

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: A.G.

Date of Birth: [redacted]

Dates of Hearing: 7/28/2014, 7/29/2014, 8/1/2014, 9/3/2014, 9/4/2014, 9/5/2014, 9/29/2014, 9/30/2014, 10/1/2014, 10/2/2014, 11/3/2014, 11/7/2014, 11/10/2014, 11/12/2014, 1/21/2015, 1/22/2015, 1/23/2015, 1/26/2015, 1/27/2015, 1/28/2015, 1/30/2015, 2/23/2015, 2/27/2015, 3/17/2015, 3/23/2015, 3/25/2015, 3/26/2015, 3/31/2015, 4/6/2015 and 4/7/2015

CLOSED HEARING

ODR File No. 15166-13-14

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Philadelphia City School District
Office of General Counsel
Philadelphia, PA 19130

Date Record Closed: May 4, 2015

Date of Decision: May 26, 2015

Hearing Officer:

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Introduction

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4. It is the companion to the case at ODR No. 15181-1314KE. Both hearing were heard together.

The Parent, who speaks [a language other than English], alleges that the District violated the Parent's right to meaningfully participate in meetings concerning the provision of FAPE to the Student. The Parent also alleges that the District violated Child Find, failed to provide an appropriate IEP, and denied the Student a FAPE.

Issues¹

1. Did the District violate its Child Find responsibilities?
2. Did the District deny the Guardian's right to meaningful parental participation?
3. Did the District violate the Student's rights by failing to provide an appropriate IEP or Section 504 plan?
4. Is the Student entitled to compensatory education?

Findings of Fact

The very large record of this hearing and its companion case was carefully reviewed in its entirety. In special education due process hearings, there is a world of difference between what is technically admissible and what is truly necessary to resolve the issues presented. I have limited my findings of fact to what is necessary to resolve the parties' dispute.

1. "Interpretation" describes the act of restating spoken language in a different language. Interpretation can either be simultaneous (in which the interpreter restates the communication as it is said) or consecutive (in which the interpreter restates the communication just after it is said).
2. "Translation" describes the act of re-writing a document in another language.
3. "Sight translation" describes the act of reading text in one language out loud in another language.
4. The Student's native language is [not English]. The Student has limited English proficiency.
5. The Guardian is the Student's legal guardian and "parent" for purposes of the IDEA.
6. The Guardian's native language is [not English]. The Guardian has limited English proficiency.

January 2011 to November 2012

- 1 The issues identified flow from the Guardian complaint and opening statement. The Complaint includes claims regarding the District's systemic practices, which were dismissed at the start of this hearing, and a demand for IEE reimbursement that is now moot. The Complaint does not include a demand for compensatory education. The Guardian argued at the hearing that if the District was permitted to present evidence of mitigation arising after the hearing was requested, the Guardian must also be permitted to include demands that were not apparent at the time that the Complaint was filed. I accept this argument, as the Guardian presents a new remedy, not a new issue, entitlement to which was not clear when the Complaint was filed.

7. The Student first arrived in Philadelphia from [another country] in January of 2011. NT 32, 832.
8. The student enrolled in 7th grade at [redacted parochial school] from February 21, 2011 until March 30, 2011 S-42. The Student lived with the Student's [relative] during this time.
9. From March 30, 2011 through sometime shortly prior to November 5, 2012, the Student moved back to the [other country]. The Student did not attend school while in the [other country].

November 2012 to February 2013

10. When the Student came back to Philadelphia, the Student lived with [another relative], who was [the Student's] guardian at that time.
11. On November 5, 2012, the Student enrolled in the District and was placed into [a District] High School. S-29, S-30.
12. The Student stopped attending school on February 8, 2013. S-29.
13. During the 57 school days between the Student's enrollment and withdraw, the Student was absent or late on 28 days. S-29.
14. While enrolled at [the high school], the Student spent 90 minutes per day in English for Speakers of Other Languages (ESOL) classes.
15. The District did not identify the Student as in need of special education or propose to evaluate the Student to determine a need for special education while attending [the high school].

February 2013 to October 2013

16. On or around February 8, 2013, the Student moved back to the [the other country] and stayed there for about a year. NT 836.²

October 2013 to End of 2013-14 School Year

17. On October 25, 2013, the Student re-enrolled in the District. The Student was re-enrolled by the Guardian, who had become the Student's legal guardian.
18. Upon re-enrollment, the Student was placed in [a second] High School. From enrollment through the end of the school year, there were 148 days. The student was late or absent during 97 of those days. S-29.
19. At [the second High School], the Student was placed in ESOL classes for three periods per day. While the Student attended, teachers reported that the Student was able to comprehend the classroom instruction and participate appropriately. S-29, NT 1839, 1851.
20. On March 28, 2014, the Guardian presented a letter and Court Order to [the second High School] staff. In the context of an IDEA proceeding, these documents are tantamount to a written request for a special education evaluation. S-22, S-23.

2 The timeline of the Student's travels to and from the [other country] were highly disputed. I find the Student's testimony regarding the Student's own whereabouts to be the most persuasive. While testifying, the Student was forthright and honest about what the Student could and could not remember. The Student is commended for this notable candor.

21. On April 4, 2014, the District sent a permission to evaluate form (PTE), to the Guardian, seeking consent to conduct a special education evaluation. S-19. The PTE was sent in English. The Guardian denies receiving the PTE, but recalls attending meetings concerning the evaluation request.
22. Between April of 2014 and the end of the 2013-14 school year the Student was absent or late about 40 times. The Student's attendance was such an issue that some of the Student's teachers wondered if the Student had withdrawn from school. S-29, NT 1840-1846.

Summer of 2014

23. On June 23, 2014 the Guardian requested this due process hearing.
24. The District employs Bilingual Counseling Assistants (BCA) who, among other job duties, provide interpretation services. NT 14014-1405.
25. The Parties communicated, mostly via counsel, in the summer of 2014. It was agreed that the District would fund an independent educational evaluation for the Student conducted by a bilingual evaluator selected by the Guardian.
26. The IEE was completed on July 17, 2014 and was provided to the District shortly thereafter. The evaluator concluded that the Student was eligible for special education as a student with a specific learning disability (SLD). S-15.
27. The IEE mentions that the Student was scheduled for surgery during the week of July 21, 2014, to address an issue with the Student's knee. According to the independent evaluator, the Student's knee never developed properly. *Id.*
28. The Student by that time had been diagnosed with Blount's Disease, a condition that causes [a physical condition] and, in some cases, pain. Blount's Disease is corrected through a complex surgical procedure followed by intense physical rehabilitation, both of which can be painful. During rehabilitation, the patient's bones are screwed into a brace, which is adjusted during rehabilitation and ultimately removed.
29. The Student was first diagnosed with Blount's Disease sometime in 2014. NT 3268.
30. There is no preponderant evidence on the record to suggest when the Student first started experiencing the symptoms of Blount's Disease. The symptoms can appear in childhood or adolescence, and may progress rapidly. There is no preponderant evidence that anybody at [the second High School] noticed a problem with the Student's mobility prior to the summer of 2014. There is no preponderant evidence that the Guardian or Student alerted the District to the Student's condition prior to the IEE. NT, *passim*.
31. According to the Student's surgeon, the Student's case of Blount's Disease may not have been readily apparent to a layperson. NT 3268-3278.
32. The Student did not have surgery during the week of July 21. Some testimony indicates that the District was under the impression that the Student had surgery during the week of July 21 up until the start of the 2014-15 school year.
33. On August 18, 2014, in response to the IEE, the District issued a Notice of Recommended Educational Placement (NOREP) and another PTE. Both documents were provided in English and in Spanish. The purpose of the NOREP was to obtain parental consent to provide specially designed instruction in the areas of literacy and mathematics as a stopgap until a full IEP could be developed. Literacy and math are areas identified in the IEE. The

purpose of the PTE was to both enable the District to review and consider the IEE³, and to conduct a bilingual speech evaluation recommended in the IEE. S-10.

2014-15 School Year

34. During the summer and early fall of 2014, the District and Parents continued to meet and negotiation via counsel. Several placement options for the 2014-15 school year were discussed. Ultimately, it was agreed that the Student should attend the [a] Learning Academy (LA), which is housed within [a third] High School.
 35. LA is a program primarily for students who have just immigrated to the United States from other countries and have little to no English. LA is an ESOL placement, not a special education placement. However, the District can provide special education to LA students.
 36. The Student had surgery to correct Blount's Disease just a few days after the start of the 2014-15 school year. The District was not immediately informed about the Student's surgery, but was aware of the Student's absence from school. The District was notified about the surgery in late September of 2014. NT 2069, 2685.
 37. On October 6, 2014, the District provided forms in English and [Guardian's native language] so that the Student could receive homebound instruction. S-6. It is not clear whether these forms were provided just before or just after the Guardian presented a doctor's note requesting homebound services. S-6. Regardless of the timing, the District informed the Guardian that the doctor's note was insufficient, and gave the Guardian the proper forms in both English and [Guardian's native language].
 38. On October 6, 2014, the District also sent forms in English and [Guardian's native language] inviting the Parent to an IEP meeting. The purpose of the meeting was to review the District's reevaluation report ("RR" - mostly a copy of the IEE plus the bilingual speech evaluation), and to draft an IEP. S-6.
 39. The IEP meeting convened as scheduled on October 16, 2014. A [Guardian's native language] speaking BCA was in attendance, as was the Guardian and counsel for both parties. S-44.
 40. The District had a copy of its RR translated into [Guardian's native language] and provided that to the Guardian. S-44.
 41. The District agreed with the IEE's conclusion that the Student was a student with a disability, specifically SLD, as evidenced by the Student's deficits in literacy and mathematics. S-3. The District disagreed with the IEE's conclusion that the Student should be placed in either 11th or 12th grade. *Id.*
 42. The IEE recommended placement in 11th or 12th grade in consideration of the Student's age and to (in essence) foster the Student's positive perception of both school and the Student's own abilities. Through March of 2015, the District refused this recommendation on the basis that grade placement was only available to students who earned sufficient credits, and the Student was lacking credits for an 11th or 12th grade placement. S-1, S-3, NT 1730-1731.
 43. From October 16, 2014 onward, the District has consistently proposed that the Student should graduate on IEP goals, as opposed to academic credits. *See, e.g.* S-1. The Student's principal testified that students who graduate on IEP goals could be placed into any grade,
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- 3 It is a common misconception that LEAs need any further consent to "review" or "consider" evaluations that are handed to them by parents. If review and consideration prompts the need for more testing, further consent must be sought. This distinction is not entirely pertinent to this case, as the District proposed a speech evaluation in the August 18, 2014 IEE.

regardless of academic credits. This testimony notwithstanding, the District refused to place the Student into 11th or 12th grade until May of 2015. NT 2669.

44. The District also disagreed with the IEE's recommendation for "private language school courses." S-3. That recommendation was based on the independent evaluator's understanding that the Student had not made progress towards mastery of English after two years with ESOL services. *Id.* At the time of the IEE, based on number of days of full attendance, the Student had spent less than one full school year in an ESOL (155 days).
45. For many of the same reasons, the District also disagreed with the IEE's recommendation to provide instruction to the Student in [Guardian's native language]. During the hearing, the independent evaluator clarified that her preference would be for the ESOL instructor to be bilingual, but that actual instruction in ESOL programming need not be in [Guardian's native language]. S-4, NT 2278-2279.
46. During the October 16, 2014 IEP meeting, the District maintained that LA was an appropriate placement for the Student. NT *passim*.
47. Although the District intended to discuss an IEP for the Student during the October 16, 2014 meeting, the Guardian had to leave after the evaluations were discussed and so an IEP was not discussed in the Guardian's absence. NT 1618.
48. On October 21, 2014 the District scheduled a second IEP meeting for October 28, 2014. Invitations were sent in English and [Guardian's native language] to the Guardian and counsel. On the October 28, 2014, the Guardian was not able to attend and the meeting was canceled. S-1, S-2.
49. On November 3, 2014, the Guardian returned the homebound instruction forms. S-50.
50. The Student's surgeon testified that the Student could have returned to school in November of 2014. NT 3279. It is not clear whether the Guardian knew this. This was never communicated to the District prior to this hearing.
51. On November 19, 2014, the District scheduled a third IEP meeting for December 2, 2014. Invitations were sent in English and [Guardian's native language] to the Guardian and counsel. A [Guardian's native language] speaking BCA was present at the meeting. S-54. The Guardian arrived late to the meeting and had to leave early. Consequently, the IEP team could not review the entire IEP. NT 1624-1628.
52. The majority of the IEP meeting on December 2, 2014 was a discussion of the Student's need for, and the District's obligation to provide, homebound instruction or instruction in the home. NT 1626, P-25. The record does not enable a definite conclusion about which terms were used during the meeting.
53. During the December 2, 2014 meeting, the parties agreed to meet again on December 17, 2014 (the District's fourth attempt to discuss the IEP). S-55. The District issued invitations in English and [Guardian's native language]. S-55.
54. The Guardian canceled the December 17, 2014 IEP meeting due to illness. S-55.
55. On December 22, 2014 the District issued invitations in English and [Guardian's native language] to an IEP meeting on January 6, 2015 (the District's fifth attempt to convene). The Guardian canceled the meeting due to concerns about the weather. S-55.
56. Pursuant to its homebound instruction policy the District offered to provide three hours per week of homebound instruction to the Student.

57. The District's policy permits certain District personnel to authorize up to three hours of homebound instruction to high school students who are expected to be out of school for more than four weeks. See NT at 2046, 2102, 2640-2643.
58. Despite the District's policy, the District increased the Student's level of homebound instruction to four hours per week, and sometimes instructors stayed longer. As a result, from December 2014 through February 2015, the Student received 3.5 to 4.5 hours of homebound instruction per week. S-56.
59. In February of 2015, the Student returned to LA with bus transportation and elevator access, but with no IEP in place. S-58.
60. The Student's IEP team convened again in March of 2015. It is not clear if the IEP in its entirety was reviewed during this meeting, which was the District's sixth attempt to discuss the IEP. NT 2669.
61. Starting with the first attempt to convene the Student's IEP team in October of 2014 through its latest attempt in March of 2015, the District has always prepared a draft IEP to discuss at the meetings.
62. In the course of six attempts to convene the IEP team in as many months, the District did not fully translate the draft IEP into [Guardian's native language]. Rather, the District relied upon its IEP writing software to translate portions of the IEP. Specifically, in Pennsylvania, IEPs are drafted on a form promulgated through PaTTAN. The District's software translated the form, but not the content written on it. For example, the text identifying a section of the IEP as goals was translated but the goals themselves were not. The District intended to rely upon [Guardian's native language] speaking BCAs to sight translate the English portions of IEPs during IEP meetings. S-1, S-51, S-44; NT 161-167, 248, 256-258, 1614, 1625-1627.
63. Other than IEPs, all other IDEA documents were fully translated into [Guardian's native language].

Legal Principles

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this case, I find that all witnesses testified to the best of their ability, relaying facts as they recalled them. To whatever extent one witness's testimony is inconsistent with another's, they legitimately remembered events differently.

As stated above, the Student's candor is both noteworthy and commendable.

The Burden of Proof

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 *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent the party seeking relief and must bear the burden of persuasion.

Child Find

The IDEA statute and regulations require school districts to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be “advancing from grade to grade.” 34 U.S.C. §300.311(a), (c)(1).

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

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 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE 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. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 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); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d 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)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the “hour-for-hour” method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting

Reid and explaining that compensatory education “should aim to place disabled children in the same position that they would have occupied but for the school district’s violations of the IDEA.”).

Despite the clearly growing preference for the “same position” method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount of what type of compensatory education is needed to put the Student back into that position. Even cases that express a strong preference for the “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

“... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district’s deficiencies.”

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student’s school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA’s “failure to provide specialized services permeated the student’s education and resulted in a progressive and widespread decline in [the Student’s] academic and emotional well-being” *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Meaningful Parental Participation

The IDEA requires schools to use procedures that afford parents an “opportunity ... to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child...” 20 U.S.C. § 1415(b)(1). Similarly, parents must receive prior written notice whenever a school district proposes to the educational placement of a child. 20 U.S.C. § 1415(b)(3). The IDEA explicitly details the type of information that must be contained in such prior written notice. See, e.g. 20 U.S.C. § 1415(c)(1)(A)-(B), (E)-(F). This includes an explanation of why the change is proposed, what other options were considered and why those other options were rejected. *Id.* These

participation requirements are in addition to the procedural safeguards notice requirements found at 20 U.S.C. § 1415(c)(1)(C).

In Pennsylvania, the NOREP is the document that provides the prior written notice to parents that is contemplated by the IDEA. As explained by the Pennsylvania Training and Technical Assistance Network (PaTTAN), “The NOREP explains the recommended educational placement or class for [a] child, and explains [parental] rights.” <http://parent.pattan.net/iep/WhatisaNOREP.aspx>. Moreover, the United States Supreme Court has recognized that parents have a right to receive prior written notice whenever a school district intends to alter a student’s “program or placement.” *Honing v. Doe*, 484 U.S. 305, 311-12 (1988); see also *Petties v. District of Columbia*, 238 F.Supp.2d 114, 123 -124 (D.D.C., 2002).

Parent’s Native Language

The notification required by 20 U.S.C. § 1415(b)(3) must be sent “in the native language of the parents, unless it clearly is not feasible to do so.” 20 U.S.C. § 1415(b)(4). The same is true for the IDEA’s procedural safeguards. 20 U.S.C. § 1415(d)(2).

As applied individuals with limited English proficiency, the term “native language” is defined as the “language normally used by that individual.” 34 C.F.R. § 300.29.

As drafted, these rules do not permit consideration of the individual’s ability to understand written or spoken English. If the individual has limited English proficiency (as the Parent does in this case), procedural safeguards and prior written notices must be sent in the individual’s native language.

Discussion

Child Find

The District did not violate its child find obligations. There is no serious dispute in this case as to whether the District has a system in place to identify students who may have disabilities. There is a debate in this case as to whether the District’s child find materials are easily averrable in [Guardian’s native language]. Regardless, it is the Student’s right to be found, not the Guardian’s obligation to seek out child find information.

In this case, I accept the District and Student’s account of when the Student was in Philadelphia and when the Student was in the [other country]. I also accept the District’s accounting of the Student’s attendance. There was some dispute as to whether the District properly marked the Student’s absences as excused or unexcused. Whether the Student’s absences were lawful does not change the fact that the Student’s inconsistent school attendance inhibited the District’s ability to form an opinion as to the need to evaluate any suspected disability.⁴

The Student did not enroll in the District until November 5, 2012, and left the District 57 school days later. The Student was absent or late for much of those 57 days, but appear to participate well when present. The record does not indicate any Child Find triggers during this time.

The Student re-enrolled in the District on October 25, 2013. The Guardian requested a special education evaluation on April 4, 2014. The pertinent question, therefore, is whether the District should have seen any child find triggers between those two dates. Again, the record does not preponderantly reveal child find triggers or “red flags” during this period of time. Consequently, the Guardian has not established by preponderant evidence that the District violated its child find obligations.

Meaningful Parental Participation

⁴ In some cases, chronic absenteeism can be a child find trigger in and of itself. The evidence in this case does not indicate that the Student’s absences were a child find trigger.

At the outset of this hearing, there was significant discussion about the District's obligation to translate documents into [Guardian's native language]. The District is correct that the IDEA's regulations require translation of only the procedural safeguards notice and the prior written notices issued pursuant to 20 U.S.C. § 1415(b)(3) – NOREPs in Pennsylvania. The IDEA does not explicitly require the translation of any other documents.

However, the IDEA requires schools to facilitate meaningful parental participation in the IEP development process. Unlike the strict translation rules, meaningful participation requires inquiry into the Parent's ability to participate in meetings without translation. In this case, it is not possible for the Parent to meaningfully participate in meetings concerning the provision of FAPE to the Student unless the documents presented at that meeting are fully translated.

The purpose of an IEP meeting is to develop an IEP for the student. This requires more than a recitation of an IEP. Rather, it requires a conversation about the Student's needs, and what program and placement will satisfy those needs. Reading a mostly-English document in [Guardian's native language] is not the dialogue contemplated by the IDEA. The Parent's ability to follow along in documents while participating in the required dialogue is essential.

In this case, the District put people in place so that the Parent could engage in dialogue during the meetings. It is significant that the District went out of its way in its effort to schedule an IEP meeting six separate times. I must note, however, that by the time that the team actually got to addressing the IEP, that time would have been better spent discussing the draft IEP than reading the English sections of the document to the Guardian out loud in [Guardian's native language]. To the extent that meetings were devoted to reading documents out loud in [Guardian's native language], the requisite discussion did not happen at all.

District witnesses agreed, and I explicitly find, that having the documents in an accessible form either during the meetings, or prior to the meetings when mandated, is critical to meaningful participation. (see, e.g. NT at 2995-2997). The Parent was placed at an obvious disadvantage by effectively not having access to these documents.

The heavy participation of counsel for both parties at every turn is somewhat confounding. The Parent's attorneys speak English.⁵ It is reasonable for the District to assume that anything communicated to the Parent's attorney will be relayed to the Parent in a way that the Parent will understand the information. I also have no doubt that communicating via counsel was often the fastest, easiest way for the parties to communicate with each other. Even so, it is the District's obligation to ensure meaningful parental participation. The Parent has no obligation to retain services, let alone hire an attorney, in order to meaningfully participate.

In sum, I find that the District satisfied the IDEA's narrow *translation* requirements but, even in doing so, did not satisfy the IDEA's requirements for meaningful parental participation. The District put personnel in place so that the Parent could literally speak during meetings, but did not make meaningful accommodations so that the Parent could prepare for meetings or participate in meetings as they were happening. This is a violation of the Parent's rights.

Provision of an Appropriate IEP

After accepting the IEE's findings that the Student was a student with an SLD and in need of special education, it was the District's obligation to offer an appropriate IEP. The District drafted an IEP for the meeting on October 16, 2014 (S-1). There is some ambiguity in the record as to when the District formally proposed that IEP with a NOREP, but the totality of the record leaves no doubt whatsoever that the District was ready to implement that IEP the moment it received parental consent.⁶

5 I do not know if any of the Parent's attorneys also speak [Guardian's native language], but that is not relevant.

6 It must be noted that the District has no right to request a hearing to override parental rejection of a proposed initial placement.

The District has no right to request a hearing to override parental rejection of a proposed initial placement. 22 Pa. Code § 14.162(c). Since the Guardian has never consented to the District's proposed IEP, the Student cannot claim a denial of FAPE if 1) the proposal was appropriate and 2) the District did not implement the IEP based on the Guardian's rejection of it.

The District's offered IEP was appropriate. It is derived in substantial part from the undisputed portions of the IEE (which was most of the IEE), and paints an accurate picture of the Student's abilities and needs at the time the document was drafted. The IEP's goals are directly related to those needs, and present clear statements as to how the Student's progress is to be monitored.⁷ The IEP also includes short term goals and objectives despite the fact that none are technically required. Further, the IEP provides modifications and specially designed instruction, both in an absolute sense and targeted on a goal-by-goal basis. In short, the IEP clearly explains where the Student is, where the team wants the student to be by the expression of the IEP, and what the District will do to get the Student from here to there. This is what the IDEA requires.

The most significant testimony challenging the IEP came from the independent evaluator. I find the independent evaluator's critique to be hypercritical in the sense that her quarrel with the IEP was that it is sub-optimal. Assuming *arguendo* that the independent evaluator is correct, the independent evaluator argues for a standard beyond the District's legal obligations. I am not persuaded by this testimony. The Student could derive a meaningful educational benefit from the District's offered IEP.

The Guardian also challenges the IEP on the basis that it does not provide extended school year (ESY) services. I find no preponderant evidence in the record to substantiate a claim that the Student is entitled to ESY based on regression/recoupment data or that ESY services are required in order for the Student to complete IEP goals.

I also consider whether the District should have provided instruction in the home. As discussed at various points during this hearing, homebound instruction is a regular education service that LEAs may provide to students who are unable to attend school for a finite period of time. Instruction in the home is an IDEA placement (part of the IDEA's continuum of placements) for Students who cannot be educated in school. In this case, although unbeknownst to the parties, the Student's surgeon opined that the Student was able to attend school around the same time

that the Guardian was completing the homebound instruction forms. It is, therefore, unlikely that the Student should have qualified for homebound instruction, let alone instruction in the home, which is the most restrictive of all IDEA placements. When a student is able to attend school and receive appropriate special education there, that student has no right to the IDEA's most restrictive placement option.

The District's offered IEP is appropriate. By offering an appropriate IEP, the District has also discharged its obligations under Section 504.

Compensatory Education

The Student is not entitled to compensatory education for any failure on the District's part to offer appropriate programming. However, the IDEA explicitly makes violation of meaningful participation rules a substantive violation. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). Compensatory education is the remedy for substantive violations.

Neither party presented evidence as to how much compensatory education is owed to the Student to compensate for the parental participation violation on its own. It could be argued that this lack of evidence indicates that compensatory education should not be awarded at all, given

⁷ The IEP is not *flawless* in regard to its measurability or objectivity, but that is not the standard. The IEP's goals are appropriately measurable, objective and baselined.

the Guardian's burden of proof. I decline to reach this conclusion. In the absence of better evidence, I look to the meetings that the Parent could not meaningfully participate in. Of the six scheduled IEP meetings, the Guardian attended three. I therefore award three hours of compensatory education to the Student to compensate for the District's denial of the Guardian's right to manfully participate in IEP meetings.

The Guardian may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device. The Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP, or via dual enrollment or equitable participation should the Student remain in private school, to assure meaningful educational progress.

ORDER

Now, May 26, 2015, it is hereby **ORDERED** as follows:

1. The Parent was denied meaningful parental participation as described above.
2. The Student is awarded three (3) hours of compensatory education as described above.
3. Compensatory education is subject to the limitations described above.
4. All other claims are denied.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER