IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ANCHORAGE SCHOOL DISTRICT, Plaintiff, vs. D.K., a student with a disability, and S.K., his parent. Defendants.	Case No. 3:08-cv-00031 TMB O R D E R

I. MOTIONS PRESENTED

This is an appeal from an administrative ruling concerning the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"). The Anchorage School District ("ASD") seeks a declaration that an administrative decision issued February 19, 2008 by an independent hearing officer ("IHO") was a "final decision" and that the hearing officer's retention of jurisdiction beyond that date was improper.[1] In response, D.K. and his parent, S.K., filed a counterclaim appealing aspects of the IHO's decision.[2]

II. BACKGROUND

A. The IDEA

IDEA provides a source of federal money to support local efforts to educate children with disabilities.[3] The IDEA requires States receiving federal funding to make a "free appropriate public education" ("FAPE") available to all children with disabilities residing in the state "that emphasizes special education and related services designed to meet their unique needs and prepare them for

[1] Dkt. 1, ASD's Compl. at 3.

[2] Dkt. 8 at 10-11.

[3] *Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993).

further education, employment, and independent living."[4] The primary tool for achieving this goal is an individualized education program ("IEP"), which is to be tailored to a child's unique needs and designed by the school district in consultation with the child's parents.[5] A student's IEP must address a multitude of concerns identified by Congress, including "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided" to achieve enumerated goals.[6] The IDEA also includes a comprehensive framework of procedural safeguards to protect the interests of children with disabilities and their parents.[7] This framework requires school districts to give prior written notice ("PWN") to the parents of a child with a disability whenever the district proposes to change or refuses to change the "identification, evaluation, or educational placement of the child" or its provision of a FAPE.[8] In addition, the IDEA provides for an administrative hearing process, to be conducted as determined by state law, to resolve disputes that arise over the education placement of a child or a district's provision of FAPE.[9] The Act also gives this court jurisdiction to hear appeals from final administrative decisions issued after a due process hearing, and authorizes a district court to "grant such relief as the court determines is appropriate."[10]

The IDEA provides three avenues by which a child with disabilities may receive special education services in connection with a private school. First, the district may place the child in a private school as the child's placement under the IDEA.[11] Under this scenario, the district is responsible for the child's tuition, transportation, and related costs.

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[4] 20 U.S.C. § 1412(a)(1)(A).

[5] See 20 U.S.C. §§ 1412(a)(4), 1414(d).

[6]20 U.S.C. § 1414(d)(1)(A)(i), § 1414(d)(1)(A)(i)(IV).

[7] 20 U.S.C. § 1415.

[8] 20 U.S.C. § 1415(b)(3).

[9] 20 U.S.C. § 1415(f).

[10] 20 U.S.C. § 1415(i)(2)(A) and (B).

[11] 20 U.S.C. § 1412(a)(10)(B).

Second, a parent may opt to place her child in a private school without the consent of the school district, and then seek reimbursement via an administrative hearing or lawsuit.[12] With regard to this option, the IDEA provides:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.[13]

The IDEA further provides that any reimbursement "*may* be reduced or denied" if the parent failed to inform the child's IEP team that she was rejecting the district's placement and proposed FAPE in favor of enrolling her child in a private school – with the intent to seek reimbursement.[14] Similarly, reimbursement may be reduced or denied if the parent failed to give the district written notice 10 business days before removing the child from the district, if the parent refused to make the child available for an evaluation by the district, or if a court finds the parent's actions were unreasonable.[15] But the IDEA also provides that reimbursement "shall not be reduced or denied" based on a parent's failure to give proper notice if: the district prevented the parent from giving such notice, the parents were not informed of the notification requirement pursuant to 20 U.S.C. § 1415, or enforcement of the notice requirement against the parents would likely result in physical or serious emotional harm to the child.[16]

B. Procedural and Factual History

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[12] 20 U.S.C. § 1412(a)(10)(C). *See also Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359 (1985).

[13] *Id.* at (ii).

[14] 20 U.S.C. § 1412(a)(10)(C)(iii).

[15] *Id.* at (iii).

[16] *Id.* at (iv). Finally, a child placed in a private school by his parents, for reasons unrelated to his disability, e.g., religious reasons, may be eligible to received special education services from the district under a "services plan." 20 U.S.C. § 1412(a)(10)(A). This provision is not at issue in the case at bar.

The court has received the record of the administrative proceeding from which the appeals have been taken.[17] The Court finds that the opinion of the hearing officer is thorough and complete, and that the facts stated within are established by a preponderance of evidence in the administrative record. Born in 1997, D.K. has been diagnosed with multiple disabilities, including dyspraxia, communication disorders, and ADHD.[18] These impairments interfere with D.K.'s sensory processing, fine motor and visual perception, processing speed, and attention span.[19] D.K. does not, however, have cognitive disabilities.[20] From kindergarten through the third grade, D.K. attended Denali Montessori School within ASD.[21] Denali is part of the ASD lottery program, and offers a less structured learning environment than a traditional classroom.[22] At Denali, he received special education services under a series of IEPs.

As part of a settlement agreement from a prior hearing request, D.K. had a 1-on-1 special assistant during his second- and third-grade years.[23] D.K. had the same teacher during his entire three year education at Denali, but the bulk of his instruction was carried out by this aide.[24] D.K. also had a highly qualified special-education teacher during his third grade year, who was also the student's case manager for his IEP. D.K. also had a speech language implementer and private

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[17] At Docket 32, ASD lodged the administrative record with the clerk's office, and at Docket 33, ASD supplemented the administrative record with additional documents, including the IHO's April 1, 2008 decision and ASD's March 31, 2008 email to the IHO with the attached PWN dated March 28, 2008. References to the administrative record will be denoted "AR" followed by the stamped number.

[18] Dkt. 6, Ex. 2 at 3.

[19] *Id.*

[20] *Id.*

[21] Docket 6-2, at 3.

[22] *Id.* at 3-4.

[23] *Id.* at 4.

[24] *Id.*

therapy from licensed providers.[25] In 2005, D.K.'s IEP contained seventeen goals for him to implement during his first grade year, many of which he did not meet.[26] In the spring of 2006, a new IEP was developed, which had thirteen goals for D.K.'s second grade year; but this was amended to twelve goals in September of 2006.[27] These goals were substantially similar, except less stringent, described as a "dumbing down" of the goals by S.K .[28] S.K. requested objective standardized testing to measure D.K.'s progress, but the goals included in the IEP were subjective and unclear.[29]

In March 2007, D.K.'s IEP was again reviewed, and this time contained only nine goals.[30] Occupational therapy goals were removed; three of the goals related to speech and language; and D.K.'s time with his aide was reduced to 5.5 hours per week.[31] The IEP team met again in late March 2007 but did not complete a draft of the IEP. At both meetings, S.K. expressed concern that there were no goals dealing with standardized testing, and also objected to the goals that had been carried forward from previous IEPs without any progress.[32] Whether D.K. actually received testing was much disputed at the hearing. At this hearing, S.K. raised the option of removing D.K. to Gateway, a school that specialized in language-related learning disabilities but no further discussion

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[25]*Id.* at 4-5.

[26]*Id.* at 5-6.

[27]*Id.* at 6.

[28]*Id.*

[29]*Id. at 8.*

[30]*Id.* at 6.

[31]*Id.*

[32]*Id.* at 6-7.

apparently occurred.[33] IHO Gallagher concludes that ASD knew that S.K. was at least considering placement at Gateway.[34]

D.K. was enrolled at Denali in the fall of 2007 and an IEP meeting was scheduled for September 13, 2007 to discuss unresolved issues. However, S.K. had already enrolled D.K. in Gateway and did not inform ASD, so that D.K. would not lose his enrollment spot at Denali.[35] D.K. attended Denali and then Gateway. S.K. testified that she learned she could be reimbursed for Gateway tuition when Gateway personnel gave her the ASD pamphlet on private school placements.[36] S.K. then requested reimbursement, which ASD denied. The request for due process was filed shortly thereafter.

On October 17, 2007, D.K.'s parents filed a request for a due process hearing challenging his educational placement and ASD's provision of a FAPE. In the February 2008 decision, IHO Sheila Gallagher found that the ASD failed to provide D.K. with a FAPE and that the Gateway School and Learning Center, a private school in which the parents enrolled D.K. during the 2007-08 school year, was an appropriate placement. But, the IHO also concluded that the parents were not entitled to reimbursement for Gateway tuition because they failed to give ASD written notice 10 days before removing D.K. from the district and enrolling him in Gateway.[37] In support of this, the IHO noted that D.K.'s mother "was 'not direct' with the IEP team about her decision to enroll at Gateway."[38] In addition to these legal conclusions, the IHO ordered that: "an IEP team" consisting of D.K.'s parents, D.K.'s private speech and occupational therapists, "Gateway personnel," D.K.'s special education teacher at Denali Elementary School, and ASD's elementary special education supervisor or "another administrator with authority and knowledge of the placement options available,"

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[33]*Id.* at 9.

[34]*Id.* at 10.

[35]*Id.* at 10-11.

[36]*Id* at 11, P. Ex. 1.8, page 3-7.

[37] Dkt. 6, Ex. A at 16.

[38] *Id.* at 16.

convene "on or before April 1, 2008 to consider whether or not ASD has an appropriate placement for student." The IHO further stated that this directive was based on testimony by ASD's elementary special education supervisor as to "options available through the ASD, of which parents had not previously been informed, and mother's statement that she would consider a more restrictive environment for her son in order to provide him with a meaningful education."[39] The IHO further directed the "IEP team" to provide her with a report on or before April 15, 2008.[40] The decision concluded: "Because of this, this is not yet considered to be a final order subject to appeal unless both parties, in writing to me, decline this opportunity for an IEP meeting."[41]

On February 25, 2008 D.K. and his parent filed a motion for reconsideration before IHO Gallagher.[42] On February 28, 2008, ASD initiated this litigation by filing a complaint in U.S. District Court seeking a declaration that IHO Gallagher's February 19, 2008 ruling was a "final decision," and that she had "failed to follow procedures and improperly retained jurisdiction in this matter without proper authority."[43] On March 28, 2008, ASD convened an IEP meeting, which was attended by D.K.'s parents, his private therapists, and ASD staff. The parties dispute what actually happened at the meeting. What is undisputed is that the ASD issued a PWN to parents on March 31, 2008 that refused the parents' request that D.K. be placed at Gateway at district expense as an interim measure. On the same day, ASD emailed the PWN to IHO Gallagher. On April 1, 2008, IHO Gallagher issued a "Final Decision" stating:

> At the [March 31, 2008 IEP team meeting] no decision was reached because an IEP was not yet prepared. However per the PWN dated March 31, 2008, an evaluation of student is being conducted and it appears from that PWN that an IEP meeting can be scheduled following the evaluation of student. A services plan for student will be

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[39] *Id.* at 17.

[40] *Id.*

[41] *Id.*

[42] Dkt. 8 at 5.

[43] Dkt. 1 at 3.

developed for student while he is attending Gateway and if he continues to attend Gateway.[44]

While this litigation was pending, the parents filed a second due process request on June 30, 2008, seeking, among other things, reimbursement for the cost of Gateway from the issuance of IHO Gallagher's February order through the end of the 2008-09 school year.[45] The IHO assigned to that complaint, Timothy Seaver, found that: ASD failed to provide D.K. with an appropriate IEP for the 2008-09 school year; failed to fairly consider placement at Gateway; and inappropriately provided D.K. with a "services plan" when he was entitled to an IEP, including a clear offer of placement.[46] As a remedy, IHO Seaver ordered ASD to reimburse the parents for the costs of Gateway from March 29, 2008 through the end of the 2008-09 school year.[47] In reaching this conclusion, IHO Seaver gave preclusive effect to IHO Gallagher's determinations that ASD failed to provide D.K. with FAPE and that Gateway was an "appropriate" placement.[48]

III. LEGAL STANDARD

In an administrative appeal under the IDEA, the court's review "differs substantially from judicial review in other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review."[49] In IDEA cases, judicial review is less deferential. Even so, the court must "give 'due weight' to judgments of education policy."[50] The court must also give deference to the hearing officer's findings, especially where the hearing officer has made findings that are careful and thorough.[51] Ultimately, though, courts have discretion

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[44] Dkt. 60, Ex. A-1 at 10.

[45] *Id.* at 2.

[46] *Id.*

[47] *Id.* at 43.

[48] *Id.* at 28.

[49] *Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993).

[50] *Id.* at 1472 (internal citations and quotations omitted).

[51] *Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1499 (9th Cir. 1996).

to determine how much deference to give state and local educational agencies.[52] In exercising that discretion, courts must apply a preponderance of the evidence standard,[53] while the burden of proof rests with the party challenging the administrative decision.[54]

In addition, the Ninth Circuit has directed that, "[i]n determining the degree of deference owed to the administrative findings, this court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue."[55] "After such consideration, this court is free to accept or reject the findings in part or in whole."[56] Where a hearing officer's findings are "thorough and complete," the degree of deference given to the hearing officer increases.[57]

IV. DISCUSSION

A. Issues Before the Court

This case requires the Court to address the following issues: (1) whether ASD properly appealed the substantive factual and legal conclusions of IHO Gallagher's decisions; (2) whether IHO Gallagher improperly retained jurisdiction following her February 19, 2008 order; (3) whether ASD provided D.K. with a free appropriate public education prior to the due process complaint filed in October 2007; (4) and whether IHO Gallagher erred in denying D.K.'s parents reimbursement for Gateway tuition and related expenses for the 2007-08 school year.

B. The Scope of ASD's Lawsuit

As a preliminary matter, the Court must consider D.K.'s argument that ASD failed to properly appeal the substantive conclusions in IHO Gallagher's February 19, 2008 ruling. This

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[52] *See Gregory K v. Longview School Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987).

[53] 20 U.S.C. § 1415(i)(2)(C)(iii).

[54] *Hood v. Encinitas Union School Dist.*, 486 F.3d 1099, 1103 (9th Cir. 2007).

[55] *Adams v. Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999) (internal quotations and citations omitted).

[56] *Id.* (internal quotations and citations omitted).

[57] *Id.*

would limit ASD's suit to whether the IHO improperly retained jurisdiction after the ruling. D.K. relies primarily on the language of ASD's complaint and one paragraph of ASD's answer to D.K.'s counterclaim. ASD's complaint focuses on whether IHO Gallagher's February 19, 2008 ruling was a "final decision," requests a declaration from the Court that the decision was final, and that IHO Gallagher thus improperly retained jurisdiction over the matter beyond February 19, 2008. The complaint also alleges at paragraph nine that the "[t]he District is a party aggrieved by the findings and decision made by the hearing officer . . ." While the complaint does not identify the specific conclusions being challenged, Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The rule further states that "[p]leadings must be construed so as to do justice."[58] Given this liberal approach to pleading under the Federal Rules, the Court finds that paragraph nine of ASD's complaint provided D.K. with fair notice that the district intended to challenge IHO Gallagher's substantive rulings.

D.K. also attacks ASD's answer to an allegation in D.K.'s counterclaim. Paragraph 11 of D.K.'s Amended Counterclaim and Appeal states: "Plaintiff ASD filed the instant lawsuit on February 28, 2008, naming only D.K. and his mother, S.K., as defendants, and apparently attempting to appeal the February 19, 2008 ruling by IHO Gallagher."[59] In response, ASD's Answer to Counterclaim states: "The District admits the allegation that it filed this lawsuit on February 28, 2008 naming only D.K. and S.K. as defendants, but denies the remaining allegations in paragraph 11."[60] D.K. reads this as a specific denial by ASD that it was "appealing any part of the February order."[61] The Court disagrees. ASD's answer is a denial that the district was "*apparently attempting* to appeal" the February ruling if the District believed it had actually appealed that ruling in substance. Although the Rule 26(f) Scheduling and Planning Report is not a pleading document, it provides further evidence that D.K. had fair notice the district was challenging the IHO's

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[58] Fed. R. Civ. P. 8(f).

[59] Dkt. 8.

[60] Dkt. 10.

[61] Dkt. 51 at 2.

substantive rulings, in addition to the retention of jurisdiction beyond February 19, 2008.[62] The Court therefore finds that ASD gave adequate notice it intended to challenge the substance of the IHO's ruling, including her determination on FAPE.

C. The IHO's Issuance of a Final Order Beyond the 45-day Deadline

ASD argues that IHO Gallagher erred by unilaterally extending the deadline for her decision, and that by doing this, she lost jurisdiction over the matter. D.K. and S.K. dispute this, asserting that ASD's argument on this issue is moot because the IHO issued a final order on April 1, 2008, which adopted the substantive findings and conclusions of her February 19, 2008 decision. And although they do not dispute that the IHO violated the deadline requirements under the IDEA and its implementing regulations, they contend that the IHO retained jurisdiction after February 19, 2008.[63]

One of IDEA's safeguards is the opportunity to have a due process hearing conducted by the State or a local educational agency.[64] Under the IDEA's implementing regulations, a public agency such as ASD is required to ensure that a hearing officer make a decision on a due process complaint within 45 days.[65] The regulations further provide that "[a] hearing or reviewing officer may grant specific extensions of time" beyond the 45 days "at the request of either party."[66] Parallel Alaska regulations permit deadline extensions under similar terms.[67]

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[62] *See* Dkt. 12 at 2 (Listing contested issues of fact and law as including whether "the Findings and Conclusions by the Hearing Officer [were] supported by evidence in the record and consistent with the law.").

[63] In any case, the issue should have been addressed at the agency level, and has been waived through doctrine of administrative collateral estoppel.

[64] 20 U.S.C. § 1415(f).

[65] 34 C.F.R. § 300.515(a) ("The public agency must ensure that not later than 45 days after the expiration of the 30- day period . . . [a] final decision is reached in the hearing.").

[66] 34 C.F.R. § 300.515(c).

[67] *See* 4 AAC 50.52.550.

No language exists in the regulations that would divest an IHO of jurisdiction for exceeding the 45 day limit.[68] Even if it did, the regulations would not divest an IHO of jurisdiction that has been granted by statute in the IDEA. Such an interpretation would place regulation above statute in order of authority and would also undermine the intentions of the IDEA.[69]

In support of their position, D.K. and S.K. cite *Paul K. v. State of Hawaii*, in which the district court held that a hearing officer's failure to issue a decision before the 45-day deadline did does not divest the hearing officer of jurisdiction over a parent's due process complaint.[70] In *Paul K.*, the parents of a disabled child challenged a dismissal of their due process complaint on that basis and none of the parties had requested an extension of the deadline, and the IHO lost jurisdiction over the matter.[71] Addressing the parents' appeal of the hearing officer's dismissal, the district court concluded that "[t]he hearing officer's interpretation of the Decision Deadline as a jurisdictional prerequisite is simply inconsistent with the overall purpose of the IDEA."[72] Expanding on this conclusion, the court stated:

> Clearly, the IDEA is designed to ensure that children with disabilities receive a free appropriate public education, and that those children and their parents are afforded procedural protections of that right. The hearing officer's interpretation of the IDEA, applicable regulations, and administrative rules as automatically divesting him of jurisdiction at the end of the Decision Deadline flies in the face of the very spirit of the IDEA. This interpretation would result in serious injustice.[73]

Similarly, the Court finds the 45-day requirement does not impose a jurisdictional bar against the IHO's retention of jurisdiction beyond February 19, 2008. ASD's argument on this issue is

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[68] *See generally* 34 C.F.R. § 300.515.

[69] *See, e.g., Dreher v. Amphitheater Unified School Dist.,* 22 F.3d 228, 232 (9th Cir.1994).

[70] 567 F.Supp.2d 1231 (D. Hawaii 2008).

[71] *Paul K.*, 567 F.Supp.2d at 1232.

[72] *Id.* at 1235.

[73] *Id.* at 1236.

denied.[74]

D. Whether D.K. received a Free Appropriate Public Education

To be eligible for reimbursement, S.K. must show that the district failed to make FAPE available in a timely manner and that the private placement was appropriate.[75] S.K. asks the Court to uphold the IHO's decision that D.K. was denied a free public education, based on procedural violations (the primary tool through which FAPE is to be achieved) and inadequate substantive IEP goals. ASD argues that IHO Gallagher erred in her conclusion. ASD complains that the IHO failed to give due weight to the testimony of the ASD teachers and administrators who participated in the 12-day due process hearing. ASD also contends that the evidence showed D.K.'s March 2007 IEP was tailored to address his unique needs, and that he achieved measurable progress on goals related to his speech, occupational therapy, and behavior.

As an initial matter, the Court finds that the opinion of IHO Gallagher with regard to her conclusions on FAPE are "thorough and careful," and therefore entitled to increased deference.[76] The IHO thoroughly summarized the testimony of ASD teachers and administrators, D.K.'s private therapists, Gateway staff, and S.K. Each of the IHO's factual statements is supported by citations to the hearing transcript or exhibits. Transcripts from the twelve day administrative hearing show patience and understanding of the facts and the law by IHO Gallagher, and the decision is based on careful consideration of the evidence and correctly applies the law.

The Supreme Court directs courts to make a two-fold inquiry in lawsuits brought under §1415(i)(2).[77] First, the court must determine whether a district complied with the procedures set forth under the IDEA. Second, the court must examine whether the individualized education program developed through those procedures are reasonably calculated to enable the child to receive

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[74] In light of the Court's rulings on ASD's denial of FAPE, Gateway as an appropriate placement, and ASD's obligation to reimburse D.K.'s parents for Gateway tuition and costs for the 2007-08 school year, the Court declines to address D.K.'s arguments regarding the IHO's violation of the 45-day deadline and 5-day exchange rule.

[75] 34 C.F.R. § 300.148(c).

[76] *See Capistrano Unified School Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995).

[77] *Rowley*, 458 U.S. at 206-207.

educational benefit. The Ninth Circuit has held that only those "procedural inadequacies that result in the loss of educational opportunity ... or seriously infringe on the parent[s]'s opportunity to participate in the IEP formulation process ... clearly result in the denial of FAPE."[78]

IHO Gallagher's conclusion that the district failed to provide D.K. with FAPE is based largely on two related issues: the goals included in successive IEPs were merely "watered down" iterations of the same goals, and there was no standardized testing to measure D.K.'s progress and present level of performance. Even in the absence of regular standardized testing, the IHO found that "the student met very few goals" and that "the goals were reduced in number each year and in most instances the student regressed and fell farther behind."

A district court reviewing the merits of an IEP must examine whether the program is "reasonably calculated to enable the child to receive educational benefits."[79] The FAPE to which a disabled child is entitled "does not mean the absolutely best or 'potential-maximizing' education."[80] Rather, a state must provide "'a basic floor of opportunity' through a program 'individually designed to provide educational benefit to the handicapped child.'"[81]

An IEP must include, among other things, "a statement of measurable annual goals, including academic and functional goals, designed to . . . meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and . . . to meet each of the child's other educational needs that result from the disability."[82] The IEP also must include: "a description of how the child's progress toward meeting

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[78] *W.G. v. Bd. of Trustee of Target Range School Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) (internal citations omitted).

[79] *Board of Educ. of the Henry Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 207 (1982).

[80] *Gregory K. v. Longview Sch. Dist.*, 811 F.2 1307, 1314 (9th Cir. 1987).

[81] *Id.* (quoting Rowley, 458 U.S. at 201).

[82] 20 U.S.C. § 1414(d)(1)(A)(II).

the annual goals ... will be measured and when periodic reports on the progress the child is making toward meeting the annual goals . . . will be provided."[83]

IHO Gallagher concluded that, despite frequent IEP meetings and interaction between S.K. and district staff, the "IEP was not tailored to student's individual needs" and could not be tailored to D.K.'s needs due to the lack of standardized testing. The Court agrees, because the Spring 2006 and September 2006 IEP included fewer goals than the earlier IEPs, and the remaining goals were simply new iterations of the previous goals. D.K. was not progressing in his goals, and any progress indicated was only due to the reduction in the goals. D.K.'s third grade regular instruction teacher, along with S.K, wanted to retain D.K. in the third grade instead of advancing him to the fourth grade, which was "not an option" according to the school principal.[84] His teacher testified that D.K.'s level of ability had not increased enough for him to succeed in fourth grade, and there are no reliable objective measures of progress in math, reading, or writing during his third grade year.

The lack of reliable objective testing is another reason the school district failed to provide an IEP that met the requirements of IDEA. By the Spring of 2007, ASD had not agreed with S.K. which tests would be used in the following year to assess D.K.'s progress. In additions, the IEP goals were vague and less measurable than required by IDEA. They generally refer to subjective increases in social and academic skills, and the objective measures (i.e. to answer math problems with at least 60% accuracy) did not include the methods by which D.K. was to be tested.

The IHO correctly found that D.K.'s March 2007 IEP failed to meet the requirements of the IDEA on annual goals and measurement of progress toward those goals. D.K. also failed to make any progress toward those goals, which is itself a failure to provide FAPE. The Court agrees with the IHO's conclusion that the IEPs prepared for D.K. while he was a student at Denali were inadequate and that he was therefore denied FAPE.[85] This Court also concludes that D.K.

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[83] 20 U.S.C. § 1414(d)(1)(A)(III).

[84] AR 442.

[85] On the issue of standardized testing, the IHO found that despite S.K.'s requests for standardized testing beginning in April 2004, this issue had not been resolved as of May 2007. Although the school violated procedural requirements, standardized testing having not been provided, the issue is resolved on the other points.

consistently failed to meet the IEP goals and that the district thus failed to provide a FAPE to him. The Court affirms the IHO's determination that D.K. was denied a free public education.

E. Appropriate Placement at Gateway

To be eligible for reimbursement, S.K. must show "both that the public placement violated [the Act] and that the private school placement was proper under the Act."[86] "A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs."[87] A private school is appropriate if it is "reasonably calculated to enable the child to receive educational benefits."[88] IHO Gallagher found that Gateway was an "appropriate placement," based primarily on the testimony of D.K.'s private speech and occupational therapist. The IHO noted that they had worked with D.K. for many years, were familiar with the program at Gateway, and "thought that it was a good fit for him." The IHO further noted that the occupational therapist visited Gateway and observed D.K. in class. In addition, the IHO found that Gateway was particularly suited to D.K. because it "has a small class size, individualized instruction and a focus on pragmatic language disabilities...." Although D.K.'s ADHD and dyspraxia may have made him particularly unsuited to Montessori education and a traditional classroom may also have been appropriate, the smaller class sizes at Gateway make it a particularly suitable choice. D.K. has at least average intelligence, but suffers from disabilities primarily inhibiting his linguistic functions; Gateway is staffed with qualified teachers and features a curriculum that focuses on overcoming difficulties related to reading and writing for children of normal intelligence. Gateway employs special techniques, known as Slingerland instruction and Lindamood Bell instruction, known as MSI, which is not refuted, and which are reasonably calculated to educationally benefit D.K. The Court agrees and affirms IHO Gallagher 's finding that Gateway was an appropriate placement for D.K.

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[86] *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993); *see also* 34 C.F.R. # 300.148(c).

[87] *Id.*

[88] 510 U.S. at 11.

F. Reimbursement for Gateway

Despite finding the district denied D.K. FAPE and that Gateway was an appropriate placement, the IHO concluded that the parents failed to satisfy the IDEA's notice requirements for parents who unilaterally place a child in a private school therefore denied reimbursement for the 2007-2008 school year. The IHO stated that the parents failed to provide ASD with prior written notice of their intent to remove D.K. from the district 10 business days before doing so, and that S.K. was "not direct" with the IEP team about her decision to enroll D.K. in Gateway.

The IDEA and its implementing regulations state that reimbursement "*may* be reduced or denied" if a parent fails to satisfy the notice requirement, either by informing the IEP team or giving the district 10 days prior written notice.[89] It is a relatively longstanding doctrine that a parent who unilaterally removes a child from a public education to a private school does so "at their own financial risk."[90] Even after a denial of FAPE by the school district, a parent that has acted unilaterally must show that reimbursement is an equitable remedy.[91] This approach was confirmed by the Supreme Court under the current rendition of IDEA, even though Congress had altered the law by specifying when reimbursement is appropriate in the interim.[92] The court ruled that the change in the law provided a "safe harbor" in which a parent is guaranteed reimbursement, but that the factors in the statute were elucidative, not exhaustive.[93] Courts retain the discretion to reduce reimbursement if equities warrant, such as when a parent fails to give adequate notice.[94] Equitable

[89] 20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d) (emphasis added) (became effective on July 1, 2005).

[90] *Burlington Sch. Comm. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 373-74, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

[91] *W.G. v. Bd. of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479 (9th Cir.) (prior law).

[92] *Forest Grove School Dist. v. T.A.*, 129 S. Ct. 987 (2009) (No. 08-305), decision below at 523 F.3d 1078 (9th Cir. 2008).

[93] *Id.*

[94] *Id.*

remedies grant the IHO and courts a wide jurisdiction to weigh the relevant factors, but decision-makers should begin with a presumption that school officials are properly performing their duties under IDEA.[95] ASD incorrectly cites *Forest Grove* for the proposition that this Court must use the abuse of discretion standard, although the result would not change if that standard were used.[96]

The statute at issue allows a court or hearing officer to require reimbursement to parents who have unilaterally removed a child to a private school if a free appropriate public education had not been made available to that child.[97] But the law also provides that the cost of reimbursement may be reduced or denied if the parents did not inform the IEP team that they were rejecting the proposed placement to provide a FAPE and state their concerns and intent to enroll their child in a private school at public expense; or if the parents did not provide written notice 10 days prior to the removal; but a court may not reduce or deny reimbursement if the failure to provide such notice if the school prevented the parent from providing it, if the parents had not received notice pursuant to §1415 of the notice requirement, or if compliance with the notice requirement would likely result in physical harm to the child; or if, in the discretion of the court, such notice would likely result in serious emotional harm to the child .[98] A court may also reduce or deny reimbursement "upon a judicial finding of unreasonableness with respect to actions taken by the parents."[99] The regulations are identical to the statute in this matter.[100]

The record shows that the district had actual knowledge of S.K.'s interest in placing D.K. at Gateway, and consistently failed to address this interest through the IEP team process. The IHO found that during a May 14, 2007 meeting with ASD administrators, S.K. "raised the option of

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[95] *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

[96] *Forest Grove School Dist. v. T.A.,* 523 F.3d 1078, 1084 (9th Cir. 2008) (the *appeals court* in this case reviewed the *district court* decision for abuse of discretion, but affirmed that the district court determines whether to grant or deny reimbursement under principles of equity).

[97] 20 U.S.C. 1412(a)(10)(C)(ii).

[98] 20 U.S.C. 1412(a)(10)(C)(iii)(I), 20 U.S.C. 1412(a)(10)(C)(iv).

[99] 20 U.S.C. 1412(a)(10(C)(iii)(III).

[100] *Cf.* 34 C.F.R. §300.148.

Gateway," but "[n]o one gave her any other options." Nonetheless, an ASD administrator "sent a memo to the parents on May 31, 2007 denying placement at Gateway." The administrator did not direct D.K.'s IEP team to meet or address S.K.'s interest in Gateway. Given this, the IHO concluded that "ASD understood that the parents were seeking placement at Gateway with the District to bear the cost." However, although S.K. had mentioned placement in Gateway to the IEP team, she did not provide written notice to the public agency ten days prior to the removal, as required by law.

S.K. did not inform ASD before enrolling D.K. in Gateway in August 2007 because she "was afraid to lose [D.K.'s] spot at Denali if Gateway did not work out." D.K. was enrolled in Gateway, and also enrolled in Denali (which has a wait-list to enroll and limited availability) as a backup in case the private placement did not work. In fact, D.K. attended Denali for at least a few days, but S.K. reported that he suffered extreme anxiety and vomited on one occasion, so she decided to keep him exclusively at Gateway. After learning that she could seek reimbursement under the IDEA, S.K. sent a letter to the district on September 19, 2007 requesting reimbursement, stating that she did not know of the prior-notice requirement, and requesting an IEP meeting.

This Court should not reduce or deny reimbursement for failure to provide prior written notice if the school prevented S.K. from providing such notice, if the parents had not received notice, pursuant to 20 U.S.C. § 1415 of this notice requirement, or if providing such notice would have likely resulted in harm to D.K.[101] S.K. testified, and wrote in her letter dated September 19, 2007 that she had not known of the requirement until after the placement.[102] Because IHO Gallagher denied reimbursement on this ground, she must have found that a preponderance of evidence in the administrative record shows that the S.K. *had been* notified of the notice requirement as required in §1412(a)(10)(C)(iv)(I)(bb). This court sees no reason to overturn that decision based on S.K.'s unsupported testimony, and thus, reimbursement to S.K. will be reduced, in part, because of S.K.'s failure to notify the school 10 days prior to the removal.

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[101] 20 U.S.C. § 1412. The remedy, of course, is equitable, but the Court defers to the statute here.

[102] D.K.'s violent physical reaction when attending Denali, as well as S.K.'s concerns over bullying, may also satisfy §1412(a)(10)(C)(iv)(I)(cc) ("would likely result in physical harm").

This Court may also balance the equities and determine to reduce or deny reimbursement on a judicial finding of unreasonableness with respect to the actions taken by the parents.[103] Although the school refused to consider placement of D.K. into Gateway during the IEP meetings and failed to provide a FAPE to D.K., the actions of S.K. may be considered unreasonable. S.K. manipulated the school district by enrolling D.K. in Denali and sending him there on the first day so that he would maintain one of the limited spots in the Montessori program. S.K. requested consent by the district, after notifying them that D.K. was enrolled at Gateway, that D.K. could return to the Montessori program at Denali at any time. Despite investigating Gateway during D.K.'s third grade year and determining to enroll him prior to the IEP meeting, S.K. only indirectly mentioned placement during the final meeting.[104] IHO Gallagher implied that "the behavior of the Parents and their counsel may have been overly contentious at the March 28 meeting" but determined that the breakdown of the IEP process was due to the district.[105] This Court finds that S.K. did act unreasonably, that reimbursement may thus be denied or reduced.

S.K.'s conduct in this matter was unreasonable and not only calculated to deprive ASD of a chance to find a conforming FAPE program, but did so by keeping D.K. in a program that is limited in availability. S.K.'s actions had consequences beyond ASD. By holding a spot in the Denali program without intending to stay, she precluded another child from the Denali program. Based on the foregoing, this Court finds that D.K.'s parents are entitled to reimbursement for one year of tuition at Gateway, but that this amount may be denied or reduced. Due to D.K.'s parents' failure to notify the school district prior to removal, and due to D.K.'s parents' unreasonable behavior, this Court uses its equitable powers to determine that reimbursement shall be reduced by 25% percent.[106]

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[103] 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

[104] Although S.K. maintains that she had no prior knowledge of the fact that she could be reimbursed by the district for private placement, the record is suggestive that this may not be the case. However, there is no argument or evidence provided to this effect by ASD and this Court will not speculate.

[105] Docket 6-2, at 19.

[106] This amount corresponds with the percentage of the school year in which ASD had not been given fair prior notice of their obligation to pay D.K.'s tuition.

Because one year of tuition at Gateway costs $11,500, D.K.'s parents are entitled to a reimbursement of $8,625.

G. Attorney's Fees and Costs

The Court may, in its discretion, award a reasonable amount of attorneys' fees recoverable by the prevailing party pursuant to the IDEA.[107] The amount awarded is governed by the "degree of success" standard announced by the U.S. Supreme Court in *Hensley v. Eckerhart*, which held that a party may not recover for unsuccessful claims, and may recover only partially for a partially successful claim.[108] D.K.'s parents, having predominantly prevailed in their requested relief, are hereby ordered to submit briefs and any supporting documents on these issues by October 31, 2009 in light of the decisions of this Court.

V. CONCLUSION

For the reasons stated above, IHO Gallagher's February 19, 2008 decision, which was made final on April 1, 2008, is reversed on the issue of reimbursement for private school tuition and related costs for the 2007-08 school year. The hearing officer's decision is affirmed in all other respects, and ASD is ordered to pay the parents' costs in the amount of $8,625 and parties are ordered to submit briefs regarding payment of attorneys' fees in bringing this action.

Dated at Anchorage, Alaska, this 30th day of September 2009.

/s/ Timothy Burgess
Timothy M. Burgess
United States District Judge

[107] 20 U.S.C. Section 1415(i)(3)(B)(i).

[108] *Aguirre v. Los Angeles Unified School Dist.*, 461 F.3d 1114, 212 Ed. Law Rep. 183 (9th Cir. 2006).