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: P.A.

Date of Birth: [redacted]

Dates of Hearing:

December 11, 2014
January 14, 2015
February 10, 2015
February 11, 2015
February 20, 2015
February 26, 2015

CLOSED HEARING

ODR Cases (consolidated)
15461-1415AS
15661-1415AS

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
School District of Philadelphia 440 North Broad Street Suite 313 Philadelphia, PA 19130	Judith Baskin, Esquire 440 North Broad Street Suite 313 Philadelphia, PA 19130
Date Record Closed:	February 26, 2015
Date of Decision:	March 31, 2015
Hearing Officer:	Jake McElligott, Esquire

INTRODUCTION

Student[1] is a kindergarten student residing in the School District of Philadelphia (District) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (IDEA)[2]. The student has been identified under the terms of IDEA as a student with autism and intellectual disability.

The student's grandmother acts as guardian of the student. At the outset of the current 2014-2015 school year, the student transitioned from early intervention services at a nearby intermediate unit ("IU") to kindergarten in the District. The District implemented the individualized education plan ("IEP") from the IU early intervention program. The guardian asserts that the District has denied the student a free appropriate public education ("FAPE") and requests compensatory education. The District counters that its hands have been tied because, having requested permission to evaluate the student, the guardian has withheld permission.

For the reasons set forth below, I find in favor largely, although not uniformly, in favor of the guardian.

[1] The generic "student", and gender-neutral pronouns will be utilized throughout the decision to protect the student's confidentiality.
[2] It is this hearing officer's preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. See also 24 PA Code §§14.101-14.162.

ISSUES

Did the District deny the student a FAPE
in its implementation of the IU early intervention IEP?

What, if anything, should be done
to address the evaluation impasse between the parties?

FINDINGS OF FACT

1. Prior to coming to the District in the current school year, the student received early intervention services from a neighboring IU. The last IU evaluation was issued in February 2014, and the student's early intervention IEP was crafted in March 2014. (Parent Exhibit ["P"]-1, P-2, P-28; School District Exhibit ["S"]-6, S-7).
2. In late July/early August 2014, the student's guardian enrolled the student in the District. (P-4; S-11).
3. After initially assigning the student to one elementary school, the student's assignment was transferred to a second elementary school, and the student began to attend school in the latter half of September. The lack of attendance at the first-assigned school was the result of administrative handling at the District and not a decision by the guardian. (P-7, P-13; S-13; Notes of Testimony ["NT"] at 383-478, 482-560, 571-641, 1017-1067).
4. In mid-September 2014, the student's IEP team met twice to discuss the student's needs. Both times the District requested

permission to evaluate the student and, both times, the student's guardian indicated that she would not provide permission. At both meetings, the guardian approved notices of recommended education placement (NOREP) for the provision of the student's special education program; the first NOREP indicated that the District would continue to implement the early intervention IEP, the second indicated that the student would receive speech and language services, occupational therapy ("OT"), physical therapy ("PT"), behavior consultation, a 1:1 aide and curb-to-curb transportation. (P-15, P-16, P-17, P-18, P-19; S-8, S-9).

5. The District implemented the early intervention IEP, although it repeatedly voiced to the guardian that it wished to evaluate the student to design District-based programming. (P-1; S-7; NT at 383-478, 482-560, 812-916).
6. Some goals in the early intervention IEP could not be implemented by the District; most goals, however, could be implemented. For the instruction and goals the District was able to implement, the special education teacher did not consistently monitor the student's progress. (P-25; S-15; NT at 812-916).
7. Even though the student received OT and PT services through the early intervention IEP, and the second of the September 2014 NOREPs issued by the District indicated that the student would continue to receive OT and PT as part of the District's

programming, the District has not provided OT or PT services to the student. (P-1; S-7, S-9; NT at 280-320, 325-379).

8. The District refused to provide the services because of a District policy requiring its own physician, after examining the student, to issue a medical prescription for OT and PT services. The student has been without OT and PT services the entire school year. (S-17, S-18, S-19; NT at 175-251, 280-320, 325-379, 383-478, 571-641).
9. In October 2014, a District school psychologist, at the request of the building principal, undertook an evaluation of the student and issued a document entitled psycho-educational evaluation report. (P-31; S-22; NT at 922-1011).
10. In preparing the report, the school psychologist observed the student across two days in multiple settings (classrooms, cafeteria, playground). The school psychologist solicited teacher input. The report indicates that parent input was sought for the report, but this was not the case. Parent had no knowledge of the evaluation process, assessments, or, until produced over the course of the hearing in December 2014, the report itself. (P-31; S-22; NT at 922-1011).
11. The school psychologist administered the following assessments: the Woodcock Reading Mastery Tests/Revised, the Key Math-III, and the Adaptive Behavior Assessment System-II. (P-31, S-22; NT at 922-1011).

12. District witnesses repeatedly referred to the necessity of these assessments to establish "baselines" for the student. The school psychologist himself described the assessments as geared to the appropriateness of the student's program. (NT at 383-478, 482-560, 571-641, 812-916, 922-1011).

13. The IU school psychologist testified credibly that, having seen the contents of the District's psycho-educational evaluation report, she would have expected the evaluation process described therein to be undertaken only after receiving permission to evaluate from a parent/guardian. (NT at 649-731).

CREDIBILITY FINDINGS

a. All witnesses testified credibly. (NT at 44-143, 149-169, 175-251, 280-320, 325-379, 383-478, 482-560, 571-641, 649-731, 736-794, 812-916, 922-1011, 1017-1067, 1072-1104, 1124-1149).

b. The testimony of the IU school psychologist was found to be highly persuasive and was accorded heavy weight. (NT at 649-731).

c. The direct testimony of the student's guardian was limited. But, as a *pro se* party, her participation and demeanor throughout the hearing led this hearing officer to credit her perspective on multiple events/issues in the record. It is an explicit finding that, based on the entirety of the record and the guardian's participation in the

hearing, the guardian has advocated effectively and in good faith for [the student]. (NT generally, and specifically at 1124-1149).

DISCUSSION AND CONCLUSION OF LAW

Implementation of the IEP

To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful benefit' means that a student's program affords the student the opportunity for "significant learning" (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

The IEP is a collaborative document between parents and educators. (34 C.F.R. §§300.23, 300.320-300.324). Understanding a student's needs involves multiple perspectives, including formalized evaluation procedures "to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." (34 C.F.R. §§300.15, 300.304-300.305).

Here, the District found itself in a position where it did not have permission to evaluate the student. It is understandable that the District would seek to evaluate the student and found itself stymied by the

guardian's withholding of permission to perform such an evaluation. Accordingly, it implemented the early intervention IEP.

On this record, however, two findings provide a basis for finding that the District denied the student a FAPE as the result of its prejudicial implementation, or more accurately non-implementation, of the early intervention IEP. First and most significantly, the District by its own choice has refused to provide OT and PT services to the student. The District argues that the provision of OT and PT services requires a medical prescription. There is no dispute that the student requires the services—the early intervention IEP contains three OT goals and two PT goals, and the second of the September 2014 District NOREPs calls for 30 minutes of OT weekly and 60 minutes of PT weekly. Yet week by week, it withheld these services. In effect, the District has applied a prejudicial and unfounded condition on the provision of necessary special education and related services: We will provide OT and PT services to this student (and, ostensibly, other students with similar needs in the District) under the terms of an IEP to meet explicit IEP goals and to gain access to other specially designed instruction only after you can provide a "doctor's note".[3] This is untenable under the IDEA.

[3] It must also be pointed out that the District compounds this wrongful practice even more prejudicially by requiring that the medical prescription be provided by, and only by, the District's physician. In this case, the guardian offered to secure such a prescription but was told only a District physician could issue it. (See NT at 175-261, 280-320, 325-379, 383-478).

Second, in implementing the early intervention IEP, the record cannot support a finding that the District diligently provided instruction to the student under the terms of that document or that it can document progress on any IEP goal. This finding is based particularly on the sparse production of progress monitoring reports produced in the record taken alongside the testimony of the student's special education teacher. The teacher's testimony is taken as true and credible by this hearing officer that progress monitoring on IEP goals took place every two weeks, yet the only progress monitoring data in the record is four consecutive days in mid-November (November 17th-20th). Additional progress monitoring data was not produced by the District, and no one could testify to its whereabouts; it is equally clear that the guardian was not provided with any progress monitoring at any time. The question, then, of whether the student was offered the opportunity for significant learning through a program implemented to provide meaningful education benefit cannot be answered, and that void lies with the District in failing to meet its obligations in implementing the early childhood IEP.

Where a school district has denied a student a FAPE under the terms of the IDEA, compensatory education is an equitable remedy that is available to the student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area School District v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). Compensatory education is available from a point where a school district knew or should have known that it was failing in

its obligation to provide FAPE, accounting for time it reasonably would have taken for the student's program to be remedied. (Ridgewood).

In this case, as to the OT and PT services, in the second of the September 2014 NOREPs (approved by the guardian on Friday, September 19th), the District recognized and recommended that the student receive OT for 30 minutes twice per week and PT for 60 minutes per week. The District, therefore, should have made arrangements for those services over the week of Monday, September 22nd so that, as of the week of Monday, September 29th, the student should have been receiving OT and PT services on this schedule. The student will be awarded compensatory education on this schedule for every school week beginning the week of Monday, September 29th. Compensatory education will be awarded accordingly.

As to the progress monitoring, in the first of the September 2014 NOREPs (approved by the guardian on Friday, September 12th), the District recommended "continuation of special education services…in accordance with (the) early intervention IEP."[4] The District, therefore, should have been in a position to begin instruction under the terms of that IEP the very next week, the week of Monday, September 15th. The award of compensatory education in this instance, however, is more a matter of equity than calculation-based. Taking the record as a whole, as a matter of equity, the student is awarded two hours of compensatory

[4] P-18, S-8.

education for every school week beginning the week of Monday, September 15th. Compensatory education will be awarded accordingly.

Evaluation Issues

For a school district to perform an initial evaluation or a re-evaluation of a student, the school district must obtain consent from the parent or guardian before performing such an evaluation. (34 C.F.R. §300.300). "Consent", under the terms of the IDEA, means that "the parent has been fully informed of all information relevant to the activity for which consent is sought" and that "the parent understands and agrees in writing to the carrying out of the activity for which…consent is sought". (34 C.F.R. §300.9). Screening for instructional purposes, however, "to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation" under IDEA. (34 C.F.R. §§300.302).

Here, the District undertook an evaluation process and issued an evaluation report without the consent of the guardian. In fact, the District undertook these actions in the face of repeated, explicit instances of opposition by the guardian to an evaluation by the District. While one may question the wisdom of the guardian's position on the matter (and, below, this hearing officer will order that an evaluation must take place), the District cannot ignore the guardian and proceed to

evaluate the student without consent. It is a bedrock principal not only of the IDEA but of student/family privacy in general.

The District quite rightly insists upon seeking permission to evaluate the student. Faced with a lack of permission, and outside the knowledge of the student's guardian, however, it tasked a school psychologist to observe the student multiple times in various settings and to administer multiple achievement-based assessments and a behavioral assessment. The resulting document is entitled psycho-educational evaluation report, and the text of the report itself repeatedly refers to the document and process as an "evaluation". And, when reviewed by an outside, experienced IU school psychologist, it clearly represented to her a document that was evaluative and that should follow only upon parental consent. For all of the District's evidence/arguments that the process and report were geared to some general instructional purpose, the record weighs definitively in favor of a finding that in October 2014, the District undertook an evaluation process and issued an evaluation report for servicing the student's needs under the terms of the IDEA, all without the consent of the guardian and with full knowledge that the guardian opposed such an evaluation.

The District's own witnesses, too, recognized the purpose of the evaluation process and report. Repeatedly, multiple District witnesses testified to the evaluation process and report as necessary to establish "baselines" for the student's specially designed instruction, and the

school psychologist himself characterized the effort as a way to gauge the appropriateness of the student's program. These witnesses all testified credibly, but their testimony does not support a finding that the evaluation process and report were outside the context of the student's special education programming. Indeed, the record weighs definitively in favor of a finding that the District knew the evaluation process and report were undertaken for the purpose of understanding, for this student, "the nature and extent of the special education and related services that the (student) needs." (34 C.F.R. §§300.15).

Again, the frustration of the District at not being able to evaluate the student is understandable. But its subsequent actions were deeply problematic—disregarding the guardian's express objection to the evaluation of the student, setting aside the privacy of the student and family, and evaluating the student without consent. Therefore, as a matter of equity, the student will be awarded 250 hours of compensatory education.

Having so found, the point remains: The student must be evaluated so that the District has an opportunity to understand the student's needs within the context of the District and its special education programming. The parties are at the very beginning of this student's educational journey and may need to cooperate and collaborate on the student's programming for, ostensibly, years to come. The tenor of the parties at the hearing is best described not as adversarial but as

deeply wary. Therefore, a District evaluation of the student may not set the trajectory the parties require to continue coordinating decisions related to the student's needs. Accordingly, under the hearing officer's authority to order an evaluation pursuant to 34 C.F.R. §300.502(d)/22 PA Code §14.102(a)(2)(xxix), the order will structure a process by which an independent evaluation may be obtained.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above:

The District shall forthwith, but no later than the week of Monday, April 13, 2015, make arrangements to have in place, and provide, OT and PT services for the student in accord with the service schedule set forth in the September 19, 2014 NOREP.

The student is awarded compensatory education as follows:

- 2 hours per school week beginning the week of Monday, September 29, 2014 through and including the week of Monday, March 30, 2015 for denial of a FAPE related to OT and PT services
- 2 hours per school week beginning the week of Monday, September 15, 2014 through and including the week of

Monday, March 30, 2015 for denial of a FAPE related to a prejudicial lack of progress monitoring

- 250 hours for undertaking an evaluation process, and issuing an evaluation report, without the consent of the guardian.

Pursuant to the authority of a hearing officer as granted in 34 C.F.R. §300.502(d)/22 PA Code §14.102(a)(2)(xxix), it is ordered that:

- On or before Wednesday, April 22, 2015, the guardian shall provide by email to the District's special education liaison responsible for the student the names and contact information for three independent evaluators experienced in conducting comprehensive psycho-educational evaluations for educational programming ("IEE evaluator[s]"), to make themselves available to conduct an independent educational evaluation ("IEE") at District expense.
- On or before Wednesday, May 6, 2015, the District's special education liaison responsible for the student shall select one of the IEE evaluators to conduct an IEE. The District may research the backgrounds of the potential IEE

evaluators but shall not contact the IEE evaluators prior to making the selection.

- The cost of the IEE shall be at the IEE evaluator's rate or fee and shall be borne by the District at public expense. Communications regarding arrangements between the District, the guardian, and IEE evaluator shall include all three parties.
- If the guardian has not provided by email on or before April 22, 2015 the names and contact information of the potential IEE evaluators, the roles of the parties in determining the independent evaluator shall flip. In such a case, on or before May 13, 2015 the District's special education liaison responsible for the student shall provide by email to the guardian the names and contact information for three IEE evaluators, to make themselves available to conduct an IEE at District expense. In such a case, on or before May 27, 2015 the guardian shall select an IEE independent evaluator from the lists provided and inform by email the special education liaison of the selected IEE

evaluator. Similarly, the guardian may research the IEE evaluators identified by the District but shall not contact them. And again, the cost of the IEE shall be at the IEE evaluator's rate or fee and shall be borne by the District at public expense; communications regarding arrangements between the District, the guardian, and IEE evaluator shall include all three parties.

- The input, assessments, scope, details, findings and recommendations of the independent evaluation report shall be determined solely by the IEE evaluator. Notwithstanding the provisions of this paragraph, observations by the IEE evaluator shall be only school-based and shall not take place in the home environment.
- After the IEE evaluator has issued the independent evaluation report for the student, the student's IEP team shall meet to consider the findings of the evaluation in light of the student's IEP and educational programming ("the independent evaluation IEP meeting"). At the independent evaluation IEP meeting, the IEP

team shall invite and include the IEE evaluator in the IEP team meeting (making scheduling

- accommodations for his/her participation as necessary). The District shall bear any cost, or rate, for the appearance of the IEE evaluator at the independent evaluation IEP meeting.
- The terms of this order regarding the involvement of the IEE evaluator shall cease after the IEE evaluator has participated in the independent evaluation IEP team meeting, although nothing in this order should be read to limit, or interfere with, the continued involvement of the IEE evaluator as one party, or both parties, see(s) value in such continued involvement and might make arrangements therefor.

Nothing in this order should be read to limit or interfere with the ability of the IEP team, by agreement of the guardian and the District, to alter the explicit directives of this order related to the IEE evaluator and/or evaluations, or the student's IEP generally.

Any claim not specifically addressed in this decision and order is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

March 31, 2015