

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: C.A.

Date of Birth: [redacted]

Dates of Hearing:
September 30, 2009
November 23, 2009
March 17, 2010
May 27, 2010

CLOSED HEARING

ODR No. **10136-0809-AS**

Parties to the Hearing:

Parent[s]

Ms. Kathryn Ashbridge
Assistant Superintendent for Student
Services
Upper Merion Area School District
435 Crossfield Road
King of Prussia, PA 19406

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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June 28, 2010

July 12, 2010

Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a teen-aged student who resides in the Upper Merion Area School District (hereafter District). Student's parents filed a complaint on June 8, 2009, claiming that the District denied Student a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA)² and Section 504 of the Rehabilitation Act of 1973.³ The case was assigned to Hearing Officer Deborah G. DeLauro who conducted hearing sessions on September 30, 2009 and November 23, 2009 limited to the issue of whether the Student was eligible under the IDEA and/or Section 504. (Notes of Testimony (N.T.) 9, 77)

The case was reassigned to this hearing officer on December 18, 2009. After counsel for both parties submitted written closing statements on the issue of eligibility, this hearing officer ruled on January 12, 2010⁴ that Student was eligible under Section 504, but not under the IDEA. The matter proceeded to a third hearing session on March 17, 2010 at which time the parties first presented evidence related to whether the statute of limitations would operate to bar the parents' claims which pre-dated the due process complaint by more than two years. This hearing officer ruled on the record that the statute of limitations was applicable and that neither of the enumerated exceptions were established. (N.T. 297-99)⁵ In accordance with that ruling, the parents presented evidence on their claims challenging the provision of FAPE to Student for the very end of the 2006-07 school year, the 2007-08 school year, and the 2009-10 school year.⁶ The District defended those claims, asserting that it did not deny FAPE to Student throughout that time period. The record closed on June 28, 2010.⁷ For the following reasons, I find in favor of the District on the claims for an independent educational evaluation and for compensatory education, and in favor of the parents on the tuition reimbursement claim.

¹ The name and gender of the Student are not used in this decision in order to preserve the Student's privacy.

² 20 U.S.C. §§ 1400 *et seq.*

³ 29 U.S.C. § 794.

⁴ That ruling was clarified on February 11, 2010 to reflect that the parties would be afforded the opportunity to present evidence on whether some of the parents' claims were barred by the applicable statute of limitations.

⁵ In addition to the explanation provided on the record, the statute of limitations ruling will be further discussed in this opinion.

⁶ There is no claim regarding the 2008-09 school year. (N.T. 300-01, 396)

⁷ Counsel for the parties jointly requested and were granted an extension of time to submit the closing statements. After the record closed, counsel confirmed with the undersigned that the following exhibits were admitted during the course of the proceedings: Parents' Exhibit Nos. 1, 3, 4, 5, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 22, 25, 29, 30, 33, 35, 36, 38, 39, 40, 41, 42, 43; and School District Exhibit Nos. 6, 11, 13, 20, 23, 24, 28, 36, 37, 42, 43, 44, 45, 47, 48, 49, 51, 52, 56, 58, 59, 60, 61, 62.

ISSUES

1. Whether the parents are entitled to reimbursement for an independent educational evaluation;
2. Whether the District denied FAPE to Student from the time period from June 7, 2007 to the end of the 2007-08 school year and, if so, whether Student is entitled to compensatory education; and
3. Whether the District denied FAPE to Student for the 2009-10 school year and, if so, whether the parents are entitled to reimbursement for the private school tuition paid for that school year.

FINDINGS OF FACT

1. Student has attended school in the District since at least the 2001-02 school year when Student was in second grade. Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (N.T. 83, 203; School District Exhibit (S) 36, S 37, S 42)
2. Student received some gifted programming in second grade. Before Student started third grade, the District evaluated Student and issued a Gifted Written Report (GWR) in July 2002. Student was administered the Wechsler Intelligence Scale for Children—Third Edition (WISC-III) and achieved a Verbal IQ of 145, a Performance IQ of 133, and a Full Scale IQ of 145, resulting in the descriptive classification of Student's IQ as Very Superior. The GWR also reported achievement testing results as well as input from Student's parents and regular education teacher. Student was recommended for a gifted program. (N.T. 83-85, 206; Parent Exhibit (P) 33; S 6)
3. In third grade (2002-03), Student's teacher reported that Student's behavior was inconsistent and that Student needed encouragement to put forth best effort into work, especially in the areas of language arts and math. Similarly, in fourth grade (2003-04), Student's teachers noted that Student was not always focused on work and made careless errors in math. Student sometimes missed or lost assignments during those school years. (N.T. 86-87, 139, 208-10; S 42 pp. 3-5)
4. By fifth grade (2004-05), when Student began attending the District middle school, Student was demonstrating a lack of focus on work and continued to misplace assignments or fail to complete them. Student had a Gifted Individualized Education Program (GIEP) at the beginning of the school year which addressed educational needs in math, reading, and writing, as well as leadership abilities. A new GIEP developed at the end of October 2004 noted that Student had a need to develop organizational skills as well as to improve writing and handwriting skills. Goals and short term learning outcomes addressed

- development of higher order thinking skills, use of problem solving strategies, improvement of handwriting skills, and needs in the areas of written expression and organization (being prepared for class with materials and assignments, and keeping notebooks organized). (N.T. 85-87, 211; P 25 p. 2; S 11, S 13, S 42 p. 6)
5. Student achieved As and Bs as final grades in all classes in fifth grade, although teachers noted needs for Student to be prepared for class consistently and to put forth more effort. In April 2005, Student was disciplined on two occasions: once for inappropriate physical contact and verbal disagreement, and once for vandalizing the school bus (writing on the seat). Student received lunch detentions for those incidents. Student also experienced some difficulty with peers beginning in that fifth grade school year, with other students taking Student's lunch and pushing Student into the lockers. (N.T. 85-86, 97-98, 214-17, 223; P 25 p. 2; P 29, P 30; S 42 p. 6, S 45)
 6. Sometime in 2005 the parents had Student privately evaluated. During Student's sixth grade year (2005-06), Student continued to experience difficulty with organization at school, and one teacher commented on the report card that Student needed to work more carefully. Student did have an accelerated math class that year. (N.T. 213, 222, 380; P 25; S 42 p. 7)
 7. In October 2006, during Student's 7th grade year, Student's GIEP team met and developed a new GIEP for Student. Student's Present Levels of Educational Performance indicated that Student had achieved advanced scores on the 6th grade Pennsylvania State System of Assessment (PSSA) tests in reading and mathematics, and Student's then-current grades and other test scores were also reported. Parental input included a desire for Student to learn how to better organize and approach work more proactively. Also noted in the GIEP were Student's difficulties getting focused and staying on task as well as being organized. Annual goals and short term learning outcomes addressed development of higher order thinking skills, use of problem solving strategies, math enrichment and acceleration, improvement of handwriting skills and written expression, and improvement of organizational skills (being prepared for class with materials and assignments, and keeping an organized notebook and folders). (S 20)
 8. Student achieved As and Bs as final grades for the 2006-07 school year, although one teacher commented that Student needed to improve organizational skills and another noted that Student needed to work more carefully. Student's scores on the seventh grade PSSA tests were again in the advanced range for both reading and math. (N.T. 35-36, 90, 93-95, 315-17; P 25 p. 2; S 42, p. 8, S 44)
 9. Student entered eighth grade at the start of the 2007-08 school year, and Student's GIEP team met in October to develop a new GIEP. As before, needs were noted to improve organizational skills and stay focused. Goals and short term learning outcomes addressed development of higher level critical thinking skills through acceleration, enrichment, and differentiation with respect to literature, science,

- social studies, and mathematics; development of writing skills; demonstration of appropriate and effective organizational skills (being prepared for class with appropriate materials and assignments, and keeping notebooks, folders, and locker organized) and use of a task prioritization strategy; improvement in ability to remain on task and stay focused; and successful and cooperative participation in group work. (N.T. 100, 431-33; P 22; S 24)
10. Student's first and second progress reports for the 2007-08 school year reflected positive comments by Student's teachers with fluctuating grades in Algebra I (74 and 90, respectively) and science (88 and 75, respectively). By the third marking period (which ended April 4, 2008), Student's teachers commented that the quality of Student's work was decreasing, that classwork and homework were inconsistent, and that Student needed to prepare consistently for class. Student's grades were adversely affected by these difficulties. (N.T. 99-101, 429-30, 436-38, 450-52; P 18, P 36; S 42 p. 12)
 11. Student's science teacher reported in January of the 2007-08 school year that Student was rushing through assignments and failing to complete them, that Student often packed up books before class was over, and that Student's attention would wander. She suggested that Student needed either a parent or teacher to review Student's work with Student before it was turned in to ensure it was complete. (N.T. 103-04; P 19, P 20)
 12. Student demonstrated significant difficulty with organization in the Algebra I class during that school year. Student sometimes did only part of an assignment or failed to complete all of the steps to a problem. Additionally, Student sometimes took poor notes in class or was unable to locate those notes. Student's Algebra I teacher was generally able to redirect Student as necessary when Student was not on task. (N.T. 421-23, 430-32, 440, 452-53; P 10)
 13. Student's teachers monitored Student and Student's locker between classes during eighth grade, sometimes prompting Student to organize it or clean it out. (N.T. 422, 424-28, 456-57)
 14. In late winter of the 2007-08 school year, Student's parents took Student for a pediatric evaluation because of their concerns over Student's low self-esteem and a decline in Student's mood. (N.T. 318-20)
 15. In late April 2008, it was reported to the District that Student had had a [redacted] on the school bus and had been showing it to other Students. The District asked Student about the incident the next day, and Student admitted to having the [redacted] at school and on the bus the day before. Student was suspended and did not return to school for the rest of the 2007-08 school year, receiving home tutoring instead by agreement of the parents and District. Although there was some difficulty with scheduling tutoring sessions, all of the specified hours were provided. (N.T. 112, 320-24, 381-82, 398-400, 464-65; P 17)

16. Students in the District are taught throughout middle school to report incidents of bullying. The District was unaware of any circumstances involving Student during the relevant school years which might have been construed as bullying under its policy. (N.T. 379-80, 397-400, 415-18, 427-28, 514; S 62)
17. Student scored in the advanced range on both reading and math the PSSA tests given in eighth grade, and in the proficient range in writing. Student's final grades for that school year were all Bs in academic subjects and Outstanding in all other classes. (P 13, P 14; S 42 p. 9, S 44, S 52)
18. Student was privately evaluated in the summer of 2008. The neuropsychologist/certified school psychologist who conducted the evaluation administered a variety of assessments including the WISC-Fourth Edition (WISC-IV), Children's Memory Scale (CMF), the Beery Buktenika Test of Visual Motor Integration (VMI), the Delis Kaplan Executive Function System (DKEFS), and the Wechsler Individual Achievement Test-Second Edition (WIAT-II). Student's parents and the former Algebra I teacher in the District completed the Behavior Assessment System for Children – Second Edition (BASC-2) and the Behavior Rating Inventory of Executive Function (BRIEF); Student also completed the self-report form of the BASC-2. (N.T. 22-23; P 11)
19. Student achieved a full scale IQ of 119 on the WISC-IV, demonstrating a relatively weak performance on the Processing Speed Index and revealing Student's difficulty with attention, auditory memory, and auditory processing. This psychologist did not calculate Student's IQ using the Global Ability Index (GAI). (N.T. 23-24; P 11)
20. On the WIAT-II, Student scored in the high average range in overall reading, in the superior range in overall math, and in the high average range in overall written language. (P 11)
21. On the BRIEF, Student's parents indicated clinically significant elevations in the Emotional Control and Plan/Organize scales, while Student's former Algebra teacher indicated clinically significant elevations on the Inhibit and Monitor scales. Notably, through additional input, the former Algebra teacher stated concerns with Student's attention/focus, inconsistency, and social skills, and described organization as a major problem for Student. (N.T. 25-27, 440; P 10, P 11)
22. On the BASC-2, Student's self-report was clinically significant on the Atypicality subscale, and at-risk on the Anxiety, Somatization, Locus of Control, Social Stress, Relations with Parents, Attitude to Teachers, and Attention Problems subscales. Student also reported symptoms consistent with depression and anxiety. Student's parents reported clinically significant elevations on the Depression, Anxiety, Withdrawal, and Activities of Daily Living subscales, while Student's former Algebra teacher did not indicate clinically significant or at-risk elevations on any of the subscales. (N.T. 23-25, 28-29; P 11; S 49)

23. The independent school psychologist determined that Student was exhibiting symptoms of ADHD but did not make that diagnosis because those same symptoms could also indicate depression. She was most concerned with Student's difficulties with attention and executive functioning. (N.T. 24-25; P 11)
24. Student attended a small private school for the 2008-09 school year at District expense and achieved consistent grades of As and Bs in all subjects. The District believed that the private school was appropriate for Student. (N.T. 488-92; P 1, P 3, P 4, P 15; S 43)
25. The private school has approximately 105 students in secondary grades. Students must apply for admission and a committee determines whether to accept a student at the school. Many of the students are considered gifted but also have executive functioning weaknesses, or are anxious, or have been diagnosed with ADHD. (N.T. 242-47, 251-52)
26. There are typically 11-12 students in a classroom at the private school. Each student has an Individual Learning Profile which sets forth strengths, weaknesses, accommodations, and strategies. Teachers meet with a learning specialist on a weekly basis and each student's Individual Learning Profile is updated every three or four weeks. (N.T. 255-58, 270-71, 276-79; P 39, P 40)
27. In addition to academic and special classes, Student attends a voluntary learning support class at the private school which meets four times per week for 45 minutes. In that class, the learning specialist and each student review homework assignments and ongoing projects in order to prioritize assignments and ensure that a student is prepared to complete them, and also organize book bags. This is also a class where students can receive individual assistance with assignments. (N.T. 265-67, 276-77)
28. The private school psychologist who evaluated Student in the summer of 2008 issued an addendum to her initial evaluation report in April 2009. This addendum followed review of all of Student's educational records as well as letters from Student's pediatrician and treating psychologist. Additionally, Student and Student's parents again completed the BASC-2 forms which reflected improvement in Student's overall mood and behavior; Student also completed the Brown Attention-Deficit Disorder scales. In the addendum, the evaluator diagnosed Student with ADHD and determined that Student met the criteria for eligibility for a Section 504 plan or an IEP. (N.T. 29-32, 33-36; P 5)
29. Also in April 2009 Student's treating psychologist recommended that Student remain in the private school where Student had flourished "academically, socially, creatively, and behaviorally." (S 37 p. 1) Student felt comfortable at the private school and Student's parents believed Student was doing well there overall. (N.T. 335-36)

30. By letter dated August 12, 2009, the parents advised the District that Student would attend the private school for the 2009-10 school year and asked the District to support that placement. Student attended the private school for the 2009-10 school year and continued to maintain A and B grades. (N.T. 258-61; P 41, P 42; S 58, S 59)
31. Student's parents formally withdrew Student from the District on September 15, 2009. (N.T. 508-09; S 61)
32. The District evaluated Student in 2009 to determine whether Student was eligible for special education under the IDEA. It issued an evaluation report (ER) dated September 28, 2009, which included information from Student's October 2008 GIEP, information from Student's teachers at the private school, progress reports from eighth grade at the District, and input from Student's former Algebra I teacher at the District, as well as a classroom observation. (N.T. 116-18, 120-21; S 47, S 48, S 60)
33. In the Present Levels of Academic Achievement section of the ER, the importance of Student's eighth grade experience in the District was noted. This section described Student's difficulties with organizing and staying focused and included the Algebra I teacher's report that Student's failure to complete or hand in assignments affected Student's grades. (S 60)
34. The District psychologist administered the WISC-IV, on which Student achieved a full scale IQ of 117 within the high average range. The District also calculated Student's IQ using the GAI, obtaining a score of 126 which it determined to be Student's true IQ given Student's difficulties in working memory and processing speed. (N.T. 121-23; S 60)
35. Student was also assessed using the WIAT-II, scoring in the superior range on the Reading Composite, in the high average range on the Math Composite, and in the high average range on the Written Language Composite. (S 60)
36. Behavioral Information included in the 2009 ER included the BASC-2 forms from one of Student's teachers at the private school, Student's parents, and a self-report. The parents' ratings reflected at-risk scores in the areas of Anxiety, Depression, Internalizing Problems, Attention, Withdrawal, Adaptability, Activities of Daily Living, Emotional Self-control, and Executive Functioning. Student's teacher provided ratings reflecting at-risk scores in the areas of Hyperactivity, Aggression, and Externalizing Behavior, and one clinically significant score in the area of Executive Functioning. Student's responses on the self-report reflected no scores in the at-risk or clinically significant range. (S 60)
37. Student, Student's parents, and a teacher at the private school also completed the BRIEF questionnaires. The parents' ratings reflected elevated scales in the at-risk range on the Inhibit, Monitor, Behavioral Regulation, Metacognition, and Global Executive Composite scales, with a clinically significant score on the Working

Memory scale. Student's teacher's responses indicted at-risk scores on the Inhibit, Emotional Control, Working Memory, Plan/Organize, and Metacognition Index scales. Student's self ratings did not translate into any at-risk or clinically significant scores. (S 60)

38. The District's 2009 ER concluded that Student had a disability (ADHD) but was not in need of specially designed instruction. The District did not consider whether Student might be in need of any type of plan under Section 504 or Pennsylvania's Chapter 15. (N.T. 123-26, 389-90, 391-92, 395; S 60)
39. On October 28, 2009, the District issued a Notice of Recommended Educational Placement (NOREP) concluded that Student was no longer eligible for gifted programming. (N.T. 330-31; P 43)
40. The District's September 2009 ER was appropriate insofar as it assessed Student for eligibility for special education under the IDEA and determined Student was not eligible. (Interim Order of this Hearing Officer dated January 12, 2010)
41. Student is eligible under Section 504 and Chapter 15. (Interim Order of this Hearing Officer dated January 12, 2010)

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Persuasion

The U.S. Supreme court has made clear that in an administrative hearing, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden in this case rests with the parents who requested the hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.⁸

Section 504 Eligibility

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life

⁸ Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D.Pa. 2009). The testimony in this proceeding was, for the most part, wholly consistent rather than contradictory, and this hearing officer found each of the witnesses to be generally credible, except as specifically noted in this decision.

activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood Board of Education v. N.E., 172 F.3d 238, 253 (3d Cir. 1999). “In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability.” *Id.* In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Id.* (citation and quotation marks omitted); *see also* 34 C.F.R. § 104.33(a). That obligation includes the duty of child find under Section 504. 34 C.F.R. § 104.32; *Ridgewood*, 172 F.3d at 253. Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). “There are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

Similar to Section 504, Pennsylvania’s Chapter 15 regulations require a substantial limitation with respect to education, defining a “protected handicapped student” as:

A student who meets the following conditions:

- (i) Is of an age at which public education is offered in that school district.
- (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program.
- (iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

22 Pa. Code § 15.2. Student is eligible under Section 504 and Chapter 15. (FF 41)

Statute of Limitations

The first portion of the March 17, 2010 hearing session was devoted to evidence relating to whether the statute of limitations should operate to bar certain of the parents' claims. "[T]he IDEA's two-year statute of limitations applies to claims made for education under § 504 of the Rehabilitation Act." *P.P. ex rel. Michael P. v. West Chester Area School Dist.*, 585 F.3d 727, 737 (3d Cir. 2009).

The IDEA expressly provides that parties must be afforded the opportunity to file a due process complaint alleging "a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the complaint." 20 U.S.C. §1415(b)(6)(B); *see also* 34 C.F.R. § 300.507(a)(2). In other words, a party "must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(c); *see also* 34 C.F.R. § 300.511(e). Hearing officers must "make determinations, on a case by case basis, of factors affecting whether the parent 'knew or should have known' about the action that is the basis of the complaint." *J.L. v. Ambridge Area School District*, 622 F.Supp.2d 257, 266 (W.D. Pa. 2008) (quoting 71 F.R. § 46540-01 at 46706 (August 14, 2006)). This is a "highly factual inquiry." *Id.*

The IDEA also provides for two specific exceptions to the two-year limitation period, permitting claims beyond that timeframe to a parent who was prevented from requesting the hearing as a result of:

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local education agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D); *see also* 34 C.F.R. § 300.511(f). The burden is on the parent to establish that one of the exceptions applies, which similarly requires a "highly factual inquiry to determine if application of either exception is warranted." *J.L. v. Ambridge Area School District*, 2009 WL 1119608 (W.D. Pa. April 27, 2009) at *4.

During this portion of the March 17, 2010 hearing, the parents presented evidence that they and the District had discussed Student's lack of focus and need to improve organization skills, as well as Student's general academic progress, from as far back as the 2001-02 school year. (N.T. 200-27) There was also evidence that Student was subject to bullying from other students during the 2004-05 school year and that this incident was addressed by the District at the time. (N.T. 216-19, 222-23) The District

presented brief evidence with respect to a disciplinary incident during the 2004-05 school year (N.T. 231-37)

Based on the evidentiary record presented on the statute of limitations issue, this hearing officer concluded that the parents had not established that they should be permitted to raise claims beyond the two-year statutory limitation period. (N.T. 297-99) By way of further explanation, the record revealed no evidence that the parents were unaware of the District's actions or inactions throughout the relevant time periods. I also concluded that the evidence did not support a finding that the parents had been prevented from filing a due process complaint based upon any specific misrepresentation by the District that it had resolved the problem which formed the basis of the complaint, or that the District had withheld any information it was required to provide to them. With respect to the misrepresentation exception, the statute requires a "specific misrepresentation." A contention, in hindsight, that a school district failed to adequately address a student's needs in the past is not sufficient to establish a specific misrepresentation for purposes of the statutory limitations period. *School Dist. of Philadelphia v. Deborah A.* 2009 WL 778321, *4 (E.D.Pa. 2009).

Similarly, with respect to the withholding of information exception, there is no evidence that the District had an obligation to inform the parents of any rights under the IDEA or Section 504 or to provide them with a copy of a procedural safeguards notice. An assertion that a school district failed to inform parents that they could request an educational evaluation once behavioral difficulties began to affect the student in school has, at first blush, some facial appeal in the context of applying a statute of limitations exception to a child find claim. *Cf. D.K. v. Abington School Dist.*, 2010 WL 1223596 (E.D. Pa. 2010). Nevertheless, federal courts in this jurisdiction have interpreted the IDEA statutory limitations period to apply to child find claims. *See, e.g., Evan H. V. Unionville-Chadds Ford School District*, 2008 WL 4791634, *8 (E.D. Pa. November 4, 2008); *Daniel S. v. Council Rock School District*, 2007 WL 3120014, *2 (E.D. Pa. October 25, 2007). It is also important to recall that the statutory exceptions to the limitations period are meant to be exceptions, not extensions, and cannot be permitted to "swallow the rule." *Deborah A.* at *4. Here, there is insufficient evidence to find that the District, having addressed Student's known difficulties with being organized and remaining focused in its various GIEPs (Finding of Fact (FF) 4, 7, 9), was obligated to inform the parents of the right to request an educational evaluation. It is also not insignificant that one of Student's parents testified that they did have Student privately evaluated in 2005 (FF 6), so they clearly possessed the knowledge to question whether Student's educational needs were being addressed by that point in time.⁹ For all of these reasons, the parents were limited to presenting evidence related to the two-year period immediately preceding the filing of the due process complaint. As that complaint was filed on June 7, 2009, Student's claims encompassed the very end of the 2006-07 school year (from June 7, 2007 to the last day of school) through the proposed program for the 2009-10 school year.

⁹ The record does not establish whether the District was ever provided with the results of that private evaluation.

Independent Educational Evaluation

The parents' due process complaint set forth a claim for reimbursement for an IEE. Although their written closing did not specifically address this issue, to the extent the claim remains for my determination, I conclude this relief is not warranted.

The regulations implementing the IDEA make specific provision for obtaining an independent educational evaluations at public expense. 34 C.F.R. § 300.502. However, Section 504, under which Student has now been determined to be eligible, contains no such provision. I do not find that distinction to be fatal to the claim, contrary to the District's assertion, however. In this case, the parents' due process complaint sought a determination that Student was eligible under the IDEA as well as Section 504, and the IEE request was, thus, premised upon both statutes.

Analyzing this claim under the IDEA, then, it is significant that the statute permits parents to obtain an IEE at public expense under certain circumstances. 34 C.F.R. § 300.502. One critical consideration for reimbursement for an IEE is that the parents must disagree with an evaluation of the District. *See, e.g., P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009). Here, the IEE was not pursued out of disagreement with any evaluation by the District, nor was there a request for an evaluation that the District refused. Moreover, where a school district's evaluation is determined to be appropriate, reimbursement for an IEE is not warranted. This hearing officer previously determined that the District's evaluation, insofar as it comprehensively assessed Student's need for special education under the IDEA, was appropriate. (FF 40) To the extent that the District's 2009 evaluation failed to assess Student under Section 504 and Chapter 15 (FF 38), it is important to recognize that the IEE in this case was conducted over the summer and during a time period when Student was not attending school in the District. Further, as discussed more fully below, the District did not have reason to suspect that Student was in need of formal evaluation until the results of the third marking period were available at the end of February 2008, and by the end of April, Student was, by agreement, finishing the school year with home tutoring before moving to a private school for the 2008-09 school year. (FF 15) Thus, there was no opportunity for the District to conduct an evaluation before the IEE, nor did the parents request the District to either evaluate Student or fund the IEE at the time it was obtained. For all of these reasons, I cannot conclude that the parents have established a right to reimbursement for the IEE.

FAPE for the 2006-07 and 2007-08 School Years

The obligation to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Commw. 2005). The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood* at 247. The obligation does not, however, require a District to "maximize the potential of a disabled student." *Id.* at 247.

This hearing officer previously concluded that Student meets the criteria for eligibility under Section 504 and Chapter 15. (FF 41) Specifically, Student has ADHD which has been manifested at school in significant difficulties with organization and noted lack of focus. (FF 7, 8, 9, 10, 11, 12, 13) Certainly by the third marking period of Student's eighth grade year, these difficulties had a clear adverse impact on Student's academic performance and affected Student's ability to learn. (FF 10) The question, then, is whether the District discriminated against Student by failing to address these needs.

Student did not have a specific plan for accommodations to address Student's needs under Section 504 or Chapter 15. Nevertheless, Student's GIEPs through the end of the 2007-08 school year included goals and objectives to address Student's lack of organizational skills and inability to focus and give attention when required. (FF 7, 9) Locker checks during the middle school years also appeared to be helpful to address Student's ability to be organized and prepared for class. (FF 13) Even with continued needs to improve organizational skills and to work more carefully, Student demonstrated appropriate academic progress and achieved A and B grades through the end of the 2006-07 school year, also scoring in the advanced range on both reading and math PSSA tests that spring. (FF 8) While accommodations beyond those provided in Student's GIEPs may have produced even better performance, the District is not required to maximize a disabled student's potential.

There were also suggestions in the testimony that Student was bullied, especially during middle school, and the District failed to address those circumstances. However, even assuming that Student did experience bullying from peers based on Student's disability, the evidence supports the conclusion that the few instances of such conduct of which the District was aware were addressed. (FF 16) There was also no evidence that any bullying was related to Student's disability.

In contrast to prior years, Student's success during the first half of the 2007-08 school year showed some decline from the prior school year. Specifically, during the first two marking periods, Student's Algebra I and science grades were no longer consistently in the A and B range and had fluctuated between marking periods. (FF 10) By the end of February 2008, the quality of Student's work was decreasing and Student's inconsistent work and class preparation were adversely affecting Student's performance. (FF 10) Given that Student was experiencing significant difficulties in most if not all of Student's classes, the provisions in Student's GIEPs to address Student's needs were of questionable benefit by that time. Student's very apparent declining success in school, coupled with Student's known difficulties with organization, attention, and assignment completion, should have prompted the District to consider an assessment whether Student was eligible for services under either the IDEA or Section 504, or both.

Nevertheless, even if the District had immediately begun the process of conducting an evaluation, it had a reasonable period of time within which to do so. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). Section 104.35 of the applicable regulations

require that an initial evaluation under Section 504 assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. 34 C.F.R. § 104.35. As noted, at the end of April 2008, Student was removed from school for a disciplinary incident¹⁰ and, by agreement, completed the 2007-08 school year through home tutoring.¹¹ Student was not expected to return to the District for the 2008-09 school year. Under these circumstances, the District cannot be faulted for failing to undertake and complete a comprehensive evaluation of Student's educational needs before the end of the 2007-08 school year. Accordingly, the record does not establish that the District discriminated against Student by failing to provide a program which reasonably accommodated Student's needs and provided meaningful educational benefit for this specific time period.

FAPE for the 2009-10 School Year

As Student did not attend school in the District for the 2008-09 school year, the determination of whether the District was prepared to provide FAPE to Student for the 2009-10 school year must be assessed with due consideration of the circumstances as they existed at the end of the 2007-08 school year.¹²

As set forth above, the District was on notice during the third marking period of the 2007-08 school year that Student was experiencing difficulties which had an adverse affect on Student's education. (FF 10) Although the District can be, and has been, excused for not evaluating Student before the end of the 2007-08 school year, as the time approached for Student to return to the District in the fall of 2009, the District should have been prepared to proceed with some type of educational evaluation to assess Student's needs. Additionally, Student had previously been eligible for gifted programming and the District would have had to convene a meeting of the GIEP team to discuss programming for the 2009-10 school year.

Notwithstanding Student's continued enrollment in the private school for 2009-10, the District had an opportunity to and did conduct a comprehensive special education evaluation of Student in September 2009, concluding that Student was not eligible under the IDEA. (FF 32, 38, 40) This hearing officer agreed with this determination. (FF 40) Nevertheless, despite having a diagnosis of Student's ADHD, with which the District agreed, as well as documentation from its own educational records from the spring of 2008 that Student's organizational and attentional needs were adversely impacting Student's grades, the District did not even consider whether Student needed a Section 504 or Chapter 15 plan to accommodate that disability. (FF 38) The District suggested that the decline in Student's grades might be attributed to the increased demands placed on

¹⁰ It bears mention that there was no claim that the disciplinary proceedings followed in this case, or the 2008-09 placement decision, were in any way inappropriate.

¹¹ There did not appear to be any argument that the home tutoring denied FAPE to Student, and the evidence would not support such a conclusion given the parties' agreement on how to handle Student's education for that limited time period. (FF 15)

¹² I note that this consideration is consistent with the District's own ER. (S 60, p. 9)

eighth grade students (N.T. 468-69), and while that may well have been a factor in this case, this possibility does not mean that the impact of Student's disability should not have been explored. Additionally, the District determined in October 2009 that Student no longer qualified for the gifted program. (FF 39) Thus, it follows that many of the supports previously provided for Student's organizational and attentional needs in the prior GIEPs, however effective or ineffective, would no longer be afforded to Student. Furthermore, even giving the District the benefit of the first month of the 2009-10 school year to conduct whatever assessments it deemed necessary, there was no testimony presented as to how the District would have considered addressing Student's individual needs outside of the regular curriculum. (N.T. 498-509) For example, the parents' expert described several accommodations, such as instruction in study skills, which could easily be provided to address a known need of Student. (P 11)

Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County Sch. Dist. v. Carter*, 510 U.S. 10 (1993); *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Id.* In considering this prong of the tuition reimbursement test, the hearing officer does observe that the concept of least restrictive environment (LRE) is not controlling in evaluating parents' unilateral placements. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 (3d Cir. 1999). A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.* Pennsylvania courts have not precluded the remedy of tuition reimbursement premised on a violation of Section 504. *Molly L. ex rel. B.L. v. Lower Merion School District*, 194 F.Supp.2d 422 (E.D. Pa. 2002).

The evidence supports the inescapable conclusion that the private placement was appropriate. The District referred Student to, and funded, Student's placement at that private school for 2008-09. (FF 24) This program includes an Individual Learning Profile for each student which is updated on a regular basis in team meetings to reflect current strengths, weaknesses, accommodations, and strategies. (FF 26) Student also has a learning support class four times each week which assists with organization and prioritization of assignments, two needs reflected in the progress reports when Student was in the District. (FF 27) Student is doing well both academically and emotionally in this private placement. (FF 29)

The last prong of the tuition reimbursement test requires consideration of the equities. On the one hand, the District has not been faulted for failing to conduct an evaluation before Student left the District in April 2008, although it has not suggested that it was prevented from proceeding to assess Student before Student would have re-entered its buildings in the fall of 2009.¹³ On the other hand, while the parents did

¹³ The results of the District's evaluation have been previously addressed and will not serve to weigh against the District in this analysis.

provide notice of their intention to enroll Student in the private school for the 2009-10 school year, it is also evident that the parents, for whatever well-intentioned and understandable reasons, decided before the District evaluated Student that Student should remain in the private school regardless of what, if any, educational program the District offered. (N.T. 263, 342-44; P 1; S 58) This is not a situation, however, where the District was prevented by the parents from developing an appropriate program for Student. On balance, I find that the conduct of the parties was not unreasonable or improper on either side, and that the equities weigh equally in favor of both parties. Accordingly, I will not reduce the tuition reimbursement award under this third step. *See Forest Grove School District v. T.A.*, ___ U.S. ___, 129 S.Ct. 2484 (2009) (explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice).

CONCLUSION

The District did not deny FAPE to Student for the very end of the 2006-07 school year or during the 2008-09 school year. The District did not offer, and was not prepared to offer, an educational program which met Student's educational needs for the 2009-10 school year and, therefore, the parents are entitled to reimbursement for the private school tuition paid for that school year.

ORDER

1. During the time period from June 8, 2007 through the end of the 2007-08 school year, the District did not fail to provide an appropriate educational program to Student.
2. The District is ordered to reimburse the parents for the tuition paid to the private school for the 2009-10 school year.

Any claims not addressed in this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: July 12, 2010

ODR 10136-0809-AS