

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: E.A.

Date of Birth: [redacted]

ODR Nos. 14382-13-14-KE

OPEN HEARING

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Montgomery County Intermediate Unit
1605 West Main Street
Norristown PA 19403-3290

Timothy E. Gilsbach, Esquire
Fox Rothschild, L.L.P.
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Date of Hearing:

January 7, 2014

Record Closed:

January 15, 2014

Date of Decision:

January 28, 2014

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The Child named in the title page of this decision (Child) is an eligible resident of the Intermediate Unit named in the title page of this decision (IU) and was an eligible resident of the IU during the period of time relevant to this decision.¹ (NT 6-7.) Child is identified with Developmental Delay pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) and Pa. Code Chapter 14, and is receiving Early Intervention (EI) services. (NT 7.)

Parent requested due process under the IDEA, alleging that the IU failed to provide an appropriate evaluation and failed to provide the Child with a free appropriate public education (FAPE).

The hearing was completed in one session, and the record closed upon receipt of written summations. I conclude that the IU's challenged actions were appropriate, except for its failure to provide speech and language services at home as required by the governing IEP. I order compensatory education for this failure.

ISSUES

1. Was the IU evaluation dated July 19, 2013, appropriate?
2. Did the IU evaluation inappropriately fail to identify Child with Autism?
3. Did the IU inappropriately fail to provide services within fourteen days of the issuance of the IEP, including speech and language therapy, occupational therapy, and specialized instruction?
4. Did the IU fail to implement the IEP appropriately by failing to provide speech and language therapy services to Child at home?

¹ Parent challenged IU actions and omissions for the period from April 1, 2013 to the date of the first hearing in this matter, January 7, 2014. (P 1 to P 9.)

5. Did the IU fail to offer and provide Child with a free appropriate public education by failing to provide appropriate amounts of speech and language therapy services?
6. Should the hearing officer order the IU to provide compensatory education to Child as a remedy for any of the above alleged denials of a FAPE to Child?

FINDINGS OF FACT

1. Parent took the Child into her home on or about April 18, 2013. On April 24, 2013, prior to receiving legal custody of the Child, Parent sought evaluation and referral for early childhood services from the IU. (NT 166; IU 3.)
2. In April 2013, Parent sought a medical evaluation and dental care for the Child. Parent obtained custody of the Child, who had been neglected and possibly abused, in May 2013. (NT 166; IU 3, 4.)
3. The IU received consent to evaluate Child on or after April 30, and the IU proposed additional testing. Parent provided written permission to evaluate for the additional testing on May 23, 2013. (NT 164; IU 3; P 1.)
4. In various written requests, Parent indicated areas of suspected disability to include language and sensory hypersensitivity. In interviews and responses to questions in school forms, Parent also mentioned concerns about possible autism, emotional concerns, behavior, following directions and social functioning. (IU 3-4.)
5. The IU provided an evaluation report to Parent on July 19, 2013, fewer than 60 calendar days from receipt of consent to evaluate on May 23, 2013. (IU 4.)
6. A multidisciplinary team (MDT) produced the evaluation, consisting of Parent, a qualified occupational therapist, a qualified psychologist, a qualified special education teacher, and a qualified speech therapist. (NT 126-127, 146-149, 158; IU 4.)
7. The MDT utilized a variety of assessments and strategies, including observation at home, interviewing Parent, a team-based developmental inventory, parent responses to a second developmental inventory, clinical observation, and standardized instruments addressing speech, language, gross motor and fine motor development. (IU 4.)
8. The developmental inventory addressed and produced a standardized score for cognitive, academic, perceptual, conceptual, and social-emotional functioning. Child's scores indicated a more than twenty-five percent developmental delay as contrasted with same age peers. (IU 4.)
9. The MDT also utilized a developmental observation checklist to gauge Child's developmental level as compared with same age peers. This checklist was based upon an interview with Parent on July 17, 2013. This instrument yielded scores that were

consistent with the developmental inventory and showed developmental delays in cognitive skills. (IU 4.)

10. The MDT addressed Child's communication development, utilizing a standardized norm-referenced assessment of both receptive and expressive language, language sampling, an articulation screening instrument, and the parent-interview developmental inventory. Communication assessment included assessment of Child's ability to respond to commands through receptive language. Scores were mixed, but indicated eligibility for services. (IU 4.)
11. Social and emotional development was assessed through the two developmental inventories, and the MDT found no special educational services needed in this domain. (IU 4.)
12. The MDT screened Child for physical development, and relied upon Parent's report, as well as clinical observation, for hearing and vision. No delays were found in these areas. (IU 4.)
13. The MDT assessed visual-motor integration through a developmental motor assessment, and the parent-response developmental checklist. The MDT found no need for specially designed instruction. (IU 4.)
14. The MDT screened for adaptive delays and obtained an occupational therapy assessment. This assessment included a standardized subtest and found significant delays requiring specially designed instruction. (IU 4.)
15. The MDT, based upon Parent's report, administered an autism rating scale through interview with Parent on July 17, 2013. The team found that Child appeared to exhibit a number of behaviors that are consistent with autism, including very elevated scores for sensory sensitivity; however, Child's history of neglect, multiple changes in caregiver and possible abuse suggested that some of the behaviors could be the result of trauma rather than autism. The evaluation report did not identify Child with Autism. (NT 144-145, 151-164; IU 4.)
16. The evaluation found Child in need of early intervention and suggested strategies for intervention. (IU 4.)
17. On July 25, 2012, the IU sent Parent an invitation to attend a meeting to create an individualized education program (IEP), scheduled for August 2, 2013. The meeting occurred on August 2, 2013. This was less than 30 days after the MDT determination that Child needed early intervention. (IU 6.)
18. The IEP team created an IEP for Child and placed Child in a special education class. Early intervention services were offered, including specialized instruction, occupational therapy, speech therapy, and transportation. (NT 86; IU 6.)
19. The IEP provided that the Child would receive speech and language services at home, one session per week, for one half hour per session, except when the IU was on scheduled

breaks. This service was required from August 27, 2013 to August 1, 2014. Speech therapy was provided for 30 minutes in the preschool, and 30 minutes at home. (NT 27-28; IU 6; P 4.)

20. The IEP goals addressed speech articulation, pre-academic skills, fine and gross motor skills and strength, attending in classroom setting, and expressive language. (IU 6.)
21. The IEP provided that preschool, speech and occupational therapy services would not start until after 14 days from the date of the IEP, because the IU would be on break at the 14 day point, and it was considered desirable to provide continuity in these services. Since starting services during the IU break would require assigning a therapist and then assigning a new therapist shortly thereafter, the team decided to delay the services until the first day after the break. (NT 78-82, 95-96; IU 6.)
22. The IEP team determined that Student did not require services during scheduled breaks in the IU calendar. (IU 6.)
23. The IU sent Parent a Notice of Recommended Educational Placement Prior Written Notice (NOREP) on August 7, 2013. (IU 9.)
24. The IEP was revised on August 12, 2013, without an IEP team meeting. The revision added 15 minutes of occupational therapy. (NT 77-78; IU 6 p. 20, IU 7 p. 22; P 4 p. 20.)
25. Parent approved and signed the NOREP on August 16, 2013. (IU 9.)
26. Student began preschool on the first day of the August session according to the IU calendar, August 27, 2013. (IU 6.)
27. In September 2013, the IU failed to provide speech therapy sessions at home as required by the IEP. A therapist was assigned and saw Child on October 2. On the next week, the therapist cancelled due to illness. Thus, from August 27 until October 15, the IU failed to offer or provide 6 speech therapy home sessions required by the IEP. (NT 94, 97-100; IU 6, 7, 12.)
28. The assigned speech therapist offered to make up missed home therapy hours but Parent declined to receive any services at home until the end of this due process proceeding. (NT 131; P 8 p.17.)
29. Parent asked for a new therapist but the IU declined to honor this request. The IU offered to provide four make up sessions. (P 8 p. 13, 16, 17.)
30. By October 31, Parent indicated a willingness to have four sessions made up as offered, and provided one date for scheduling. (P 8 p. 18, 23.)
31. The IU assigned therapist provided a proposed schedule for make-up sessions, but Parent was not willing to commit to those dates. (NT 105-111; P 8 p. 18-22, 42.)

32. The assigned speech therapist provided two sessions at home in November 2013. To January 7, 2014, the therapist delivered a total of four sessions. (NT 104, 175; IU 12.)
33. The assigned therapist scheduled Child for sessions by email messages and notes on the session notes. (P 8 p. 24- 45.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).² In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence³ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

² The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

³ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

In this matter, the Parent requested due process and the burden of proof is allocated to the Parent. The Parent bears the burden of persuasion that the IU failed to comply with its obligations under the IDEA, and that the hearing officer should order the relief that Parent requests. If the Parent fails to produce a preponderance of evidence in support of Parent's claims, or if the evidence is in "equipoise", then the Parent cannot prevail.

APPROPRIATENESS OF EVALUATION

The IDEA⁴ sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child" 20 U.S.C. §1414(a)(1)(C)(i). The IDEA regulations prescribe in detail the procedures to be used in order to fulfill this requirement. 34 C.F.R. §§300.301 to 300.311. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U.S. Dist. Lexis 20646 (W.D. Texas 2002).

In addition to the above requirements, Pennsylvania regulations require the IU to assess the Child's development in the areas of physical development, cognitive and sensory development, learning problems, learning strengths and educational need, communication development, social and emotional development, self-help skills and health considerations, as well as an assessment of the family's perceived strengths and needs which will enhance the child's development. 14 Pa.Code §14.153(2).

⁴ In Pennsylvania, there are regulations in Chapter 14 of the Pennsylvania Code that require intermediate units to comply with the IDEA regulations when evaluating children between the ages of three to five. 14 Pa. Code §14.153(5); 14 Pa. Code §14.123(b). In addition, the IDEA regulations require compliance with these procedures for children in this age range. 34 C.F.R. §300.8(a)(1), and 300.8(b).

The July 2013 evaluation at issue here was sufficiently comprehensive to determine whether or not Student suffered from a disability as defined in the law, as well as to identify all of Student's educational needs. The MDT considered the Child's cognitive, perceptual, communication, social, emotional, physical, and visual-motor development, as well as sensory maturity, pre-academic skills⁵, adaptive skills and symptomatology for autism. The report lists information about both the family and the Child, and contains referral information to assist Parent in supporting the Child's development during the pre-school period. By a preponderance of the evidence, I conclude that the evaluator and multidisciplinary team addressed all areas of suspected disability, 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), and all of the areas required by the above regulations.

Evaluation procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" 20 U.S.C. §1414(b)(2)(A), 34 C.F.R. §300.304(b). The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B), 34 C.F.R. §300.304(b)(2). Here, the evidence is preponderant that the IU met this standard. The IU's strategies in the July 2013 evaluation at issue here included review of documents, interviews with Parent, clinical observations of and interactions with the Child, the use of two standardized developmental inventories assessing the Child's development in a broad range of areas, speech and language assessments addressing communication, and occupational therapy and physical assessments addressing both gross motor

⁵ These skills include following multi-step directions, an area that Parent noted in referring the Child for evaluation. After reviewing the record as a whole, I conclude that this area was addressed in the evaluation, because the speech and language tests administered to the Child required the Child to respond to oral directions and commands, and the Child's responses to those directions and commands were documented in the evaluation report. Moreover, Parent's observations of the Child's responses to directions were documented in the responses to one of the developmental inventories.

and fine motor skills. Social, emotional and behavioral development was addressed through multiple instruments and strategies. The evaluation also included an adaptive skills screening instrument and an autism screening instrument.

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i), 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1). The record is preponderant that the MDT solicited and obtained parental input through review of previous parental input, developmental inventories, a home visit and interviews with Parent.

The Parent does not challenge the IU's selection of testing instruments or their administration. 20 U.S.C. §1414(b)(2)(C), 34 C.F.R. §300.304(b)(3); 20 U.S.C. §1414(b)(3)(A)(iii), 34 C.F.R. §300.304(c)(1)(iii); 20 U.S.C. §1414(b)(3)(A)(v), 34 C.F.R. §300.304(c)(1)(v). The evaluators were trained and knowledgeable. 20 U.S.C. §1414(b)(3)(A)(iv), 34 C.F.R. §300.304(c)(1)(iv).

Parent asserts that the IU evaluation was inappropriate because the evaluation report did not identify Student with Autism. This argument does not prove the evaluation to be inappropriate, for two reasons. First, Parent obviously (and I think appropriately) abandoned this criticism after the testimony of the psychologist that showed that the MDT chose not to label the Child with autism at the time of the report, because it wanted to see how the Child would respond to education in the preschool environment, along with the other services that would be provided in the IEP. Second, the IU is authorized under Pennsylvania regulations and the IDEA to find

three-to five year old children eligible based upon developmental delay alone, rather than classifying based upon the disabilities enumerated in the IDEA. 34 C.F.R. §300.8(b), 300.111(b); 14 Pa. Code §14.101(Developmental Delay).

Consequently, I conclude that the July 2013 evaluation at issue here was appropriate⁶.

IMPLEMENTATION WITHIN FOURTEEN DAYS OF IEP

Parent argues that the IU owes the Child additional speech and language services because it failed to implement the IEP, including speech and language services at home, within 14 calendar days of the issuance of the IEP for the Child. I conclude that the IU does not owe services due to this delay in implementation, because the parties agreed that the services would not be provided during the IU's scheduled break in August, and that agreement was documented in the IEP.

The Pennsylvania regulation requires the IU to provide services within 14 days of the final IEP. However, the exact language of the regulation is pertinent:

The IEP of each eligible young child shall be implemented as soon as possible, but no later than 14 calendar days after the completion of the IEP.

14 Pa. Code §14.154(d)(1). This language requires implementation of the IEP within fourteen days of its completion. Thus, the language of the IEP is pertinent and in this case, the IEP provided that services, including speech and language services at home, would not start until

⁶ The timeliness of the IU evaluation is in question because of the Parent's assertion that she provided a permission to evaluate form on or about April 30, 2013. However, all agree that the IU case manager called Parent in to sign a new permission to evaluate form, which was received on May 23, 2013. There is no evidence of when the IU received the permission form dated April 30, 2013. Moreover, the record implies that the parties agreed to the presentation of the evaluation report within 60 days of May 23, 2013. Given this ambiguity, the evidence is not preponderant that the IU failed to provide the evaluation report with the sixty day deadline, based upon a permission form dated April 30, 2013.

after the IU's calendared break in August. Because the IEP did not require services to be provided during the break, the IU did not violate the Pennsylvania regulation by not doing so⁷.

FAILURE TO PROVIDE SPEECH AND LANGUAGE SERVICES REQUIRED BY THE IEP

The evidence is uncontroverted that the IU did not provide the home speech and language services required by the IEP. The IEP provided that the Child would receive speech and language services at home, one session per week, for one half hour per session, except when the IU was on scheduled breaks. This service was required from August 27, 2013 to August 1, 2014. The IU admits that it failed to assign a therapist to start in the first week in which the IEP required services, which would be the last week of August, 2013. The IU finally assigned a therapist after Parent complained, and the first session provided was on October 2, 2013. Thereafter, due to absences of the therapist and the Parent's unwillingness, for a period of time, to have the services made up, the IU provided only three more sessions at home⁸.

Based upon the IU calendar, which was in evidence in this matter, I calculate that the IU should have provided 15 sessions at home between August 27, the first day of IU classes after the August break, and January 7, the date of the hearing. This does not count 4 weeks in which the IU was not in session⁹. Subtracting the 4 sessions delivered¹⁰ from the 15 sessions due, the IU owes the Child 11 sessions (30 minutes each) of home speech and language services.

⁷ Parent sought to prove by her own testimony that she did not know that this language in the IEP pertained to home speech and language services; however, the regulation refers to the IEP, and there is no exception to the regulation for contrary parental expectations.

⁸ While the evidence was mixed, both the therapist and the Parent agreed on this figure, and I adopt this figure by a preponderance of the evidence.

⁹ The IU argues that services are not required to be provided on "in-service" days in which classes are closed but teachers and personnel (including the speech and language therapist who was an employee) are expected to be at work for in-service activities. This is not specified in the IEP; therefore, I find no basis to conclude that the IEP did not require services on those weeks in which the Child's speech and language appointment fell unluckily on an in-service day. I reach the same conclusion with regard to snow closings. There is no basis for Parent to know or this hearing officer to conclude that this was anticipated or agreed in the IEP meeting.

FAILURE TO PROVIDE APPROPRIATE AMOUNTS OF SPEECH AND LANGUAGE SERVICES

Parent argued that the IU failed to provide an appropriate amount of speech and language services in the IEP. However, Parent failed to provide any evidence whatsoever to support this claim. Therefore I dismiss this claim for failure to present a preponderance of the evidence in support of it.

CREDIBILITY

On the whole, I found the witnesses' testimony credible.

CONCLUSION

In sum, I conclude that the IU evaluation was appropriate, and that the MDT's decision to not identify the Child with Autism was legally authorized and appropriate. I conclude that the IU was not required by law to start speech and language services in this matter during its August break. I conclude that the IU owes the Child 11 half-hour sessions of speech and language services in the home. I conclude that the IEP did not provide for inappropriate levels of speech and language services. In the exercise of my equitable authority, I order the IU to provide to the Child the eleven sessions that it owes.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

¹⁰ The District argues that it should not be charged with one week during which Parent refused to admit the IU assigned speech and language therapist, arguing that obstruction is a basis for an equitable reduction in compensatory education. I agree that I have this discretion, as compensatory education is an equitable remedy, and Parent's conduct for that week was not equitable. Nevertheless, I decline to penalize the Child for the actions of Parent. Moreover, the IU failed blatantly to provide services when it was pledged to do so – during an entire month of September. Thus, the IU does not come with clean hands to argue that the Parent's behavior was inequitable, when its own conduct was inexplicably negligent, and had the effect of further souring the relationship with Parent, and eroding the trust between the parties upon which this vulnerable Child's educational wellbeing is dependent.

ORDER

1. The IU evaluation dated July 19, 2013, was appropriate.
2. The IU evaluation appropriately did not identify Child with Autism.
3. The IU appropriately and with legal authority chose to begin provision of services more than fourteen days after the issuance of the IEP, including speech and language therapy, occupational therapy, and specialized instruction.
4. The IU failed to implement the IEP appropriately by failing to provide speech and language therapy services to Child at home as required by the IEP.
5. The IU did not fail to offer and provide Child with a free appropriate public education by failing to provide appropriate amounts of speech and language therapy services.
6. The hearing officer hereby orders the IU to provide compensatory education to Child in the form of eleven (11) half-hour sessions of speech and language services in the home. These services shall be in addition to all services required to be provided to the Child in the present and any future IEP.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

January 28, 2014