PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: NG
ODR #7459/06-07 KE

Date of Birth:
xx/xx/xx

Dates of Hearing:
May 1, 2007
May 14, 2007
June 19, 2007

CLOSED HEARING

Parties to the Hearing: Ms.	Representative: Stephen L. Alvstad, Esquire Beautyman Alvstad 1201 Bethlehem Pike Flourtown, Pennsylvania 19031
Tredyffrin-Easttown School District 738 First Avenue Berwyn, Pennsylvania 19312	Jane Williams, Esquire Sweet, Stevens, Katz & Williams PO Box 5069 New Britain, Pennsylvania 18901
Date Record Closed:	August 8, 2007
Date of Decision:	August 18, 2007
Hearing Officer:	Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old student who is enrolled in the Tredyffrin-Easttown School District (hereinafter District). She is eligible for special education under the classifications of emotional disturbance and learning disability. Ms., Student's mother (hereinafter Parent) requested this hearing because she believes that the District has not implemented her daughter's IEP, and maintains that it did not make revisions to the IEP that she requested pursuant to recommendations made by medical specialists. The Parent also alleges that the District prevented her from having a due process hearing.

The District denies all allegations, but maintains that even if it were determined that any of the Parent's allegations were found to be true, individually and collectively any errors on the District's part did not constitute a denial of FAPE to Student or significantly interfere with the Parent's opportunity to participate in the decision-making process.

Issues

1. Did the Tredyffrin-Easttown School District fail to implement Student's IEP?

2. Did the Tredyffrin-Easttown School District fail to make revisions to Student's IEP as requested by her mother, Ms. pursuant to the recommendations of medical specialists?

3. Did the Tredyffrin-Easttown School District prevent Ms. from having a due process hearing for her daughter, Student ?

4. If the Tredyffrin-Easttown School District erred in any of these regards, did the error(s) result in a denial of a free, appropriate public education (FAPE) to Student, and/or significantly interfere with the Parent's opportunity to participate in the decision-making process, and if so what remedies will be applied?

Complaint Forming the Basis of the Hearing.

The Parent's Amended Complaint[1] alleges that the District did not implement Student's IEP as follows: not allowing the use of a calculator in mathematics class; completed homework not being disseminated by the special education teacher to Student's other teachers; not permitting Student to take tests in her home after mid-February 2006, and not providing Student with a quiet, separate room for taking tests in school.

The Parent's Amended Complaint alleges that the District did not adopt any of the IEP recommendations made by Student's doctors at [redacted] Hospital or by Student's mathematics tutor.

[1] The Parent's Complaint was found to be insufficient pursuant to a sufficiency challenge from the District. This hearing officer allowed the Parent to file an Amended Complaint.

The Parent's Amended Complaint alleges that the District did not permit the Parent to have a due process hearing despite repeated requests.

Findings of Fact

IEP –Revisions and Implementation

1. Student has attended school in the District since 5th grade. (NT 44)

2. An IEP dated August 23, 2005 was in place for Student at the start of the 2005-2006 school year. The Parent approved the issued NOREP.[2] (NT 120-121, 259; S-3, S-4)

3. There was another IEP meeting on November 28, 2005 to discuss the aide for Student and "tweak" the aide's responsibilities regarding Student, for example amending the number of prompts the aide would give Student, and allowing Student to make mistakes, per the Parent's wishes. The IEP was also revised at that time to conform to new IDEIA requirements regarding functional performance. (NT 121-122, 262-265; S-6)

4. The aide's responsibilities had been outlined in writing prior to the school year for the aide's reference and for the reference of any substitute if the aide were out; the list of responsibilities was in place from the beginning of school in September and all aspects were implemented. (NT 262-263; S-6)

5. The IEP team as a whole decided that for many of Student's modifications the term "as needed" was appropriate under "frequency". (NT 266, 350-351)

6. Prior to February 13, 2006 the District had been requesting that the Parent participate in an IEP review as the District believed that Student was not making as much progress as she should in certain areas. (NT 274-275)

7. On February 13, 2006 Student fell. (NT 55-56, 102-104, 307)

8. The District continued to request IEP meetings after February 13th. (NT 275)

9. On February 27, 2006 the principal asked the Parent to participate in an IEP meeting. (S-7)

10. On March 1, 2006 following a conversation with the Parent wherein it was represented to the special education teacher that Student was experiencing

[2] Although NOREPs were provided to both parents and the father participated in Student's educational planning, the Parent referenced is the mother unless otherwise specified as she is bringing the complaint against the District. (NT 259-260)

symptoms of dizziness, blurred vision and headaches secondary to a concussion, the special education teacher sent all Student's teachers a list of accommodations that had been discussed with the mother to be put in place for Student. (S-7)

11. The accommodations were provided from February 2006 through the end of the school year, although they were not able to be put into an IEP until May 26, 2006, the first IEP meeting the Parent agreed to attend. (NT 76-77, 125, 286, 407, 409; S-14A)

12. These accommodations were based on mother's communications with the school about her conversations with the child's doctors. The school revised these accommodations on a weekly basis. Although the District asked the Parent to provide independent corroboration of what the doctors were reportedly saying, this was not forthcoming.[3] (NT 286-287, 290, 319, 406)

13. The Parent did provide a two-page preliminary report from Dr. C to the school nurse[4] sometime in late April 2006; this report provided a diagnosis.[5] (NT 66, 69, 91, 94)

14. An IEP meeting was scheduled for March 9, 2006 with the mother,[6] and the father was notified. However, at the mother's request, this meeting was not held.[7] Because of additional information coming in from the Parent, on March 10, 2006 the school requested that a full IEP meeting be held the following week. The Parent replied that an IEP meeting could not be held because she would not have "medical write-ups" that soon and because the Parent had missed work and could not afford to be out from work again. (S-7)

15. On April 20, 2006, at the request of the special education teacher, the director of special education wrote a letter to the Parent asking for an IEP meeting and suggesting dates. The Parent did not respond. The letter never came back to the District as "undeliverable", (NT 275, 405-406; S-8)

16. The District again attempted to set up a meeting during the week of May 8, 2006 but the Parent's then-attorney notified the District's then-attorney that the mother could not attend because of illness. (S-12)

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[3] Notably, as Dr. C did not testify, the corroboration was not available even at the time of this hearing.
[4] The Parent testified she also gave it to the guidance counselor. The guidance counselor says she did not give it to her. The credibility of both Parent and counselor was diminished by memory issues, so this point is moot.
[5] The comprehensive report by Dr. C (dated June 16 & June 19, 2006) was not provided to the District until shortly before the start of the hearing. It became available to the Parent at the end of the summer in 2006.
[6] The principal asked the mother for a meeting; the special education teacher's email to the father stating that the mother had asked for a meeting was in error. (S-7)
[7] The Parent testified that she does not recall whether or not she attended an IEP meeting on March 9, 2007 as Student was seeing doctors and "there were a lot of dates flying around at that point". (NT 116-117)

17. There were no IEP meetings held without the Parent's being in attendance, although the District told the Parent that this may have to happen in order to revise the child's IEP to include her ongoing accommodations. (NT 284, 316-318; S-8)

18. The Parent did attend an IEP meeting, accompanied by her then-attorney, on May 26, 2006. At the May 26th IEP meeting the specially designed instructions "calculator" and "access to multiplication chart" were added to the draft IEP for the first time. These provisions were continued on the subsequent finalized IEP.[8] (NT 70, 72, 92, 94, 96-98, 291; S-14, S-20)

19. Although the District members of the IEP team wanted the list of accommodations that had been provided to Student since February 2006 written into a finalized IEP, the Parent's then-attorney did not want anything written into the IEP until medical reports were available to aid in planning for Student. Therefore the May 26th IEP was designated a "draft". Before being attached to the IEP, the list of accommodations was discussed and revised at the May 26th IEP meeting. (NT 127, 285-286, 288-289; S-14)

20. The Parent testified to attending "quite a few meetings" between February 2006 and May 2006, but maintained that these were meetings of the IEP team but not IEP meetings, because these were only "…meetings where everybody gathered and we talked accommodations and we looked at IEP plans…" This is not supported in the record, although there were numerous telephone contacts. (NT 118-119)

21. Another IEP meeting was held on August 24, 2006 to finalize the earlier "draft" IEP. Both the Parent and Student were present and Student's father participated by speakerphone. (NT 132, 290-291; S-20)

22. At the August 24th IEP meeting the specially designed instruction regarding Student's being allowed to retake tests was added for the first time. This provision was in lieu of Student's taking tests at home, which had been permitted under the February through June 2006 accommodations. At this meeting the Parent requested that Student no longer have an aide. (NT 292-293; S-20)

23. A NOREP was issued on August 28, 2006. The father signed it as approved and returned it. The mother did not return it as approved or disapproved, and she did not request a hearing by means of the NOREP, although as usual she was presented with the Procedural Safeguards. (NT 133, 293-294; S-21)

24. When a parent does not return a NOREP as approved, agreement is presumed. The Parent had been informed of this on previous occasions. (NT 294)

[8] Of August 2006.

25. Dr. C participated in a team meeting in October or November 2006 with the school by speakerphone[9]. The Parent maintains that this was not an IEP meeting, but a "casual IEP where they would bring in… everybody involved in an IEP, but not be drawing up an IEP document". Dr. C spoke about memory issues Student was having, and this was echoed by the summer math tutor who was also present. At this meeting Dr. C recommended that Student have an aide, but the Parent had already declined this service at the August 24, 2006 IEP meeting because the Parent did not "want somebody following Student and prompting her as had happened in the past years of her schooling". The Parent told the District's guidance counselor that Student was not comfortable with aide support, and the counselor had passed this information along to the special education teacher. The Parent had already informed the special education teacher of this. (NT 72-73, 92-94, 134-136, 149-151, 186-188, 301- 307, 319)

26. The summer math tutor suggested during the October/November meeting that Student be given "memory cards". (NT 301, 307-309, 318)

27. Neither Dr. C nor the summer math tutor put forth any other suggestions at the October/November team meeting. (NT 307-308, 319)

28. There was an IEP meeting on November 9, 2006, held to incorporate recommendations for accommodations from the earlier core team meeting wherein Dr. C participated by speakerphone and at which the summer math tutor was present. (NT 140, 309; S-23A)

29. Neither parent objected to the program or placement put forth in the IEP revisions of November 9, 2006. (NT 309)

30. At no time did any other professional participate in a meeting by telephone or in person to give recommendations for Student's program planning. (NT 319)

31. At no time did the District receive a written request by the Parent for the IEP team to reconvene after the District received any written information from a physician or a psychologist with educational planning recommendations. (NT 311-312)

32. The District received no verbal recommendations directly from physicians or a psychologist except for Dr. C's recommendation for an aide. (NT 312)

33. Via a letter dated December 14, 2006, the District issued an Invitation to an IEP meeting to be held on December 21, 2006 with alternate dates in early January. The District wished to discuss Student's progress in math. The Parent declined to attend. (NT 140-141; S-25)

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[9] Dr. C had not seen Student since April 2006. (NT 137-138)

34. The District issued another Invitation to an IEP meeting to be held on January 11, 2007 with an alternate date. The Parent did not participate in an IEP meeting. (NT 141, 314; S-26)

35. On January 3, 2007 the District's supervisor of special education sent a letter to the Parent suggesting an array of dates for an IEP meeting. The Parent did not participate. (NT 141-142; S-28)

36. The Parent did participate in an IEP meeting on January 16, 2007 wherein a discrete topic regarding math class was discussed and the IEP revised accordingly. The District then asked for another more comprehensive meeting and proposed various dates via letter dated February 2, 2007. The Parent testified that she did not receive the letter. The District's current attorney wrote to the Parent's current attorney making him aware that a federal judge had ordered another IEP meeting and inviting his participation. The District's request to hold an IEP meeting was independent of the judge's order. (NT 142, 328-329; S-29, S-30)

37. The Parent testified that she "didn't agree with attending IEPs when I'm requesting a due process and being denied, so (I) stopped signing them after I had sent in my request for a Due Process hearing". (NT 133)

38. The Parent did not at any time tell the District that she did not want to participate in an IEP meeting and that she only wanted a due process hearing. (NT 318)

39. The Parent testified that the IEP was not implemented with regard to: "a teacher's assist" because "[although] Student could probably have benefited from [a] teacher's assist, but we couldn't use a teacher's assist because of the way Student was treated and we weren't provided with her credentials"; a calculator – "she wasn't allowed to use a calculator"; tests – "she was told she could bring tests home, and she did for a while, and then they said 'well, she should take them in school, we'll give her extra time, but we'll put her in a quiet classroom and they did not" and "Student was supposedly going to be able to take tests twice…if she didn't do well, and she flunked out because she had the memory issues and she was only allowed to take the test once". The Parent could not think of anything else during her testimony, but then added that the resource room teacher cut out a picture of Camilla Parker Bowles when helping Student with a report on Princess Diana, and the resource teacher made a mistake when helping Student with her math. (NT 153-155)

40. Homework logs from March 10, 2006 through June 13, 2006 were prepared by an assistant to help Student keep track of her assignments. Although at one time homework was faxed in, this was never a part of the IEP. (NT 320-322, 397-398, 401-404; S-5, S-16)

41. On March 10, 2006 the Parent requested that Student's tests be sent home for her to take. The request was granted, and implemented through the end of the 2005-2006 school year, but taking tests at home was never made part of Student's IEP. The August and November 2006 IEPs specifically provided for test-taking in school in an alternative setting. When Student complained that the resource room was too loud the District gave the option of testing in the library with an aide but the Parent declined as she did not want an aide. (NT 322-323, 327-328, 400-401, 408; S-14)

42. Use of a calculator was not put into the IEP until the 7th grade IEP. This is because use of a calculator is a routine part of regular education in the 6th grade curriculum so it is not specially designed instruction. As it is not a routine part of regular education in the 7th grade, use of a calculator was put into Student's IEP for that grade. Student had access to a calculator at all times. (NT 324-326, 356-359, 408)

43. The special education teacher's communication log had 56 contacts around Student with one or the other of her parents – predominantly the mother – between February 13 and May 16, 2006. These were written in a contemporaneous log. None of the entries referenced any concerns the Parent may have had around non-implementation of the IEP. (NT 396-397; S-15)

44. The Parent did not ever voice any concerns about the implementation of Student's IEP to the guidance counselor. (NT 209-210)

45. The director of special education personally confirmed with Student's teachers that the accommodations were being provided to the child. (NT 287, 290, 351-352)

46. The special education teacher, who is the liaison between the regular education teachers, the school team and the Parent, is certain that Student's IEP was being implemented as written. Her certainty comes from supervising the aide and having weekly, or sometimes daily, contact with the teaching team. (NT 396, 398-399)

47. The last time the District evaluated Student was in November 2004. The District made subsequent requests to evaluate Student, which the Parent declined. (NT 105-109; S-1)

48. The Parent did not at any time request a re-evaluation of Student subsequent to the incident of February 13, 2006. (NT 273)

49. The Parent did not at any time request a review of Student's IEP subsequent to the incident of February 13, 2006. (NT 274, 409)

50. On April 23, 2006 the Parent in a faxed and mailed letter forbade the District to test Student without the Parent's express written permission. (NT 279; S-10)

51. At some subsequent time the District requested permission to evaluate Student, but the Parent declined since the request was mailed in the same envelope as a request to evaluate Student's brother and the Parent testified, "that just offended me, that they would put the two of them together in an envelope like that and mix up their education. So that just brought me back to needing a Due Process hearing."[10] (NT 143-144)

52. In December 2006 the District requested permission to conduct a Key Math evaluation and the Parent declined because she did not trust the District's motivation or reporting. (NT 136-137, 151, 309, 311-; S-24)

53. Although the Parent told the District that Student was receiving private assessments, reports were never forwarded to the District despite the District's requesting such information from the Parent on many occasions.[11]. (NT 280-282)

Due Process Hearing

54. In mid-April 2006 the Parent decided she wanted a due process hearing, because she believed that certain accommodations were not being provided to Student. (NT 127)

55. The District's practice is to provide a copy of the Pennsylvania format Procedural Safeguards Notice, which includes information about rights to due process, to Parents at every IEP meeting, although the IDEIA only requires it to be presented annually. The supervisor of special education participated in every IEP meeting for Student and personally gave the Parent a copy of the Procedural Safeguards Notice. (NT 248-249, 260-261)

56. When Parents indicate that they want a due process hearing, it is the District's practice to supply parents with the contact numbers for ODR including the website, and/or the blank ODR due process request form along with a cover letter.[12] (NT 250, 336, 437-438, 459)

57. The District does not request hearings on behalf of parents. The District did not tell the Parent that it would request a hearing on her behalf. (NT 250, 313)

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[10] This hearing officer must note that one of the reasons the original Complaint submitted by Parent's counsel needed to be amended was that it combined issues regarding [name redacted], Student's brother, as well as Student.

[11] The District did receive doctors' notes about participation in gym and a note that Student was seen in an ER. (NT 281-282)

[12] Concerned after hearing the Parent's testimony, the District's director of individualized student services contacted ODR and confirmed that her understanding of the current procedure was correct. (NT 440-441)

58. The Parent never told the special education teacher that she wanted a due process hearing. Had she done so the teacher knows proper procedure. (NT 393-394)

59. In an April 23, 2006 email to the District's superintendent and to the school principal, the Parent alluded to having made a request for a due process hearing to the school principal at some previous time. In an April 23, 2006 letter by fax and U.S. mail the Parent also referenced asking for a hearing. The letter cc'd the Parent's then-attorney, [name redacted] Esquire. (NT 85-86, 460; P-3, P-4, S-10, S-11)

60. Under cover of a letter dated April 20, 2006 the District sent the Parent an ODR form for requesting a due process hearing. The Parent received the form and testified she sent it "to the office". She later testified that she sent it to the Office for Dispute Resolution, and/or to her then-attorney, and/or to the District's director of special education. (NT 110-111, 128-130, 278, 330, 341; S-9)

61. On May 1, 2006 the Parent acknowledged receiving a due process hearing application from the director of student services, and noted that she would have her attorney contact the school principal. (P-4, S-11)

62. On August 22, 2006 the Parent, in a letter to the principal, noted that Student's work with a therapist would remain confidential, "unless there is the need to have the matter addressed in a due process hearing in the future". (NT 661-462; S-39)

63. The District's director of special education sent the Parent another Due Process request form on January 2, 2007 at the Parent's emailed request, with instructions that if she wished she could make the request online and that she could contact ODR with any questions. The Parent did not contact ODR. (NT 158, 313, 439-440; S-27)

64. The Parent did not tell the director of individualized student services that she was awaiting the District's filing a due process hearing request for her with ODR. This individual never heard anything along this line from anyone prior to hearing the mother's testimony at the hearing. (NT 442-443)

65. At no time in any meeting or phone call did the Parent ask the District why it had not filed for her due process hearing. (NT 315-316)

66. On February 22, 2007 the District's current attorney wrote to the Parent's current attorney, "You will be filing shortly a due process complaint". (S-31)

67. After the Parent decided she wanted a hearing in April 2006 and "did not hear anything" she reportedly contacted ODR in summer 2006 and ODR sent her "a book". The Parent testified that she contacted ODR, and reported that ODR

allegedly said the request had to "come through them" [the school district?].[13] (NT 156-157)

68. The Parent was represented by an attorney[14] at least by April 2006 if not earlier,[15] and at all times forward. Counsel attended Student's IEP meeting in May 2006. (NT 113-114, 460)

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.[16] Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. 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). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

Student testified. She is a [redacted] year old girl who presented as somewhat younger than her chronological age. She seemed earnest in her testimony and there was no reason to think that she was not telling the truth as she perceived it to be. However, her recollection was poor and, notably, she had difficulty remembering the time-frame of most events such that it was not possible to use her testimony to confirm or refute the Parent's allegations of lack of IEP implementation. Although Student's testimony is being given limited weight due to her age, maturity level and memory problems, and is not included in the Findings of Fact, is it noted that her testimony tended to support the District more than support the Parent's case. She said she was allowed to use a calculator in her most recent math class (7th grade) and in 6th grade math class, she said she was allowed to take tests home in sixth and seventh grades, and she said that she took her tests in a resource room rather than in the regular education classroom (although sometimes the room was not quiet). The Parent testified. It should be noted that she was not feeling well during the session. During direct examination and during cross-examination the Parent often made confusing and contradictory statements and presented as an extremely poor historian. Further, documentary evidence and the later testimony of District

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[13] The District's director of individualized student services checked the ODR fact sheet after the Parent's testimony and it confirmed the District's understanding of ODR procedures, that is the party asking for the hearing makes the request. (NT 441)

[14] An attorney different from the current attorney representing her at this due process hearing.

[15] The special education teacher's contemporaneous log entry of 3-13-06 reads: ""Has met w/attorneys". (S-15)

[16] Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

witnesses, particularly [name redacted], the special education supervisor, effectively contradicted most of the Parent's testimony. Of final concern, as it goes toward credibility, was the fact that the Parent on two occasions gave testimony indicating she was reacting to her own feelings of having taken offense rather than acting in her child's best interests. (FF 37, FF 51) It is noted that Dr. C, a neuropsychologist whom the Parent intended to call and whom the hearing officer specifically wanted to hear, did not appear despite additional time being given to the Parent and her attorney to arrange for this witness' telephone or in-person testimony.[17] Not having her available made it difficult for the Parent to establish her case, as much of what the Parent alleged the District was told Student needed was attributed to Dr. C. The hearing officer had made clear on the record that testimony from this individual was important to establish what educational recommendations she made and/or what IEP revisions she had suggested, that may not have been followed/implemented. (NT 73-74)

The special education supervisor, a District employee, was exceptionally credible and her testimony was specific, and certain. This hearing officer had no doubt that her version of events was correct and true, and as noted earlier her testimony effectively contradicted most of the Parent's testimony. The school counselor, for unknown reasons, conveyed the attitude of not being willing to cooperate with the proceedings both under direct examination from the Parent's attorney and under cross-examination by the District's attorney. It was difficult for this hearing officer to discern whether this witness knew anything at all related to the case, and/or whether she remembered anything related to the case, and/or whether she was just being difficult. Had her position been more central to delivery of FAPE to Student her testimony could not possibly have helped the District's case. Because she was peripherally involved in Student's instruction and accommodations, her lack of credibility did not enhance the Parent's case. The special education teacher, provided testimony that was forthright and explicit, leaving no doubt about her credibility, and her testimony along with that of the special education supervisor effectively combined to refute all the Parent's allegations regarding revising the IEP and implementation of the IEP. Dr. V's and Mr. C's testimony effectively established the District's procedures regarding due process requests, and demonstrated that the District's procedures conform to current ODR policy. Their testimony helped bring out the key fact that the Parent was represented by counsel at least by April 2006, but more likely by March 2006, the entire period during which the Parent claims to have been depending on the District to file a hearing request for her.[18]

[17] The matter was suspended for three weeks in order for the Parent to arrange for this witness' participation. The reason that she did not testify was not provided to this hearing officer.

[18] Notably, again, counsel attended the May 26th IEP meeting and had significant input into establishing the document as a "draft" rather than a finalized IEP.

Discussion and Conclusions of Law

Legal Basis

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Having been found eligible for special education, Student is entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that "Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit "must be gauged in relation to the child's potential." This was reiterated in later decisions that held that meaningful educational benefit must relate to the child's potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999). The appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993); Adams v. State of Oregon, 195 F.3d 1141 (9th Cir. 1999); Rose *supra.*

Districts need not provide the optimal level of service, maximize a child's opportunity, or even provide a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998; Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988). In creating a legally appropriate IEP, a School District is not required to provide an optimal program, nor is it required to "close the gap," either between the child's performance and his untapped potential, or between his performance and that of non-disabled peers. In Re A.L., Spec. Educ. Opinion No. 1451 (2004) ; See In Re J.B., Spec. Educ. Opinion No. 1281 (2002)

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). Under the IDEA parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. M.M. v. School Board of Miami - Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006); Lachman, supra. If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk, Rowley. The purpose of the IEP is not to provide the "best" education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

A party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and instead, must demonstrate that the [school district] failed to implement substantial or significant provisions of the IEP. Leighty v. Laurel School District, 457 F. Supp.2d 546, 46 IDELR 214, 220 (W.D. Pa 2006).

A procedural violation does not necessarily compel a finding that a student has been denied FAPE. In the statute and the implementing regulations of its 2004 revisions to the IDEA, Congress affirmed its position that *de minimis* procedural violations do not constitute a deprivation of FAPE, providing

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision making process…; or (3) caused a deprivation of educational benefits.
> 34 C.F.R. 300.513, 20 U.S.C.1414(f)(3)(E)

Pennsylvania Special Education Appeals Panels have repeatedly held that the denial of FAPE will be found only where violations of a procedural safeguard result in the loss of educational opportunity or prejudice the student's ability to receive FAPE. In Re J.D. and the Colonial School District, Special Education Opinion No. 1120 (2001); In Re K.B.. and the Sto-Rox School District, Special Education Opinion No. 1477 (2004); In Re B.T. and the Harrisburg School District, Special Education Opinion No. 1577 (2005); In Re D.J. and the Philadelphia School District, Special Education Opinion No. 1745 (2006).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). In the instant matter the burden

of proof is borne by the Parent as it was she who asked for the hearing. However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter that was not the case.

Discussion

The Parent alleges that the District failed to incorporate recommendations made by professionals into Student's IEP and failed to implement Student's IEP. The Parent also alleges that the District prevented her from having a Due Process Hearing.

In her Amended Complaint and over the course of this three-session hearing the Parent alleged that the District failed to incorporate recommendations made by the Student's doctors into the child's IEP. The plural "recommendations" and the plural "doctors" is misleading. The only doctor named in this regard was Dr. C, a neuropsychologist. Dr. C wrote an evaluation report in June 2006 which was not given to the District despite numerous requests until just before the due process hearing nearly one year later. The only other written communication from Dr. C was a brief note containing Student's diagnosis; this note contained no educational recommendations. Dr. C participated in a team meeting with school personnel in October 2006, eight months after Student's concussion, and six months after she had last seen Student. District staff credibly testified, and the Parent did not contradict, that Dr. C made only one suggestion at this meeting – to provide Student with an aide. However, Student had had an aide previously, and the Parent had already requested that the aide be discontinued as of the August 2006 IEP meeting. The only other professional referenced in this hearing as having offered a recommendation for educational programming for Student was the summer math tutor who, also in the October 2006 meeting, suggested that Student be given memory cards to assist her in math. In November 2006 the District convened an IEP meeting to revise the IEP in accord with discussions during the October 2006 meeting. The Parent failed to establish that there were any specific recommendations, made by any specific doctors or other professionals, either verbally or in writing, that the Parent wanted for Student but that the District did not adopt in the IEP.

Soon after Student's concussion the Parent began reporting to District personnel, usually the special education teacher, a number of recommendations she said were made by Student's doctors. Although the District asked for an IEP meeting numerous times, and asked for written doctors' reports numerous times, the District nevertheless immediately drew up a list of accommodations based upon the conversations with the mother and the list was disseminated to Student's teachers. The list was revised frequently in accord with the Parent's reports of what Student's doctors had said. At no time did the District refuse any accommodation the Parent reported had been recommended. The District implemented all the accommodations the Parent requested. In fact the District was very concerned that these accommodations be made a part of Student's IEP and invited the Parent to participate in an IEP meeting to do so, numerous times, to no avail. When finally at the end of May 2006 the Parent did participate in an IEP team, the list of accommodations, again discussed and revised, was only put into a "draft" IEP at the

insistence of the Parent's attorney who participated in the IEP meeting. When the IEP was at last finalized, in August 2006, the Parent did not sign it with approval, disapproval or a request for a hearing. The evidence presented in this hearing clearly established that Student was offered all accommodations that the Parent reported her doctors said she needed, and that the only impediment to these accommodations being put into the IEP was the Parent herself who declined to attend IEP meetings, and the Parent's then-attorney who insisted the May 2006 IEP be only a "draft".

The Parent claimed that certain elements of Student's IEP were not implemented, specifically regarding use of a calculator, homework organization and dissemination, taking tests at home and/or in an alternate setting, and retaking tests. The District established that whenever these things were, in fact, in Student's IEP they were implemented. Confusion on the part of the Parent as to when each of these provisions were made part of the IEP no doubt contributed to her erroneous beliefs about non-implementation. The record is clear that Student received the accommodations listed in her IEPs. Also, as noted above, Student received accommodations requested by the Parent that were not officially incorporated into the IEP until months later due to the Parent's lack of cooperation with the District in setting up an IEP meeting.

The Parent alleged that the District prevented her from having a due process hearing. It is notable that at least from April 2006, and likely from March 2006, the Parent was represented by counsel who attended at least one of the IEP meetings for Student. Given the ready availability of that legal expertise, it is simply not possible to accept the Parent's contention that she kept asking for due process hearings and was denied them. If she truly believed that she was being brushed off by the District at any time, all she needed to do was ask her attorney to make a call to clear up the matter. Moreover, in addition to being represented by an attorney, the Parent is an employed professional, she received numerous Procedural Safeguards Notices, she received contact information for ODR, she received copies of the ODR Due Process Request form, and she may have even spoken with someone at ODR. Parents acting pro se with far less sophistication request and obtain due process hearings literally hundreds of times a year. It is simply beyond any credible explanation that the Parent believed she was being denied a due process hearing. The District provided the Parent with all the information she needed to file for a hearing. The District was under no obligation to check up on the Parent to see if she actually did file.

The Parent failed to meet her burden of proof regarding allegations against the District. Furthermore, even if the burden of proof were shifted, the District more than proved that in all respects at all times relevant to these proceedings it provided FAPE substantively and procedurally to Student.

Order

It is hereby ordered that:

1. The Tredyffrin-Easttown School District did not fail to implement Student's IEP.

2. The Tredyffrin-Easttown School District did not fail to make revisions to Student's IEP as requested by her mother, pursuant to the recommendations of medical specialists.

3. The Tredyffrin-Easttown School District did not prevent [mother] from having a due process hearing for her daughter, Student .

4. As the Tredyffrin-Easttown School District did not err in any of these regards, did not deny a free, appropriate public education (FAPE) to Student, and did not significantly interfere with the Parent's opportunity to participate in the decision-making process, the student is not entitled to any remedies and the District is required to take no further action.

August 18, 2007
Date

Linda M. Valentini, Psy.D.
Linda M. Valentini, Psy.D.
Hearing Officer