

**DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL**

In the Matter of) **ORDER**
 ("Student"))
 Petitioner,) Date of Order: 12/11/15
 v) DE DP 16-5
 CAMPUS COMMUNITY SCHOOL) Dates of Hearing: 11/2/15,11/3/15
 ("District")) Date of Closing Submissions: 11/30/15
) mailed & emailed to counsel: 12/11/15
 Counsel for Petitioner/Student: Lauren O'Connell-Mahler, Esq.
 Counsel for District: James D. Taylor, Jr., Esq. and Allison J. McCowan, Esq.

DECISION AND ORDER

I. PROCEDURAL BACKGROUND

Student (DOB xx/yy/zz) through Counsel filed this Due Process Complaint against Campus Community School ("District") on August 28, 2015 alleging that District had violated the Individual with Disabilities Education Act ("IDEA") from the time October, 2011 (just after Student entered first grade at District) until September 24, 2014, the date Parents signed the withdrawal documentation from District.

For the sake of brevity, while all of the allegations of the ten page complaint were considered by this Panel and addressed by this order, these will not be repeated. In summary, the Complaint alleged that at of the start of October, 2013 Parents knew or should have known of the issues for the basis of the Complaint (the "KOSHK")¹ which briefly are:

- a. a failure to timely evaluate and identify Student pursuant to District's Child Find Obligations;
- b. District's limited evaluations of Student were not sufficient to identify Student 's special education and related service needs;
- c. District failed to provide Student program and placement in the Least Restrictive Environment.
- d. Failed to conduct a Functional Behavior Assessment of Student;
- e. Failed to provide Home Bound Instruction when Student was out as a result of Pertussis.
- f. As relief originally Student requests compensatory education in the form of a monetary fund maintained by an independent Trustee for Student's Educational Needs from October, until September 24, 2014, inclusive of Extended School Year and attorneys' fees.²

¹ Later in their District's Brief, District alleged that the KOSHK Date was April, 2014 when their tutor told them of District's obligations. Prior to filing the Complaint, Parent's sent a draft complaint with a settlement offer indicating that Plaintiff's KOSHK date was February, 2012, This was the subject of a Motion to Dismiss which is denied by this Order as it is believed that Counsel was not relying upon a Parents or Student's Statement in using this date in a settlement letter and there was no proof at trial that the draft complaint language was approved by Parent and was intentional. Rather the source of the error was an attorney mistake not an admission by a client and for this reason and since this concerns a matter critical to a child unaware of such mistakes, the Motion to Dismiss is denied.

² This Panel does not award attorney's fees; that is a different forum.

District responded denying the allegations, indicated that it did violate any of Student's rights and moved to dismiss alleging that the Complaint was not timely filed as the KOSHK date was February, 2013. Student moved to dismiss the Response or ask for issue preclusion for District's failure to do a resolution session promptly. This was denied as to dismissal and issue preclusion and the Panel indicated it would allow Student to show any separate injury from the failure to attend the resolution session at trial. This was not shown. This Order acts as a final order on the District's Motion to Dismiss, the Complaint, as well as any Motion filed by either party.

II. TESTIMONY AND EXHIBITS

As a preliminary matter, this decision is reached after 2 full days of testimony, and the review of all Exhibits provided. While, not all the testimony is summarized in this portion or the finding of facts. All of the testimony and admissible exhibits were considered by the Panel.

A. (District's first witness- Student's 1st grade teacher)

Teacher was Student's first grade teacher in the 2011-2012 school year. Teacher met Student at an Open House for the District in the August prior to the start of school. (N.T. 26). Teacher described Student as shy and upset at the beginning of the school day. Teacher was able to calm Student down from crying, Teacher needed to give Student a "push" to get Student to attempt things. (N.T. 27). Teacher was informed by Mother that Student had epilepsy and Teacher undertook to videotape Student and provided the same to Mother to determine if what Teacher was witnessing in Teacher's classroom were seizures due to Student's epilepsy. Mother described the videotapes to her Medical Provider and emailed Teacher that what was on them were not seizures and inquired as to whether Student had a processing issue and questioned the effect that had on Student's low reading in November 3, 2011. In response to this November 3, 2011 email, Teacher indicated that Teacher contacted special services and discussed a 504 or IEP for Student and decided to make an appointment after conference(S-12) and that further Teacher would continue with small group instruction and prompt Student when Student was with Teacher. Teacher clarified that small group instruction for Student was 4x per week at this juncture for about 20 minutes and that at school there was a tier process.

Teacher went on to say that the Tier Process used at District was known as the Response to Intervention ("RTI") and had 3 tiers with Tier 1 being the general Student population, Tier 2 being Student's who were not getting enough education benefit from the general education and Tier 3 being student's who needed more small group or repetition than Students in Tier 2. (N.T. 35).

Teacher testified that during the school year of 2011-2102 Student was educationally growing but was regressing because of absences, but that Parent has responsibility to get Student to School. Teacher also testified that Student was late frequently and had homework issues both of which were not within Teacher's control.

On Cross examination, Teacher admitted Teacher had no information with Teacher during testimony as to a time when Student was not struggling. Student Exhibit 16 stated March 16, 2012 indicated that Student was at Tier 3, the tier for the lowest performing Students in RTI and that Student in this case was never up to the educational level of the average student.

Critically, in an email from Special Education Teacher dated 2/3/12, it is relayed that Mother was through Teacher. was requesting a pyschoeducational evaluation for Child.

B. (District's 2d witness- provided Special Services for Student while in 1st Grade)

Special Education Teacher was a certified special education teacher assigned to the 1st grade while Student was in 1st Grade at District. Special Education Teacher testified that while Special Education Teacher did not test Student Special Education Teacher probably had Student do a phonics inventory. Special Education Teacher might have administered a Jerry Johns and probably did a DIBELS on Student.

Special Education Teacher in February 3, 2012 emailed Special Education Teacher's Superior at District with Student's results from a Phonics inventory, San Diego Quick Assessment, IRI (or Jerry Johns), DIBELS and critically in that inventory indicated that Mother had indicated a doctor diagnosed Student with Dyslexia, that Mother of Student (though 1st grade teacher) was requesting Student get a Psychoeducational Evaluation, Student was in the lowest performing tier of RTI for reading **and asked Special Education Teacher's Superior at District whether or not Special Education Teacher should get permission to evaluate Student for Achievement (Reading, Writing, Math), Cognitive, Scotopic, BASCs**, (indicating Student did not exhibit ADHD/ADD behaviors).

Special Education Teacher testified that Special Education Teacher did not get a reply from District as to the above boldfaced underlined tests. However, attached as S-14 is a permission to evaluate done by district for Student and signed by Mother on 2/8/12 with absolutely no mention of what was done regarding Mother's request for the above bold faced tests. The permission to evaluate was only provided for Scotopic. S-12. There clearly is a box in this form to notify parent as to a decision for example as to the above bold faced Achievement, but nothing is filled out. Nor did Special Education Teacher testify that District provided a separate form to Mother as to what District did in response to Mother's request as to the above bold faced tests as Special Education Teacher never heard from her superior at District, who Special Education Teacher asked for guidance. N.T. 131. ³ On re direct, Special Education Teacher explained that District was not required to give every test a parent asks (N.T. 152) and later indicated on recross to a question without a time frame that Special Education Teacher did not know why Student was not offered services when Student was not in school. (N.T. 165).

As to how Student's did on the sort of first grade assessments administered, except for phonics and that portion of the San Diego Quick Assessment as the for Student's at a preprimary level (pre-K), Student did not perform as a typical first grader. S- 13.

This witness testified that Special Education Teacher never saw S-10 which was a note from the Student's neurologist which states "Ask School Psychoeduc Tests For Dyslexia, Reading and Conner forms for attention. Note Pos Fx History".

³ This is in contradiction with Mother's testimony that she signed and returned the consent. N.T. 596.

C. (District's third witness- Curriculum Director for District)

Curriculum Director was the curriculum director for the school for Student's 1st grade through 3rd grade years. Curriculum Director testified that the District's RTI had 3 tiers each in place for a minimum of 6 weeks, but in District they kept it the length of a marking period which was 9 weeks and the purpose of RTI was preventative. Tier 1 was students doing fine, the general population, and Tier 3 was for student performing in the lowest levels of the Tiers. After Tier 3, Curriculum Director indicated that most students stay on the intermediate intervention, level Tier 2, before they move to Tier 3, if they are not improving adequately. Curriculum Director went on to say that Parent could request an educational evaluation and if requested the same had to be done.

As to absences, Curriculum Director said that the time a Student was absent did not count towards consideration as to whether the student should change Tiers. There was to be a meeting called the IST meeting which was to occur right before the Student was evaluated.

As to testing while Curriculum Director testified that the test Curriculum Director was familiar with done for Student while in 3d grade showed Student performed better than only 6% of the Student's tested in Math which was well below the standard . S-36. N.T. 190-191. Curriculum Director also testified about Student's State testing scores DCAS which were well below the standard for reading and math.

Curriculum Director also testified that Student was absent from September, 2013 through January, 2014 due to Pertussis and that Curriculum Director coordinated homebound and that there was confusion as to whether student would be out at the start of this period and that Parent did not get Curriculum Director a Drs. Note when school adjourned for winter break.

Curriculum Director also testified that Curriculum Director attended a meeting where parents were not there concerning whether the gaps in Student's learning were from a learning disability or were due to Student's excessive absences from school and it was decided in the spring of 2014 during student's 3rd grade year to have Student tested for a disability. As to Mother's earlier request some time before February 3, 2012 in Student's first grade year Curriculum Director testified Curriculum Director was not aware of that.

Curriculum Director testified that Curriculum Director did not know how long Student was on Tier 1 or Tier 2 of RTI. (N.T. 239.) Curriculum Director testified as to the meeting that took place both with and without parents when Student returned to school. Curriculum Director further testified as to Student's report cards during 3d grade and that at the end of 3d grade Student's report card indicated Summer School was required for Student.⁴ As to the withdrawal document, Curriculum Director testified that District sent parent a letter on September 23, 2014 which would have been Student's 4th grade year that Student had missed all 18 days of school that year unexcused and absent explanation would be referred for truancy. S-46.

⁴ Mother testified that this was excused at an IEP if she had Student privately tutored.

D. B.R.(DISTRICT'S FOURTH WITNESS- HomeBound Provider for Student during Fall/ Winter of Student's 3d Grade)

Homebound Provider, while Student in 3rd grade was out for Pertussis or exposure, was the Home Bound Tutor that provided services from October 30, 2013- December 18, 2013⁵ for a total of a little over 18 hours. See D-17. The instruction was in Reading and writing and one Math assignment as directed by the Teacher. N.T. 302-303. Homebound Provider testified that in Homebound Homebound Provider picked up regular work from school for Student and assisted Student with completion of the same but completion was to be done independently and when Homebound Provider was not there. Student did not complete assignments and would often not give a reason for this.

E. (DISTRICT'S FIFTH WITNESS- Principal for School Student Attended.

Principal was the principal for the School Student attended in Student's 2d and 3rd grade years which has been referred to as District. (N.T. 309.) Principal's relevant involvement with Student in Student's 3d grade year was in 2014. Principal attended an initial meeting in March 23, 2014 where Principal was not certain why Parent was not involved concerning possible special education needs. Student was initially evaluated on March 31, 2014 by Evaluator. After this, there was a meeting later in the Spring , 2014, May 1, 2014, which was not completed as Mother requested an independent educational evaluation. A meeting was then done on May 27, 2015 where Principal indicated Dr. Erb (mother's selected Independent Educational Evaluator) somehow participated. On May 27, 2014. in District Exhibit 31. Principal and parents agreed that Student qualified for an Individualized Education Plan ("IEP ") under the categories of Learning Disability and Other Health Impairments. Also, on May 27, 2014 at the end of Student's school year the parents and relevant parties all agreed and signed an IEP for Student set forth as Campus Exhibit 34 which while all of the provisions of this IEP will not be set forth in detail, this IEP discusses Student's particular need that result from Student's Disability, discusses evaluation of Student for Occupational Therapy, addresses Student's Focus and Attention Deficits, Reading Comprehension, Written Expression and Math Calculation with has Benchmarks.

On cross examination as to why the Occupational Therapy Examination and other evaluations set forth In IEP after IEP was done on May 27, 2015, Principal indicated they were not done as Student was not in school and did not show up after that. Summer School was required in the Student's Report Card and Instruction in Summer school was governed by the IEP. (N.T. 348.)

F. Student's Second and Third Grade Teachers..

Neither party called the Student's 2d or 3d grade teacher as a witness. Parent's counsel submitted Student's Report Cards for First Grade(S-18), Second Grade (S-22) and Third Grade (S-44).

⁵ Student did not return to school until January 13 or 14th the following year but Homebound Provider explained the reason the last homebound session was given was December 18, 2013 was because of the lack of a Drs. Note.

G. (Mother of Student and witness for Both District and Parent)

Mother testified that Student is 10 years old and 1 of 5 children, 2 of which are foster children. (N.T. 373). Student currently attends a different school in a different district and for the year immediately following Student's last year at District was home schooled. Mother stated District knew Student had anxiety on November 2, 2011. Mother indicated there were 4 diagnoses given that time but could not locate the record of same. As to diagnosis at Student's school prior to District, Mother did not recall. As to the sick time that caused Student to miss school at District during first grade, Mother said the illnesses were epilepsy, seizure activity, sleep disruption, flu and viruses. Student was not diagnosed with a sleep disorder. Student has been off seizure medication since November, 2012 .Mother indicated there were no seizures in First grade that District reported to her.

Mother testified that Student had excessive absences in 2012/2013 when Student would have been in second grade. As to Student's seizure activity during this school year Mother testified that Student was too sleepy to go to school and worried about having a seizure at school. Besides being tired Mother testified she witnessed Student wakes up- , walks around and does different things, . The evening near trial Mother described Student wake up sit up and it looks as if Student tries to speak, but can't some times. Some times, Student has mild tremors at night, picks at Student's clothes and other random actions. Mother said these behaviors may not be seizures. ⁶

In 2011, Mother testified that she communicated to Teacher that the Student's neurologist wanted Student examined for Attention Deficit Disorder, Dyslexia, and sent out Conners forms to District to be completed for this. Mother also indicated Student can't take medication for ADD/ADHD because of Student's other health problems, being Student's seizure issues and anxiety.

Mother testified that Teacher changed Student's 1st grade seating assignment so Student sat in the front of the room because Student would gaze off and stares off presumably not in a typical direction and was having difficulty learning to read (N.T. 555) and sent off paperwork for Student to be evaluated. Mother also explained that while she was not certain what Student experienced with Teacher were seizures or not, they did affect Student.

Mother indicated that in second grade, Student was taught by Second Grade Teacher and at some point Second Grade Teacher went to look for testing that was supposed to have been done the previous year. (N.T.560). As to the Independent Educational Evaluator, Dr. Erb, Mother said she did not choose her but relied upon the recommendation of Dr. Kaza and that as to what Dr. Erb did, she did not know what a psychoeducational evaluation was. (N.T. 568-572).

As to the Individualized Education Plan that was done for Student on May 27, 2014, Mother testified that she felt it addressed all of her concerns for Student and that it was implemented the next day. Mother later testified that she thought there was going to be a meeting before the next school year, but they did not have special education people there. (N.T. 578). Mother explained that School did not have special education personnel in August, 2014 such as the "RTI Coordinator gone, Everybody was gone", the speech evaluation was not done so they pulled Student from the school. (N.T. 579). Mother says she signed the withdrawal of Student on September 24, 2014. (N.T. 583).

⁶ It was agreed by counsel to interrupt Mother's testimony and take Tutor. as a convenience to the witness

Mother testified that she supplied a Note from Student's neurologist (Dr. Bean) on or shortly after December 20, 2011 (marked as S-10 in the Exhibits) that school should conduct psychoeducational testing for dyslexia, reading and Conner's forms for attention. (N.T. 596). Mother additionally testified that she believed she has signed a consent form for that testing. (N.T. 597). Mother testified that at the May 1, 2014 she read a letter from Student's first grade teacher dated January 20, 2012 where that teacher said Student had dyslexia, but that Dr. Bean disagreed. This letter was not placed in evidence. Mother testified that lots of records were missing from District's file and that the school moved the summer between Student's first and second grade years.

As to Student not going to summer school for the summer. 2014, Mother brought up that idea of Student not going to summer school in 2014 at the IEP meeting in May. 2014. The report card issued after that.(S-44 and District's 37) said otherwise and that was received by Mother around June 3. 2014 (N.T. 614-615). Mother never called the Principal after that date , but that Principal indicated that Student could use a private tutor in lieu of summer school at an earlier meeting. (N.T. 616). Mother as to her attempts to contact folks at school in the summer of 2014 as to Student's progress with the tutor admitted she did not contact Principal. Further, Mother knew Special Education Teacher worked at District. (N.T.680).Mother got her material to home school Student for the 2014-2015 school year at the end of August or the beginning September, 2014. (N.T. 683).

Mother testified that the amount she paid for Tutor to tutor Student as \$35 per hour. Mother stated she first realized that Student's rights were violated by District when she hired the tutor, on April 1. 2014. (N.T 666-667).

Mother testified that she did ask School through Teacher for a psycho educational evaluation some time in the neighborhood of February, 2012 (N.T. 721) but that she did not know what that entailed. (N.T. 686-687). Mother said the paperwork was signed in the Spring. (N.T. 687) . Mother asked for the results of those exams for two years. (N.T. 689). Mother later testified that she thought Special Education Teacher's Superior at District ⁷who was at one point head of special education in the high school did that examination of Student at the end of Student's first grade school year. (N.T. 692-693).

There is support that as late as March 21, 2014. Mother was asking Principal about this testing (S-32, 80). Mother later discovered this sort of testing was never done. N.T. 695) Mother then testified to the extent she had asked about this testing. (N.T. 696-697, 701,703) Some time before December 29, 2011 the school got the Connors forms tests for Student's attention issues from Student's neurologist Dr. Bean. (N.T. 713). The end result is Mother thought there had been psycho educational tests done in Student's first grade year only to learn about 2 years later such tests were not done and that Student's second and third grade teachers had asked about it.

⁷ Mother testified Special Education Teacher's Superior at District left District during Student's 1st grade school year and Mother later learned later Special Education Teacher's Superior at District moved to Africa. (N.T. 727)

H. (Student's witness / Student's Tutor)

Tutor was Student's tutor starting in April, 2014, Student's 3d grade year at District to present. Tutor is certified in elementary education K through 6th grade and certified to teach special education K through 12th Grade.

Tutor indicated that the Student at the time Tutor first started tutoring Student was anxious, apprehensive, struggling with reading comprehension and decoding and missing fundamentals in Math and Reading. (N.T. 441-442). As to Student's writing skills, Student had difficulty with punctuation and was often off topic. N.T. 443. Tutor described Student as needing specific direction and difficulty working independently. Tutor indicated that Student struggles with memory, processing, and focus. Student also often looks to Mother and sibling for answers to questions. Tutor indicated that Tutor did not believe Parent's exaggerated Student's illnesses. In these assessments, though Tutor has never been to school at District had little email contact with school and admitted that while there were gaps in Student's education when Tutor met Student, Tutor did not know why. As to Student not attending summer school in 2014 in lieu of Tutor tutoring Student, Tutor testified that this occurred with another student (not the one in this case), but in that case, Tutor communicated directly with the school, unlike this situation where Tutor communicated only with Parent and this was unusual.

III. MAJORITY'S FINDINGS OF FACTS

1. During the fall of 2011, Student's first grade teacher, with Mother's permission, was videotaping Student to determine if certain behaviors of Student's teacher was witnessing were seizures. Mother described these behaviors to her neurologist's office and relayed to this teacher, they were not seizures, with the nurse practitioner describing them a possible processing issue of Student concerning reading.
2. Mother at some point during Student's first grade year requested through Student's first grade teacher a psycho educational evaluation of Student for dyslexia reading and testing for Student's attention difficulties.
3. Mother's request was based on and consistent with Student's neurologist, Dr. Bean's note set forth as S-10 which she made available to District some time after December 20, 2011 but before February 2, 2012.
4. Mother's request was made to Student's first grade teacher who relayed that request to the first grade special education teacher who relayed that request to Special Education Teacher's Superior at District who was in charge of getting that testing completed at the relevant time, February of 2012, during Student's first grade year.
5. Mother was given the permission to evaluate set forth as S-14 and signed the same on February 8, 2012.
6. S-14 does not tell or put Mother on Notice that Student would not receive the psycho educational evaluation that Mother requested. Now Mother herself may not have realized this difference. However, District with educational expertise did as evidenced by Special Education Teacher's request to Special Education Teacher's Superior at District.
7. Mother's request to District was equivalent to a request for Initial Evaluation of a Student during RTI which Mother is entitled to do.
8. Student at the time the Request was made for Initial Evaluation by Mother's above request for a psycho educational evaluation was in the lowest performing group of Student's receiving RTI .
9. Mother had adequate basis to request Student be evaluated with the detail of a psycho educational evaluation as evidenced by Student's performance on those assessments described by Special Education Teacher and set forth in S-13.
10. District did not inform Mother it was not performing a psycho educational evaluation described in S-13 until 2014 as the Permission to Evaluate set forth as S-14 does not say whether or not the psycho educational evaluation as requested by Mother and described in S-13 will be given or not and if not, why not. The specific sort of written notice that the psycho educational testing requested by Mother which was beyond testing for Irlene Syndrome (scotopic sensitivity) would not be given had to be consistent with 14 De. Admin. Code 926.3.0. No such written notice was presented by District in the record. The absence of this, coupled with the unrebutted testimony that during the Student's second and third grade years, Mother was asking about the test results for the psycho educational evaluation support this finding.
11. The above omission was not the fault of Special Education Teacher as Special Education Teacher indicated Special Education Teacher was waiting to hear as to whether to get the psycho educational testing requested by Mother was approved by Special Education Teacher's superior.

12. District should have completed the testing requested by Mother and completed an Individualized Educational Plan by the start of Student's second grade year. This was a reasonable amount of time.
13. The sole control of the Documentation and responsibility to maintain the Documentation that adequately notifies a parent when the District does not do a specific test requested by a Parent rested with District in this particular case as evidenced by the un rebutted testimony of Mother that during the second and third grades she was still asking District where were the results of the psycho educational evaluation requested by her in the first grade were. There was no description in written language the general public could understand as a refusal to give the sort of testing requested by Mother.
14. Student did not receive an Individualized Educational Plan ("IEP") until May 27, 2014 toward the end of Student's third grade year.
15. Student received Student's report card and was offered summer school on June 3, 2014. Mother chose not to send Student as the summer school that was to be given Student for the summer 2014 which had to be consistent with Student's May 27, 2014 IEP.
16. The IEP of May 27, 2014 for Student was adequate and governed all of Student's education at District from May 28, 2014 forward. This IEP discusses Student's particular, specific needs that result from Student's Disability, discusses evaluation of Student for Occupational Therapy, addresses Student's Focus and Attention Deficits, Reading Comprehension, Written Expression and Math Calculation with Benchmarks.
17. Mother's refusal to send Student to summer school in the summer. 2014 was her unilateral choice and it is equitable not to award this as a part of compensatory education.
18. Mother refusal to send Student back to school in September of 2014 was her unilateral choice and could not be attributed to District.
19. Mother was paying \$35 per hour for tutoring of 2 students. As such the reasonable rate that should be attributed for compensatory education should be \$17.50 per hour.
20. Mother requests a compensatory fund for 8 hours in school. However, this includes an hour of time for eating and recess that would not necessarily be a part of a tutoring environment where there is the sort of flexibility in scheduling testified by Mother's chosen tutor. The amount of instructional time is limited to seven (7) hours a day.
21. As the homebound instruction provided by District was not pursuant to an IEP, they do not offset the educational deficit to this Student and do not diminish the compensatory educational time due.
22. The Draft Due Process Complaint and the KOSHK date set forth therein was not admission to fact that parents knew or should have known of the facts forming the basis for complaint because the entire notice procedure did not place Parent on notice as required that District was **not** conducting a psychoeducational evaluation as requested by Mother. This has the effect combined with District's silence in response to Mother's 2 years of persistent inquiries as to the results of this nonexistent psycho educational evaluation of withholding required information to Mother. This is not to say if there had been a written specific, compliant denial compliant with the regulation, the same has to be exhaustively repeated but there is a need for this writing once.

IV. MAJORITY'S RATIONALE FOR DECISION

A. District Has Burden of Proof.

Under 14 Admin. Code 926.11.10 District has the burden of proof and persuasion in this proceeding. Our state of Delaware has made a decision to give its student's this protection which is permissible and not in contradiction with *Schaffer v. Weast*, 126 U.S. 528(2005).

While Parent undoubtedly has the burden to bring an action within two (2) years the parent knew or should have known the alleged action that forms the basis for the due process complaint, this time line does not apply where District as the LEA withheld information from the parent that was required under these regulations. Under 14 Admin. Code 925.12.11 it is unequivocally stated Mother requested Student be given a psycho educational evaluation for dyslexia, reading and Conners forms for attention. Not only was anything remotely similar to this not done until Spring, 2014, but during this period, District did not inform Mother that it was not giving Mother such testing in plain language and in the manner otherwise required by 14 DE Admin Code 926.3.0. Exhibit S-14 in no way satisfies this requirement as it concerns a vastly different sort of testing and is not phrased in a manner such as: (1) to put Mother or any general public member on notice that her request for psycho educational testing was rejected, or (2) why it was rejected which is required by 14 DE Admin Code 926.3.2.2, and (3) what part of the record that formed the basis for the rejection of the requested testing under by 14 DE Admin Code 926.3.2.3.

Here rather the limited sort of assessments done for Student in first grade that are described in S-13 namely the San Diego Quick Assessment for P(kindergarten) and One (1st grade) and the IRI for all levels indicate further testing of Student as requested by Mother was the proper course of action for District. That is, this case fits an exception to the deadline.

As a separate basis for not applying the time bar, Mother persistently asked about the result for the tests not done in first grade in Student's second and third grades and was met with silence. This had the effect when combined with District's lack of an explicit rejection of the request for a test never triggered two year deadline to file a Complaint until Mother was told the test was never conducted in the spring, of 2014. Since the date the complaint was filed was within two years of this, the Complaint is timely.

The next piece of analysis was did the District have enough information such that Student qualified for an IEP under Specific Learning Disability, Other Health Impairment or Emotional Disturbance. The evidence was that District had Dr. Bean's diagnosis of epilepsy in late September 2011 but that more critically S-10 where Dr, Bean was suggesting school do a psycho educational testing Student for Dyslexia Reading and attention testing. S-10 was received by District no later than February 3 , 2012. It further had the poor results of Student in the testing relayed from Special Education Teacher to Special Education Teacher's Superior at District in Special Education Teacher's February 3, 2012 email.

The next piece is if the District should have been testing to formulate what the IEP would include, when should District have had an IEP in place. It is believed that in this case, given the complexity of Student's symptoms, it is reasonable that Student should have had an IEP by the beginning of Student's Second School Year. In reaching this conclusion, we believed that it should have been done in about the same time frame as when the Student returned from Pertussis in the third grade until completion.

This leads to determination when did District finally do what it was supposed to. The answer was on May 28, 2014, the first day, District put the IEP for Student in place. From that point forward there was an admission by Mother she was satisfied with the IEP. Moreover, it was reviewed in detail by the Panel in light of the Independent Educational Evaluation done by Dr. Lynn Erb, Ph.D. and was found to be sufficient not only agreeable by Mother. At that point forward, Mother's choices were her own, and it was her unilateral choice not to send Student to Summer School at District or not to start Student at District the next school year. The education District was bound to provide was governed by a satisfactory IEP and it would be as inequitable to punish District.

This brings us to the relief requested. District set forth no basis why the rate should be \$75 per hour when Mother was paying a tutor who was a certified special education teacher \$35 per hour to teach 2 students who testified the fact that 2 were tutored did not compromise the tutoring value to each Student. As to the amount of instructional time, while student claimed it to be 8 hours per school day, at least one of these hours from experience⁸ is a break time (in the form of a lunch period and or recess) that may have no application to a tutoring arrangement which the witness indicated was flexible in time beyond that which a school could do so the amount of instructional hours was limited to 7 hours per school day or one hour less than that requested at the rate of \$17.50 per hour.

This brings us to the matter of the fund established for the educational trust. This is acceptable with the following conditions for the following reasons. First the trustee and the trust must be governed by Delaware law and accept the jurisdiction and service of the Delaware Courts including the Court of Chancery and include language including this and appointing an agent with a Delaware address to accept service of any Complaint. Second, the trust funds must be used for the educational benefit of Student within four (4) years of the date of this Order. The reason for both these provisions is that the right to this education is Student's. Student lives in Delaware and is entitled not to have to chase any trustee in another state for any violation. As to time limit to use this trust, the reason is Student has an educational deficit and the sooner addressed the better prospect of greater remediation. To the extent not used within 4 years, the successor beneficiary to the remaining unused funds shall be District, and if District is not around, the school district student is attending. The fourth condition is that there has to be consent given by Parent's to provide any school where student is attending the results of any testing paid for by the trust. The reason for this is this is it will maximize the value of the services Student is getting from the trust for Student's education.

⁸ There was insufficient evidence as to the length of a School Day and schedule at District. However, this is not fatal as the relief is set forth so that it becomes a simple matter of looking at a calendar.

V. ORDER.

Student's request in the Complaint is granted to the follow extent. District shall establish a fund for a trust for the compensatory education of Student in the amount of \$17.50 per hour multiplied by 7 hours multiplied by the number of School Days of Student's District during Student's Second Grade School Year through May 28, 2014. There is no separate sanction for the missed resolution session as there was no separate harm. District's Motion to Dismiss is denied.

2. Student is a successful litigant for purposes of any further attorney's fees claim.
3. **This is a final decision subject to appeal by any aggrieved party within ninety (90) days in the federal court or the Delaware Family Court.**

So Ordered this 11th Day of December, 2015

/s/ Gary R. Spritz
Gary R. Spritz, Esq.

/s/Dr. Harold Tarriff
Dr. Harold Tarriff

/s/ John Werner
John Werner