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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: Student

Date of Birth: xx/xx/xx

Dates of Hearing: April 28, 29, 30, July 27, August 10, 11, 2009

CLOSED HEARING

ODR No. 9835/08-09 AS

Parties to the Hearing:

Parents:	Representative: Colleen P. Frankenfield, Esq. Latsha, Davis, Yohe & McKena, P.C. 350 Eagleview Boulevard, Suite 100 Exton, PA 9341 cfrankenfield@ldylaw.com
School District: Methacton School District 1001 Kriebel Mill Road Norristown, PA 19403-1047	School District Attorney: Sharon W. Montanye, Esq. Sweet, Stevens, Katz & Williams 331 Butler Avenue P.O. Box 5069 New Britain, PA 18901-5069 smontanye@sweetstevens.com
Date Record Closed:	August 31, 2009
Date of Decision:	September 14, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student) [1] is a teen-aged high school senior at the Methacton School District (District) with attention deficit hyperactivity disorder (ADHD). Arguing that the District has not provided Student a free and appropriate public education (FAPE) since 2001, Student seeks compensatory education and Student's parents seek reimbursement for an evaluation and tuition costs associated with an out-of-state wilderness program. Of Student's timely claims, the District denied FAPE to Student from December 28, 2007 when it recommended that Student not be reevaluated, through the end of the 2007-2008 school year. Student's Parents are not entitled to evaluation reimbursement because they did not disagree with the District's evaluation (or, in this case, the District's recommended waiver of evaluation.) Student's parents are not entitled to reimbursement of wilderness program costs because it is not an appropriate unilateral program and placement.

ISSUES

Whether the District has provided FAPE to Student since 2001?

Whether the District's proposed program and placement is appropriate?

Whether Student is entitled to compensatory education?

Whether Parents are entitled to reimbursement for an evaluation and/or tuition costs associated with an out-of-state wilderness program?

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[1] All future references to Student will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a teen-aged high school senior at the District who is eligible for special education under the category of other health impairment (OHI) due to ADHD. (S5, pp.1, 19) [2] Student's intellectual and academic functioning is in the average range. (S5; P80)
2. Since 1st grade, Student's parents have been concerned about Student's academic performance. (P4,p.1; NT 38-40)
3. At the end of 3rd grade (2000-2001), Student's Parent requested an educational evaluation of Student, signed a permission to evaluate form, and received a procedural safeguards notice. (P7; P8,p.10; S2,p.5; NT 46-50) The District's September 19, 2001 evaluation report (ER) concluded that Student's IQ was in the average range, and that Student demonstrated good skills in all academic areas. (P12,p.4-5; S2,p.8) Noting that some progress was hindered by attention deficit disorder (ADD) but that medication was effectively moderating this difficulty, the ER concluded that Student was not eligible for special education services. (P12; S2,p.10)
4. At the end of 6th grade (2003-2004), Student's Parent gave to the District a physician's letter stating that Student has ADD and needs a Section 504 plan with accommodations. (P2; NT 63) On March 29, 2004, Parent signed a permission to evaluate student and received a procedural safeguards notice. (P13,p.2;S3,p.2) The District, however, did not conduct the requested evaluation because at that

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[2] References to "HO," "S" and "P" are to the Hearing Officer, District, and Parent exhibits, respectively. References to "N.T." are to the transcripts of the hearings conducted in this matter.

time its practice for children with ADD diagnoses, even when a parent requested an evaluation, was to provide a Section 504 plan without performing an evaluation. (NT 1108-1109)

5. On September 29, 2004 (7th grade), the parties agreed to a Chapter 15 service agreement.[3] (P14; S4) Two months later, on November 22, 2004 (7th grade), Student's Parents gave the District permission to evaluate Student. (P15) Parent acknowledged receipt of a procedural safeguards notice at that time. (P15, p.2; P16; NT 65-67, 417)
6. On February 10, 2005, the District issued a reevaluation report (RR) essentially concluding the same thing it concluded in its September 2001 ER, i.e., that there was no learning disability and Student's problems were avoidance behaviors, distractedness, incomplete work, not keeping track of assignments, disorganization and leaving class. (NT 69,-70, 416; P19,p.2; P20; S5,pp.2, 10)
7. Four months later, however, on June 27, 2005, the District issued an addendum to its February RR, finding Student eligible for special education services under the "other health impaired" (OHI) category. Based upon Student's poor grades during the 4th quarter, as well as several disciplinary incidents, the District concluded that Student was experiencing academic problems and difficulties with interpersonal relationships that required special education services. The District recommended incorporating Student's Section 504 plan into an individualized education program (IEP) and providing counseling to Student to address anger

[3] 22 Pa. Code Chapter 15 contains the Commonwealth's regulations implementing Section 504 of the Rehabilitation Act and its federal implementing regulations.

management and organizational issues. (S5,p.19; NT 1076, 1078; P10,p.3; P19, p.17)

8. Student's August 1, 2005 8th grade IEP contained goals for organizational/time management skills, study skills, and completion of assignment. (P22; S6) That IEP indicated that Student was on grade level academically but was demonstrating frustrational and avoidance behaviors. The "behaviors" box on the IEP form was not checked, and no behavior assessment or behavior plan was prepared for 8th grade. (NT 78; P22; S6)
9. On May 25, 2006, at the end of Student's 8th grade (2005-2006) school year, the IEP team developed Student's IEP for the upcoming 9th grade high school year. The IEP team increased the level of support to daily direct instruction and support on IEP goals, and counseling services were removed at the request of the Parents. (P25,p.4; S8, pp.2,5)
10. Student's 9th grade (2006-2007) special education teacher did not observe any behavior problems with the Student. (NT 377, 379, 385-386) She did observe difficulties in organization and work completion. When her data collection indicated that existing interventions were not effective, she modified her interventions to stabilize Student's decreasing trend line. She admits that Student's IEP goal was not accomplished in 9th grade. (NT 344-345; P27,pp.9, 24-32) Student finished the school year with 4 Ds and 1 F in Spanish. (P10, p.6)
11. On May 1, 2007, at the end of Student's 9th grade school year, the IEP team modified Student's schedule to include co-taught math class where Student could receive additional support from both a regular education and a special education

teacher. (S9,pp. 4,5,8) Student also would receive English course in the Resource room for additional support. (S9; P27; P28; P29; P32)

12. During 10th grade (2007-2008) Student became more detached, depressed and withdrawn. (NT 453-454) Student's behavior became more defiant; Student would refuse to cooperate and leave class to avoid doing work. (NT 457, 458; P60) Student's parents informed the District that Student's neurologist diagnosed depression and advised the District that Student wanted to quit school. (NT 454-456, 466) In response to Student's difficulties, the IEP was revised on September 5 (S10; P34,p.2), November 14 (S11; P36,p.4) and December 18, 2007 (S12; P38; NT 464, 541-542, 553, 568) A supported study hall and counseling services were added to the IEP, Student's schedule was changed so that all courses were co-taught to provide additional support, Student's handwriting illegibility was accommodated with the use of a computer and permission for Student to read illegible test answers to the teacher, and a teacher with whom Student had a good rapport volunteered to mentor Student. (SD11; SD12; P36; NT 550-552, 568)
13. On December 28, 2007, the District recommended waiving reevaluation of Student because ongoing progress monitoring indicated that Student was making expected progress. Student's parents agreed to waive reevaluation of Student. (S14; P40; NT 464-465)
14. On June 9, 2008, at the end of Student's 10 grade school year, the IEP team developed Student's 11th grade IEP. (S16)
15. From August 5, 2008 to October 8, 2008, Student attended, at private expense and without consultation with the District, a nine-week outdoor wilderness program in

[redacted state] (Wilderness). (P52; NT 465-466, 467, 468) Wilderness is a [state redacted] licensed therapeutic treatment program that treats adolescents who are struggling in school or home. Wilderness' rugged outdoor experience and daily journaling promotes the adolescents' self-discovery. Wilderness does not provide educational services or special education services. (NT 276, 297, 305-310, 328, 923) Student's Wilderness advisor observed that Student's poor self esteem made it difficult to accept help from others, and that Student experienced significant frustration and engaged in avoidance behaviors during any academic activities. (NT 274, 286-287, 291) Student's Wilderness advisor taught Student how to receive academic assistance without perceiving it as a message that Student was bad or lazy or dumb. (NT 316)

16. Wilderness also arranged for a psychoeducational evaluation to determine whether Student's avoidance and resistive behaviors were related to a learning disorder. (NT 288) On September 12, 2008, Dr. C issued an ER for Wilderness. (P51; S23) Dr. C is a [redacted state]-licensed psychologist in [state redacted] but not a certified school psychologist in either [state redacted] or Pennsylvania. Dr. C. testified at the due process hearing by telephone.
17. Dr. C's evaluation was conducted in the wilderness in the back of his SUV in a single six hour session. Student's IQ was measured as 81, which was 26 points lower than the 2001 ER's IQ of 107 and 14 points lower than the 2005 ER's IQ of 95. (P12, p.5; P51, p.6) Dr. C's ER determined Student's math grade equivalency as 5.9. (NT 189-191) Verbal comprehension was at grade level. (NT 189) Written expression was ½ standard deviation decrease from 2005. (NT 192) Dr. C

diagnosed attention deficit hyperactivity disorder (ADHD) (combined type), Depressive Disorder not otherwise specified (NOS), Anxiety Disorder NOS, Learning Disorder NOS, and Academic Problems. (P51,p.15)

18. As soon as Parents received Dr. C's ER in September 2008, they gave a copy to the District. (NT 468-471)
19. Student returned from Wilderness on or about October 8, 2008. Upon discharge, Wilderness recommended that Student attend school in a small group setting with an environment with rules and boundaries that were clear, with immediate consequences for behaviors and additional support for academic needs. (NT 295-296) Wilderness determined that Student's primary area of need was attention deficit learning disorder that was impacting ability to perform academic tasks. (NT 284-285)
20. The District recommended, and Parent agreed, that Student would attend [redacted] Academy (Academy) upon returning from Wilderness. (NT 471, 472; S18; P43) Academy is a private alternative education provider with small class sizes. (S18; P45; NT 729-730; P45) Academy is designed for students who are lost in large public school environments, who are coming back from other alternative placements, for students who require a small environment, for students who had disciplinary incidences in a public school setting, and for students who have trouble coming to school. (NT 699-701) Academy does not accept juvenile delinquents or students with a history of violent behaviors. (NT 699, 700) Academy provides individual and group therapeutic support, regular academic curriculum, implementation of IEPs with certified special education teachers, and

school wide and individual behavior support programming. Academy implemented Student's June 9, 2008 IEP but did not send progress monitoring. (NT 704-705, 715, 1036, 1037; SD16)

21. Student did not enjoy attending Academy. Student thought there were only two members of Student's race at Academy. (NT 890, 1028) In fact, Academy's student body is predominately Student's race, and five of the six students that the District sent to Academy last year were members of Student's race. (NT 1019) Student did like the teachers, the small class sizes and the supportive environment at Academy. (NT 920-921). The Academy's Director observed Student's frequent positive interactions with staff and peers. (NT 705-706)
22. On January 15, 2009, at parental request and against Academy's recommendation, Student returned to the District's High School. (P46; P47; P55; S22,p.3, 6; S26; NT 476-477, 483-484, 1028)
23. Upon Student's return to the District's High School, Student's case manager was aware that Student responded well to [gender redacted] teachers and so she arranged the schedule so that most of Student's teachers were [gender redacted]. (NT 796) Student received school based individualized counseling and was assigned two [gender redacted] teachers as mentors. (NT 940-941, 956-958) The District's case manager coordinated with the regular education teachers to ensure compliance with the IEP. (NT 809-813; S25) Student's behavior was pleasant as long as the topic was not school work. (NT 806-807) When it was school work Student would politely decline any help. Student was compliant and pleasant, did

not appear sad or depressed, clearly had friends, and never mentioned anxiousness or difficulty. (NT 989, 991-992)

24. On March 17, 2009, parents filed due process hearing request. (P64; S26,p.3)
25. On April 18, 2009, the District performed a functional behavioral assessment (FBA). (NT 484-485, 1181-1182; P79; P68) The District did not inform Parents or receive parental permission before conducting the FBA. (NT 485)
26. On June 3, 2009, Parents privately secured a psychoeducational evaluation from Dr. V. (P80) Dr. V noted a decrease in full scale IQ of 26 points from 2001 to 2008. (P80) Dr. V found Student's reading skills to be age and grade level appropriate, and writing skills to be basic but effective. (P80) Dr. V concluded that Student's difficulty in the classroom, low tolerance for frustration, low self-esteem, and willingness to give up, were due to weaknesses in executive functioning specifically in the area of attention and concentration. (NT 648-649, 652-653) Dr. V concluded that the District should have performed an FBA by 7th grade. (NT 666) Dr. V also concluded that the District should have instituted significant accommodations upon Student's return from Wilderness, incorporating successful Wilderness strategies to engage Student in the educational program. (NT 692) Dr. V believes the District's April 2009 FBA is incomplete because it omits interviews with Student and Student's parents, and does not adequately identify antecedent event. (NT 661-662)
27. A due process hearing was conducted on April 28, 29, 30, July 27, August 10, 11, 2009. Hearing Officer exhibits HO1 and HO2 (NT 1188), District exhibits S-1 through S-33 (NT 1191), and Parent exhibits P-1 through P80 were admitted into

the record. (NT 1189-1190) The parties submitted written closing arguments, and the record was closed, on August 31, 2009.

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Proof

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) If one party produces more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence. In this case, the Student bears the burden of persuasion because Student seeks compensatory education, and Student's parents seek reimbursement for an evaluation and tuition costs associated with an out-of-state wilderness program.

Limitations Periods

When the Individuals with Disabilities Education Act (IDEA) was re-authorized in 2004, it included amendments that, while often called a "statute of limitations," are actually separate provisions limiting when due process claims can be requested and what violations they can set forth. Both the claim-filing limitation and the claim-content limitation are dependent upon the date that the filing party knew or should have known (KOSHK) about the alleged action that forms the basis of the complaint. The due process hearing must be requested within two years of the KOSHK date. 20 USC §1415(f)(3)(C); 34 C.F.R. §300.511(e) When that hearing is requested, the complaint must allege a

violation that occurred not more than two years before the KOSHK date. 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. §300.507(a)(2)

The two year filing and content limitations do not apply if the parent was prevented from requesting the hearing due to either: 1) specific misrepresentations by the District that it had resolved the problem forming the basis of the complaint; or 2) the District's withholding of information from the parent that was required to be provided to the parent. 20 U.S.C. §1415(b)(6)(B); 20 U.S.C. §1415(f)(3)(D); 34 CFR §300.507(a)(2); 34 C.F.R. §300.511(f) Neither the statute nor applicable regulations define either "specific misrepresentations" or "withholding of information." In fact, the drafters of the federal regulations declined to provide such definitions, believing instead that such matters were within the purview of the hearing officer. 71 Fed.Reg. 46540 at 46706 (August 14, 2006); See P.P. v. West Chester Area School District, 557 F. Supp. 2d 648 (E.D. Pa 2008)

Determining the applicable KOSHK date(s) and the existence of any specific misrepresentations or withholding of required information requires highly factual determinations. J.L. v. Ambridge Area School District, 2008 U.S. Dist LEXIS 13451 (W.D. Pa. Feb. 22, 2008) At the first hearing session in this case, the parties addressed those specific issues in order to establish the appropriate scope of the remaining hearing sessions.

By the end of the first hearing session, the evidence had established that Student's parents had been concerned about Student's academic performance since 1st grade. (P4,p.1; NT 38-40) Student's Parents knew or should have known about Student's academic and emotional difficulties at the end of 3rd grade (2000-2001) when they

requested an educational evaluation of Student, signed a permission to evaluate form, and received a procedural safeguards notice. (P7; P8,p.10; S2,p.5; NT 46-50) Student's parents also knew or should have known about Student's academic and emotional difficulties at the end of 6th grade (2003-2004), when they gave to the District a physician's letter stating that Student had ADD and needed a Section 504 plan. (P2; NT 63) They also knew or should have known about Student's academic and emotional difficulties on March 29, 2004, when they signed a permission to evaluate student and received a procedural safeguards notice. (P13,p.2;S3,p.2; NT 147-148)

Thus, the remaining hearing sessions focused upon the maximum four year window of potential FAPE liability assuming, of course, that Student's parents did not know, and should not have known, between March 17, 2005 and March 17, 2007 of any of the FAPE denials that they alleged in their March 17, 2009 complaint.

Student's claims prior to March 17, 2007 are untimely

On June 27, 2005, the District issued an addendum to its RR, finding Student eligible for special education services based upon Student's poor grades during the 4th quarter, as well as several disciplinary incidents. (S5,p.19; NT 1076, 1078; P10,p.3; P19, p.17) Student's parents were aware 11 months later, at the May 25, 2006 IEP team meeting that Student needed daily direct instruction and support on IEP goals, and Student's parents requested that counseling services be removed from the IEP. (P25,p.4; S8, pp.2,5) Student finished the 9th grade (2006-2007) school year with 4 Ds and 1 F in Spanish. (P10, p.6) On May 1, 2007, the IEP team modified Student's schedule to increase the level of special education support. (S9,pp4,5,8; P27; P28; P29; P32)

Clearly, at all times before March 17, 2007, Student's parents knew, or should have known, of the actions forming the basis of their March 17, 2009 complaint. Thus, to be timely, any complaint regarding FAPE denials prior to March 17, 2007 should have been filed before Student's actual March 17, 2009 complaint. Consequently, allegations of pre-March 17, 2007 FAPE denials are untimely.

No Exceptions to the Time Limitations Apply

The record contains no evidence of either a specific misrepresentation or withholding of information that prevented Student's parents from filing a due process hearing request sooner than March 17, 2009. (N.T. 148-149)

The "specific misrepresentation" exception refers to intentionally erroneous communication by the District that it had resolved a particular problem that induced parent to refrain either from filing a due process complaint or from further investigation. The "withheld information" exception refers solely to the withholding of information regarding the procedural safeguards available to a parent. Evan H. v. Unionville-Chadds Ford School District, 2008 WL 4791634 (E.D. Pa. 2008)

Student argues that the District's practice in 2004 of providing a 504 plan but not conducting an evaluation for children with ADD diagnoses, even when a parent requested an evaluation (NT 1108-1109), constitutes a specific misrepresentation. The record did not establish whether this erroneous determination from the District was intentional or not. It certainly qualifies as a communication by the District that it had resolved a particular problem that would induce Parents to refrain either from filing a due process complaint or from further investigation.

Student's parents argue that, because they only found out at the August 11, 2009 due process hearing about the District's illegal 2004 practice of refusing evaluations for children with ADD/504 plans, it should somehow serve as a permanent exception to the two year filing and claim limitations. This is not correct. It is irrelevant when, or even if, parents discover the District's behavior constituted a specific misrepresentation. What is relevant are two things: 1) the specific misrepresentation itself; and 2) parental reliance upon that specific misrepresentation.

Assuming the District's 2004 communication was intentionally erroneous, any detrimental reliance upon this specific misrepresentation was cured as early as November 18, 2004 when the District requested permission to evaluate Student, which permission was granted on November 22, 2004 (P15), and as late as February 10, 2005 when the District issued its RR. (NT 69,-70, 416; P19,p.2; P20; S5,pp.2, 10) Thus, even if the District's misrepresentation was intentional and relied upon, this would only have excused parental failure to file a due process claim until February 10, 2005, when Parents once again, knew or should have known of the subsequent actions upon which the claim is based.

There is also no evidence of any withholding of required information. Although Parents did not recall receiving procedural safeguards (NT 149), they did receive their procedural safeguards at the end of 3rd grade (2000-2001) (P7; P8,p.10; S2,p.5; NT 46-50), at the end of 6th grade on March 29, 2004 (P13,p.2;S3,p.2), and in 7th grade on November 18, 2004 (P15, p.2; P16; NT 65-67, 417).

The District denied FAPE from December 28, 2007

to the end of the 2007-2008 school year

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the District is required to provide FAPE to all students who qualify for special education services. 20 U.S.C. § 1412 Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988); Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

From March 17, 2007 (9th grade) through the first semester of Student's 10th grade (2007-2008), Student's behavior became more defiant; Student would refuse to cooperate and leave class to avoid doing work. (NT 457, 458; P60) In response, the IEP team met three times during the first semester of 2007-2008 to revise the IEP. (S10; P34,p.2; S11; P36,p.4;(S12; P38; NT 464, 541-542, 553, 568) This was appropriate District behavior in attempting to respond to Student's own behaviors. No FAPE denial occurred during this time period.

Incredibly, however, on December 28, 2007 the District recommended waiving reevaluation of Student. (S14; P40; NT 464-465) Student correctly argues that this was a denial of FAPE. The District argues that 34 CFR 300.303(b)(2) permits parents and District to waive a revaluation. The District also contends that ongoing progress monitoring indicated that Student was making expected progress.

It is remarkable that either party considered waiving reevaluation in December 2007. Parental consent was valid – both parties had sufficient information upon which to base their decisions to waive reevaluation. Nevertheless, the IEP team had met three

times the previous semester and Student's special education teacher's data collection indicated that repeatedly modified interventions were not effective. (NT 344-345; P27,pp.9, 24-32) It was not an appropriate IEP team decision to waive reevaluation in December 2007 and, consequently, that behavior was a denial of FAPE.

The District's FAPE denial concerning the waived reevaluation ended on August 5, 2008, when Student's parents unilaterally sent Student, at private expense and without consultation with the District, to the nine-week outdoor Wilderness program in state redacted]. (P52; NT 465-466, 467, 468) At that point, the District was no longer programming for Student.

Further, the District's behaviors between Student's unilateral removal in August 2008 and the March 2009 due process hearing request were appropriate and did not deny FAPE to Student. When Student returned on October 8, 2008, Wilderness recommended that Student attend school in a small group setting with an environment with rules and boundaries that were clear, with immediate consequences for behaviors and additional support for academic needs. (NT 295-296)

The Academy was consistent with the Wilderness recommendation. Academy provided small class sizes, individual and group therapeutic support, and school wide and individual behavior support programming. (S18; P45; NT 729-730; P45) Academy is designed for students who are lost in large public school environments, who are coming back from other alternative placements, for students who require a small environment, for students who had disciplinary incidences in a public school setting and for students who have trouble coming to school. (NT 699-701) The Academy's Director observed Student's frequent positive interactions with staff and peers. (NT 705-706)

Thus, upon Student's return from Wilderness, the District provided FAPE to Student.

The District's 2009 Proposed Program and Placement were appropriate

Student returned to the District's High School on January 15, 2009. Two months later, on March 17, 2009, Student's Parents filed the due process hearing request. (P64; S26,p.3) During this two month period, Student's schedule was individualized so that most of Student's teachers were [gender redacted] and Student received individualized counseling. (NT 796) This was appropriate programming based upon the information available to the IEP team at that time. Accordingly, FAPE was provided during the second semester of 2008-2009 through the March 17, 2009 filing date of this case.

Student is entitled to 60 hours of compensatory education

Compensatory education may be awarded for the period of time that a school district deprives an eligible student of FAPE, with an offset for the period of time reasonably needed to discover and remedy the deficiencies in the school district's services to the student. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)

The time during which the District denied FAPE to Student was the five months between December 28, 2007 and the end of the 2007-2008 school year. Before the District's failure to reevaluate Student, the District had programmed appropriately for Student, and upon Student's return in October 2008, the District programmed appropriately for Student.

Because it is clear from the record that Student's unevaluated problem behaviors affected Student's entire educational day during the 5 months between December 28,

20007 and the end of the second semester of 2007-2008, Student will receive full school days (five hours per day) of compensatory education. That award shall be offset by a two month offset for the period of time reasonably needed to discover and remedy the deficiencies in the school district's services to the student. This equates to 3 months, or 12 weeks, or 60 days of school. Student's compensatory education award, therefore, shall be 300 hours (60 days x 5 hours/day).

Student's Parents are not entitled to Tuition Reimbursement

Under any claim by parents for tuition reimbursement, determining that the District denied FAPE to Student is the necessary first step in the 3-step analysis outlined by Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359 (1985) and Florence County School District v. Carter, 511 U.S. 7 (1993) (hereinafter "Burlington-Carter") Only if that issue is resolved against the District are the second and third steps considered, i.e., whether the program proposed by the parents is appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007)

This decision has already concluded that the District denied FAPE to Student from December 27, 2007 through the end of the 2007-2008 school year. Because no change in programming was planned, the District was on its way to continued FAPE denial at the beginning of the 2008-2009 school year when the Parents unilaterally sent Student to Wilderness. Thus, the first prong of the Burlington-Carter 3-step analysis is satisfied.

The second step requires that the private placement be appropriate to the Student's educational needs. In this case, it was not. Parents argue that Wilderness was necessary for Student to participate in any academic program and to make meaningful progress. Wilderness is a [state redacted]-licensed therapeutic treatment program, however, that does not provide educational services or special education services. (NT 276, 297, 305-310, 328, 923) While Wilderness may have been just what Student needed for mental health purposes, it was not an appropriate educational program. Thus, the second prong of the Burlington-Carter 3-step analysis is not satisfied.

The third step in the Burlington-Carter analysis involves a weighing of the equities. The District argues that Student's parents sabotaged Student's education by telling Student that Student was low functioning, by ignoring Student's goal of a military career, and by requesting that counseling services be discontinued just before the Student entered high school.

In this case, the equities favor the parents. Parents were doing what they thought best. It is clear that Student's goals are not the same as Parents' goals. (NT 682, 902) Parents, however, always provided relevant information to the District, returning all permissions and other forms. This satisfies the 3rd step of the Burlington-Carter analysis. Nevertheless, because the second prong of the Burlington-Carter 3-step analysis is not satisfied, Student's parents cannot be reimbursed for the Wilderness program.

Student also argues that Wilderness reimbursement should be awarded as a related service if it is not reimbursable as a private placement. Student argues that the District is required to provide psychological and social services where needed, and Wilderness services can be categorized as psychological and social services. This

argument is rejected. It would be inequitable and inappropriate to reimburse unilaterally secured psychological and social services from [state redacted] in response to the District's FAPE denial. When Student returned to the District from Wilderness, the District provided appropriate services via the Academy, which included small class sizes, individual and group therapeutic support, and school wide and individual behavior support programming. (S18; P45; NT 729-730; P45) While this program might have been called for the semester before (i.e., the last semester of 2007-2008), Student has already been awarded compensatory education for that time period. Thus, Student's parents are not entitled to Wilderness reimbursement under either a tuition reimbursement or a related services replacement theory.

Student's Parents are not entitled to evaluation reimbursement

Student's parents seek $4,300 reimbursement for evaluation costs. Student does not indicate whether this is the cost of just Dr. C's evaluation, or just Dr. V's evaluation, or if it is the combined cost of both.

Parents are entitled to an independent evaluation at public expense if they disagree with a District evaluation and request an independent educational evaluation at public expense. 34 CFR §300.502 In this case, Parents agreed with the District's December 27, 2007 recommendation to waive reevaluation, and then obtained evaluations by Drs. C and V without first requesting from the District an independent educational evaluation at public expense.

Dr. C's evaluation is not reimbursable because Parents jumped the regulatory gun. They must have disagreed with a District evaluation, rather than agreeing to waive District reevaluation, and they should have first requested an independent educational

evaluation at public expense. Dr. V's June 3, 2009 evaluation is not reimbursable for the same reasons as apply to Dr. C's evaluation, and also because Dr. V had not even evaluated Student at the time Parents filed their March 17, 2009 complaint. (P64; S26,p.3)

With regard to Dr. C's evaluation, the District also argues, as a matter of law, that a hearing officer cannot find credible any witness who testifies by telephone because the hearing officer did not have the opportunity to observe that witness' demeanor and candor. Although Dr. C's evaluation is not reimbursable for other reasons, this argument of the District's is explicitly rejected. First, telephone testimony does permit the hearing officer to auditorily observe the witness. (Surely the District does not argue that, as a matter of law, a blind judge is incapable of making credibility determinations.) Second, Dr. C was testifying as a licensed psychologist about Student's report. While the substantive credibility of his opinion was certainly at issue, there was no reason to suspect either that Dr. C was lying or that his lie somehow could have been discovered simply by visual observation of him at the hearing.

The District did not violate Student's §504 Rights

Section 504 of the Rehabilitation Act, 29 U.S.C. §701 et seq., prohibits discrimination on the basis of disability within federally funded programs. 29 U.S.C. §794(b)(2)(B) To the extent that the FAPE requirement under Section 504 differs from that under IDEIA, the difference appears to be a difference between merely failing to meet statutory and regulatory requirements (IDEIA) and either intentionally or deliberately indifferently failing to provide FAPE (Section 504). Mark H. v Department of Education, 513 F.3d 922 (9th Cir. 2008); K.R. v. School District of Philadelphia, 50

IDELR 190 (E.D. Pa. 2008); L.T. v. Mansfield Township School District, 48 IDELR 156 (D.N.J. 2007)

The record in this case does not contain specific evidence that the District's FAPE denial occurred either with intention or with deliberate indifference. Student's §504 claim is based entirely upon the same facts asserted in the IDEA claims. Student produced no evidence of intentional discrimination against Student. Accordingly, the District did not violate Student's Section 504 rights during the relevant time period.

CONCLUSION

Student's claims prior to March 17, 2007 are untimely because any complaint regarding FAPE denials prior to March 17, 2007 should have been filed before Student's actual March 17, 2009 complaint. No exceptions to the time limitations apply because the record contains no evidence of either a specific misrepresentation or withholding of information that prevented Student's parents from filing a due process hearing request sooner than March 17, 2009.

The District denied FAPE from December 28, 2007, when it recommended waiving reevaluation of Student, to the end of the 2007-2008 school year. Upon Student's return from Wilderness the next school year, the District provided FAPE to Student. Thus, Student is entitled to a total of 60 hours of compensatory education.

Student's parents are not entitled to reimbursement of Wilderness costs because the private placement was not appropriate to Student's educational needs. Student's parents are not entitled to reimbursement of evaluation costs because they agreed with the District's December 27, 2007 recommendation to waive reevaluation, and then obtained

evaluations by Drs. C and V without first requesting from the District an independent educational evaluation at public expense.

ORDER

- Student's claims prior to March 17, 2007 are untimely
- The District denied FAPE from December 28, 2007 to the end of the 2007-2008 school year.
- Student is entitled to a total of 60 hours of compensatory education.
- Student's parents are not entitled to reimbursement of Wilderness costs.
- Student's parents are not entitled to reimbursement of evaluation costs.

Daniel J. Myers

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Daniel J. Myers
HEARING OFFICER

September 14, 2009

Student
Methacton School District
ODR No. 9835/08-09 AS