IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAUREN P., A MINOR, BY AND THROUGH HER PARENTS, DAVID AND ANNMARIE P., AND DAVID AND ANNMARIE P., ADULTS, INDIVIDUALLY, AND ON THEIR OWN BEHALF v. WISSAHICKON SCHOOL DISTRICT	:	CIVIL ACTION NO. 05-5196

O'NEILL, J. JUNE 20, 2007

MEMORANDUM

On September 30, 2005, Lauren P., a minor, by and through her parents David and Annmarie P., and David and Annmarie P., individually and on their own behalf, filed a complaint against defendant Wissahickon School District challenging the final decision of the Pennsylvania Special Education Appeals Panel and seeking compensatory education and tuition reimbursement under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 et seq. (2007), related to Lauren's attendance at Wissahickon High School during the 2001-2002 and 2002-2003 academic years and Lauren's enrollment at the Delaware Valley Friends School for the 2003-2004 academic year. Plaintiffs further seek relief under 42 U.S.C. § 1983 and Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 795 et seq. Before me now are the parties' cross-motions for summary judgment, the responses thereto, and the administrative record.

BACKGROUND

Plaintiff Lauren P. is a nineteen-year-old adult who during all times relevant to this litigation was a resident of defendant Wissahickon School District and eligible for special

education services under the Individuals with Disabilities Education Act. Lauren first was identified as a child with a disability – attention deficit hyperactivity disorder – in 1995 by the District, a publicly-funded school district designated by the Commonwealth of Pennsylvania as the local educational agency responsible for providing Lauren with a free appropriate public education. In November 1997, the District concluded that Lauren required specially-designed instruction due to learning disabilities in reading, written expression, and math.

On February 7, 2001, during Lauren's eighth grade year, the District developed an individualized education plan (IEP) for her. The IEP stated, "Due to Lauren's need for support in written expression, math skills, reading skills and organization and study skills, she will require modification and adaptation of the general education curriculum to ensure success." The District issued subsequent IEPs for Lauren in November 2001, December 2002 (after performing a re-evaluation to determine her continued eligibility for special education), January 2003, and July 2003. The IEPs for Lauren developed by the District did not include behavior management plans.

On September 2, 2003, Lauren's parents advised the District that Lauren would be attending the Delaware Valley Friends School (DVFS), a private school for students diagnosed with learning differences for preparing for work and study, for her eleventh grade year. In September 2003, Lauren enrolled as an eleventh grade student at DVFS. According to the director of DVFS, Katherine Schantz, Lauren was accepted on the basis of her average intelligence and her identified needs in reading, writing, math, and organization. The curriculum at DVFS is taught at grade level, but students' individual needs are addressed by adjusting volume of work and through the provision of individual support. Typical class size at DVFS

ranges from five to ten students so that the teacher can provide close attention to each student's individual needs. Each student at DVFS has a written educational plan that takes into account school records, prior IEPs, and an assessment of the student's strengths and weaknesses. An individual educational profile was developed for Lauren and identifies her academic needs and strengths. The profile acknowledged Lauren's low self-esteem and lack of confidence in her academic abilities, took note of her auditory processing difficulties and addressed them through a small class setting and modification of instruction, and recognized her anxiety associated with school performance.

On February 19, 2004, the parents requested a due process hearing pursuant to 34 C.F.R. § 300.507 seeking compensatory education for Lauren's ninth and tenth grade years and tuition reimbursement for her eleventh grade year at DVFS. A due process hearing in front of a hearing officer began on June 8, 2004 and concluded after four sessions on September 21, 2004. On October 18, 2004, the hearing officer entered a decision denying all relief. The hearing officer denied the request for compensatory education because she found that the District offered Lauren a free appropriate public education during her ninth and tenth grade years. The hearing officer denied the request for tuition reimbursement because she found that the District offered an appropriate IEP for Lauren's eleventh grade year.

The parents filed timely exceptions to the hearing officer's order pursuant to 22 Pa. Code. § 14.162(o), which mandates a review of the hearing officer's decision by a panel of three appellate hearing officers. On December 7, 2004, a Pennsylvania Special Education Appeals Panel reversed in part and affirmed in part the hearing officer's decision, awarding Lauren compensatory education for the period between February 19, 2003 and the end of the 2002-2003

school year and denying all other relief. The Appeals Panel concluded Lauren's tenth-grade IEP required "a behavior management plan that shaped the desired behaviors and used positive reinforcement rather than the negative consequences provided," and "the District should have known that the program it was providing was not effective." The compensatory education award was limited to the period after February 19, 2003 because the Appeals Panel applied a one-year equitable limitations period. The Appeals Panel denied tuition reimbursement because it found that Lauren's private placement was "not reasonably calculated to provide the child with educational benefit."

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, the moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact." Fed. R. Civ. P. 56(c) (2007); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Where, as here, cross-motions for summary judgment have been presented, we must consider each party's motion individually. Each side bears the burden of establishing a lack of genuine issues of material fact." Reinert v. Giorgio Foods, Inc., 15 F. Supp. 2d 589, 593-94 (E.D. Pa. 1998).

Any party aggrieved by a state educational agency's findings and decisions made under the IDEA has the right to bring a civil action in a district court without regard to the amount in controversy. See 20 U.S.C. § 1415(i)(2)(A). In reviewing administrative findings and decisions under the IDEA, a district "court – (i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the

preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B).

"Judicial review in IDEA cases differs substantively from judicial review in other agency actions, in which the courts are generally confined to the administrative record and are held to a highly deferential standard of review." Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 757 (3d Cir. 1995). In IDEA cases, district courts are required to give "due weight" to the factual findings of the state administrative agency. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). The Court of Appeals has defined "due weight" as "modified de novo review." S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 270 (3d Cir. 2003). Under this standard, "a district court is required to make findings of fact based on a preponderance of the evidence contained in the complete record, while giving some deference to the fact findings of the administrative proceedings." Id., quoting Knable v. Bexley City Sch. Dist., 238 F.3d 755, 764 (6th Cir. 2001). "Factual findings from the administrative proceedings are to be considered prima facie correct. [I]f a reviewing court fails to adhere to them, it is obliged to explain why." Id., quoting M.M. v. Sch. Dist. of Greenville County, 303 F.3d 523, 530-31 (4th Cir. 2002) (citations omitted).

DISCUSSION

I. The Individuals with Disabilities Education Act

Congress enacted the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., to provide federal assistance to states in educating disabled children.[1] In order to receive

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[1]Under IDEA, "'a child with a disability' means a child – (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and

funding under IDEA, a state must ensure that “[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive . . . .” 20 U.S.C. § 1412(a)(1)(A). “This education must be tailored to the unique needs of the disabled student through an individualized education program [IEP].” Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999), citing Bd. of Educ. v. Rowley, 458 U.S. 176, 181-82 (1982). IDEA “defines a ‘free appropriate public education’ pursuant to an IEP to be an educational instruction ‘specially designed . . . to meet the unique needs of a child with a disability,’ § 1401(29), coupled with any additional ‘related services’ that are ‘required to assist a child with a disability to benefit from [that instruction],’ § 1401(26)(A).” Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2000-01 (2007). “In examining the parameters of a “free appropriate public education,” the Court of Appeals has held that “the IDEA ‘calls for more than a trivial educational benefit’ and requires a satisfactory IEP to provide ‘significant learning’ and confer ‘meaningful benefit.’” Id., quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 & 184 (3d Cir. 1988) (citations omitted).

“If the compensatory education standard is to spring from [IDEA], it must focus from the outset upon the IEP – the road map for a disabled child’s education.” M.C. v. Cent. Reg’l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996). The IEP is developed by an “IEP Team,” which includes the child’s parents, at least one regular education teacher of the child, at least one special education teacher of the child, a representative of the local educational agency, an individual who can interpret the instructional implications of evaluation results, other individuals who have

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related services.” 20 U.S.C. § 1401(3)(A).

knowledge or special expertise regarding the child, and, whenever appropriate, the child with a disability. 20 U.S.C. § 1414(d)(1)(B). The IEP Team shall "in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i).

"'When an IEP fails to confer some (i.e., more than *de minimis*) educational benefit to a student, that student has been deprived of the appropriate education guaranteed by IDEA' and compensatory education is appropriate." Penn Trafford Sch. Dist. v. C.F., 2006 WL 840334, at *9 (W.D. Pa. Mar. 28, 2006), citing M.C., 81 F.3d at 395. The Court of Appeals further has "rejected the notion that what was 'appropriate' could be reduced to a single standard, holding the benefit 'must be gauged in relation to the child's potential.'" Id., citing Polk, 853 F.2d at 185 (citations omitted).

II. Compensatory Education

"An award of compensatory education allows a disabled student to continue beyond age twenty-one in order to make up for the earlier deprivation of a free public education." Ridgewood, 172 F.3d at 249, citing M.C., 81 F.3d at 395. The Court of Appeals has "held that the right to compensatory education accrues when the school knows or should know that its IEP is not providing an appropriate education." Id., citing M.C., 81 F.3d at 396-97. If a school district fails to correct the situation, "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." M.C., 81 F.3d at 397 (noting that "[t]he school district . . . may not be able to act immediately to correct and inappropriate IEP; it may require some time to

respond to a complex problem").

"[I]t is the responsibility of the child's teachers, therapists, and administrators – and of the multi-disciplinary team that annually evaluates the student's progress – to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly." M.C., 81 F.3d at 397. "[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith." Id.; see also Ridgewood, 172 F.3d at 249 ("[A]n award of compensatory education does not require a finding of bad faith or egregious circumstances.").

A. No Equitable Limitations Period Exists for Compensatory Education Claims

The Pennsylvania Commonwealth Court has applied an equitable limitation on compensatory education. See Montour Sch. Dist. v. S.T., 805 A.2d 29 (Pa. Commw. Ct. 2002). In Montour, the Court held that under IDEA "the initiation of a request for a due process hearing must occur within one year . . . of the date upon which a parent accepts a proposed IEP," though a two-year limitations period may apply "if the mitigating circumstances show that the equities in the case warrant such a delay." Id. at 40. In so holding, the Court relied upon the reasoning of the Court of Appeals in Bernardsville Board of Education v. J.H., 42 F.3d 149 (3d Cir. 1994).

In Bernardsville, the Court of Appeals held that the ability of the parents of a disabled child to seek tuition reimbursement from a school district for private education if the district had failed to provide a free appropriate public education was contingent upon whether the parents provided the district with the opportunity to modify the student's individual education program. 42 F.3d at 157. To give school districts such an opportunity, the Court of Appeals determined

that parents seeking tuition reimbursement must initiate "review proceedings with a reasonable time of the unilateral placement for which reimbursement is sought" and further explained that to fall within "reasonable time" parents may not wait more than "two years, indeed more than one year, without mitigating excuse" to initiate review proceedings. Id. at 158. The Pennsylvania Commonwealth Court, in Montour, extended the reasoning in Bernardsville beyond tuition reimbursement cases to compensatory education cases under IDEA. See Montour, 805 A.2d at 39-40 ("[W]e hold that the limitation period set forth in Bernardsville is applicable – generally, initiation of a request for a due process hearing must occur within one year, or two years at the outside . . . of the date upon which a parent accepts a proposed IEP."). The Court concluded that plaintiffs, who sought three years of compensatory education, were eligible to seek only one to two years of compensatory education. Id. at 40.

Contrary to the reasoning in Montour, federal courts in Pennsylvania consistently have held that no equitable limitations period exists for compensatory education claims.[2] See M.C., 81 F.3d at 397 (declaring that "a child's entitlement to special education should not depend on the vigilance of the parents"); Robert R. v. Marple Newtown Sch. Dist., 2005 WL 3003033, at *4 (E.D. Pa. Nov. 8, 2005) ("[F]ederal courts in Pennsylvania, faced with the potentially conflicting instructions of Bernardsville and Ridgewood, have largely accepted Ridgewood . . . along with its result – a remand to determine nine years of the child's entitlement to compensatory education

[2]A federal court is not bound to follow a state court's interpretation of federal law. See United States v. Bedford, 519 F.2d 650, 653 n.3 (3d Cir. 1975) ("It is a recognized principle that a federal court is not bound by a state court's interpretation of federal laws . . . ."); see also RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1276 (7th Cir. 1992) ("[F]ederal courts are under no obligation to defer to state court interpretations of *federal* law. . . . Although state court precedent is binding upon us regarding issues of state law, it is only persuasive authority on matters of federal law.") (emphasis in original) (citations omitted).

– as the most compelling direction the Third Circuit has provided for determining whether an equitable limitations period applies to claims for compensatory education.") (citing cases); Amanda A. v. Coatesville Area Sch. Dist., 2005 WL 426090, at *6 (E.D. Pa. Feb. 23, 2005) ("[T]here is no limitations period, whether equitable or legal, on a disabled child's claim for compensatory education pursuant to the IDEA.").

In Ridgewood, the Court of Appeals expressly rejected a school district's argument that all compensatory education claims more than two years old were barred. 172 F.3d at 250. Though the Court in Montour distinguished Ridgewood by asserting the limitation at issue was the time within which a parent may file a civil suit under IDEA as opposed to the time a parent must seek a due process hearing, "[t]his distinction is irrelevant, as both decisions involved the enforcement of a child's right to compensatory education, not the parents' right to reimbursement. The right to compensatory education belongs to the child and should not be deprived based upon the parents' inaction." Penn Trafford, 2006 WL 840334, at *6.

In this case, the Appeals Panel relied on the Commonwealth Court's holding in Montour to reject as a matter of law plaintiffs' request for compensatory education for dates prior to February 19, 2003. Accordingly, the Panel did not consider the merits of Lauren's claim for compensatory education during the period prior to February 19, 2003. I hold that there is no equitable limitation for Lauren's compensatory education claim; imposing such a limitation on Lauren's compensatory education claim "would effectively punish her for her parents' lack of vigilance, a result expressly forbidden by both M.C. and Ridgewood." Amanda A., 2005 WL 426090, at *6. Having so found, I now turn to the merits and determine whether Lauren is entitled to compensatory education for her tenth and ninth grade years.

B. Award of Compensatory Education for Lauren P.

Based on a preponderance of the evidence contained in the complete record and giving some deference to the fact findings of the administrative proceedings, I conclude that the District knew or should have known, based on its reevaluation of Lauren in the beginning of her tenth grade year, that the December 2002 IEP was not providing an appropriate education. Therefore, Lauren is entitled to compensatory education from December 12, 2002, the implementation date of her post-reevaluation IEP, to the end of the 2002-2003 school year.

The Panel concluded that the IEP offered for Lauren's tenth grade year was inappropriate for at least two reasons. First, the Panel found:

> [I]t is clear that part of Student's disability is distractability that manifests itself as not completing assignments, becoming distract[ed] coming from and going to class, losing assignments, not completing assignments, and so forth. Not only are these behaviors part of her disability, they interfere with her learning and require intervention. She needed a behavior management plan that shaped the desired behaviors and used positive reinforcement rather than the negative consequences provided. Moreover, this behavior management plan should have been used consistently across all school settings by all teachers.
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> Second, Student's problems worsened and the District should have known that the program it was providing was not effective. Instead, the District blamed Student for behaving like a student with a disability.

As a result of these factual findings and its application of Montour's one-year limitations period, the Panel awarded compensatory education from February 19, 2003 to the end of the 2002-2003 school year.[3]

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[3]The Panel concluded:

> Because Student's lack of study and organizational skills pervaded her entire school program and the District's failure to address these needs adequately had a negative effect on her entire school day, we shall award compensatory education from February 19, 2003 to the end of the 2002/03 school year. The number of

The first reason cited by the Panel also applies to the time period before February 19, 2003, as the District concedes that none of the IEPs developed for Lauren by the District included a behavior management plan. Based on the evidence available in the record, I agree with the factual determination of the Panel and find that the District knew or should have known Lauren is a child whose behavior impedes her learning when it developed Lauren's IEP for her tenth grade year, and the District failed to provide an appropriate IEP by not including a management plan to address that behavior.

In this case, rather than implementing a consistent plan to treat Lauren's behavior via an IEP, the District confronted Lauren's behavioral problems by repeatedly providing "substantial accommodations." The District contends that such accommodations conferred educational benefit to Lauren. However, the District and its teachers' constant adjustment of Lauren's treatment throughout her tenth grade year[4] discloses knowledge that Lauren's IEP was not

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> days of compensatory education shall be equal to the number of school days less days Student was absent. In addition, because the District failed to provide appropriate instruction in school coping skills and because school coping skills remain a need, we shall order that the nature of the compensatory education be direct and systematic instruction in homework completion, personal organization, study skills, learning strategies, and other such skills as are needed to be successful in school and in academic instruction. . . . This compensatory education shall be provided at Student's and her parents' convenience and may be after school, on weekends, during the summer, or after graduation. Student and her parents may select the specific learning strategies and school skills to be provided.

[4]The inconsistency of the District's approach to Lauren's behavioral problems during her tenth grade year is apparent from the record, which contains instances where teachers addressed Lauren's lateness, absences, and failure to complete assignments on an improvisational basis. As a result of the District's informal approach, teachers permitted Lauren's misbehavior in certain circumstances and punished that same behavior in others. Attempting to convince me of "the absurdity of any attempt to hold the District legally responsible for compensatory education," the District cites an instance where Lauren refused to attend and participate in a reading class. The

providing an appropriate education. In other words, accommodations were necessary because Lauren's IEP was a failure.

This is not an attempt to judge retrospectively the December 2002 IEP. It is certain that Lauren's case presented complex problems, and the District needed a reasonable time to respond. However, the December 2002 IEP was implemented after a December 2002 reevaluation by the school psychologist. Lauren's December 2002 reevaluation report includes a litany of behavioral concerns, including her routine failure to complete assignments, her feelings of embarrassment and anxiety about the quality of her work, and her resistance to support from her parents and teachers. Further, the reevaluation report states, "Last year [when Lauren was in ninth grade] teachers reported a similar pattern, such as losing her assignments, not handing them in, or handing in incomplete work." The report thus indicates that the District knew that the program it was providing was not effective at the time the December 2002 IEP was implemented. The December 2002 IEP failed because it did not recognize and modify previously unsuccessful strategies to account for Lauren's behavioral problems.

As the December 2002 reevaluation put the District on notice of the inappropriateness of the strategies contained in her IEPs, I find that Lauren's right to compensatory education accrued after the December 2002 reevaluation.[5] The Panel noted that the IEPs offered to Lauren in tenth

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District also notes that Lauren's poor grades in creative writing class and ceramics class were a reflection of her not completing assignments. However, in the English class taught by Krista Firely, the District did not apply the lateness policy to Lauren and never penalized Lauren for handing in work late.

[5]Advocating for a compensatory education award for Lauren's ninth grade year, plaintiffs contend that after the IEP Team "had an obligation to develop and implement a clear and consistent behavior plan in response to this clearly identified need" as early as the start of 2001-2002 school year. Yet I conclude that the ninth grade IEP is not inadequate for failing to include

grade were deficient because they failed to address Lauren's worsening performance once it became clear that the existing program was not effective. I agree with the Panel's conclusion that by Lauren's tenth grade year in effect "the District blamed Student for behaving like a student with a disability." Recognizing Lauren's chronic behavioral problems, the December 2002 IEP stated, "Lauren needs to become more responsible with her books and materials. . . . She needs to apply the strategies taught to her to her mainstreamed courses. . . . She needs to take her time and concentrate on the task at hand." These statements demonstrate the District's failure to respond to deficiencies in previous IEPs and thus meet its responsibility to provide a free appropriate public education. The District and the Hearing Officer rely on the adage, "You can lead a horse to water, but you can't make him drink." Yet the December 2002 IEP requires Lauren to quench her thirst at an empty well.

The District repeatedly cites parental involvement and approval as suggestive of the appropriateness of the IEP, but the approval of the parents – who may not be sufficiently sophisticated to deal with Lauren's issues – does not allow the District to disclaim its responsibility. By failing to respond to deficiencies and to provide a consistent policy for handling Lauren's behavioral problems, the District failed to confer any meaningful educational benefit to Lauren in her tenth grade year.

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a behavior plan, because the need for a behavior plan was not clearly identified until Lauren's December 2002 reevaluation. The November 2001 IEP states that Lauren "needs to turn in all assignments, focus and concentrate more." It attempts to correct this problem by providing a program by which Lauren would maintain an agenda book for her daily assignments. As the Court of Appeals recognized in M.C., "it may require some time to respond to a complex problem," and a compensatory education award should "exclud[e] the time reasonably required for the school district to rectify the problem." 81 F.3d at 397. In other words, the November 2001 IEP embodies the District's effort to rectify a perceived problem. In contrast, the December 2002 IEP simply asserts that Lauren needs to apply existing, unsuccessful strategies.

Krista Firely, Lauren's special education teacher, testified that Lauren's case involved "the most intervention and modifications that I've ever had for a student." I do not dispute that the District and its employees expended a great deal of effort and good faith on Lauren's case, and I reiterate that an award of compensatory education does not require a finding of bad faith or egregious circumstances.[6] Because the record reflects that the District should have known its IEP was not providing Lauren with an appropriate education after her December 2002 reevaluation, I conclude that the District must provide Lauren with compensatory education for the number of school days from December 12, 2002 to the end of the 2002-2003 academic year less the days Lauren was absent.

C. Tuition Reimbursement

The "IDEA's grant of equitable authority empowers a court 'to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12 (1993), quoting Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985). Reimbursement of expenditures may include costs for "transportation ... as may be required to assist a handicapped child to benefit from special education." See 20 U.S.C. § 1401(26) (defining those "related services" required pursuant to a free appropriate public education).

In Burlington, the Supreme Court asserted that "parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to

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[6]"[I]n general, the prerequisite of a compensatory education award has not been the gross, egregious, or bad faith conduct of the school district but rather a simple finding that a child has received an inappropriate education." M.C., 81 F.3d at 397.

be inappropriate or pay for what they consider to be the appropriate placement." 471 U.S. at 370 (adding that "it would be an empty victory to have a court tell [parents making the latter choice] several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials"). However, "parents [possess] the right to reimbursement for a unilateral placement in a non-qualifying school only 'if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.'" T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 582 (3d Cir. 2000), quoting Florence County, 510 U.S. at 15.

To be considered proper, private school placement must provide education "reasonably calculated to enable the child to receive educational benefits." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. Westchester County v. Rowley, 458 U.S. 176, 207 (1982). "[A] private school's failure to meet state education standards is not a bar to reimbursement under the IDEA." Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 83 (3d Cir. 1999), citing Florence County, 510 U.S. at 14. In other words, a private school "may be a proper placement even if it does not conform to all of the 'extensive' procedural and substantive requirements set forth in IDEA." David P. v. Lower Merion Sch. Dist., 1998 WL 720819, at *6 (E.D. Pa. Sept. 18, 1998) (holding that a private placement that "may not be the long-term program of choice" was "a proper placement which was reasonably calculated to provide [the student] with educational benefit"), citing Rowley, 458 U.S. at 179.

Further, the Court of Appeals has held that a least-restrictive environment requirement[7]

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[7]"The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." Carlisle Area Sch. v.

does not apply to private placements, as such a requirement would "vitiate the parental right of unilateral withdrawal." See Warren G., 190 F.3d at 83-84 ("[W]hen the public school fails to provide an appropriate IEP, tuition reimbursement may be made to students placed in private schools that specialize in educating students with learning disabilities."); Ridgewood, 172 F.3d at 245, 249. "The least-restrictive environment requirement does not bar reimbursement because 'the IDEA requires that disabled students should be educated in the least restrictive appropriate educational environment.' An appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement." Warren G., 190 F.3d at 84, quoting Ridgewood, 172 F.3d at 245, 249 (citations omitted).

Though tuition reimbursement, if granted, imposes a significant financial burden on participating states and school districts, "public educational authorities who want to avoid reimbursing parents for the private education of a disable child can . . . give the child a free appropriate education in a public setting, or place the child in an appropriate private setting of the State's choice. This is the IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims." Florence County, 510 U.S. at 15.

1. IEP for Lauren's Eleventh Grade Year

In the present case, the Appeals Panel concluded that the IEP offered to Lauren for her eleventh grade year was inappropriate for the same reasons that the earlier IEPs were inappropriate. That is, the District again failed to provide "an appropriately constructed behavior management plan that used positive consequences to shape Student's behavior."

The District notes that the July 2003 IEP for Lauren's eleventh grade year "contain[ed] a

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Scott P., 62 F.3d 520, 535 (3d Cir. 1995).

statement that a functional behavioral assessment would be conducted to determine why Lauren's behaviors were occurring. A functional behavioral assessment was to occur when Lauren returned to school in September, 2003." The District contends that because Lauren was at Wissahickon High School for three days after the development of the July 2003 IEP, this functional behavioral assessment was not completed. While it is true that Lauren's parents could have gone along with the July 2003 IEP and waited for the potential completion of a functional behavioral assessment, they chose instead to pay for what they consider to be an appropriate placement at DVFS. The public placement pursuant to the July 2003 IEP perhaps provided a means by which it would become appropriate at some unknown future date, but it clearly had the same failing as previous IEPs; it lacked a behavior management plan, and at the time it was created the District knew or should have known that any IEP lacking a behavior management plan was not providing Lauren with an appropriate education.

2. Program at DVFS

Though it found the July 2003 IEP was inappropriate, the Appeals Panel denied plaintiffs' claim for tuition reimbursement because it determined the private placement at DVFS was not "reasonably calculated to provide the child with educational benefit." Specifically, the Panel found that "DVFS does not sufficiently address Student's on-going needs in assignment completion, distraction moving to and from class, losing assignments, not completing assignments, and so forth." The Panel did not explain further its conclusion or cite to the record for support. However, the record reflects that, just as her District IEPs, the DVFS IEP did not address Lauren's behavioral problems. The District notes this and references several examples of Lauren's poor classroom performance at DVFS as indications of the inappropriateness of

Lauren's private placement.

As this Court recognized in David P., a private placement – in this case DVFS – may be proper for the purposes of tuition reimbursement even if it does not conform to the procedural and substantive requirements of IDEA. According to their respective recitations of the established facts, the parties agree that DFVS is a private school designed to prepare students diagnosed with learning differences for work and study. During her eleventh grade year at DVFS, Lauren had a written educational plan and an IEP that identified her academic needs and strengths. Though the District contends the DVFS IEP was not as extensive as the one provided by the District, the profile acknowledged Lauren's low self-esteem and lack of confidence in her academic abilities, took note of her auditory processing difficulties and addressed them through a small class setting and modification of instruction, and recognized her anxiety associated with school performance. Also, that DVFS was a more restrictive placement than Wissahickon High does not bar tuition reimbursement.

Though the DVFS program may not have conformed to the procedural and substantive IDEA requirements imposed on the District, I nevertheless conclude that the DVFS program was reasonably calculated to confer educational benefit to Lauren. Therefore, I will Order the District to reimburse plaintiffs for one year of tuition and transportation costs for Lauren's enrollment at DVFS.

III. Section 504 Claim

The Rehabilitation Act, 29 U.S.C. §§ 701 et seq., prohibits discrimination on the basis of disability within federally funded programs. In the education context, the Court of Appeals has recognized that substantive requirements of the Rehabilitation Act and IDEA are equivalent.

Ridgewood, 172 F.3d at 253 ("[T]here are few differences, if any, between IDEA's affirmative duty and § 504's negative prohibition."). To prevail on a claim under Section 504 of the Rehabilitation Act, plaintiffs must prove that: (1) student is disabled as defined by IDEA; (2) she is otherwise qualified to participate in school activities; (3) the District is the recipient of federal financial assistance; and (4) student was excluded from participation in, or denied the benefits of, education in the District and thus was not provided with an appropriate education. Id. at 253. "There are no bright line rules to determine when a school district has provided an appropriate education as required by § 504 and when it has not." Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422, 427 (E.D. Pa. 2002).

In this case, the only element of the Section 504 analysis at issue is the fourth. As I concluded above in my analysis of plaintiffs' IDEA claim, the District did not provide Lauren with an appropriate education. The relief accorded pursuant to IDEA equally applies to Lauren's Section 504 claim.

IV. Section 1983 Claim

Relying on the Court of Appeals's holding in W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995), plaintiffs assert that "violations of Lauren's statutory rights also amount to a violation of her civil rights under the Civil Rights Act, 42 U.S.C. § 1983." However, in A.W. v. Jersey City Public Schools, 2007 WL 1500335, at *5-6 (3d Cir. May 24, 2007) (en banc) (citing cases), the Court relied on subsequent decisions by the Supreme Court and other Courts of Appeals to abrogate its decision in Matula. ("[W]e are now convinced that our ruling in Matula is no longer sound."). Facing the issue of whether Congress intended to allow rights granted by IDEA to be remedied through a § 1983 action, the Court of Appeals concluded that the provisions of IDEA "create an

express, private means of redress [which] means that a § 1983 action is not available to remedy violations of IDEA-created rights, absent some 'textual indication, express or implicit, that the [statutory] remedy is to complement, rather than supplant, § 1983.'" Id. at *9, quoting City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 122 (2005). Looking to the text of IDEA – specifically § 1415(*l*) – the Court of Appeals held that because Congress provided IDEA with a comprehensive remedial scheme, Congress did not intend § 1983 to be available to remedy violations of the rights secured by IDEA. Id. at *10 (finding that "the Court has continued to refer to the IDEA as an example of a statutory enforcement scheme that precludes a § 1983 remedy").

In A.W., the Court also addressed whether Congress intended to allow rights granted in Section 504 of the Rehabilitation Act to be remedied through a § 1983 action and similarly concluded that "§ 1983 is not available to provide a remedy for defendants' alleged violation of [student's] rights under Section 504." Id. at *12 ("There is no showing that the remedial scheme in Section 504 was intended 'to compliment, rather than supplant, § 1983.'"), citing Rancho Palos Verdes, 544 U.S. at 122.

Because there is no remedy available under § 1983 for violations of IDEA and Section 504 such as those alleged by Lauren, I will enter judgment in favor of defendant with respect to plaintiffs' § 1983 claim.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAUREN P., A MINOR, BY AND THROUGH HER PARENTS, DAVID AND ANNMARIE P., AND DAVID AND ANNMARIE P., ADULTS, INDIVIDUALLY, AND ON THEIR OWN BEHALF	:	CIVIL ACTION NO. 05-5196
v.	:	
WISSAHICKON SCHOOL DISTRICT	:	

ORDER

AND NOW, this 20th day of June 2007, upon consideration of the parties' cross-motions for summary judgment, the responses thereto, and the administrative record, and for the reasons stated in the foregoing memorandum, it is ORDERED that defendant shall provide plaintiffs compensatory education for the number of school days from December 12, 2002 to the end of the 2002-2003 academic year less the days Lauren was absent plus tuition reimbursement for Lauren's enrollment at Delaware Valley Friends School for the 2003-2004 academic year. It is further ORDERED the defendant's motion for summary judgment is GRANTED with respect to plaintiffs' § 1983 claims.

Final judgment is reserved until plaintiffs provide defendant and the Court with documentation of tuition and transportation costs. Plaintiffs shall do so within ten (10) business days of date.

s/Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.