COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Quincy Public Schools **BSEA # 1307468**

RULING ON QUINCY'S MOTION TO DISMISS AND EACH PARTY'S MOTION FOR SUMMARY JUDGMENT

This ruling is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

INTRODUCTION

This dispute requires that I rule on Parents' Motion for Summary Judgment and Quincy Public Schools' (Quincy) Motion to Dismiss and/or Motion for Summary Judgment.

I briefly recount the context of these motions. On April 24, 2013, Parents filed with the BSEA a hearing request alleging that Quincy has not complied with that portion of my Decision of November 21, 2012 in which I ordered Quincy to "locate or create" an appropriate educational program for Student. Parents' hearing request correctly notes that in the meantime, Student has continued in her stay-put placement at the Clarke School for Hearing and Speech (Clarke School) in Northampton, MA.

Rather than requiring Quincy to "locate or create" an alternative placement (as required by my November 21, 2012 Decision), Parents seek an order requiring Quincy to immediately provide Student (at Clarke School) with a special education teacher who is knowledgeable in deaf education and to take whatever additional steps are necessary to make Clarke an appropriate placement for Student. Parents' hearing request also seeks two years of compensatory services "due to the lack of appropriate summer services, lack of a current appropriate IEP, and failure to provide a special education teacher in [Student's] current placement"; as well as reimbursement Parents for "all costs they have had to endure".

On May 6, 2013, Quincy filed its response to Parents' hearing request. Quincy generally denies that it has failed to comply with my Order requiring it to "locate or create" an appropriate program; rather, Quincy takes the position that "Parents have been and are sabotaging Quincy's efforts to create a program for [Student] which meets the hearing officer's criteria." Quincy denies any responsibility to improve the Clarke placement, and seeks to rebut Parents' claims for compensatory services and reimbursement of expenses.

On June 14, 2013, Parents filed a Motion for Summary Judgment, seeking a finding by the hearing officer that Quincy violated the "locate or create" order in the November 21, 2012 Decision. Their Summary Judgment Motion also seeks an order that Quincy must take steps to make Clarke appropriate for Student so that she may continue to go to school there for the next two school years. Parents' Motion further seeks "full reimbursement for their costs associated with the placement of [Student] at the Clark[e] School and the related travel costs included [sic] tutoring costs and support costs for the 2012-2013, 2013-2014, and 2014-2015 school years."

On June 14, 2013, Quincy filed its Motion to Dismiss and/or Summary Judgment. Quincy seeks to dismiss Parents' hearing request, in its entirety, on the basis of res judicata and "the rule which prohibits parties from splitting their cause of action." Quincy also seeks dismissal of Parents' reimbursement claims, arguing that there is no legal basis for such claims. Quincy seeks summary judgment on Parents' claim for compensatory services, arguing that this claim is barred by a settlement agreement, accepted IEP and the November 21, 2012 Decision.

On June 28, 2013, each party filed an opposition to the other's motion.[1]

The parties have not requested an opportunity for oral argument and I have concluded, pursuant to BSEA Hearing Rule VII D, that such oral argument would not advance my understanding of the issues and is unnecessary.[2]

STUDENT'S PROFILE

The following facts are undisputed or were established through my Decision of November 21, 2012.

Student is fourteen years old and recently completed her 6th grade at the Clarke School at its campus in Northampton, MA. For the 2012-2013 school year, she has been attending Clarke as a day student pursuant to a stay-put order of the BSEA. For the 2011-2012 school year, she attended Clarke as a residential student pursuant to an agreement between the parties.

Although not entirely deaf, Student has a bilateral, sensorineural hearing loss that is communicatively and educationally significant. Relying on her residual hearing, and the use of binaural hearing aids and an FM system for amplification at school, she is and always has been an aural/oral learner/communicator (i.e., she is a listener and talker). She also relies upon visual cues to support her understanding of spoken language. She has never learned (or wanted to learn) sign language. She sees herself as an aural/oral student who has a significant hearing loss. See November 21, 2012 Decision, page 3.

[1] Parents also filed a Motion to Exclude Affidavits. This Motion is denied for reasons explained in Quincy's opposition. Quincy also filed a Motion for Clarification. The instant ruling provides the clarification requested.
[2] Parents are represented by attorney Michael Turner. Quincy is represented by attorney Doris MacKenzie Ehrens.

Student is also diagnosed with deficits in expressive and receptive language, and language-based learning disabilities. It is undisputed that, as explained in an evaluation by Terrell Clark, PhD (a pediatric psychologist, who has evaluated and followed Student for many years and who testified at the hearing as Parents' expert), Student "continues to require a small, language-based class where her language and learning needs are addressed by professionals who employ special educational techniques to circumvent and compensate for learning disabilities and for the effects of her significant hearing loss." See November 21, 2012 Decision, page 3.

Student's cognitive profile has remained relatively stable over time. Her 2011 test scores on the WISC-IV reflect functioning in the Low Average range in the Verbal Comprehension area (index score of 85) and functioning in the Average range in the Perceptual Reasoning or non-verbal area (index score of 96). This profile is consistent with her diagnosis of learning disabilities. See November 21, 2012 Decision, page 3.

EDUCATIONAL AND PROCEDURAL BACKGROUND

The following educational and procedural background facts were established in my Stay-Put Order of October 10, 2012 and my Decision of November 21, 2012 (both of which are BSEA # 1302133).

2007-2008 school year through the 2010-2011 school year. For the 2007-2008 school year, Student was unilaterally placed by Parents at the Learning Prep School, a private school for learning disabled children in Newton, MA. For the subsequent three school years (i.e., through the 2010-2011 school year), Student continued to be placed at Learning Prep; but instead of this occurring through a unilateral placement by parents, the placement occurred through a settlement agreement between the parties. The settlement agreement provided for Quincy to pay for tuition and transportation, but specifically relieved Quincy of any responsibility to provide accommodations or services relevant to Student's hearing loss. Parents believed that the Learning Prep School would appropriately address this area of need without any assistance from Quincy. See November 21, 2012 Decision, page 5.

2011-2012 school year. For this school year, Quincy proposed an IEP that would continue Student's placement at Learning Prep. Because they were not satisfied with Learning Prep, Parents rejected the IEP and filed a hearing request with the BSEA. The parties resolved their dispute through a settlement agreement that provided for Quincy to place Student residentially at Clarke School. The residential component of the program was needed only because the distance between Quincy and Northampton was too long for Student to commute daily. She typically spent Monday through Thursday nights at Clarke, returning home for the weekends. During this school year, she repeated 5th grade by agreement of Parents and the Clarke School. By this time, Student was twelve years old. See November 21, 2012 Decision, page 5.

2012-2013 school year. On May 3, 2012, Parents filed a hearing request with the BSEA, seeking an order requiring Quincy to continue funding Student's placement at Clarke for the 2012-2013 school year. Student had previously attended Clarke as a residential student, but Clarke had terminated its residential program effective the end of the 2011-2012 school year. Clarke offered only a day program for the 2012-2013 school year. In light of these changed circumstances, Parents, through their hearing request, sought an order from the BSEA requiring payment not only of the Clarke tuition but also of Parents' living expenses in the Northampton area so that Student would have sufficient residential support from her Parents so that she could continue to attend Clarke, this time as a day student. See November 21, 2012 Decision, page 5.

Prior to the scheduled hearing dates in this dispute and prior to the beginning of the 2012-2013 school year, the parties settled their differences, and Parents withdrew their hearing request. Their settlement agreement required Quincy to fund Student's tuition as a "publicly-funded residential student" at Clarke. Quincy's obligation to do so, however, was contingent upon Quincy's "obtain[ing] sole source approval for [Student's] residential placement at Clarke." See November 21, 2012 Decision, pages 5-6.

Quincy included this "sole source" language in the agreement because Clarke no longer had a residential program and, to the extent Clarke had created an as yet unapproved residential program, Quincy could not place Student there without prior approval and it could not expend public funds for the program without price authorization. See November 21, 2012 Decision, page 6.

After the settlement agreement was signed, Quincy completed its portion of the sole source application and forwarded the application to Clarke for it to complete its portion. Clarke did not do so. Clarke took the position that it could not complete the application because it did not have a residential program and could not develop a budget for a program it did not have. See November 21, 2012 Decision, page 6.

Because Quincy's payment of the Clarke tuition was made expressly contingent upon sole source approval and because sole source approval was never obtained, Quincy did not make tuition payments to Clarke for the 2012-2013 school year. Nevertheless, apparently because the parties (and Clarke School) assumed that there was an agreement pursuant to which she would attend Clarke School, Student began attending Clarke as a day student at the beginning of the school year and continued to attend until September 24, 2012 when Clarke informed Parents that because it had received no tuition payment, Student must terminate immediately. See November 21, 2012 Decision, page 6.

On September 14, 2012, Quincy filed a hearing request with the BSEA, seeking a determination that its proposed IEP for the current school year is appropriate. This is BSEA # 1302133. On October 2, 2012, Parents' attorney filed a motion in this dispute, seeking that I determine Student's stay-put placement to be the Clarke School, and that Quincy be ordered not only to pay for this day placement but also to pay for Parents' living expenses in

the Northampton area, where Clarke is located. See October 10, 2012 Stay-Put Ruling and November 21, 2012 Decision, page 6.

During the motion hearing, Parents' attorney represented that although Parents were seeking payment of their residential support services, they would be willing, at their own expense, to cover their residential expenses in Northampton so as to support their daughter's attendance at Clarke as a day student in the event that I did not order Quincy to pay for Parents' residential services. In a ruling dated October 10, 2012, I found that it was only the Clarke School day program that could offer Student an educational program that would be comparable to her previous residential placement at Clarke. My ruling determined the Clarke day program to be Student's stay-put placement but declined to consider the merits of Parents' prospective claim that Quincy pay for Parents' living expenses, essentially reserving this issue for possible consideration at a future time. Quincy was ordered to immediately place Student in Clarke's day program. See October 10, 2012 Stay-Put Ruling, pages 5-7.

Student then began attending Clarke again. At her own expense, Mother obtained a hotel room in the area, providing Student with the residential support needed for her to attend Clarke. See November 21, 2012 Decision, page 7.

To resolve the issues in Quincy's September 14, 2012 hearing request regarding the appropriateness of its proposed IEP, there was an evidentiary hearing, and I issued the November 21, 2012 Decision. The Order in this Decision stated the following:

> The IEP most recently proposed by the Quincy Public Schools (i.e., exhibit S-2A) is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. Additions or other modifications cannot be made to the IEP in order to satisfy this standard. Therefore, placement at the READS Collaborative Deaf and Hard-of-Hearing Program is not appropriate.
>
> Clarke School for Hearing and Speech also does not (and cannot) satisfy this standard. Parents have not established a right to prospective payment of residential living expenses in the Northampton area to support Student's attending Clarke. Therefore, placement at Clarke is not appropriate.
>
> Because no appropriate educational program has been proposed by either party, Quincy shall, as soon as possible, locate or create an appropriate educational program that meets each of the three criteria specified above and that is otherwise consistent with the instant decision. [See November 21, 2012 Decision, page 23.]

On April 24, 2013, Parents filed a hearing request with the BSEA in the present dispute (BSEA # 1307468) alleging that Quincy had not complied with my Decision of November 21, 2012 and requesting certain relief as discussed in greater detail in the Introduction section, above. The parties then filed their motions and oppositions, which are the subject of the instant ruling, also as discussed in greater detail in the Introduction section, above.

STANDARD OF REVIEW

With respect to a *motion to dismiss*, BSEA Hearing Rules and the Massachusetts Executive Office of Administration and Finance Adjudicatory Rules of Practice and Procedure both provide that a Hearing Officer may allow a motion to dismiss if the moving party fails to state a claim upon which relief may be granted.[3] Similarly, the federal courts have concluded that a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) may be allowed if the court finds "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[4]

In order to satisfy the showing of an entitlement to relief, "a complaint must contain enough factual material to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[5] A hearing officer must deny a motion to dismiss if after "accepting as true all well-pleaded factual averments and indulging all reasonable inferences in the [Parents'] favor…, recovery [can be justified] under any applicable legal theory …."[6]

Generally, courts consider only the initial complaint and answer in deciding motions to dismiss, treating the motion as one for summary judgment if they consider materials in additional to these pleadings. Other information submitted by the parties may be considered, however, without formally converting the motion to dismiss to a motion for summary judgment, where to do so would not prejudice the other party.[7] Here I consider facts alleged in affidavits accompanying Parents' Motion for Summary Judgment and their opposition to the Motion to Dismiss, in addition to Parents' hearing request.

With respect to a *motion for summary judgment*, the Executive Office of Administration and Finance Adjudicatory Rules of Practice and Procedure, which are applicable to BSEA hearings, allow for summary decision when there is no genuine issue of fact relating to all or part of a claim or defense, and the moving party is entitled to prevail as a matter of law.[8]

Further guidance is found by turning to judicial rules regarding a motion for summary judgment, which rules set forth a standard substantially similar to the above-referenced adjudicatory rules. Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law." A "genuine"

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[3] BSEA Rule 17B; 801 CMR 1.01(7)(g)3.
[4] *Judge v. City of Lowell*, 160 F.3d 67, 72 (1st Cir. 1998) (quoting *Conley v.Gibson*, 355 U.S. 41, 45-46 (1957)).
[5] *Ocasio–Hernández v. Fortuño–Burset,* 640 F.3d 1, 8–9 (1st Cir.2011).
[6] *Caleron-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60, 63 (1st Cir. 2002). See also *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Citron*, 372 Mass. 96, 98 (1977).
[7] See *White v. Peabody Construction Co.,* 386 Mass. 121, 127 (1982).
[8] 801 CMR 1.01(7)(h). These rules govern BSEA proceedings pursuant to 603 CMR 28.08(5)(b).

issue is one that could be resolved in favor of either party, and a "material fact" is one that has the potential of affecting the outcome of the case.[9]

DISCUSSION

Legal standards

It is not disputed that Student is an individual with a disability, falling within the purview of the IDEA and the Massachusetts special education statute. The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE]."[10] Massachusetts FAPE standards, which are found within Massachusetts statute and implementing regulations, provide protections and requirements similar to those found within the IDEA.[11]

Quincy seeks to dismiss Parents' hearing request on the basis of res judicata, and I therefore outline the relevant case law. Res judicata (as well as the related doctrine of collateral estoppel) have typically been applied within the context of litigation in court, but they apply equally to a BSEA Hearing Officer's decision regarding the merits of a special education dispute.[12] The Supreme Court has noted that these two doctrines "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication,"[13] and these underlying purposes apply equally to a BSEA proceeding.[14]

Under res judicata, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action.[15] More specifically, the three elements of res judicata are (1) a final judgment on the merits in an earlier suit, (2) "sufficient identicality" between the causes of action asserted in the earlier and later suits, and (3) "sufficient identicality" between the parties in the two suits.[16] It is not disputed that comparing the instant dispute with the dispute that was resolved through my November 21,

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[9] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-50 (1986).
[10] 20 U.S.C. § 1400 (d)(1)(A).
[11] See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the "education standards established by statue or established by regulation promulgated by the board of education").
[12] See *Kobrin v. Board of Registration in Medicine*, 444 Mass. 837, 844 (2005) ("final order of an administrative agency in an adjudicatory proceeding ... precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction"). The BSEA has applied these doctrines in *In Re: Harwich Public Schools*, BSEA # 08-1670 (2/1/08) and *In Re: Neville & Sutton Public Schools*, BSEA # 07-7534 (11/2/07).
[13] *Allen v. McCurry*, 449 U.S. 90, 94 (1980).
[14] Massachusetts recognizes the similar doctrines of claim preclusion and issue preclusion. See *Kobrin v. Bd. of Registration in Med.,* 444 Mass. 837, 832 N.E.2d 628, 634 (2005), discussed in *In re Sonus Networks, Inc., Shareholder Derivative Litigation*, 499 F.3d 47, 56 -57 (1st Cir. 2007).
[15] *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *In Re Sonus Networks, Inc., Shareholder Derivative Litigation*, 499 F.3d 47, 56-57 (1st Cir. 2007); *Kobrin v. Board of Registration in Medicine*, 444 Mass. 837, 843 (2005); *In Re: Neville & Sutton Public Schools*, BSEA #07-7534 (Ruling dated November 2, 2007).
[16] *Gonzalez-Pina v. Rodriguez*, 407 F.3d 425, 429 (1st Cir. 2005); *Breneman v. U.S. ex rel. F.A.A.,* 381 F.3d 33, 38 (1st Cir. 2004).

2012 Decision, there was a final judgment on the merits and the parties are identical. The question to be addressed is to what extent there is "sufficient identicality" between the causes of action asserted in the earlier and later suits.

There is "sufficient identicality" if the causes of action are identical or if they derive from a "common nucleus of operative facts".[17] This latter principle effectively "prevents plaintiffs from splitting their claims by providing a strong incentive for them to plead all factually related allegations and attendant legal theories for recovery the first time they bring suit."[18]

In determining whether claims arise from the same nucleus of operative facts, the First Circuit has provided the following guidance:

> Only if the actions' factual bases are the same will [the current] claims be barred by res judicata. If [the current] claims … are separate and distinct from those litigated in [in an earlier dispute], that is, if they rest on a different factual basis, then res judicata does not preclude litigation of [the current] claims.[19]

The First Circuit has also enumerated the following factors to assist in determining whether current and previous claims derive from the same nucleus of operative facts:

> 1) whether the facts are related in time, space, origin or motivation; 2) whether the facts form a convenient trial unit; and 3) whether treating the facts as a unit conforms to the parties' expectations. Additionally, when defining the contours of the common nucleus of operative facts, it is often helpful to consider the nature of the injury for which the litigant seeks to recover.[20]

<u>Parents' claim for reimbursement of expenses</u>

Parents' Motion for Summary Judgment seeks "full reimbursement for their costs associated with the placement of [Student] at the Clark[e] School and the related travel costs included [sic] tutoring costs and support costs for the 2012-2013, 2013-2014, and 2014-2015 school years." Quincy's Motion to Dismiss seeks to bar Parents' claim for reimbursement of expenses related to Mother's temporary home in Northampton, MA, to support Student while she has been attending Clarke School. In order to place this issue in perspective, I briefly review the parts of my previous ruling and decision that are relevant to this claim.

In my October 10, 2012 Stay-Put Ruling, I declined to rule on the merits of Parents' claim for prospective payment of residential services costs to support Student's placement at Clarke. Parents had indicated a willingness to pay for these residential services. I also

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[17] *Breneman v. U.S. ex rel. F.A.A.,* 381 F.3d 33, 38 (1st Cir. 2004); *Gonzalez v. Banco Cent. Corp*., 27 F.3d 751, 755 (1st Cir. 1994).
[18] *Apparel Art Int'l, Inc. v. Amertex Enters., Ltd*., 48 F.3d 576, 583 (1st Cir.1995). See also *AVX Corp. v. Cabot Corp*., 424 F.3d 28, 31 (1st Cir.2005).
[19] *Apparel Art Intern., Inc. v. Amertex Enterprises Ltd*., 48 F.3d 576, 583 -584 (1st Cir. 1995) (citations omitted).
[20] *Id.* (internal citations omitted).

concluded that I could not consider this issue without the benefit of "an evidentiary hearing (addressing not only the necessity for this kind of relief but also the details of the requested expenses including the nature and scope of the living expenses) and full briefing by the parties regarding my legal authority to order the requested relief," neither of which had occurred. In the stay-put ruling, I explained that at a hearing on the merits, I may possibly have to address the question of what liability, if any, Quincy may have to pay for Parents' living expenses so that Student can attend the Clarke day program. October 10, 2012 Stay-Put Ruling, pages 5-6.

In the November 21, 2012 Decision, I addressed the issue of prospective payment of a residential component for Student while she attends Clarke School. I found that Parents' right to residential services would only exist if Student's special education needs cannot be met appropriately through a day placement alone and that "it is likely that Student's special education needs can be addressed through a day placement without the need for residential services." Thus, I determined that Student was not entitled to an order requiring Quincy to pay for prospective residential services in the form of parental living expenses. November 21, 2012 Decision, pages 20-21.

At the same time, however, the November 21, 2012 Decision made clear that it was not seeking to resolve any claim for reimbursement of Parents' living expenses to support Student's day placement at Clarke School. See November 21, 2012 Decision, footnote 2 at page 2.

In this Decision, I explicitly declined to address Parents' claim for reimbursement of expenses incurred while Mother lived in Northampton. I found it was not until immediately prior to the beginning of the evidentiary hearing that Parents' attorney advised Quincy that Parents were also seeking reimbursement of Mother's previously-incurred living expenses in the Northampton, and therefore Quincy had not received sufficient notice that this issue would be addressed at hearing. I noted in the Decision that Parents' reimbursement claim was an "issue separate and distinct" from all of the other issues that had been identified by the parties, including Parents' claim for prospective residential services. See November 21, 2012 Decision, footnote 2 at page 2.

Near the end of the November 21, 2012 Decision (footnote 36 at page 23), I wrote that it is anticipated that Parents may renew their request for reimbursement and that Parents may possibly be entitled to reimbursement of certain expenses until such time as Quincy locates or creates an appropriate educational program for Student. At the same time, I cautioned Parents that "any determination of the appropriateness or amount of such reimbursement … may appropriately consider Parents' conduct, including any conduct that delays or hinders Quincy's efforts to find an appropriate program for Student as soon as possible."

Quincy argues that Parents' present claim for reimbursement of their residential expenses has essentially been already considered by me and may not be considered again. Quincy takes the position that because the October 10, 2012 Stay-Put Ruling did not order Quincy to pay for residential services and because the November 21, 2012 Decision determined that Parents

had no prospective right to residential services, Parents are precluded from later seeking reimbursement for these same residential services costs under res judicata principles.

I am not persuaded for several reasons. First, as discussed above, my October 10, 2012 Stay-Put Ruling did not address the merits of Parents' claim for payment of their residential services costs.

Second, as discussed above, my November 21, 2012 Decision explicitly separated out Parents' prospective claim regarding residential services costs and Parents' reimbursement claim for residential services costs, and the November 21, 2012 made clear that it was only ruling on the prospective claim and anticipated that Parent may further file with the BSEA seeking reimbursement.

Third, establishing a right of Parents to receive a certain amount of money for prospective residential services expenses is a remedy that is, by its nature, different than a reimbursement claim. The former requires the BSEA to do something roughly analogous to what a state agency might do to establish a rate pursuant to which a private service provider would be paid for the residential portion of a residential school—that is, to determine future costs and payments for residential services.[21] On the other hand, a reimbursement claim presents a more manageable task that falls squarely within the work of the BSEA. The process for considering this equitable claim allows the Hearing Officer to review specific expenses (which have already been incurred) to determine whether they should be reimbursed as necessary for Student's residential support and as reasonable in nature and amount.

I therefore find that Parents' reimbursement claim for residential living expenses and Parents' prospective claim for residential service expenses are two distinct claims for purposes of res judicata, and that Parents' reimbursement claim has not yet been addressed by the BSEA.

Quincy argues that even if the reimbursement issue and the previously-resolved prospective residential services issue are not identical, there is "sufficient identicality" so as to bar Parents' reimbursement claims under res judicata. I therefore return to the res judicata legal standards, outlined above, to consider Quincy's argument. In order to answer this question, I consider whether the reimbursement issue and the previously-resolved issues derive from a "common nucleus of operative facts".

The reimbursement claim requires consideration of the necessity and reasonableness of specific expenses that have been incurred by Parents from the beginning of the 2012-2013 school year. This essentially requires a backwards look at what Parents have actually done in order to support their daughter at Clarke, as compared to the previous dispute which required consideration of what special education and related services are necessary so that Student would receive FAPE.

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[21] See, e.g., 808 CMR 1.01 (governing the Massachusetts Division of Purchased Services).

I find that the factual evidence relevant to the reimbursement claim will be entirely different than the evidentiary record in the previous dispute. For these reasons, I conclude that res judicata does not preclude Parents' reimbursement claims.

Quincy further argues that the reimbursement claims should be dismissed because there is no legal basis upon which relief may be granted. I now consider this argument.

Quincy takes the position that because the November 21, 2012 Decision determined the Clarke School placement to be inappropriate, there may be no reimbursement of any related residential expenses. Quincy relies upon case law for the proposition that a parent's expenses may be reimbursed only if parent's privately-procured services were appropriate for the student's needs.[22] This case law is applicable to a parent's request for reimbursement for a unilateral placement where the school district has proposed an inappropriate placement, but I am not persuaded that this case law is applicable to a stay-put placement.

Student's initial placement at Clarke School occurred as a result of a settlement agreement between the parties, with a continuation of the placement through my stay-put order. The stay-put ruling did not consider, nor would it have been appropriate to consider, the appropriateness of the Clarke School placement. Stay-put's essential purpose is "to preserve the status quo pending resolution of challenge proceedings under the IDEA"[23] rather than to resolve the question of whether the status quo placement is reasonably calculated to provide a student with FAPE. The fact that the Clarke School was later found to be an inappropriate placement (pursuant to the November 21, 2012 Decision) did not change Quincy's obligation to continue funding Clarke School on an interim basis.

Parents' reimbursement claims are based on the simple fact that Clarke School is the stay-put placement that Student has the right to attend under state and federal special education laws until an appropriate program is located or created. It is not disputed that Student can only attend this placement if she is supported residentially since her family home in Quincy is too far from Northampton to permit a daily commute. Where a residential component is required in order that Student access the program to which she is entitled, the student's residential component "must be at no cost to the parents of the child."[24] Thus, reimbursement of certain expenses related to Mother's maintaining a temporary home in the Northampton area may be warranted if shown to be necessary to allow Student to attend her stay-put placement.[25]

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[22] See *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 11-13, 16 (1993); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 31 (1st Cir. 2006); *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26-27 (1st Cir. 2002).

[23] *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 3 (1st Cir. 1999).

[24] See 34 CFR §300.104 ("If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.").

[25] See *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1527-1528 (9th Cir. 1994) ("[i]f a child's appropriate special education placement is at a non-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are related services that are required to assist that child to benefit from the special education" and ordered reimbursement of the cost of lodging for the student and his grandmother in Los Angeles, as well as reimbursement of transportation costs). See also *In Re: Provincetown Public Schools and*

I emphasize that at this juncture of the dispute, I make no predetermination as to what categories of expenses (much less any specific expenses) are appropriate for reimbursement. As discussed more fully at the end of this section of the ruling, all of this will need to be resolved through an evidentiary hearing.

I turn briefly to the question of when this stay-put placement began. On October 10, 2012, I determined Student's stay-put placement to be the Clarke School. However, it cannot be seriously disputed that Clarke School was also Student's stay-put placement prior to my ruling. From the beginning of the 2012-2013 school year, Student had no other educational placement to attend. The analysis supporting my October 10, 2012 Stay-Put Ruling applies equally to the time period from the beginning of the school year. Accordingly, I find that from the beginning of the 2012-2013 school year, Clarke School has been Student's stay-put placement.

I therefore find that the law does not preclude Parents from obtaining reimbursement of residential living expenses necessary and reasonable to support Student's stay-put placement from the beginning of the 2012-2013 school year at Clarke School.

Quincy further challenges part of Parents' reimbursement claims on the basis that Parents seek reimbursement of future expenses. Quincy correctly points out that Parents seek reimbursement not only for actual expenses that have been incurred, but also for future expenses. This claim is found most specifically in Parents' Motion for Summary Judgment which takes the position that they should be provided "full reimbursement for their costs associated with the placement of [Student] at the Clark[e] School and the related travel costs included [sic] tutoring costs and support costs for the 2012-2013, 2013-2014, and 2014-2015 school years."

The First Circuit has explained that "[u]nder the category of 'reimbursement,' parents may recover only actual, not anticipated, expenditures for private tuition and related services".[26] Thus, Parents cannot transform a reimbursement claim into a request for payment of future expenses. I also note that Parents' right to prospective residential services has been denied in the November 21, 2012 Decision, as discussed above, with respect to the educational placement that Quincy has responsibility to locate or create.

I therefore find that any reimbursement claims must be limited to costs that have actually been incurred by the time of the evidentiary hearing in the instant dispute. This applies not only to Parents' living expenses but also to any other reimbursement claims, such as "tutoring costs".

Mass. Dept. of Education and Anne, BSEA # 04-3100 & 05-0340, 10 MSER 493 (November 2, 2004) (BSEA Hearing Officer ordered prospective payment of certain expenses, including some of parents' living expenses).

[26] *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 20 (1st Cir. 2006).

Finally, I address the nature of these claims and how I may address them. Reimbursement is discretionary, equitable relief.[27] "Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors"[28] including, among other things, the reasonableness of the parties' conduct,[29] and it is appropriate for the BSEA to do the same.[30]

In order to determine whether equitable considerations support reimbursement, I will need to determine not only that Parents actually incurred each particular expense for which they seek reimbursement but also that each particular expense was necessary for purposes of supporting Student at Clarke and that each particular expense was reasonable with respect to its nature and amount. Parents, who have the burden of persuasion, have not yet provided any factual information necessary for me to identify the specific expenses for which they seek reimbursement, much less any information supporting the reimbursement of a particular expense. Quincy needs to be provided an opportunity to challenge the appropriateness of reimbursement of Parents' specific expenses. An evidentiary hearing is needed for this purpose.

Also, as I advised the parties in the November 21, 2012 Decision, when resolving Parents' reimbursement claim, I may appropriately consider any conduct that may have delayed or hindered Quincy's efforts to find an appropriate program for Student as soon as possible.[31] In its response to Parents' hearing request, Quincy takes the position that "Parents have been and are sabotaging Quincy's efforts to create a program for [Student] which meets the hearing officer's criteria." Parents strongly deny this allegation. The positions of the parties are supported by affidavits filed with their motions and oppositions. To the extent that Quincy can persuade me that Parents have not fully cooperated with its efforts to locate or create an appropriate placement for Student and that this has slowed or stopped Quincy's process, I may limit the amount of time during which Parents may obtain reimbursement for their residential expenses. Fact finding is needed for this aspect of the reimbursement dispute.

For these reasons, I find that an evidentiary hearing is needed to resolve Parents' claim for reimbursement of expenses.

Therefore, I rule that Parents' Motion for Summary Judgment and Quincy's Motion to Dismiss are denied with respect to Parents' reimbursement claims; except that Quincy's Motion to Dismiss is allowed with respect to Parents' claim for

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[27] See *School Union No. 37 v. Ms. C.,* 518 F.3d 31, 34 (1st Cir. 2008) ("Reimbursement is an equitable remedy"); *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13, 31 (1st Cir. 2006) ("Reimbursement is a matter of equitable relief, committed to the sound discretion of the district court") (internal quotations omitted).
[28] *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993).
[29] See *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 288 (1st Cir. 2008) (parent's unreasonable actions may justify a denial of reimbursement under the IDEA).
[30] See *Forest Grove Sch. Dist. v. T.A.*, 2009 WL 1738644, *8, n.11, and *10 (2009) (in an IDEA dispute, the authority of a Hearing Officer and the authority of a Court are concurrent with respect to the equitable remedy of reimbursement).
[31] See *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 288 (1st Cir. 2008) (parent's unreasonable actions may justify a denial of reimbursement under the IDEA).

reimbursement of expenses that have not actually been incurred by the date of the evidentiary hearing.

By allowing Parents' reimbursement claim to go forward to an evidentiary hearing, I make no predetermination of what general kinds of expenses (or of what specific expenses) must be reimbursed by Quincy. Parents will have the burden of persuasion to demonstrate what kinds of expenses, as well as what specific expenses, should be reimbursed. Quincy will have a full opportunity to contest the appropriateness of reimbursement of every expense for which Parents make a reimbursement claim. And, as discussed above, Quincy may seek to establish that the time period during which Parents may be allowed reimbursement should be limited because of Parents' conduct during the "locate and create" process.

In order to provide Quincy with sufficient information prior to the evidentiary hearing and in order to facilitate my resolution of the reimbursement dispute, one or both Parents shall, no later than July 22, 2013, file an affidavit (together with any documents supporting her reimbursement claims) that itemize the expenses for which they seek reimbursement, as more fully described in the Order at the end of this Decision.[32]

The affidavit will likely serve to shorten and facilitate the direct testimony of one or both Parents regarding their reimbursement claims, but it will nevertheless be necessary for one or both Parents to testify at hearing to allow Quincy to cross-examine (and so that I may ask questions of) the author(s) of the affidavit. Parents may also use testimony and documents to further explain the expenses described in the affidavit and to substantiate expenses incurred after preparation of the affidavit but prior to the evidentiary hearing.

Parents' compliance claim

In their hearing request, Parents take the position that Quincy has failed to comply with my November 21, 2012 Decision—specifically, that Quincy has failed to locate or create an educational program that meets the criteria specified in that Decision. Through their Motion for Summary Judgment, Parents seek a ruling in their favor on this issue. They support their position through the affidavit of Mother, who recounts, from her perspective, the process that Quincy has sought to utilize and why it has been ineffective in locating such a placement. Quincy opposes Parents' Motion for Summary Judgment and supports its position with the affidavit of its Out-of-District Liaison (Sylvia Pattavina). The affidavit recounts, from Quincy's perspective, what it has done to locate such a placement. Quincy takes the position, as supported by this affidavit, that it has acted appropriately but that Parents have effectively stymied its process for finding an appropriate placement for Student.

Resolution of Parents' compliance claim requires that I determine material facts that are in dispute, as reflected within the parties' affidavits. Because of this factual dispute, I cannot resolve this claim without an evidentiary hearing.

[32] By Order of July 3, 2013, I advised Parents that they may be required to file such an affidavit by July 22, 2013, and this was discussed with the attorneys during a conference call on July 8, 2013.

I therefore rule that Parents' Motion for Summary Judgment and Quincy's Motion to Dismiss are denied with respect to the question of whether Quincy has complied with my November 21, 2012 Decision.

Parents' claim for compensatory services

Through their hearing request filed on April 24, 2013, Parents have sought relief in the form of an order that would require Quincy to provide two years of compensatory services "due to the lack of appropriate summer services, lack of a current appropriate IEP, and failure to provide a special education teacher in [Student's] current placement".

In its Motion to Dismiss, Quincy seeks to bar this claim on the basis of res judicata. However, this claim would require development of a factual record entirely distinct from the evidentiary record in the previous dispute. Following the same analysis used regarding Parents' reimbursement claim, I find that res judicata does not preclude Parents' compensatory claims.

Quincy also seeks summary judgment on Parents' claim for compensatory services, arguing that this claim is barred by a settlement agreement, accepted IEP and the November 21, 2012 Decision.

For the 2010-2011 school year, Student was placed at Learning Prep School pursuant to a settlement agreement between the parties. See November 21, 2012 Decision, page 5. Parent does not allege or argue that Quincy violated Parents' rights regarding the 2011 summer services.

For the 2011-2012 school year, the parties entered into another settlement agreement. This agreement provided for Quincy to pay for Student's residential placement at the Clarke School. The agreement stated that it covered the summer of 2012, that Parents would arrange for summer services for Student, and that Quincy bore no responsibility for services for the summer of 2012. See Todd affidavit, pars. 6, 7, 8, and attachment B, pars. 3, 5.[33]

I therefore find that Quincy has no compensatory liability regarding summer services.

For reasons explained below in the next section, I agree with Quincy that the November 21, 2012 Decision precludes Quincy from having any responsibility to provide a special education teacher to Student at Clarke School during the 2012-2013 school year. I therefore find that Quincy has no compensatory liability regarding its alleged failure to provide a special education teacher for Student at Clarke.

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[33] Quincy's proposed IEP that was addressed through my November 21, 2012 Decision indicated that extended year services would be recommended to address Student's "significant learning disabilities" but did not specify the nature or extent of these services because the IEP was for the period 10/19/12 to 7/9/13. November 21, 2012 Decision, page 4.

Parents have taken the position that the alleged lack of an appropriate IEP also forms the basis of their compensatory claim. During a July 8, 2013 conference call with me and Quincy's attorney, Parents' attorney made clear that what is being referred to is not the IEP that was the subject of my November 21, 2012 Decision, but rather a later IEP that, in draft form, was shared with Parents. Quincy's responsibility is to "locate or create" an appropriate educational program for Student consistent with my November 21, 2012 Decision. Any concerns that Parents have regarding lack of an appropriate IEP can be considered as part of the evidentiary hearing that will be needed to resolve the question of whether Quincy has complied with my November 21, 2012 Decision.

However, in order to provide guidance to the parties, I address a principal concern of Parents, which is the role of a teacher of the deaf in Student's education, particularly if she is placed in a language-based program that may not understand how to accommodate a deaf student. In their opposition to Quincy's Motion to Dismiss, Parents make clear that, from their perspective, there must be direct instruction from a teacher of the deaf. Parents seek a "co-taught model with a teacher of the deaf and a special ed[ucation] teacher for her academic courses." Parents' opposition, page 6. However, as explained below, no such requirement appears either explicitly or implicitly in the November 21, 2012 Decision, which is the controlling document for purposes of Quincy's obligation to locate or create an appropriate educational placement for Student.

The November 21, 2012 Decision determined generally that "Student's educational program must effectively accommodate her hearing loss." More specifically, the Decision listed a number of accommodations that should be provided for Student and emphasized the need for the "deaf accommodations to be fully integrated into all of the teaching that Student receives" and that "deaf accommodations must be part of Student's entire curriculum so that all of her teachers understand her unique needs related to her hearing loss and continually teach in a manner that allows Student to access the instruction." The Decision further noted that "[f]or this to occur, Dr. Clark recommended that one or more persons with appropriate expertise (for example, a teacher of the deaf) be integrated into Student's education team, and that there be sufficient consultation and other resources provided to the school." The Decision thus emphasized the critical importance of accommodations being provided and being integrated into the entire curriculum and that consultation and other resources be provided to make Student's education accessible to her, but the Decision did not dictate any particular model in order to reach these results. See November 21, 2012 Decision, pages 13-14. For these reasons, I find Parents' arguments to be misplaced.

In the event that I were to determine that Quincy has not, in a timely manner, complied with the November 21, 2012 Decision, compensatory services or other relief could be ordered. Parents should be prepared to demonstrate during the evidentiary hearing what relief would be appropriate under these circumstances. To date, the only relief requested by Parents is the addition of a special education teacher or other supports needed to make Clarke School an appropriate placement, but, for reasons explained below in the next section of this ruling, that relief is barred on the basis of res judicata.

Therefore, I rule that Parents' Motion for Summary Judgment is denied and Quincy's Motion for Summary Judgment is allowed with respect to Parents' compensatory claims, except that Quincy's Motion is denied for any relief that may be ordered in the event that I determine that Quincy has not complied with my November 21, 2012 Decision.

<u>Parents' claim for provision of a special education teacher and other supports for Student at Clarke School</u>

As noted above, Parents seek summary judgment on their claim that during the time that Student has been attending Clarke School, Quincy has failed to provide Student with a special education teacher who is knowledgeable in deaf education, and that Parents are therefore entitled to compensatory services. This claim is without merit with respect to the 2011-2012 school year because Student attended Clarke pursuant to a settlement agreement that resolved all of the parties' claims for that year. But, I will consider this compensatory claim with respect to the 2012-2013 school year.

Through their hearing request and Motion for Summary Judgment, Parents take the position that Quincy has been unable to locate or create an appropriate placement for Student and therefore Parents seek an order requiring Quincy to provide Student (at Clarke School) with a special education teacher who is knowledgeable in deaf education and requiring Quincy to take whatever additional steps are necessary to make Clarke School an appropriate educational program for Student. Through this relief, Parents' seek to make Clarke School appropriate not only while Quincy is seeking to locate or create an appropriate placement for Student, but also to make Clarke School appropriate for Student through the 2014-2015 school year.

I now address the question of whether Parents' claim for (and requested relief of) adding a special education teacher and other support for Student at Clarke are precluded by res judicata.

Through the November 21, 2012 Decision, I first considered the appropriateness of Quincy's proposed IEP that would place Student at the READS Collaborative. I determined that it was not appropriate and could not be made appropriate.

I then considered the appropriateness of Parents' proposed placement at Clarke School. I determined that Clarke was not appropriate and could not be made appropriate. This finding was based upon extensive evidence, relying principally upon the testimony of Parents' expert (Dr. Clark). Specifically, I found, based upon Dr. Clark's testimony, that

> Student's language-based learning deficits cannot be remediated simply by adding to her curriculum one or more classes taught by a special education teacher. Instruction can only be effective through integration of specialized teaching methods throughout Student's academic curriculum. Learning strategies needed to remediate her learning

> deficits (for example, as taught as part of a structured reading program) must also be used and reinforced consistently throughout her academic curriculum, and a common instructional language that can be accessed by Student must also be used throughout the curriculum. The result is a language-based educational program that is both consistent and integrated throughout all academic classes. Dr. Clark testified persuasively that nothing less will likely be effective in remediating Student's learning deficits so that she can make meaningful progress, particularly in reading and math—two areas of pronounced weakness. [November 21, 2012 Decision, page 14.]

Parents did not come close to demonstrating that Clarke School would or could, even with extensive modifications to its educational program, meet their own expert's minimum standards, as quoted above. The November 21, 2012 Decision, at page 18, found that the two Clarke School witnesses (Ms. West, a Clarke School teacher of the deaf, and Mr. Logue, the Clarke School Director of K through 8th Grade Program) "made clear that the premise of Clarke's educational program is instruction across the curriculum by teachers of the deaf, and that this would necessarily continue with Student regardless of her special education needs." The Decision concluded, at page 18, that "Clarke School has no interest in implementing across the curriculum the language-based instruction from special education teachers that Dr. Clark believes to be essential for Student to make meaningful progress." The Decision further noted, in footnote 30 (page18), that even if Clarke School wanted to train its current teachers of the deaf to implement language-based instruction for Student across the curriculum, this would likely be a "long and challenging process" that "would likely take between one and two years" to complete.

The November 21, 2012 Decision concluded, at page 18, that "[n]ot one witness and not one document indicated that Clarke would or could provide language-based instruction that would be consistent and integrated throughout Student's academic curriculum." Thus, I found that Clarke School did not and could not meet the minimum requirements set forth by Parents' own expert. I therefore concluded that Clarke was not appropriate, and Quincy had no responsibility to try to make it appropriate. Instead, I determined that Quincy's responsibility was to locate or create another educational program that would be appropriate for Student.

In the instant dispute, Parents are not asserting through their hearing request and Motion for Summary Judgment that circumstances have changed at Clarke School and that its appropriateness should be reconsidered in light of Clarke's now-different ability and willingness to provide consistent and integrated language-based instruction throughout Student's curriculum; and there are no allegations that Student's special education needs have substantially changed.

Instead, Parents simply take the position (based upon an affidavit of a Clarke employee) that Clarke actually is a language-based program because (1) all classrooms have low student-teacher ratios, (2) the curriculum is modified to meet the needs of the child, (3) "language is the core of our program", and (4) every student receives social pragmatics training. Parents simply ignore the fact that even were I to fully credit this affidavit, it bears little if any

relevance to the requirements, explained in the November 21, 2012 Decision and discussed above, as to what minimally must be included in a language-based program for it to be appropriate for Student. Again essentially ignoring the findings of the November 21, 2012 Decision as discussed above, Parents take the position that Clarke can be made appropriate for Student by adding a special education teacher and perhaps other resources. Parents then take the position that notwithstanding the November 21, 2012 Decision's finding that Clarke was not (and could not be made) appropriate for Student, Quincy has the responsibility to add these resources to make Clarke's educational program appropriate for Student.

I find that Parents seek that I do what is precluded under res judicata principles—that is, to make findings regarding identical issues addressed in the November 21, 2012 Decision. Specifically, I conclude that res judicata precludes Parents from relitigating the finding in the November 21, 2012 Decision as to what is minimally necessary to provide language-based instruction for Student and that Clarke School is not appropriate for Student and cannot be made appropriate with respect to such instruction. Nor, because of res judicata, may Parents relitigate the finding in the November 21, 2012 Decision that Quincy should locate or create another placement for Student, rather than seek to make the Clarke placement appropriate.

I therefore rule that Parents' Motion for Summary Judgment is denied and Quincy's Motion to Dismiss is allowed with respect to Parents' compensatory claim for (and requested relief of) adding a teacher and other resources to Student's program at Clarke School.

ORDER

Parents' Motion for Summary Judgment is <u>denied</u>.

Quincy Public Schools' Motion to Dismiss and Motion for Summary Decision are <u>allowed in part</u> and <u>denied in part</u> as follows:

- With respect to Parents' reimbursement claim, Quincy's Motion to Dismiss is allowed with respect to expenses that have not actually been incurred by the date of the evidentiary hearing, and is otherwise denied.

- With respect to Parents' compliance claim, Quincy's Motion to Dismiss is denied.

- With respect to Parents' compensatory claim, Quincy's Motion for Summary Judgment is allowed except with respect to relief that may be due as a result of any compliance violations.

- With respect to Parents' claim regarding Quincy's obligation to add a special education teacher and other supports at Clarke School, Quincy's Motion to Dismiss is allowed.

This matter remains scheduled for an evidentiary hearing on August 5 and 6, 2013 (with August 19, 2013 also reserved for a Quincy witness who is not available on the earlier hearing dates) to address those issues that have not been resolved through the parties' motions. These issues (which are the only issues that will be addressed at hearing) are the following:

1. Has Quincy complied with the November 21, 2012 Decision and if not, what relief, if any, should be awarded?

2. What residential living expenses, travel expenses and tutoring expenses have been incurred by Parents from the beginning of the 2012-2013 school year to the present, and to what extent should these expenses be reimbursed by Quincy?

By July 22, 2013, Parents shall file an affidavit (together with any documents supporting their reimbursement claims) that itemizes each specific expense which has been incurred by Parents from the beginning of the 2012-2013 school year and for which they seek reimbursement. At a minimum, the affidavit shall detail (1) the nature and amount of each specific expense, (2) the date that it was incurred, and (3) any additional information necessary to explain why each specific expense was necessary for purposes of supporting Student at Clarke School and was reasonable with respect to the nature and amount of the expense. Since Parents are also seeking reimbursement for "tutoring costs", the affidavit shall also fully describe the details and costs of any tutoring. Failure to timely file an affidavit that provides this information may result in reduction or denial of some or all of Parents' reimbursement claims.

By the Hearing Officer,

William Crane
Dated: July 11, 2013