

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

OPEN HEARING

ODR No. 29401-23-24

Child's Name:

I.R.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parent:

Pro Se

Local Education Agency:

Upper Darby School District
Edward Marshaleck
8201 Lansdowne Avenue,
Upper Darby, PA 19082

Counsel for the LEA:

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Hearing Officer:

Charles W. Jelley Esq.

Decision Date:

June 3, 2024

OVERVIEW OF THE DISPUTE

The Parents filed the pending Due Process Hearing Complaint alleging failures under the Individuals with Disabilities Education Act (IDEA).¹ The Parents contend that the school is not safe and the Student is not learning. The Parents now seek a change in placement to another elementary school in or outside of the District. The District, on the other hand, seeks a declaratory ruling that, at all times relevant, they procedurally and substantively complied with the IDEA. Applying the IDEA preponderance of evidence standard, I now find that the Parents have not met their burden of proof that the District failed to offer the Student an appropriate education. Accordingly, for all the reasons that follow, I now find in favor of the District.

Issue

Did the District offer the Student a free appropriate public education during the 2023-2024 school year? If not, what appropriate relief is otherwise appropriate?

Findings of Fact

1. The Parents filed a *pro se* Due Process Complaint on March 20, 2024. In filing the Complaint, the Parents checked the Box that the dispute was about a discipline matter. (Case Management File). The Office for Dispute Resolution (ODR) case manager processed the Complaint as an expedited due process complaint. (NT *passim*).
2. On March 22, 2024, after reading the Complaint and not finding a specific statement that the Student was suspended, expelled, or otherwise disciplined, the hearing officer emailed the Parties to confirm that the

¹ The Parent's claims arise under 20 USC §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 CFR §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth at 22 Pa. Code §§ 14.101-14.163 (Chapter 14).

dispute was, in fact, an expedited discipline matter. (ODR Hearing Officer File).

3. On March 22, 2024, the Office for Dispute Resolution case manager provided the Parties with a scheduling Notice that an expedited due process hearing would take place virtually on April 19, 2024, at 1:30 pm. The email Notice included the ODR Expedited Due Process hearing fact sheet and a mediation fact sheet. (ODR Case Management File).
4. Also, on March 22, 2024, the District, in an email, filed a Motion to Strike the Complaint. The District alleged that they never disciplined the Student. The District requested the hearing officer to convert the dispute from the expedited track to the non-expedited dispute track. (ODR Hearing Officer File). The hearing officer denied the District's Motion and scheduled a prehearing status conference. (ODR Hearing Officer File).
5. On March 28, 2024, the hearing officer emailed the Parties asking if the Parties had participated in a Resolution Session. On Friday, March 29, 2024, the District filed its "Answer" denying all claims and agreed to participate in a prehearing conference call. (ODR Hearing Officer File).
6. On Saturday, March 30, 2024, the Father emailed the hearing officer, *ex parte*, asking for a one-on-one phone call. The hearing officer denied the request for the one-on-one call as an improper *ex parte* communication. The hearing officer also instructed the Parent to copy the District on all future emails. (ODR Hearing Officer File).
7. On April 4, 2024, the parties participated in a joint telephone conference call. During the telephone call, the Father stated that he checked the "discipline" box in error. The Father asked, and the hearing officer agreed to go forward with the hearing on April 19, 2024, on a non-expedited basis. Also, during the joint call, the hearing officer learned that English was not the Father's primary language. Concerned that the Father's English language oral communication skills may be somewhat limited, the hearing officer

informed the Parties that he would ask the Office for Dispute Resolution Case Manager to locate an interpreter. Following ODR practices, the case manager identified a court-certified interpreter. (Case Manager File).

8. On April 4, 2024, to ensure that the interpreter was prepared, the hearing officer emailed the Parents asking if they would identify their primary language. The Father never responded to the request. (Hearing Officer Email File).
9. The hearing officer also requested that the case manager provide a copy of the ODR Prehearing Directions in another language. (Hearing Officer Email File).
10. On April 8, 2024, the hearing officer provided the Parents with a copy of the standard Prehearing Directions to the Parents in English and in another language. The Prehearing Directions describe how to label exhibits and when to share and exchange the witness and exhibit lists. (Hearing Officer email File).
11. On April 8, 2024, the case manager confirmed the interpreter's participation and provided the interpreter with a list of common terms used in special education hearings. (ODR Case Manager file).
12. On April 10, 2024, the District requested that the hearing start before 1:30 pm. The hearing officer emailed the Parties and agreed to start the hearing earlier in the day. The ODR case manager issued a new hearing Notice of the start time to the Parties and the interpreter. (Hearing Officer email File).
13. On April 10, 2024, the District's attorney emailed the Father asking for copies of the Parents' exhibit list and witness list. The Father never responded. (Email to Father from District in Hearing Officer File).
14. On April 15, 2024, the hearing officer provided the Parties, the interpreter, and the stenographer with a virtual link for the session. (Email in Hearing Officer File).

15. The Parties went on the record as planned. While on the record, the hearing officer reviewed the interpreter's credentials, found the interpreter qualified, and entered the interpreter's credentials in the record as a hearing officer exhibit. Also, while on the record, the interpreter and the Father had a brief conversation in [redacted] and English, discussing the interpreter's role in the hearing. After the conversation, the Father agreed that he could understand the interpreter. (NT pp.6-12).
16. Also, while on the record, the hearing officer inquired how the Farther wanted to use the interpreter services. The Father stated that he would speak in English, and if needed, he would use the interpreter to translate if a difficulty arose. (NT pp.4-8).
17. The hearing proceeded in an orderly fashion, and the Father opted for an "Open" hearing. The Father also elected to receive an electronic transcript. The District elected to receive an electronic copy of the transcript. (NT pp.7-11).
18. The hearing officer then inquired if the Parties had complied with the disclosure rules. The District stated that they made the disclosures, and the Father acknowledged receipt of the District's exhibits and the witness disclosures. The Father further acknowledged that he did not make any disclosures of exhibits or witnesses. (NT pp.6-12). The District agreed to allow the Father to proceed even though he did not comply with the disclosure rules. (NT pp.6-12).
19. In the early morning hours on April 19, 2024, before going on the record, the Father sent the hearing officer an email with a screenshot of one document. The Father did not share the document with the District. (ODR Hearing Officer email File). The hearing officer directed the Father to provide the document to the District.
20. After being sworn in, the hearing officer invited the Father to state the issue and make an opening statement. (NT pp.7-44). The Father then proceeded

to testify in narrative form. The Father's testimony covered a variety of topics, several of which did not appear in the Complaint. *Id.* First, the Father complained about the number of times that the bus was late. Second, the Father testified that the Student was sent home for [redacted] on more than one occasion. Third, the Father expressed a desire to increase the Student's time in the regular education classroom. Fourth, the Father testified that the Student was nicked in the groin area during [redacted]. Fifth, the Father stated that the classroom was not a safe place because a peer dropped a laptop on the Student's foot. (NT pp. 7-44). At the same time, the Father stated that he did not have any problems with the school or the staff. (NT pp.36-37).

21. At the conclusion of the Father's testimony, the hearing officer inquired if the Father wanted to enter any exhibits or call any other witnesses. The Father declined to enter any exhibits and declined to call any other witnesses. The Father then rested his case. (NT p.9; NT p.42; NT p.51; NT p.53).
22. At the conclusion of the Father's testimony, the District made a Motion to Dismiss the action for failure to prove by a preponderance of evidence a substantive or procedural IDEA violation. The District argued that the absent corroboration from other witnesses or exhibits, the Parents' narrative testimony alone is inadequate as a matter of law. (NT pp.56-60).

Analysis, Discussion, and Conclusions of Law

Burden of Proof

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of the two contending parties must bear the risk of failing to convince the finder of fact. The other consideration, the burden of going forward, determines which party must present its evidence first. In *Schaffer v. Weast*, 546 U.S. 49, 126

S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the moving party, the Family. The moving party must produce a preponderance of evidence that they are entitled to the relief requested in the Complaint. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Commonwealth v. Williams*, 532 Pa. 265, 284-286, 615 A.2d 716, 726 (1992). If the Parent fails to produce a preponderance of evidence in support of their claims, then the Parent can not prevail.

Credibility

During a due process hearing, the hearing officer is responsible for judging the credibility of witnesses, weighing evidence, and rendering a decision incorporating findings of fact, discussion, and conclusions of law. Hearing officers have an ongoing 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). While I found the Father's testimony credible, meaning that he believes what he is saying, the Father's testimony was not otherwise persuasive. The absence of exhibits and corroborating testimony undercut the persuasiveness of the testimony.

Free Appropriate Public Education

School districts must provide a free appropriate public education (FAPE) by designing and implementing a program of individualized instruction set forth in an Individualized Education Program (IEP). 20 U.S.C. § 1414(d). When offered, each IEP must be "reasonably calculated" to allow the Student to make "meaningful educational benefit." *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). School districts are not required to provide an eligible student with services designed to provide the best possible education to maximize educational benefits or to maximize the child's potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251;

Carlisle Area School District v. Scott P., 62 F.3d 520 (3rd Cir. 1995). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

APPROPRIATE RELIEF WITHIN THE MEANING OF THE IDEA

The IDEA allows hearing officers to award appropriate relief. Appropriate relief can take many forms, including compensatory education, tuition reimbursement, and reimbursement for costs.² Furthermore, the plain language of the Act provides that "Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with the [Act's] procedural requirements under this section."³ With these fixed legal principles in mind, I will now make Conclusions of Law.

ANALYSIS AND CONCLUSIONS OF LAW

The Father is deeply committed to the Student's long-term learning and happiness. The events relied upon by the Father, like sending the Student home when ill, [redacted], and the injury when a peer dropped on the Student's foot, do not relate to the identification, evaluation, or education of the Student. The Parent's testimony does not provide cogent or persuasive evidence that the District failed to offer or provide a FAPE. Absent preponderant evidence that the present levels, the goals, the specially designed instruction, or related services are flawed, the Father failed to meet the applicable burden of proof. Next, the Father's testimony about the busing does not describe sufficient facts to establish a loss of educational benefits. Finally, the Father's testimony about the Student's learning and participation

² Zirkel, P.A. 2013. "Adjudicative Remedies for Denials of FAPE under the IDEA." *Journal of the National Association of Administrative Law Judiciary* 33 (1): 214-241, Zirkel, Perry A. "The Remedial Authority of Hearing and Review Officers Under The Individuals With Disabilities Act" *Administrative Law Review*, vol. 58, no. 2, 2006, pp. 401-427. *JSTOR*, www.jstor.org/stable/40711960.

³ 20 USC § 1415(f)(3)(E)(ii) (2017); *Letter to Zirkel*, 74 IDELR 171 (OSEP 2019).

in class was unclear and rambling. Stated another way, the evidence does not establish that the Student suffered a loss or missed any instructional time. Therefore, I now find that the limited evidence presented does not establish a substantive or procedural violation. Absent documents and corroborating testimony, the Father's testimony alone did not tie the alleged IEP inadequacies to a procedural or substantive violation. Accordingly, the District's Motion to Dismiss the Complaint is Granted.

Dicta: The Child is fortunate in many respects. First and foremost, the Father and the Family are clearly loving and invested Parents. Second, prior to and after the filing of the Complaint, the parties spent considerable time, effort, and resources collaborating on the Student's needs and circumstances. Given the Student's age, I hope that they can now put aside their differences and work together to make this Student's current and future school years a success.

Order

And now, after taking testimony and hearing all of the Parties' arguments, the Parents' claims are denied. All other claims and defenses are dismissed.

Date: June 3, 2024

/s/ Charles W. Jelley, Esq.
Special Education Hearing Officer
ODR File # 29401-23-24