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

DUE PROCESS HEARING

Name of Child: L.G.
ODR #1582/10-11-AS

Date of Birth:
[redacted]

Dates of Hearing:
May 10, 2011
July 5, 2011

CLOSED HEARING

Parties to the Hearing: Parent[s]	Representative: Emily Foote, Esquire McAndrews Law Offices 30 Cassatt Avenue Berwyn, PA 19312
West Chester Area School District 829 Paoli Pike West Chester, PA 19380	Sharon Montanye, Esquire Sweet, Stevens, Katz and Williams 331 Butler Avenue PO Box 5069 New Britain, PA 18901
Date Record Closed:	August 2, 2011
Date of Decision:	August 6, 2011
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

Student[1] is a late-teen aged individual who was formerly enrolled in the West Chester Area School District (District). When Student was attending school in the District, the District found Student ineligible for classification as a Protected Handicapped Student under Section 504 of the Rehabilitation Act. In the fall of 11th grade the Parents (Parents) unilaterally placed Student in a therapeutic residential school at some distance from the District. Approximately eight months later when Student was permitted home for a visit the District evaluated Student and found Student ineligible for special education under the IDEA. Student received a diploma from the residential placement approximately five weeks after the District's evaluation was conducted.

The Parents requested this hearing under the IDEA and under Section 504 alleging the District erred when it failed to identify Student as a Protected Handicapped Student and/or an eligible Student. They are requesting tuition reimbursement for the period from July 21, 2009 to August 15, 2009. [2]

For the reasons presented below I find for the Parents with modifications.

Issues

Did the School District deny Student a free, appropriate public education [FAPE] during the relevant period by failing to identify Student as eligible under Section 504 and/or the IDEA?

If the School District denied Student a free, appropriate public education during the relevant period, is Student entitled to tuition reimbursement for the Parents' unilateral placement?

---

[1] The decision is written without further reference to the Student's name or gender to provide privacy.

[2] The District moved to limit claims as per the IDEA's two-year statute of limitations. After hearing testimony as to whether or not either or both exceptions to the statute of limitations existed, the hearing officer ruled that they did not and established the scope of the hearing to be from March 11, 2009 forward to March 11, 2011. However given the fact pattern of this case the actual recovery period is limited to portions of July and August 2009. [NT 13-16, 109-118]

Stipulations and Findings of Fact[3]

1. Student was in 7th Grade in the District for the 2004-2005 school year. [STIPULATION]

2. Student was in 8th Grade in the District for the 2005-2006 school year. [STIPULATION]

3. The Parents withdrew Student from the District and enrolled Student in a private denominational high school for the 2006-2007 school year, which was Student's 9th Grade. [STIPULATION]

4. Student stayed at the private denominational high school for the first half of 10th Grade, the 2007-2008 school year. [STIPULATION]

5. In January or February 2008 Student returned to the District for the second half of 10th Grade in the 2007-2008 school year. [STIPULATION]

6. A few weeks following Student's re-enrollment, the denominational high school's counselor informed the District's guidance counselor that Student had "behavioral issues" in the denominational high school, but did not elaborate. [NT 175]

7. After Student re-enrolled into the District, the high school guidance counselor saw Student once a week because the District tracks new students to ensure they are "okay in classes". Although Student seemed to be handling classes, the guidance counselor testified that Student struggled with attendance, but it was "not [the guidance counselor's] job" to address attendance issues. [NT 177-180]

8. Student self reported to the District's guidance counselor that Student was seeing a psychiatrist. [NT 226-227]

9. On March 8, 2008, Student was admitted to an inpatient psychiatric hospital for suicidal ideation. Student's Parents emailed the District on March 9, 2008 to inform the District of Student's placement. The guidance counselor wrote a note indicating that Student was admitted for "possible bipolar, depression," and "suicidal thoughts" and emailed the teachers. [NT 175-177; P-14, P-15, P-16, P-17[4]]

10. Upon discharge from the inpatient unit, Student was admitted on March 21, 2008 to a partial hospitalization program where Student was diagnosed with Depression, Not Otherwise Specified (NOS), Obsessive Compulsive Disorder,

---

[3] The Stipulations and Findings of Fact are presented together in this section in order to maintain chronological order. Stipulations, found in the transcript at pages 21 through 32 will be marked as such; Findings of Fact will be referenced by Notes of Testimony [NT] and/or Exhibits from the School District [S] and the Parents [P].

[4] The Parents did not share the Discharge Summary [P-17] with the District.

Oppositional Defiant Disorder, and possible Attention Deficit Disorder. [NT 131; P-17, P- 21]

11. The partial hospital's assessment noted the use of marijuana; however, it did not determine that Student had a substance abuse diagnosis. The mother testified that Student said marijuana helped make repetitive thoughts about the devil and the number six stop. [NT 130-131; P-21]

12. On March 24, 2008 the Parents emailed the high school guidance counselor a letter from Student's psychiatrist, noting that in January 2008 Student had been diagnosed with Major Depression, Attention Deficit/Hyperactivity Disorder (ADHD), Obsessive Compulsive Disorder (OCD), and Anxiety Disorder. [P-19]

13. After returning from inpatient and partial psychiatric hospitalization in April 2008, Student sought guidance from either the District's intervention specialist or crisis counselor, or the guidance counselor once or twice a week. The guidance counselor and staff provided Student with "social, emotional, academic, [and] career guidance". [NT 146, 188, 225-226, 232-233, 235]

14. At this time Student was cutting classes in math and history, and being extremely talkative in biology. [NT 229-230; P-20]

15. Shortly after Student's April 4, 2008 discharge from the partial hospitalization program, the Parents requested in writing that the District begin the "process of getting [Student] a 504" to address "everything that [Student] was going through" because a friend had informed her that a psychiatric hospitalization was a "huge red flag" for the District to provide Student with accommodations. [NT 81, 88, 103, 135-137; P-22]

16. The District's Child Study team met to determine if Student was eligible for a Section 504 Plan. Based on a review of academic records, student meetings and staff inclusion [providing written feedback on observable data] the District determined that Student did not meet criteria as a Protected Handicapped Student. [NT 67-68, 188, 225-226, 229-230; P-20, P-22, P-27, P-30].

17. The Denial of Eligibility Letter for a Protected Handicapped Student dated April 16, 2008 informed the Parents that they had a number of rights, including inspecting and reviewing all Student's school records, meeting with school officials to discuss issues associated with evaluating or accommodating Student's needs, requesting assistance from the PA Department of Education, having an informal conference with a school district representative, requesting a due process hearing, and/or filing a lawsuit in Federal Court. A copy of the Procedural Safeguards Notice was attached to the Letter. The Letter instructed the Parents that if they wished to have an informal conference with the guidance counselor, or wished to request a due process hearing, they should indicate such at the bottom

of the Letter and return a copy to the guidance counselor. The Parents took none of these steps at the time. [NT 63-65; S-2, P-27]

18. At the start of the 2008-2009 school year, Student's mother was "on the phone a lot" with the high school guidance counselor and various District staff because Student was experiencing depression, withdrawing, cutting classes, being difficult to speak to, discussing dropping out of school and failing classes. By mid-October an "attendance hearing" was set up between the school and the family. [NT 139-140, 145, 180, 182-183, 204; S-3]

19. At the start of the 2008-2009 school year, Student frequently visited the crisis counselor, and on September 29, 2008 confided to the crisis counselor that [Student's] "moods and emotional (sic) are not right" and that Student was "tired all the time" . The guidance counselor recommended to the Parents that they find a new psychiatrist to help Student become more stabilized. [NT 39-40, 146, 196; P-39, P-40]

20. In October 2008 Student self-reported to the crisis counselor feelings of not wanting to do anything. The crisis counselor reported this to the guidance counselor who spoke to Student about various intervention services that the District offered such as tutoring and the Drop-In-Center which according to the guidance counselor Student had to initiate. The guidance counselor testified "you can lead a horse to water, but you cannot make them, you know, drink it". [NT 213-214; P-44]

21. Student's mother testified that at the start of the 2008-2009 school year she had to "physically drag" Student out of bed because Student did not want to go to school and Student often complained of headaches and other somatic symptoms. [NT 139-140, 146]

22. On October 20, 2008 the Parents made a written request that the District conduct a psychiatric evaluation and a psychoeducational evaluation of Student, and stated their understanding that the evaluation must be completed in 60 days. [NT 144-145; P-41]

23. On October 23, 2008 Student was admitted to a Partial Hospitalization Program where Student remained for two weeks "after erratic behavior at home. [Student] snuck out of the house in the middle of the night, stole [the] mother's car and crashed it. [Student] has refused to attend school, is smoking marijuana and possibly abusing other substances". [NT 129, 149; P-42, P-43, P-57]

24. On October 30, 2008 the Parents completed and signed a PTE Request Form which the District had issued upon receipt of the Parents' written request for an evaluation. The Parents wrote that Student "has been diagnosed with a Mood Disorder, OCD, ODD, depression and an anxiety disorder which has an effect on [Student's] ability to perform academically. Therefore we would like a complete

evaluation so we can get some direction on how to help our [child]." [NT 79; S-8/P-48]

25. At the end of October 2008 Student's psychologist and psychiatrist recommended that the Parents meet with an educational consultant to place Student. The Discharge Summary from the partial program noted "Both parents were also exploring placement in a boarding school, in order to give [Student] a new start in a more structured environment". [NT 98; P-57]

26. The Discharge Summary noted that Student required ongoing substance abuse treatment and was being referred to Rehab After School to address this. [P-57]

27. In November 2008[5] the Parents placed Student in a private therapeutic boarding school in New England. [STIPULATION]

28. On November 10, 2008 the school psychologist determined that it would not be appropriate to conduct a psychiatric evaluation since Student had just had one at the partial hospitalization program. On November 24, 2008 the District issued a Permission to Evaluate, noting "A recent psychiatric report indicated that [Student] is a student with a Mood Disorder. The Student Success Team would like to conduct an evaluation in order to explore if symptoms of the Mood Disorder adversely affects [sic] [Student's] educational performance. A copy of the Procedural Safeguards was enclosed. [NT 72, 74, 77; S-18, P-59, P-63]

29. The PTE and the Procedural Safeguards were sent by regular mail. The District sent another packet on November 29, 2008 by certified mail. The certified mail packet was not picked up by the Parents, and on December 15, 2008 it was returned to the District by the US Postal Service marked "unclaimed". [NT 77-78; S-18]

30. Despite being aware that an evaluation had to be completed in 60 days after their request, the Parents did not get back to the District because Student was already in the private residential school in New England, about nine hours away. [NT 99-100]

31. The Parents retained legal counsel in November or December 2008. [NT 97]

32. On December 16, 2008 and January 5, 2009 Student received a private psychological evaluation from a psychologist who has licensure and school certification in his home state and who is also a Nationally Certified School Psychologist. [P-67]

33. The private psychological evaluation found Student to have average cognitive ability [Composite Intelligence 100 at the 50th percentile on the Reynolds Intellectual Assessment Scales] and a Numerical Operations standard score of 75

[5] Sometime between November 17th and November 24th. [NT 113-114; S-4]

at the 5th percentile as assessed with the Wechsler Individual Achievement Test. [P-67]

34. The private psychological evaluation assessed Student's emotional functioning through the Milton Adolescent Clinical Inventory, a self-report instrument, and the Achenbach System which gathers parent and teacher reports as well as a self-report. Based on results of these instruments, the evaluator conferred Dysthymic Disorder among other diagnoses. [P-67]

35. The private school psychologist found that Student qualified as a student with serious emotional disturbance and a specific learning disability in math calculation. [P-67]

36. On April 1, 2009 the Parents filed a due process complaint asking *inter alia* for an independent educational evaluation at public expense. The Parents later withdrew the other issues. [STIPULATION]

37. The District declined to fund an IEE but on April 16, 2009 agreed to conduct its own evaluation. [STIPULATION]

38. The Parents brought Student to the District in July 2009 so that the District could conduct its testing. The therapeutic residential facility only allowed a one-week home visit. The evaluation was conducted on July 9, 2009. [NT 99]

39. In August 2009 Student received a high school diploma from the private therapeutic boarding school. [STIPULATION]

40. The private therapeutic boarding school kept Student enrolled there through December 2009 while Student also took two classes at a state college. [STIPULATION]

41. The Parents received the District's evaluation report in September 2009. The NOREP was issued on October 21, 2009 indicating that Student was not eligible for either special education or a 504 Service Agreement. [S-12, S-13]

42. The District psychologist had access to Student's diagnoses from the two previous psychiatric hospitalization programs as well as to the private psychological evaluation completed by the out-of-state school psychologist. [S-12]

43. The District psychologist who saw Student in July 2009 noted that "Given [Student's] previous diagnosis and social-emotional and behavioral challenges, one might quickly associate [Student] with the educational disability of Emotional Disturbance [ED]. It is clear that [Student] may have demonstrated one or more of the ED characteristics. However, it is unknown how long [Student] truly exhibited these characteristics, and if this duration of time would qualify as, the law states, "a long period of time"." [S-12]

44. The District psychologist also opined that "these characteristics do not appear to have adversely affected [Student's] educational performance to a marked degree... any social-emotional or behavioral issues did not seem to be manifesting themselves within the school environment". [S-12]

45. The NOREP notes with regard to special education, "Based on the comprehensive psychoeducational evaluation (dated 10-21-09), [Student] is not in need of specially designed instruction". With regard to a 504 Service Plan, the NOREP notes, "At this time, [Student] does not demonstrate a disability. [Student] demonstrates average cognitive abilities and academic skills. [Student] does not demonstrate any clinically significant social-emotional or behavioral areas of concern." [S-13]

46. On November 5, 2009 the Parents again requested an IEE at public expense but did not file a formal due process complaint. [STIPULATION]

47. The District agreed to fund an IEE on April 16, 2010 and the report of that evaluation was completed on September 15, 2010. [STIPULATION]

48. The IEE psychologist concluded that "[Student's] presentation during 10th and 11th grade (based on record review, consultation with treating therapists and clinical interview) suggest[ed] that [Student] was struggling with an emotional disturbance that impeded [Student's] ability to learn, access academic curriculum and attend school on a daily basis to a marked degree." The psychologist noted that Student's "struggles with OCD and emotional/behavioral functioning during high school resulted in a significant impairment in global functioning, including academic performance." [P-73]

49. After some attempts to come to a resolution of their differences in the absence of filing a due process complaint, the Parents then did file the current complaint on March 11, 2011. [STIPULATION]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in "equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore,

assigned the burden of persuasion pursuant to Schaffer and also bore the burden of production.

Credibility of Witnesses

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). There was no reason to discredit the testimony of any of the witnesses who appeared at the hearing. It is notable however that the District did not produce the author of the July 2009 evaluation report to testify, given the central role that individual played in this case. Student's mother was particularly credible as she recounted, painfully at times, what she remembered from her dealings with the District and with her child during the last part of 10th grade and the first part of 11th grade. She did not embellish, and in fact often simply testified that she could not remember, even when recollection could have contributed weight to her case.

IDEA and Section 504

IDEA: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The purpose of the IDEA is to ensure that all children with disabilities are provided FAPE which emphasizes special education and related services designed to ensure meaningful academic, social, emotional, and behavioral progress. *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484, 2491 (2009); *Breanne C. v. Southern York Cty. Sch. Dist*., 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (referencing *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 394 (3d Cir. 1996) (finding that to confer meaningful educational benefit, an IEP must be designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social, and emotional domains); *See also, Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Section 504: Section 504 requires a recipient of federal funds to make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped" person. 34 C.F.R. §104.12 (a). Although the Third Circuit has not specifically addressed what is a "reasonable accommodation" in relation to the Rehabilitation Act's requirement of an "appropriate" education", Courts have concluded that a reasonable accommodation analysis comports with the Third Circuit's explanation that an "appropriate" education must "provide significant learning' and confer 'meaningful benefit,'" *T.R. v. Kingwood Township Bd. of Educ*. 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16,* 853 F.2d 171, 182, 184 (3d Cir. 1988), but that it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247*; Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002).

There is no substantive distinction between Section 504's prohibition against discrimination on the basis of handicap and a School District's affirmative duty under the Individuals with Disabilities Education Improvement Act (IDEA) to assure that eligible students with disabilities receive a free and appropriate public education (FAPE). *Ridgewood.*

Emotional Disturbance

The applicable regulations at 34 C.F.R. §300.8(a)(4) define Emotional Disturbance as follows:

(i) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

Child Find

The IDEA sets forth the responsibilities (commonly referenced as "child find" responsibilities) borne by school districts for identifying which children residing in their boundaries are in need of special education and related services such that "[all] children with disabilities residing in the State…regardless of the severity of their disabilities…are identified, located and evaluated…" 20 U.S.C. §1412(a)(3).

Child Find is a positive duty requiring a school district to begin the process of determining whether a student is exceptional at the point where learning or behaviors indicate that a child may have a disability. *Ridgewood.* A district is on notice of the *possibility* of a disability where a student is experiencing failing grades, or where it has notice that the student has been identified for ADHD. *See S.W. v. Holbrook Public Schools* 221 F.Supp.2d 222, *226 -227 (D.Mass. 2002). The possibility that the student's difficulty *could* be attributed to something other than a disability does not excuse the district from its child find obligation. *See Richard V. v. City of Medford,* 924 F.Supp. 320, 322 (D.Mass.1996) The United States Supreme Court held early on that merely passing from grade to grade and achieving passing grades is not dispositive that a student has received a FAPE. *Board of Educ. v. Rowley,* 458 U. S. 176, 203, n.25 (1982). 34 C.F.R. §300.101(c)(1) provides: "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even

though the child has not failed or been retained in a course or grade, and is advancing from grade to grade."

The Parents did not file for this due process hearing until March 11, 1011. Therefore under both the IDEA[6] and Section 504[7] the potential recovery period in this matter begins two years prior to their filing, that is March 11, 2009, absent either of the IDEA's statutory exceptions. This hearing officer devoted the first hearing session to the question of whether either of the two exceptions existed and after hearing testimony from five witnesses determined that neither exception was present.

When we turn to the question of whether there is a carve-out for Child Find with regard to the statute of limitations we find that although the IDEA is silent on this issue, the Federal Court for the Eastern District of Pennsylvania applied the IDEA's two year statute of limitations to a child find claim in *Daniel S., ex rel. Michael S. v. Council Rock School District*, 2007 WL 3120014, *2 (E.D.Pa. October 25, 2007) (IDEA's two year statute of limitations is applicable to child find claim).[8]

Nonetheless, although the IDEA's two-year statute of limitations is well established by case law, and case law also fails to support a carve-out for Child Find violations, this hearing officer nevertheless for the record makes the finding that the District did violate its Child Find obligations with regard to Student, in April 2008 when it failed to identify Student as a Protected Handicapped Student and again in July 2009 when it failed to find Student eligible for special education under the IDEA.

---

[6] *See Steven I. v. Central Bucks School District*, 618 F.3d 411 (3d Cir. 2010), *cert denied*, 131 S.Ct. 1507 (2011) (IDEA-2004's two-year statute of limitations applies to complaints filed after July 1, 2005); *Daniel S., ex rel. Michael S. v. Council Rock Sch. Dist.*, 2007 WL 3120014, 2 (E.D.Pa. 2007) (Court applied IDEA's two year statute of limitations to child find claim where the due process hearing request was made after July 1, 2005); *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 FR 46540, 46706, *citing* 34 C.F.R. §§ 300.507(a)(2) and 300.511(e) (Sections 1415(b)(6)(B) and 1415(F)(3)(C) of the IDEA provide the exact same two-year statute of limitations period).

[7] Although Section 504 does not contain a statute of limitations, the federal courts have applied that state statute which is most analogous to the federal claim. *P.P. v. West Chester Area Sch. Dist*., 585 F.3d 727 (3d Cir. 2009) (IDEA-2004's two-year statute of limitations is applicable to Section 504 claims). *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Cmnwlth. 2005) (Court explicitly determined that requirements under the IDEA apply with equal force to Section 504).

[8] Additionally, although arguably no longer binding, Appeals Panel decisions analyzing child find claims are instructive as the underlying statute has not changed. The Appeals Panels consistently held that the statute of limitations is equally applicable to child find claims as to any other kind of claim under the IDEA. In *In re the Educational Assignment of D.H.*, Special Education Appeals Panel Opinion No. 1672 (2005), the Appeals Panel noted that the statute of limitations "provides no exception for child find claims." See also *In re the Educational Assignment of J.L.*, Special Education Appeals Panel Opinion No. 1763 (2006); *In re the Educational Assignment of C.H.*, Special Education Appeals Panel Opinion No. 1750 (2006); *In re the Educational Assignment of D.S.*, Special Education Appeals Panel Opinion No. 1740 (2006); *In re the Educational Assignment of E.F.*, Special Education Appeals Panel Opinion No. 1733 (2006); *In re the Educational Assignment of B.B.*, Special Education Appeals Panel Opinion No. 1728 (2006); *In re the Educational Assignment of D.H.*, Special Education Appeals Panel Opinion No. 1672 (2005).

The Third Circuit set forth a clear rule that courts and hearing officers cannot engage in "Monday Morning Quarterbacking" whereby armchair "quarterbacks" take what is known after the outcome of the game to criticize the play-calling that occurred during the game the preceding day. *Fuhrman v. E. Hanover Bd. of Educ*., 993 F.3d 1031 (3d Cir. 1993). With this caution in mind, I will examine what the District knew and when the District gained this knowledge.

April 2008: Shortly after Student's return to the District in February 2008 the denominational high school's counselor informed the District's guidance counselor that Student had "behavioral issues". [FF 6] The District's high school guidance counselor was seeing Student once a week and Student was struggling with attendance. [FF 7] Student told the guidance counselor that Student was seeing a psychiatrist. [FF 8] On March 8, 2008, Student was admitted to an inpatient psychiatric hospital because of "possible bipolar, depression," and "suicidal thoughts". [FF 9] Upon discharge from the inpatient unit, Student was admitted to a partial hospitalization program. [FF 10] On March 24, 2008 the Parents emailed the high school guidance counselor a letter from Students' psychiatrist, noting that in January 2008 Student had been diagnosed with Major Depression, Attention Deficit/Hyperactivity Disorder (ADHD), Obsessive Compulsive Disorder (OCD), and Anxiety Disorder. [FF 12] After returning from the inpatient and partial psychiatric hospitalizations in April 2008, Student sought guidance from either the District's intervention specialist or crisis counselor, or the guidance counselor once or twice a week and was at the same time cutting classes in math and history. [FF 13, 14] Given that the District was in possession of all the above information when the Parents asked the District to see if Student qualified for a 504 Service Plan [FF 15] it was inappropriate for the District to focus only on in-class observations and grades. [FF 16] I find that the District's determination that Student did not have a disability that qualified Student as a Protected Handicapped Student was a clear error, but that Student is not entitled to the remedy of compensatory education because Student left the District prior to March 11, 2009 which is the start of the potential recovery period.

July 2009: At the time the District psychologist conducted the July 2009[9] evaluation the psychologist knew, as noted in the ER, that as least as far back as January 2008 Student had been diagnosed by Student's therapist with a mood disorder, depression, anxiety, OCD and ODD and that student's psychiatrist had conferred the diagnosis of Major Depression, severe. The District psychologist also knew, as documented in the ER, that Student had been diagnosed in December 2008 by an evaluator in New England with Dysthymic Disorder, among other diagnoses. [FF 32, 34] The District psychologist does not dispute or question the diagnosis of Dysthymic Disorder in the ER and therefore it must be concluded that she accepts the diagnosis.[10] The District psychologist also knew that the evaluator in New England who was both a licensed psychologist and a certified school psychologist in his home state, and a nationally certified school psychologist, had

[99] The District was under no obligation to conduct its evaluation while Student was outside the District. *Great Valley S.D. v. Douglas M*., 807 A.2d 315, 170 Ed. Law Rep 292 (Pa. Cmwlth. 2002).

[10] Dysthymic disorder as described in the DSM-IV requires a duration of at least two years within which no more than two months are free of mood symptoms.

found Student eligible for special education under the classification of emotional disturbance and specific learning disability in mathematics.[11] [FF 35] The District psychologist's purported reluctance to classify the Student as emotionally disturbed because the length of time characteristics of emotional disturbance were present is "unknown" [FF 43] is belied by her own report of background information and is rejected. Likewise rejected is the District psychologist's conclusion that "these characteristics [of emotional disturbance] do not appear to have adversely affected [Student's] educational performance to a marked degree... any social-emotional or behavioral issues did not seem to be manifesting themselves within the school environment". [FF 44] As noted above, in Spring 2008 Student was seeking help from the school's support personnel [guidance counselor, intervention specialist, crisis counselor] weekly and sometimes more than once a week following an inpatient psychiatric hospitalization and a subsequent partial psychiatric hospitalization, both of which kept Student out of school. In the fall of 2008 Student was missing school and skipping classes to the point where an "attendance meeting" was arranged, and was eventually again hospitalized, missing more days until being removed from the District and unilaterally placed. I find that the District psychologist was clearly in error when she failed to identify Student as eligible for special education under the IDEIA with the classification of Emotional Disturbance and I reject her tortuous reasoning and deplore her blatant disregard of information in her possession.

To its credit, the District did not attempt to fashion a closing argument defending its psychologist's conclusion that Student was not eligible for special education. Instead, in its closing argument the District notes that should the hearing officer find that the District's determination of non-eligibility was an error, there should be no remedy awarded since, although it really had no obligation to produce an evaluation of Student until the 60th calendar day after the first day of the new school year[12] and it assessed Student in July to accommodate the family, by the 60th day of the new school year Student had already graduated. In a similar vein, in its closing argument the District posits that had Student been found eligible the District was not obligated to make an offer of FAPE until 30 days from the date of the determination that the Student was eligible[13] and that by that time Student had already graduated from high school. I find these arguments flawed because in fact the District did evaluate Student in July, did not find Student eligible and had no intention of making an offer of FAPE. To contend that the District should be given 60 days or 30 days to do what it was not going to do in the first place is not persuasive.

---

[11] The District psychologist obtained better math scores from Student in July 2009 than those generated during the earlier testing in New England in December 2008 and January 2009. Since success in this aspect of math requires attention and focus, Student's functioning in this area may have been disrupted by Student's emotional state. Therefore the District psychologist's not finding Student to have a specific learning disability in mathematics is left to stand in this decision. The psychologist who conducted the IEE in July 2010 also found no specific learning disability, however she noted, "[Student's] struggles with OCD and emotional/behavioral functioning during high school resulted in a significant impairment in global functioning". [P-73]

[12] See 34 C.F.R. § 300.301 and 22 Pa. §14.123(b)

[13] 34 C.F.R. §300.323(c)

Remedies

Compensatory Education: The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B). In this case, I find that the District erred in not identifying Student as a Protected Handicapped Student and offering a 504 Service Plan in April 2008. However, the relevant period defined by the IDEA's statute of limitations began after Student had already left the District, and therefore I can award no remedy for the period from April 2008 to mid-November 2008.

Tuition Reimbursement: The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). A court may grant "such relief as it determines is appropriate". "Whether to order reimbursement and at what amount is a question determined by balancing the equities." Burlington, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

In 1997, a dozen years after *Burlington* the reauthorized Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement and IDEIA 2004 maintains this authorization:

> (i)In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.
>
> (ii)Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Having found Student not eligible for special education, the District did not offer Student an individualized educational program. Our United States Supreme Court held that "[w]hen a child requires special-education services, a school district's failure to propose

an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP." *Forest Grove*, 129 S.Ct. at 2489, 2491, 2495). Therefore the first prong of the *Carter* test is easily resolved in the Parents' favor.

The Second prong of *Carter* requires an examination of the appropriateness of the placement unilaterally chosen by the Parents. The record is bereft of persuasive evidence that Student required a residential placement for educational purposes. Rather it is clear that Student's mental health issues and substance abuse issues were the primary focus of the placement. That having been said, the placement did confer meaningful educational (which comprises social and emotional as well as academic) benefit to Student. At the private placement Student "did well emotionally and academically; [Student] completed the high school program early and was able to take some classes in the Fall of 2009 at a local college while continuing to receive emotional support and supervision". [P-73]. Student's therapist at the private school described Student as the "poster child" for "growth and development" at the facility. [P-71] Therefore, as the private placement offered appropriate academic, social and emotional support in the absence of an offer from the District, the second prong is decided in the Parents' favor. However, the remedy will be limited to the educational (including social and emotional) portion of tuition and will exclude the residential portion during the relevant period.

The third prong of *Carter* requires an examination of the equities. In this matter, I find nothing in the Parents' actions that would reduce or eliminate the District's responsibility for tuition reimbursement for the relevant period. Parents' failure to initiate due process prior to the date of the complaint, in fact, deprived them of potential recovery in this matter and greatly benefitted the District.

In conclusion I find that the Parents are entitled to reimbursement for the academic and social/emotional portions, but not the residential portion, of the private placement for thirteen school days within the period July 21, 2009 to August 15, 2009. In order to establish as much clarity as possible regarding the recovery, I am specifically ordering the District to reimburse the Parents one- half [1/2] of the cost of a day in the program for a total of thirteen [13] days. The cost of a day is to be determined by dividing the total monthly cost of the program by thirty [30] days. If a monthly cost cannot be determined, the cost of a year of the program is to be divided by twelve [12] months and then each month is to be divided by thirty [30] days to calculate the daily cost. This award explicitly excludes transportation, books, separately billed therapies not included in the tuition, and other such items.

As the Parent prevailed on the IDEA claims, this decision satisfies the 504 claims as well. *See West Chester Area School Dist. v. Bruce C., et al.,* 194 F.Supp.2d 417, 422 n.5 (E.D.Pa. 2002) (court found issue of whether student was entitled to Section 504 Service Plan to be moot because court found student eligible for IDEA services).

Order

It is hereby ordered that:

1. The District failed to identify Student as a Protected Handicapped Student under Section 504 in April 2008. As Student left the District prior to the beginning of the relevant period established by the IDEA's statute of limitations which applies equally to Section 504 claims no remedy is available.

2. The District failed to identify Student as eligible for special education under the IDEA in July 2009 and consequently did not make any offer of FAPE to Student.

3. The educational portion, including social and emotional portions, of the Parents' unilateral placement was appropriate, and the equities favor the Parents.

4. The District must reimburse the Parents for the cost of tuition for thirteen (13) half-days within the period from July 21, 2009 to August 15, 2009. The cost of the half-days shall be calculated as described above.

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

August 6, 2011
Date

Linda M. Valentini, Psy.D., CHO
Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official