

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

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING

ODR File Number: 22206, 22317 and 22370/18-19

Child's Name: J. H. **Date of Birth:** [redacted]

Parents:
[redacted]

Counsel for Parents
None

Local Education Agency:
West Chester Area School District
782 Springdale Drive
Exton PA 18901

Counsel for the LEA
Jason Fortenberry, Esq
Sweet Stevens
331 E. Butler Avenue
New Britain, PA 18901

Hearing Officer: James Gerl, CHO **Date of Decision:** August 28, 2019

DECISION

DUE PROCESS HEARING

22206, 22317, 22370/18-19KE

BACKGROUND

The parents filed a due process complaint in this case requesting an independent educational evaluation, stating that the IEP that the district was implementing was harmful to the student, requesting that the student's label of autism be removed and protesting the failure of the school district to agree to mediation. The school district then filed a due process complaint opposing the parents' request for an independent educational evaluation and seeking to override the parents' failure to provide consent for the district to reevaluate the student. The parents then filed an additional due process complaint repeating the previous allegations and adding an allegation that the school district had failed to provide certain educational records of the student to the parents. In this case, I find for the parents with regard to one student record which was not provided to them by the school district. I find for the school district on all other issues.

PROCEDURAL HISTORY

This case is a classic example of the failure of parents and a school district to work together in a collaborative fashion in order to ensure an appropriate education for a child with a disability. After opening statements in which the parent claimed that the district would not talk to the parents and in which the district claimed that the parents would not talk to the school district, the hearing officer ordered the parties out in the hall to talk to each other for a brief period of time. This effort was not successful, and the parties proceeded to a due process hearing. The hearing was conducted over one session with three witnesses presenting testimony.

The school district's Exhibits 1 through 19 were admitted into evidence. The parents' Exhibits 1 and 2 were admitted into evidence. The parents' Exhibits 3, 4 and 5 were excluded on the basis of relevance. The excluded exhibits are included in a sealed envelope contained with the record exhibits to avoid a remand in the event that a reviewing court might want to review the documents, but parents' Exhibits 3, 4 and 5 were not considered in the preparation of this decision.

After the hearing, the parents and counsel for the school district presented written closing arguments/post-hearing briefs. Counsel for the district also presented proposed findings of fact.

All arguments submitted by the parties have been considered. To the extent that arguments advanced by the parties are in accordance with the findings, conclusions, and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments have been omitted as not relevant or not necessary to a proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES PRESENTED

The following issues were presented at the hearing herein:

1. Did the school district violate IDEA by implementing the student's IEP from the previous school district?
2. Whether the student was appropriately labeled as having autism?
3. Whether the school district violated the parents' rights by failing to agree to mediation of this dispute?

4. Whether the school district violated the parents' right to meaningful participation in the process?
5. Whether the school district failed to produce for the parents educational records concerning the student to which the parents had a right under IDEA?
6. Whether the school district has proven that the parents are not entitled to an independent educational evaluation at public expense?
7. Whether the school district has proven that the parents' failure to consent to an evaluation should be overridden and the district should have the opportunity to reevaluate the student?

FINDINGS OF FACT

Based upon the evidence compiled at the due process hearing, the hearing officer makes the following findings of fact:

1. The student's date of birth is [redacted], and the student is [mid-teen aged]. The student is a sci-fi geek with a big imagination, who loves to do roleplaying. The student plans to major in theology and then become a priest. (S-5; NT 118 – 119)
2. The student is eligible for special education and related services under the primary category of autism and a secondary eligibility category of other health

impairment because of attention deficit hyperactivity disorder, as well as a speech and language impairment. (S-5)

3. The student attended a different school district for elementary school through 7th grade. The student enrolled in this school district for one school year for the student's 8th grade year. (S-8; P-1; S-6; NT 67, 129-130, 153-154, 199-200)

4. The student withdrew from the school district after 8th grade and attended a different school district for 9th grade and the first part of 10th grade. (S-8; P-2; S-6; NT 57)

5. The student enrolled for a second time in the school district as a 10th grader on April 29, 2019. (S-8; S-12; NT 153)

6. The school district has never evaluated the student. (NT 144, 220 – 221; P-2)

7. When the student was being enrolled in 10th grade, the father attended a registration meeting to discuss the student's special education needs and to discuss a proposed schedule. (NT 70 – 71, 209-211; S-7; S-8)

8. On April 30, 2019, the district sent the parents a Notice of Recommended Educational Placement stating that the school district would implement the IEP from the district from which the student had transferred for 30 days. The form provided to the parents a number of options, including requesting an informal meeting with school personnel to discuss the recommendation; approving the recommendation or not

approving the recommendation. The parent checked the boxes not approving the recommendation and requesting mediation. (S-9; NT 201)

9. On May 6, 2019, the parents requested mediation concerning the student. (S-14)

10. On May 10, 2019, the school district declined to engage in mediation. (S-14)

11. On May 13, 2019, the school district's supervisor of special education e-mailed the parents stating that the district is "willing and open to discussing all aspects of your complaint and also any questions you have about the IEP." The e-mail asked the parents whether they were able to attend an IEP meeting at a specified date and time. The student's father replied by e-mail stating that he would not attend an IEP meeting. (S-16; NT 206 – 207)

12. The school district suggested an IEP team meeting on May 29, 2019. The student's father checked the box that he wished to attend the meeting at another time or location and filled in "upon completion of the due process hearing" in the box with regard to needing accommodations. The parent signed the form on May 23, 2019. (S-10; NT 111 – 112, 151 – 152)

13. On May 13, 2019, the student's father sent an e-mail to the school district special education supervisor and other staff of the school district asking them to direct all further communication through "legal representation." The father noted that

additional communication by the district would be considered harassment. On May 23, 2019, the father emailed the district's special education supervisor stating "... (p)lease direct all communication through our attorneys." The parents have never identified any lawyer or legal representation to the school district. (S-16; NT 7, 137 – 138, 215 – 217)

14. The school district convened an IEP team meeting on May 29, 2019 without the parents and developed a proposed IEP for the student with the limited information that the school district had available to it. The IEP developed by the school district for the student was never implemented because of the pending due process hearing. The IEP from the previous school district has been implemented since the student's enrollment in the district in April 2019. (S-12; NT 165 – 166, 153-154)

15. The IEP from the previous school district had been in place and was implemented for the student since October of 2017. The IEP did not provide the student with any services that are harmful to the student. (S-6; S-15 at p. 6; NT 153 – 154, 159 – 160, 188 – 189)

16. On May 23, 2019, the school district requested that the parents consent to a reevaluation of the student based upon teacher concerns regarding certain inappropriate behaviors by the student. (S-11; S-10 at pp. 4 – 6; NT 141 – 144)

17. The parents refused to provide consent for the school district to reevaluate the student. (S-11; NT 148)

18. On June 12, 2019, the student's father requested educational records pertaining to the student from the school district. Through their attorney, the school district provided all educational records pertaining to the student to the student's father with the exception of a recording of a resolution meeting by telephone and/or a transcript of said resolution meeting. The school district's reason for not including the recording of the phone call resolution meeting, or a transcript thereof, was that the recording or transcript is "not maintained as a part of the student's educational file." (S-19; NT 102 – 106, 221-224)

19. After the hearing was held, the parents requested by e-mail on July 16, 2019 that the student be exited from special education. The student exited special education on July 25, 2019. (Stipulation of fact by both parties in their post-hearing briefs)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as independent legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. If a child with a disability, who had an IEP in a prior school district in the same state, transfers to a new public agency in the same state and enrolls in new school within the school year, the new school district must provide FAPE to the student,

including services comparable to those in the child's IEP from the previous school district until the new school district either adopts the previous IEP or else develops, adopts and implements a new IEP of its own. 34 C.F.R. § 300.323(e); IDEA § 614(d)(2)(C)(i)(1); Questions & Answers on IEPs, Evaluations & Reevaluations 54 IDELR 297 (OSERS 2010).

2. Services are not categorical under IDEA; IDEA does not concern itself with labels, rather, the IEP of a child with a disability must be tailored to the unique needs of that particular child. 34 C.F.R. § 300.106(a)(3)(i); Heather S v. State of Wisconsin, 125 F.3d 1045, 26 IDELR 870 (7th Cir. 1997); Osage R-1 School District v. Sims ex rel. BS, 841 F.3d 996, 56 IDELR 282 (8th Cir. 2011). The child's identified needs and not the child's disability category determine the services that must be provided to the child. Maine Sch. Administrative Dist. No. 56 v. Mrs. W ex rel. KS, 47 IDELR 219 (D. Maine 2007); see also Analysis of Comments to Proposed Federal Regulations, 71 Fed. Regis. 156 at 46586, 46588 (OSEP August 14, 2006); In re Student With A Disability, 52 IDELR 239 (SEA W.V. 2009); Sch. Dist. of Philadelphia v. Post, et al., 262 F. Supp.3d 178, 70 IDELR 96 (E.D. Penna. 2017)

3. Mediation is a procedural safeguard that is available to parents and school districts who wish to resolve disputes concerning a student with a disability. Parties having a dispute have the opportunity to meet with a qualified and impartial mediator and engage in confidential discussions. The mediation process is voluntary on the part

of both parties. 34 C.F.R. § 300.506; JD by Davis v. Kanawha County Bd of Educ., 571 F.3d 381, 52 IDELR 182 (4th Cir. 2009); Memo to Chief Sch Officers Re Dispute Resolution Procedures Under Part B of IDEA, 61 IDELR. 232 (OSEP 2013)(See § A of the attached Q & A document)

4. IDEA requires that parents be provided meaningful participation in the process. 34 C.F.R. § 300.322; Deal v. Hamilton County Board of Education, 392 F.3d 840, 43 IDELR 109 (6th Cir. 2004); Strepp ex rel. MS v. Midd West Sch. Dist., 65 IDELR 46 (M.D. Penna. 2015); JD v. Kanawha County Board of Education, 48 IDELR 159 (S.D. W. Va. 2007).

5. Under IDEA, a procedural violation is actionable only if it results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights or causes a deprivation of educational benefit. IDEA § 615(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

6. A parent of a student with a disability has the right under IDEA to examine “all records relating to such child....” Each school district must permit parents to inspect and review any educational records relating to their children that are “collected, maintained or used...” by the school district. 34 C.F.R. § 300.613(a); IDEA § 615(b)(1). The definition of educational records for purposes of the parents’ access

rights includes the type of documents covered under educational records in the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 C.F.R. § 300.611(b). One of the procedural safeguards given to parents by IDEA is the right to inspect and review all education records with respect to the identification, evaluation, educational placement and the provision of FAPE to a child. 34 CFR § 300.501(a).

7. A parent has a right to an independent educational evaluation if the parent disagrees with an evaluation obtained by the school district. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing without unnecessary delay to show that an evaluation is appropriate or (ii) ensure that an independent educational evaluation is provided at public expense. 34 C.F.R. § 300.502(b)(1) and (2). A parent has a right to an independent educational evaluation at public expense only if it disagrees with evaluation obtained by the school district. PP v. Westchester Area School District, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009)

8. When a parent refuses to consent to a reevaluation, school district officials may utilize the due process hearing procedure to seek an override to conduct the reevaluation without parental consent. 34 C.F.R. § 300.300(c).

9. The school district properly implemented the student's IEP from the student's previous school district after the student transferred from another district in the same state.

10. The parent has not proven that the student's eligibility category of autism is incorrect or must be changed.

11. The school district did not violate the provisions of the law by failing to agree to participate in mediation, as requested by the parent.

12. The parents have not demonstrated that they were denied meaningful participation in the process.

13. The parent has proven that the school district failed to comply with the law by withholding the recording of the telephone resolution meeting or the transcript thereof. With regard to all other educational record requests by the parent, the school district has complied with the law.

14. The school district has shown that the parents are not entitled to an independent educational evaluation at public expense.

15. The school district has shown that the parents' refusal to give consent for a reevaluation of the student is inappropriate and should be overridden in the event

that the parents later give consent for the student to receive special education or related services.

DISCUSSION

1. **Did the district violate IDEA by implementing the student's IEP from a previous school district?**

The parent's complaint contends that the school district violated IDEA by implementing the student's IEP from the previous school district.

The school district was required, however, to provide the student, who had transferred from another Pennsylvania school district, with a free appropriate public education, including services comparable to those described in the student's IEP from the previous district, in consultation with the parents, until such time as the school district either adopted the previous IEP or developed and implemented a new IEP. See 34 C.F.R. § 300.323(e). When the student enrolled in the school district, the district issued a Notice of Recommended Educational Placement explaining that it would implement the IEP from the prior school district for a period of 30 days until the school district could develop its own IEP. The parents apparently misread the Notice of Recommended Educational Placement to state that they were required to file a due process complaint or a mediation request if they did not approve of the

recommendation. Although the form clearly also includes an option for an informal meeting with school personnel to discuss the recommendation, the parents claimed that they did not believe that they had any choice other than to request mediation and a due process hearing.

The district attempted to obtain the cooperation of the parents in convening an IEP team meeting. The parents, however, put up numerous obstacles to any interaction with the district, including refusing to attend an IEP team meeting and demanding that all communication go through the parent's lawyer even though the parents did not have a lawyer.

The parents contend that the IEP from the previous school district was harmful to the student. At the hearing, the father testified that the IEP contained too much by the way of social skills instructions and not enough academic instruction. Unfortunately, for the parents, however, they never shared this information with the school district. The parents declined the opportunity to have an informal meeting with the staff of the school district. The parents also refused to have an IEP team meeting until after the decision in the due process hearing. The school district staff testified credibly and persuasively that the parents never told the district about their concern with regard to the relative amounts of social skills instruction and academic instruction. The parents also unreasonably misread the Notice of Recommended Educational

Placement to somehow require them to file for a mediation or a due process hearing if they wanted to communicate with the district. Moreover, the credibility of the parents' testimony that they thought that the IEP from the previous district was harmful to the student is impaired by the fact that the IEP had apparently been in effect since it was implemented on October 24, 2017, long before the student reenrolled in the new school district. The parents provided no testimony or other evidence concerning any efforts to change the IEP in the previous district. It is concluded that the IEP from the previous district was not harmful to the student.

It is concluded further that the school district complied with the in-state transfer rules under IDEA by implementing the IEP from the previous school district. The parents have not proven that the district violated IDEA.

2. Did the school district improperly classify the student as autistic?

The student's category of eligibility is only relevant to the question of whether the student is eligible for special education and related services. Once a student is identified as eligible, however, the question of the services that the student is entitled to depends not upon the student's category of eligibility, but rather upon the student's

educational needs. Because eligibility is not in issue; there can be no legitimate dispute concerning the disability category.

To the extent that the parents' argument could be construed to relate to the student's needs rather than the label affixed to the student, it should be noted that the school district would need an opportunity to evaluate the student in order to determine the student's educational needs. The parents have refused to consent to such an evaluation. See subsequent discussion.

The parent has not proven any violation of IDEA by the school district with regard to the label of autism or category of eligibility of the student.

3. Did the school district violate IDEA by refusing to participate in the mediation process?

The parents requested that the district engage in mediation concerning this matter. The district flat out refused. It is not clear why the district refused. This was clearly a case in which the parties were having difficulty communicating. The district knew that it was having difficulty getting the parents to cooperate- even with something as simple as a date for an IEP team meeting. Something was obviously very wrong. Mediation, unlike the other dispute resolution options, seems well suited to restoring the relationship between parents and school officials having a dispute or

communication issues. See the website of the OSEP dispute resolution technical assistance organization CADRE, <https://www.cadeworks.org/>. Especially in view of the importance of the collaborative relationship between districts and parents as noted by the U. S. Supreme Court in Shaffer v Weast, 546 U.S. 49, 44 IDELR 150 (2015), the failure of the school district to agree to mediation is very puzzling. In the opening statement by counsel, the district complains about failure to communicate by the parents and a lack of collaborative response from the parents, yet the district refused the parents' offer to sit down with a qualified and impartial mediator and engage in confidential discussions about the student.

That said, mediation under IDEA is a voluntary process. Regardless of the wisdom of their decision, neither party is required to accept an invitation to participate in mediation. Accordingly, the school district was within its legal rights to decline the offer to participate in mediation extended by the parents even if mediation would seem to be tailor-made for this particular situation.

The parents have not proven that the district violated IDEA by failing to agree to the voluntary mediation process.

4. Did the school district deny the parents meaningful participation in the process of the development of the student's educational program?

The parents contend that the school district violated IDEA by having an IEP team meeting without the parents present.

It is true that the school district did convene an IEP team meeting and attempted to develop an IEP without the parents present on May 23, 2019. The record indicates, however, that the parents thwarted the efforts of the school district to obtain the parents' participation. The school district convened the meeting within the 30-day period stated in its previous Notice of Recommended Educational Placement. To the extent that the district convening the IEP team meeting without the parents might be construed to be a procedural violation, the violation is clearly harmless. Indeed, the parents prevented all attempts by the school district to talk with the parents from being successful. The parents refused to have an informal meeting, and more importantly, declined to participate in any IEP team meeting until after there was a decision in the due process hearing. Because the parents refused to cooperate in any way in the scheduling of an IEP team meeting, the district cannot be held to have denied them meaningful participation.

The parents instructed the school district personnel not to contact them and warned the district that any contacts by the school district would be construed to be harassment. The parents also informed the school district that it should communicate only with the parents' lawyer, even though the parents had never designated a lawyer to

represent them with the school district in this matter. It is clear that the parents' conduct in refusing to communicate with the school district was unreasonable and was intended to prevent a meeting. The parents had the opportunity to participate, but elected not to do so. The parents also failed to engage in the collaborative spirit that the Supreme Court has stated is necessary for the education of a student with a disability.

The parents have not proven that they have been denied meaningful participation in the process.

5. Did the school district refuse to provide educational records pertaining to the student to the parents?

IDEA provides a parent of a special education student with sweeping rights to obtain records pertaining to the student. A parent has a right to inspect educational records relating to their children that are "collected, maintained or used" by the district. 34 C.F.R. § 300.613. The right to records under IDEA, which is also a procedural safeguard, is even broader than parental rights under FERPA because any records used by the district are also included and because of the recognition of access to records as a procedural safeguard.

It appears, from an e-mail exchange in the record, that the school district has provided the parents with copies of almost all records pertaining to the student. At the

hearing, the father stated that the two documents he believed that were not provided were (1) an 8th grade evaluation, and (2) a recording of the resolution meeting by telephone call. The record indicates that the parent misconstrued a referral form to the intermediate unit to be a request for an evaluation. There is no evidence that an 8th grade evaluation, or any other evaluation of the student, was conducted by the school district.

The recording of the resolution meeting, however, is another matter. The school district concedes that the recording or transcript of a recording of the resolution meeting held by telephone exists, but the district took a hypertechnical and hyperlegal position concerning the district's refusal to produce the document for the parent, however, because the recording was "not intentionally maintained by the district in a centralized location as a part of its recordkeeping responsibilities."

First, it is difficult to understand why the district would take such a hyper-technical position in response to a request from a parent with whom the district was having communication problems. Second, it is clear that the district "used" this document because it was part of a resolution session, which is a required meeting under IDEA. Whether or not the document meets the legal requirements of "an educational record" under FERPA, the document is clearly a document that a parent is entitled to under the much broader provisions of IDEA.

The parents have proven that the school district has violated IDEA by failing to provide the parents with a copy of the recording and any transcript of the recording of the resolution meeting by telephone. The district will be ordered to provide the recording and or transcript to the parents.

6. **Is the parent entitled to an independent educational evaluation at public expense?**

The parents have requested an independent educational evaluation at public expense. In response, the school district filed a due process complaint challenging the parents' right to receive an independent educational evaluation.

The record evidence indicates that the school district has not yet had a chance to evaluate the student. The school district has tried to evaluate the student; however, the parents have refused to consent to the evaluation.

The federal regulations giving the parent the right to an independent educational evaluation contemplate that the school district will have the first crack at evaluating a student. Because the school district had not yet had a chance to evaluate the student, the parents' request for an independent educational evaluation is premature.

According, it is concluded that the school district has proven that the parents are not entitled to an independent educational evaluation at public expense.

7. Whether the school district has proven that the parents' failure to consent to an evaluation should be overridden and the district should have the opportunity to reevaluate the student?

It should be noted that both parties stipulated in their posthearing briefs that the parents have revoked consent for the student to receive special education from the school district. Given that the student cannot obtain special education and related services, this issue has been made less important. Because it is possible that the parents will later give consent for the student to receive special education, the following discussion of the issue is provided below. The student should only be reevaluated, however, in the event that the parents later consent to special education.

The record evidence indicates that the district request for reevaluation of the student was prompted in part by problem behaviors on the part of the student. The district has shown that an evaluation is necessary to address behaviors of the child that affect the student's learning and the learning of others. 34 C.F.R. § 300.324(a)(2)(i). An evaluation is needed.

Moreover, it is clear that the parents disagree with the statement of the student's needs as contained in the IEP from the previous school district. Indeed, the parents described that IEP as harmful to the student. A new evaluation would seem to be important to both parties. Given the above, it is apparent that the student should be

reevaluated by the district if the parents consent to special education for the student at a later date.

The school district has proven that the student should be reevaluated and the parents' failure to give consent is overridden if and only if the parents later consent to special education for the student.

RELIEF

An IDEA hearing officer has broad equitable powers to remedy a violation of the Act. Forrest Grove Sch. Dist. v. TA, 557 U.S. 230, 52 IDELR 151 (U.S. 2009); Stapelton v. Penns Valley Area Sch. Dist., 71 IDELR 87 (MD Penna 2017); In Re Student With A Disability, 52 IDELR 239 (SEA WV 2009).

The only violation proven by the parents involves one student record. The school district will be ordered to provide a copy of the recording and any transcript of the recording of the resolution meeting conducted by telephone that the district has refused to provide to the parents.

The district has proven that the parents are not entitled to an independent educational evaluation at public expense. The district has also shown that in the event

that the parents later consent to special education for the student, that the district may reevaluate the student.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that:

1. Within ten days of this decision, the district is ordered to provide the parents with a copy of the recording of a resolution meeting concerning this case that the district has refused to provide to the parents as well as any transcript thereof;
2. In the event that the parents later give consent for the student to receive special education, the school district is granted leave to evaluate the student without consent from the parents;
3. The parents are not entitled to an independent educational evaluation at public expense; and

4. All other relief requested by the instant three due process complaints is hereby denied.

IT IS SO ORDERED.

ENTERED: August 28, 2019

James Gerl

James Gerl, CHO
Hearing Officer