1st Source Bank*, 895 F.2d 159, 163 (4th Cir.).*

Federal law determines accrual of a federal action even if the statute of limitations is borrowed from state law. *Cox v. Stanton*, *supra*.** The cause of action accrues whether or not a plaintiff knows the injury is actionable.

The injury in an IDEA case - the injury that allows a parent to bring a suit - is an allegedly faulty IEP or a disagreement over the educational choices that a school system has made for a student. See 20 USCA §1415(b)(6), stating that parents can bring a claim with respect to the provision of a free appropriate public education ("FAPE"), among others.

As Parents contend, the cases relied upon by PS appear to be distinguishable from the instant case. In the *RR v. FCPS*, *supra*, RR's claim accrued when Parent rejected the proposed IEP or

* See also 20 USC 1425(c)(3)(C), cited above.

** Under Virginia law, a cause of action accrues on the date that a party has a right to bring the asserted action. *Boykins v. Weldon*, 221 VA 81, 266 SE 2d 887, 889 (VA 1980).

withdrew RR from the public school system, with at least 29 months lapsing from each of the latter events. In *Manning v. FCPS*, *supra*, the parents agreed to a son's placement but parents' request for a due process hearing was time barred because the statutory period expired when the request was filed. In *Richards v. FCPS*, *supra*, the parents knew of the facts giving rise to the claimed injury when plaintiff was first advised that the Child would no longer be eligible for special education when she graduated, and therefore filing after that the limitations period from that time barred the asserted claims. In *Ian v. FCPS*, *supra*, parents were notified that child was no longer qualified for special education, but parents did not contest this decision until after the statutory period for filing a claim. In _____ v. *FCPS* (George Towner, Hearing Officer), the statute of limitations started to run from the date parents refused to sign an IEP since this, in effect, was a rejection of the IEP.

Rationale and Decision. Here, we have a situation where Parents during the school year at _____ were dissatisfied with _____'s program, apparently in numerous respects, but at the end of the school year, when an IEP was being prepared for the subsequent year, 2006-2007, Parents agreed to the IEP proposed, and then, within less than three months after the IEP was signed by Parents, Parents notified PS of their dissatisfaction with Child's program, among other things, and informed PS that _____ would be attending a private school in 2006-2007.

As stated, the discovery rule, cited above, determines when Parents' cause of action accrues. This rule inquires when Parents discover, or in the exercise of reasonable diligence should discover, the facts giving rise to their claim. *Hamilton v. 1st Source Bank*, supra. Parents' Request For Due Process Hearing cites in paragraph 11 the alleged difficulties [redacted] has experienced in the 5th Grade while at [redacted] School in 2005-2006. These included PS' alleged shortcomings, e.g., PS failed to provide [redacted] FAPE. In other words, Parents during the 2005-2006 school year had already discovered PS' failures set forth in their due process complaint, and, if such failures were not then known *arguendo*, Parents clearly should then have known of them with the exercise of reasonable diligence. Thus, it appears that the two year statute of limitations began to run at some point during the 2005-2006 academic year at [redacted], and Parents' description of these PS' failures appears to have commenced before PS' proposed IEP on May 16, 2006. Parents' subsequent agreement to the IEP on May 18, 2006, does not alter the fact that the statute of limitations started to run before May 18, 2006, because that is when the alleged defects are stated by Parents to have occurred and continued, as shown by the allegations in Parents' due process complaint and their letter of August 11, 2006 to PS which referenced these past alleged PS failures.

I conclude that here Parents' cause of action accrued and the statute of limitations began to run when Parents could maintain their action which was at some point in 2005-2006, before May 18, 2006. Entry into IEP discussions May 18, 2006, did not toll the

statute or waive it. See *Lockard v. Deitch*, 855 SW 2d 104 (TX Ct. App. 1993). For these reasons I reject parents' assertions that the statute of limitations commenced either when the IEP was rejected on August 11, 2006, or when Parents withdrew from school. Clearly, claims asserted here in Parents' due process complaint accrued before August 2006, because they were then known by Parents or could reasonably have been discovered with reasonable diligence.

Moreover, Parents' failure to pursue their administrative remedies more promptly here denied PS the opportunity to address the objections and contentions now alleged by Parents before

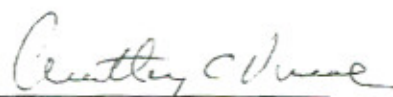
School costs were incurred. In similar circumstances, in *Ian v. FCPS*, CA Action No. 97-168-A (ED VA 9/5/97), Judge Bryan ruled that the Ian plaintiff was estopped from challenging the ruling made there and seeking reimbursement for tuition costs.

Wherefore, I find that Parents' cause of action accrued at some point while attended the academic program at

School during the period 2005-2006 and before May 18, 2006; and that Parents' claims for relief here were not filed until August 11, 2008, which is beyond the applicable two year statute of limitations, thereby barring Parents' 2006-2007 and 2007-2008 claims. PS' Motion To Dismiss is granted.

IT IS SO ORDERED.

DATED: September 17, 2008


Anthony C. Vance
Hearing Officer

Certificate of Service

I hereby certify that on September 17, 2008, a copy of the foregoing has been served by facsimile upon the following persons:

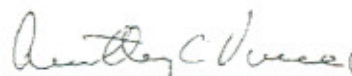
John Cafferky, Esq.
(Fax 703 691 3913)

Howard Deiner, Esq.
(Fax 703 991 2534)

Ronald Geiersbach, Esq.
(Fax 804 786 8520)

William Brownley, Esq.
(Fax 703 758 5561)

Brian Miller, Esq., Evaluator
(Fax 804 353 8218)



Anthony C. Vance

Original will follow ____
Original will not follow X

STIPULATIONS OF FACT

For the purposes of Public Schools' motion to dismiss, the parties stipulate as follows:

1. (" ") is a thirteen year old boy, who will be an eighth grade student during the 2008-09 school year. was first found eligible for special education services by Public Schools ("PS") as a student with an Other Health Impairment ("OHI") in December 2001.
2. Until the completion of the 2005-2006 school year, attended PS special education programs at School (" ") and School (" ") pursuant to agreed-upon IEPs.
3. On May 18, 2006, PS staff proposed a 2006-2007 IEP for to his Parents during an IEP meeting. On the same date, the Parents signed the IEP agreement. A copy of the 2006-2007 IEP is attached hereto as Exhibit A.
4. The Parents sent PS the attached letter (Exhibit B) dated August 11, 2006. PS received the letter on August 15, 2006.
5. PS sent the Parents the attached letter (Exhibit C) dated August 30, 2006.
6. During the 2006-2007 and 2007-2008 school years, beginning in September 2006 and September 2007 respectively, attended School (" "). is a private day school located in , Virginia.
7. On October 17, 2007, Mr. Louis Nuzzo, an advocate for the Parents, contacted Dr of PS regarding the possibility of reimbursement for 's unilateral placement at School. A copy of the October 17, 2007 e-mail is attached hereto as Exhibit D.
8. On June 12, 2008, an PS IEP team convened and proposed an IEP for the 2008-2009 school year for . During the IEP meeting, the Parents did not sign in agreement with the proposed 2008-2009 IEP. A copy of the proposed 2008-2009 IEP is attached hereto as Exhibit E.
9. PS received the Parents' request for a due process hearing on August 11, 2008.
10. On the 2006-2007 IEP, the Parents acknowledged they received a copy or copies of the Virginia Department of Education's Procedural Safeguards document. The procedural safeguards document, among other things, provided the Parents with notice of their right to request a due process hearing.
11. 's placement at during the 2006-2007 and 2007-2008 school years was a unilateral placement.