

*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: T.R.

Date of Birth: redacted

Dates of Hearing: 8/4/2014, 9/22/2014, 9/24/2014, 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

## OPEN HEARING

ODR File No. 15181-13-14

### Parties to the Hearing:

Parents  
Parent[s]

### Representative:

Parent Attorney  
Sonja Kerr Esq.  
Public Interest Law Center  
1709 Benjamin Franklin Parkway, 2nd Floor  
Philadelphia, PA 19103  
215-627-7100 x 229

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

LEA Attorney  
Sarah Davis Esq.  
Fox Rothschild LLP, 10 Sentry Parkway  
Suite 200, PO Box 3001  
Blue Bell, PA 19422-3001  
610-397-3924

Date Record Closed: May 4, 2015  
Date of Decision: May 26, 2015  
Hearing Officer: Brian Ford, Esquire

## 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. 15166-1314KE. Both hearings 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 failed to implement an IEP that carried over from the Student's prior charter school enrollment, failed to properly evaluate the Student, incorrectly identified the Student as a student with an intellectual disability, and failed to offer an appropriate program and placement for the Student.

### **Issues**

1. Did the District seriously infringe upon the Parent's meaningful parental participation in the IEP Process, by its failure to provide her with vital IEP documents and other school documents in [her native language] and in a timely manner?
2. Did the District deny the Student a free and appropriate public education during the 2013-14 and/or 2014-15 school year by its overall by failing to implement the Student's IEP?
3. Did the District err in identifying the Student as having an Intellectual Disability and propose an inappropriate and unspecified out of district placement in June, 2014?
4. What placement is currently appropriate for the Student?

### **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. It is not disputed that the Parent's native language is [not English], or that the Parent has limited English proficiency.
4. Based on *the totality of the record*, I find that the Student<sup>1</sup> is best able to communicate using a combination of [mother's native language] and English, and switches between the two depending on the circumstances of the communication and the vocabulary involved.
5. Based on *the totality of the record*, I find that the Student's ability to communicate is impaired if the Student is required to communicate in either [mother's native language] or English exclusively.
6. The Student attended a charter school (Charter) within the District during the 2010-11 and 2012-13 school years.

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1 Typically, identifying information is not included in due process decisions. For reasons that will be apparent, the Student's gender cannot be omitted from this decision without yielding vague or overly-wrought findings.

7. The Student enrolled in the District for the 2013-14 school year. The District became the Student's Local Educational Agency (LEA) at that time, and has remained the Student's LEA since.
8. The Student was evaluated for special education eligibility shortly before leaving the Charter. An evaluation report (ER) was drafted on May 23, 2013. The ER concluded that the Student was a "child with a disability" as defined by the IDEA. S-9C
9. The ER concluded that the Student fell under the disability category of Other Health Impairment (OHI). S-9C.
10. The Charter drafted an IEP for the Student dated June 27, 2013. S-9E.
11. The Charter's IEP called for:
  - a. 2000 minutes (33 hours) a month of counseling support as a related service.
  - b. 60 minutes of skills training (2 sessions at 30 minutes each) per week.
  - c. Counseling in the counselor's office.
  - d. Implementation of a 5 point rating scale to address behaviors.
  - e. Implementation of a truancy elimination plan.
12. The Charter's IEP contemplated the immediate development and implementation of a positive behavior support plan (PBSP). S-9E.
13. The Student did not receive special education from the Charter but rather transferred to the District.
14. On July 30, 2013, parent, via her attorney, placed the District on notice that the Student would enroll for the coming 2013-14 school year, and requested special education programming. P-5.
15. In response to parent's July 30, 2013 letter, the District convened a meeting. Counsel for both parties attended.
16. During the August 20, 2014 meeting, the District offered programming at [a District] High School ("High School"), the Student's neighborhood school. More specifically, the District offered programming at High School if the Student enrolled. S-3, S-7,
17. Language Line is a service available to District personnel that provides interpreter services by phone. The District used Language Line during the August 20, 2014 meeting. NT 3086-3087.
18. The Parent rejected placement at High School prior to the Student's enrollment, and requested other placement options. S-7.
19. On September 4, and 12, and October 3, 2013, the District proposed five different alternative placements. Four of those five placements were located on the same campus (one of the District's high schools). These placements were proposed prior to the Student's enrollment. NT 3061-3062, 3090-3091, S-7.
20. The Parent did not register the student immediately after receiving the District's alternative placement proposals. *Id.*

21. The District translated the Charter's ER and IEP into [mother's native language] and provided the translation to the Parent on September 23, 2013. S-5, S-7, S-9, S-21.
22. On September 25, 2013, the District sent Parent's attorney a Notice of Recommended Educational Placement (NOREP) dated September 24, 2013 in English and [mother's native language]. The NOREP was an offer of special education. Specifically, the District offered supplemental learning support with services in accordance with the Charter's IEP. NT 1096, 1098-1099, 3090-3091, 3090-3091, 3108, S-6, S-21.
23. On October 2, 2013, via counsel, the District invited the Parent to participate at an IEP meeting. The same invitation was sent to the Parent on October 3, 2013. The meeting was scheduled for October 9, 2013 at High School. The meeting convened as scheduled with counsel for both parties in attendance. S-9A through S-9J, S-10, S-13.
24. The District employs Bilingual Counseling Assistants (BCA) who, among other job duties, provide interpretation services. NT 14014-1405.
25. A [mother's native language-speaking] BCA attended the October 9, 2013 IEP meeting.
26. During the October 9, 2013 IEP meeting, all of the placements previously offered by the District were still on the table. After the meeting, on October 15 and 16, the Parent and Student toured two of those placements. The Parent and Student were accompanied by a [mother's native language-speaking] BCA on both tours. NT 1415, 1419-1421 3094-3095, S-10, S-13.
27. Another meeting convened, with counsel for both parties in attendance, on October 16, 2013. During that meeting, the District proposed [another] High School (Second High School) a sixth potential placement (or a seventh potential placement including High School). S-13.
28. On October 24, 2013, the District sent a Permission to Re-Evaluate (PTRE), seeking the Parent's consent for the District to conduct a multidisciplinary evaluation of the Student. The District also sent a NOREP proposing placement at Second High School. These forms were sent in both English and [mother's native language] to both the Parent and the Parent's attorney. S-12, S-13, S-14, P-14.
29. On November 1, 2013, the District sent additional paperwork (an EH-36 form) to the Parent to complete as part of the placement into Second High School. The Parent completed and returned the form on November 8, 2013. *Id.*
30. On December 3, 2013, the District sent an invitation to participate in an IEP team meeting, along with a revised NOREP. The meeting was scheduled for December 19, 2013. The NOREP proposed implementation of the Charter's IEP at Second High School (until the District could complete its own evaluation and offer its own IEP). The revised NOREP also provided yellow bus service. S-21.
31. The Parent enrolled the Student on December 3, 2013 and the Student started attending school on December 4, 2013. S-18, S-21, S-21, S-50, S-61. This enrollment was accomplished with the help of Second High School's Special Education Liaison (SEL), who speaks [mother's native language], and a BCA.
32. On December 4, 2013, the Parent also approved the NOREP of December 3, 2013. *Id.*
33. An IEP meeting convened on December 19, 2013 as scheduled. A [mother's native language-speaking] BCA was in attendance. The Parent approved the District's PTRE the same day.

34. The Student [had a physical condition] from December of 2013 through March of 2014. [Redacted.] NT *passim*.
35. The District evaluated the Student on February 26, March 18 and March 25, 2014. Based on the evaluation, the District concluded that the Student is a student with an Intellectual Disability (ID), not OHI, an emotional disturbance (ED), or a speech and language impairment. S-24, S-25, S-29.
36. Prior to conducting the reevaluation, the District concluded that a bilingual reevaluation was not necessary, and so the evaluation was conducted in English by English speaking evaluators. NT *passim*.
37. On March 25, 2014, the District convened an IEP meeting with a [mother's native language-speaking] BCA in attendance. The District's reevaluation, the ID diagnosis, and the Student's need for [redacted reason for] homebound instruction were discussed at the meeting. NT 679, 688-689, 760-761, 1142-1148, 1228-1229, 2775, 2778-2781, 3069-3070, 3073-3075, 3122, S-25, S-26, S-29.
38. The District translated its evaluation report into [mother's native language], and provided a [mother's native language], copy to the Parent via counsel.
39. The District offered [redacted] homebound instruction to the Student in April of 2014. S-28, S-29, S-30, S-32.
40. The Student returned to Second High School on May 5, 2014.
41. After the Student's return in May of 2014, the parties agree that the Student was absent from school several times. The parties disagree about whether those absences should have been marked as excused or unexcused.
42. After the Student's return in May of 2014, the Student frequently came to class late or skipped class. The parties disagree about what specifically constitutes a "tardy" or "late" or "cut" etc. I find that the Student frequently did not attend the entirety of class periods, regardless of the reason (or the legitimacy of the reason).
43. On June 6, 2014, the District issued English and [mother's native language], invitations to participate in an IEP meeting on June 12, 2014. S-33. The meeting convened as scheduled with a [mother's native language-speaking] BCA in attendance.
44. During the June 12, 2014 IEP meeting, the District provided a draft IEP, offered extended school year (ESY) services for the summer of 2014, discussed the Student's current behavioral needs and strategies for the Student to attend class more frequently, and discussed various placement options for the 2014-15 school year.
45. One placement option discussed during the June 12, 2014 IEP meeting was placement at an approved private school (APS). APSs are private schools in Pennsylvania that have been approved to educate students with disabilities. The record is ambiguous as to whether specific APSs were discussed during the meeting, or whether the general idea of an APS placement was discussed.
46. The District finalized an IEP and drafted a NOREP on June 17, 2014. Both documents were provided to the Parent's counsel and were later translated and provided to the Parent. The NOREP proposed full time learning support at an unspecified APS. S-35, S-39. Although the APS was not specified, the District communicated (via counsel) that four specific schools were under consideration, pending the Student's acceptance.

47. On June 25, 2014, the Parent rejected the NOREP and requested this due process hearing.
48. After this hearing was requested, the Parent obtained an independent educational evaluation (IEE) at the District's expense. The IEE was conducted by a bilingual evaluator. The bilingual evaluator deviated from standard testing protocols in an effort to obtain accurate information about the Student's abilities. P-34, P-42.

## **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.

### ***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.

### ***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.

### ***Evaluation Criteria – Language***

The IDEA and its regulations set forth extensive criteria for evaluations and reevaluations See 20 U.S.C. § 1414. Of those, one is pertinent here:

Each local educational agency shall ensure that – assessments and other evaluation materials used to assess a child under this section... are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer...

20 U.S.C. § 1414(3)(A)(ii).

In drafting this language, congress did not focus on any student's native language. Rather, congress explicitly instructs schools to administer tests in whatever language is most likely to yield accurate results. Moreover – perhaps in recognition that not all tests are offered in multiple languages – congress also instructs schools to administer tests in the *form* most likely to yield accurate information. As such, given the choice between strict adherence to testing protocols, or variation to assess a child's actual abilities, the IDEA unsurprisingly favors accurate information.

## **Discussion**

### ***Meaningful Parental Participation***

At the outset of this hearing, there was significant discussion about the District's obligation to translate documents into [mother'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 [mother'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 (either through Language Line or by having a BCA in the room). Moreover, the District fully translated its evaluations, IEPs and NOREPs for the Parent. However, the IEP and NOREP from the June 17, 2014 meeting ready in [mother's native language], at the time of the meeting, and were often provide later only after parental request.

District witnesses agreed, and I explicitly find, that having the documents in an accessible form either during the meeting was critical to meaningful participation. (see, e.g. NT at 2995-2997).

Given the parties' vastly different views regarding the Student's needs and abilities, the Parent was placed at an obvious disadvantage.

The heavy participation of counsel for both parties at every turn is somewhat confounding. The Parent's attorneys speak English.<sup>2</sup> 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 during the June 17, 2014 meeting. The District put personnel in place so that the Parent could literally speak during that meeting, but did not make meaningful accommodations so that the Parent could prepare for it, or participate as it was happening. This is a violation of the Parent's rights.

### ***Denial of FAPE – 2013-14 School Year***

When a student places a school district on notice that he or she will leave a charter school and return to the district, the district is obligated to put an IEP in place for the Student's return even before the Student enrolls. See *I.H. v. Cumberland Valley Sch. Dist.*, 2012 U.S. Dist. LEXIS 101056 (M.D. Pa. July 20, 2012). This can be accomplished by simply offering to implement the charter's IEP until the district can evaluate and offer its own. However, even in those very rare cases in which a school district is required to do something more than adopt the charter's program, districts have no liability to provide a FAPE to a student before the student enrolls in the district. See *id.*<sup>3</sup>

In this case, tragically, the Student received nothing from the start of the 2013-14 school year through December 4, 2013 (the date that the Student started attending school). During this period of time, despite substantial communication between the District and the Parent – the bulk of which was via counsel – the Parent never actually enrolled the Student. I do not question the Parent's choice to not enroll until acceptable services were in place, but that choice comes with consequences. Even if the facts of this case were completely analogous to the facts of *I.H. v. Cumberland Valley* (and they are not), the District's only obligation is to say what program and

placement it would offer upon the Student's enrollment. The District not only satisfied that obligation, but went a step further to negotiate many placement options. As such, the District's obligation to provide a FAPE was not triggered until December 3, 2013 (the date that the Parent enrolled the Student).

From the time of the Student's enrollment through this due process hearing, the District has been obligated to implement the Charter's IEP because the Parent has rejected the District's subsequent proposals.

From December of 2013 through March of 2014 the District insists that the Student made progress. The question that I am called upon to answer, however, is whether the District implemented the Charter's IEP. I have no doubt that the Parent did not meaningfully participate in the development of the Charter's IEP, and I question the appropriateness of that document. However, again, the issue that I must resolve is whether the District implemented the Charter's IEP. If the District did not implement the Charter's IEP, the Student's right to a FAPE has been violated *per se*.

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

3 In *I.H. v. Cumberland Valley*, the school district was required to draft an IEP for a student who was potentially returning to from a charter school. Even then, Cumberland Valley had no obligation to actually provide a FAPE until the Student returned.

In this case, there is evidence that the District placed the student into learning support classes. There is no evidence that the District provided any of the services explicitly required by the Charter's IEP. Technically, it is the Parent's burden to establish what the District did not do. In this case, the near-absolute lack of persuasive evidence suggesting that the Charter's IEP was implemented is more than ample proof of the District's inaction.

This does not imply that the District made no effort to educate the Student. The record is to the contrary. The District placed the Student into its own program and honestly thought that it was doing right by the Student. But the District's obligation was to implement the Charter's program until it evaluated the Student and offered its own program. The District's failure to implement the Charter's program from December 3, 2013 through the end of the 2013-14 school year is a violation of the Student's right to a FAPE.

The exception to the foregoing is the period of time during which the Student received homebound instruction after [redacted]. Although there is no extensive record about the Student's actual ability to attend school immediately after [that event], none is needed. It was appropriate for the District to offer homebound instruction, and the District cannot be faulted for any failure to implement the Charter's IEP during this time.

### ***Appropriateness of the District's Evaluation***

The District's evaluation was inappropriate because it was conducted in English only. Per FF #4, English is not the language most likely to yield accurate information about the Student. Rather, permitting the Student to hear questions in both English and [mother's native language], and allowing the Student to respond to questions in English, [mother's native language], or both is the "language" that will yield the most accurate information.

Although this finding is based on the totality of the record, I make special note of the testimony of an independent, bilingual evaluator who assessed the student on behalf of the parent and at the District's expense. This was the only person who testified who is bilingual and who evaluated the Student. The District's evaluators spoke English only, and consulted with bilingual evaluators prior to evaluating the Student in English. This consultation did not give the District's evaluators any ability to determine how restricting the Student to English impacted upon the

Student's ability to communicate. Further, none of the District's bilingual evaluators evaluated the Student. Their conclusion that a bilingual evaluation was not necessary is both conclusory and, as presented in this case, mostly hearsay.

The record reveals that there are [mother's native language], versions of some common, standardized assessments. These [mother's native language], versions are not literal translations, but a [mother's native language], version normed against a [mother's native language], speaking sample population. When administering either the English or [mother's native language], tests, translating or interpreting questions and answers from language to language is (generally) a violation of testing protocols. Yet this is precisely the sort of deviation in form that the IDEA contemplates. Deviation for the purpose of getting accurate information is not only permitted, but required.

Whenever deviating from standardized testing protocols, evaluators are wise to proceed with extreme caution. Deviation, and the reason for it, must be explicitly noted in the final evaluation report. Also, the deviation must be carefully considered when an evaluator interprets the testing results for the purposes of providing a diagnosis or educational recommendations.

In sum, the District failed to evaluate the Student in the language most likely to yield accurate information, and failed to make necessary deviations from testing protocols to enable testing in that language. As a result, the District's evaluation was inappropriate, even assuming that all other requirements of 20 U.S.C. § 1414 were met.

### ***Intellectual Disability***

In substance, any student's eligibility category is not determinative of what services the student will receive. Programming is driven by need, not by label. This applies even to students with an intellectual disability. However, unlike the other disability categories, students who are classified as having an ID receive enhanced protections in disciplinary proceedings, and are evaluated more frequently.

I do not discount the mental toll that hearing an ID diagnosis puts on parents. In this case, to hear those words for the first time at the Student's age was no doubt shocking to the Parent. The Parent's legitimate surprise, however, is not a factor in determining whether the District applied the proper disability category.

In this case, the only evaluations concluding that the Student has an ID are the District's evaluations. I have concluded that the District's evaluations are inappropriate. Consequently, the ID label must be removed immediately.

Both parties should note that my determination is based exclusively on the inappropriateness of the District's evaluation. It is possible that an appropriate evaluation could conclude that the Student is a student with an ID. I find only that no such evaluation has occurred.

### ***Denial of FAPE – 2014-15 School Year***

The District was obligated to implement the Charter's IEP until it evaluated the Student and offered its own. After evaluating the Student, the District offered an IEP with a NOREP on June 17, 2014. That IEP was inappropriate.

The District's IEP was based on the District's evaluation. The District's evaluation was not calculated to yield accurate information about the Student. An IEP can only be as good as the evaluation upon which it is based. The IEP in this case is inappropriate as a matter of law, because it was based upon an inappropriate evaluation.

The fact that the District's only evaluation of the Student is inappropriate compels the conclusion that all subsequently offered programs are inappropriate for the same reason. This makes the District's subsequent offers irrelevant to show mitigation.

### ***Current Placement***

The issue of where the Student should go to school, and what services the Student must receive, are properly before me. I have concluded that the District's evaluations of the Student were not appropriate and, as a result, the District's placement offers were not appropriate as a matter of law.

The Parent urges that I should determine that IEE was appropriate, and that I should compel the District to offer what the IEE recommends. I decline to do so. LEAs are obligated to consider IEEs, they are not obligated to adopt them as their own. However, the IEE in this case satisfies the deficiencies of the District's evaluation. The District, therefore, is free to either adopt the IEE and modify its IEP accordingly. The District may also consider the IEE and reevaluate the Student in accordance with this decision. Either way, the ID label must be removed unless or until an appropriate evaluation yields a conclusion that ID is the proper classification for the Student.

### ***Remedies***

For reasons articulated above, the Student was denied a FAPE during these periods of time:

- December 4, 2013 through April of 2014
- May of 2014 through the end of the 2013-14 school year
- The start of the 2014-15 school year through the present (ongoing).

Prior to June 17, 2014, the denial of FAPE was based on the District's failure to implement the Charter's IEP. With no better evidence, I find that the portions of the IEP that were not provided come to 37 hours per month (33 hours per month of counseling in a counselor's office and 1 hour per week of social skills training), or 1.85 hours per school day.

After June 17, 2014, the denial of FAPE was based on the District's offer of programming based on inappropriate evaluations. From the time of the District's own offer forward, the Charter's IEP sheds no light on a compensatory education award. The standard is either what services it will now take to remediate the Student, or how much the District failed to offer. With little evidence to conduct the calculation either way, I find that the Student was denied 2.5 hours of compensatory education per school day from June 17, 2014 through the present.

In addition, the Parent was denied meaningful participation during one IEP meeting. 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 the Guardian's burden of proof. I decline to reach this conclusion. In the absence of better evidence, I look to the meeting that the Parent could not meaningfully participate in and award one (1) additional hour of compensatory education as a remedy.

Regardless of whether the Student's absences should have been excused or unexcused, in this case I find that the District is not liable to provide services when the Student does not attend

school. Compensatory education shall be awarded only on the days that the Student actually attended school, or will attend school until a FAPE is offered.

The Parent 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 Intellectual Disability classification shall be immediately removed from any IEP offered by the District.
2. The District may either adopt the Parent's IEE as its own evaluation, or may propose a reevaluation of the Student consistent with this order. If choosing to reevaluate, the District must complete its evaluation and offer programming expeditiously.

3. The Student was denied a FAPE as described above.
4. The Parent was denied meaningful parental participation as described above.
5. The Student is awarded 1.85 hours of compensatory education for each day that the Student attended school between December 4, 2013 and June 17, 2014, excluding the period during which the Student received homebound instruction in April of 2014.
6. The Student is awarded 2.5 hours of compensatory education for each day that the Student attended school between June 17, 2014 and the present.
7. The Student is awarded one (1) hour of compensatory education to remedy the denial of meaningful parental participation during the June 17, 2014 IEP meeting.
8. Compensatory education is subject to the limitations described above.
9. Compensatory education shall continue to accrue at the rate of 2.5 hours for each day that the Student attends school after the date of this order until the District proposes programming in accordance with #2 of this order.

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

/s/ Brian Jason Ford  
HEARING OFFICER