

*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**

**Final Decision and Order**

**CLOSED HEARING**

**ODR File Number:** 20712-1718AS

**Child's Name:** D.H.

**Date of Birth:** [redacted]

**Date of Hearing:** 6/27/2018

**Parent:**

[redacted]

*Pro Se*

**Local Education Agency:**

Pottstown School District  
Administration Building  
Pottstown, PA 19464

**Counsel for the LEA:**

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**Hearing Officer:** Brian Jason Ford, JD, CHO

**Date of Decision:** 07/05/2018

## Introduction

This matter concerns the educational rights of the Student who, until recently, was enrolled in the District.<sup>1</sup> The Student's mother (the Parent) alleges that the District failed to provide timely notice of meetings and failed to incorporate recommendations of a school psychologist into the Student's Individualized Education Program (IEP). The District denies these allegations.

This matter is best understood in the context of prior litigation between the parties. The Parent previously requested a due process hearing against the District. That matter, ODR Nos. 19970-1718AS and 20146-1718AS (consolidated), was heard over four hearing sessions between January and April 2018. Hearing Officer William Culleton issued a decision on May 11, 2018, denying all of the Parent's claims. In making that determination, Hearing Officer Culleton considered an IEP offered by the District in December 2017, and a Notice of Recommended Educational Placement (NOREP) issued by the District in March 2018. Specifically, Hearing Officer Culleton concluded that the "District's current offers of educational services are appropriate...." *Id* at 46.

The Parent withdrew the Student from the District on May 11, 2018, the same day that Hearing Officer Culleton issued the prior due process decision. The Parent enrolled the Student in a public cyber charter school (Cyber Charter) the same day, whereupon the Cyber Charter became the Student's local educational agency (LEA).

## Procedural History / *Ex Parte* Hearing

All written communication listed below, including notices issued by ODR, was by email.

On May 21, 2018, the Parent filed a complaint initiating these proceedings. ODR assigned the matter to me. I scheduled the hearing for June 27, 2018.

On May 24, 2018, ODR issued a notice for the hearing. The location listed on the notice was the District's administration building.

On June 20, 2018, the Parent called ODR. The Parent told ODR personnel that she did not know about the hearing until she received the District's evidence disclosure.

On June 21, 2018, I decided to accept the Parent's call to ODR as a request to postpone the hearing to ensure both parties received sufficient notice. I explained that the District could preserve an objection to the continuance. I also contacted both parties individually by phone to discuss scheduling and the possibility of proceeding on a stipulated record. Both parties were aware of, and consented to, this limited-scope *ex parte* communication.

Later on June 21, 2018, the District objected to the continuance but acknowledged that the matter would be continued over its objection and proposed alternative dates.

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<sup>1</sup> Except for the cover page, identifying information is omitted to the greatest extent possible.

On June 22, 2018, the Parent responded to the District's objection by withdrawing her continuance request. In the same email, the Parent explained that she made arrangements to proceed on June 27<sup>th</sup> and objected to any document not delivered to her in accordance with applicable disclosure rules.

Later on June 22, 2018, I acknowledged the Parent's email withdrawing the continuance request, and told the parties that the hearing would proceed on June 27<sup>th</sup> as scheduled.

On June 25, 2018, the District determined that it was unable to accommodate the hearing in its administration building, and asked to change the hearing location to its high school. I granted that request, and ODR issued a new notice, changing the hearing location to the District's high school.

On June 27<sup>th</sup>, the hearing convened. The Parent did not come to the hearing. I delayed the start of the hearing, and called the Parent three times, leaving a voicemail each time. The District also attempted to call the Parent from a speakerphone in my presence. I also confirmed that the Parent did not contact ODR by phone or email.

During the hearing, the District highlighted the Parent's burden of proof (discussed below) and averred that the Parent failed to disclose evidence. Despite this, the District expressed a preference to receive a decision on the merits and did not move to dismiss the matter. I took evidence and testimony from the District.

On June 29, 2018, I wrote to the parties explaining that the Parent should review the hearing transcript, which was sent later the same day. I explained that I would consider any motion by the Parent to re-open the record made on or before August 3, 2018. The Parent did not move to re-open the record.

The last communication that I received from the Parent was her email of June 22, 2018.

### **Issues**

The Parent's complaint (the Complaint) does not explicitly reference any laws, but the Complaint is reasonably read to include claims arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Parent raised the following issues in the Complaint:

1. Did the District fail to provide adequate notice of an IEP team meeting to the Parent?
2. Did the District violate the IDEA by convening an IEP team meeting without the Parent?
3. Did the District fail to include placement recommendations from a school psychologist in the Student's IEP?

The Complaint also includes the following, "Unable to print documents received 24 hours prior." In context, this appears to concern either documents sent by the District via email in advance of an IEP team meeting, or in advance of the prior due process hearing. If the former, this issue is

subsumed by the adequate notice claim. If the latter, I have no authority to hear claims concerning the prior due process hearing.

Regarding remedies, the Parent demands that the District strike the “current IEP” and convene another IEP team meeting.

The fact that the District is no longer the Student’s LEA does not render this matter moot. *See I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762 (M.D. Pa. 2012), overruled in part on other grounds by *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 607 (3d Cir. 2015).

### **Findings of Fact**

1. The District drafted and proposed an IEP dated November 2, 2017. S-2.
2. On December 5, 2017, while the prior hearing was pending but before it convened, the District sought the Parent’s consent to conduct an educational reevaluation to obtain information about the Student’s eligibility and need for specially designed instruction. The Parent did not respond to the request for consent. S-3.
3. On December 11, 2017, the Student’s IEP team (including the Parent) reconvened and made revisions to the November 2017 IEP. S-2
4. On January 14, 2018, the District re-issued the reevaluation request. By this time, the prior hearing had convened but had not concluded. S-3.
5. On January 26, 2018, the Parent both sought an informal meeting via telephone to discuss the proposed reevaluation and provided consent for the reevaluation. S-3.
6. On February 14, 2018, the Student’s IEP team (including the Parent, who participated by phone) reconvened and made further revisions to the November 2, 2017 IEP. The revisions included provision of extended school year (ESY) services. S-2, S-4.
7. On February 14, 2018, the District issued a Notice of Recommended Educational Placement (NOREP) to implement the November 2, 2017, IEP as revised, including ESY. The Parent did not return the NOREP. S-5.
8. On March 16, 2018, the District issued the reevaluation report (RR). Portions of the RR were completed by a school psychologist who was working under contract for the District but was not an employee of the District. S-6, NT at 38.
9. While the prior hearing was pending, the Parent “indicated an intention to enroll Student in a cyber charter school.” ODR Nos. 19970-1718AS and 20146-1718AS at 13.
10. On April 11, 2018, the District received a request to transfer records to the cyber charter school. The request came with a signed release from the Parent. The District contacted the Parent by email to confirm, and the Parent asked the District not to send records to the cyber charter school until she could clarify which records the cyber charter school

needed. The District also confirmed that the Student would remain enrolled in the District until the transfer was complete. S-17 at 1-2.

11. On April 12, 2018, the Parent again asked the District not to send records to the cyber charter school. The Parent indicated that she would tour a private school on April 13, 2018. The Parent also asked when the IEP team would meet to review the RR. The District replied that it was looking for a date before April 30, 2018. The District also stated that it was obligated to convene a meeting within 30 days of the RR's completion. S-17 at 3.
12. On April 13, 2018, the Parent asked the District to send possible dates for a team meeting. The Parent also said that she was unaware of the obligation to convene a meeting within 30 days of a reevaluation. S-17 at 4.
13. On April 17, 2018, the District contacted the school psychologist for her availability. The school psychologist replied that she had already reviewed the RR "in depth" with the Parent, saw no need to attend the IEP team meeting in person, and expressed the opinion that she "should not be involved with the IEP meeting." S-17 at 8-11.
14. On April 19, 2018, the District proposed IEP team meeting dates to the Parent. S-17 at 4.
15. The Parent did not respond to the District's proposed dates. The parties saw each other at a due process hearing session on April 20, 2018, but did not discuss dates for an IEP team meeting at that time. S-17 at 5.
16. On April 22, 2018 (a Sunday), the Parent informed the District that the Student was enrolling in a cyber charter school, starting on May 14, 2018. The Parent said that she based the decision to send the Student to a cyber charter school upon her discussion with the school psychologist. S-17 at 12.
17. On April 23, 2018, after the prior hearing concluded but before the prior decision was issued, the District sent three IEP team meeting invitations to the Parent. The invitations were for IEP team meetings on April 25<sup>th</sup>, 26<sup>th</sup>, and 27<sup>th</sup>, respectively. S-7, S-8, S-9.
18. The District sent the three invitations with a clarification that the Parent could choose whichever date was most convenient. S-17 at 5.
19. When the District issued the three invitations, it acknowledged that the Parent and school psychologist had already reviewed the RR together. In light of that, and the school psychologist's statements about attending the meeting, the District explained to the Parent that the school psychologist would not attend the meeting in person, but would be available by phone in case the Parent had questions. S-17 at 5.
20. The Parent responded to the three invitations on the same day that the District sent them. The Parent stated that she had previously informed the District that she was unavailable

on all of the proposed dates. The same email exchange also concerned a release of funds from a prior compensatory education award. S-17 at 5-7.

21. On April 27, 2018, the District issued a fourth IEP team meeting. The invitation was dated April 27, 2018. The proposed meeting date was April 30, 2018. The Parent did not respond to the fourth invitation. S-10.
22. On April 29, 2018, the Parent wrote to the District, asking to reschedule the April 30<sup>th</sup> IEP team meeting. The Parent expressed frustration at the need for a meeting before April 30 but did not grant an extension of any deadlines. The Parent also said that there would not be enough time to review the RR and IEP at a meeting before a hearing session, but no session was scheduled for April 30. The final session of the prior hearing was April 20, 2018. S-17 at 15, S-15.
23. On May 3, 2018, the District issued a fifth IEP team meeting invitation. The date printed on the invitation was May 1, 2018, but the District did not issue the invitation until May 3, 2018. The proposed meeting date was May 8, 2018. The Parent did not respond to the fifth invitation. S-11, S-17 at 16.
24. On May 8, 2018, the District convened the Student's IEP team without the Parent and drafted revisions to the Student's positive behavior support plan (PBSP). The team did not revise other portions of the Student's IEP at that time. S-12.
25. Also on May 8, 2018, the District sent another IEP team meeting invitation to the Parent. The purpose of the meeting was to "review restraints." The District scheduled the meeting for May 10, 2018. The Parent did not respond to the invitation. S-13.
26. On May 10, 2018, the District convened the Student's IEP team without the Parent, revised the Student's IEP, and drafted further revisions to the Student's positive behavior support plan (PBSP). S-12, S-14.
27. On May 11, 2018, Hearing Officer Culleton issued the prior due process decision, and the Parent withdrew the Student from the District and enrolled the Student in a cyber charter school. S-1, ODR Nos. 19970-1718AS and 20146-1718AS.
28. On May 17, 2018, the District sent copies of the May 10, 2018, IEP to the Parent by mail and email. S-17.
29. On May 21, 2018, the Parent filed the due process complaint initiating these proceedings and also filed a complaint with the Pennsylvania Department of Education, Bureau of Special Education (PDE/BSE), initiating the IDEA's state complaint process. The state complaint raises the same issues presented in the due process complaint. However, the state complaint more clearly indicates that the alleged violations occurred on May 10, 2018. It appears that PDE/BSE suspended its investigation because the Parent also requested a due process hearing. S-16.

## **Applicable Legal Principles**

### ***The Burden of Proof***

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 its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. 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). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

The Parent's failure to present evidence warrants dismissal in and of itself. Even so, I will honor the District's request to consider the merits of this case. I will view the evidence presented in the light most favorable to the Parent. I also note again here, as above, that the Parent stated that she wished to proceed on June 27, 2018, was given an opportunity to present evidence on June 27, 2018, and, after failing to take that opportunity, was given an additional opportunity to re-open the record. The Parent did not avail herself of any of those opportunities and has remained incommunicado since June 22, 2018.

### ***Procedural Violations***

Parents may allege procedural violations of the IDEA in a due process hearing. 20 U.S.C. § 1415(a), (f)(3)(E)(ii). However, a procedural violation arises to a denial of a free, appropriate public education (FAPE) only if the violation impedes the Student's right to a FAPE, or significantly impedes the Parent's opportunity to participate in the decision-making process. 20 U.S.C. § 1415(f)(3)(E)(ii).

### ***Timelines***

Pennsylvania regulations adopt federal IDEA implementing regulations and also impose additional timelines. Pertinent to this case, Pennsylvania regulations require LEAs to send copies of evaluations to parents at least ten school days before the meeting of the IEP team unless a parent in writing waives this requirement. 22 Pa Code § 14.123(d), 124(d).

Pennsylvania regulations also require LEAs to implement IEPs not less than ten school days after their completion. 22 Pa Code § 14.131(6). This is why IEPs become operative ten days after the issuance of a NOREP unless parents reject the IEP.

LEAs must also convene an IEP team meeting within ten school days after the use of a restraint to control a child's behavior, unless the parents wave the timeline in writing. 22 Pa Code § 14.133(c)(1).

Unlike the above timelines, the IDEA imposes other reasonable but non-specific timelines. Some of those are applicable in this case.

The IDEA requires LEAs to review IEPs when reevaluations indicate that changes are needed. See 20 U.S.C. § 1414(d)(4)(A)(ii)(II). The IDEA does not impose a specific timeline for LEAs to convene an IEP team meeting after a reevaluation, and what is reasonable may vary case-by-case.

The IDEA requires LEAs to notify parents of IEP team meetings. 34 C.F.R. § 300.322, 300.501(b)(2). The IDEA does not set a specific timeline, but rather requires notice “early enough to ensure that they will have an opportunity to attend.” 34 C.F.R. § 300.322(a)(1). At the same time, the IDEA requires LEAs to schedule the meeting “at a mutually agreed on time and place.” 34 C.F.R. § 300.322(a)(2). These regulations function to ensure that parents are present at IEP team meetings and are afforded an opportunity to participate. 34 C.F.R. § 300.322(a).

At the same time, the IDEA permits LEAs to make placement decisions without the parent if the LEA is unable to secure parental participation. 34 C.F.R. § 300.501(c)(4). In such cases, the LEA must document its efforts to secure parental participation. *Id.* Similarly, the IDEA permits LEAs to convene IEP team meetings without the Parents if, after a well-documented effort, the LEA cannot obtain parental participation. See 34 C.F.R. § 300.322(d).

## **Discussion**

### ***Notice of IEP Team Meetings***

The District provided adequate notice of IEP team meetings to the Parent. The District completed the RR on March 16, 2018. The RR prompted the District to reconvene the Student’s IEP team. The District believed, incorrectly, that it was obligated to convene an IEP team meeting within 30 days of the RR — which would have been April 15, 2018 — or by April 30, 2018 (documents from the District refer to both a 30-day timeline and an April 30<sup>th</sup> deadline). To accomplish this, the District first sought the school psychologist’s availability on April 13, 2018, and then proposed dates to the Parent on April 19, 2018. In doing so, the District fell short of its own 30-day goal but did not violate the IDEA. Moreover, the Parent does not allege that the District moved too slowly in reconvening the IEP team. Instead, the Parent alleges that she did not receive adequate notice of the IEP team meeting that convened on May 10, 2018.

In the most literal way, the Parent received notice of the May 10, 2018, IEP team meeting on May 3, 2018. Under the totality of circumstances, I find that one week’s notice was reasonable in this case.<sup>2</sup> It is notable that May 10 was the fifth date offered by the District, and the culmination of a two-week effort to obtain parental participation. During those two weeks, the parties concluded a lengthy due process hearing, the District was on notice that the Student was leaving for a cyber charter school, and the parties were in frequent communication by email and in person. Also during this time, the Parent rejected three proposed dates and did not respond to two others. The District proposed the final two dates after the Parent rejected the first three, indicating that the District was willing to meet at a date and time convenient to the parent. When

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<sup>2</sup> This holding is limited to the facts of this case. It is easy to envision circumstances under which one week’s notice is insufficient.



the Parent replied to say that the dates were not good, the District proposed a different date. When the Parent stopped responding altogether, the District convened the IEP team as required. The District had an obligation to secure parental participation if possible, but it was equally obligated to convene an IEP team meeting in response to the RR.

The Parent also alleges that she received documents electronically less than 24 hours before an unspecified meeting and was not able to print those documents. It seems more likely than not that this is about the prior due process hearing. Alleged errors related to the previous due process hearing must be taken to a court of competent jurisdiction. I have no authority to hear such claims.

On the off chance that this issue relates to the May 10, 2018, IEP team meeting, the record does not establish that the District sent any documents to the Parent less than 24 hours before the meeting. Moreover, the Parent was able to access and use documents sent to her in advance of that meeting; for example, the Parent was able to have an in-depth conversation about the RR with the school psychologist. The record of this case, which includes email conversations between the Parent and District personnel, does not establish that the District sent documents to the Parent less than 24 hours before the May 10, 2018, IEP team meeting, or that the Parent had to print any document that the District sent electronically.

### *Placement*

The Parent alleges that the District did not include the school psychologist's placement recommendations in the IEP. In context, it appears that the Parent refers to "placement" in the literal sense, meaning the physical location in which the Student will receive services. See, 34 C.F.R. 300.115 (regarding the continuum of placements that LEAs must make available to children with disabilities). Both the email correspondence between the parties at the time, and the just-concluded prior due process hearing both focused on where the Student should go to school and the appropriateness of schools proposed by the District.

In that context, I must reject the Parent's claim. The school psychologist's recommendations are contained in the RR. The RR does not make specific placement recommendations. Instead, the RR describes the type of services expected to benefit the Student, and the kind of environment that the Student requires. In a literal sense, the District did not fail to include the school psychologist's placement recommendations because no such recommendations were made.

In a less literal sense, the RR explicitly notes that its findings are generally consistent with prior evaluations. The RR also recommended the same type of therapeutic environment found to be appropriate for the Student on the day before the Parent's current complaint was filed. In sum, the District offered a full-time emotional support placement in a specialized, out-of-District school. Hearing Officer Culleton found that placement was appropriate. At the same time, the school psychologist evaluated the Student and concluded that the Student's need for that type of placement had not changed. Based on that evaluation, the District again offered a full-time, out-of-district, emotional support placement. Nothing in the proposed IEP is inconsistent with the

RR.<sup>3</sup> To the extent that the RR included placement recommendations, the IEP is consistent with those recommendations.

### **Conclusion**

The Parent did not satisfy her burden of proof because she did not present evidence. However, I do not resolve this matter on that basis. I reach a decision on the merits using the record before me. That record is contrary to the Parent's assertions. Under the unique facts of this case, the Parent received sufficient notice for the IEP team meeting on May 10, 2018. The record also demonstrates that the IEP offered by the District is consistent with the school psychologist's placement recommendations.

### **ORDER**

Now, July 5, 2018, it is hereby **ORDERED** that the Parent's claims are **DENIED** and **DISMISSED**.

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

/s/ Brian Jason Ford  
HEARING OFFICER

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<sup>3</sup> It is not clear that I could consider the school psychologist's recommendations outside of the RR if there were any. The record does not reveal any such recommendations. However, in the email explaining that the Parent's conversation with the school psychologist was a factor in choosing the cyber charter school, the Parent said that the psychologist said that the Student "needs a break from the restraints and institutional surroundings." That statement is hearsay, and the District introduced the email for another purpose. Even so, the school psychologist noted the Student's history of significant behavioral issues in school and the school's response to those behaviors, including restraint and referrals to crisis intervention. The school psychologist opined that those events were at least potentially factors in the Student's possible depression. The school psychologist did not say that the school's prior responses to the Student's behaviors were inappropriate. Moreover, the IEP as drafted is consistent with the RR's recommendations even considering that particular caution.