

Seashore Learning Center	§	BEFORE A SPECIAL
	§	EDUCATION
	§	
	§	HEARING OFFICER FOR THE
V.	§	
	§	
Student b/n/f PARENTS	§	STATE OF TEXAS

ORDER

Seashore Learning Center (“SLC”) filed a request for due process hearing on November 3, 2006 to obtain a declaratory judgment regarding its obligation (or lack thereof) to provide Respondent STUDENT with a Free Appropriate Public Education. Alternatively, it sought an order to override lack of parental consent to perform a Full and Individual Educational Evaluation on STUDENT

Respondent, STUDENT, filed a timely Original Answer on November 10, 2006, which he amended on November 22, 2006. Respondent asserted that SLC had an obligation under IDEIA to provide FAPE to STUDENT; an obligation that SLC failed to satisfy over a period of several years. For this reason, Respondent alleges, STUDENT was enrolled in a private school located within the geographical area of Flower Mound ISD, in which SLC was located, for portions of the 2004/2005; 2005/2006; and 2006/2007 school years. Respondent counter-claimed for reimbursement of educational expenses for home schooling and private school tuition as set out, herein:

2004/2005 School Year	
April 12, 2005 through July 29, 2005 (**)	\$2,451.73
Transportation 74 days x 96 miles x \$0.485	
	\$3,445.44
15 weeks x 20 hours x \$15.00/ hr. (home school)	\$4,500.00
2005/2006 School Year	
November 2005 through May 2006	
27 weeks x 50 hours/week x \$15.00/ hr. (home school)	\$20,250.00
Related expenses	\$ 750.00
2006/2007 School Year	
August 2006 through November 2006 (**)	\$4,400.00
Transportation 63 days x 96 miles x \$0.485	\$2,933.28
Total amount claimed	\$38,730.47

On November 30, 2006, SLC supplemented its original complaint and responded to STUDENT's counterclaim. SLC "clarified" paragraph 4 of its Original Complaint to assert that in June 2006, STUDENT enrolled in ** (a private school) for the 2006/ 2007 school year. SLC asserted that STUDENT's counterclaim was frivolous, unreasonable or without foundation and stated that SLC was entitled to recover its attorney's fees from Respondent and Respondent's counsel pursuant to 34 CFR 300.517(a).

During a December 6, 2006 pre-hearing conference on this case, the parties were allowed to discuss the active issues outstanding, following the amended pleadings. The parties agreed that SLC would have an unqualified right to evaluate STUDENT, and following this stipulation, SLC withdrew its request for an order to override the previously qualified parental consent for an FIE. The Pre-hearing Order set out issues important to the case to be addressed by counsel for the parties.

The briefing of issues submitted by SLC on January 19, 2007 was styled as a Motion for Summary Judgment with Supporting Briefs and Affidavits. To support its Motion, SLC asserts the following claims that will be addressed by this Order:

- a) Respondent's claim for 2004/2005 are barred by the statute of limitations;
- b) Respondent's claims for the 2004/2005 and 2005/2006 school years are barred based on a settlement agreement between the parties;
- c) Respondent's claims for the 2006/2007 school year are moot because Respondent unilaterally withdrew from SLC and was enrolled in a private school for the 2006/2007 school year.

In STUDENT's January 19, 2007 brief of the issues, he amended his counterclaim for monetary reimbursement for education and related services and sought compensatory services and related services for which SLC failed to provide from the 2004/2005 school year to the present, excluding the time period from the beginning of the 2005/2006 school year through the end of November 25, 2005.

Statute of Limitations

There is an absolute one year statute of limitations period for due process hearings prosecuted in the State of Texas. IDEIA, at 20 U.S.C. §1415(f)(3)(c), provides:

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

Texas does, in fact, provide for an explicit statute of limitations period. Commissioner Rule 19 TAC §89.115(c) provides:

“Effective with requests for due process hearings filed on or after August 1, 2002, a parent or public education agency must request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request.”

Therefore, due process hearings in Texas are limited to issues that arose one year or less before the filing of the due process hearing request. Because the case was filed on November 3, 2006, the hearing is limited to issues arising on or after November 3, 2005. This would bar consideration of Respondent’s counter claim for reimbursement/ compensatory education for the 2004/2005 school year.

Respondent’s reference to the Texas Civil Practice and Remedies Code is not persuasive. That state Statute does not control the limitation period prescribed for a due process hearing. Moreover, because Petitioner’s due process hearing references the current school year and, as stated, Respondent’s argument that the counter claim for 2004/2005 arises from the “same transaction” cannot be used to erroneously extend the limitation period which controls this case.

Scope of Existing Settlement

IDEIA allows a due process litigants to resolve their disputed issues through a binding, written settlement agreement. At 20 U.S.C. §1415(f)(1)(iii) the statute provides:

“Written Settlement Agreement. In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i) the parties shall execute a legally binding agreement that is

- (I) signed by both the parent and a representative of the agency who has authority to bind such agency; and
- (II) enforceable in any State court of competent jurisdiction...”

The Hearing Officer is aware that the Settlement Agreement attached to Respondent’s brief was not executed to resolve disputed issues resolved in a Resolution Meeting or adjudicated in a previous due process hearing. However, the Agreement was used to resolve a formal complaint that was filed with the state education agency regarding the student’s special education program. There is no indication that the parties or TEA meant for the written agreement, executed by the parent and a representative of SLC, to be any less legally binding or enforceable, certainly by a special education hearings officer. The Hearing

Officer is unwilling to attack collaterally, the validity of the Settlement Agreement by considering factors such as STUDENT's parents representation, or lack thereof. However, there is some question as to the scope of the claims released by the Complainant. SLC argues that the Complainant "released SLC from any and all claims and causes of action relating to the 2005/2006 school year and TEA Complaint No. 20062010." That may be an overstatement. The Agreement does release claims relating to Complaint No. 20062010, which was filed on November 28, 2005. The Agreement includes a recital that "Complainant agrees that such services are sufficient to compensate STUDENT for any insufficiency in the services provided for STUDENT for 2005/2006 school year." The Agreement was executed by the parties on April 24, 2006. I will presume that the Settlement Agreement is binding on all claims arising in the 2005/2006 school year up until April 24, 2006.

Enrollment Issue

The enrollment issue presented in this case is fraught with a vexing interplay of the sub-issues of public service to students privately enrolled; the role of charter vis à vis the remainder of the LEA; and basic issues of evidence law. Ultimately, the resolution of the issues is found in a straight-forward analysis of the undisputed facts.

The enabling regulations of the IDEIA outlines a system, the details about which are unclear. The basic regulations are captioned *Children With Disabilities Enrolled by Their Parents in Private Schools* and is found at 34 CFR §§300.130-300.148, inclusive, depending on the subject of a particular controversy. It appears that LEA's are obligated to identify educationally disabled students within their catchment area even if they attend private schools; (§300.131) be prepared to provide special education services to them as necessary; (§300.132) and not discriminate against those privately enrolled students who they actually serve, in the expenditure of funds (§300.133). However, the envisioned system seems to require the *private institution* to approach the LEA for a "consultation" of how the LEA will provide special education service generally (§300.134); the LEA must affirm its plan in writing, timely (§300.135) and be subject to compliance requirements (§300.136). The regulations contemplate an established relationship between the LEA and private institution, rather than the LEA and *individual family*. Otherwise, the apparent contradictory statement of §300.137(a) would not have been included in the regulations. Section 300.137(a) provides:

No individual right to special education and related services. No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

As relevant to this case, the envisioned system would require ** to approach the LEA to provide special education support to *all of its students with disabilities*, including STUDENT

The issue of the role of the charter school relative to the rest of the LEA is interesting, but ultimately irrelevant to a resolution of this issue. Both of the parties provide a less than complete analysis of the issue. SLC seems to argue that, as a charter school, none or few of the requirements apply to it and Respondent should look to Flower Bluff ISD for services because it is actually the LEA. This argument is not supported by the relevant regulations, however. There is no exception in §§300.130 - 300.148 for charter schools. Respondent repeatedly urges that SLC is a public school, and is as much an LEA as is Flower Bluff ISD. Accordingly, he argues that it is simply a matter of "which LEA" the *parent chooses* to provide the services. The problem with Respondent's position is that there is never a clear reason why *only* SLC has been chosen for the last several years even though it has never, according to the Respondent, provided satisfactory services. More than likely, the role of the charter facility located within the applicable LEA will have to be addressed in the new regulations.

On these facts, it is unnecessary to resolve the charter school/ LEA question for the 2006/2007 school year simply because STUDENT does not attend SLC now, has never attended SLC for the 2006/2007 school year, and seems not to want to attend SLC. Respondent's case is based on the flawed assumption that a valid FAPE issue can be prosecuted in a due process hearing with theoretical, wholly speculative evidence. More than once, Respondent states that there is a valid issue of whether SLC *could* provide STUDENT with FAPE. The emails and other contacts prior to the start of the 2006/2007 school year are worthless to a determination of whether SLC *did or did not* provide FAPE to STUDENT. The Hearing Officer is unaware of a decision by a hearing officer that concludes that a LEA violated a student's right to FAPE even though it never got the chance to try to provide it. Maybe SLC could have satisfied STUDENT's needs for the Fall Semester of the 2006/2007 and maybe it could not have: there can be no evidence to support either conclusion. For mere academic reasons, §300.148 could be discussed; or the regulations and case law regarding unilateral withdrawal and enrollment in public school. However, §300.148 is tied to the system discussed herein and STUDENT was merely enrolled "on paper" for 2006/2007 at SLC, with no apparent intention of attending any school other than **.

The facts of STUDENT's "enrollment" in SLC for 2006/2007 seems to support more artifice than anything else. STUDENT was enrolled in SLC even though his parents thought it could not provide him FAPE. When an ARD meeting was convened and additional data was sought, STUDENT's parents seem to have resisted all efforts to remove the assumed deficiencies in SLC's program or his ARD Committee's need for more information. It seems that STUDENT remains on SLC's rolls so that it (not Flower Bluff ISD) can, potentially, *pay* for STUDENT's private education at **.

In the final analysis, this case can be disposed of by referring to 34 CFR §300.300(4), which was not cited by the parties:

(4) If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency -

(i) Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and

(ii) is not required to convene an IEP team meeting or develop an IEP under 300.320 and 300.324 for the child for the special education and related services for which the public agency requests such consent.

