BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN RE:

M.A.R.

v. NO. 04-30

Hamilton County Schools

FINAL ORDER

This cause came to be heard in Chattanooga. Tennessee on the 19th day of May 2004, before the Honorable Linda G. Welch, Administrative Law Judge for the Department of Education at the office of Gary Landers by agreement between the parties. Petitioner was represented pro se while the Respondent was represented by Gary Landers, attorney for the Hamilton County School System. Evidence was offered in the form of documents as well as sworn testimony given by the following individuals:

1. MAR- Petitioner
2. Mr. R- Father of the Petitioner
3. JoAnn Adams-Part time instructor at Berean School
4. Vincent Scott Hooper-Lead school psychologist for Hamilton County Department of Education
5. Kathy Crocker Brown-Supervisor of Exceptional Education for Hamilton County Department of Education
6. Pamela Hudson-Director of Exceptional Education for Hamilton County Department of Education

PROCEDURAL HISTORY

A request for a Due Process Hearing was filed for the child, MAR, by and through his parents, Mr. and Mrs. R, which was received by the school system on April 20, 2004. The espoused issues in this case were: (1) Whether or not the child should receive tuition reimbursement for private school placement retrospectively for the 1998-1999 school year, the first semester of the 1999-2000 school year, the 2002-2003 school year, as well as for the 2003-2004 and 2004-2005 school year. (2) Whether or not his child was in an appropriate placement pursuant to this specific needs.

A telephonic conference call was held with the parties on April 29, 2004 with a subsequent scheduling order issued that same day. A Motion for Summary Judgment was filed by Hamilton County Schools which was denied in part and granted in part. Summary judgment was granted with regard to retrospective tuition reimbursement for the 1998-1999 school year and first semester of 1999-2000 school year (February 2000-May). Summary judgment with regard to the issue concerning 2002-2003, 2003-2004 and 2004-2005 tuition reimbursement was denied. The basis for denial of private school tuition reimbursement for the 1998-1999 and the first half of the 1999-2000 school year was that the Petitioner did not file for reimbursement within the applicable three year statute of limitations. Because the IDEA does not specify a particular statute of limitations, the Court in Janzen v. Knox County Board of Education, 790 F. 2d 484 (6th Cir. 1996), held that no single state statute of limitations applied to each IDEA action. Rather, the cases are be analyzed individually to choose the most analogous state statute of limitations. In Janzen the Court applied a Tennessee three year statute of limitations as opposed to the 60 day statute of limitations in

the Uniform Administrative Procedures Act, T.C.A. § 4-5-322 (1998), to an original action filed in federal court seeking reimbursement for private school tuition. It was not until April, 2004 that MAR filed a request for a due process hearing; therefore, the Petitioner's claim for 1998, 1999, and 2000 is barred by the statute of limitations. The due process hearing was held on May 19, 2004 with both parties present. Subsequent briefs and additional information have been presented by both parties.

FINDINGS OF FACT

MAR has been both a public and private school student in Hamilton County, Tennessee. MAR attended Highland Plaza UMC for preschool, Big Ridge Elementary School for grades one through four. Scenic Land School (hereafter referred to as SLS) for the fifth grade through the ninth grade and Berean School for the tenth grade. (Ex. #8, 9) He attended public school through the fourth grade. He was then placed by his parents at SLS where he stayed through ninth grade. (Transcript p. 29, ll. 15-20) There is no dispute that the parents paid tuition initially for SLS; however, the Hamilton County School paid for the second semester of the 2000 school year and the 2001-2002 school years. (Transcript p. 16, ll. 15-20)

He stayed at SLS, where he completed the ninth grade, until it closed in May of 2002. During the period of time MAR was in private school, he had an IEP developed by Hamilton County Schools. (Transcript p. 114, ll. 6-24) Although, this child had been placed at a private school, SLS, Hamilton County School was involved in the preparation of his IEPs from 2000 through May 2002. (Transcript p. 114, ll. 6-24) Hamilton County School

provided a representative for each IEP meeting and the IEPs were considered to be those of Hamilton County School. (Transcript p. 114, ll. 6-25; p. 115, l. 1) Mrs. Pamela Hudson, who at the time in question was a supervisor of administrative services for Hamilton County Schools, the individual who was Hamilton County IEP facilitator, the Hamilton County case manager, and the contact person for MAR from 2000 until the end of the school year in 2002. (Transcript p. 389, ll. 1-25; p. 390 ll. 1-7) Therefore, she was the liaison between Hamilton County Schools and MAR. Mrs. Hudson testified that in the years preceding the 2002-2003 school year, the IEP team met with the intent that the IEP be completed prior to the start of school but would plan to meet prior to the beginning of school. (Transcript p. 391, ll. 8-25; p. 392, ll. 1-14; p. 432, ll. 5-8) She stated the intent to meet provided the opportunity for MAR to consider re-entering public school. She further testified that on occasion the IEP for MAR was not completed prior to the start of school. (Transcript p. 392, ll. 20-23) However, when there had previously been an issue with regard to whether or not SLS was accredited, the parents expressed concern that the IEP be in place prior to the beginning of school. (Transcript p. 393, ll. 3-11) Mrs. Hudson, as contact person for MAR was present at the May 14, 2002 IEP meeting held at SLS. (Transcript p. 394, ll. 21-25; p. 395, ll. 1-11; Exhibit #6) It was her responsibility to communicate with MAR after the May 14, 2002 meeting. (Transcript p. 396, ll. 6-13) The specific intent of the IEP team was to reconvene prior to the beginning of school to consider placement for MAR. In fact, the specific language in the IEP as written by Mrs. Hudson, who took notes for that May 14, 2002 IEP, was that "The IEP team must recommence to determine a placement." (Transcript p. 397, ll. 6-9) During this meeting concerns were expressed as to class size as well as the possibility of placing MAR in

an out-of-zone placement or even at another private school placement. (Transcript p. 397, ll. 11-25; p. 398, ll. 1-5, Exhibit # 5) It was felt that another school might expand upon the May 14, 2002 IEP. (Transcript p. 398. ll. 12-21: Exhibit #5) Therefore, the intent of the May 14, 2002 IEP team was to find. not just a building, but a program that would accommodate MAR.

There is no dispute that the child has had and continues to have learning difficulties and that reading was and is an issue. (Ex. #5, Transcript p. 25, ll23-25; p. 26, ll. 1-3) In fact upon the completion of the ninth grade he was reading at a 3.6 grade level. (Id. at 7) During his public school years (1-4) grades he did not learn to read. Little time was spent in educational activities (a couple hours a day) but rather he would clean the classroom or sit in the classroom flipping through books. (Transcript p. 23 ll. 15-25 p. 24, ll. 1-19) When he went to Berean Academy, he received one-on-one instruction via the Discovery Program as taught by Jo Ann Adams to address his reading development. (Transcript p. 34. ll. 22-25)

On May 14, 2002, an IEP was developed for MAR for the 2002-2003 school year. (Ex. #5) At that time he was to matriculate to the tenth grade. As SLS was closing. placement was an issue. (Id.) The child participated in the May 14th IEP meeting and stated he was "would rather not go to public school, but will give it a try." (Id. at 5) Apparently. this was the only IEP Team meeting in which the child actually participated. (Transcript p. 31, ll. 23-25; p. 32, L. 1: p. 71, ll 18-25; p. 72, ll 1-6) Prior to SLS closing. Hamilton County Schools personnel arranged to have meetings with the parents of those students who attended SLS. (Transcript p. 303 ll. 2-25: p. 304 ll 1-20) Those meetings occurred in February and probably March. (Id.) One of the school personnel (Mrs. Hudson) was

assigned to MAR. (Transcript p. 308, ll 9-16) At one of these meetings the parents could circle whether or not they intended for their child to attend Hamilton County High School in the fall of 2002 for the 2002-2003 school year. (Ex #7) "No" was circled on the form submitted by the parents of MAR. (Id.)

The IEP of May 14, 2002 addressed several issues. It was noted that the beginning date for MAR to begin school was August 13, 2002. (Id. at 14, 18 and 19) Further, it was noted on the IEP that it was not anticipated that the child would receive all special education services in the general curriculum given his history of needing restrictive as well as direct support services. It was felt and noted by the IEP Team that MAR had a general need for success (Id. at 22) At the time of this IEP, the child was in SLS receiving full time EXED services per contract with the Hamilton County School System. (Id. at 28) At that meeting, the parents expressed concern about "transition and getting a good placement where he will feel comfortable and continue to progress academically with success" (Id. at 28) Another IEP Team meeting was to be held to determine placement on or before August 6, 2002 with the noted appropriate beginning date of services to start on August 13, 2002. (Id. at 16, 30, 78) No IEP decisions were to be made without full IEP Team participation. (Id. at 29) One goal was for this child to participate as a knowledgeable IEP Team member. (Id. at 13) The goal concerning placement was to reconvene prior to August 6, 2002 to allow zoned school input and others if needed so the IEP could be implemented with modifications. (Id. at 24) Further, there were concerns for the stress this child would undergo as he had experienced headaches while attending public school as well as hair loss. (Ex. #8, HC-A00238, Transcript p. 87, ll. 1-4)

There was no IEP team meeting to determine placement prior to the day Hixson High School started on August 13, 2002. (Transcript p. 401, l. 25; p. 402, ll. 1-3) The teachers actually began school on August 6, 2002. (Transcript p. 431, ll. 11-25: p. 432, ll. 2-4) Further, there was no persuasive proof that anyone at Hamilton County School actually talked to the parents about an IEP meeting during the summer of 2003. (Transcript p. 406, ll. 3-20: p. 407, l. 25; p. 408, ll. 1-2) Additionally, neither the teachers nor the principals were successfully reached to even discuss setting the meeting prior to the beginning of school. (Transcript p. 408, ll. 17-23) As the summer progressed the parents visited a variety of schools in an effort to find a school they felt would be suitable, with the expectation that a Hamilton County School representative would contact them during the summer months. (Transcript p. 156, ll. 8-16)

On August 12, 2002, the day before school began, the parents faxed a letter at 5:33 P.M. to the Hamilton County School System requesting an emergency IEP meeting. (Transcript p. 158, ll. 2-24) There was no response that day to the fax sent. (Transcript p.158 ll. 25; p. 159 ll. 1-4) The fax was stamped "received" on August 13, 2002. (Transcript p. 412, l 18-25: p. 413, l. 1-9, 21-25: Ex # 2. Ex.# 3) Further, the parents contacted Congressman Zach Wamp's office as well as the Tennessee State Department of Education. (Transcript p. 59, ll. 9-25)

A meeting between Hamilton County School and the father of MAR was arranged for August 14, 2002 (Transcript p. 161 ll. 2-25) which was prompted by a letter sent to and a subsequent call from Chip Fair, attorney for the Tennessee Department of Education, a phone call emanating from Congressman Zach Wamp's office, and the fax from the parents

requesting an emergency IEP. (Transcript p. 412, ll.18-25; p. 413, ll. 1-9, 21-25; Ex 2 and 3) However, no IEP meeting was held on August 14, 2002, although it was suggested to the parents that they enroll MAR and have an IEP placement meeting 3-4 weeks later. (Transcript p. 419, ll. 11-17)

Following the contacts initiated by the parents, it was the parents' understanding that this meeting on August 14th was to be an IEP meeting. (Id.) When the father arrived at the meeting he was told that the school intended to place MAR in public school that day. (Transcript p. 161 ll. 24-25; p. 162, ll. 1-9) He refused to do so as there was no specific plan for the actual physical placement of MAR nor the environment into which he would be placed. (Transcript p. 89 ll.1-23) The father testified he, in good faith, signed the documents to enroll his son at Hixson High School at the end of the August 14, 2002 meeting. He gave the school personal previously prepared letters stating he was giving them 10 days notice of intent to enroll MAR elsewhere. (Transcript p. 167, ll. 2-25) A letter dated August 13, 2002 and a letter dated August 14, 2002 were handed to school personnel at this meeting. (Ex. # 3 and 4)

Witnesses offered to support the school's positions with regard to the issues in the case included Scott Hooper. Mr. Hooper, who is a psychologist with the Hamilton County School System, licensed with the Tennessee Department of Education but not the State of Tennessee, gave certain opinions with regard to the Discovery Program into which MAR was placed at Berean School to address his reading difficulties. (Transcript p. 254 ll. 12-14) Although, he had criticisms of the Discovery program used at the Berean school for MAR he could not say the program did not work for and help MAR. (Transcript p. 279, ll. 2-6; p.

299, ll. 2-13) The child testified the Discovery program did help him learn to read. (Transcript p. 24, ll. 20-25; p. 25, ll. 1-11) Therefore, it is found that the program did assist and help MAR.

Mr. Hooper further had criticisms of the use of the term "cognitive processing disorder" as used with regard to MAR (Transcript p. 76 ll 5-25) However, William E. McGee Ph.D. of Pediatric Psychologists Associates, who is a licensed and nationally certified psychologist, states in his report that this child had "a pattern of disordered language processing such that the ability to decode and encode graphic symbols (letters and numbers) is significantly impaired. (Ex #8 HC-A-00239) It is found that this child did have a cognitive processing disorder. Further, Hamilton County Schools paid for this evaluation. (Transcript p. 132, 133) Additionally, Mr. Hooper did not see or test the child and read little of his records. (Transcript p. 286 ll. 11-25; p. 287 ll. 1-9; p. 291 ll 5-8) Additionally, he did not know how well the child could or could not read. (Transcript p. 298 ll. 15-22) Primarily, Mr. Hooper's testimony was given for the purpose of reviewing the Discovery Program and its application to remediate defects in reading and other academic subjects. (Transcript p. 289 ll. 23-25 p. 299 ll. 1-13)

There was an IEP meeting held on August 27, 2002. (Transcript p. 415, ll. 1-21) The parents were not in agreement with the class size, pupil teacher ratio, and attendance at Hixson High School. (Transcript p. 418, ll. 5-12) School personnel were not able to tell the parents on August 27, 2002 the number of students in the resource class nor even the reading class in which he would be placed. (Transcript p. 418, ll. 22-25; p.419, ll. 1-10) Further, the only plan to address issues of placement were to occur 3-4 weeks later, some 6 weeks after

school had begun. (Transcript p. 420, ll. 7-13) There was no documentation or credible proof provided that any representative from the school system contacted the parents during the summer either orally or in writing. (Transcript p 433, ll. 2-4; p. 424, ll. 24-25; p. 425, ll. 1-8) Further, it is found that it was the parents action in contacting the State of Tennessee Department of Education and a Tennessee Congressman's office that prompted the school system to instigate a meeting concerning this child. (Transcript p. 431, ll. 4-13)

Although there were concerns raised by the Petitioner with regard to additions being made on August 27, 2002 to the May 14, 2002 IEP, these were not considered to be significant. Further, it was found that money paid by the parents for the Berean School program on August 14, 2002 was to reserve a place rather than tuition for MAR. (Transcript p. 90, ll. 24-25; p. 91, ll. 1-7)

CONCLUSIONS OF LAW

Generally IDEA requires that in order to be eligible for tuition reimbursement the parents must give notice to the school that special education is an issue prior to placing the child in a private school setting. 20 USCA § 1400 et seq. The purpose of notice is to give the school sufficient time to assemble the IEP team, develop an IEP and ascertain whether or not FAPE can be provided in the public schools. Greenland School District v. Amy N. 358 F. 3d 150, 160 (1st Cir. 2004)

The Individual with Disabilities Act specifically provides for reimbursement for private school placement in certain circumstances. 20 USCA § 1412 (10) et seq. Although the IDEA does not require a local education agency to pay for unilateral private school

placement, the Act does provide for reimbursement if "the agency has not made a full appropriate public education available to the child in a timely manner prior to that enrollment." 20 USCA § 1412 (10) (c) (ii) Such is the case at hand. MAR attended the IEP meeting in May, 2002 stating he did not want to go to public school but he would be willing to try. (Ex. # 5) The parents of MAR expected, based on the May, 2002 IEP, that there would be another meeting before August 2002, to decide placement. The school did not address the issue of placement of this child during the summer or even during the week school personnel began school (August 6-13, 2002) (Transcript p. 9, ll. 20-25; p. 10, ll. 1-9) School had begun and the issue of placement had never been addressed by the school with this child or his parents. It has been argued that the child was not enrolled in the Hamilton County School System and thus the child would not be eligible for reimbursement. This argument will not lie as the school, by virtue of the May 14, 2002 IEP, was to arrange an IEP meeting prior to the beginning of school. The development and implementation of the IEP are "cornerstones" of the IDEA. Tennessee Department of Mental Health v. Paul B., 88 F. 3d 1466, 1471 (6th Cir. 1996) The failure to timely and appropriately address the issue as to the environmental placement of this child violated his right to FAPE. Because the school had made no arrangements for any educational placement for this child prior to the beginning of the school year of 2002-2003 the parents had no option but to make arrangements themselves. Although, the argument has been made that the school offered placement on August 14, 2002 at a meeting between Mr. R and a few school personnel, this was not an "environment" that had been selected for the unique needs of this child. This was a situs used only to "hold" the child until something could be arranged in 3-4 weeks. This decision

was not made in an IEP meeting, nor was the parents' input considered. Given the fact that this child had a traumatic and non-productive experience in public school, placing him without preparation into a public high school, after school started, without a specified program was inappropriate.

In the case at hand, the school system was well aware that this child was in need of special education services. They had participated in the IEP process throughout this child's education including private school. (Transcript p. 114, ll. 6-24) The purpose of an IEP is to address the child's unique educational needs (20 USC § 1400 et seq.; Letter to Anonymous (OSEP 2002); Board of Education of Hendrich Hudson Central School District v. Rowley. 458 U.S. 176 (1982)) The school already knew there was an issue with regard to whether or not the child would need to be placed in a public or private setting as this issue was raised in May of 2002. (Ex. #5 and #6) The issue at hand was where can services be provided which are unique to this child. He had serious issues with regard to reading and had previously had exhibited physical symptoms of stress in public school. The school system as of August 2002 had made no arrangements that were unique to this child. The touchstone of the term "educational placement" is not the location to which the student is assigned but rather the environment in which the educational services are provided." A W by Wilson v. Fairfax County School Board 372 F. 3d 674; 2004 U.S. App. Lexis 12701 (4th Cir. 2004) There were a multiplicity of environments considered by Mrs. Hudson as liaison for MAR and Hamilton County Schools. She had made contacts in some fashion with a variety of public and private schools. (Transcript p. 402, 403, 404) The idea was that she would "address your (parents')

concern about smaller environment, smaller facility, smaller total number of students, and attempt to locate a school that would have a low pupil/teacher ratio that would be similar to what he had in the past or what he had in the past couple of years." (Transcript p. 423, L. 25; p. 424. ll. 1-14) Mrs Hudson even contacted Berean Academy, the school into which this child was placed by his parents for the 2002-2003 school year. It is quite clear that it was an environment, not a building, to be addressed when the issue of placement was noted in the May 14. 2002 IEP. The school system had self imposed notice as of May of 2002 that the issue with regard to the specific environment and the situs of the program for this child had to be addressed on or before August 6, 2002. (Ex. #5 and #6) Further, there was no specific evidence offered which proved that the parents were ever contacted between May of 2002 and August 13, 2002 by the school system. (Transcript p. 9, ll. 20-25; p. 10, ll. 1-9) In fact the parents specifically stated they were not contacted and therefore they had to resort to calling the Tennessee Department of Education and a Tennessee Congressman to address education issues concerning their son. (Transcript p. 59, ll. 9-25)

The fact that Mr. R had prepared letters to give to the school system representatives does not indicate he was not placing his son at Hixson High School. (Transcript p. 166, Ex # 2 and 3) The parents had asked for an IEP meeting and had been forced to result to contacting outside sources. Therefore, they could have anticipated that the unique needs of their child were not going to be met in the August 14, 2002 meeting with the school system. They, as parents, had a responsibility to educate their son, which they were attempting to do.

The school system has raised the issue that the parents did not intend to send their child to public school because they had circled "No" on the questionnaire in the winter of

2002 while the child was still at SLS. (Transcript p. 307, ll. 9-16, Ex. # 7) However, this ignores the subsequent events wherein the child and his parents attended the May 14, 2002 IEP meeting and talked of MAR attending public school. (Ex # 5 and # 6) Further, the parents exerted considerable efforts to even have an IEP meeting in August of 2002.

The school system contests the cost of the Discovery reading program as it is not a special education program and as such should not qualify for reimbursement. This argument is without merit as the child needed a reading program and this was the one offered at Berean Academy. If Hamilton County School had properly addressed the educational environment prior to August 6, 2002 this issue would have been resolved. This Court is not saying the Discovery Program is the best program for this child, just that it was the one available at that time under those circumstances. Therefore, the parents shall be reimbursed for those Discovery Program expenses for the 2002-2003 school year. The 2003-2004 reimbursement request is denied as IEP meetings could have been held to address the child's specific needs. No proof was offered to show the school system failed in that regard.

A request for prospective reimbursement has been made with regard to the 2004-2005 school years. It is felt this is an issue that is not ripe for this forum. At the time of that request, it was not known where the child would attend school nor what his unique needs would be at that specific point in time. Therefore. prospective reimbursement shall not be granted.

ORDERED, ADJUDGED AND DECREED:

1. That the parents shall be reimbursed for the monies expended for tuition at Berean Academy as well as for the cost of the Discovery Program for the

2002-2003 school year. To that end the parents shall provide specific billing from Berean Academy for the 2002-2003 school year including the Discovery Program to the Hamilton County School within five (5) business days of the issuance of this order. Reimbursement shall be provided within ten (10) days of presentation of said billing.

2. That Petitioner is the prevailing party.

3. That the 2003-2004 reimbursement request is denied.

4. That prospective tuition reimbursement for the 2004-2005 school year is denied

ENTERED this _____ day of _____, 2004.

_____
Linda G. Welch
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that I. Linda G. Welch, the undersigned, served a true and exact copy of this legal pleading to, M. and D. R., parents for M.A.R. at XXXXXXXX, Hixson, TN 37343 and Gary D. Lander, attorney for the Hamilton County Schools, at Chambliss, Bahner & Stophel, P.C., Two Union Square, 1000 Tallan Building, Chattanooga, Tennessee 37402, by deposit in the United States mail, postage prepaid and correct address thereon to carry the same to its destination.

This is the _____ day of _____, 2004.

_____
Linda G. Welch
Administrative Law Judge

"Any party aggrieved by this decision may appeal to the Chancery Court in the County in which the Petitioner lives or may seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order in non-reimbursement cases or three (3) years in cases involving education costs and expenses. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this order (or thirty (30) days if the Board of Education chooses not to appeal), the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provisions of this order."