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
DUE PROCESS HEARING

Name of Child: B.L.

ODR #15677 14-15 AS
ODR #15721 14-15 AS
ODR #15737 14-15 AS
ODR #15811 14-15 AS

Date of Birth:
[redacted]

Date of Hearing:
February 13, 2015

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Owen J. Roberts School District 901 Ridge Road Pottstown, PA 19465	Sharon Montanye, Esquire Sweet, Stevens, Katz and Williams PO Box 5069 331 Butler Avenue New Britain, PA 18901
Date Record Closed:	February 13, 2015
Date of Decision:	February 21, 2015
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

Student[1] is an early teen-aged student living with the Parents within the boundaries of the District but attending an Approved Private School [APS] at District expense. Student is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA][2] and Pennsylvania Chapter 14[3]. Student is also an individual with a disability protected under Section 504[4] [Section 504] and a protected handicapped student under Pennsylvania Chapter 15[5]. Student is classified under the categories of autism and intellectual disability.[6] The Parents[7] filed the four due process complaints numbered above which were consolidated into one hearing session with the consent of the parties.

The current disputes arose from the outcome of a previous due process matter adjudicated by another hearing officer; background information about that matter is essential in order to understand the context of the present matters. The previous hearing officer was asked to decide "whether Student requires a residential placement" for school year 2014-2015. Based upon the testimonial and documentary evidence before her the previous hearing officer concluded that "the evidence is simply insufficient to establish whether a residential placement is necessary for Student at this time" and that "a new evaluation of Student is essential so that the [IEP] team has a comprehensive understanding of Student's current strengths and needs before it can consider where the special education and related services should be provided". The Parents' complaint also required the previous hearing officer to decide whether the District committed procedural violations that denied the Parents meaningful participation in IEP development, and the hearing officer so found. Exercising her authority to fashion an appropriate remedy under the IDEA, the previous hearing officer awarded Student an Independent Educational Evaluation [IEE] at District expense rather than ordering the District to reevaluate Student. As such the IEE at District expense served both to obtain additional necessary information to guide future IEP team decisions about placement, and to compensate the Parents for their having been denied meaningful participation in their child's educational programing. In her Decision, the previous hearing officer stated, "This remedy of a publicly funded IEE will serve the critical function of 'guarantee[ing] meaningful participation [of the Parents] throughout the development of the IEP' and placement decision, something that was denied between February and June 2014". The Parents

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[1] This decision is written without further reference to the Student's name or gender to protect Student's privacy.
[2] 20 U.S.C. §1401 et seq.
[3] 22 PA Code §1400 et seq.
[4] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794
[5] 22 PA Code §15.1 et seq.
[6] This hearing officer presided over a due process hearing involving Student and the current parties in December 2014 and issued a Decision in January 2015 finding that Student should properly be classified as both autistic and intellectually disabled. [Valentini, ODR 15486/14-15 AS, January 2015]
[7] The term "Parents" is used here because although Student's father took the lead in filing the complaints and participating in the hearings it is understood that he was acting on behalf of both Parents. In the body of the Decision when "Parent" is used the father is specifically referenced.

however did not agree that Student should have an IEE, and appealed the previous hearing officer's Order to federal court. Despite receiving verbal notice of the Parents' intent to file an appeal of the Order, the District proceeded without the Parents' cooperation and followed the Order to obtain an IEE. Once the District received the formal written notice of appeal the District still held Individualized Education Plan [IEP] meetings [one without the Parents and the other with the Parents] to discuss the IEE, modified the IEP based on the IEE, and issued Notices of Recommended Education Placement [NOREPs] pursuant to these actions. The Parents in response filed the sequential due process complaints as numbered above and as put forth in the Issues section below. Although the Decision Due Dates of the four complaints ranged from February 21, 2105 to April 6, 2015 this decision is being issued on the earliest of these dates. The Parents prevailed on all four complaints.

Issues

15677: Did the District violate the Parents' procedural rights when it commissioned an IEE in accord with the Order of a previous hearing officer but against the Parents' wishes, after the Parents had notified the District of their intent to file an appeal of the Order to federal court? Further, once having received formal notice of the Parents' appeal to federal court, did the District err in considering the IEE and using it as a basis to amend the IEP? [S-2, IP-1][8]

15677: Did the District violate the Parents' rights when it released Student's educational records to the independent evaluator without parental consent?

15699: Was the IEE the District commissioned substantively appropriate? [S-2, IP-1]

15721: Did the District violate the Parents' procedural rights when it convened an IEP meeting on December 15, 2014 to consider the IEE and to make IEP revisions as necessary based on the IEE despite the Parents' request to reschedule the IEP meeting? [S-22, IIP-4]

15737 and 15811: Did the District violate the Parents' procedural rights when it issued a NOREP dated December 19, 2014 noting "Review of IEE Pursuant to Hearing Officer Ruling 15205-1415AS"? [S-23, IIIP-2] Did the District commit a procedural error when on January 16, 2015 it sent the Parents a NOREP proposing implementation of the IEP revision as per its December 15, 2014 NOREP? [S-30, IIIP-6]

[8] "S" denotes School District exhibit; Parents' exhibits are in three volumes: IP-1 denotes Volume One Parent Exhibit 1. Some of the parties' exhibits are duplicates of one another's – at times both documents may be referenced and at other times one or the other may be referenced.

Findings of Fact

Independent Educational Evaluation

1. Pursuant to a due process hearing held in August 2014 wherein the Parents requested residential placement for Student, the previous hearing officer ordered an IEE in a decision issued on September 15, 2014 because "a new evaluation of Student is essential so that the [IEP] team has a comprehensive understanding of Student's current strengths and needs before it can consider where the special education and related services should be provided" and to "serve the critical function of 'guarantee[ing] meaningful participation [of the Parents] throughout the development of the IEP' and placement decision". [S-2]

2. The previous hearing officer also made part of her Order the following: "Nothing in this Order should be read to preclude the parties from mutually agreeing to alter any of the directives set forth in this decision and Order." The parties did not come to any alternate agreement. [NT 95, 103; S-2]

3. On September 19, 2014 pursuant to the September 15, 2014 Order, the District sent the Parent the names of four potential independent evaluators – two were employees of the IU in which the District is located and two were private practitioners. The District did not inform the Parent that the Parents could choose someone not on the list, as long as the person met the same qualifications as required of a District evaluator. The Parents did not select an evaluator. [NT 59; S-3]

4. The Parents objected to the IEE[9] and so informed the District on September 29, 2014 indicating that they intended to take the matter to federal court. When they resided in another state, the Parents filed previous federal court appeals of which the District and/or its counsel may have been aware. [NT 34, 38, 93-94; S-5, S-9, S-29; IP-8, IP-10]

5. After having received the Parent's September 29th letter, and not having been given the Parents' choice of an evaluator, the District proceeded to itself select an evaluator[10] from the list it provided to the Parents and proceeded to have the IEE conducted pursuant to the previous hearing officer's Order.[11] [NT 61-62, 94; S-5]

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[9] It is not clear if the Parents understood that the hearing officer's award of a publicly funded IEE was a favorable outcome for them. The Parents' reasons for their objections to this award, that many parents seek and frequently participate in due process hearings to obtain, seem to be related to their belief that the District may have been trying to place Student in a different school. [NT 57; IP-3]

[10] The District's choice of an IU employee to conduct the evaluation, while not in violation of the requirements for an IEE, could cast some doubt about whether the IEE could be truly independent. The District did put two private practitioners who in the past have testified for parents on the list, and choosing one of them would have been a gesture of good faith. In his closing the Parent noted that he told the District that he wanted to try to find an evaluator that was not on the District's list, the record does not contain that correspondence. [NT 160-161]

[11] The District took comfort in part to an email response this hearing officer provided on October 18, 2014 regarding right of refusal of an IEE ordered by another HO. The email of the same date that generated this

6. The District hand-delivered a copy of Student's educational records to the evaluator. [NT 137-138]

7. On October 6, 2014 the Parent emailed and sent by US Mail a signed letter to the District's Special Education Supervisor noting: It is time for District and parent to arrange an evaluation of [Student] to update [Student's] educational needs. First, District can have its psychologist conduct the Evaluation. [NT 160; IP-6]

8. In an October 9, 2014 email the Parent reminded the Special Education Supervisor that he should have received the October 6, 2014 letter about commencing the reevaluation by the District. [IP-7]

9. The Special Education Supervisor testified that he didn't respond to this correspondence because he was surprised since the Parents had rejected reevaluations four times previously and because there was "an independent evaluation going on". [NT 92, 95-97]

10. On or about October 16, 2014 the Parent sent an email to the APS giving the name of the private evaluator the District had chosen and directing the APS not to release any educational records to the evaluator. The APS expressed to the District being in an awkward position and asked for information about the Order. [NT 63-64; S-6]

11. Since the Parents withheld their consent for the independent evaluator to observe/test Student at the APS or for the APS staff to share records/information with the independent evaluator, the APS denied the independent evaluator access to Student or to the school.[12] [NT 34, 124-126; S-9]

12. It was clear to the evaluator that the Parents were "pretty explicit" about not giving consent for the IEE. [NT 125, 131-132]

13. The Parents filed their appeal of the September 15, 2014 Decision to federal court on November 5, 2014. [S-14]

14. The independent evaluator issued a report dated November 18, 2014, and mailed it out on November 24, 2014 just before the Thanksgiving break. The District received it when school reopened after the break [likely December 1st or 2nd based upon the date of Thanksgiving in 2014]. [NT 69-70, 124, 128; S-13, S-14, IP-11]

15. The report was a review of records. [NT 124-126, 129-130]

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response did not include the information that the Parent had indicated three weeks earlier that he intended to appeal the Order in federal court. [NT 102-103; S-7]

[12] The APS appears to harbor misconceptions about its standing vis a vis the administrative due process system and is urged to clarify its understanding with the Pennsylvania Department of Education/Bureau of Special Education. [See S-9, page 2]

16. The District was formally served with the Parents' appeal to federal court on November 25, 2014. [NT 70; S-14, IP-2]

December 15, 2014 IEP Meeting

17. In June 2014 Student's Homelife Instructor and Classroom Teacher at the APS provided written information on unsigned pages to the District about Student's abilities in certain skill areas but noted that Student's performance of these skills was inconsistent and varied from what Student could do at home. The Parent asserts that this information was never sent to the Parents by the APS[13], and further that the information is incorrect. Based upon the previous due process hearing the District knew that the Parents believed that this information was incorrect. [NT 20-21; S-19, IP-13]

18. Based in part on this contested information[14] the independent evaluator recommended observation by a behavior specialist in the home and the APS environments, writing, "Given the parents [sic] concerns regarding the discrepancy between [Student's] behaviors and skills in the classroom versus the home environment, it is recommended that [Student] be observed by a behavior specialist in both environments." [NT 127-128, 131; S-13, IP-11]

19. Despite having received formal notice of Parents' appeal to federal court of the Order for an IEE, on December 4, 2014 the District issued an Invitation to Participate in an IEP Team Meeting to discuss the IEE. The Parent acknowledged receipt of the Invitation on December 5, 2014 but requested that the meeting be rescheduled to January 12, 2015. [NT 40-41, 70-71; S-15, S-16, IIP-1, IIP-2]

20. The District did not contact the Parents prior to scheduling the meeting for December 15, 2014. The District did not try to work with the Parents to find another December date rather than January 12, 2015. [NT 104-105, 158, 165-167; IIP-2]

21. The District agreed to reschedule the meeting but also notified the Parent by letter dated December 8, 2014 that it was "compelled" to hold an IEP meeting on December 15, 2014 to review the IEE report and "implement any recommendations which may come from this report". This District misinterpreted a special education regulation regarding timelines for reviewing a reevaluation. [NT 73, 108-111; S-17, IIP-7]

22. At the IEP meeting the IEE was discussed as well as proposed revisions to the IEP's SDI based on the IEE's recommendations. The revisions were: Observation to be conducted by a behavioral specialist in the home environment upon parental consent; Observation to be conducted by a behavioral specialist in the school

[13] Hence the Parent references this written information as the Hidden Documents.
[14] There is no reason to suspect that the independent evaluator knew that the reliability of this information was in question.

environment upon parental consent; and, Upon parental consent staff to provide parent with information and opportunities for guided training at [APS] on self-help and self-care, which [Student] is currently able to perform during the school day. Student's Self-Help Skills teacher agreed that these were appropriate SDIs to add to the IEP. [NT 75-77, 80; S-18, S-27, IIP-3, IIIP-1]

December 19, 2014 Correspondence/NOREP

23. Following the IEP meeting on December 15, 2014 the District sent the Parents a letter on December 18, 2014 indicating the three SDIs that were added to the IEP and proposing, if the Parents agreed, an agency to carry out the observations. [S-21]

24. The Parent understands the SDIs to mean that there is a need for Parent Training and disputes that this is a need. He sees no reason to include these SDI's in the IEP, asserting that the purported need arose from inaccurate information. He is deeply offended by the idea that he and his wife need training to help their child. [NT 46-48, 100, 112-113, 132-137, 141-150]

25. On December 19, 2014 the Parents received a NOREP pursuant to the December 15, 2014 IEP meeting[15]. [S-30; IIIP-2]

January 12, 2015 IEP Meeting and Subsequent NOREP

26. Although the Parent had indicated that he was not available for an IEP meeting on December 15, 2014 to discuss the IEE and possible IEP revisions, he did indicate that he could attend a meeting on January 12, 2015. In a letter dated January 1, 2015 the Parent questioned the purpose of the January meeting since a meeting had already been held without him on December 15, 2014. [NT 40-42, 54; S-25]

27. The District did hold another IEP meeting on January 12, 2015 at which the Parent was present. In addition to the IEE results and the draft changes to the IEP, the team briefly discussed possible transportation changes which the Parent proposed. [NT 42-43, 84-85, 89-90; S-27; S-28]

28. At the IEP meeting the Parent reiterated his opposition to the proposed SDI additions. [NT 89]

29. Pursuant to the January 12, 2015 IEP meeting, on January 16, 2015 the District issued a NOREP indicating that the IEE had been reviewed and that the District proposed to change the provision of FAPE to Student [implementation of the added contested SDIs]. [S-27]

Burden of Proof and Credibility of Witnesses

[15] I could not locate a copy of the December NOREP in either of the parties' exhibit books. The December NOREP is referenced in the District's January 23, 2015 Answer to Parents' Complaint of January 21, 2015. [S-30] and I accept the Parent's assertion that he received a December NOREP. [Parents' Due Process Complaint of December 22, 2014,]

Burden of Proof: The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer). In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[16] that the other party failed to fulfill its legal obligations as alleged in the due process complaint. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). In this case the Parents asked for the hearing and thus bore the burden of persuasion; the District volunteered to undertake the burden of production at the hearing session and the Parent accepted this offer. As the evidence was not equally balanced the Schaffer analysis was not applied.

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); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014). The witnesses each appeared to be making every effort to be candid and there was no indication that anyone was dissembling. Each witness described the events from his or her own standpoint, and although they differed widely in interpretation of the events there were no significant factual contradictions among them that this hearing officer could discern or needed to resolve.

Legal Basis and Discussion

Did the District violate the Parents' procedural rights when it commissioned an IEE in accord with the Order of a previous hearing officer but against the Parents' wishes, after the Parents had notified the District of their intent to file an appeal of the Order to federal court? Further, once having received formal notice of the Parents' appeal to federal court, did the District err in considering the IEE and using it as a basis to amend the IEP?

Jurisdiction: As a threshold matter, in its December 30, 2014 Answer to Parents' Complaint #15737/14-15 AS, the District raised the issue of hearing officer jurisdiction, stating "…as you have appealed the issue of the IEE, that subject is no longer a matter

[16] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

over which the current Hearing Officer can take jurisdiction which now lies in federal court." [IIIP-3] The District seems to have dropped that defense, as the subject of jurisdiction was not raised at the hearing nor was it raised in the District's post- hearing Memorandum of Law. If indeed the District still holds this position, this hearing officer must disagree. In their appeal to federal court, the Parents asked the court to decide whether the previous hearing officer properly issued the Order for an IEE, and, if not, to vacate that Order. In the current hearing, the issue *inter alia* is whether the District erred in already having conducted the IEE and if so should the IEE be stricken from Student's educational records on that basis or on the grounds that the IEE is inappropriate. This is a distinct and separate issue and is subject this hearing officer's jurisdiction.

Evaluations/Independent Educational Evaluations: The IDEA sets forth two purposes for an evaluation: first, to determine whether or not a student is a student with a disability as defined in the law, and second to "determine the educational needs of such student …" 20 U.S.C. §1414(a)(1)(C)(i). After a child is determined to be eligible, the IDEA statute and regulations provide for periodic re-evaluations to assess the child's needs on an ongoing basis. The reevaluations "may occur not more than once a year unless the parent and public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that an evaluation is unnecessary." 20 U.S.C. §1414(a)(2)(B)(i), (ii); 34 C.F.R. §300.303(b). In Pennsylvania however, children with an intellectual disability "shall be reevaluated at least once every two years." 22 PA Code Chapter 14 §14.124(c).

An IEE is defined in the IDEA regulations as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. §300.502(a)(3)(i). Parents can obtain an IEE at public expense if they disagree with an evaluation obtained by a district and the district agrees to fund the independent evaluation, or if the district files for a hearing to defend its evaluation but the evaluation is found inappropriate by a hearing officer after an administrative due process hearing. 34 C.F.R. §300.502(b)(1), (2)(ii).

In addition to IEEs being made possible by agreements or by litigation, federal implementing regulations of the IDEA allow for IEE's to be initiated by a hearing officer, and "[i]f a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense." 34 C.F.R. §300.502(d). Under Pennsylvania special education regulations hearing officers may order an IEE as a "hearing officer shall have the authority to order that additional evidence be presented". 22 PA Code §14.162(g).

Going forward with the IEE: Pennsylvania is a one-tier system, that is to say that there is no appellate body between the hearing officer and the courts. Accordingly an Order by a hearing officer is considered a final order of the state educational agency unless that order is appealed to a court of competent jurisdiction. The IDEA and its implementing regulations provide as follows regarding the finality of a hearing decision:

> A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2). 20 U.S.C.§1415(i)(1)(A)
>
> A decision made in a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530 through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and §300.516. 34 C.F.R. §300.514 (a)
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> Any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy. 20 U.S.C. § 1415(i)(2)(A)
>
> Any party aggrieved by the findings and decision made under §§303.507 through 303.513 or §§300.530 through 300.534 who does not have the right to appeal under §300.514(b) and any party aggrieved by the findings and decision made under §300.514(b) has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under §§300.507 or §§300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. 34 CFR §300.516(a)
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> Time limitation: The party bringing the action shall have 90 days from the date of the decision of the hearing officer, or if applicable the decision of the State review official, to file a civil action, or, if the State has explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by State law. 34 CFR §300.516(b)

Pennsylvania Chapter 14 incorporates these federal regulations regarding time limitations by reference.[17]

Pursuant to the Pennsylvania Department of Education's policies, in July 2011 the Office for Dispute Resolution issued revised Appeal Timelines and Instructions for Completing Assurance Forms, a document that is sent to both parties along with every hearing officer decision. This document reads in relevant part as follows:

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[17] Pennsylvania Chapter 15 regulations, which address a student's rights under Section 504 provide: Stay Pending Judicial Appeals. If, within 60 calendar days of the completion of the administrative due process proceedings under this chapter an appeal or original jurisdiction action is filed in State or Federal court, the administrative order shall be stayed pending the completion of the judicial proceedings, unless the parents and the school district agree otherwise. 22 Pa. Code §15.8(d). This is provided for informational purposes only as the Parent filed this hearing under the IDEA.

> Timeline for Completing All Other Assurance Forms (i.e. those not covered under Section III [related to change in educational placements]: *Until the expiration of the applicable appeal period, the EI-Preschool Early Intervention, LEA or Charter School is not obligated to implement the Hearing Officer's Decision.* [Emphasis added] At the expiration of the appeal period, if no appeal has been taken, the EI-Preschool Early Intervention, LEA or Charter School is required to comply with the Hearing Officer's Decision. The EI-Preschool Early Intervention, LEA or Charter School has sixty (60) calendar days after the expiration of the appeal period in which to complete, have executed by the EI-Preschool Early Intervention, Superintendent or Charter School Chief Executive Officer, and return the Assurance Form to the assigned Office for Dispute Resolution Case Manager.
>
> *If an appeal is taken from the Hearing Officer Decision, the LEA or Preschool Early Intervention is not required to implement the Decision unless directed to do so by the judiciary.* [Emphasis added]

The United States Department of Education Office of Special Education and Rehabilitative Services [OSEP], in a June 2, 2014 Letter to Voigt addresses Pennsylvania's timelines for implementation of hearing officer orders and provides "informal guidance [that] is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented. The Letter reads in part:

> Under Section IV of the [Pennsylvania] policy, an LEA is not obligated to implement the decision until the expiration of the applicable appeal period. The LEA has 60 calendar days after the expiration of the applicable appeal period to implement the decision and file the required assurance with the State verifying implementation of the order. As we read the policy, the timeline for implementing a due process decision in Section IV of the policy does not apply if a hearing officer agrees with the child's parents that a change of placement is appropriate. ..
>
> *The hearing decision is final, unless a party aggrieved by that decision appeals that decision by bringing a civil action in a State court of competent jurisdiction or a district court of the United States.* 34 CFR §300.514(a) and 300.516. [Emphasis added] As noted above, in Pennsylvania, a party may appeal a final due process decision to state court within 30 calendar days and to Federal Court within 90 calendar days. While the IDEA does not specifically address State-established timelines for implementation of final administrative decisions, we would expect that all final due process decisions are implemented within a reasonable period of time and without undue delay so that a child with a disability receives the services determined necessary to provide that child with the free appropriate public education to which he or she is entitled, but has been denied, under the IDEA. *These determinations are highly factual in nature; therefore, we believe that what constitutes a "reasonable period of time" depends in part on the circumstances surrounding the decision.* [Emphasis added] If an LEA determines

> shortly after the beginning of the time period to bring an appeal that it is not going to appeal a final due process decision, the LEA should not delay implementation of the decision until the expiration of the 90 day appeal period. To the contrary, that LEA should implement the decision as soon as possible, absent a specific reason to do otherwise. If the LEA does not make a final decision about whether to appeal a decision until the end of the 90 day appeal period, the LEA should not delay implementation of the decision for an additional 60 days beyond the 90 days. Depending on the type of relief ordered, particularly where the relief itself is time sensitive, a shorter time frame may be reasonable. For example, if an LEA is required to pay tuition reimbursement or provide compensatory education services that are commonly available, the LEA should implement the decision in less than 60 days. On the other hand, in unusual circumstances where implementing the hearing officer's decision requires the LEA to undertake significant action, e.g., training an entire school staff on how to meet the needs of the child, extensive renovations, or purchasing particularly unique equipment that is not readily available, the LEA may need additional time, up to 60 days in Pennsylvania, to implement the decision. As noted above, meeting the special education and related services needs of the child without undue delay is paramount and should drive the timeliest implementation of the hearing officer's decision.

Once the Parent informed the District that it objected to the previous hearing officer's Order for an IEE and intended to file in federal court the District made no efforts that are documented in the record to seek direction from the previous hearing officer, to seek direction from PDE/BSE, or to invoke the previous hearing officer's ancillary Order that the parties could mutually agree to alter the terms of the Order. Even if the District did not have direct knowledge that the Parents had engaged in federal litigation in another state and that the Parent's stating that he was going to file an appeal of the previous hearing officer's Order was likely not an idle threat, it was still incumbent upon the District to allow the appeal period to lapse before beginning the IEE given the Parent's prompt objection to the IEE and his statement of intent to appeal.

The District did not wait out the appeal timeline before having the IEE conducted even in the face of the Parent's stated intention to file an appeal. Instead, the District opted to follow the previous hearing officer's Order and have the IEE done against the Parents' wishes. This hearing officer acknowledges that the District may have believed it was itself in the uncomfortable position of being between the proverbial rock and hard place, and is not entirely unsympathetic. However, what cannot be condoned in any respect is that once having received the formal notice of appeal the District chose to use the IEE report that was mailed one day before the formal notice of appeal, an IEE report which it had not yet even received. The independent evaluator mailed her November 18, 2014 report on November 24, 2014 with a cover letter dated November 24, 2014. The District's special education supervisor believes he did not see the IEE report until the District resumed operation after the Thanksgiving break. The District however acknowledges receiving formal service of the Parents' appeal of the Order for an IEE on November 25, 2014, one day after the report was mailed but before the District received

the report. Once the District received the notice of appeal the appropriate response was to set aside the IEE report and take no further action on it pending the outcome of the appeal to federal court other than reimbursing the evaluator for her service. The District was under absolutely no obligation to hold an IEP meeting to consider the IEE and in fact erred in doing so.

Did the District violate the Parents' rights when it released Student's educational records to the independent evaluator without parental consent?

Parental Consent: The IDEA contemplates the situation where a parent withholds consent for a reevaluation. Its implementing regulations regarding reevaluations provide that "If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described [in a preceding section related to initial evaluations]". 34 C.F.R. §300.300(c)(ii). The preceding section provides that if a parent does not provide consent for an evaluation the public agency may, but is not required to, utilize procedural safeguards, "including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516 if appropriate, except to the extent inconsistent with State law relating to such parental consent. Pennsylvania Chapter 14 has incorporated these portions of the federal regulations by reference. 22 PA Code §§14.123-14.124.

Releasing Educational Records: Public comments and responses on the implementing regulations of the 2004 reauthorized IDEA were issued in the August 14, 2006 Federal Register. It was noted that although parental consent is not required for a district to release educational records to a hearing officer [because a hearing officer is an official of a participating agency] when a hearing officer orders an IEE, parental consent would be required under 34 C.F.R. 300.622(a) for a public agency to release education records to the independent evaluator who will conduct the IEE, since the independent evaluator is not an official of a participating agency. Further, "If a parent refuses to consent to the release of education records to an independent evaluator, a hearing officer could decide to dismiss the complaint." Federal Register, Vol. 71, No. 156, August 14, 2006. [IP-15] Although this section apparently refers to cases in which parents themselves have asked for an independent educational evaluation, there is nothing to indicate that it does not also refer to an IEE that a hearing officer orders on his/her own initiative and authority.

The District did commit a procedural error when it released Student's educational records to the independent evaluator without parental permission or seeking a further hearing officer order.

Was the IEE the District commissioned substantively appropriate?

The purpose of an evaluation is, first, to determine whether the child meets any of the criteria for identification as a "child with a disability" as that term is defined in 34 C.F.R. §300.8, and second, to provide a basis for the contents of an eligible child's IEP, including a determination of the extent to which the child can make appropriate progress "in the general education curriculum." C.F.R. §§300.8, 300.304(b)(1)(i), (ii). The

general standards for an appropriate evaluation are found at 34 C.F.R. §§300.304—300.306. The District is required to 1) "use a variety of assessment tools"; 2) "gather relevant functional, developmental and academic information about the child, including information from the parent"; 3) "Use technically sound instruments" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using "any single measure or assessment as the sole criterion" for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be "sufficiently comprehensive to identify all of the child's special education and related service needs" and provide "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). An initial evaluation must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom–based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child's educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2). 305(a)(1),(2).

Further, the regulations require that the evaluation procedures assist in determining … the content of the child's IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs. 34 C.F.R. §300.304(c)(6). At least one federal court has interpreted the IDEA to require that the evaluation be "sufficient to develop an appropriate IEP … ." *Brett S. v. West Chester Area School District*, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

In order to conduct Student's evaluation the independent evaluator sought access to Student for observation/testing, sought to gather current input from the APS staff, and sought to receive current input from the Parents. The independent evaluator could not complete these activities essential to an evaluation because the Parents, who opposed the IEE, withheld their consent to allow the APS to make Student available for observation or testing, and/or to allow APS staff to provide information about Student. The Parents likewise declined to provide the evaluator with input regarding their views of their child's current functioning and educational needs.

The only portion of the evaluation that the independent evaluator could accomplish was reviewing the existing educational records that the District sent to her. Because she could not ask questions of APS staff or of the Parents she relied on the information Student's educational records contained, and was not able to verify the information contained therein. As parental consent is not required before reviewing existing data as part of an evaluation or a reevaluation, the independent evaluator did not commit an error in

reviewing the records provided to her. 34 C.F.R.§300.300(d)(2)(1)(i). Given that her only basis of knowledge was her record review, the evaluator explained in her summary of the "Confidential Psychoeducational Evaluation" that Student's "current level of functioning in and out of the classroom is unable to be determined" given that the evaluator "was not granted access to the student or to [Student's] educational environment". Had the evaluator stopped there she would have been on very solid ground; however she went one step further and offered the recommendation that "Given the parents [sic] concerns regarding the discrepancy between [Student's] behaviors and skills in the classroom versus the home environment, it is recommended that [Student] be observed by a behavior specialist in both environments." Because she had no opportunity to inquire from teachers or Parents as to whether two APS teachers' descriptions of Student as of June 13, 2014 were ever accurate or still accurate as of mid-November 2014, or whether the information the Parents purportedly provided to the APS about lack of carryover[18] was or continued to be accurate, this recommendation, although generally representing best educational practice standing alone in and of itself, as applied to Student lacked a sufficient current basis and was ill-advised. [P-11]

Through no fault of the independent evaluator the IEE was not appropriate given that it lacked most of the elements required for an evaluation. In fact, rather than being titled "Confidential Psychoeducational Evaluation" the report would more properly have been titled "Review of Educational Records" and in her testimony the evaluator acknowledged that the report represented simply a record review. There was not one piece of information in the report that was not already in Student's educational records and already known to the parties. The desire of the independent evaluator to be of some service to the child and the District once engaged is understandable, however, rather than making recommendations for specific information gathering/interventions the evaluator would more properly have simply concluded that more information gathering was needed about Student's skill levels.

Did the District violate the Parents' procedural rights when it convened an IEP meeting on December 15, 2014 to consider the IEE and to make IEP revisions as necessary based on the IEE despite the Parents' request to reschedule the IEP meeting?

The IDEA's regulations put forth the requirements of a district to ensure parental participation:

> Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting

[18] The Parent contended in the present hearing that it is not true that Student does things at the APS but not at home. The transcript of the hearing held in late August 2014 was not made available in the documents, however in her Decision the previous hearing officer found that in November 2013 the Parents expressed a concern that "Student behaved differently at home than at school, specifically with respect to feeding and sleeping" [Finding of Fact 10] and that "because of [these concerns] the Parents asked the IEP team at the November 2013 meeting to consider a residential placement for Student" [Finding of Fact 12]. [S-2]

> at a mutually agreed on time and place…If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls consistent with [a later section]…when conducting IEP Team meetings…the parent of a child with a disability may agree to alternative means of meeting participation, such as video conferences and conference calls. 34 C.F.R. §300.322(a)(1)(2); §300.328.

The District chose the December 15, 2014 IEP meeting date without consulting the Parents and sent out an Invitation to Participate on December 4, 2014. The Invitation noted that the purpose of the meeting was twofold: to review the IEE as ordered by the previous hearing officer and to discuss the current IEP and review and revise it as needed based on the IEE. The Parent responded on December 6, 2014 that he could not attend on that date, and suggested January 12, 2015.

On December 8, 2014 the District responded in a letter to the Parent that it was "compelled to hold this meeting at the proposed date and time to review the report issued by the Independent Evaluator and implement any recommendations which may come from this report". Although the previous hearing officer ordered that the IEP team meet after receiving the IEE, she did not specify a timeline for that meeting. Further the only reference to a 30-day timeline in the IDEA is with regard to a finding of eligibility of a child: A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services. 34 C.F.R. §300.323(c)

Nonetheless, given its erroneous belief that the meeting had to be conducted within 30 days of its November 24, 2014 receipt of the IEE, the District inexplicably did not seek to determine if the Parent could meet on a date between December 7, 2014 and the beginning of the winter break, and instead went ahead and held the meeting to discuss the IEE and the IEP without the presence of the Parent[s]. In addition to refusing to reschedule, the District did not offer to arrange any alternative method of parental participation. The District's Answer to Parents' Complaint #15721-14-15 AS presents flimsy grounds to justify its holding the meeting on December 15, 2014 when the Parents had immediately upon receiving the Invitation indicated that they could not attend on that date. The response also sent a strong, if unintended message to the Parents that their scheduling needs were put behind those of the APS and the evaluator: "Not meeting until January 12, 2015 would have put the District well outside of thirty days that is *typical* for updating an IEP when an evaluation is completed. Therefore the District scheduled the IEP meeting within *proscribed timelines* and the *availability of the staff at [APS] and the Independent Evaluator*."[Emphasis added][IIP-5]

Given the Parents' unmistakable resistance to the IEE in the first place, but its mistaken belief that it was under a 30-day timeline, the appropriate course would have been for the District to see if any other earlier date was possible for the Parent[s] or to try to arrange an alternate method of their participation, or to forego the December 15, 2014 meeting in favor of the January 12, 2015 meeting.

As noted above, there was not one piece of information in the IEE that was not already in Student's educational records and therefore the IEE presented no new data upon which to proceed. As per its Invitation, the District not only reviewed the IEE on December 15, 2014 but without the Parent[s] being present also made revisions to the IEP that flowed from recommendations in the IEE. The District's making IEP revisions based on an insubstantial IEE is especially difficult to understand as, pursuant to the August 2014 hearing, the previous hearing officer found the District's adding certain specially designed instructions to the IEP without the Parents' consent to be a procedural violation that impeded the Parents' right to meaningful participation that in part gave rise to the award of an independent evaluation to help the Parents maintain equal footing on the IEP team. The District's holding the IEP meeting without the Parents and then revising the IEP based on the IEE recommendations was inappropriate and a repeat of its recent past mistake.

Did the District violate the Parents' procedural rights when it issued a NOREP dated December 19, 2014 noting "Review of IEE Pursuant to Hearing Officer Ruling 15205-1415AS"? *Did the District commit a procedural error when on January 16, 2015 it sent the Parents a NOREP informing them that it was going to implement the IEP revision as per its December 15, 2014 NOREP*?

Given that the District had held the meetings and had made changes to the IEP it was required to provide the Parents with NOREPs.

The changes the District unilaterally made to the IEP were written in such a way as to make implementation impossible without the Parents' consent/permission. The Parents strongly rejected the SDIs that were proposed pursuant to the recommendations of the IEE. They opposed them when they received notification of the results of the IEP meeting held without them and continued to oppose them after the IEP meeting they did attend. Aside from the Parents' vehement objections to the IEP revisions, given that the three new SDIs are written in such a way as to require parental consent they are impossible to implement at this time and must be removed.

Conclusion

The Parents have met their burden of proof and prevailed on all issues addressed in this hearing. The District had opportunities along the way to curtail the round of litigation that this decision addresses. This was not a runaway train barreling to an inevitable ending. First, having been given verbal notice of the Parents' intent to file an appeal of the Order for an IEE, the District should have halted the process and waited out the appeal timeline. Second, having decided to follow the Order and go ahead with the IEE, once it received formal notice of the appeal on November 25, 2014 the District should have set aside the IEE mailed on November 24, 2014 and not received until after the Thanksgiving break and taken no further action other than reimbursing the evaluator. Third, having decided to act on the IEE by holding an IEP meeting despite having received the formal notice of appeal, the District should have consulted first with the Parents to select a mutually

available dates. Fourth, having unilaterally set the date for the convenience of the APS and the evaluator, but receiving the Parents' request to reschedule, the District should have worked with the Parents to find a date within what it believed was a 30-day window. Fifth, if there was no date in that window the District should have canceled the date it unilaterally chose and held the first discussion of the IEE on the date the Parent was available. Sixth, given the Parent's vehement opposition to the IEP revisions based on the IEE recommendations the District should not have indicated its plan to implement the revisions, particularly since each of the three SDIs in question was conditioned on the Parents' consent, and thus were not able to be implemented. At any point along the way the District could and should have stopped the process that led to this hearing.

Order

It is hereby ORDERED that:

The District erred when having received notice of the Parents' intent to appeal and without waiting for the appeal timeline to lapse, it procured an Independent Educational Evaluation pursuant to a previous hearing officer's Order.

The District violated the Parents' procedural rights when it released Student's educational records to the independent evaluator without parental consent or seeking a further Order from the previous hearing officer.

The District erred when it acted upon the Independent Educational Evaluation twenty days after having been served a formal notice of appeal.

The Independent Educational Evaluation was not a substantively appropriate evaluation.

The District violated the Parents' procedural rights when it convened an IEP meeting on December 15, 2014 to consider the IEE and to make IEP revisions based on the IEE despite the Parents' prompt request to reschedule the IEP meeting.

The District violated the Parents' procedural rights when it made revisions to Student's IEP without parental participation.

The District erred when it retained these IEP revisions after the Parents strongly objected to them, and issued NOREPs indicating its intent to implement the contested revisions despite their being impossible to implement as written.

Unless it intends to appeal this Order, the District must immediately remove the report of the Independent Educational Evaluation from Student's educational records.

Unless it intends to appeal this Order, the District must immediately remove the contested revisions from Student's IEP.

Any claims not specifically addressed by this decision and order are denied and dismissed.

February 21, 2015
Date

Linda M. Valentini, Psy.D., CHO
Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official