This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer

Final Decision and Order

CLOSED HEARING
ODR File Number: 19993-1718KE

Child's Name: T.B. **Date of Birth:** [redacted]

Dates of Hearing:
2/6/2018

Parent:
[redacted]

Local Education Agency:
North Allegheny School District
200 Hillvue Lane
Pittsburgh, PA 15237

Counsel for the LEA
Christina Lane, Esq.
Maiello, Brungo & Maiello, LLC
424 South 27th Street, #210
Pittsburgh, PA 15203

Hearing Officer: Brian Jason Ford, JD, CHO **Date of Decision:** 3/13/2018

Introduction, Prior Litigation, and Procedural History

This special education due process hearing was requested by the Mother, on her own behalf and on behalf of her child, the Student, against the School District (District).[1] As explained below, the District filed a Motion to Dismiss. I convened a hearing session so that the Mother could present evidence establishing that this matter should not be dismissed. Having considered that evidence carefully, I now grant the District's motion and dismiss this matter.

The procedural history of this matter is captured in a Sufficiency Determination of December 8, 2017 (H-1), a Pre-Hearing Order of December 21, 2017 (H-2), and a Second Pre-Hearing Order of January 31, 2018 (H-3). I summarize that procedural history and prior litigation as necessary to provide context.

On October 31, 2017, Hearing Officer McElligott issued a due process decision in *T.B., North Allegheny Sch. Dist*., ODR No. 19219-1617AS. The issues before Hearing Officer McElligott were the following:

1. Did the District meet its obligation to provide a FAPE to the student?

2. [redacted]

Id at 3. Hearing Officer McElligott concluded that the District provided a FAPE to the Student during the 2015-16 and 2016-17 school years (4th and 5th grade). *Id* at 2, 13. [redacted].

In making these determinations, Hearing Officer McElligott also considered an Evaluation Report (ER) that the District completed in October 2016. *Id* at 14. In that ER, the District identified the Student as a child with an Other Health Impairment (OHI) resulting from ADHD. Hearing Officer McElligott found that the District should have also identified the Student as a child with a Specific Learning Disability (SLD) – specifically, math calculation. *Id* at 14. The failure to identify SLD did not result in a substantive denial of FAPE, given the math support that the Student received. *Id* at 16.

Hearing Officer McElligott ordered the District to amend the ER to address the Student's SLD status and ordered the IEP team to reconvene to discuss whether to add a math calculation goal to the Student's IEP. He dismissed all other claims.

On November 28, 2017, twenty-eight (28) days after Hearing Officer McElligott issued his decision, the Mother requested this due process hearing by filing a new due process complaint (the Complaint). As explained in the pre-hearing orders, the Complaint primarily raised issues that were resolved by Hearing Officer McElligott and functioned as an appeal of Hearing Officer McElligott's decision. *See* H-1. Even so, I did not grant the District's motion to dismiss outright. Instead, I acknowledge that any child's needs do not remain constant over time. Therefore, if the

[1] Except for the cover page of this decision, identifying information is omitted to the greatest extent possible. The Student's mother and father are estranged. Their precise marital status is not part of the record. Although the Student's father did not participate in these proceedings, as matters of both caution and courtesy, I have included the Student's father on correspondences. The Student's father will also receive a copy of this final decision and order.

Student's needs changed after Hearing Officer McElligott's decision, the District's program may no longer be appropriate. Consequently, I gave the Mother leave to amend the Complaint to "clearly and concisely say how the Student's educational needs have changed since October 31, 2017, and … explain how those changes rendered the District's programmatic offers inappropriate." H-1 at 10.

On December 28, 2017, the Mother filed a letter amending the Complaint (the Amended Complaint). That letter included no information about how the Student's needs changed after October 31, 2017. The District renewed its motion to dismiss on that basis. I again denied the motion, saying the following:

> I try to never penalize *pro se* parents for a lack of legal acumen. It is possible that the Mother did not fully realize the consequences of failing to cure the complaint's deficiency, or did not fully understand the language [of H-1]. In general, the Mother has demonstrated her capabilities as an advocate for the Student. Even so, given the dispositive and preclusive nature of the District's current motion, I must give the Mother the benefit of any doubt. H-2 at 3.

Consequently, I convened a hearing for the limited purpose of enabling the parties to present evidence about whether the Student's needs have changed since the prior due process hearing. The Amended Complaint can also reasonably be read to include a claim that the District denied the Mother an opportunity to meaningfully participate in IEP development after the prior due process decision. I took evidence regarding that issue as well.

Issues

The issues are:

1. Did the District deny the Mother an opportunity to meaningfully participate in the development of the Student's IEP at any point after the final order in ODR No. 19219-1617AS?

2. Should the District's motion to dismiss claims concerning an IEP that was previously found to be appropriate be granted?

Parental Participation

There is no dispute that the Student's IEP team convened on October 30, 2017 – one day before Hearing Officer McElligott's decision. Although the parties engaged in a lengthy discussion, they took no action at that meeting. Consequently, the IEP that Hearing Officer McElligott considered did not change before he issued his decision and order. After receiving the decision, the District sent an invitation to reconvene the IEP team to effectuate Hearing Officer McElligott's final order. S-2. The IEP team then reconvened on November 10, 2017. S-2, S-9 at 8. As ordered, the team discussed whether to add a math calculation goal to the Student's IEP. S-4, S-7. The District proposed math calculation goals and discussed those possible goals with the

Mother, who rejected the goals outright. *See id,* S-8, S-9, S-11, NT at 102.[2] Consequently, the District could not add a math calculation goal to the Student's IEP. S-9 at 32. Use of a calculator remained in the Student's IEP as a modification. *Id*.

Nothing in the record supports the Mother's claim that the District denied her an opportunity to meaningfully participate in IEP development at any time after the prior due process decision. Instead, the record establishes that the District invited the Mother to the IEP team meeting that Hearing Officer McElligott ordered. There, the Mother and District engaged in a lengthy, substantive discussion about math goals for the Student. S-8, S-9, S-11. Such discussions are the hallmark of meaningful participation.

Ultimately, the Mother and District could not agree on math goals. The record preponderantly establishes, however, that the District carefully considered parental input and then proposed a math goal that it believed to be appropriate. The District did what it was ordered to do, involving the Mother every step of the way. Participation and acquiescence are not the same things. That the District and Mother ultimately disagreed does not substantiate a diminution of parental participation, let alone predetermination.

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). Regarding the issue of meaningful parental participation, the Mother is the party seeking relief and must bear the burden of persuasion. The Mother did not satisfy that burden. To the contrary, the evidence establishes that the Mother meaningfully participated in IEP development, despite longstanding disagreements with the District.

The District's Motion to Dismiss

Analysis of the District's motion to dismiss, including the application of *res judicata*, is fully explained in my pre-hearing orders. H-2, H-3. I dismissed all of the Mother's claims except for two. First, addressed above, I did not dismiss claims concerning meaningful parental participation in IEP development in the period after Hearing Officer McElligott's decision. Second, I would not dismiss claims concerning the appropriateness of the Student's current IEP, even though that IEP was previously found to be appropriate because the Student's needs could have changed.

I explained to the Mother many times in many ways, both before and during the hearing, that the hearing session was her opportunity to present evidence that the Student's needs had changed in some way after Hearing Officer McElligott's decision.

[2] The Student's father approved the District's recommendation to add math goals and programming to the IEP by approving a copy of the same NOREP. S-10.

The Mother presented no evidence that the Student's needs changed in any way after the prior due process hearing. To the contrary, the Mother testified emphatically that the Student's needs have remained constant. NT *passim*.[3] It is this consistency which is the basis of the Mother's argument that the IEP is not appropriate. The Mother's testimony presents an argument that the Student's IEP is inappropriate now for all of the same reasons that Hearing Officer McElligott considered and rejected.

As explained in pre-hearing orders, this due process hearing cannot be used to appeal the prior decision at ODR No. 19219-1617AS. Similarly, in the absence of evidence that the Student's needs changed after ODR No. 19219-1617AS, this matter is barred by the doctrine of *res judicata*. As a result, the remaining portion of the District's motion to dismiss shall be granted.

ORDER

Now, March 13, 2018, it is hereby **ORDERED** as follows:

1. The District did not violate the Mother's right to meaningfully participate in the development of the Student's IEP.

2. The District's Motion to Dismiss is **GRANTED** as to all other claims raised in the complaint which have not been previously dismissed.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

[3] One example of many is at NT 219, but the record as a whole – especially the Mother's testimony from NT 193 onwards – presents an argument grounded in the unchanging nature of the Student's strengths and needs.