STATE OF VERMONT
DEPARTMENT OF EDUCATION

Special Education — Due Process Hearing
Case #DP 14-09

SUMMARY JUDGMENT ORDER

A Due Process Complaint was filed by the Parents on February 28, 2014. On March 10, 2014, the District filed a Motion for Summary Judgment. On March 20, 2014 the Parents filed an Opposition to the District's Motion for Summary Judgment. The District filed a Reply to the Parents' Opposition on March 25, 2015.

UNDISPUTED MATERIAL FACTS

Although the parties disagree about many facts in this case, there is no genuine dispute about the following material facts:

1. The Student attended the Town School from 2008 until April of 2013.

2.The Student was found eligible for Special Education and provided with an IEP in 2012.

3. On January 14, 2013, the IEP Team including the Parents met to discuss the Student's progress. The District stated that, because the Student's and academic issues were deteriorating and its resources and options were exhausted, the Student may need an alternative placement to provide with an appropriate education. (Exhibit B1, District's Motion for Summary Judgment).

4. The IEP Team including the Parents met on February 4, 2013 to review the IEP. The District provided, and the Parents accepted, a copy of *Parental Rights in Special Education Procedural Safeguards Notice*. The IEP Team concluded that the Student should be placed in an alternative short-term day program beginning on March 6, 2013. The District offered four specific alternative placement options for the Student that the Parents were to visit during the week of February 19, 2013. (Exhibit A1 and Exhibit C, District's Motion for Summary Judgment).

5. On February 21, 2013, the Parents informed the District that they were refusing the alternative placements proposed by the District. (Exhibit D, District's Motion for Summary Judgment).

6. On March 11, 2013, the IEP Team including the Parents and their attorney met to review the IEP. The District offered the Parents and their attorney a copy of *Parental Rights in Special Education Procedural Safeguards Notice.* However, it was refused. The Parents proposed placing the Student in a smaller independent school such as the School (hereafter " School") or the School. The District informed the Parents that these were not appropriate alternative placements because they did not provide special education services. (Exhibit A1 and Exhibit D, District's Motion for Summary Judgment).

7. At the March 11th IEP meeting, the Parents stated that they had not visited the programs proposed by the District at the February 4th IEP meeting. However, they did not believe that the any of the programs would be a good fit for the Student. The Parents and the District were unable to agree on an appropriate alternative placement. The District agreed to provide the Student with off-site tutoring pending the results of evaluation and trial. (Exhibit A1 and Exhibit D, District's Motion for Summary Judgment).

8. On April 1, 2013, the Student's tutor told the District that tutoring would no longer be needed because the Student was attending the School. The Student was enrolled at on April 1, 2013. (Exhibit A1, District's Motion for Summary Judgment).

9. On April 22, 2013, the District informed the Parents that their placement of the Student at the School, a private school, was a unilateral placement and that the District would not pay the tuition costs of as requested by the parents in an earlier letter. (Exhibit A District's Reply Memorandum in Further Support of District's Motion for Summary Judgment).

10. The Parents appeared before the Town School Board on July 1, 2013 to request that the District pay the Student's tuition at the School. Their motion to approve the tuition request was not seconded and thus died. (Exhibit C, attachment #2, District's Reply Memorandum in Further Support of District's Motion For Summary Judgment).

11. The Parents filed a Due Process Complaint requesting reimbursement of the Student's tuition at the School on February 28, 2014.

DISCUSSION

Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 56 V.R.C.P 56(c)(3). To determine whether or not there is a genuine issue of material fact, a court accepts as true claims in opposition if they are supported by evidentiary documentation. *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356.

The Parents, in this case, seek reimbursement for their placement of the Student at the School. The District in its Motion for Summary Judgment argues that the Parents are barred from reimbursement on three grounds. First, the District contends that reimbursement is barred by the 90-day statute of limitations pursuant to VSER 2365.1.6.1(a)(2), a rule stating that a parent's claim for reimbursement of a unilateral special education placement by the child's parent must be filed within 90 days of the placement. The 90 day filing requirement does not apply if the parent was prevented from filing a complaint by: "(i) Specific misrepresentation by the LEA that it had resolved the problem forming the basis of the due process complaint; or (ii) The LEA's withholding of information from the parent that was required under this part to be provided to the parent." VSER 2365.1.6.1(a)(3). In addition, if the parent has not been given notice of the special education rights, including notice of the limitations, the limitations shall run from the time notice of the rights have been provided to the parent. VSER 2365.1.6.1(a)(4).

To support its argument, the District cites a case in which a Vermont hearing officer found that the LEA made a placement proposal on or before October 3, 2006 and the child's guardian placed the child unilaterally in a private school on or before October 3, 2006. The hearing officer found that, at an IEP meeting on August 18, 2006, the school district offered and the guardian had accepted a copy of the *Parental Rights in Special Education Procedural Safeguards Notice*. The hearing officer granted the school district's motion for summary judgment, citing VSER 2365.1.6.1(a)(2) on the grounds that the guardian did not file a due process complaint until May 27, 2007, more than 90

days after the unilateral placement of the child had occurred. *See also, K.D. ex rel. C.L. v. Dep't of Educ., Hawaii*, 665 F.3d 1110 (9th Cir. 2011).

The Parents contend, in the case under consideration, that the District withheld information from them that, under VSER 2365.1.6.1(a)(3)(i), would render the 90-day limitation inapplicable. They allege that the District withheld information by telling them that the proper procedure for the reimbursement claim was not a due process complaint but instead was a request to the school board, a recommendation the Parents followed. There is, however, no documentary evidence in the record that the District withheld information or misled the Parents. The affidavit of the Mother makes no reference to the Parents being told by the District not to file a complaint but instead to request a hearing before the school board. Having presented no evidence to support their claim, this allegation must fail.

The Parent's also argue that they did not receive proper notice of the 90-day limitation on filing for reimbursement of a unilateral placement as required by VSER 2365.1.6.1(a)(4). The Parents point to the omission of any reference to the 90-day limitation in the *Parents' Rights in Special Education Procedural Safeguards Notice* offered to and accepted by the Parents at the February 4, 2013 IEP meeting. They argue that, although the Parents' Rights booklet states that a due process complaint may be brought within 2 years, there is no mention of the 90-day limitation on complaints for unilateral placement reimbursement.

The District counters by pointing out that the first paragraph on the cover of the *Parental Rights in Special Education* booklet states that all references to Rules can be found in *The Vermont State Board of Education Manuel of Rules and Practices*. Directly under the caption "Due Process Complaint", on page 19 of the booklet, is the reference to "Rule 2365.1.6" which includes the 90-day limitation exceptions pursuant to VSER 2365.1.6.1(a)(3) &(4). Any direct omission regarding the 90-day limitation in the booklet is cured by the reference to *Vermont State Board of Education Manuel of Rules and Practices*.

In addition, the District argues that the Parents were represented by counsel at the March 11, 2013 IEP meeting when they refused a copy of *Parents' Rights in Special Education Procedural Safeguards*. During the meeting, there was a discussion about

placing the Student at the School and the District put the Parents on notice of that the School was not an appropriate alternative placement due to its lack of special education services. When a parent is represented by an attorney, the parent is presumed to have knowledge of the parent's rights and responsibilities under the law. The attorney identified as the Parents' attorney on the Parents' Due Process Complaint filed on February 28, 2014 was the same attorney representing the Parents at the March 11, 2013 IEP meeting. In *Christopher W. v. Portsmouth School Committee,* the court concluded that a student had failed to exhaust his administrative remedies when he disputed the disciplinary penalties imposed by the school. The court stated that "Since [the student] had retained an attorney early on in this controversy....we find lacking in persuasiveness any assertion of ignorance as to appropriate procedures to be followed." 877 F.2d 1087, 1097 (1st Cir. 1989). *See also Waterman v. Marquette-Alger Intermediate Sch. Dist.*, 739 F. Supp. 361, 369; *Wagner v. Logansport Community Sch. Corp.*, 990 F. Supp. 1099, 1102 (N.D. Ind. 1997). At the time of the March 11th IEP meeting if not before, the Parent's attorney was clearly aware that the Parents were giving consideration to placing the Student at the school. Given the attorney's involvement in this matter, the Parents are presumed to have had knowledge about the procedures they needed to follow including the filing of a due process complaint within 90 days of unilaterally placing the Student at the School and the possible consequences of not filing in a timely manner.

The Parents' final argument is that they never made a special education unilateral placement. They contend that the District did not "establish" an alternative placement prior to their removal of the Student but merely suggested several alternative placements and, therefore, it did not provide the Student with an appropriate program or FAPE. The undisputed documentary evidence does not support this contention. Instead, it confirms the District's argument that, at the February 4, 2013 IEP Team meeting, the District offered the Parents four specific short-term day programs that would be appropriate for the Student. The Parents indicated that they would visit these programs during the week of February 19, 2013. At the February 4th meeting, it was also determined that the Student's IEP would be revised to reflect a temporary change of

placement to a day program. Although the Parents did not visit any of the programs, they decided that none of them would be a good fit for the Student.

At the next IEP Team meeting on March 11, 2013, the Parents and the District were unable to agree on an appropriate placement for the Student. At this meeting meeting, the District offered, at the request of the Parents, an off-site tutoring program as short-term placement to provide the Student with FAPE while the team awaited the results of ' evaluation and ' trial. The Parents withdrew the Student from the District's tutoring program and placed at the School before the evaluation and test results were available for the IEP Team to use as it developed an appropriate program and placement for the Student. Only if a school fails to provide FAPE, can a parent receive retroactive reimbursement for a unilateral placement of a child in a private school. *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471, U.S. 359, 370 (1985). Having removed the Student from the interim tutoring program while the IEP Team was in the process of gathering information and developing an appropriate IEP, the Parents cannot now argue that the District failed to provide the Student with FAPE. The Parents' argument that placing the Student at the School was not a unilateral placement is without merit.

The District raised two additional grounds in its Summary Judgment Motion, however, because the first ground has resulted in a granting of Summary Judgment, it is not necessary to address the remaining grounds.

CONCLUSION

Based on the above, the undisputed material facts demonstrate that the District did not withhold required information from the Parents or mislead them and did not fail to provide the Parents with notice of the 90-day limitation for reimbursement of a unilateral placement. In addition, placement of the Student by the Parents at the School did constitute a unilateral placement. As a result, the Parents' due process complaint is barred by the 90-day statute of limitations pursuant to VSER 2365.1.6.1(a)(2).

ORDER

The District's Motion for Summary Judgment is hereby GRANTED.

NOTICE OF APPEAL RIGHTS

Pursuant to Vermont Agency of Education Rule 2365.1.8:

"(a) The decision of the hearing officer is final unless appealed to a state or federal court of competent jurisdiction within 90 days of the decision.

(b) Parties have the right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction. An appeal from a due process decision to a court of competent jurisdiction in accordance with Rule 2365.1.9 shall be commenced within 90 days from the notice of the final decision, and not after."

Dated at Hartland, Vermont, this 1st day of April, 2014

Catherine C. Stern, Hearing Officer