

*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.*

## DECISION

Due Process Hearing for GC

ODR File No. 8406/07-08 LS

Date of Birth: xx/xx/xx

Dates of Hearing: February 25, April 2, April 3, May 7, 2008 –  
Closed Hearing

Parties to the Hearing:

Representative:

Ms.

None

Mr.

Wayne Highlands School District  
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Honesdale, PA 18431-1099

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Hearing Officer: Debra K. Wallet, Esq.

Record Closed: June 9, 2008

Date of Decision: June 24, 2008

## BACKGROUND:

Student [hereinafter Student] is an [over twenty year] old (date of birth xx/xx/xx) who, by stipulation, is a resident of the Wayne Highlands School District [hereinafter School District] where Student lives with Mother. Student is eligible for services as a result of emotional disturbance, autism, and psychosis.

After a series of in-state psychiatric hospitalizations of Student, the School District began the process of meeting Student's educational needs in July 2007. In mid-November 2007, Student was hospitalized in [state redacted] while visiting Father. At least through the last hearing date of May 7, 2008, Student has continuously remained in [state redacted] either in the hospital or at a psychiatric treatment facility where Student was transferred as a result of an involuntary commitment in December 2007. There is no evidence on this record that Student will be ready to leave this [state redacted] facility in the near future.

At issue in this case is whether or not the School District has responsibility for providing a Free Appropriate Public Education [hereinafter FAPE] to Student while Student is out of state and whether or not FAPE has been provided for the short period of time when Student was physically resident within the School District. If not, what remedy should be provided?

## ISSUES:

1. Is the School District responsible to provide Student with FAPE after November 12, 2007, when Student was hospitalized in [state redacted] due to a psychiatric emergency?
2. Does this Hearing Officer have jurisdiction to award compensatory education to Student for a denial of FAPE after December 26, 2007, when Student was involuntarily committed to a state hospital in [state redacted]?
3. Did the School District provide FAPE during the period between July 6, 2007 and November 12, 2007?
4. Is Student entitled to an award of alternative placement or compensatory education

for any period after July 6, 2007?

FINDINGS OF FACT:

1. Student is a resident of the School District and has been identified as a student with a disability. (By stipulation; HO 17).
2. Student is registered to vote in Pennsylvania, specifically to vote in a county served by the School District. (N.T. 111).
3. Student was first enrolled in the School District on September 22, 2004. (N.T. 23-26).
4. On October 6, 2004, Student was placed in a psychiatric facility situated outside the School District. (N.T. 23-26).
5. The School District prepared an evaluation report and IEP dated December 20, 2004. (N.T. 23-26).
6. On December 21, 2004, Student was transferred to another residential psychiatric facility outside the School District where Student remained until February 24, 2006. (N.T. 23-26).
7. On February 24, 2006, Student was transferred to a hospital outside the School District where Student remained until October 16, 2006. (N.T. 23-26).
8. On October 16, 2006, Student was transferred to a facility outside the School District where Student remained until July 6, 2007. (N.T. 23-26).
9. After July 7, 2007, Student was physically present within the School District until November 12, 2008, when Student underwent an emergency hospitalization in [state redacted]. (N.T. 117).
10. The School District transferred records to the [state redacted] hospital in or about December 6, 2007. (S-8; N.T. 547-548).
11. By [redacted state] court order, Student was transferred from the [state redacted] hospital to a long-term psychiatric facility in [state redacted] on December 26, 2007. (N.T. 118-119; S-44, p. 2).
12. Parent had no knowledge as to when Student would be ready to leave this [state redacted] psychiatric facility. (N.T. 124).

13. The State of [redacted] began the process of implementing an educational program for Student in that state and invited representatives of the School District to attend a January 24, 2008 IEP meeting. (N.T. 124-126; S-40; S-44, p. 2-3).

14. Subsequent to the final hearing date, Parent transmitted to this Hearing Officer and the attorney for the School District the Stipulation of Settlement entered in the case of P.C. o/b/o G.C., Petitioner v. [state redacted] Department of Children and Families, Office of Education, Respondent, OAL Docket Number EDS 5249-08 and an Order of ALJ Jesse H. Strauss dated May 6, 2008 approving this settlement. The Hearing Officer marked these documents collectively as HO-19.

15. Mother filed for a due process hearing in the State of [redacted] on March 13, 2008. (HO-19).

16. Parent waived Student's right to receive any further special education services from the State of [redacted] as of May 1, 2008. (HO-19, Decision Approving Settlement, p. 4).

17. The January 24, 2008 IEP prepared in the State of [redacted] was declared null and void by virtue of the agreement between [state redacted] and Parent. (HO-19, Decision Approving Settlement, p. 4).

18. On or about December 28, 2007, Parent initiated this due process proceeding on behalf of Student. (HO-2).

19. In response, the School District filed an answer, a partial motion to dismiss based upon insufficiency of the complaint, a motion to dismiss and a motion for judgment as a matter of law. (HO-17).

20. Both parties participated in a pre-hearing telephone conference on February 11, 2008 during which there was general agreement about what must be decided by the Hearing Officer.

21. By Interim Order dated February 15, 2008, this Hearing Officer dismissed Parent's claims for the period from October 6, 2004 through July 6, 2007. (HO-10).

22. Hearings were held February 25, April 2, April 3, and May 7, 2008. The parties submitted written briefs on June 9, 2008, at which time the record was closed.

23. The following exhibits were admitted: Hearing Officer Exhibits HO-1 through HO-18. HO-19 was admitted after the last hearing as described above. School District Exhibits S-5, S-6, S-8 through S-10, S-12 through S-15, S-17 through S-19, S-22 (limited purpose), S-23 through S-24, S-26 through S-38, S-40 through S-45 have been admitted. (N.T. 763-778, 810-811). Parents Exhibits P-1, P-3, P-5, P-8, P-13, P-14, P-18, and P-19 were admitted. (N.T. 165, 208, 227, 268-269, 784, 801-803).

24. Parent called seven witnesses: Mother, Father, evaluating psychologist, a second evaluator with a doctorate in special education, two witnesses from the [redacted] Center, and a family friend. A CD contains the video portion of information about the [redacted] Center.

25. The School District called six witnesses: the special education supervisor, the coordinator for special programs and psychological services, a school psychologist, a speech/language pathologist, and two occupational therapists.

26. An IEP team met several times in August and September, 2007 to review and discuss Student's educational needs. (N.T. 356, 380, 414-415, 429, 448, 454-455).

27. Parents signed a Permission to Evaluate for both speech and language and occupational therapy. (N.T. 369-370; S-15, pp. 14-17).

28. Student received educational services in Parent's place of business beginning September 24, 2007 but these services were temporarily suspended October 12, 2007 following an incident in which Student was alleged to have been aggressive toward a teacher. (N.T. 467, 494, 512, 526; S-17).

29. There was a delay in hiring a new teacher and attempting to locate a residential placement between the October incident with the teacher and November 12, 2007 at which time Student was hospitalized for psychiatric reasons. (N.T. 537-538; S-18).

30. No education was provided after the incident with the teacher on October 12, 2007 until Student was hospitalized in [state redacted]. (N.T. 512).

31. The School District considered residential treatment options at the time educational services were suspended. (N.T. 526, 533, 537-538; S-9, S-10, S-13, S-17, S-18).

32. The School District held an IEP meeting on September 20, 2007 and a revision meeting November 14, 2007 to discuss the results of an occupational therapy and the speech and language evaluations. (S-12).

33. By evaluation report dated November 9, 2007, the School District concluded that Student was not a child with a disability in the areas of occupational therapy and speech/language pathology. This evaluation concluded that Student was an effective communicator with advanced vocabulary. Although Student's general language ability was determined to be in the borderline average range, the tester determined that Student's lethargy during the administration of the tests likely contributed to lower scores. The occupational therapist concluded that Student needed supervision to perform even the most routine daily tasks, including self-care and home management, but that mental-health-based occupational therapy services would be more appropriate than school-based occupational therapy services. (S-15). These findings and conclusions are adopted by the Hearing Officer.

34. At the August 30, 2007 IEP meeting, changes discussed at an August 15 IEP meeting were incorporated into the draft of the document. These changes included adding bi-

weekly probes to measure most goals, adding a problem solving goal to help Student develop mental planning and organizational skills, adding a goal for increased understanding in nutrition and food management, and providing for gentle redirection when Student was off task. (N.T. 417-419).

35. The proposed educational placement was life skills support instruction conducted in the home ten hours per week. (S-28, p. 27; N.T. 419).

36. Ten hours per week at two hours per day of one-on-one educational instruction is appropriate for Student because working one-on-one is quite demanding. (N.T. 421).

37. After further discussion it was determined that these services would be provided at Mother's place of business downtown. (N.T. 422-423).

38. [Name redacted] a friend of Student's family, is a certified psychiatric nurse practitioner with a long knowledge of Student's situation. (N.T. 288-289).

39. While Student was living in an apartment in the summer of 2007, [family friend] did not see teachers come to the apartment or anyone from the School District come to the apartment. (N.T. 313, 302).

40. Mother did not approve the NOREP dated August 30, 2007 and requested an IEP team meeting. (S-28, p. 3; N.T. 415).

41. {Dr. , Ph.D., licensed psychologist and certified school psychologist, evaluated Student on April 17, May 2, and May 17, 2007 to determine Student's cognitive and academic status. Dr. issued her report June 20, 2007 in which she called Student one with "complex needs." Dr. testified by telephone confirming Student's psychological evaluation in which she found Student eligible for special education with the classification of Emotional Disturbance, Autistic Spectrum Disorder, and a learning disability in language processing. Dr. suggested that Student needs to be prepared for some kind of job setting and could be taught basic computer skills such as keyboarding, accessing the internet, using email, and taking advantage of online learning activities when a teacher is not present. Weekly psychotherapy was recommended to improve Student's understanding of Student's abilities and disabilities. Ongoing medication monitoring should attempt to reduce the amount of medication needed to keep Student stabilized. (S-37; P-1 is the same exhibit as S-37; N.T. 67).

42. School District stipulated that it agreed "in general" with Dr. 's report. The testimony of a second DR. confirmed this agreement. (N.T. 38, 386).

43. Dr. admitted that she had no experience as a speech and language therapist, but she is generally knowledgeable about both areas. She testified: "I'm not sure the direct services of a speech and language therapist would be all that benefit except in the area of trying to give [Student] some strategies for improving Student's memory." (N.T. 88, 77).

44. According to Dr. , Student has difficulty holding information in memory partly because Student has difficulty maintaining attention. (N.T. 77).

45. Dr. thought that language difficulties could be addressed through instruction rather than direct therapy services in speech and language but would want to see “regular consults.” (N.T. 91-92).

46. Regular consults are needed for Student in speech and language but direct educational services in these areas are not. (N.T. 91-92).

47. The September 20, 2007 IEP with the November 14, 2007 revisions included life skills programming to increase Student’s reading comprehension, money management skills, the performance of household chores, and functioning within the community. (S-23; N.T. 733, 735, 748-749, 753).

48. The School District began instruction under the September 20, 2007 IEP on September 24, 2007 and this instruction continued until early October. (N.T. 467, 566-567).

49. Parent presented the telephone testimony of a third Dr. as an expert in determining what post-high school outcomes are most appropriate for Student. This testimony was presented over the School District’s objection based on failure to plead and failure to submit an expert report in a timely fashion. (*See* N.T. 171-174). The Hearing Officer heard his testimony but refused to accept his report into evidence. (N.T. 207).

50. The Hearing Officer gives little weight to the testimony of the third Dr. because he never met Student, because he did not interview any teachers who worked with Student, and because the issue of a transition plan was not specifically raised by Parent. (N.T. 182, 185; HO-2).

51. A licensed speech and language pathologist, conducted a number of tests to assess Student’s speech and language deficits. (S-15; N.T. 575, 577, 578-580).

52. On November 14, 2007, the School District revised Student’s IEP to include consultation with a speech and language pathologist as needed. (S-12, S-15; N.T. 642).

53. A certified occupational therapist, met with Student two times in September, 2007. (N.T. 692-694).

54. Because of a medical leave, the occupational therapist collaborated with another occupational therapist, who assisted in drafting the report and recommendations. The second occupational therapist had not met Student. (N.T. 704-705, 712, 713).

55. S-15 is the evaluation report written November 9, 2007 addressing speech, language, and occupational therapy. (N.T. 469).

56. While it was concluded that there were no needs for direct speech and language and occupational therapy, it was determined that a School District speech and language pathologist and occupational therapist would be available for consultation with Student's teacher. (N.T. 474).

57. Recommendations for occupational therapy services on a consultative basis are consistent with the recommendation of Parent's expert. (N.T. 714, 716-717, 91).

58. On November 14, 2007, School District revised Student's IEP to include consultation with an occupational therapist as needed. (S-12, p.7; S-15).

59. The School District occupational therapist testified to ways in which the occupational therapist might assist the teacher such as in identifying accommodations to meet the goal of understanding money management or the understanding of nutrition and food management. The occupational therapist might make recommendations for an adaptive keyboard or larger keys to assist Student in obtaining basic computer skills. (N.T. 717).

60. The consultative services provided in the November 14, 2007 IEP revisions with respect to speech and language and occupational therapy were appropriate to address Student's needs at that time. (N.T. 394-395).

61. The special education supervisor has a Masters of Education and has been the special education supervisor for the School District for two years. (N.T. 330-331).

62. According to the special education supervisor, the School District utilized Dr.'s report in or about mid-July 2007 to begin to create an IEP for Student. (N.T. 332-333; S-37).

63. By mid-July 2007, Student had begun to live in an apartment within the School District, but no educational services were being provided at that time until an IEP meeting could be scheduled. (N.T. 338-339).

64. The School District sent a Permission to Reevaluate dated August 1, 2007 because the School District felt it needed to know Student's present levels of academic and functional performance. Student had not been living in the School District for quite some time. (N.T. 354-355; S-32). Parent gave permission. (N.T. 356).

65. The School District chose to do a "document review" reevaluation rather than a comprehensive psychoeducational evaluation because Dr. had only recently completed the independent educational evaluation. (N.T. 355, 385-386).

66. An IEP team meeting was held on August 15, 2007. Parent's psychologist, Dr., participated in this meeting. (S-30; N.T. 357, 363-364).

67. During the August 15 meeting, the IEP team was suggesting instruction in the home ten hours per week adding more hours as appropriate. However, the final placement decision was postponed because Parent wanted to see the proposed IEP. (N.T. 363).



68. The second DR, special programs and psychological services coordinator for the School District, with a Ph.D. in school psychology and certifications as a school psychologist and reading specialist among other certifications, accepted Dr.'s report as comprehensive and current. (N.T. 382-384).

69. At that time, Student needed a small supportive educational placement in order to meet with success. (N.T. 387).

70. In May 2008 (at the last of the due process hearings), the School District's coordinator for special programs and psychological services was of the professional opinion that the School District could not make a recommendation for placement at that time because the district did not know Student's condition after approximately five months in a psychiatric hospital setting. (N.T. 390-391).

71. The [redacted] Center is a residential facility located in [town and state redacted] with a population coming from psychiatric or correctional facilities. It has been successful in reducing or eliminating psychotropic medication. (N.T. 210-213).

72. Parent seeks placement for Student at the [redacted] Center because Student has been accepted there and no other placement has been determined. (N.T. 231).

### CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction over the identification, evaluation, placement of, or provision of free appropriate public education (FAPE) under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* [hereinafter IDEIA] to Student, who was stipulated to be a Pennsylvania resident of the School District.

2. The School District had responsibility for providing FAPE to Student only for the period from July 7, 2007 to November 12, 2007.

3. Student's September 2007 IEP as modified in November 2007 satisfied the IDEIA statute and regulations. Specifically, this IEP was designed to provide meaningful educational benefit to Student in an appropriate setting.

4. Student was not denied FAPE from July 2007 to November 12, 2007, the period Student was physically present within the School District.

5. Parents are not entitled to an order for alternative placement of Student at the Center or an other facility.

6. Parents are not entitled to compensatory education services.

## DISCUSSION OF ISSUES

### **1. Is the School District responsible to provide Student with FAPE after November 12, 2007, when Student was hospitalized in [state redacted] due to a psychiatric emergency?**

While visiting Father in [state redacted], Student was hospitalized on an emergency basis on November 12, 2007. (N.T. 110, 117). The School District provided educational records to the [state redacted] facility upon its request in December (N.T. 547-548; S-8), but it did not provide any educational services to Student while hospitalized there for approximately six weeks. It does appear that Student was in no condition at the time of the hospitalization to receive educational services and the Hearing Officer finds that the School District cannot be held responsible for providing educational services during this short period of hospitalization for acute medical reasons. *In Re: The Educational Assignment of M.C.T.*, Special Education Opinion No. 1715 (2006).

### **2. Does this Hearing Officer have jurisdiction to award compensatory education to Student for a denial of FAPE after December 26, 2007, when Student was involuntarily committed to a state hospital in [state redacted]?**

The School District maintains that this Hearing Officer has no jurisdiction to hear issues regarding FAPE after December 26, 2007 because “[state redacted] law requires the State of [state redacted] to provide education to Student while hospitalized, and the state has taken steps to do so. S-41.” (Written Closing Argument, pp. 14-15). The Hearing Officer cannot agree that Student must be governed by [state redacted] law. To the contrary, it must be a matter of Pennsylvania law regarding who has responsibility for the period after December 26, 2007 for this resident of Pennsylvania. The Hearing Officer finds that jurisdiction exists in this proceeding to decide this issue regarding who has the responsibility.

However, having jurisdiction to decide does not mean that School District is responsible for the provision of an appropriate program of special education and training to this Student. The Pennsylvania School Code does not require the resident district, as opposed to the “host” district where an institution is located, to provide an appropriate program of special education and training. In pertinent part, Pennsylvania School Code, 24 P.S. §13-1306 [hereinafter Section 1306], states:

whenever a student described in this section is a suspected or identified eligible student as defined in [Pennsylvania School Code sections relating to the provision of special education], the school district in which the institution is located is responsible for: (1) providing the student with an appropriate program of special education and training. . . and (2) maintaining contact with the school district of residence of the student for the purpose of keeping the school district of residence informed of its plans for educating the student and seeking the advice of that district with respect to the student.

24 P.S. §13-1306(c)(1),(2).

The interesting legal issue in this case involves the fact that the institutionalization occurred in [state redacted] while the resident district is in Pennsylvania. This Hearing Officer is required to examine, interpret, and apply Pennsylvania law, not [state redacted] law. As indicated in the citation above, the School District is not obligated under Pennsylvania law to provide educational programs<sup>1</sup> when the student is located in an “institution” outside the resident school district.

The Parties have cited no case law directly on point and the Hearing Officer has found none. However, the case of *Michael C. v. The Radnor Township School District*, 202 F.3d 642

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<sup>1</sup> The issue of funding is an entirely separate matter, but there has been no request herein regarding the cost incurred by the State of [state redacted], or anyone else for that matter, who has provided services to Student for any period. As the School District notes in its brief, Parent has provided no evidence that educational services were actually

(3d Cir. 2000), *cert. denied*, 531 U.S. 813 (2000) is helpful. In *Michael C.*, in the context of the stay-put provisions, the Court analyzed the movement of a student from one state to another as opposed to the movement of a student from one school district to another school district within the same state. The Court upheld the lower court's reliance on state regulations and approved the deference given to a state court's analysis because "education is traditionally a state function." *Id.* at 650.

Here, the state regulation appears to be plain enough, although the definition of "institution" could certainly be more precise. A school district does not have the legal obligation to provide educational services to a student who is "out of school district" either in another district within the state or outside the state. The State of [state redacted] certainly assumed this responsibility and apparently believed that it, not Pennsylvania, had an obligation to provide schooling.

Of course, Parent has now waived Student's right to receive education services from the State of [state redacted]. (*See*, decision approving settlement from the State of [state redacted], May 6, 2008, together with the signed stipulation of settlement, HO 19.) It may be regrettable that Parent has waived Student's right to receive education services from the State of [state redacted] inasmuch as the holding here is that the Pennsylvania School District has no obligation to provide such services. However, Parent's actions cannot negate this State's reasonable regulatory provision which does not in any way conflict with the IDEIA. This Hearing Officer concludes as a matter of law that this School District had no obligation to provide Student with FAPE after December 26, 2007.

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provided to Student in [state redacted] or at what cost. Consequently, there is no viable claim before this Hearing Officer for reimbursement of any kind.

**3. Did the School District provide FAPE during the period between July 6, 2007 and November 12, 2007?**

The educational standard to which the School District's action must be compared is established by our state and federal courts. The IDEIA does not require states to develop IEPs that "maximize the potential of handicapped children" but merely requires the provision of "some" educational benefit. *See Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). The Third Circuit has defined that standard to mean that more than "trivial" or "de minimus" benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179, 184 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). The issue, then, is whether or not the School District has shown that it devised and implemented an IEP which provided a meaningful benefit to this Student.

Parent's primary argument is that because Student has had a psychological breakdown that Student's educational program must have been inappropriate and insufficient. The mental health services provided to Student may have been somewhat lacking, but these services are not at issue in this proceeding. It is the appropriateness of the IEP's and services which were provided in accordance with those IEP's which must be examined. Parent simply did not provide evidence during this hearing that would allow a finding of a denial of FAPE.

Much emphasis was placed on the speech and language evaluation and the occupational therapy evaluation. Parents contend that these were deficient because it was obvious to them that Student was in need of these services. However, Dr.'s testimony must be credited and this testimony simply does not support the need for different or greater speech and language or occupational therapy services than that provided in the IEP. Consultation with the teacher in these areas was deemed by Dr. to be adequate.

No one testifying in this hearing has given any support to Parent's contentions that the IEP was deficient or that the services were not provided in accordance with the IEP.

**4. Is Student entitled to an award of alternative placement or compensatory education for any period after July 6, 2007?**

In Parent's written closing argument, the primary allegation against School District seems to be a lack of urgency in implementing an education for Student. Parent maintains that the speech and language evaluation was inordinately delayed and that Student was "greatly harmed by being denied FAPE in PA." (Closing Argument, p. 9). Although it is not altogether clear, Parent apparently requests an order directing Student to be placed at the [redacted] Center or, in the alternative, a monetary settlement of \$200,000.<sup>2</sup>

In order to award any relief to Parent, the Hearing Officer must first conclude that the School District has indeed denied FAPE to Student. This conclusion cannot be reached on the record here. For the very brief time that it had legal responsibility to provide an educational program to this student, the School District performed the necessary evaluations and crafted an IEP in a reasonably prompt fashion. The goals seemed reasonably tailored to Student's needs and the selection of ten hours of one-on-one instruction was appropriate for Student's behavioral difficulties and Student's fatigue factor. There is simply no evidence in this record that the IEP of September, later modified in November, failed to provide "meaningful benefit" to Student.

Testimony regarding the [redacted] Center establishes that this placement could cope with a student with the kinds of diagnoses as Student. But this testimony is like putting the cart before the horse. Before one may consider any alternative placement, the Hearing Officer must

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<sup>2</sup> The demand in the letter attached to the Due Process Hearing Request is \$50,000. (HO-2, p. 6).

first conclude that the School District failed to provide FAPE and second that the [redacted] Center is a necessary placement to provide the educational services required by Student.

The School District is legally required to place any student in the least restrictive environment and to place a student in a more restrictive setting only if necessary. *See Oberti v. Board of Education*, 995 F.2d 1204 3d Cir. 1993. The School District here did provide a program of individualized instruction which meets the legal test of being reasonably calculated to yield educational benefit and afford the Student the opportunity for significant learning. Consequently, no alternative placement is warranted.

Further, having found no denial of FAPE, no compensatory education can be awarded.

#### ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that no alternative placement or compensatory education is awarded to Student.

Date: June 24, 2008

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Debra K. Wallet, Esq.  
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