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

ODR No. 2805-1112AS

Child's Name: S.S.

Date of Birth: [redacted]

Dates of Hearing: 5/23/12, 6/29/12

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	None
Abington School District 970 Highland Avenue Abington PA 19001-4535	Claudia L. Huot, Esquire Wisler Pearlstine, LLP Blue Bell Executive Campus 460 Norristown Road, Suite 110 Blue Bell, PA 19422
Date Record Closed:	July 24, 2012
Date of Decision:	August 6, 2012
Hearing Officer:	Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student in this case has been enrolled and attending school in the District since the 2009-2010 school year, and is IDEA eligible due to the effects of several disabilities. Because of a significant new medical condition that arose during the summer of 2011, Parents requested homebound instruction for Student at the start of the 2011-2012 school year, which the District provided after receiving medical documentation as it requested. When it became obvious that Student would be unable to return to school for at least several months, Student's educational placement was changed to instruction in the home in accordance with District policy. Parents did not disagree with the District's change of placement recommendation.

In January 2012, anticipating Student's ability to return to school on February 1, 2012, the District and Parents made tentative plans for another change in placement back to the school setting. Student's medical condition did not improve sufficiently, however, to permit returning to school and Student ultimately remained in the instruction in the home placement through the end of the 2011-12 school year.

Parents filed a due process complaint on February 1, 2012, asserting that the District committed a number of procedural violations arising from the District's insistence that Student's educational program be delivered in the school setting beginning February 1, 2012 due to a lack of updated medical information, notwithstanding Student's medical condition and the absence of a NOREP proposing a change of placement. A due process hearing was conducted over two sessions in May and July 2012. For the reasons explained below, some of the District's actions concerning Student constituted IDEA procedural violations. The District, therefore, will be

required to assure compliance with IDEA requirements with respect to any proposed change of placement.

ISSUES

1. Did the District commit any procedural violations of the IDEA statute by improperly changing or proposing to change Student's placement without issuing a Notice of Recommended Educational Placement (NOREP)?

2. Did the District improperly impose certain homebound instruction requirements on Student's instruction in the home special education placement?

3. Did the District fail to provide certain documents to Parents that were necessary for the Parents to meaningfully participate in the process of making educational placement decisions for Student?

FINDINGS OF FACT

1. Student is an [elementary school-aged] child, born [redacted]. Student is a resident of the Abington School District and at all times relevant to this matter was eligible for special education services. (Stipulation, N.T. pp. 17-19)

2. Student has current diagnoses of orthopedic impairment, autism, and speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1), (8), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 17-19)

3. Student attended elementary school in the District during the 2009-10 and 2010-11 school years. (N.T. pp. 17-19)

4. An Individualized Education Program (IEP) developed in June 2011 provided for supplemental autistic support. (Stipulation, N.T. pp. 17-19)

5. During the summer of 2011, Student contracted pneumonia and suffered significant complications. Student was diagnosed with serious medical conditions, including an immune deficiency disorder. Student began, and continues to receive, regular treatment for that condition. Because of the immune deficiency, Parents take precautions before Student goes out in public. (N.T. pp. 351-352, 354-356, 366-369)

6. Because of Student's medical condition, Parents requested homebound instruction for Student in early September 2011. (N.T. pp. 281-282, 283-284)

7. The District has a policy for the procedure to be followed when a request for homebound instruction is made by a parent, wherein it sends an informational packet that includes a request for a physician's statement explaining the need for that service. The packet also

typically includes a release so that the District is authorized by the parent to communicate with the physician directly.[1] (N.T. pp. 275-278, 282-283)

8. The District responded to the Parents' request for homebound instruction with a set of forms, including two "Permission to Release Records," for their signature. Parents signed the release forms. (S-3 pp. 2-4, 29-30)[2]

9. Documentation of the medical condition by Student's private physician was provided to the District on September 12, 2011. (Stipulation, N.T. pp. 17-19)

10. Homebound services began on September 21, 2011. (Stipulation, N.T. pp. 17-19)

11. On October 17, 2011, the District requested an update on Student's medical condition from the private physician. (S-3 pp. 6-7)

12. Student's private physician provided updated information on October 20, 2011, indicating that Student was not able to return to school. (S-3 p. 8)

13. Student's IEP team convened on October 20, 2011, at which time the placement was changed to instruction in the home. Parents agreed to this change in placement, although they did not sign and return the Notice of Recommended Educational Placement (NOREP) sent by the District. (Stipulation, N.T. pp. 17-19; P-3; S-6, S-7, S-10)

14. Student's IEP was also revised at that October 20, 2011 meeting to reflect the instruction in the home including the related services provided in that setting. (S-8 pp. 1, 3-5, 11, 18-19, 22, 24, S-9)

15. Both the homebound services and instruction in the home amounted to five hours per week. (N.T. pp. 70-71)

16. Another IEP team meeting was held on November 17, 2011 to discuss Student's instruction in the home and update Student's present levels of academic achievement and functional performance. No change in placement was proposed at that time. (N.T. pp. 74-75, 77-78, 159-160; S-11, S-13 pp. 1, 4-6, 9-10, 12-14)

17. On November 28, 2011, the District again requested updated information on Student's medical condition from Student's private physician. (N.T. 287-289; S-3 pp. 17-18)

18. Student's private physician provided updated information on November 28, 2011, indicating that Student was not able to return to school. (S-3 p. 20)

[1] The District implemented a new policy sometime at the beginning of 2012 wherein it provides copies to parents of all requests for information made directly to physicians. (N.T. pp. 250-252, 293-294)

[2] The parties moved for the admission of specific exhibits, all of which were admitted without objection. (N.T. pp. 374-375) Also admitted on the record was HO-1, a string of email messages to and from this hearing officer and the parties, between February 6 and 7, 2012, after the Parents asked whether it was necessary to amend the proposed resolution section of their due process complaint. (N.T. p. 376-377)

19. On December 19, 2011, the District requested updated information on Student's medical condition from Student's private physician. (S-3 pp. 25-26)

20. The IEP team next re-convened on January 12, 2012. (Stipulation, N.T. pp. 17-19)

21. At the January 12, 2012 IEP meeting, the team discussed a proposed change to Student's placement, as the members of the team, including the Parents, believed that Student would be able to return on or about February 1, 2012. However, the Parents did make clear, and the District understood, that the return on that date was not a certainty. (N.T. p. 42, 47, 53, 55-57, 80-83, 85, 101, 160, 342, 352-354; P-6)

22. The January 12, 2012 revised IEP updated Student's present levels of academic achievement and functional performance, and noted parental concerns about related services. Goals related to social skills and related services were added, and the location of program modifications and specially designed instruction in both the home and school setting were provided for before and after Student's anticipated return. This IEP also specified, and the District representatives expected, that there would be a prescription from Student's medical doctor stating that Student could return to school before the change in placement back to the school setting occurred. The District believed that the medical information was necessary in order for it to understand and program for all of Student's needs upon the return to school. (N.T. pp. 55-56, 85-86, 130-132, 167; S-21 pp. 1, 3-6, 11-12, 14, 16-17, 22-30)

23. The team also planned to hold another IEP meeting to plan for Student's transition back to the school environment before it occurred. (N.T. pp. 47, 82-83, 131-32, 162, 163-164, 170; S-21 p. 4)

24. On January 26, 2012, at a scheduled doctor's appointment, Parents learned that Student would not be able to return to school on February 1, 2012. Parents immediately so advised the District. (N.T. pp. 46-47, 133-136, 342-343, 346; P-7; S-24)

25. On January 27, 2012, the District renewed its December 2011 request for updated information on Student's medical condition from Student's private physician. (S-3 pp. 35-36)

26. On January 31, 2012, the District's Director of Special Education advised the Parents that it could not continue to provide instruction in the home if medical documentation from Student's physician was not provided, and that it was prepared to implement the January 12, 2012 IEP at the elementary school without that documentation. He further explained that if Student did not attend school, Student's absence would be unexcused and standard truancy procedures would follow. (N.T. pp. 173-175; S-4 p. 12)

27. Student's private physician provided updated information to the District on February 1, 2012, indicating that Student was not able to return to school. (S-3 p. 37)

28. Parents filed their due process complaint on February 1, 2012. (S-27)

29. Student's IEP team met again on February 22, 2012 to discuss Student's eligibility for Extended School Year (ESY) services, to update Student's present levels of academic achievement and functional performance, and to clarify that Student would not be returning to school but would remain in the instruction in the home placement. (P-12; S-28 pp. 1, 3-4, 12-13, 20, 27-28, 31)

30. No IEP meeting was held during the 2011-2012 school year to plan for Student's transition back to school. (N.T. pp. 82, 162-163)

31. Student's placement did not change from instruction in the home and, as of the date of the first due process hearing, Student had not been marked, and was not, absent during the 2011-12 school year.[3] (N.T. pp. 61-63, 178, 362)

32. Because of the serious medical condition diagnosed during the summer of 2011, Student did not return to a classroom setting at any time during the 2011-2012 school year. (Stipulation, N.T. pp. 17-19)

33. The District has a specific procedure and policy for students receiving homebound instruction. Pursuant to that procedure, a statement by a physician that the student requires homebound instruction is required. It is also the District's practice to require periodic, updated medical documentation for students provided instruction in the home in cases where the reason for that placement was medical. (N.T. 190-193, 222, 238-241, 335-336; P-17 pp. 1-3)[4]

DISCUSSION AND CONCLUSIONS OF LAW

Procedural Safeguards/Burden of Proof

Before considering the parties' contentions and the evidence produced in this case, it is helpful to set out the familiar legal framework that governs consideration of the issues in dispute.

The substantive protections of the IDEA statute and regulations discussed below are enforced via procedural safeguards available to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20

[3] The District corrected its records after two days' absence were erroneously reported to the Parents. (N.T. pp. 61-63, 89-90; P-14)

[4] The District's Director of Special Education explained that the medical documentation for instruction in the home is required so that it can comply with compulsory attendance laws, and that truancy results when this documentation is not provided. (N.T. pp. 181-183, 186-187, 190, 214-215, 217)

U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009).

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of proof. In this case, since Parents filed the complaint, it was their obligation to prove each of their claims. As is also usual in civil cases, Pennsylvania federal courts have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

FAPE Requirements/Standards Relating to Procedural Violations/Mootness

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia* 575 F.3d at 249.

The substantive protections of the IDEA statute and regulations are enforced via procedural safeguards available to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

The IDEA regulations explicitly prohibit finding a denial of FAPE, and, of course, awarding a remedy such as compensatory education, based on a procedural violation unless such violation had a substantive effect in terms of impeding an eligible Student's right to FAPE, a parent's participation rights, or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii)(I), (II), (III); 34 C.F.R. §300.513(a)(2)(i), (ii), (iii). The statute and regulations also provide, however, that "Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section." 20 U.S.C. §1415(f)(3)(E)(iii); 34 C.F.R. §300.513(a)(3).

Contrary to the District's argument, therefore, the IDEA statute and regulations do not preclude either a claim or remedy for a procedural violation alone in the absence of a claim for denial of FAPE. The IDEA, in fact, contemplates a complaint alleging a purely procedural violation, and provides for a limited remedy, in the nature of injunctive relief, upon proof of a procedural violation only.

Moreover, the fact that Student's instruction in the home educational placement did not change from the time it began through the end of the 2011/2012 school year (FF 31) does not preclude a conclusion that the District committed procedural violations. Had the District actually changed Student's placement in a manner that violated the IDEA statute and regulations, the violation would then have been substantive, not solely procedural.

Finally, although the school year in which the alleged procedural violations occurred ended without a change of placement or a suggestion that the District is currently proposing a change of placement, those circumstances do make the procedural issues Parent raised moot, as the District contended. The situation presented by this case is similar to that presented in *Taddonio v. Heckler*, 607 F.Supp. 620 (E.D. Pa. 1985). There, the Social Security

Administration defended a court action brought by a claimant over an adverse action by arguing that the claim was moot because the claimant had suffered no actual injury. The district court disagreed, based upon the following analysis:

> The Secretary argues that this case is moot because of two events: (1) plaintiff's benefits never lapsed because there was an agreement between the parties which provided that plaintiff's benefits would continue through the ALJ's decision; and (2) because the ALJ's decision reinstated plaintiff's benefits, plaintiff received all the relief to which he is entitled under the Social Security Act and no longer has any personal stake or interest in this action or its outcome. In response to the Secretary's argument, plaintiff avers that this action is not moot because it falls within the well accepted "capable of repetition, yet evading review" exception to the mootness doctrine. *See Weinstein v. Bradford,* 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).
>
> The court turns first to the "capable of repetition" element. Under the Secretary's review procedures, plaintiff's benefits, like those of all Supplemental Security Income recipients, are subject to periodic review. 20 C.F.R. § 416.204. It is not improbable that plaintiff's SSI status could be altered or terminated at any time because plaintiff is found to have demonstrated that he was capable of performing SGA (Substantial Gainful Activity) or to be ineligible*622 for other non-medical reasons. Accordingly, the court concludes that the Secretary's challenged action is capable of repetition.
>
> Second, the court considers the evading review element. … [T]he court finds that in situations, such as the situation of plaintiff, where the recipient challenges (in the appropriate district court) the constitutionality of the Secretary's decision at the reconsideration stage, (Footnote Omitted) and simultaneously appeals the reconsideration decision for a hearing on the remaining questions before an ALJ, the ALJ will almost invariably render its decision before the district court rules on the difficult constitutional issues, such as the ones before the court in this case. In that event, the outcome of the ALJ's decision would effect the justifiability of the constitutional challenge in the district court. If the ALJ affirms the Secretary's reduction or termination of the recipient's SSI benefits on the non-constitutional grounds, this court cannot perceive that the recipient would have an actual injury because the ALJ has merely determined that plaintiff's benefits had been rightfully terminated below. Under these circumstances, plaintiff would have no standing to continue his lawsuit in the district court. *See Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). On the other hand, if the ALJ's decision reinstated plaintiff's benefits and the court concluded that the ALJ's decision to reinstate plaintiff's benefits made his constitutional challenge moot, the constitutional issue would continually evade review. As a result, the court holds that plaintiff's challenge is within the "capable of repetition, yet evading review" exception, and the decision of the ALJ, favorable to plaintiff, did not render plaintiff's claim moot.

607 F.Supp. at 621-622. Here, the issue of Student's placement is subject to periodic review, similar to the benefits provided to the claimant in *Taddonio.* Consequently, the District's actions

are certainly capable of repetition. In addition, requiring medical documentation in connection with instruction in the home special education placements is part of the District's policies and procedures, and the District contends that such procedure is not only proper but required. It is, therefore, certain that Parents will again be asked for medical updates, thereby assuring that an essential aspect of the procedural violations Parents asserted will be repeated. The District could also repeat its threat of changing Student's placement unilaterally and without issuing a NOREP in the absence of a timely update from medical providers, and, as it did here, rescind the decision if Parents submit a due process complaint and/or provide medical documentation prior to the District implementing the change of placement. If Parents are not permitted to challenge the procedures the District applies to instruction in the home educational placements now, those procedures would continually evade review until and unless the District actually implemented a unilateral change of placement based upon Parents' failure to provide medical documentation when required by the District, or Parents would be forced to file a complaint each time the situation occurred, yet be denied a hearing if the District took no substantive action. For all of these reasons, the procedural issues presented by this case are not moot.

Consideration of Parents' Procedural Claims

The first issue is whether the District committed any procedural violations of the IDEA statute by improperly changing or proposing to change Student's instruction in the home placement without issuing a NOREP. The second issue is whether the District imposed certain homebound instruction requirements on Student's instruction in the home special education placement. Because these two issues are intertwined, they will be discussed together.

The District manages services provided to special education students in an instruction in the home special education placement through its Pupil Services Department rather than through

its Special Education Department, just as services provided to students on homebound instruction are monitored and managed through Pupil Services. (N.T. pp. 117-119) District representatives believe that in Pennsylvania, parents of students who are in an instruction in the home special education placement are required to periodically provide updated medical information from the child's physician. (N.T. pp. 115-117) The District's Supervisor of Special Education for its elementary schools explained that instruction in the home is a special education placement used for a child with a medical condition who needs more than 30 days of homebound instruction. (N.T. pp. 124-25, 154-155) This witness also stated that the change of Student's placement from homebound instruction to instruction in the home was nothing more than "a change in terminology" (N.T. p. 127) and that the delivery of services was the same. (*Id*.)

The District, therefore, required Parents to provide the same medical justification for continuing the instruction in the home special education placement that is required of students receiving homebound instruction, thereby making no distinction between an instruction in the home special education placement and homebound instruction, a temporary excusal from school for medical reasons. This requirement is apparently based upon the belief that for students who are provided with academic instruction at home, the term "instruction in the home" is used for special education students who are at home for more than 30 days, while "homebound instruction" is the term used for regular education students, and for special education students who are instructed in the home setting for less than 30 days.

In compliance with *Cordero v. Department of Education*, 795 F.Supp. 1352 (M.D. Pa. 1992), the Pennsylvania Department of Education (PDE) issued a Basic Education Circular (BEC) "to implement a comprehensive system for identifying all children with disabilities who are experiencing placement delays or who are at-risk for placement delays. In part, the court

order requires districts to report monthly all children with disabilities who are placed by the Individualized Education Program (IEP) team to instruction conducted in the home or assigned to homebound instruction to PDE ." [5] Pursuant to that BEC, Districts are required "to report monthly all children with disabilities who are placed by the Individualized Education Program (IEP) team to instruction conducted in the home or assigned to homebound instruction to PDE." This BEC provides a link to the website for reporting both homebound instruction and instruction in the home, and describes that information as follows (emphasis in original): "The Districts and Charter Schools must supply the Department with information about the student, his or her disability, **the type of program or placement required,** and the anticipated length and reason for the placement." It also states that, "districts and charter schools must document the physician's recommendation for homebound instruction." The BEC reflects a policy against using an instruction in the home placement for reasons other than the specific needs of the child.

PDE's Bureau of Special Education issued a Corrected Memorandum in December 2011 to provide guidance on the reporting requirements for homebound instruction and instruction in the home, stating that the local education agency must "Indicate *if* the student has a doctor's excuse (certificate) for their homebound instruction or instruction conducted in the home" (emphasis added) and "Include a brief detailed description as to why the student is receiving homebound instruction or instruction conducted in the home."[6] There is also a procedure for requesting an extension of the initial period of instruction in the home, with a place to enter a "brief explanation" of why the extension is sought.

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[5]This BEC was last reviewed on July 1, 2009, and is available on the PDE website at http://www.portal.state.pa.us/portal/server.pt/community/federal_codes/7499/instruction_conducted_in_the_home/507387 (last visited July 31, 2012).

[6] This Memorandum is available at http://specialed.iu1.wikispaces.net/file/view/pennlink+homebound.pdf (last visited July 31, 2012).

Review of the above reveals that there is no requirement in Pennsylvania for school districts to require updated medical documentation for instruction in the home in order to maintain that placement beyond the initial period reported to PDE. Nor does the cited District policy, to which District witnesses referred (P-17), support such an interpretation. Moreover, even if any of these documents could be read to impose a requirement for updated medical documentation to continue an instruction in the home special education placement, the District would not have had the authority to make any change to that placement without prior written notice through issuance of a NOREP, *before* making any such change. 34 C.F.R. §300.503(a), (b). Furthermore, none of the policies relevant to this case would support a decision to expose a medically fragile student to the risks inherent in a school environment based on technical noncompliance with a documentation request, particularly a student whose medical condition has been well known to the school district, as in this case. For all of these reasons, the District cannot impose the same requirements for homebound instruction on students who are in the special education placement of instruction in the home, and certainly cannot effectuate a change of that special education placement for non-compliance with District policies without complying with the IDEA obligation of providing prior written notice of that change. 34 C.F.R. §300.503(a)(1)

Parents claim that the District committed procedural violations of the IDEA by changing, or proposing to change, Student's placement without a NOREP in January 2012. The District argues that Student's placement was never changed and, thus, there was no error, or that any procedural error was harmless. Thus, it asserts that there is no actionable claim for not issuing a NOREP after the January 12, 2012 IEP meeting. The record is clear that the IEP team, which included Parents, was proposing the change in placement for Student to return to school at the

January 2012 IEP meeting, but that final determination could and would not be made unless and until Student's physician made that recommendation. (FF 21, 22, 23) The parties also stipulated that Student's placement was never actually changed. (FF 31) The decision of the IEP team to change the placement upon the occurrence of specific conditions cannot be considered a definitive decision to initiate an imminent, unconditional change in placement such that a NOREP was required prior to the occurrence of the specified contingency. The District, therefore, cannot be faulted for failing to issue a NOREP after the January 2012 IEP meeting.

The conclusion is different, however, with respect to the District's email notice to Parents on January 31, 2012 that it could not continue instruction in the home, as of the very next day, and suggesting that truancy proceedings were imminent if medical documentation was not immediately provided. (FF 26) That action can only be construed as a decision to implement an immediate change of Student's educational placement and, therefore, prior written notice by way of a NOREP was required. The District's message notifying Parents of an imminent change of placement without prior written notice in the form of a NOREP violates the procedures in the IDEA statute and, in essence, denied any parental participation in that decision, which should have been proposed via Student's IEP team. It is quite fortunate in this case that Parents were knowledgeable enough about their rights under the IDEA statute, as well as acutely aware of the impact of such a change in placement on Student's medical condition, so that they did not bow to the District's demands and send Student to school on February 1, 2012. As noted above, it is particularly important to recognize that this issue is one that is clearly capable of repetition, and that the result of the District's violation could be very unfortunate for a medically fragile child. For these reasons, a remedy is warranted to prevent uncertainty about the 2012-2013 school year, as well as prevent any confusion over the District's obligations with respect to future proposals

to change Student's special education placement from instruction in the home to a school-based placement.

The District claims that it was entirely reasonable for it to request periodic medical documentation so the IEP team could properly consider maintaining Student's very restrictive instruction in the home placement. There can be no question, and Parents do not even dispute, that the District can and should be periodically provided with current information about Student's medical condition. The requests made by the District to obtain such information were, therefore, reasonable. The District's apparent attempt to enforce those requests by threatening an immediate change in Student's special education placement by means of a message to Parents from a School District official without convening Student's IEP team and without issuing a NOREP is, however, a clear violation of IDEA procedures.

The third issue to be considered in this matter is whether the District failed to provide certain documents to Parents and thereby denied them meaningful participation in placement decisions regarding Student. Parents suggest that the District's use of signed releases to obtain medical information directly from Student's physicians led to decision-making about Student's program without them. (FF 8, 9, 11, 12, 17, 18, 19, 25, 27) Parents, however, were active members of Student's IEP team and fully participated in all educational decision making throughout the 2011-2012 school year to which this argument applies. Although it is possible that this whole dispute could have been avoided if Parents had been aware of the absence of updated medical information earlier in January 2012, there was no actual change made to Student's placement that should have included Parents' input with respect to missing medical documentation. Further, the fact that the District recently changed its policy to include all

parents on requests for medical documentation made to physicians leads to the conclusion that this concern is unlikely to recur in the future.

Effect of the District's Failure to Answer Parents' Complaint

Parents argue that because the District failed to respond to their due process complaint within ten days, they are entitled to a decision in their favor on all issues. Although there is some provision for a school district response to a parent's due process complaint, the IDEA statute and regulations are not crystal clear with respect to when a school district response is required, and a response by school districts within 10 days of receiving a parent's due process complaint is not required in all circumstances. In many cases, such as this one, the need for a response should be evaluated by examining the issues in dispute and determining the nature and extent of the parents' knowledge of the district's position with respect to each such issue. In determining whether the District was required to submit an answer that included specific and detailed responses to each of a Parents' claims, the only truly important consideration is whether the underlying purpose of the prior written notice/response requirement has been fulfilled.

This point is well illustrated in *Sykes v. District of Columbia*, 518 F.Supp.2d 261 (D.D.C.2007), where the court considered the effect of a school district's failure to respond to a due process complaint in accordance with statutory/regulatory requirements, stating,

> Initially, it should be noted that the IDEA does not specify default as the penalty for failure to serve an appropriate response to a Due Process Complaint Notice. The purpose of the response requirement seeks to guarantee meaningful parental participation in the student placement process. Throughout the ongoing process for D.B., plaintiff has attended IEP meetings, voiced concerns and contributed to the student's placement. Considering these factors, the hearing officer sought a full hearing to examine the available documents and to hear testimony of the parties. A default judgment would have subverted the administrative process and assigned D.B. a placement without a full examination of the record or his needs.

518 F.Supp.2d at 267.

Both the court's and the hearing officer's reasoning in *Sykes* are based upon the same underlying principle, *i.e.*, that the IDEA statute contemplates, above all, open communication and cooperation between parents and school districts to identify and appropriately address the unique needs of a child with a disability. The procedural safeguards built into the statute, including due process hearings, are designed to foster the underlying purpose of the statute, not to force a particular result based upon procedural missteps. The most important question in that regard is whether Parents were aware of the District's position with respect to each issue in dispute and its basis for each such position at or about the time the due process complaint was filed. The record establishes that Parents were aware of the District's position even without a formal response to their due process complaint. In addition, as noted by the court in *Sykes,* IDEA has no default provision.

Moreover, there are additional reasons that none of the issues in dispute in this case are subject to a decision based solely upon the District's failure to respond to Parents' complaint. First, in any case, the failure of the defending party to respond to a complaint does not automatically result in a default judgment, meaning that all of the claims raised in the due process complaint should be deemed established due to the absence of a response to the due process complaint. As the court explained in *In re JRA 222, Inc.* 365 B.R. 508, 512 -513 (Bkrtcy.E.D.Pa., 2007),

> Obtaining a default judgment involves a two step process.
> a. First, default must actually be entered against the non-appearing party.
> b. Second, after the entry of default, the movant must request the entry of a default judgment. Although application for the entry of a default and default judgment are often submitted simultaneously to a court, the two procedural steps are analytically independent, and each step has distinct consequences.
> 2. The entry of default does not automatically entitle the nondefaulting party to the entry of a default judgment.

3. Instead, the general effect of an entry of default is to deem the allegations contained in a complaint as admitted. Accordingly, a defaulting party may not attack the factual allegations in a complaint; however, that does not mean that the party admits to the legal conclusions made in the complaint.
4. Even after default it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit to mere conclusions of law.
5. A trial court has wide discretion in determining whether to enter a default judgment, and its decision will not be overturned, unless there is an abuse of discretion. In exercising that discretion, the court may consider
a. the possibility of prejudice to the plaintiff;
b. the merits of plaintiff's substantive claim;
c. the sufficiency of the complaint;
d. the sum of money at stake in the action;
e. the possibility of a dispute concerning material facts;
f. whether default was due to excusable neglect; and
g. the strong policy underlying the Federal Rule of Civil Procedure favoring decisions on the merits.
See also, DirecTV v. DeCroce, 332 F.Supp.2d 715, 717 (D.N.J.2004), *rev'd on other grounds,* 431 F.3d 162 (3d Cir.2005); *Net Construction, Inc. v. C & C Rehab and Construction, Inc.,* 256 F.Supp.2d 350, 354 (E.D.Pa.2003).

In a case such as this, where there was no real dispute over the relevant facts and the issues in dispute were both purely procedural and purely a matter of the legal interpretation of the facts in light of IDEA legal requirements, there is no proper basis for a default judgment even if the District's failure to respond to the complaint were considered a default. The interpretation of IDEA requirements and the application of those requirements to the facts in this, or any due process case, are matters reserved to the hearing officer. Although the parties are certainly free, and encouraged, to present arguments on those matters, no procedural lapse on the part of either party can require the hearing officer to interpret the law in a manner that establishes either party's legal position.

Finally, default judgments are generally disfavored by the courts. *See, e.g., Hutton v. Fisher,* 359 F.2d 913, 916 (3rd Cir. 1966): "[T]his court has clearly stated its reluctance to permit the final disposition of substantial controversies by default." *See also, Livingston*

Powdered Metal, Inc. v. N.L.R.B., 669 F.2d 133, 136 (3rd Cir. 1982): "The possibility that an injustice may occur is much more likely in those circumstances since the controversies are decided upon a procedural technicality instead of a ruling on the merits."

For all of the foregoing reasons, Parents' argument for an order in their favor with respect to all issues in dispute based solely upon the District's failure to respond to their due process complaint must be denied.

CONCLUSION

Having determined that the District committed some of the procedural violations asserted in Parents' complaint, an appropriate remedy will be ordered, requiring the District to comply with IDEA procedural requirements in the future.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Abington School District is hereby **ORDERED** to take the following actions:

1. Convene an IEP team meeting prior to the start of the 2012-2013 school year to discuss Student's special education program, placement and related services needs as currently known, and develop an appropriate IEP and accompanying NOREP that meets all statutory/regulatory requirements, for implementation during the 2012-2013 school year.

2. As part of the process of developing an appropriate IEP for Student for the 2012-2013 school year and beyond, the District shall:
    a. Consider Student's individualized needs for special education and related services, including the amount and type of instruction and related services, and shall not determine services based solely on the nature of Student's educational placement. In other words, the IEP team shall not be required to select the nature and amount of instruction and/or related services for Student based solely on general District policies regarding the nature, type and extent of services that are or should be available to students receiving educational services at home;
    b. Convene Student's IEP team to discuss any proposed change in educational placement, addition or termination of any special education or related services, should the District believe that any such changes are warranted;

c. Refrain from proposing, threatening or announcing to Parents or the IEP team a change in Student's special education placement and/or services based solely on an absence of updated medical information and without meeting all statutory/ regulatory requirements, including issuing a NOREP.

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

Anne L. Carroll

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Anne L. Carroll, Esq.
HEARING OFFICER

August 6, 2012