

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]

Dates of Hearing:

August 23, 2016
September 7, 2016

CLOSED HEARING

ODR Cases #17920-1516AS

Parties to the Hearing:

Parent[s]

Owen J. Roberts School District
3650 St. Peters Road
Elverson, PA 19520

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Sharon Montanye, Esquire
331 East Butler Avenue
New Britain, PA 18901

September 30, 2016

Michael J. McElligott, Esquire

INTRODUCTION

[Student] (“student”)¹ is [a mid-teenaged] student residing in the Owen J. Roberts School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)². The student has been identified under the terms of IDEIA as a student with an intellectual disability, autism, and speech/language impairment.

On June 6, 2016, the student’s individualized education program (“IEP”) team met to consider the results and recommendations of an independent educational evaluation (“IEE”) issued in May 2016. As a result of that meeting, parents filed a special education due process complaint, alleging that the parents were denied an opportunity for meaningful participation at the June 6, 2016 IEP team meeting and that events thereafter which led to the revision of the student’s IEP did not accurately and/or comprehensively address the results of the IEP team meeting.

For the reasons set forth below, I find that the parents were not denied meaningful participation in the events surrounding the June 6,

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.

2016 IEP team meeting. I will, however, order that the IEP team reconvene under certain conditions for further consideration of the student's educational programming.

ISSUES

Were the student's parents denied meaningful participation at the June 6, 2016 IEP meeting?

FINDINGS OF FACT

1. In May 2016, an independent evaluator issued an IEE for the student. (Parents Exhibit ["P"]-4, P-5, P-24; School District Exhibit ["S"]-1; Notes of Testimony ["NT"] at 29).
2. The parties often coordinate and communicate through individuals at a private school where the student currently attends. Through this coordination/communication, the parties and the independent evaluator shared dates to hold an IEP meeting. The IEP team meeting was scheduled for June 6, 2016. (P-5, P-6; S-2, S-3, S-4; NT at 30, 38-39, 50-51).
3. The independent evaluator indicated to the parties, in the course of these scheduling exchanges, that she was not available in person on the dates being discussed but that she was available to participate by telephone. (P-5; S-3; NT at 30-32).

4. On June 6, 2016, the IEP team met to consider the student's IEP in light of the IEE. The IEP team included, among others, the student's father, a special education administrator from the District, representatives from the private placement, and the independent evaluator who participated by telephone. (NT at 32-33, 86-87).
5. At the June 6th IEP meeting, the recommendations of the IEE were discussed. (NT at 90, 93-94).
6. The independent evaluator participated by telephone but was not overly expressive. The independent evaluator could not participate for the entirety of the IEP meeting and dis-connected the call before the meeting's end. (NT at 32-35, 60-61, 107-108, 113-114).
7. In the afternoon June 6th, after the IEP meeting, the private school administrator emailed to various individuals, including support staff at the private school, the parents, and the District special education administrator who attended the IEP meeting, a draft version of the summary of the IEP team exchanges. (P-7, P-9; NT at 93-94, 107-108, 111-112).
8. On June 9, 2016, the District special education administrator emailed the private school administrator input based on the summary prepared by the private school administrator and further indicated District revisions to some of the text prepared by the private school administrator. (P-12).

9. On June 10, 2016, the parents responded by email to the District's input/revisions, disagreeing with portions of that input/those revisions. (P-13).
10. On June 13, 2016, the private school administrator emailed to the parents and the District special education administrator draft IEP content "including your additions and responses to my initial summary". This draft contained the entirety of the private school administrator's text (P-14, generally and at page 1; NT at 99).
11. On June 14, 2016, the private school administrator emailed to the parents and the District special education administrator a second version of draft IEP content where certain "changes and additions" offered by the District special education administrator were incorporated into the draft and, at the request of the District special education administrator, "moved parent responses...into parental input section" of the IEP. The pages provided, however, were identical to those pages emailed by the private school administrator on June 13th. (P-14, P-15, generally and at page 2).
12. The content of the IEP as initially prepared by the private school administrator after the meeting on June 6th and in the subsequent revisions to include the parents'/District's updates and revisions was detailed and explicit. For example, in the initial summary, the private school administrator was precise in pointing

out views shared at the meeting by private school staff, the parent, and the District members of the IEP team, including disagreements where those occurred. Thereafter, as the parents and District provided updates and revisions, the IEP drafts of June 13th and 14th contained the verbatim updates/revisions offered by both parties. (P-7, P-12, P-13, P-14; NT at 42, 98-99).

13. The private school administrator provided the recording/scribing function at the June 6th IEP meeting and facilitated the parties' ongoing updates/revisions in good faith and was entirely honest and reliable in offering and coordinating these communications. (P-7, P-12, P-13, P-14, P-15; NT at 84-136).
14. On June 16, 2016, a support staff member at the private school revised the draft IEP alongside the District special education administrator. The staff member then emailed the parents and the District special education administrator the pages that had been discussed in the emails, indicating that this was the student's "final IEP". (P-18; NT at 40).
15. The text of the June 16th IEP draft was changed from the language crafted by the private school administrator solely to the updates/revisions offered by the District special education administrator. The updates/revisions offered by the parents, except for one provision related to specially designed instruction, was moved to the parental input section. The content of the

parental input section, however, was a verbatim repetition of what the parents had previously shared through the email exchanges with the private school administrator. (P-15, P-18; NT at 40, 87-88, 104, 131).

16. This change of text and structure of the IEP was at the direction of the District, as this was the text and structure of the IEP that the District felt it needed to offer formally through a notice of recommended educational placement (“NOREP”). (P-21; NT at 40, 42, 99-100, 120-121, 156-159).

17. At the hearing, parent testified to his belief that the final draft of the IEP text/structure emailed on June 16th was somehow fraudulent, or nefariously produced by the District through the private school. This is not the case; the private school, in its familiar role as a coordinator of communications between the parties, simply responded to the instructions of the entity—the District—ultimately responsible for offering an IEP through a NOREP. (NT at 90-91, 99-100, 120-121, 131, 156-161, 169-175, see generally 179-214).

18. By NOREP dated June 16, 2016, the District formally offered the IEP with the text and structure emailed earlier that day as the text/structure in the “final IEP”. (P-18; S-4, S-5).

19. In the days thereafter, the parents voiced objection to the District on how the exchanges between the parties were handled in the creation/offer of the IEP on June 16th. (P-20; S-6).
20. On June 22, 2016, the parents filed the special education due process complaint which led to these proceedings, and they formally rejected the NOREP on June 25, 2016. (P-1; S-5).
21. All witnesses testified credibly and, as a whole, no one witness's testimony was accorded any heavier or lighter weight than any other witness's. (NT at 21-83, 84-136, 155-177, 179-214).

DISCUSSION AND CONCLUSION OF LAW

IDEIA/Denial of FAPE

To assure that an eligible child receives a free appropriate public education ("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)).

A student's IEP is crafted as the result of a collaborative process among the IEP team members, including parents, teachers (both regular education teachers and special education teachers), a representative of the local education agency who has decision-making authority to commit agency resources to implement the IEP, an individual who can interpret evaluation data in terms of instructional or related service needs, and others at the invitation of the parents or local education agency who have knowledge of the child and/or special expertise that may help the IEP team. (34 C.F.R. §300.321). The IDEIA allows for parental participation by telephone at IEP meetings, in fact requiring it where it is the only means for a parent to participate. (34 C.F.R. §§300.322, 300.328).

At the IEP meeting, a student's IEP team must consider, among other student-specific factors, a student's strengths, concerns of the parents, results of the most recent evaluation, and the academic, developmental, and functional needs of the child. (34 C.F.R. §300.324(a)). At any time, whenever a local education agency proposes to change (or refuses to change) the identification of, evaluation of, educational placement of, or the provision of FAPE to, a child, it must provide to the parents of a student with a disability written notice regarding this action/refusal to act, including a description and explanation of this action/refusal, procedural safeguards, and resources for parental assistance. (34 C.F.R. §300.503(a), (b)). In Pennsylvania, this written notice is normally the NOREP.

Here, the parents were afforded an opportunity for meaningful participation at the June 6th IEP meeting. One concern of the parents was that the independent evaluator did not participate in person and participated only by phone. This fact, by itself, does not discount that person's participation, or provide the basis for a finding that this person's participation was not meaningful. Indeed, even a parent may participate by telephone where necessary; the participation by telephone of any IEP team member does not, in and of itself, deny a family meaningful participation in an IEP meeting. Having said that, and as indicated above, the fact that the independent evaluator was not present in person at the meeting is a concern to the family. The record fully supports a finding that, while the evaluator participated to some degree, that person's participation was not deep or comprehensive. This is no comment on the evaluator herself, but it leads to questions in the mind of parents as to whether the nature and quality of that person's participation might have been different had she been present in person. Accordingly, the order will address a process by which the independent evaluator will be afforded an opportunity to engage again in the IEP team process.

Another concern of the family is that, ultimately, the language and structure of the IEP were decided by the District. First, in terms of the language, this record supports a finding that the language initially drafted by the private school administrator, and his subsequent

inclusion, verbatim, of the updates and revisions offered by both the parents and the District is preferable. This is not to say that the language ultimately crafted by the District, and offered through the NOREP of June 16th IEP, is somehow manufactured or deceptive. But comparing the language that characterizes the IEP team's considerations between that related by the private school administrator (*see* P-15) and that crafted by the District special education administrator (*see* P-18), the draft language of the private school administrator is simply a view over time of how the IEP team shared views on June 6th, and how the parents/District updated those views in the days thereafter. Importantly, this is not language that explicitly informs the IEP; it is, in effect, a record of the IEP team's dialogue. For that reason, the order will require that the June 6, 2016 IEP include the private school administrator's content as outlined in P-15.

Second, and in the same way, the structure of the updates/revisions is best presented as the private school administrator presented it. Specifically, the District feels that the parents' update/revisions should be included in the parental input section of the IEP. There is a degree of sense in that—at the end of the day, the updates/revisions offered by the parents are certainly parental input. But, again, as a documentation over time of how IEP team members shared views, and then updated/revised text in terms of those views, separating the parents' updates/revisions from the private school

administrator's initial summary and the District's updates/revisions breaks what is, surely, a cohesive and understandable IEP team dialogue, as presented by the private school administrator. Therefore, the order will address the structure of the IEP in terms of the content outlined in the paragraph immediately above; that content will be placed, in its entirety, starting at page 2 of 50 of the June 16th IEP (page 5 of 53, as presented in the record at S-4).

Finally, the parties appear to have had a contentious history with each other. In the record is another hearing officer decision issued in June 2015, and there was mention at the hearing of past due process proceedings, as well as federal litigation, between the parties. (P-27; NT at NT at 68-70, 110). This decision and order will provide the parties with an opportunity to re-convene the IEP team to consider the May 2016 IEE and June 2016 IEP so that the parties may focus on B.L.'s programming and, it is hoped, come to a consensus view. Failing that, at least such a meeting may draw more sharply the lines of substantive disagreement because this record is fundamentally about procedural elements of the IEP meeting, communications between the parties, and IEP language.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the family was not denied meaningful participation in the IEP meeting of June 6, 2016.

It is ordered that the IEP of June 16, 2016 be changed in the following particular:

- the text beginning at page 2 of 50 of that IEP (page 5 of 53 of S-4, as presented on this record) shall be revised to include the entirety of the substantive text found at P-15, pages 2-5 (inclusive) beginning with the date “Update from the IEP meeting on 06/06/16”.

The June 16th IEP, as amended by the terms of this order, shall not be implemented, however, until such time as the IEP team has met under the terms of this order (see below).

It is further ordered that the IEP team shall re-convene on or before November 30, 2016 (the “independent-evaluator-IEP-meeting”), as soon as is convenient for the schedule for the in-person participation of the independent evaluator who issued the May 2016 IEE and the other members of the IEP team who participated in the June 6th IEP meeting.

To the extent that the independent evaluator’s in-person participation at the independent-evaluator-IEP-meeting requires a fee and/or expenses, the District shall bear the cost of the independent evaluator’s fee and/or expenses to attend the independent-evaluator-IEP-

meeting. The independent evaluator's in-person participation, at District expense, is ordered for only for the independent-evaluator-IEP-meeting. Any participation by the independent evaluator at a subsequent IEP meeting is not required under the terms of this order, nor does this order address or require any fee/expense arrangement for such participation at any IEP meeting held subsequent to the independent-evaluator-IEP-meeting.

If the independent evaluator is unable or unwilling to attend the independent-evaluator-IEP-meeting in person, the independent-evaluator-IEP-meeting need not be held under the terms of this order. However, regardless of whether *or not* the independent-evaluator-IEP-meeting is held, or, if held, the result of the independent-evaluator-IEP-meeting, the District shall issue a NOREP for the student's special education programming no later than November 30, 2016.

Nothing in this order shall be read to interfere with the parties' ability to modify any provision of this order to the extent the parties agree in writing a modification.

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

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

September 30, 2016