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: B.L.

Date of Birth: [redacted]

Date of Hearing: 5/15/2015

CLOSED HEARING

ODR File No. 16048-14-15-KE

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney
Local Education Agency Owen J. Roberts School District 901 Ridge Road Pottstown, PA 19465-8423	LEA Attorney Sharon Montanye Esq. Sweet, Stevens, Katz & Williams PO Box 5069, 331 Butler Avenue New Britain , PA 18901

Date Record Closed: 5/15/2015

Date of Decision: 6/4/15

Hearing Officer: William Culleton Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student[1] is an eligible child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Student lives within the respondent District. (1NT 8-9.)[2] Student is identified under the IDEA as a child with the disabilities Autism, 34 C.F.R. §300.8(c)(1), and Intellectual Disability, 34 C.F.R. §300.8(c)(6)[3]. (1NT 8.)

The Parents challenge the appropriateness of specific language in an individualized educational program (IEP) offered by the District. The District responds that the IEP is appropriate and that it should not be revised as requested by Parent. The hearing was completed in one session. I conclude that much of the contested IEP language is inappropriate and I order removal of specific language.

ISSUES

1. Does the IDEA permit the District to add a log or summary of Parent's statements to the IEP, and is the added log or summary at page 6 of the IEP appropriate?
2. Are the SDI set forth in the IEP, which offer to provide assessments and training of Parents in the home setting, appropriate?
3. Is the SDI set forth in the IEP, which offers to provide "informal screening" regarding Student's physical therapy needs, appropriate?

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[1] Student, Parents and the respondent District are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality. Because the Student's father engaged in most of the transactions with the District, he is referred to below as "Parent" in the singular.

[2] With the agreement of the parties, I incorporate the record of ODR No. 16036-14-15-KE as part of the record in this case. (NT 59-60.) The previous transcript in No. 16036 will be cited as "1NT"; the transcript in the present matter will be cited "NT". Similarly, citations to the exhibits admitted in evidence in No. 16036 will be cited with a numeral "1" before the exhibit reference, to distinguish them from exhibits admitted in the present matter, which will have the usual designations.

[3] Although the IDEA category is labeled "mental retardation", 34 C.F.R. §300.8(c)(6), in Pennsylvania, this classification is referred to as "intellectual disability" in keeping with the most recent nomenclature, as recognized by the American Psychiatric Association and the American Association on Intellectual and Developmental Disabilities. See generally, Commonwealth v. Hackett, 99 A.3d 11, 49 n. 2, 50 (Pa. 2014)(Baer, dissenting)(citing recognizing entities).

4. Does the IEP contain appropriate language showing how Student's disabilities affect Student's involvement and progress in the general education curriculum? If not, should the hearing officer order its inclusion in the IEP?

FINDINGS OF FACT

1. Student is [mid-teenaged], and is in eighth grade. Student is diagnosed with autism and intellectual disability, and is classified with those disabilities for purposes of the IDEA. (1NT 8.)

2. Student attends an approved private school (APS), placed there by the District pursuant to Student's eligibility for special education. Student has been at the APS for about two years, and Student's teachers report that Student has made some progress in basic academic skills, as well as communication skills, activities of daily living, and other basic adaptive skills. (1S 5.)

3. In October 2014, Parents requested that the District perform a re-evaluation of Student for purposes of ascertaining whether Student continues to need special education under the classifications of autism and intellectual disability, and for purposes of updating Student's educational needs. (1S 2.)

4. In December 2014, the District provided Parents with a Permission to Re-evaluate form, which the Parent signed with conditions. (1NT 100; 1S 2, 3; 1P 20.)

5. The District commenced its re-evaluation of Student after December 2014, and completed it in February 2014. (1S 3, 5.)

6. On December 15, 2014, the District revised Student's IEP based upon a private evaluation that it had obtained contrary to Parents' objection. The revisions included assessment and provision of parental training in the home. Decision of Special Education Hearing Officer, ODR Nos. 15699-14-15-AS; 15721-14-15-AS; 15737-14-15-AS; 15811-14-15-AS (February 21, 2015).

7. By final Decision dated February 21, 2015, a special education hearing officer decided that the revisions offering assessment and parental training in the home were inappropriate, because they were based upon a private evaluation that was substantively inappropriate; because the revisions were entered into the IEP without parental participation; and because they were impossible to implement as written due to parental opposition. The hearing officer ordered the District to remove the contested revisions. Decision of Special Education Hearing Officer, ODR Nos. 15699-14-15-AS; 15721-14-15-AS; 15737-14-15-AS; 15811-14-15-AS (February 21, 2015). (P 16.)

8. The District provided its re-evaluation to Parent on February 21, 2015. (1S 5.)

9. The February 2015 re-evaluation report recommended that the IEP team provide recommendations to Parents for behavioral and other strategies aimed at helping Student to generalize behaviors learned at school to the home setting. The report also recommended that the District provide a behavioral specialist to consult with Parents, with parental consent. These recommendations were for essentially the same specially designed instruction services (assessment and parental training in the home) that the previous hearing officer had found inappropriate. (1NT 45-46; 1S 5.)

10. On March 2, 2015, the APS issued an invitation to Parents, with copy to the District, to participate in an IEP team meeting on March 12, 2015, at which the APS proposed to discuss a draft IEP that was sent to Parents, on March 10, 2015. (S 3; P 8.)

11. The draft IEP sent to Parents on March 10 did not contain any reference to Student's skill in the home setting; it did not contain specially designed instruction providing for assessment and parental training in the home. It did not contain language providing for an informal screening to determine whether or not Student needed physical therapy services. It contained a recommendation that the amount of occupational therapy services remain the same as in the previous year. (NT 66-67; P 8.)

12. The meeting was held on March 12, 2015, and Parent attended. The occupational and physical therapists did not attend; the speech and language therapist attended and spoke about the occupational therapy and physical therapy recommendations not to increase the amount of those services. Parent participated in that discussion by asking questions, but was directed to seek answers to Parent's questions directly with the occupational and physical therapists at a later time. Parent did not take a position for or against the recommended amount of related services. (NT 33-43, 146-148.)

13. The District and APS agreed to an informal physical therapy assessment to consider whether or not an increase in services was appropriate. The parties did not reach a meeting of minds on the nature of any further physical therapy assessment. (NT 33-56.)

14. The District's representative erroneously concluded that Parent agreed with continuing the same level of related services subject to an informal physical therapy assessment, and, after the March 12 IEP meeting, sent language to the APS for insertion into the final IEP reflecting this misunderstanding. The Parent was not asked to review, revise or agree to this language before it was inserted into the IEP. (NT 33-56; S3; P 8, 14.)

15. At the March 2015 IEP meeting, the participants discussed certain skills that Student was demonstrating at school, as to which the District representative felt it appropriate to provide assessment in the home and parental training. These included, but were not limited to, use of an iPad and sorting items by colors. (NT 63-65.)

16. During the meeting, the District representative suggested that the IEP include an offer for assessment in the home and parental training, conditional upon parental consent. (NT 67-70, 72, 74-75, 94, 164-166.)

17. The IEP present levels of functional and academic performance did not mention any specific skills that Student could not perform at home. The IEP did not include any goals concerning Student's skills at home. (NT 80-91, 149-156; S 3; P 8.)

18. The District representative raised this issue even though the representative was on notice that the Parents would not agree to it, because the representative believed that it would be in the best interests of the child to provide such services. (NT 72, 149-166, 171-180.)

19. Although the Parent objected, and some in the meeting did not discuss their opinions freely, after the IEP meeting the District asked the APS to add three SDI on the last page of the IEP, with no associated present levels or goals, offering to provide assessment and parental training in the home. These were added to the IEP after the meeting by the APS at the District's request. (NT 101-103, 137-138, 149-166; S 3; P 8, 14.)

20. The District's representative consulted with one or more IEP team members after the meeting, in the belief that these members were uncomfortable agreeing with the proposed changes during the meeting. (NT 101-102.)

21. The IEP team did not discuss the previous determination of the hearing officer that such proposed SDI would be futile in the face of parents' consistent opposition. (NT 89.)

22. The IEP team, including Parent, discussed Parent's concerns regarding the Student's physical skills and the possibility of providing physical therapy as a related service. The team added an additional SDI calling for an informal screening of Student to determine need for physical therapy, without providing for the obtaining of informed consent. Because Parent did not object, the IEP team concluded that the Parent was not requesting a formal evaluation requiring informed consent. (NT 104-110, 133-136; S 3; P 14.)

23. The final IEP omitted to state that Student was classified with both autism and intellectual disability. (NT 112-117; S 3.)

24. By decision dated May 7, 2015, this hearing officer decided that the February 2015 re-evaluation report was inappropriate to the extent that it recommended assessment and parental training in the home environment. Decision of Special Education Hearing Officer, ODR No. 16036-14-15-KE (April 28, 2015).

DISCUSSION

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), an IDEA case. The United States Supreme Court held that the burden of persuasion is on the party that requests relief. Thus, the moving party must produce a preponderance of evidence that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

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

In this matter, the Parents requested due process and the burden of proof is allocated to the Parents. The Parents bear the burden of persuasion that the Parents' claims are true. If the Parents fail to produce a preponderance of evidence in support of their claims, or if the evidence is in "equipoise", then the Parents cannot prevail.

LOG OR SUMMARY INSERTED INTO IEP

The regulations implementing the IDEA make it clear that an IEP cannot be developed,

reviewed or revised unless this is done at a meeting in which parents are afforded the opportunity to participate. The meeting context is the first requirement for an IEP. 34 C.F.R. §300.320(a)(defining IEP as a statement that is "developed, reviewed and revised in a meeting … ."). Moreover, this meeting must include the parent. 34 C.F.R. §300.321(a)(1)(defining IEP Team to include "The parents of the child"). Educational agencies are enjoined to make efforts to "ensure" the presence of at least one parent "at each IEP Team meeting", or at least to afford parents the opportunity to participate. 34 C.F.R. §300.322(a).

At the IEP team meeting, the team that develops the IEP "must consider" parents' concerns for the child's education. 34 C.F.R. §300.324(a)(ii). If changes are proposed after the IEP team meeting, they may be considered only in another team meeting, unless the parent and the agency agree otherwise. 34 C.F.R. §300.324(a)(4)(i) and §300.324(a)(6).

Only the IEP team may review and revise an IEP; the educational agency cannot do this unilaterally. 34 C.F.R. §300.320 (a); 34 C.F.R. §300.324(b). When a child is placed in a private school, the private school may initiate meetings to review and revise the IEP, but the public agency remains responsible to ensure that the parents "are involved in any decision about the Child's IEP" and that parents "agree to any proposed changes in the IEP before those changes are implemented." 34 C.F.R. §300.325(b). The agency remains responsible for the private school's compliance with the IDEA. 34 C.F.R. §300.325(c).

Here, Parents complain that the District made a change to the language and content of the IEP – by adding language purportedly reflecting their agreement to the offered services - after the IEP meeting and without consulting them on the added language. The language in question is at page 6 of the March 12, 2015 IEP (S 3 p. 9):

3/12/2015 Meeting
During the IEP meeting, the Team discussed [Parent]'s statement he submitted in the parental concerns section of the IEP regarding "should we consider to increase sessions of speech and OT and PT (e. g., horseback riding) for [Student]". A speech and language evaluation was recently conducted at [Parent's] request. This speech therapist recommends continuing with 2 times per week for 30 minutes per session. The occupational therapist recommends 1 time per week for 30 minutes per session. [Parent] agreed to these recommendations at the meeting.

At the present time, [Student] does not receive physical therapy services. The [APS] physical therapist will conduct an informal screening to determine if [Student] would benefit from physical therapy service. [Parent] agreed to allow the [APS] Physical Therapist to conduct an informal screening to assess the need.

The evidence is preponderant that the District's Supervisor of Special Education sent the above language to the APS after the March 12 IEP meeting. I also find by a preponderance that Parent did not agree to these proposals as they related to occupational therapy and physical therapy services. On the contrary, Parent had questions about the occupational therapy services that could not be answered at the meeting, and Parent did not agree to either the plan to maintain the same level of occupational therapy service or the plan to conduct an "informal screening" to determine need for physical therapy services.

Thus, the record shows preponderantly that the IEP team did not insert the above language into the IEP, nor did it agree to the language at an IEP meeting. Parent did not agree to this revision of the IEP "statement". Thus, I conclude that this language was a revision after the meeting without parental consent and a revision that Parent did not agree with, contrary to the IDEA. Consequently, it cannot be implemented and must be removed from the IEP.

The District's supervisor, and the District in argument, asserted that Parent did agree during the meeting to the actions reflected in the contested language above, because

the Parent did not object to these proposals, and even nodded his head silently. Such silence and such a head nod are simply too ambiguous to rebut Parent's testimony that he never agreed.

Nor would such an understanding, even if reasonable on the supervisor's part, obviate the mandate of the IDEA regulations that the IEP, which is defined as a "statement" – and thus, essentially, as language itself – be "developed" at a meeting. 34 C.F.R. §300.320(a). I conclude that any addition to the language of the IEP at least should have been reviewed at the meeting under the IDEA regulations. If it were not developed in this way, but there was a desire to add it later, then the parent must at least have been consulted and must have consented to its addition without a meeting. 34 C.F.R. §300.324(a)(4)(i). In the present matter, the Parent must have agreed to the revision in the IEP "statement", because it was made by the APS. 34 C.F.R. §300.325(b).

This was not done in the present matter. Therefore, the District committed a procedural violation, and the language is inappropriate. I will remedy this violation by ordering the offending language removed from the IEP.

Parent argued that the language constituted a "log" or summary of the IEP meeting, and that such language should not be in the IEP because the IDEA does not explicitly authorize it to be placed in an IEP. While I need not reach this issue in light of my disposition of this IEP language on other grounds, I note that Parent's argument is not persuasive. While there is nothing in the IEP or its regulations that authorizes the language of concern to be put into an IEP, and while it is a statement about Parent's agreement at a meeting and thus different in nature from language stating services to be rendered, I find

nothing in the IDEA to prohibit IEP teams from inserting such language into IEPs, if done according to the procedural requirements set forth above. I do not conclude that the IEP can have only language that is explicitly authorized in the law itself; nothing in the IDEA suggests that Congress intended to so micro-manage IEP teams.

INSERTION OF SPECIALLY DESIGNED INSTRUCTION FOR ASSESSMENT AND TRAINING OF PARENTS IN THE HOME

After the March 12, 2015 IEP meeting, the Supervisor also sent the following three statements of specially designed instruction to the APS, and the APS inserted them into the IEP at page 49 (S 3 p. 52):

> Upon parental consent, observation to be conducted by a behavior specialist in the home environment.
>
> Upon parental consent, observation to be conducted by a behavior specialist in the school environment.
>
> 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.

The evidence is preponderant that these statements were inserted into the IEP by the APS at the request of the supervisor, after the IEP meeting, and that the IEP team did not review or discuss the language of these statements. Parent remained vigorously opposed to their insertion into the IEP, and did not consent to this procedure.

The school psychologist raised the subject of inserting statements offering assessment and parental training in the home at the IEP team meeting, in discussing the psychologist's re-evaluation report, which recommended such services. The Supervisor

thereupon proposed adding such language into the IEP, but the specific language was not developed at the IEP meeting.

I conclude that this was a procedural violation of the IDEA, for the reasons discussed above. The proposed IEP language was not reviewed at the IEP team meeting, and when the Supervisor and APS revised the IEP language by inserting this language, the Supervisor did not review the language with Parent, or obtain Parent's consent to do so without an IEP meeting; moreover the APS did not obtain Parents' consent to revise the IEP to add this language. For this reason alone, the language in question was inappropriate.

The language is inappropriate for another reason. A previous hearing officer had decided that similar language in a previous IEP was inappropriate for three substantive reasons: First, the language had been based upon an inappropriate re-evaluation – a private re-evaluation that the District had solicited over Parents' objection, which the hearing officer had found inappropriate on substantive grounds unrelated to Parents' opposition. Second, the language had been inserted into the IEP without parental participation. Third, the language had been impossible to implement because Parents would never consent to it and it could not be implemented without parental consent. All of these reasons obtain in the present matter, and I therefore conclude that the presently challenged language is substantively inappropriate for all of these reasons.

I do not rely upon the doctrines of administrative res judicata or collateral estoppel to reach this conclusion. The District argued at the hearing that the March 2015 IEP was a new document, based upon new information that the previous hearing officer had not reviewed; thus, the District argued that I should make a fresh factual determination. I do

so here, and I find that the language remains as inappropriate now as it was when reviewed by the previous hearing officer.

First, in this matter, as in the previous matter, the language is based upon an inappropriate re-evaluation. In the companion case, I have decided that the most recent re-evaluation was inappropriate also, insofar as it recommended essentially the services embodied in the IEP language at issue here. Although IEP language is not always inappropriate when based upon an inappropriate re-evaluation recommendation, I conclude that, in this case, the inappropriate re-evaluation was virtually the sole basis for the contested IEP language, and for that reason, the IEP language is inappropriate.

The District argues that the IEP team discussion disclosed independent bases for the contested language, but I find that the evidence is preponderant to the contrary. There was little if any evidence that the IEP team meeting discussion disclosed any information pertinent to the appropriateness of the language in question. The Supervisor testified that, during the meeting, Parent admitted some differences in Student's skills demonstrated at home as opposed to those demonstrated in school. Parent credibly denied that there was any evidence of such discrepancy sufficient to justify the proposed IEP language. Considering the record of the strained and imprecise circumstances of this IEP meeting discussion, I find Parent's testimony more convincing and therefore preponderant, on this question.

Second, as previously discussed, the language was entered without parental participation – by revision to the language of the IEP after the IEP meeting. The supervisor did not consult Parent on this revision, ask for consent to revise without a meeting, or ask

for consent to the revision. Thus, again, the IEP was altered without the degree of parental participation that the IDEA requires. In addition, I note that the IEP team did not even advert to the fact that a hearing officer had found Parents' objections valid, and the proposed language in substance inappropriate. This omission from the discussion reinforces my conclusion that any discussion of the proposed services in the home did not fully come to grips with the Parents' steadfast opposition to the proposal.

Third, the proposed specially designed instruction in the home remains impossible to implement, due to parental opposition. I see no objective reason for the District to continue to force this issue. I conclude that the District's repeated attempts to insert this language in the IEP are likely, not to provide meaningful educational benefit to Student, but to heighten tensions in the IEP team and exacerbate Parents' distrust of the District's intentions. The evidence shows also that the District's persistence on this issue – and Parent's sometimes inappropriately adversarial response - has left the APS educators deeply uneasy because of the relentless conflict that has enveloped this Student's IEP process. All of these consequences of the District's repeated proposals to provide unwanted services in the home have detracted from the collaborative teamwork that the Student will need to receive meaningful education – a collaborative atmosphere that both the IDEA and the policy of the Commonwealth promote as the heart of good educational practice for children with disabilities.

The language in question is inappropriate and I will order it removed from the IEP.

INSERTION OF SPECIALLY DESIGNED INSTRUCTION FOR "INFORMAL SCREENING" REGARDING PHYSICAL THERAPY NEEDS

The District inserted a fourth statement of specially designed instruction, for an "informal screening" of Student's physical therapy needs, at page 49 of the IEP (S 3 p. 52):

> Informal screening to be conducted by Physical Therapist to determine the need for Physical Therapy Services.

Parent argues that this was inappropriate and should be removed from the IEP. I agree, because, again, the language was inserted outside the context of the IEP meeting, and the language itself was not reviewed with parental participation. Thus for the reasons discussed above on the IDEA procedural requirements for development, review and revision of IEP language, I conclude that the fourth inserted statement of specially designed instruction was inappropriate. I will order it removed from the IEP.[4]

LANGUAGE SHOWING HOW STUDENT'S DISABILITIES AFFECT STUDENT'S INVOLVEMENT AND PROGRESS IN THE GENERAL EDUCATION CURRICULUM

Parent argued that the District should be ordered to include additional language at IEP page 18, showing how Student's disabilities affect Student's involvement and progress in the general education curriculum. Specifically, the Parent argued that the District should include language reflecting Student's primary and secondary disability classifications,

[4] Parent also argues that this is an end-run around the IDEA requirement that an evaluation to determine need for special education requires parental consent and a sixty day timeline. I do not reach this issue for two reasons. First, my decision disposes of the claim on another basis. Second, the issue is not so simple: the IDEA permits some assessment of need for services, e.g., 34 C.F.R. §300.302 (screening for instructional purposes); in this matter, there was insufficient evidence to make a finding as to whether or not the offered "informal screening" would have been the functional equivalent of evaluation, requiring consent and IDEA timeline.

Autism and Intellectual Disability. The District agreed to include this information at page 18 of the IEP, under the appropriate heading. (NT 114-117.) Therefore, this issue is moot, and I will dismiss this claim.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I found that all witnesses were credible. I accorded less weight to the testimony of the supervisor of special education, only because the supervisor's memory of the events central to the issues in this case was not as clear or expressly delineated as clearly as that of Parent and the APS administrator.

CONCLUSION

I conclude that the District's insertion of language purporting to summarize Parent's agreement with certain proposals regarding related services was not appropriate. I further conclude that the District's insertion of language stating three specially designed instruction services providing for assessment and parent training in the home was inappropriate. I conclude that the District's insertion of language stating a specially designed instruction characterized as an "informal screening" of Student for physical therapy needs was inappropriate. I order these items of language removed from the IEP. 34 C.F.R. §300.513(a)(3). Finally I find the claim for addition of language reflecting Student's IDEA classifications to be moot, and I dismiss that claim.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. Within ten days, the District will delete or cause to be deleted from the IEP the language quoted in this decision at pages 7 (IEP page 6), 10 (IEP page 49) and 13 (IEP page 49).

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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

DATED: June 4, 2015