

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

DUE PROCESS HEARING

Name of Child: D. F.
ODR #2082/11-12-KE

Date of Birth:
[redacted]

Dates of Hearing:
August 22, 2011
October 31, 2011

OPEN HEARING

Parties to the Hearing:
[Parents]

Representative:
Judith Gran, Esquire
Reisman, Carolla, Gran,
19 Chestnut Street
Haddonfield, NJ 08033

Red Lion Area School District
696 Delta Road
Red Lion, PA 17356

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York, PA 17404

Date Record Closed:

November 15, 2011

Date of Decision:

November 21, 2011

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹, who is a teen-aged child with a low incidence disability, resides in the Red Lion Area School District (District). The Parents requested this hearing seeking a finding that the District has not provided all Student's educational records to them, thus denying them meaningful participation in their child's educational programming and/or denying Student a free appropriate public education (FAPE).

Issue

Did the Red Lion Area School District commit a procedural violation that impeded the Parents' right to participate in their child's educational programming and/or denied the Student FAPE by failing to provide educational records for student as defined by FERPA, that is, directly related to the Student and maintained by the school district for the Parents to inspect and review within a reasonable time and under reasonable conditions with explanations about said records as necessary?

Findings of Fact

1. Student is a teen-aged aged eligible child with a low incidence disability who resides in the District. [NT 36, 246]
2. In September 2009 a private evaluator chosen by the Parents found that "[Student] has the capacity to learn, but the modalities through which [Student] learns are not likely vision or hearing as primary means... [Student's] cognitive functioning appears to allow for regulation and direction of attention, mental effort, inhibition and association/application...Data did not support the presence of planning, generation of novel solutions, pacing of efforts, execution of complex abstract processing, or self-awareness of errors and corrections." [S-1]
3. An expert in Student's disability [inclusion specialist] who originally was retained by the Parents and now serves as an expert consultant to the District exclusively for Student's program, noted that Student's educational needs include "adaptive behavior, communication development, independent living, recreation/leisure, sensory development and academics based in the core curriculum content areas which include literacy." [P-5]
4. The inclusion specialist is of the opinion that it would be difficult if not impossible to ascertain an intellectual quotient level for an individual like Student. [NT 288]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

5. Student's primary mode of communication is tactile sign language (signing in Student's hands). The family uses a "total communication" approach, a combination of sign language, speech, and printed pictures. [NT 246; P-5]
6. Student is now becoming familiar with more people, is able to have more communication exchanges with a variety of people and these exchanges have become spontaneous. Student can put two and sometimes three words together spontaneously. In the classroom Student is more independent in seeking out age-appropriate leisure activities as for instance getting familiar books from the bookshelf. Student's stamina for participation in regular education class periods has grown from less than ten minutes to a whole fifty-minute class period. [NT 212-213]
7. Student can now identify the number one and the number two, and a group of many and a group of one. Student is able to identify many different pictures for a variety of vocabulary words. Student can understand some concepts such as wet versus non-wet and wind vs. non-wind. He is attending to a computer screen to answer questions and to put a sentence together. Student requests math homework. [NT 218, 241]
8. Student is placed in a supplemental [disability specific] support program. [S-8]
9. During the 2009-2010 school year, Student was placed in a regular education class, with less than half of Student's time spent in a resource room. [NT 323; S-8]
10. During the 2010-2011 school year, Student was placed in a regular education program, with approximately 54% of the time being spent in regular education classes. [NT 255, 324]
11. For the most part in order to provide direct services to Student the District contracts with the IU for teachers who have expertise in Student's disability and various areas that would relate to Student's disability as well as for therapists who also have expertise in the particular areas related to Student's disability. [NT 36 – 37]
12. IU personnel during the 2010 – 2011 school year included three special education teachers with specific expertise in Student's disability, an intervener, an instructional aide, and the materials specialist who created materials to enable Student to access the curriculum. [NT 37 – 38]
13. Regular education teachers on Student's grade level team interact with Student daily in their classrooms and throughout the day. Student's

subjects are English, academic literacy, social studies, science, and family and consumer sciences as well as other specialty subjects. [NT 38]

14. For at least the past year and a half the District has held twice-weekly 35-45 minute team meetings about Student with regular education staff [regular education staff go to one or the other depending on scheduling] and the special education staff [specialty teachers and either the intervener or the teacher assistant]. On occasion the occupational therapist and/or the physical therapist will attend as well. Although the Parents have been invited they have not been able to attend, although the District has offered care for Student during that time. [NT 168-170, 209-211, 261-262; S-9]
15. A specialist in inclusion and education of children with low incidence disabilities [inclusion specialist] was first engaged by the Parents. He produced a written report in 2007, and noted that failure to deliver a program to Student within the general education classroom using “a deliberate, systematic approach” would have devastating consequences for Student: “In the absence of an appropriate educational program, severe regression across all the domains of human development may be expected. This includes demonstrated skills of cognition, communication and adaptive behavior.” [P-5]
16. The District then hired this inclusion specialist to serve as a consultant to Student's team. By December 2010 the school and the inclusion specialist were consulting almost weekly. He regularly visits the team, observes Student, and gives verbal feedback to the intervener and to the teachers working with Student at the time. This consultant observes about once a quarter and occasionally he visits two days in a row. [NT 49 – 50, 157; S-55]
17. The inclusion specialist observes in the regular education and the special education classrooms and in the general school milieu and then discusses what he has seen with the team members and gives them feedback. He corresponds verbally with the members of the IEP team. Other than his report of 2007 the consultant communicates verbally with district and IU staff to assist in their implementation of Student’s program including modifications of the general education curriculum. [NT 50 – 51, 238]
18. A request from the Parents that was typical of this case is that of November 22, 2010, wherein they asked to review all Student’s records that had been generated since June 3, 2010, specifically, “E-mails, instructional materials that are created, adapted, and/or modified, lesson plans for general education and special education, notes relating to consultations and meetings required by the IEP ...[and] any contracts, invoices, agreements for services required by the IEP for people not

directly employed by the school district from June 2009 to current.” [P-49]

19. The Parents explained their reasons for wanting these items as, “trying to get a better understanding of [Student’s] present levels --as it pertains to the curriculum content for reading, writing, math. The IEP has [Student’s] functional performance but we do not understand what [Student] can do academically.” They also asked for an explanation of the records they had already received, specifically how the documents would help them understand what Student could do academically: “From the educational file we received from the district, what records will help us get a better understanding. Not of [Student’s] IEP goals, but of the curriculum content”. [P-51]
20. The Parents have been provided with a substantial number of documents, amounting to at least two bankers’ boxes full of records.² [NT 175; P-58, P-65]
21. In addition to being provided directly, records were forwarded to the Parents’ attorney by the District. [NT 129, 295; P-33]
22. Over the relevant period the Parents have been provided with, or given the opportunity to review and scan, files and documents. Reviewing/scanning is in evidence as follows:
 - The Parents reviewed Student’s educational records eight to twelve times over four years. [NT 154]
 - The Parents requested to review Student’s records in June 2009 [P-10]
 - The Parents requested to review Student’s records in December 2009 [P-9]
 - At a January 2010 IEP meeting the Parents asked to conduct a file review and documented their request in writing in an e-mail dated February 1, 2010.
 - The Parents were invited to review Student’s special education file at the administration building. [NT 42-43; P-6]
 - The Parents noted that they would visit and review records on December 15, 2010 [P-54]
 - The Parents reviewed records in January, February and April 2011 and the items reviewed in February 2011 comprise a two-page list [NT 88-89; P-23]

² There were two storage archives created for Student on the District’s server. The first related to past federal litigation and multiple DVDs and CDs were required to hold the information when it was retrieved. The second storage archive for Student is related to this current due process hearing. Because of the volume of correspondence around Student, Student is the only pupil who has a specific storage archive email mailbox on the District’s server. [NT 60-64, 70-71]

The Parents have had the opportunity to review files beyond the last review [NT 89-91, 110]

The files reviewed included current and former IEPs, conference reports, evaluations, RRs, correspondence, NOREPs, progress monitoring on goals, teacher manuals, curriculum, and instructional materials [NT 43, 92; P-9, P-14]

23. Specific items or collections of items provided to the Parents by the District are cited in evidence and include:
- January 7, 2010 Conference Report [NT 39; P-4]
 - July 28, 2010 Conference Report [P-34]
 - October 28, 2010 Conference Report with state standards [NT 136; P-47]
 - Notes and records of consultations [NT 47-50, 141, 149]
 - Communications log [NT 55-56]
 - Quarterly progress reports [NT 56]
 - IEP matrices [NT 73, 225]
 - Team meeting notes [NT 78-82, 112, 239; S-9]
 - Grading rubric [NT 87]
 - Sixth grade curriculum, seventh grade curriculum [NT 92]
 - Therapist notes, therapist logs and data related to progress monitoring [NT 96]
 - District assessment results [NT 112-113]
 - State assessments [NT 296]
 - Raw data related to goals and progress monitoring integration sheets [NT 116]
 - April 5, 2010 draft IEP with revised present levels [NT 121; P-26]
 - Information relating to the COACH process [NT 126-128, 226-227; P-29]
 - Transition assessments [NT 131]
 - Communications log, (backpack book) [NT 149-150]
 - Grading system through Edline³ [NT 77, 150, 276]
 - Work assigned and completed [NT 238]
24. The Parents have also viewed/received the following types of information related to the [redacted] Intermediate Unit: progress monitoring, IEP paperwork, RRs, consultant reports, integration sheets, daily communications log, adapted materials, progress notes including raw data, behavioral data, assessment raw data, COACH information, and team notes. [NT 214-215]
25. The Parents were given three bankers' boxes full of three-ring binders containing the books that had been modified for Student in relation to the general education curriculum. [NT 267-268]

³ Hard copy grade books are no longer used in the District.

26. Related service providers are currently on a consultative basis and when they were providing direct services they regularly put notes in the log that goes back and forth between the Parents and the school. There currently would not be a time log of direct services for Student because they do not serve Student directly; in the past when they did provide direct service they provided time logs for the parents. [NT 55]
27. In addition to the communications log (backpack book) that goes back and forth between the Parents and school there are formal communications including quarterly progress reports that are sent with the report card. These progress reports include all progress monitoring and all raw data taken to develop the progress monitoring. [NT 56]
28. The Parents were provided names of researchers on whose work the District modeled interventions for Student. [NT 23]
29. Although personal notes that team members may have made during trainings they attended about areas related to children with disabilities similar to Student's are not available, handouts from trainings conducted by PaTTAN would be available on request to PaTTAN and may be on PaTTAN's website. [NT 48-49, 203]
30. The Parents have viewed adapted books and materials based on the District's general education curriculum. [NT 292]
31. The Parents have observed Student in school. [NT 318]
32. The Intermediate Unit has invited the Parents to any trainings that were held for staff specifically around Student, and Parents were sent copies of the handouts for trainings they were not able to attend. [NT 230]
33. The supervisor of special education for the District is responsible for the overall coordination and management of Student's program. [NT 37]
34. The District's director of special education believes the Parents are entitled to see all the records related to Student, which include everything in Student's special education file, any notes that would have been shared with the entire group, everything that is in Student's cumulative file, everything that is in Student's health file, all the data sheets that are collected for Student, all the progress monitoring collected for Student, all the team meeting notes collected for Student, Student's grades, copies of tests and test items that Student has completed, copies of any book that has been created for Student to help Student to access the curriculum, as well as the daily notebook that goes back and forth with notes from the teacher(s) to the Parents. [NT 45 – 46]

35. Other than personal notes of teachers and lesson plans that are not specific to Student the director of special education believes that the Parents are entitled to all documents related to Student. [NT 46]
36. In order to retrieve the documents requested over time by the Parents the director of special education has variously spoken to members of the school team, spoken to consultants, looked through her own records, requested records from team members, and requested records from consultants. [NT 47]
37. The director of special education believes that everything the Parents have requested except for teacher lesson plans, and possibly some emails that may have been lost along the way, has been provided to the Parents. [NT 158-159]
38. The associate director of special education of the [redacted] Intermediate Unit believes that the Parents have been provided with everything the team uses to make decisions about Student's program and that this is sufficient information to make appropriate decisions. [NT 217, 221, 229-230]
39. The school team has refrained from using e-mails since the last litigation, hence there is very little e-mail, if any, generated related to Student. Team members have indicated directly and indirectly that they are reluctant to take notes and will not take notes because they are concerned that the notes would be used against them.⁴ [NT 52, 99, 105-106, 208]
40. The Parents have been present, in approximately nine IEP team meetings between April 9, 2010 and April 1, 2011, along with regular and special education teachers, LEA representatives, intervener, occupational therapist, physical therapist, guidance counselor, [specific disability] itinerant teacher, community agency representative and attorneys for both Parents and District. The Parents engaged an expert who is a former PA Special Education Hearing Officer and a former Director of Special Education in Pennsylvania to accompany them at one of the IEP meetings. The inclusion expert has been at several of the meetings as well. As of the second hearing date [10-31-11], the parties have not been able to finalize an IEP. [NT 162, 311; S-8, S-12, S-13]
41. The District currently is implementing Student's pendent IEP from June 2009 while the IEP team continues to attempt to develop a new IEP. [NT 255; S-8, S-13]

⁴ The parties previously engaged in extended prior litigation that included Federal Court involvement. [NT 247-248]

42. The Parents have purchased over \$11,000 (eleven thousand dollars) worth of books to inform themselves about how Student might be educated and the list of items purchased covers 30 spreadsheet pages. [NT 249]
43. Despite wanting to understand Student's progress in the general curriculum and how Student is being graded relative to nondisabled peers, the Parent has never asked how Student provides responses in school for test taking. [NT 292]

Discussion and Conclusions of Law

Educational Records:

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* Regarding Parents' Opportunity to Examine Records, the IDEA regulations provide in pertinent part: "The parent of a child with a disability must be afforded, in accordance with the procedures of § 300.613 through 300.621, an opportunity to inspect and review all education records with respect to – The identification, evaluation, and educational placement of the child and the provision of FAPE to the child." 34 C.F.R. §. 300.501(a).

The term 'education records' means the type of records covered under the definition of "education records" in 34 C.F.R. part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA))." 34 C.F.R. § 300.611-300.625. Education records as defined under FERPA are: Directly related to a student; and Maintained by an educational agency or institution or by a party acting for the agency or institution. The term does not include: Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the 'record'. 'Record' means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche. 34 C.F.R. § 99.3.

With regard to parents' access rights, the federal regulations provide that each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made. The right to inspect and review education records under this section includes the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and

review the records; and the right to have a representative of the parent inspect and review the records. 34 C.F.R. § 300.613 (Authority: 20 U.S.C. 1412(a)(8); 1417(c))”

In pertinent part, pursuant to 22 Pa. Code § 4.4(d), districts are required to adopt policies to assure that parents or guardians have the following: Access to information about the curriculum, including academic standards to be achieved, instructional materials and assessment techniques; a process for the review of instructional materials; and, a right to review state assessments (with restrictions).

Although the Third Circuit has not ruled specifically on the issue of educational records and parental access, the District through counsel suggests that the hearing officer take note of several federal cases in other jurisdictions and of a supreme court case.

On point in the instant matter wherein the Parents seek “correspondence among members of the IEP team and/or District staff that may or may not consider themselves or be considered IEP team members either through e-mail or hard copy communication”, in *S.A. v. Tulare County Office of Education*, 53 IDELR 111 (D.C.E.D. Cal. 2009), a federal judge held that while the parents had requested copies of all emails sent or received by the district concerning or identifying the child, a school district was not required to turn over all emails that personally identified a student with autism and speech and language delay. The district did provide emails that were kept in the student’s permanent file.⁵

In *Board of Educ. of the Toledo City Sch. Dist. v. Horen*, a federal court considered whether certain “tally sheets” were education records under FERPA. 2010 WL 3522373, 2 (N.D. Ohio, 2010). The sheets contained personal notes of teachers and therapists and were intended to track students’ daily activities and achievements. The court reasoned that “the tally sheets were temporary vehicles assisting school staff in memorializing notes in the students’ permanent records, but never themselves went into a ‘records room,’ the student’s ‘permanent file,’ or on ‘a permanent secure database.’” The tally sheets were thus not “maintained” by the District and could not be considered “education records” to which the requesters were entitled under IDEA or FERPA.⁶

Finally, directly on point in the instant matter, in *K.C. v. Fulton County Sch. Dist.*, a Georgia federal court considered whether the parents/plaintiffs were entitled to 700 pages of records including writing samples, evaluations, written assignments and worksheets under IDEA and FERPA. 2006 WL 1868348 (N.D. Ga. 2006). The court citing the United States Supreme Court’s ruling in Owasso Independent School District No. I-011

⁵ However, note earlier agency guidance that does not hold the force of statute or case law, advising that although an educational agency is not required to maintain documents such as emails or other correspondence about an individual student, if it does, it is required to make them available for inspection and review by the parents. *Letter to Husk*, Complaint No 1251 (FERPA) (United States Department of Education, December 29, 2006).

⁶ Again, earlier advisory guidance to the contrary was provided in *Washoe County School District*, 13 FAB 10, 109 LRP 78026 (Nevada State Educational Agency, No. WA040209, April 2, 2009), where, in a Complaint Investigation Report, the state educational agency found that by failing to provide the parents with an opportunity prior to an IEP meeting to inspect all teacher notes, emails and behavior data collected and maintained throughout the school year, a school district failed to comply with 34 C.F.R. § 300.613(a).

v. Falvo, 534 U.S. 426 (2001), (which set the precedent for understanding a school district's FERPA obligations), stated that "the Supreme Court has thus made clear that parental access to 'education records' does not extend so far as to allow access to each individual piece of student work" and also ruled that "writing samples and other daily work are not within the definition of 'education records.'"

Procedural Violations:

Regarding Procedural Violations, the IDEA regulations provide: In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a).

Our United States Supreme Court has considered procedural violations under the IDEA and closely tracking the statutory language, ruled that a procedural violation of IDEA is actionable only if it impedes the child's right to a FAPE; significantly impedes the parents' right to participation; or causes a deprivation in benefits. See *Winkelman v. Parma City School District*, 550 U.S. 516, 127 S.Ct. 1994 (2007).

The Third Circuit has likewise considered the issue of procedural violations, and tracking the IDEA statutory language and *Winkelman*, in *D.S. v. Bayonne Board of Education*, 602 F.3d 553 (3d Cir. 2010) ruled that "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 education benefits".

Credibility of Witnesses:

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

The credibility of the two principal witnesses, the director of special education and the Student's mother, was impaired, by, respectively, overall presentation during the hearing and disingenuous responses to questions.

The director of special education presented as a rather difficult witness, variously answering many questions with "I don't recall", asking to have her previous answer re-read, taking long pauses before providing an answer, having to be instructed to answer the question, not admitting to her own initials on a document, denying knowing what P/F (pass/fail) means on a document, and on a few occasions answering in a flippant tone of voice. [See complete transcript sections for this witness]

For her part, Student's mother damaged her credibility when she testified under oath that she did not know that certain documents that were clearly questions and answers in a test format were assessments, and that despite receiving multiple documents and attending nine IEP meetings she could not recall what goals were addressed at the IEP meetings. Although Student's mother testified that she received a great quantity of records for Student over the years she asserted that the progress monitoring data was fragmented such that it was difficult for her to gain a solid understanding of it, but did not provide any testimony that other than at IEP meetings she actually asked to meet with pertinent staff to gain an understanding of how to interpret the data. She testified that despite reviewing the records she received from the District, she learned "Nothing" about Student's progress in the general curriculum. She testified that having received three bankers' boxes of modified books related to the general curriculum she "had no clue" about how they related to what Student was doing in class but testified she did not ask the person who delivered the books. Finally it simply is not reasonable that, given the Parents' desire to gather information about many aspects of Student's educational program, they have never asked how Student provides responses in that setting for tests and have never asked if Student responds in writing or if Student is being taught any writing skills. [See complete transcript sections for this witness]

Discussion:

Parents of disabled children are entitled to meaningful participation in their child's educational planning. Parents are not, nor are they expected to be, professional educators of their own children; although they contribute to designing the child's program, they are not responsible for implementing the program. In the instant matter the Parents seem to have misunderstood the difference between obtaining education records for litigation purposes, and obtaining data they need to be contributors to the IEP team discussion. The Parents have requested, and have been provided, a wealth of data upon which to base their opinions and formulate their input as members of the IEP team. They have been provided with even more information than the courts in *Falvo, S.A.*, *Horen* and *K.C.* may have ordered. Although they have requested and have received a volume of documents, it is apparent that in some instances they have not used, absorbed or remembered what they have received, raising the question if their current goal is more about acquiring data than using it.

In their closing argument the Parents characterize the District as being "determined to shield an educational program from too much scrutiny". This characterization widely misses the mark. First, the District has hired an inclusion specialist, initially located and selected by the Parents, to provide ongoing guidance, direction and support to the regular and special education staff implementing Student's program. Given this expert consultant's strong advocacy role and his specific wealth of expertise, it is virtually certain that Student's program is appropriate and is being appropriately implemented, although when asked why the Parents needed certain categories of documents, Student's mother gave reasons largely centered around monitoring the implementation of the IEP. Second, the Parents have been invited to attend the twice-weekly staff meetings convened specifically around Student's programming, and the District has offered to have someone

be with Student so the Parents can attend.⁷ Third, the District has provided access to or copies of approximately five thousand (5,000) pages of multiple categories of documents as well as to curriculum materials and training opportunities and materials. Rather than shielding Student's program, the District has opened itself, albeit sometimes grudgingly and warily, to intense scrutiny. The evidence in this case suggests that in their zeal to ensure that their child receives an appropriate education the Parents have made so many overlapping requests for education records that they have accumulated far more records than they have, as yet, been able to absorb and integrate.

Conclusion:

Our United States Supreme Court has held that in an administrative hearing brought under the IDEIA the burden of persuasion, which is one element of the burden of proof, is properly placed upon the party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). Thus, the party bearing the burden of persuasion, in this case the Parents, must prove its case by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, the burden of persuasion under *Schaffer* only comes into play when neither party introduces a preponderance of the evidence. In that event, evidence is evenly balanced, or in "equipoise" as the Court put it, and the party having the burden of persuasion failed to tip the evidence scale in its favor and thus cannot prevail. The evidence was not in equipoise on the issue under consideration.

Although the District did not conclusively establish that it found and provided absolutely everything the Parents requested, neither did the Parents establish that the District failed to provide them with any educational records to which they are entitled within a reasonable period of time and under reasonable conditions with explanations as necessary. The Parents have not met their burden of proof supporting a finding that the District committed a procedural violation that impeded their right to participate in their child's educational programming and/or denied the Student FAPE. Rather the evidence provided by both the Parents and the District supports a finding that the Parents have been afforded ample opportunity for meaningful participation and that Student has received FAPE.

Summary:

The Parents failed to produce a preponderance of evidence to support their position on the issue; rather the preponderance of the evidence supported the District's position such that the District prevailed.

Dicta:

The parties previously engaged in extended prior litigation that included federal court involvement. For purposes of the current matter the issues in that litigation are not relevant and were not reviewed by this hearing officer. However, likely due in part to

⁷ The intervener and the teacher's assistant alternate attending these meetings – one rides the bus home with Student while the other attends the meetings. It would be a simple matter for the bus escort for the day to keep Student at school until the meeting is over and Student could then return home with a parent.

this litigation history, during the testimony of the mother and of the director of special education the tension between these principal participants was palpable, although this did not seem to be the case with the other witnesses. It appeared to this hearing officer that the District and the Parents have been glaring at one another in litigation mode so long that their gazes have been removed from where they should be focused – on the Student, whose appropriate education for life above all needs adults working in a cooperative manner. The parties' lack of cooperation is exemplified by their failing to agree upon an IEP for going on a year and a half, and their barely acknowledging the hearing officer's off-the-record offer to assist them to establish on the record what goals in the IEP were agreed upon and could be implemented.

The longstanding history of litigation between the parties may be partially or largely to blame for the breakdown in cooperation that has become so static that the Student has not even been afforded a simple basic right under the IDEA, a current IEP. In order to confer upon Student what is due under the law, the parties are urged to quickly schedule and participate in a facilitated IEP meeting, as this avenue has been successful in other cases.

Additionally, so that the relationship between the District and the Parents can begin to be healed, in the future, within ten school days upon receipt of a request for educational records that were generated after the date of this decision the District should inform the parents whether or not the requested educational records generated after the date of this decision exist, and what steps were taken to ascertain whether they exist. If the educational records exist they should then be made available to the Parents without delay; if told they do not exist the Parents should refrain from adding them to any further additional request for education records they may make.

Finally, the Parents are encouraged to observe Student's classes at least once per quarter so they can see first-hand how instruction is being carried out, thus allowing for a consistent approach to instructing Student in communication and other skill areas across settings. It might be particularly beneficial if the Parents visited at a time when the inclusion specialist is there so that they could benefit from the feedback offered to school personnel working with Student.

Order

It is hereby ordered that:

1. The Red Lion Area School District did not commit a procedural violation that impeded the Parents' right to participate in their child's educational programming and/or denied the Student FAPE.
2. The District has provided the Parents with sufficient records needed to participate meaningfully in Student's educational planning through the date of this Decision.
3. The District is not required to take any further action.

Any claims not specifically addressed by this decision and order are denied and dismissed.

November 21, 2011

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official