

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: J.P.

Date of Birth: [redacted]

CLOSED HEARING

ODR File No. 18110-16-17 KE

Parties to the Hearing:

Representative:

Parent
Parent[s]

Parent Attorney
None

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

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Date of Hearing:

October 19, 2016

Date of Decision:

October 29, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a pre-teenaged student who resides in the School District of Philadelphia (District) and is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parent filed a Due Process Complaint against the District asserting that it failed to comply with the procedural protections afforded to Student under the IDEA, thereby denying Student a free, appropriate public education (FAPE) during the 2014-15 and 2015-16 school years. Student currently attends a charter school.

Upon assignment of the case to this hearing officer, she sent the parties informational materials that included, among other things, the timelines applicable to special education due process hearings with references to the federal regulations that set forth events that could result in adjustment to those timelines. The specific decision due date calculated from the date of the filing of the Complaint was also provided to both parties. After an unopposed continuance requested by the Parent, and a further rescheduling of the hearing without objection due to a District closure for a school holiday, the hearing convened on October 19, 2016, in a proceeding consolidated with that of Student's sibling by agreement of the parties. It became evident during discussions on and off the record that both parties intended to call witnesses who were not available on the date of the hearing. However, neither party moved for an extension of the

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision, and will be redacted from the cover page prior to posting on the website of the Office for Dispute Resolution.

² 20 U.S.C. §§ 1400 – 1482. The federal regulations are found at 34 C.F.R. §§ 300.1 – 300. 818; and the applicable Pennsylvania regulations are found at 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14). This decision will cite to the regulations where applicable as they are generally more accessible.

decision due date as permitted by 34 C.F.R. § 300.515(c), and it was not possible to schedule an agreeable date for a second hearing session within the mandatory timelines.³ Accordingly, the record was concluded in a single hearing session.

The parties each presented evidence in support of their respective positions. The Parent sought to establish that the District failed to comply with its procedural obligations under the IDEA,⁴ including the timeliness of its evaluation of, and Individualized Education Program (IEP) development for, Student; she sought compensatory education for the 2014-15 and 2015-16 school years and placement in a different school that would be appropriate for Student's needs. The District maintained that any procedural irregularities, including the delayed evaluation, did not deny Student FAPE, and that no remedy was due.

For the reasons set forth below, the Parent will prevail on the procedural issues, but there will be no remedy awarded.

ISSUES

1. Whether the District complied with its procedural obligations to Student under the IDEA, including the timeliness of its evaluation of Student and proposed educational program, during the 2014-15 and 2015-16 school years;

³ During off the record discussions, this hearing officer noted and explained the calculation of the hearing and decision timelines, with reference to the materials previously provided regarding those timelines. She also noted the limited number of days remaining between the actual hearing date and the decision due date. This hearing officer confirmed on the record the decision due date and her understanding that the testimony would be completed on October 19, 2016. (Notes of Testimony (N.T.) 214-15, 266-67) Neither party asserted that the testimony of any unavailable witness was necessary to a determination on the issues presented, nor objected to concluding the record on October 19, 2016. School District Exhibits (S-) 1 through 6 and 8 through 15 were admitted without objection, with ruling reserved on S-7 that the Parent but not the District sought to be included. (N.T. 267-70) After consideration, S-7 is hereby admitted as providing context for some of the Parent's concerns regarding student records and about which no available witness could testify (N.T. 269-70), although S-7 p. 3 was disregarded as clearly part of confidential mediation discussions (but the name at the top of p. 3 of S-7 that appears to be that of a peer was redacted by the hearing officer).

⁴ The Parent expressly stated that she was not asserting a denial of FAPE claim on substantive grounds with respect to Student. (N.T. 39-40)

2. If the District did not comply with its procedural obligations to Student, should Student be awarded a remedy such as compensatory education; and
3. Should the hearing officer order the District to provide a placement to Student in a different school that will meet Student's needs?

FINDINGS OF FACT

1. Student is a pre-teenaged child who is a resident of the District. Student is eligible for special education services under the IDEA. (N.T. 40-42)
2. Student did not return to the District in the fall of 2016-17 school year and currently attends a charter school. (N.T. 42-43, 79)
3. While attending the District elementary school, Student was provided with behavioral health support services at school through an outside agency. Those services addressed Student's behavior and included group therapy. The level of services varied over the course of the several school years Student attended there depending on Student's behavioral needs. At times, the Parent was called to go to the school building to assist with Student's behaviors. (N.T. 63-66, 74, 100-01, 217-18, 221-22, 244, 248-50)
4. In March 2015, Student made comments at school that suggested thoughts of self-harm. The Parent was contacted for an emergency conference, and Student was hospitalized in a mental health facility. Student returned to the fourth grade classroom following discharge. (N.T. 55-57, 220-22; S-14)
5. In April 2015, the Parent made a written request for Student to be evaluated for an IEP due to concerns with Student's behavior and emotional functioning. The Parent followed up on the request a number of times because there was a lengthy delay in completing that evaluation. (N.T. 48-50, 51, 176-77, 218-20; S-8 p. 1)
6. Beginning in September of 2015, Student also had behavioral health support services through an outside agency arranged by the Parent. (N.T. 227-29)
7. In November 2015, the Parent made a written request for a complete copy of Student's education records. (N.T. 218-19; S-8 p. 2)
8. During the 2015-16 school year, the District provided a daily report of Student's behavior to the Parent, although sometimes Student did not bring that report home. The teacher also called the Parent each day to advise how Student was behaving and seek the Parent's assistance in calming Student if needed. (N.T. 227-28, 254-55; S-9)
9. Student was disciplined on several occasions during the 2015-16 school year for failing to follow rules, missing or leaving class, and inappropriate interactions with peers. (N.T. 224-25; S-10)

10. At least two interagency meetings were held in late May-early June 2016 regarding Student and the school-based behavioral health services provided, including the possible addition of a one-on-one aide to support Student through the end of the 2015-16 school year. There was a concern at that time that there may be a lapse in services for Student but that did not occur. (N.T. 68-70, 191-92, 250-51; S-12)
11. The District issued an Evaluation Report (ER) on May 27, 2016. (S-6)
 - a. The ER included parental input including social and medical history information, and input from teachers as well as two brief observations by the school psychologist. Teachers reported academic strengths and weaknesses; they also described behavioral struggles, including working with peers, initiating and maintaining attention to tasks, distractibility, physical aggression, agitation, and tantrums. Diagnoses noted included Post-Traumatic Stress Disorder and Attention Deficit Hyperactivity Disorder. (S-6 pp. 1-6)
 - b. Behavioral support services reported for the ER were three hours of individual and one hour of group therapy each week through a school therapeutic service agency. The ER also reported on two admissions to an acute partial hospitalization program during the 2014-15 school year. (S-6 p. 4)
 - c. The school psychologist administered cognitive and achievement assessments. Student's Full Scale IQ was in the low average range (Wechsler Intelligence Scale for Children – Fifth Edition) with working memory skills a relative strength and processing speed a relative weakness. (S-6 pp. 4-5, 10-12) Academic achievement (Wechsler Individual Achievement Test – Third Edition) reflected average range scores in all areas of Reading and Mathematics tested; below average range scores in Written Expression; and in the average to below average range in Receptive and Expressive Language skills tested. (S-6 pp. 9-10)
 - d. Behavioral functioning was assessed (Behavior Assessment System for Children – Second Edition) through teacher and parent rating scales.
 - 1) The teacher reflected clinically significant concerns on the Externalizing Problems Composite and each of its scales (hyperactivity, aggression, and conduct problems); on the Internalizing Problems Composite and each of its scales (anxiety, depression, somatization); and on the Behavioral Symptoms Index and each of its scales (atypicality and withdrawal). Teacher ratings were in the at-risk range on the School Problems Composite and one of its scales (attention problems) and on the Adaptive Skills Composite and one of its scales (adaptability). (S-6 pp. 6-7)
 - 2) The Parent reflected clinically significant concerns on the Externalizing Problems Composite and each of its scales (hyperactivity, aggression, and conduct problems); on the Internalizing Problems Composite and two of its scales (anxiety and depression); and on the Behavioral Symptoms

Index and one of its scales (atypicality). Several other scales were in the clinically significant or at-risk range. (S-6 p. 8)

- e. The ER concluded that Student was eligible for special education on the basis of an Other Health Impairment and Emotional Disturbance. A number of recommendations were provided in the ER. (S-6 pp. 15-17)
12. A Functional Behavior Assessment (FBA) was conducted in mid-June 2016 based on Student's off-task behaviors, refusal to complete tasks, elopement from the classroom, and physical aggression toward peers and property across all educational settings. The FBA hypothesized that Student engaged in these behaviors in order to avoid non-preferred tasks or to gain attention/power. (N.T. 109-11, 114-15; S-5)
 13. An IEP was developed for Student at the end of the 2015-16 school year (within two days of the last day of school). This IEP proposed emotional support at a supplemental level. (S-4)
 - a. Strengths noted in the IEP included expressive language skills and academic performance particularly in the area of reading; needs related to managing physically aggressive behavior and maintaining attention to tasks. At the time the IEP was developed, Student was receiving three hours of individual and one hour of group therapy services as behavioral support. (S-4 pp. 11-13, 19)
 - b. Annual goals in the IEP addressed the academic areas of written expression and mathematics problem solving; and behavioral goals addressed attention to tasks and expressing emotions. Program modifications/specially designed instruction included clear behavioral expectations, structure throughout the school day, and positive reinforcement of appropriate behaviors. (S-4)
 - c. Student was determined to be not eligible for extended school year (ESY) services. (S-4 p. 30)
 14. A meeting convened to review the IEP on June 20, 2016, and the District explained that Student would attend a different elementary school that provided supplemental emotional support. The participants, who included a special education liaison, regular and special education teacher, and a counselor, viewed the IEP on a computer, but not all of the participants were present for the entire meeting and some joined only briefly. The Parent asked that the IEP and related documents be printed and sent to her for further review, and the District did so. (N.T. 119-22, 149-50, 184-86, 188-89, 231-33, 240; S-4 pp. 1, 4)
 15. The District issued a Notice of Recommended Educational Placement (NOREP) for a program to include emotional support for Student on July 13, 2016. The NOREP also indicated that an IEP meeting would convene after the start of the 2016-17 school year to address needs for counseling and in the area of social skills. The NOREP did reference a first name of another student not of Student's gender (S-3 p. 35). (N.T. 188; S-3)

16. The District provided all of Student's special education records to the Parent in September 2016, and some records were provided in late spring or summer of 2016. (N.T. 197-203, 230-31, 235)
17. The Parent has had no concerns with Student's academic performance. (N.T. 40)
18. District representatives have had no concerns with Student's academic performance. Annual goals in the proposed IEP were included because of Student's behavior, not to address academic needs. (N.T. 64-65, 122-25, 187-88)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses to be credible, testifying to the best of their recollection; any discrepancies in the testimony were minor and are attributable to memory rather than on any intentional lack of candor. It should also be noted that the Parent presented as a very devoted advocate for Student,

and the District personnel all presented as qualified and dedicated professionals. In reviewing the record, the testimony of every witness, and the content of each exhibit (with the exception of S-7 p. 3), were thoroughly considered in issuing this decision.

GENERAL IDEA PRINCIPLES

The IDEA and state and federal regulations obligate local education agencies (LEAs) to locate, identify, and evaluate children with disabilities who need special education and related services.⁵ For children who are eligible for special education services, the LEA is required to provide a “free appropriate public education” (FAPE) to the student.⁶ FAPE consists of both special education and related services.⁷ In *Board of Education v. Rowley*,⁸ the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA.⁹

An LEA, including a school district, meets the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.”¹⁰ Most critically, of course, the IEP must be responsive to the child’s identified needs.¹¹ However, the LEA “need not provide the optimal

⁵ 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125.

⁶ 34 C.F.R. §§ 300.17, 300.101.

⁷ 34 C.F.R. § 300.17.

⁸ 458 U.S. 176 (1982).

⁹ *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995).

¹⁰ *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations and internal quotation marks omitted).

¹¹ 34 C.F.R. § 300.324.

level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a basic floor of opportunity.”¹²

PROCEDURAL FAPE

As *Rowley* confirmed, the IDEA contains both procedural and substantive requirements. The Parent’s claim is that the District failed to comply with its procedural obligations in conducting an evaluation, and then in developing an IEP for Student. The IDEA and state and federal regulations specify timelines and other procedures for both evaluations and IEPs.

An initial evaluation for special education in Pennsylvania must be completed within 60 calendar days of receipt of parental consent, excluding the summer.¹³ Here, the Parent provided a written request for an evaluation of Student in April 2015; and there is no evidence that she refused to provide any further requests for consent. The ER was not completed until May 2016, a period of 13 months and more than 9 months beyond the explicit 60 calendar day timeline (excluding the summer). The lengthy delay is unquestionably a major procedural violation.

Here, however, the Parent does not claim any substantive denial of FAPE. The Parent and District have no concerns with Student’s academic needs; and, while Student does present with behavioral and emotional challenges, Student was provided with support throughout the time that Student attended school in the District to address needs in those areas. Although one might wonder whether Student could have benefitted from a more intensive level of support, there is simply insufficient evidence in the record to make any determination on whether Student’s educational programming needs were or were not appropriately met. For these

¹² *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 533-534 (3d Cir. 1995) (internal quotation marks omitted).

¹³ 34 C.F.R. § 300.301(c); 22 Pa. Code § 14.123(b).

reasons, there is an insufficient nexus between the delay in the ER and any potential substantive impact on FAPE,¹⁴ and, moreover, it merits repeating that there is no claim raised by the Parent that the District denied Student FAPE on a substantive basis.

The District also failed to convene an IEP meeting with all required participants. An IEP is to be developed by the IEP team whose composition includes, at a minimum, the parents, a regular education teacher if the child may participate in regular education, a special education teacher, and an LEA representative who is qualified and knowledgeable.¹⁵ The evidence shows that not all of the required participants were fully involved in the meeting, with some joining only for a brief period of time. This circumstance amounts to a procedural violation.

The IDEA procedural obligations also include the related requirement that parents be permitted to participate meaningfully in making educational decisions about their children, and this critical concept extends to placement decisions.¹⁶ This is because parents play an important and significant role in these processes.¹⁷ Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents.¹⁸ However, a procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefit.¹⁹

With respect to the opportunity for the Parent to participate in the development of Student's IEP, the Parent has demonstrated that the District did impede her ability to gather with

¹⁴ *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565-66 (3d Cir. 2010).

¹⁵ 34 C.F.R. §§ 300.321, 300.322, 300.324.

¹⁶ 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001 (confirming the position of OSEP that local education agencies cannot unilaterally make placement decisions about eligible children to the exclusion of their parents).

¹⁷ *Schaffer*, *supra*, at 53.

¹⁸ 34 C.F.R. § 300.513(a)(2).

¹⁹ *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010); 34 C.F.R. § 300.513(a).

the full IEP team and discuss Student's proposed program and placement. The result is that Student was removed from the District by the Parent to attend a charter school, and Student's educational program was not directly affected by the extent of appropriate parental participation in the process. Thus, no remedy will be awarded for these procedural violations, but the District is reminded of those significant obligations and, should Student return to the District in the future, it must adhere to all procedural requirements in developing an appropriate program for Student.

Finally, there is preponderant evidence that the Parent was not timely provided with Student's education records following her requests. The IDEA includes specific provision for parental access to records as provided for in and defined by the Family Educational Rights and Privacy Act of 1974 (FERPA).²⁰ Pennsylvania regulations are consistent.²¹ There was no request made of this hearing officer to intervene in the provision of records for Student in this matter; and, all records have apparently been produced. Nevertheless, the District is reminded of these crucial mandates.

In sum, the Parent has demonstrated that the District committed several procedural violations of the IDEA, but there is no basis for awarding compensatory education.

PROSPECTIVE RELIEF

In Pennsylvania, the school district of residence is generally responsible for educating students residing within its boundaries, including children with disabilities, with some exceptions.²² However, in this matter, Student is currently enrolled in a charter school. Like school districts, charter schools are public schools.²³ A charter school may be an LEA and

²⁰ 20 U.S.C. § 1232g; 20 U.S.C. §§ 1417(c); *see also* 20 U.S.C. § 1415(b)(1); 34 C.F.R. §§ 300.501, 300.611, 300.613.

²¹ 22 Pa. Code § 14.162(j).

²² 24 P.S. §§ 13-1302, 13-1372; 22 Pa. Code § 11.11.

²³ 24 P.S. § 17-1703-A.

thereby “assume the duty to ensure that a FAPE is available to a child with a disability in compliance with the IDEA ... and section 504.”²⁴ “When a child with an IEP transfers to a charter school or cyber charter school, the charter school or cyber charter school is responsible upon enrollment for ensuring that the child receives special education and related services[.]”²⁵

Accordingly, because the school district of residence is not the LEA, there is no obligation under the IDEA for it to develop a proposed program of special education.²⁶ This hearing officer therefore finds no basis to order the District to develop a program and placement for Student at this time.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did commit procedural violations, but that no remedy, including compensatory education and an order for a prospective placement, is due.

ORDER

²⁴ 22 Pa. Code § 711.3; see also 34 C.F.R. §§ 300.28, 300.209; *R.B. v. Mastery Charter School*, 532 Fed. Appx. 136 (3d Cir. 2013).

²⁵ 22 Pa. Code § 711.41(a).

²⁶ *I.H. v. Cumberland Valley School District*, 842 F. Supp.2d 762 (E.D. Pa. 2012) (describing circumstances under which a school district of residence must propose an educational program).

AND NOW, this 29th day of October, 2016, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not comply with the applicable timelines for completing Student's initial evaluation for special education, and thereby committed a procedural violation.
2. The District did not convene a proper meeting of Student's IEP team to develop Student's educational program, and thereby committed a procedural violation.
3. The District failed to comply with its obligations to timely provide the Parent access to Student's education records.
4. No compensatory education is due.
5. The District is not Student's LEA and is not ordered to develop an educational program for Student or to offer a placement.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER