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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

FINAL DECISION AND ORDER
ODR File No. 13083-1213KE

OPEN HEARING

Child's Name: C.T.[1]
Date of Birth: [redacted]

Hearing Date: November 9, 2012

Parties to the Hearing	Representative
Parent	*Pro se*
Penn Hills School District 260 Aster Street Pittsburgh, PA 15235	Craig Alexander, Esquire Bruce E. Dice & Associates P.C. 787 Pine Valley Drive, Suite E Pittsburgh, PA 15239

Record Closed: November 20, 2012

Date of Decision: November 29, 2012

Hearing Officer: Brian Jason Ford

[1] Other than this cover page, the child and parents' names are not used to protect their privacy, even though the parent requested an open hearing. "Parent" and "Student" is used instead. The Student's father was not a party to these proceedings but, at the Student's mother's request, copies of all correspondences and documents have been sent to the Student's father. Other identifying information, such as the Student's gender, is omitted to the extent possible. Citation to the notes of testimony (transcript) are to "N.T.". Citations to exhibits, as applicable, are "P-#" for Parents' exhibits, and "S-#" for the school's exhibits.

Introduction

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1419. In considering the Parent's claims, I also look to the IDEA's federal and state implementing regulations; respectively 34 C.F.R. § 300.500 *et seq.* and 22 Pa. Code § 14.

The Parent requested this due process hearing to compel the Penn Hills School District (District) to add certain elements to the Student's individualized educational program (IEP). Specifically, the Parent states that it is a violation of the Parent's religious beliefs for the Student to eat [specific food]. The Parent demands a statement to that effect placed into the Student's IEP, along with a provision that the District will not offer any [specific food] to the Student. Similarly, the Parent maintains that it is a violation of the Parent's religious beliefs for the Student to come into contact with [specific items or attend specific activities.][2] As with the religion-based food prohibition, the Parent demands a statement to that effect placed into the Student's IEP, along with a provision that the District will communicate with the Parent to ensure that the Student will not [have contact with specific items or attend specific events]. The Parent believes that it is a helpful behavioral intervention for the Student to speak with the Parent via telephone [redacted]. The Parent demands [a provision to this effect] to be drafted into the Student's IEP. The Parent also wants the Student to be removed from a SAT prep class. Finally, the Parent is concerned about the Student's transition planning. The Parent wants the IEP to reflect the Student's current placement in a vocational program in such a way that the program will continue after the Student graduates.

Procedural History

The Parent requested this due process hearing on Saturday, September 22, 2012. This hearing was assigned to me on September 25, 2012. Upon assignment, I set a hearing date in accordance with IDEA timelines for November 9, 2012. Notice of the hearing date was sent to the parties on September 26, 2012.

The District moved on November 7, 2012 to either postpone the hearing or delay its start time. The Parent objected to the District's motion on the same day. I denied the District's motion on the same day, and the hearing convened as it was originally scheduled.

Issues

The IDEA prohibits consideration of issues not raised in the Parent's Complaint unless the District agrees otherwise. *See* 20 U.S.C. § 1415(f)(3)(B). In this case, the issues presented by the Parent both at the outset of and throughout the hearing varied somewhat from the issues presented in the Complaint. With no objection from the

[2] *See* Parent's Written Closing Statement, ¶ 7.

District at the time of the hearing, I will address those issues that were presented by the Parent during the hearing:

1. Must the Student's IEP note a religious prohibition against the Student eating [specific food]?

2. Must the Student's IEP note a religious prohibition against the Student participating in [specific activities] and, if so, must the Student's IEP be designed to prevent such occurrences?[3]

3. Must the Student's IEP note that [specific communication] with the Parent is an effective means of behavior modification and, if so, must the IEP incorporate a protocol for the same [redacted]?

4. Must the Student be removed from an SAT prep class?

5. Must the IEP include a provision that will enable the Student to continue participation in a vocational training program after graduation (currently anticipated in June of 2013)?

Findings of Fact

1. The Student is a [late teen-aged] resident of the District.

2. The Student is entitled to special education and related services as a student with an Autism Spectrum Disorder.[4]

A. The Most Recent IEP Team Meeting

3. The Student's IEP team met on September 14, 2012 to review and revise the Student's IEP. NT at 32.

4. It was suggested, but not established, that the meeting was convened at the Parent's request for the purpose of addressing parental concerns regarding the Student's dietary restrictions. NT at 14.

5. The Parent and District representatives signed a sign-in sheet, but the meeting turned acrimonious almost immediately, and ended without any substantive discussion of the Student's IEP. *See, e.g.* NT at 32.

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[3] *See* Parent's Written Closing Statement, ¶ 7. I note that the Parent [used specific terms when] the Parent submitted a written closing statement. It is quite clear from the Parent's testimony that [specific activities are] prohibited by the Parent's religious beliefs, and I adopt the language used by the Parent in the Parent's written closing statement for simplicity.

[4] There is no dispute concerning the Student's age, residency or entitlement to special education under the IDEA.

6. The Parent requested the instant hearing, in part, so that the Parent would be heard (that is, so the Parent could say the things that the Parent wanted to say during the IEP meeting before it ended). *See, e.g.* NT at 12.[5]

7. Sometime after the meeting, the District proposed an IEP for the Student. It is not clear exactly when the proposed IEP was issued with a notice of recommended educational placement (NOREP), but credible testimony establishes that it was issued and, as of the date of the hearing, the NOREP was not returned. NT at 70.

B. Dietary Restrictions

8. It is a violation of the Parent's religious beliefs for the Student to eat [specific food]. *See, e.g.* N.T. at 33.

9. The record does not reveal when the Parent told the District that the Student may not eat [specific] food [redacted] on religious grounds. It is likely, however, that the Parent explained to the District that the Student may not eat [specific] food [redacted] sometime before the September 14 meeting convened. *See* FF # 16 below.

10. Previously, the Parent had told the District that the Student must adhere to a gluten-free diet for medical reasons. The Student's prior IEP noted this dietary restriction. S-6 at page 6.

11. Sometime thereafter, the Parent informed the District that gluten was being re-introduced into the Student's diet. NT at 48. In response, the District removed the note about the Student's dietary restrictions from the IEP.[6]

12. Previously, the Student attended and participated in a food preparation class in the District. NT at 59. The Parent was aware of and approved of the Student's participation in that class. *Id.* The Student does not currently participate in the District's food preparation class. NT at 63.

13. It is not a violation of the Parent's religion for the Student to eat [other specific] food [redacted].[7] NT at 33.

14. The Student's current IEP, which was not made part of the record of this case, does not include a dietary restriction.

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[5] At the beginning of the hearing, I informed the Parent that the hearing was not a continuation of the IEP team meeting. Similarly, the purpose of this decision is not to give voice to the Parent's concerns. Rather, it is my task to determine if the Parent is entitled to the relief she demands.

[6] The totality of the record persuades me that the Parent knew of and approved the gluten restriction when it was placed into the IEP and knew of and approved the removal of the same.

[7] The District notes the incongruity that the Student may eat [some specific food but not other specific food]. As I noted during the hearing, however, I will not question the sincerity or basis of the Parent's religious beliefs. I find that it is a violation of the Parent's religious beliefs for the Student to eat [specific] food [redacted] for no other reason than the Parent testified that this is so.

15. Regarding food, the District's proposed IEP of September 14, 2012, includes the following: "[Student] is only to eat a lunch/food brought from home and packed by [Student's] parent. [Student] has food allergies and requires a special diet - including fruit and wraps - dairy or cheese." S-2 at 8.

C. [Specific Activities and Items]

16. It is a violation of the Parent's religious beliefs for the Student to participate in [specific activities].[8]

17. It is not possible from the record of this hearing to say precisely what makes an event [one of those specific activities]. *See* NT at 22.

18. The Student participates in a [Name Redacted] program. NT at 64. The record is not precisely clear as to what the [Name Redacted] program is, but on the totality of the record it appears that the program is a peer group and social skills program that sometimes holds events outside of the District's buildings.

19. The Student participated in a [Name Redacted] event during the current school year. The event took place outside of the District's buildings. The District provided transportation to and from the event. NT at 64-65.

20. The Student returned from the [Name Redacted] event with [a specific item]. NT at 22, 28, 64. Ultimately, the Parent regarded the entire event as a [specific activity]. *See Parent's Written Closing Statement.*

21. The Parent's testimony as a whole suggests that the District knew about her religious beliefs prior to the incident, but the record is not clear as to when (or if) the Parent informed the District of the Parent's religious beliefs concerning [specific activities]. NT at 28-29.

22. The Parent testified that the Student's IEP must be modified to prevent similar incidents from happening in the future. Specifically, the Parent demands changes to the Student's IEP that would compel the District to inform her of potential [specific] events in the future and obtain her approval prior to the Student's participation. *See, e.g.* NT at 24-25.

23. No evidence or testimony suggests that the Student was upset during or after the [Name Redacted] event or by the [specific item].

D. [A Specific] Behavioral Intervention

24. The Student has had behavioral "meltdowns" in school. NT at 18, 43, 58, 93.

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[8] As with the finding concerning the Parent's religious dietary restrictions, I will not question the sincerity or basis of the Parent's religious beliefs concerning [specific activities and items]. I find that it is a violation of the Parent's religious beliefs for the Student to make contact with such [specific items] – however poorly defined – for no other reason than the Parent testified that this is so.

25. The record does not reveal the frequency or severity of these behavioral incidents.

26. Currently, in accordance with the Parent's preferences, District personnel contact the Parent by phone when the Student has a meltdown. Then, District personnel place the Student on the phone with the Parent. NT at 58.

27. When the Student speaks with the Parent, the call is not on loudspeaker. District personnel do not, therefore, know the specific content of the conversations. However, District personnel have heard the Student [having specific communications] with the Parent during these calls. NT at 58.

28. District personnel agree with the Parent that the Student's phone calls with the Parent after behavioral meltdowns are beneficial. NT at 58.

29. The proposed IEP dated September 14, 2012 is silent in regard to calling the Parent after a behavioral incident. *See* S-2.

30. The Parent demands an explicit provision in the Student's IEP that would compel the District to call the Parent after each meltdown and place the Student on the phone with the Parent to [engage in specific communications]. P-2, NT at 19-21, 117, 118. The IEP amendment, as proposed by the Parent, includes the full text of [those specific communications]. P-2.

E. SAT Prep Class

31. Currently, the Student attends a class titled "SAT Prep."[9] *See, e.g.* NT at 90

32. The Parent is concerned about the Student's participation in that class because the Student does not currently plan to attend college. *See* NT at 24, 67.

33. The Student's case manager testified that the Student is currently enrolled in a class called "SAT Prep" but the class is not limited to preparation for the SAT test. *See* NT at 67-68. Rather, the District opens its resource room on Saturdays to offer both SAT preparation and extra resource room activities (e.g. additional math and reading assistance, homework help, work on projects, resume assistance) to interested students. *Id*.

34. The District recognizes that the Student does not currently plan to attend college and does not need to study for the SAT. The Student does not study for the SAT during SAT Prep, but rather works on postsecondary transition activities. NT at 68.

F. Vocational Training

35. The Student's school day is currently divided between the District's high school and a local vocational school. The Student attends the vocational school in the mornings

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[9] Although it was not specified on the record, I take judicial notice that the SAT (currently an empty acronym) refers to the College Board's college admission test.

and the high school in the afternoon. Transportation is provided by the District. The Student's placement at the vocational school is a function of the Student's IEP. NT at 24, 26, 52, 55, 59, 68-70.

36. The Parent is positive about the vocational school and wants the Student's IEP crafted in such a way so that the Student will continue in the vocational program after the family's "involvement with the School District" ends. NT at 24.

Discussion

I begin the analysis by noting that the Parent must bear the burden of proof in this case, and by explaining how that burden must be met. The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

There is no dispute that the Student is a student with a disability and eligible for special education pursuant to the IDEA. As such, the Student is entitled to special education from the District (assuming that the District continues to be the Student's local educational agency) until the end of the school year in which the Student graduates or turns 21 years old, whichever comes first. *See* 20 U.S.C. § 1412(a)(1)(A).

As an eligible student, the Student's education must be driven by an individualized educational program (IEP) that is reasonably calculated to yield a meaningful educational benefit to the Student. *See* 20 U.S.C. §§1412, 1414; *Board of Education v. Rowley, 4*58 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999).

In this case, the Parent argues that the Student's IEP is not appropriate and must be changed in five ways, as outlined above in the Issues section. I will address each requested change in order.

Regarding dietary restrictions, it is necessary for school districts to draft health-related dietary restrictions into a student's IEP if those restrictions would otherwise be considered a necessary accommodation under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (Section 504). All IDEA-eligible students are also protected by Section 504, and the accommodations that would otherwise appear in a Section 504 service agreement are placed in the Student's IEP. *See P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 735-37 (3d Cir. 2009).

In this case, historically, when the Parent has told the school about the Student's medical dietary restrictions (i.e. the gluten restriction), the District noted the restriction in the Student's IEP. The proposed IEP, without noting the religious reasons, states that the Student may not eat food except what the Parent provides. To a large extent, therefore, this issue is moot. It is not clear that the Parent is seeking a broader restriction that what the proposed IEP contains, but it is clear that the Parent wants the IEP to state that the dietary restriction is religious (not medical) in nature. The IDEA is silent on this point.

I proceed with caution because my jurisdictional authority does not extend to First Amendment claims. Regardless, I find that as a matter of law the IDEA neither requires nor prohibits the District from noting the religious dietary restrictions in the Student's IEP. It would not violate the IDEA for the District to amend the IEP as the Parent desires. At the same time, failing to note a religious dietary restriction is neither a procedural nor substantive violation of the IDEA. Consequently, I will not order the District to draft the religious dietary restriction into the Student's IEP.[10]

A similar analysis applies to the Student's contact with [specific activities and items]. It is important to note that the religious prohibition against [specific activities and items] is different than the religious dietary restriction in an important way. The religious dietary restriction creates a bright-line rule for the District to follow: [specific food] is forbidden. In contrast, no bright-line rule was put forth to determine what events and gifts are [prohibited]. Enforcing the religious prohibition against [specific activities and items] would, therefore, force the District to judge what events and [items] would run contrary to the Parent's religious beliefs. I will not put the District in a position where it has to decide what events and [items] run counter to the Parent's beliefs. Moreover, even if the District were in a position to judge what events and [items are prohibited], as with the religious dietary restriction, I find that as a matter of law the IDEA neither requires nor prohibits the District from noting the religious prohibition against [specific activities and items] in the IEP. Consequently, I will not order the District to draft the religious prohibition against [specific activities and items] into the Student's IEP.[11]

Issues concerning [the requested] behavioral intervention are more complex. The District acknowledges that allowing the Student to call the Parent [by] telephone is an effective post-incident behavioral intervention. The current IEP permits this protocol and, in fact, the District is currently implementing it. Further, whatever [communications the Student has] with the Parent, the protocol does not require District personnel to do anything more than facilitate the phone call. As such, incorporation of the protocol into the proposed IEP would not compel the District to [redacted] and would accurately reflect the interventions that are being used. [Redacted]. As such, under a straightforward IDEA analysis, if the phone calls are necessary for the provision of a

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[10] It is not entirely clear that the District opposes drafting notes about religious prohibitions into the Student's IEP. Although the testimony on this point is somewhat confused (and inconclusive for purposes of fact-finding) it may be that the Parent intended to tell the District about the religious prohibitions during the truncated IEP meeting. If so, it is not clear that the District would have rejected that request.

[11] *See* footnote 11.

free appropriate public education (FAPE) but are not reflected in the IEP, then the Parent's position is correct and the IEP must be amended.[12]

In light of the burden of proof noted above, the Parent has not shown by preponderant evidence that the post-incident phone calls are necessary for the provision of FAPE. To the contrary, testimony reveals that the phone calls are made *after* the Student has regained composure after a behavioral incident. The phone calls are not used to prevent behavioral incidents, and are not used during behavioral incidents as a means to end the Student's meltdowns. Although the District acknowledges that the phone calls do have a positive effect, nothing on the record indicates that the Student cannot be calmed and redirected back to class without them.

The record does reveal that the phone calls are beneficial to the Student, but the FAPE mandate does not require IEPs that provide the maximum possible benefit. Rather, the FAPE mandate requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. *See, e.g. Rowley*, 458 U.S. 176; *Ridgewood,* 172 F.3d 238 (3d Cir. 1999); S*troudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002). Again, nothing on the record indicates that the Student cannot receive a FAPE without the phone calls.

Although I will not order the District to draft a [specific phone call] protocol into the Student's IEP ([redacted]), I do urge caution on the District's part. While the phone calls may not be necessary for the provision of FAPE, both parties see their benefit. It would be clearly imprudent for the District to terminate an ongoing and beneficial practice simply because I find that there is no legal mandate under the IDEA to incorporate [the specific protocol] into a Student's IEP.

Regarding the SAT prep class, the Parent has not presented evidence or testimony that the Student's participation is inappropriate. Rather, the record reveals that the Parent likely misunderstood the function of that class as it applies to the Student. The District's description of the class, as it applies to the Student, was not challenged. No evidence or testimony was presented to explain why the Student should be removed from the class. The Parent's demand for the Student's removal from that class is, therefore, denied. I note, however, that the record does not establish that the Student was placed in the class pursuant to the IEP (current or proposed). If the Student can be removed from the class without disturbing the IEP, and if the District has a policy or procedure that otherwise allows the Parent to remove the Student from the class, nothing in this decision is intended to preclude the Parent from using that policy or procedure to remove the Student.

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[12] Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14

The final issue raised by the Parent concerns vocational training. The District has placed the Student in a half-day vocational training program, as described above. That placement is properly reflected in the Student's IEP.[13] Therefore, the Parent's concern may be moot to a degree. It is not possible for the District to discontinue the vocational training program without amending the Student's IEP. Such an amendment would necessarily require (minimally) parental consent, and a due process hearing would be necessary for the District to remove the program over parental objection.

These protections, through operation of the IDEA, remain in place until the end of the school year in which the Student graduates or turns 21, whichever comes first. *See* 20 U.S.C. § 1412(a)(1)(A). Both the Parent and the District seem to agree that the Student will graduate at the end of the current school year. Without commenting on the appropriateness of that decision, the Student's graduation will terminate the District's obligation to provide an IEP and a FAPE to the Student.[14] The District's current obligation to provide appropriate transition services to the Student also will end at that time.[15] Consequently, the IDEA does not require the District to ensure that the Student will remain in the vocational training program after all of the District's legal obligations to the Student end. I, therefore, deny the Parent's request to compel the District to guarantee the Student's placement in the vocational training program after the family's "involvement with the School District" ends. NT at 24.

Conclusion

The Parent raises five issues, as set forth above. Three of those issues are demands for the District to change the Student's IEP to conform to the Parent's religious beliefs. I find that the IDEA neither prohibits nor requires the District to make such changes, and deny those requests on that basis. The fourth issue is the Parent's request to remove the Student from a particular class. I find that the IDEA does not require the requested removal, but that other means may be available to the Parent to reach the same result. The fifth issue is the Parent's request for the District to ensure that the Student continues to participate in a vocational training program after graduation. Assuming the appropriateness of the upcoming graduation, I find that the IDEA does not require the District to continue the vocational training program after the District's legal obligations to the Student terminate.

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[13] The proposed IEP continues this placement. S-2 at 8.

[14] Some courts have held that a school district's obligation to provide a FAPE to a student may extend beyond age 21 if necessary to enable the student to access compensatory education awarded to remedy a denial of FAPE. *Ferren C. v. School Dist. of Philadelphia*, 612 F.3d 712 (3d Cir., 2010). More recently, a court has sharply divided a school district's obligation to offer an IEP and its obligation to offer FAPE, indicating that the IEP obligation may survive even after the FAPE obligation terminates. *I.H. ex rel. D.S. v. Cumberland Valley School Dist.*, 842 F.Supp 2d 762 (M.D. Pa., 2012). Neither of these cases stand for the proposition that the FAPE or IEP obligations extend beyond an appropriate graduation when access to a prior award is not at issue.

[15] The IDEA's postsecondary transition requirements are found at 20 U.S.C. 1414 (d)(1)(A)(i)(VIII); 34 CFR 300.320(b) and (c). *See also* 20 U.S.C. 1401(34); 34 CFR 300.43(a).

ORDER

And now, November 29, 2012, it is hereby ordered that the Parent's claims are **DENIED** and that this matter is **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER