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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: Child
ODR #5734/05-06

Date of Birth: xx/xx/xx

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs. Parent

Representative:
Robert Lear, Esquire
Grove Summit Office Park
607A North Easton Road
Willow Grove, PA 19090

Ms. Mary Beth Mahoney
Bucks County MH/MR
600 Louis Drive, Suite 101
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Charissa Liller, Esquire
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123 W. Bridge Street
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Date Record Closed:

June 9, 2006

Date of Decision:

June 24, 2006

Hearing Officer:

Marcie Romberger, Esquire

BACKGROUND

Child is a xx year old who received services from the [Redacted] Mental Health/Mental Retardation system prior to his Third birthday. Child is not claiming that the services or the IFSP were inappropriate. Rather, Child is seeking compensatory services for missed hours of therapy as well as reimbursement for services Child's Parents funded.

[Redacted] MH/MR agrees it owes certain service hours to Child. However, it does not believe that it owes all that is alleged. Nor does it believe that it should have to reimburse Child's Parents for services they obtained privately because the behavior of Child's Parents was the cause of the services not being provided through MH/MR. It also alleges that it cannot reimburse Child's Parents over the amount allowed by the Department of Public Welfare for MH/MR contractors.

FINDINGS OF FACT

1. Prior to his Third birthday, Child was receiving Early Intervention services from [Redacted] County Mental Health/Mental Retardation (hereinafter "MH/MR"). NT 24.
2. The goal of Early Intervention is to enhance a family's capacity to support a child with special needs. NT 24.
3. When a child begins receiving services through Early Intervention, an Individual Family Service Plan (hereinafter "IFSP") is developed. 20 U.S.C. §1436 (a)(3).
4. A section on the IFSP relates to outcomes a child is expected to reach. NT 25; 20 U.S.C. 1436 (d). According to MH/MR, the outcomes are derived from goals a family would like to see the child master. NT 25, 230, 269.
5. Early Intervention Services cannot be provided to a child without the consent of the child's parents on either an Addendum page or Parents Rights Notice. NT 25, 73-74.
6. After a parent consents to services being provided, MH/MR's normal practice is to ask the family for dates and times the family would like services to occur. NT 100.
7. MH/MR contends that it has 14 days to find a therapist to provide the services in the IFSP during which time no services are provide to a child nor are they made up at some point in the future. NT 84, 264. Pennsylvania Regulations state that Early Intervention shall be initiated as soon as possible after the IFSP is completed, but no later than 14 calendar days from the date the IFSP is completed. 55 Pa. Code § 4226.75 (b).

8. The duration of an IFSP is one year. NT 41. MH/MR is required to have an annual IFSP meeting as well as one six month review. NT 41.
9. Normal practice is for MH/MR to solicit dates and times when a family is free to meet to discuss the IFSP and to ask them which therapists they would like at the meeting. NT 94. MH/MR will then attempt to schedule the meeting around the therapist's schedule. NT 94.
10. If an annual IFSP meeting is not held, MH/MR contends that no services can be provided to a child because there would be no authorization to provide services. NT 41.
11. MH/MR would not hold an IFSP meeting without a child's parents. NT 248.
12. MH/MR contends hours therapists spend in meetings for a child are included in the hours of service they provide to a child. NT 219-220. Therefore, a therapist can count time spent at a meeting as instruction to a child. NT 220, 267-268. The family states they were not aware of this policy. NT 909. This policy is not written down anywhere. NT 509-510.
13. When a family cancels a therapy session or a meeting, the therapist does not have to make up the time, according to MH/MR. NT 85, 220, 267-268, 472, 541. This policy is not written down anywhere. NT 509-510.
14. However, there were times when MH/MR believed the family canceled IFSP meeting and the therapists still provided service. NT 1582.
15. MH/MR requires every therapist contracted through its agency to document therapy time with a child on a "progress note." NT 464. The progress note serves two purposes: to determine billable hours and to document progress. NT 464.
16. On July 28, 2004, an IFSP meeting was held for Child. There was no agreement regarding the services that should be provided. NT 25.
17. To attempt to resolve the matter, on August 25, 2004, MH/MR, through its counsel and a county representative, agreed to increase the level of most of Child's services for a period of two and one half months. NT 26-27, 853; MH/MR 1.
18. There is inconsistent testimony as to what was supposed to happen after the two and a half month period was over. An administrator from MH/MR testified that after the period was over, services for the child would be *reassessed*. NT 27-28, 34. At another point in her testimony, she stated there was an agreement in August, 2004 that services would be *reduced* after the 2 ½ month period was over. NT 69-71, 87. The latter testimony is consistent with what she told Child's

service coordinator. MH/MR 5. Child's father, however, believed that after 2 ½ months, Child's services would be reassessed. NT 854-855.

19. The IFSP addendum written by MH/MR after the August, 2004 agreement for an increase in services states, "within 2 ½ months, services will be significantly reduced." MH/MR 1. Child's parents did not agree that the above language was the agreement, so they crossed out the above language and wrote, "After 2 1/2 months, the team will meet for a review of progress being made and to discuss future appropriate level of services needed." MH/MR 1; NT 33.
20. The August, 2004 agreement increased special instruction from 1 hour per week to 5 hours per week. MH/MR 1; NT 350-351. This was to "jump-start" Child's speech. NT 350-351. Child's special instructor believed the increase was temporarily appropriate. NT 350-351.
21. Prior to September, 2004, Child was receiving one hour per week of speech therapy at a center based program rather than in his natural environment because MH/MR did not have a therapist who could go to Child's natural environment at times that were acceptable to the family. NT 96, 105, 106. On August 24, 2004, Child's speech services were discontinued because Child's speech therapist could not provide the increased speech services of one and a half hours per week when Child was available, nor could the agency provide services in Child's natural environment.¹ MH/MR 7, 11; NT 856.
22. Child's family requested speech therapy to occur in Child's day care, his natural environment. MH/MR 7, 8.² Child's day care is a significant distance away from the home in another county. NT 118-119. MH/MR had a difficult time finding a therapist who could service Child at his day care. NT 119-120.
23. A meeting was scheduled on September 9, 2004 to review the IFSP, but it was canceled by Child's parents because Child's former speech therapist and the speech therapist they believed would be working with Child could not be present at the meeting, although the former therapist could be present by phone.³ MH/MR 15; NT 93-94, 861-863.

¹ There was an issue as to whether Child's family consented to this new therapist, but that issue is not important since Child was not available at the time offered by the therapist. MH/MR 7. In addition, there was testimony alleging that Child's father lacked good faith when he did not agree to two speech therapists providing services to Child. However, the speech therapist though MH/MR who was servicing Child at the time did not feel that two separate speech therapists was appropriate for Child. P-12.

² There was testimony by MH/MR that Child's family wanted speech therapy at the home rather than at the day care and that the change in location caused part of the delay in obtaining a therapist. NT 117-118. However, there is no documentation to corroborate this. In fact, the documentation shows that the family had been requesting speech therapy at the day care since the beginning of September, 2004. MH/MR 8.

³ The MH/MR caseworker working with Child told Child's father that it was "important for all team members to be present at this teaming," and asked Child's father whether he wanted to continue the meeting. P-13. Child's father was very unhappy continuing the meeting. P-13.

24. MH/MR assumed that Child's family would not want to meet again to discuss the IFSP until a speech therapist was found for Child. MH/MR 10; NT 141. However, through a letter dated September 14, 2004, Child's family was agreeable to meet with the team and even to take the responsibility of scheduling the meeting without a speech therapist. MH/MR 16. This was not acceptable to MH/MR. MH/MR 9.
25. Two months transpired between the cancelled meeting on September 9, 2004 and when MH/MR contacted Child's family to reschedule a meeting. MH/MR 19.
26. Child's father informed MH/MR that if they did not have a speech therapist to work with Child by a certain date, Child's father would attempt to seek a private speech therapist to work with Child and would bill MH/MR for the cost. NT 109.
27. MH/MR informed him that if he did seek private speech therapy for Child, MH/MR would only pay the outside provider the medical assistance rate and only until a time when MH/MR could find a replacement. MH/MR 11; NT 109, 118. Child's father did not approve getting reimbursed only the medical assistance rate which is less than the private rate. NT 623-624. Child's father also requested compensation for the travel time of the private speech therapist. NT 624. MH/MR agreed to reimburse the private speech therapist for travel to and from the day care. MH/MR 11; NT 627. However, the private speech therapist did not provide service at Child's day care; rather he provided service at the home. MH/MR 50.
28. At the end of September, 2004, MH/MR located a speech therapist to work with Child, however, the therapist was not available to begin until November 12, 2004. NT 117-118, 865-866; MH/MR 11, 17.
29. Child's father wanted information from MH/MR before consenting to the speech therapist: the name of the therapist, her credentials, and a transition plan prior to consenting. MH/MR 13, 18; NT 123-128, 1197, 1199, 1206.
30. Child's father was also concerned about the time delay in the speech therapist's ability to begin servicing Child and also the delay in the therapist feeling comfortable with Child. NT 865-866. He was also satisfied with his private speech therapist. Id.
31. Child's parents wanted to see the speech therapist's resume before agreeing to her working with Child because of past questions with a therapist's background. NT 869-871; MH/MR 13, 18. However, MH/MR was not able to obtain the speech therapist's resume because the provider agency would not release it. NT 141-142. Instead, information regarding the therapist's background and experience was offered to MH/MR who in turn provided the information to Child's family. NT 142-144.

32. Child's parents also requested a transition plan to be in place between the private speech therapist and the new speech therapist obtained by MH/MR. MH/MR 20. A transition plan was deemed appropriate by Child's private therapist because Child does not adapt to change well. NT 924, 996. Child's parents did not elaborate on what they expected to be in a transition plan, however. NT 147.⁴
33. In response to Child's father request for a transition plan from the private therapist to the therapist found by MH/MR, MH/MR suggested the private therapist and the new therapist meet during one of the therapy sessions to discuss the Child and for the private speech therapist to provide his progress notes to the new therapist to review. NT 134. At this point, progress notes written by the private speech therapist were not provided to MH/MR.⁵
34. Child's father talked to the speech therapist obtained through MH/MR. NT 871. After the conversation, Child's father was concerned about obtaining services from her because she wanted to do group speech therapy rather than individual speech therapy and Child was included in a regular pre-school without children who needed speech services. NT 871-872. There was also a concern regarding whether the speech therapist could complete the weekly speech services since she would be coming at the end of Child's pre-school day.⁶ MH/MR 22; NT 872-873.
35. A meeting to review the increase in services in Child's August, 2004 IFSP Addendum, originally scheduled for September 9, 2004, was scheduled by MH/MR for November 22, 2004. MH/MR 19; NT 36. Child's father was unable to meet on that date. MH/MR 20.
36. Child's father offered the date of December 14, 2004 for a meeting. MH/MR 21. MH/MR agreed to meet on that day although all of the therapists could not attend. MH/MR 21.
37. Although much criticism was offered regarding Child's parents requirement that all therapists be present before a meeting be held, MH/MR itself wrote, "[I]n order for a good and comprehensive plan to be developed and to achieve the best outcomes it would be important for your whole team to be present," MH/MR 21, and "I agree with you that all team members need to be at [Child's] IFSP meeting." MH/MR 23.⁷
38. On December 2, 2004, Child's father sent MH/MR a letter now requesting speech therapy to occur in the home rather than at the pre-school. NT 151-152, 641; MH/MR 22, 24. By that time, MH/MR had a speech therapist on hold for Child

⁴ Although while testifying, Child's father requested a transition plan which included 3 or 4 co-teaching sessions with the private speech therapist and the new speech therapist, this is not specified in any documentation to MH/MR. MH/MR 26; NT 868-869.

⁵ Child's private therapist did not provide progress notes to MH/MR until September, 2005. NT 43, 136.

⁶ It appears this concern was not addressed with MH/MR.

⁷ At this point, the hostilities between the parties are evident. See, i.e., MH/MR 18, 21, 26, 28.

- since October, 2004 for services at Child's day care. NT 152. This therapist was not available to provide services in Child's home. NT 152-153.⁸
39. During December, 2004, MH/MR requested dates and times for speech services to be performed in Child's home, but Child's father did not respond with specifics. MH/MR 22, 24, 27, 28.⁹ MH/MR attempted to find a speech therapist who could accommodate Child at the times and dates given in September, 2004. MH/MR 28.
 40. Child's occupational therapist terminated her services in December, 2004, because of health reasons. NT 319. Child's father stated that he was unaware of her departure until January 21, 2005. NT 885.
 41. Child's father had requested a change in occupational therapists on December 1, 2004 as a result of the therapist's uncooperativeness. MH/MR 26.
 42. Another IFSP meeting was scheduled for December 14, 2004 although it was not certain that all therapists could attend. MH/MR 23, 24. If all therapists could not attend, MH/MR suggested rescheduling the meeting to a new date. MH/MR 23. On December 13, 2004, Child's father canceled the meeting because not all therapists could attend. NT 158, 160-161.
 43. Child's physical therapist was terminating services at the end of December, 2004 to begin maternity leave. NT 163, 172.
 44. MH/MR claims that physical therapy services were not provided to Child soon after the departure of the prior physical therapist in December, 2004 because the family did not provide dates and times they wished physical therapy to occur even though Child had already been receiving physical therapy from MH/MR at specific dates and times. MH/MR 25, 27; NT 189.¹⁰ When no dates and times were provided by the family, referrals were finally sent seeking a physical therapist who could provide services during the time that Child was previously received physical therapy services.¹¹ MH/MR 28; NT 189-190.
 45. Child's family requested a due process hearing on December 1, 2004. MH/MR 26.

⁸ It is suspicious that as soon as MH/MR located a person to perform speech services in the day care, Child's father requested that speech services commence in the home, the location his private therapist was serving Child.

⁹ It was appropriate for MH/MR to request specific dates and times to provide speech since Child's family changed the location of the service.

¹⁰ MH/MR should have written to Child's family assuming the former dates and times used to provide physical therapy were when the family wanted to continue physical therapy services unless otherwise notified.

¹¹ On December 21, 2004, Child's family did tell MH/MR that Child was available for therapy 6 days per week but did not give specifics as to what dates and times were best. MH/MR 28.

46. An administrative meeting to attempt to resolve Child's concerns occurred on January 21, 2005. NT 36. An agreement was made to increase Child's services until a new IFSP could be created at an annual IFSP meeting in February. MH/MR 2; NT 40.
47. Speech services was increased to 3 ½ hours per week which included direct time with the Child, co-treating with team members, evaluations, and attending IFSP meetings. MH/MR 2; NT 55, 198-199. Child's father again refused the medical assistance rate for reimbursement for the private therapist. NT677-678, 890-891.
48. Special instruction, a teacher to provide Applied Behavioral Analysis (hereinafter "ABA") to Child, was to be provided at a rate of 15 hours per week. MH/MR 2; NT 198-199. Child's current special instructor agreed to provide 8 of the 15 hours per week although she did not have formal training in ABA. NT 358, 384-385, 734.
49. From January 21, 2005 to June, 2005, Child was receiving 8 hours per week of special instruction. NT 267-268, 372.
50. Also agreed to at the meeting on January 21, 2005, was for Child to receive services from a behavior therapist for up to 4 hours per week. MH/MR 2; NT 198-199. The behavior therapist's job was to create an ABA plan from which the Special Instructors were to work. NT 56. The behavioral therapist began February 22, 2005. NT 373-374, 394.
51. Also discussed at the January, 2005 meeting was that Child could receive behavioral health services, also called wrap around services, from an outside agency. NT 57. These additional services are not listed on the IFSP nor are they paid for by MH/MR. MH/MR 2; NT 57-58. Child's family agreed to seek an additional 10 hours of ABA therapy through wrap-around to give Child a total of 25 hours of ABA. NT 890.
52. It was also agreed at the January, 2005 meeting that evaluations would be conducted by MH/MR and by independent evaluators to assist the parties in reaching an agreement as to the levels of service Child needed. NT 40, 42.
53. Although the Addendum dated January 21, 2005 offered into evidence by MH/MR had a service completion date of February 22, 2005, MH/MR 2, the completion date was not filled in when the Addendum was signed by Child's father. NT 1580-1581; P-9.
54. After the January, 2005 meeting, MH/MR contacted a physical therapist to assess Child and provide services to Child. NT 278-279.
55. The physical therapist contacted Child's family to discuss scheduling her assessment of Child. NT 280-281. The physical therapist contends that an

- unpleasant conversation occurred with Child's father because Child's father wanted the physical therapist to work with Child, not evaluate him. NT 280-281. There was also a discussion regarding whether a two hour session for Child was appropriate given his age. NT 281-282.
56. Also during the conversation, Child's father asked the physical therapist for her resume, but she was not willing to provide it. NT 282. The conversation ended with the therapist stating that she would ask her supervisor what her role was to be with Child and contact the family. NT 284.
 57. However, after the conversation, the physical therapist decided not to work with Child and contacted her supervisor to inform her of this decision. NT 284. Child's father also contacted the therapist's supervisor and also expressed his disinterest in having the therapist work with Child. NT 284-285.
 58. After the January, 2005 meeting, a new occupational therapist evaluated and began working with Child. NT 484-485, 487. She determined that Child should receive 2 sessions of occupational therapy per week, however, she did not provide that amount of service when she first worked with Child. NT 594-595. She terminated her service in May, 2005 after a confrontation with Child's father. NT 599-604, 610.
 59. Between January, 2005, and February 8, 2005, a new behavioral therapist was hired to work with Child developing an ABA plan. NT 288.
 60. The behavioral therapist met with Child and his family for 3 hours but did not write an ABA plan. NT 290-291, 901-902.
 61. An additional special instructor to provide ABA was hired to provide additional hours of service the other special instructor could not do. MH/MR 59; NT 902-903. The special instructor was to provide services to Child on Wednesday nights for two hours and three Saturdays per month for 3 hours each day. NT 298, 306.
 62. The new special instructor met with Child and his family for 3 hours. NT 299-300. At the end of that meeting, Child's father and the special instructor had a conversation regarding when the special instructor would return to provide services. NT 300, 903-905. She was to contact Child's father as to whether she had to provide services that week since an IFSP meeting was scheduled for that week. NT 306. See also, MH/MR 34. She did not contact Child's family because she was told by MH/MR that Child's father should know that hours in an IFSP meeting counted as providing instruction to a child. NT 302, 306. See also, MH/MR 35.
 63. When the special instructor did not appear for her designated session on February 9, 2005, Child's father contacted her. NT 302, 906-907. The instructor stated

that Child's father's voice was raised questioning why she did not provide services to Child. NT 302-303.

64. As a result of this call, the special instructor declined to work further with Child. MH/MR 35; NT 304-305, 908.
65. The Special Instructor contacted the new behavioral therapist and told him that she quit. NT 291-293, 294. Because she quit, the behavioral therapist also decided not to provide services to Child, even though he himself did not have any issues with Child or Child's family. NT 291-293, 294.
66. A meeting to develop Child's annual IFSP was scheduled for February 8, 2005. NT 208-209.
67. On February 3, 2005, Child's father canceled the meeting because all of the evaluations were not going to be completed by February 8, 2005. MH/MR 32; NT 212-213.
68. On February 8, 2005, MH/MR sent Child's family a letter requesting specific dates and times to provide physical therapy services so a new therapist could be located. MH/MR 33.¹² In addition, MH/MR requested a consent form to be signed by Child's family so that Child's information could be shared with other service providers. MH/MR 33, 36.
69. On February 22, 2005, an annual IFSP meeting was held. MH/MR 46; NT 50. At that meeting, the independent physical and occupational therapy evaluations were reviewed although the evaluators were not present. MH/MR 46; NT 50. Some of Child's therapists from MH/MR were also not present. MH/MR 46; NT 1075-1076.
70. Child's private speech therapist did not have an evaluation prepared. NT 234. However, MH/MR did not tell him that he had to conduct an evaluation. MH/MR 46; NT 263.¹³ Rather, MH/MR assumed that he knew to conduct an evaluation based upon his previous contract with MH/MR. NT 263. The private therapist states that he was never told to bring an evaluation. MH/MR 46; NT 930. Because no evaluation was provided, no goals could be written. MH/MR 46; NT 368-369.

¹² Again, it was appropriate for MH/MR to request specific dates and times for physical therapy services since over a month had gone by since Child last had physical therapy services from MH/MR and since Child's father changed his position on dates, times, and locations of availability when speaking to a previously offered physical therapist. MH/MR 32, 52. See also Findings of Facts 55 and 56.

¹³ There was differences in testimony from witnesses for MH/MR regarding whether the private speech therapist was told to complete an evaluation before the February, 2005 annual IFSP. See, NT 44, 49, 50, 263. However, it appears from reviewing the transcript from the meeting that he was not told to do so. MH/MR 46.

71. After a four hour meeting, no goals were written for the IFSP. MH/MR 3, 46; NT 50-51. MH/MR contends that it could not write goals because the family did not specify what they wanted Child to be able to do. NT 269. The special instructor however, testified that goals were discussed, but there were differences in opinion as to what Child should be doing at his age and what skills Child actually had. NT 369-370, 499, 523. This is consistent with the transcript from the meeting. MH/MR 46.
72. There was also significant disagreement over the services Child should receive at the February 22, 2005 meeting. NT 53.
73. Physical therapy services were also discussed at the February 22, 2005 meeting. Child's father had found a private physical therapist that could provide services to Child. P-10; NT 504. MH/MR informed Child's parents that it would be willing to contract with the physical therapist if the therapist would be willing to contract with a provider agency that already has a contract with MH/MR. NT 236.
74. There was conflicting testimony as to whether Child's father ever provided the name of the physical therapist to MH/MR. MH/MR stated that it never received the name of the therapist from Child's father. NT 237, 238, 1414, 1415. From documentation, however, it is clear that he did in fact provide that information to MH/MR on February 22, 2005. MH/MR 37; P-10.
75. At the February, 22, 2005 meeting, MH/MR asked Child's parents to sign some consent forms for MH/MR to send Child's information to new physical therapy providers. NT 239. MH/MR testified that these forms were never returned to them. NT 239. MH/MR then testified that Child's family did in fact provide consent forms for some providers. NT 260-261. Child did produce a consent form which Child's father did sign at the January 21, 2005 meeting, but none signed at the February 22, 2005 meeting. P-15.
76. At the end of the meeting, the participants agreed to reconvene to develop goals for the IFSP. NT 54. MH/MR contends that Child's parents would not meet again until Child's team of therapists was fully staffed. NT 236, 270.
77. The services in the January, 2005 IFSP were continued until a new IFSP could be developed. NT 54, 251.
78. On February 25, 2005, Child's mother gave MH/MR dates and times in which Child was available to receive physical therapy and special instruction services. P-11.
79. After the annual IFSP meeting on February 22, 2005, the next communication to Child's parents to schedule a meeting was May 5, 2005, over two months after the

- original meeting. MH/MR 38; NT 244. In the May 5, 2005 letter to Child's parents, MH/MR scheduled a meeting for May 18, 2005. MH/MR 38.¹⁴
80. MH/MR alleged that Child's family did not want to have another meeting to discuss the IFSP until all services were being provided to Child. NT 244-246, 636. However, in May, 2005, when MH/MR scheduled the meeting, not all of Child's IFSP services were being provided, yet it still scheduled a meeting. NT 247, 1097.
 81. A new meeting to develop IFSP goals and objectives never occurred. NT 61. MH/MR believes a meeting did not occur because Child's father never gave dates in which he could meet. NT 62; MH/MR 40.
 82. On February 22, 2005, a new behavioral therapist was hired by MH/MR to provide services to Child. NT 394. It appeared that she provided services to Child until April 6, 2005. MH/MR 57, 61-66, 67, 68, 87.
 83. Child's behavioral therapist wanted to work with Child on April 26, 2005 when she was sick but she did not want to meet with family on the same day to discuss the goals on which she was working. NT 407-408. This led to an argument between the therapist and Child's father on April 25, 2005. NT 405-412. Her last meeting was April 29, 2005 when she met with the family. NT 422-423. On that day, the behavioral therapist resigned as a result of Child's father's behavior. NT 413-415.
 84. On March 4, 2005, a physical therapist hired by Child's family began service to Child. P-4.
 85. The occupational therapist who began working with Child on January 25, 2005 resigned on May 5, 2005. NT 723; MH/MR 83, 84.
 86. On June 13, 2005, Child's family requested special instruction services be provided to Child at his day care rather than in the home. MH/MR 42; NT 251. This change was as a result of Child being sent to day care every day. NT 262, 322, 376-377. Child's special instructor believed placing Child in a program every day would be beneficial to Child. NT 376-377.
 87. MH/MR refused this change because, according to them, Child didn't need any more services at the day care. MH/MR 40; NT 251. MH/MR believed that 25 hours of special instruction was too much for Child to have at his day care. NT 259. In addition, MH/MR believed that it would be a hardship for the special instructor to drive to Child's day care. NT 252-253.

¹⁴ This letter also states that Child's parents were "adamantly opposed" to meeting again as a team. MH/MR 38. There is no contradictory or corroborating documentation regarding Child's parents' feelings at this time. However, by June 8, 2005, Child's parents had not contacted MH/MR with dates to schedule a meeting. MH/MR 40.

88. Originally, however, special instruction services were provided to Child at his day care. MH/MR 42; NT 252. Child's IFSP addendum from January 25, 2005 described special instruction to occur in Child's natural environment which could either be home or day care. NT 271-272; MH/MR 2.
89. Also in June, 2005, a private behavioral specialist began working with Child for four hours per week. NT 1001, 1008. She also provided a team of special instructors who she trained to work with children with special needs in school districts. NT 1003. The special instructors worked with Child 15 hours per week. NT 1003, 1008. P-6.¹⁵
90. The private behavioral therapist charged \$80.00 per hour for consulting and \$50.00 per hour for teaching. P-6; NT 1011-1012. The special instructors were billed at a rate of \$25.00 per hour. NT 1012. These prices were less than the amount allowed by the Pennsylvania Department of Welfare for those services if contracted through MH/MR. MH/MR 56.
91. Every time a therapist resigned, MH/MR would not assume the scheduled dates and times for each specific therapy would continue to be acceptable to Child's family. NT 274-275. MH/MR would request dates and time from the family as to when the family would like therapies even though specific dates and times for each therapy were already in place. NT 100. When the family would not respond, MH/MR would try to find a therapist who had availability during the times that Child had already been receiving that particular service. NT 100-101.
92. MH/MR contends Child's parents consistently canceled meetings at the last minute. NT 102. Child's father considered MH/MR to be the one to cancel meetings since therapists could not attend the meetings. NT 1164-1165.
93. MH/MR also contends that Child's father's tone of voice was always very harsh, demanding, and at a raised level. NT 246. MH/MR claims the therapists resigned because of comments made by Child's father that made them feel professionally threatened. NT 257. Rather than continue to locate providers, MH/MR took Child's father's behavior as a refusal of services from MH/MR. NT 738.
94. If Child's family changed the location or time of therapy, MH/MR considered it a cancellation not requiring make-up services if the therapist could not fulfill the family's request.¹⁶ NT 258-259. MH/MR considered Child's family's request for services to be provided at the day care rather than at Child's home to be a

¹⁵ There was lengthy cross examination regarding whether the special instructors were qualified to provide ABA to Child. However, the special instructor from MH/MR had never been trained in ABA although she was providing services to Child. See, Finding of Fact 49.

¹⁶ Some therapists, however, did change locations if requested by the family without issue. For example, the occupational therapist who worked with Child from March, 2003 to December, 2004 provided services to Child in four different places. NT 312.

cancellation which did not have to be made up. NT 259. Child's family was told of this policy. NT 474.

95. Child's private speech therapist receives \$110.00 per hour for providing services. NT 935. The medical assistance rate is \$ 83.92 per hour.

96. In response to Child's list of missed therapy sessions, MH/MR testified as follows:¹⁷

- A. Occupational Therapy – Child alleges that the occupational therapist from MH/MR did not provide 6 hours of occupational therapy to Child from September 9, 2004 to December 8, 2004, the date the occupational therapist terminated her services. HO 2.¹⁸ Originally, the testimony from MH/MR witnesses was that no occupational therapy services were missed from September 9, 2004 to December 8, 2004. NT 718-722. Their testimony was based on the occupational therapist's progress notes. MH/MR 76. However, after Child notified MH/MR that the therapy notes may have been forged¹⁹ and Child's family went through the time and expense to go to court to get the original progress notes, retain a handwriting specialist, and paid the handwriting specialist to come to a hearing to testify did MH/MR confirm that the documents were forged.²⁰ P-16. Therefore, the occupational therapist did not provide all of the therapy sessions to Child from September, 2004 to December, 2004.
- B. Special Instruction – Child alleges that a total of 380 hours were not provided to Child from January 24, 2005 to September 17, 2005. HO 2. MH/MR agrees that it owes 53 hours of special instruction hours to Child as a result of this service not being fully implemented from January, 2005 to June, 2005.²¹ See Finding of Fact 100 for discussion regarding missed services from June, 2005 to September 17, 2005.
- C. Speech therapy – Child alleges that MH/MR owes him 10.50 hours for missed services from August 12, 2004 to October 2, 2004. HO 2. MH/MR does not agree it owes Child for these missed sessions since Child was receiving services at a center-based program and because

¹⁷ I am going to separate "missed appointments" when Child had a therapist who did not provide services to Child from missed sessions due to a therapist's termination because MH/MR's rationale for whether it owes any make-up services is different under those scenarios. See Finding of Fact 100.

¹⁸ HO 2 was compiled by reviewing therapists' progress reports. NT 1107-1108; 1109-1111.

¹⁹ MH/MR counsel alleged that I had "ex-parte" communications with counsel for Child on this issue based upon a letter Child's counsel sent to me, even though a copy was sent at the same time to MH/MR's counsel. NT 2006; HO 3. At no time did I have ex-parte communication with Child's counsel. Ironically, MH/MR counsel also sent me letters with copies to Child's counsel, yet she did not consider this ex-parte. HO 4.

²⁰ Even without the handwriting specialist, it is clear that some of the progress notes were altered. MH/MR 76; P-16. Although I do not have the authority to order reimbursement for the handwriting experts time and expenses or Child's family's expenses seeking the original documents from MH/MR, I do think they are entitled to reimbursement.

²¹ Three weeks per month, two special instructors were to provide Child with 13 hours per week of special instruction. NT 736-737. One week per month, Child would only receive 10 hours. NT 737. Child was to receive 15 hours per week of special instruction as per his IFSP. MH/MR 2.

MH/MR found a speech therapist who could provide services if the location and times could be agreed. NT 759-760.

- D. Support ABA – Child believes that MH/MR owes 210 hours of wrap around support when it was not provided. HO 2; NT 1110. MH/MR contends it owes no hours as it was not the provider agency for this service.

97. In response to missing therapies based upon a therapist's resignation, MH/MR believes the following:

- A. Occupational therapy – Child believes MH/MR owes an additional 46 hours of Occupational Therapy services from December 8, 2004 to January 25, 2005 and from May 5, 2005 to September 17, 2005. HO 2. MH/MR agrees that it owes Child 3 hours of occupational therapy services from the beginning of January, 2005 to January 25, 2005. NT 722. It believes that it does not owe Child services from December 8, 2004, to the beginning of January, 2005 because MH/MR has 14 days to find a replacement. NT 722. MH/MR also does not believe that it owes any services to Child after the occupational therapist terminated services on May 5, 2005 because the therapist left because of Child's father's behavior. NT 723.
- B. Physical Therapy – Child alleges that MH/MR missed 74 hours of services from January 1, 2005 to September 17, 2005. HO 2. Child believes that MH/MR owes those hours less 15 hours that Child received from a private therapist.²² HO 2; NT 724. MH/MR believes that it only owes 2 hours between December 30, 2004 when Child's physical therapist resigned and January 25, 2005 when the new physical therapist could have begun providing service but Child's father declined her services. NT 725. See Findings of Fact 56-58.²³
- C. Special Instruction – MH/MR does not believe that it owes any service hours to Child after one instructor resigned because it claims the instructor resigned due to a hostile work environment caused by Child's father. NT 737.
- D. Behavioral specialist (Consult ABA)– Child claims that MH/MR owes him 107 hours of missed service minus 36.5 hours performed by a private therapist. HO 2.²⁴ MH/MR does not believe that it owes any services to Child because the specialists resigned as a result of Child's father's behaviors. NT 738-740.

²² See Finding of Fact 95 or in lieu of compensatory services, Child has requested reimbursement for the cost of the services. See Child's closing.

²³ Again, MH/MR alleges that it had 14 days to find a replacement therapist so it does not owe missed services during that time. NT 722.

²⁴ See Finding of Fact 95 or in lieu of compensatory services, Child has requested reimbursement for the cost of the services. See Child's closing.

98. As part of a settlement, MH/MR paid Child's family for the following:²⁵
- A. four hours of missed occupational therapy sessions at the rate of \$23.25 per 15 minutes, or \$ 372.00 for the four hours. NT 724.
 - B. 15 hour of private physical therapy services hours at the public rate of \$23.25 per 15 minutes or a total of \$1,097.50.²⁶
 - C. \$11,610.00 for speech services provided by Child's private therapist from October, 2004 to September, 2005.²⁷ NT 728, 759. it is possible they paid too much by counting some invoices twice – 729
 - D. 53 hours of special instruction services hours that MH/MR was not able to fill from January, 2005 to June, 2005 at a rate of \$19.82 for 15 minutes. NT 736. MH/MR calculated the amount of hours missed by adding the amount of hours both special instructors were *suppose to* have provided Child from January to June – a total of 13 hours most weeks – versus the 15 hours per week owed to Child in the IFSP. NT 736-737.²⁸
 - E. Reimbursement for 90 hours of special instruction provided by private special instructors. NT 742.

ISSUE

Is Child entitled to compensatory services for missed services from October, 2004 to July, 2005?

Are Child's Parents entitled to reimbursement for the private services they provided to Child?

²⁵ The rates per 15 minutes are determined by the Pennsylvania Department of Welfare for services provided by its contractors. MH/MR 56. The rates were later increased in a letter received by MH/MR on November 3, 2005. MH/MR 56.

²⁶ MH/MR did not pay for the two hours of missed physical therapy that it agreed it owed to Child in January, 2005.

²⁷ This amount was calculated using the public rate of \$20.98 per 15 minutes and not using the therapist's private rate of \$110.00 per hour. MH/MR agreed to pay this amount even though they did have a therapist who could have begun service in either October or November, 2004 had the family consented. MH/MR 11. The total number of hours reimbursed was over 138 hours.

²⁸ One week a month, one special instructor was not able to provide 5 hours a week to Child; rather, she was only able to provide 2 hours those weeks. NT 737. These missing hours were also included in MH/MR's calculation. NT 737.

DISCUSSIONS AND CONCLUSIONS OF LAW

Issues

It is important to note that not at issue before me is whether the services privately provided by the family are appropriate since MH/MR did not request this hearing.²⁹ Therefore in this decision, I will not address or relay my opinion as to the appropriateness of any privately obtained service.³⁰ The only issues before me are whether Child is entitled to compensatory services and whether Child's family is entitled to reimbursement for the services they retained privately.

Burden of Proof

This matter was filed and testimony began before Shaeffer v Weast, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (Nov. 14, 2005), was decided and under the old hearing officer guidelines which placed the burden of proof with the agency. Pennsylvania's Special Education Dispute Resolution Manual, July 2005. As this matter is being decided after Schaffer and L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006), the burden of proof is now borne by the party bringing the challenge. As Child filed for the due process hearing in this matter, he has the burden of proof.

Credibility

For the first time in my tenure as a Hearing Officer or with the Office for Dispute Resolution, I find no witness' testimony to be completely credible.³¹ There are numerous differences between testimony and documentation, and differences within a person's own testimony.³² I find most of the testimony to be self serving. Therefore, my conclusions are based upon documentation and testimony corroborated by documentation.³³

²⁹ Specifically, there was a great deal of testimony regarding whether the private speech therapy was inappropriate. However, this issue is not before me. If MH/MR had issues with the privately obtained services, it should not have agreed to pay the providers and instead requested its own hearing.

³⁰In fact, MH/MR has paid the family for the private speech services, some privately obtained special instruction hours and the complete private physical therapy hours at the rate authorized by the Pennsylvania Department of Welfare.

³¹ Sequestration of witnesses was not requested in the beginning of the hearing. Even if it was, sequestration is typically not done in due process hearings. Pennsylvania's Special Education Dispute Resolution Manual, July 2005.

³² For example, see Findings of Fact 18-19, 37, 71, 74 and NT 1481, 1482, 1641, 1766, 1768.

³³ A Hearing Officer may allow hearsay evidence to remain in the record. Pennsylvania's Special Education Dispute Resolution Manual, July 2005.

Individualized Family Services Plan

Under Part C of the Individuals with Disabilities Education Act (hereinafter “IDEA”), the federal government provides financial assistance to states when the states “develop and implement a comprehensive, coordinated, multidisciplinary, interagency system that provides early intervention services for infants and toddlers with disabilities and their families.” 20 U.S.C. § 1431(b)(1). Under Part C, infants and toddlers with disabilities, up to age three, are entitled to early intervention services provided at no cost and designed to meet the developmental needs of the children. 20 U.S.C. § 1432(4)(B), (C). The services are provided by “qualified personnel,” 20 U.S.C. § 1432(4)(F), and can include family training and counseling, special instruction, occupational therapy, physical therapy, psychological services, and social work services. 20 U.S.C. § 1432(4)(E).

A child in need of services to meet his/her developmental needs shall receive a written Individualized Family Service Plan (hereinafter “IFSP”) describing the needs of the child and the services in which he or she is entitled. 20 U.S.C. § 1436(a)(3). The IFSP must include a statement of: 1) the child’s present levels of development; 2) the family’s resources, priorities, and concerns (with the agreement of the family); 3) the measurable results or outcomes expected to be achieved by the child and the criteria, procedures, and timelines used to determine progress;³⁴ 4) specific early intervention services necessary to meet the needs of the child including the frequency, intensity, and method of delivery; 5) the natural environments in which the services will be provided; 6) the projected dates for initiation of service and the anticipated length, duration, and frequency of service; 7) the identification of the service coordinator who will be responsible for the implementation of the plan; and 8) the steps to be taken to support the transition of the child to preschool. 20 U.S.C. § 1436(d); 55 Pa. Code §4226.74(2). In order for the services in the IFSP to be provided to a child, a child’s parents have to consent to those services either on an IFSP Addendum or Parental Rights notice. 20 U.S.C. § 1436(e); NT 25, 73-74.

An IFSP must be evaluated once a year and reviewed at 6 month intervals. 20 U.S.C. § 1436(b). Each annual meeting to evaluate the IFSP shall include the parents, service coordinator, a person directly involved in conducting the evaluations and assessments of the child, persons providing services to the child, other family members, and an advocate if requested by the family. 55 Pa. Code §4226.73(a). If someone is unable to attend a meeting, arrangements shall be made for the person’s involvement through another means, including by telephone conference, authorized representative, or by making records available at the meeting. 55 Pa. Code §4226.73(b). By contrast, the IFSP review may be convened by a meeting or by other means *acceptable to the parents in settings and at times convenient to the parent*. 55 Pa. Code §4226.72 (italics added).³⁵

³⁴ Unlike MH/MR testimony, neither the federal statute nor Pennsylvania Regulations base IFSP outcomes on parental wishes. NT 25, 230, 269.

³⁵ A large amount of testimony centered on some meetings being held at night. However, the Regulations are clear that meeting should be at the convenience of the parents.

In the case at bar, MH/MR alleged that if an annual IFSP meeting is not held, services cannot be provided because the parents have not consented. NT 41. However, that is not applicable here. Although many meetings were scheduled and canceled, an annual IFSP meeting was held on February 22, 2005 although goals were not written at that time. After the annual IFSP meeting on February 22, 2005, the next communication to Child's parents to discuss scheduling a new meeting to write goals for Child's IFSP was May 4, 2005. NT 244. This delay was clearly not appropriate. MH/MR alleges that Child's family did not want to have another meeting to discuss the IFSP until all Child's therapists were working with Child. NT 244-246. Whether that was true, it does not waive MH/MR's responsibility under the law to have goals written for a child.³⁶ "It is important to note that while Part C recognizes the importance of, and requires parent involvement in decisions regarding appropriate early intervention services for their infants and toddlers with disabilities, it does not relieve the State Lead agency of its responsibility to ensure that other regulatory and statutory requirements, including the natural environments provisions, are met." Letter to Elder, OSEP letter dated July 17, 1998.

It is true that there were many delays in the scheduling of meetings and many instances of meetings being cancelled. These problems were not attributable to one party; rather both parties are to blame for the delays.³⁷

Natural Environments

To the maximum extent appropriate, a child receiving early intervention services should receive those services in a natural environment, including the home and community settings in which a child without disabilities participates. 20 U.S.C.1432 (G). The term "natural environments" has been defined as "settings that are natural or normal for a child's age peers who have no disabilities, including the home and community settings in which children without disabilities participate. 55 Pa. Code § 4226.5. Natural environments are communities or locations where the child lives, learns, and plays and in the activities and routines that occur in a variety of settings where children and families spend time. Mental Retardation Bulletin number 00-99-08, issued August 2, 1999. It is the parents right to choose the appropriate natural environment. Mental Retardation Bulletin number 00-95-08, issued June 15, 1995.

In a few areas, MH/MR violated the natural environment mandate. It refused to provide special instruction in the day care when the family requested a change in location. See Finding of Fact 87.³⁸ It offered speech services to Child in a center-based program. It also complained that Child's parents used some therapists as "babysitters" because they would take Child to the community playground. While it is not at all clear from the record who initiated the idea of taking Child to the community playground, the

³⁶ See Finding of Fact 80.

³⁷See, Findings of Fact 23, 24, 25, 35, 36, 37, 42, 67, 79, and 81.

³⁸It is not for MH/MR to refuse or determine the natural setting in which services will be provided for a Child, it is the family's decision. Mental Retardation Bulletin number 00-95-08, issued June 15, 1995.

idea was a good one in order for Child to transfer his acquired skills to an age appropriate setting where children with and without disabilities play and spend time. Mental Retardation Bulletin number 00-99-08, issued August 2, 1999.

Implementation of an IFSP

MH/MR “shall ensure that an IFSP is developed and implemented for each infant or toddler with a disability.” 55 Pa. Code §4226.71(c). Early Intervention services shall be initiated as soon as possible after the IFSP is completed but no later than 14 calendar days from the date the IFSP is completed. 55 Pa. Code §4226.75(b). There is no timeline in the law for when a new therapist must be in place after a therapist terminates services.

There were numerous reasons for the delays or lack of implementing the services in Child’s IFSP.³⁹ These problems were not attributable to one party; rather, both parties are to blame for the delays in implementation or the lack of implementation. One clear reason was the number of therapists who resigned. Some therapists resigned for personal reasons, many resigned because of Child’s father’s behavior. MH/MR claims that it had 14 days from the time that each therapist terminated services to find another therapist. Although, this claim is not substantiated anywhere in the law, the reality is that MH/MR could not be required to have a therapist ready to begin immediately whenever a therapist resigned as a result of a confrontation with Child’s father. However, some delays by MH/MR in locating a new therapist were unwarranted. Every time a therapist terminated services, MH/MR would request dates and time from Child’s family to schedule the therapy. This would occur even though specific dates and times were already in place for that specific therapy. NT 100. For example, MH/MR claims that physical therapy services were not provided to Child soon after the physical therapist resigned in December, 2004 because the family did not provide dates and times they wished physical therapy to occur, even though Child had already been receiving physical therapy from MH/MR at specific dates and times. NT 189. When no dates and times were provided by the family, referrals were finally sent seeking a physical therapist who could provide services during the time that Child had previously received physical therapy services. NT 100-101, 189-190. This should have occurred as soon as MH/MR heard about the resignation.

Conflict Resolution

“Congress envisioned that the cooperative process of developing, reviewing, and modifying IFSPs would lead to disagreements between parents and the local agency in charge of administering the program. It is easy to foresee that conflicts will arise when parents and local agencies have different perspectives on what services are best for the child.” De Mora v. Bucks Department of Mental Health/Mental Retardation, 379 F.3d 61, 76 (3d. Cir. 2004). To protect a family's right to early intervention services,

³⁹ See Findings of Fact 28, 38, 39, 44, 55-57, 58, 63-64, 65, 68, 87, 92-93, 94, 96, 97.

Congress incorporated procedural safeguards into IDEA. 20 U.S.C. §§ 1415, 1439. These safeguards give parents "the opportunity . . . to examine records relating to assessment, screening, eligibility determinations, and the development and implementation of the . . . [IFSP]" and mandate "written prior notice to the parents . . . whenever the State agency or service provider proposes to initiate or change or refuses to initiate or change . . . the provision of appropriate early intervention services." 20 U.S.C. § 1439(a)(4)(6).

Parents also have the right to an independent evaluation funded by MH/MR when a parent disagrees with an evaluation obtained through MH/MR and the independent evaluation is needed to assist in the resolution of a disagreement. Mental Retardation Bulletin number 00-99-09, issued August 2, 1999.⁴⁰

If a parent disagrees with an IFSP or with the appropriateness of services, a parent can request a meeting with county administrative personnel to discuss and resolve the issues. 55 Pa. Code § 4226.97(a). If a resolution is reached, the IFSP shall be revised accordingly. 55 Pa. Code §4226.97(b)(4). IDEA also entitles the parents to an impartial due process hearing. 20 U.S.C. § 1415(f).

There was a great deal of testimony regarding the January 21, 2005 "administrative" meeting held to resolve Child's families concerns, and whether the services offered at that meeting were agreed to by the therapists working with Child. However, this testimony is irrelevant as counsel for MH/MR agreed to these services on behalf of his client, MH/MR. Had MH/MR not approved offering these services to Child, it should not have given approval for its counsel to offer them. Whether Child needed these services or not, MH/MR agreed to provide them and was therefore obligated to find qualified therapists and instructors to implement the services. It did not do that. See, "Implementation of the IFSP" section above.

Remedies

IDEA permits a court to grant relief the court determines is appropriate. 20 U.S.C. § 1439 (a)(1). The Supreme Court in School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts, interpreted IDEA's provision mandating reviewing courts to grant "appropriate" relief as conferring broad discretion on those courts, and stated "the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act." 471 U.S. 359, 370, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985).

Child is seeking both compensatory services for the service hours he did not receive while in the Early Intervention system as well as reimbursement for the private services his family retained. I will first review the law related to reimbursement.

⁴⁰ Testimony was received regarding the unusual occurrence of MH/MR funding an independent evaluation. Whether it is unusual or not, a parent is entitled to it under circumstances such as those in this case.

The Court in Burlington held that reimbursing parents for expenses incurred from placing their child in private school is "appropriate" relief when a court has found that the public school placement was inappropriate and that the parents' private placement was appropriate. Id., 471 U.S. at 370. The holding in Burlington was used in Florence County School District Four v. Carter, 510 U.S. 7, 126 L. Ed. 2d 284, 114 S. Ct. 361 (1993), which held that parents have a right to reimbursement for a unilateral placement in a private school if a federal court concludes both that the County's approved placement violated the IDEA and that the private school placement was proper under the IDEA. See, T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 580 (3d Cir. 2000). The Court noted that "courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." Florence, 510 U.S. at 7. Although Burlington and Florence involved children who were not obtaining services in the Early Intervention system under Part C, the Court in de Mora did cite to them while determining that reimbursement is a remedy under Part C.

With respect to the other remedies, including compensatory services, under Part C, the Court in de Mora stated:

Although Congress envisioned parental involvement, however, Congress primarily contemplated that Bucks County would provide the early intervention services to I.D. and her family at no cost and that de Mora and her family would not have to resort to providing those services or paying for them. The level of parental involvement that Congress intended when a state meets its burden of providing appropriate early intervention services is entirely separate from what Congress intended as a remedy when a state fails to meet that burden. Congress contemplated a broad remedy when it gave reviewing courts the discretion to award "appropriate" relief. 'Congress expressly contemplated that the courts would fashion remedies not specifically enumerated in IDEA.' Matula, 67 F.3d at 494-95.

De Mora, 379 F.3d at 71-72. The Court in de Mora also stated, "[c]onsistent with our holding in Lester H., we must accept the proposition that de Mora is entitled to some type of remedy that is consistent with the purposes of Part C of IDEA.⁴¹ Because of significant differences between Part B and Part C, however, the compensatory remedy that was available in Lester H. would be ineffective and insufficient for correcting Bucks

⁴¹ The Court in Lester H. held the public agency "should [not] escape liability for [educational] services simply because [the parent] was unable to provide them in the first instance. We conclude that Congress, by allowing the courts to fashion an appropriate remedy to cure the deprivation of a child's right to a free appropriate public education, did not intend to offer a remedy only to those parents able to afford an alternative private education. The only question remaining then is whether the court abused its discretion by granting 30 months of compensatory education to Lester beyond age 21. We conclude that it did not. Lester H. v. Gilhool, 916 F.2d 865, 872-873 (3rd Cir. 1990), cert denied, 499 U.S. 923 (1991)(The court determined that granting comp ed before 21 was not beneficial to Lester since he was in an appropriate placement at the time).

County's violation in this case.” De Mora, 379 F.3d at 72 (underline added). MH/MR cites to the underlined language in de Mora for the assertion that the United States Court of Appeals for the Third Circuit has held that once a child reaches the age of three, a compensatory relief award for cases arising under Part C of the IDEA would not be appropriate because he is immediately eligible for services under Part B.⁴²

Although the Court in de Mora does state, “a compensatory remedy may be effective under Part B because it allows disabled children to receive free services beyond their age of eligibility, such a remedy provides no benefit under Part C because disabled infants and toddlers become immediately eligible for Part B services upon reaching age three,” it does not actually state that compensatory services cannot be a remedy. De Mora, 379 F.3d at 73.⁴³ In fact, compensatory education has been granted in a Part C matter. Andrew M. v. Del. Co. Office of Mental Retardation, 2006 U.S. Dist. LEXIS 7858 (E.D. Pa. 2006). “The fact that services were not provided at St. Faith's during these five months was not disputed, and it is not disputed here. As I pointed out in my decision, “in light of the fact that services were not delivered, it is immaterial that, as the County claims, no services were formally discontinued.” Andrew M., at 7 and 8. The Court awarded compensatory education for the 5 months when services were not provided to Andrew.

In addition, 34 C.F.R. §303.510(b) permits an award of compensatory services. Under 34 C.F.R. § 303.510 (b), a resolution must address both: (1) how to remediate the denial of services for the individual child, which can include an award of compensatory services, monetary reimbursement or other corrective actions appropriate to the needs of the child and family, and (2) appropriate future provision of services for all infants and toddlers with disabilities and their families. “Because the basis of the compensatory services remedy is the past denial of early intervention services that were not originally provided, compensatory services as a remedy could, if determined appropriate, be available even after a child is no longer receiving services under Part C and independent of any current right the child may have to a free appropriate public education. Receiving special education and related services under Part B would not alter a child’s right to compensatory

⁴² If I was to rule the way MH/MR would like, what incentive would any MH/MR have to provide any services to a child if they knew they would not be held responsible after the child turns 3 years old.

⁴³The Court in Matula, like the Court in Lester H. discussed awarding compensatory education while a child was eligible for IDEA services. Neither court disallowed an award of compensatory education to a child still receiving IDEA services. Matula states, “in fashioning a remedy for an IDEA violation, a district court may wish to order educational services, such as compensatory education beyond a child's age of eligibility, or reimbursement for providing at private expense what should have been offered by the school, rather than compensatory damages for generalized pain and suffering.” W.B. v. Matula, 67 F.3d 484, 495 (3d Cir. 1995). (underline added). In addition, because de Mora determined the best remedy was reimbursement, it did not need to address those cases under Part B where compensatory education was granted to a child without regard to his current or future eligibility for services under IDEA or cases where a child could receive compensatory services prior to his/her 21st birthday. Neshaminy School District v. Karla B., (E.D. Pa 1997); Deptford Township S.D. v. H.B., 2005 U.S. Dist. LEXIS 11602 (D.C. N.J. June 15, 2005); Reid v. School District of Philadelphia, 2004 U.S. Dist. LEXIS 17275 (E.D. Pa. 204); Brad J. v. Pennsylvania Department of Education, 1995 U.S. Dist. LEXIS 6172 (E.D. Pa. 1995).

services under Part C, if compensatory services were identified by the lead agency, a due process hearing officer, or a judge as an appropriate remedy to redress a denial of services.” Letter to Anonymous, OSEP letter August 19, 2003.

The facts in the matter before me are similar to the facts in Andrew M. There was no dispute that services were not provided to Child. What was in dispute was the reason for the lack of services and whether Child’s parents are entitled to reimbursement for the services they retained.

Clearly, Child’s parents are frustrated with MH/MR and their son’s delays. Moreover, it is clear there was a breakdown in communication between MH/MR and Child’s family to the point that it is difficult to ascertain whose story is completely accurate. I suspect the truth lies somewhere in between. Regardless, most important to me is whether Child received the services in his IFSP.

I find that both sides have acted improperly in this matter. MH/MR should have been doing more to provide services to Child, and the altering of documents to show Child received services when in fact he did not is appalling.⁴⁴ However, the behavior of Child’s father was also not one of collaboration.⁴⁵ In the end, it was Child who suffered by not being provided services during a very critical time in his life. I believe in the hostility between the adults, both sides lost track of who was really important in this matter. It is hard to imagine the progress Child would have made if he had been provided the services in which he was entitled.

I do not believe that Child should suffer because of the tensions and behaviors of both MH/MR and Child’s father. However, I also do not believe that Child’s family should be compensated as a result of Child’s father’s behavior. In order to determine what, if anything, should be awarded, I will review each therapy separately.

Child alleges that MH/MR owed him a total of 135 hours of speech therapy. HO 2. Child’s private therapist was able to provide 121.5 hours of service to Child. HO.2. Therefore, Child claims MH/MR still owes him 13.5 hours of service with 10.50 of those hours stemming from missed services from August 12, 2004 to October 2, 2004. HO 2. MH/MR does not agree it owes Child for missed sessions from August 12, 2004 to October 2, 2004 since Child was receiving services at a center-based program and because MH/MR found a speech therapist who could provide services if the location and times could be agreed. NT 759-760. However, it did reimburse Child’s parents \$11,610.00 for speech services provided by Child’s private therapist from October, 2004 to September, 2005.⁴⁶ NT 728, 759.

⁴⁴ See MH/MR 76; P-16. In addition, the changing of documents after providing them to the family is inappropriate and would certainly lead to concern on the part of a family. MH/MR 2, 59, 72; NT 1375-1376.

⁴⁵ In addition to the negative and argumentative behavior testified to throughout this hearing, Child’s father also filed a lawsuit against a former therapist and agency. MH/MR 82.

⁴⁶ This amount was calculated using the public rate of \$20.98 per 15 minutes and not using the therapist’s private rate of \$110.00 per hour. MH/MR agreed to pay this amount even though they did have a therapist

I disagree with MH/MR and determine MH/MR owes Child for missed sessions from August 12, 2004 to October 2, 2004 since therapy was offered at a center-based program and not in Child's natural environment as is required under IDEA. See, Natural Environment section above. Not until the end of September, 2004 did MH/MR locate a speech therapist who could service Child in his natural environment. Finding of Facts 21 and 28. Therefore, Child's family is entitled to reimbursement for 135 hours of missed therapy sessions. However, because MH/MR already reimbursed Child for over 138 hours of missed service, it does not owe additional speech services.⁴⁷

Another issue relating to speech services was whether Child's family should be reimbursed at the speech therapist's private rate or at the MH/MR rate. Unlike compensatory education which benefits a child, reimbursement is a remedy which benefits a child's family and is subject to a balancing of equities. As a result, reimbursement can be reduced or denied upon a finding of unreasonableness of actions taken by the parents. 20 U.S.C. § 1412 (C)(iii)(III). As stated above, I find Child's father's behavior and actions to be unreasonable. Therefore, I deny additional reimbursement beyond the MH/MR rate.

With respect to Special Instruction, Child believes he is owed a total of 228 hours of service and reimbursement for 152 hours provided by a private instructor. HO 2. MH/MR agrees that it owes 53 hours of special instruction hours to Child as a result of this service not being fully implemented from January, 2005 to June, 2005. MH/MR calculated the amount of hours missed by adding the amount of hours both special instructors were *suppose to* have provided Child from January to June – a total of 13 hours most weeks – versus the 15 hours per week owed to Child in the IFSP. NT 736-737.⁴⁸ MH/MR did provide monetary compensation for the 53 hours of special instruction services that it was not able to fill from January, 2005 to June, 2005 at a rate of \$19.82 for 15 minutes. NT 736. MH/MR does not believe that it owes any service hours to Child after one instructor resigned because it claims the instructor resigned due to a hostile work environment caused by Child's father. MH/MR did, however, reimburse Child's parents for 90 hours of special instruction provided by private special instructors. NT 737, 742.

MH/MR did not try to find a replacement for the other special instructor who had worked with Child until June, 2005 when she resigned as a result of Child's change of natural environment. Therefore, I will grant reimbursement to Child's family in the amount of 6 hours: 152 hours paid for by Child's family minus the 143 hours already reimbursed by MH/MR for special instruction and the additional 3 hours reimbursed for speech services over and above that which was due. I will also grant compensatory

who could have begun service in either October or November, 2004 had the family consented. MH/MR 11. The total number of hours reimbursed was over 138 hours.

⁴⁷MH/MR did agree to reimburse the speech therapist for travel to Child's day care, but since the therapist did not provide services there, I am not granting any reimbursement for travel.

⁴⁸ Three weeks per month, two special instructors were to provide Child with 13 hours per week of special instruction. NT 736-737. One week per month, Child would only receive 10 hours. NT 737. Child was to receive 15 hours per week of special instruction as per his IFSP. MH/MR 2.

services to Child in the amount of 218 hours of special instruction: 228 hours not provided by MH/MR or the private provider minus 10 hours (two weeks of therapy hours) that would have been missed while MH/MR looked for a new therapy provider.⁴⁹

With respect to occupational therapy, Child alleges that he is owed a total of 52 hours of occupational therapy services. MH/MR agrees that it owes Child 3 hours of occupational therapy services from the beginning of January, 2005 to January 25, 2005. NT 722. It believes that it does not owe Child services from December 8, 2004, to the beginning of January, 2005 because MH/MR has 14 days to find a replacement. NT 722. MH/MR also does not believe that it owes any services to Child after the occupational therapist terminated services on May 5, 2005 because the therapist left because of Child's father's behavior. NT 723. In an attempt to settle the matter, MH/MR paid Child for four hours of missed occupational therapy sessions at the rate of \$23.25 per 15 minutes, or \$ 372.00 for the four hours. NT 724.

The occupational therapist did not provide services on 7 occasions from September, 2004 to December 8, 2004 even though she claimed that she did. This time is owed to Child. MH/MR also owes Child for the services missed from May 5, 2005 to September 17, 2005 when it did not make any attempt to find a replacement occupational therapist for Child. Therefore, I will grant 44 hours of compensatory service hours for missed occupational therapy. I reached this amount by deducting from the 52 missed therapy hours the 4 hours already paid by MH/MR through settlement and 8 hours (4 weeks) during which MH/MR would have been searching for replacements for the two therapist who resigned.⁵⁰

Regarding physical therapy, Child claims that MH/MR owes him 74 hours of missed physical therapy and reimbursement for 15 hours of service provided by a private provider. MH/MR did reimburse Child's family for the 15 hour of private physical therapy services hours at the public rate of \$23.25 per 15 minutes or a total of \$1,097.50.⁵¹ MH/MR believes that it only owes 2 hours between December 30, 2004 when Child's physical therapist resigned and January 25, 2005 when the new physical therapist could have begun providing service but Child's father declined her services. NT 725. See Findings of Fact 56-58.⁵²

I believe that MH/MR does owe Child physical therapy hours, but the amount is hard to determine. I believe that MH/MR owes Child 8 hours for the month of January, 2005, (two hours per week) since MH/MR was informed long before the physical therapist left in December that she would be resigning as a result of maternity leave; yet, instead of finding a replacement for the times Child was already receiving service,

⁴⁹ The special instructor resigned in February, 2005 over a conversation with Child's father. See Findings of Fact 61-64.

⁵⁰ One therapist left for personal reasons in December, 2004 and one therapist left in May, 2005 because of a conflict with Child's father.

⁵¹ MH/MR did not pay for the two hours of missed physical therapy that it agreed it owed to Child in January, 2005.

⁵² Again, MH/MR alleges that it had 14 days to find a replacement therapist so it does not owe missed services during that time. NT 722.

MH/MR wrote letters asking Child's family when it wanted services provided. I do not believe that MH/MR owes additional services for the month of February, 2005, however, when MH/MR wrote to Child's family requesting dates and times for service after Child's family changed the location of the therapy from home to Child's day care and Child's family did not respond to MH/MR's request.⁵³ However, on February 25, 2005, Child's mother did provide dates and times for service, P-11, yet, MH/MR did not attempt to locate a therapist. Therefore, MH/MR owes Child additional services from March, 2005 for a total of 51 hours of physical therapy.

With respect to the behavioral specialist, or "Consult-ABA" as listed on HO 2, Child alleges that MH/MR owes Child a total of 70.5 hours of behavioral therapy services as well as 36.5 hours of reimbursement for services provided by the private therapist. HO 2. MH/MR does not believe that it owes any services to Child because the specialists resigned as a result of Child's father's behaviors. NT 738-740.⁵⁴

While it may be true that the behavioral specialist who worked with Child until April, 2005 did resign as a result of a confrontation with Child's father, the former behavioral specialist resigned because of something he heard from another therapist and not because of any difficulty with Child or Child's family. Therefore, I am granting a total of 36 hours of compensatory services to Child for 9 weeks of missed services.⁵⁵ Because the private behavioral therapist's pay rate was less than MH/MR's rate, I will also grant Child's family reimbursement for the 36.5 hours of service the private behavioral therapist provided service to Child after MH/MR failed to locate a replacement therapist.

There was testimony regarding whether reimbursement should be granted to Child's family for the services of the special instructors and the behavioral specialist because their credentials were suspect. Aside from the fact that the special instructor working with Child through MH/MR did not have any formal training in ABA, parents, unlike MH/MR, are not required to find a replacement who meets the definition of "qualified personnel" when MH/MR fails to provide appropriate services. Florence County, 510 U.S. at 14; de Mora. In Florence County, the Supreme Court held that parents were entitled to reimbursement for private education expenses even though the private school did not meet state standards. The Court reasoned that if parents were required to place their children in schools that do meet the state's requirements, it would eliminate their right to withdraw their child from the inappropriate placement and the child's right to an appropriate education. Id. It would be inconsistent with IDEA's goals to forbid parents from using a replacement to provide appropriate early intervention

⁵³ Although balancing of equities is usually not done regarding the remedy of compensatory education, as there was a claim for both compensatory services and reimbursement, I will balance the equities.

⁵⁴ I do not believe father's account of rude comments made by the behavioral specialist and I do believe he did get angry with MH/MR staff and contractors as was corroborated by Child's mother's testimony. As with other therapies, I believe that in subtle ways, he attributed to delays in MH/MR providing services to Child. Finding of Fact 33, 39, 56-58, 70, 80.

⁵⁵ Three weeks in February, 2005 after the first behavioral therapist resigned for no just reason, 4 weeks in May, 2005 after the new behavioral therapist resigned in April, 2005 (not counting 14 days for MH/MR to find a replacement), and two weeks in June, 2005 until the private behavioral therapist began.

services "simply because that . . . [person] lacks the stamp of approval of the same . . . system that failed to meet the child's needs in the first place." Id. Therefore, even if the private behavioral specialist and the private special instructors were not qualified – and I am not determining that they were not – Child’s family can still obtain reimbursement.

Wrap-Around Services

Child’s last allegation is that MH/MR owes him 210 hours of support ABA, otherwise known as wrap-around services. If a public agency other than MH/MR fails to pay or provide services pursuant to an interagency agreement or other mechanism for interagency coordination, MH/MR shall provide or provide for the provisions of such services to child and seek reimbursement from the public agency. 20 U.S.C. § 1440 (b).

However, the wrap around services discussed at the January 21, 2005 meeting were not pursuant to an interagency agreement or other mechanism for interagency coordination; therefore, MH/MR was not responsible for providing these services when another agency did not. Moreover, these services were not included in any of Child’s IFSPs or Addendums. Therefore, Child is not entitled to compensatory services for the lack of wrap-around services.

ORDER

MH/MR is ordered to provide a total of 349 hours of compensatory services to Child. Child's family is authorized to choose and access appropriate services from any reasonable educational, habilitative, therapeutic, or recreational program which furthers Child's current IEP goals. If the compensatory service providers' rates are higher than the MH/MR rate at the time the services are provided, MH/MR will only be responsible to pay the MH/MR rate.

MH/MR is also ordered to reimburse Child's family for 36.5 hours of private behavioral specialist services.

No additional reimbursement is required by MH/MR for the private speech therapist retained by Child's family.

No compensatory services are required by MH/MR for the wrap-around or support-ABA services.

Marcie Romberger, Esquire