

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: E. A.
Date of Birth: [redacted]

CLOSED HEARING

ODR File No. 16947-15-16 KE

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney
None

Local Education Agency
Philadelphia City School District
Office of General Counsel
Philadelphia, PA 19130

LEA Attorney
Heather Matejik, Esquire
Brian Subers, Esquire
Fox Rothschild LLP
10 Sentry Parkway
Suite 200, PO Box 3001
Blue Bell, PA 19422

Date Record Closed:

January 6, 2016

Date of Hearing:

December 14, 2015

Date of Decision:

January 10, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a kindergarten-age student in the School District of Philadelphia (hereafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's guardian (hereafter Parent) filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA in failing to provide specific special education services.

The case proceeded to a due process hearing convening over a single session, at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to provide Student with learning support as well as transportation and speech/language therapy, thereby denying Student FAPE. The District maintained that the special education program that was implemented was appropriate for Student and did not deny FAPE, and further sought an order permitting it to conduct a speech/language evaluation of Student.

For the reasons set forth below, I find in favor of the Parent on her claims, and will order an independent speech/language evaluation.

ISSUES

1. Whether the District failed to provide Student with the appropriate learning support, transportation, and speech/language therapy services; and
2. Whether the District should be permitted to conduct a speech/language evaluation.

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482.

FINDINGS OF FACT

1. Student is a kindergarten-age child who is eligible for special education under the IDEA. (School District Exhibit (S-) 20 pp. 33-34)
2. When the District receives an Intent to Register form for a student who is receiving early intervention services, the District gathers records including those from the early intervention service provider. Beginning in January of each year, the District schedules meetings with the parents of those students that include representatives of the early intervention service provider. The parents are given information about registering with the District, and discuss the process of transitioning to a school-aged program at the meeting. (Notes of Testimony (N.T.) 43-45, 67, 69-70)
3. The District conducts a review of each child's records in order to make programming recommendations for entry into kindergarten. The team conducting that review makes a determination of whether the child should be evaluated. (N.T. 48-49, 59-60, 67-68)
4. The early intervention service provider typically sends letters to the parents who have completed Intent to Register forms, advising them of the transition meetings and the need to register the child with the District. (NT. 44-45)

Student's Early Intervention Program and Transition to District

5. The early intervention service provider issued an initial Evaluation Report (ER) in July 2013. Cognitive assessment reflected significant developmental delay, and weaknesses were noted in the areas of articulation, functional language, and self-care skills. The ER concluded that Student was eligible for special education due to developmental delay, making recommendations including specially designed instruction in self-care skills. (S-25)
6. The early intervention service provider issued another Evaluation Report in January 2014 that served as a reevaluation (RR). Student was determined to be eligible for early intervention services on the basis of a developmental delay, exhibiting needs in the areas of articulation and fine motor skills. This RR again recommended specially designed instruction for self-care skills. (S-24)
7. The Parent submitted an Intent to Register Student in the District for the 2015-16 school year in September 2014, but never received a letter inviting her to a transition meeting for Student. (N.T. 236-37; Parent Exhibit (P-)3; S-23)
8. Student's March 2015 Individualized Education Program (IEP) from the early intervention provider identified needs in the areas of articulation and fine motor skills, but not specially designed instruction. Goals addressed articulation, turn taking, attending to tasks/activities/directions, and fine motor skills. Specialized instruction (three hours per week), speech/language therapy (thirty minutes per week), and

transportation were identified as services in this IEP beginning in March 2015, all to be provided on an individual basis. (P-1; S-17)

9. The Parent approved the early intervention provider's March 2015 Notice of Recommended Educational Placement (NOREP) that discharged Student from occupational therapy services, and decreased speech/language therapy to thirty minutes per week at school. Speech/language services would also be provided at home twice per month for thirty minutes. (S-19)
10. The Parent registered Student with the District in March 2015. (S-32)
11. The early intervention service provider sent records on Student to the District. After the District conducted a review of Student's records, and before the transition meeting scheduled for Student, it issued a NOREP for itinerant speech/language services for a period of 90 days, during which time the District would consider whether Student continued to need those services. (N.T. 59, 61, 63, 68, 70-71)
12. The District had difficulty obtaining all of Student's records from the early intervention provider, including the most recent March 2015 IEP. (N.T. 167-68, 186, 190; S-10, S-33 pp. 4-5)
13. As of June 2015, Student had met the IEP goals with respect to attending to tasks, but needed to continue working on the articulation and occupational therapy goals. (S-16)
14. Speech/language sessions by the early intervention provider during the summer of 2015 were group sessions rather than individual. (S-28)

District Programming

15. The Parent contacted the District in May 2015, explaining that she had not been provided with information on the transition meeting. (N.T. 53, 73; P-7 pp. 2-3)
16. Around the same time, the Parent also spoke with the principal of the elementary school that the Parent wanted Student to attend. The principal gave permission for Student to attend there even though it was not Student's neighborhood school, because it was conveniently located and was where Student's siblings attended. (N.T. 150-51, 153, 172, 227)
17. The Parent advised the principal during the conversation that Student needed speech/language therapy. She also asked about an evaluation of Student before school started. (N.T. 153, 171, 228, 238, 243)
18. During a meeting the Parent attended for another child in May 2015, the Parent was provided a NOREP for Student. (N.T. 53-54, 65-66, 79-80, 141; P-5, P-7)
19. The Parent approved the NOREP on May 21, 2015, which specified speech/language services from the early intervention IEP for 90 school days. She signed this NOREP

because she knew it was necessary in order to have Student registered for the fall. (N.T. 53-54, 75, 138-39, 154-55, 161, 228, 238, 243-45; P-8; S-18)

20. The District did not seek to conduct an evaluation of Student before Student started kindergarten. (N.T. 138-39, 149, 174)
21. The District did not conduct or invite the Parent to any IEP meeting. (N.T. 62)
22. The District did not develop an IEP or make any revisions to Student's early intervention IEP. (N.T. 57, 172-73)
23. The District offered to continue speech/language therapy in the home, but the Parent declined. (N.T. 193)
24. Student began a regular education kindergarten class in the fall of 2015 in mid-September. There are twenty students in the class. (N.T. 113; S-31 p. 1)
25. The Parent spoke with Student's kindergarten teacher before school started, and advised her that Student had an IEP. The teacher obtained the IEP after that meeting during the second week of school. (N.T. 106-07, 121-22, 135-36, 176)
26. When Student first started kindergarten, Student sometimes cried or stomped feet and screamed when frustrated. That behavior improved by December 2015. (N.T. 132-33)
27. The kindergarten teacher worked with all students on attending to tasks, listening, and concentrating. (N.T. 107)
28. The kindergarten teacher does not believe that Student needs specially designed instruction or academic support. (N.T. 117, 134-35)
29. Student does not use a bus to travel to and from school, but walks to school with one of the Parents. When the principal first spoke with the Parent, she explained that kindergarten students are not provided with bus transportation. (N.T. 111, 137, 151-52, 171-72, 240)
30. In early October 2015, the District sought permission to conduct speech/language and occupational therapy evaluations of Student. The Parent initially gave permission for, then revoked consent to, those proposed evaluations, and signed a NOREP to memorialize that revocation on November 24, 2015. (N.T. 157, 162, 239; P-9, P-15, P-16, P-17; S-4, S-5, S-7, S-13)
31. The District sent a NOREP to the Parent in November 2015 that included weekly group speech/language therapy and curb-to-curb transportation pending an evaluation by the District. The Parent initially agreed to the NOREP on November 9, 2015 but then revoked that consent. (N.T. 194-95; P-14; S-5, S-6)
32. On November 30, 2015, the District sought permission to conduct an evaluation of Student's cognitive functioning. The Parent did not consent. (S-2, S-33 p. 8)

33. Student was provided with a half hour of small group speech/language therapy on a weekly basis by a District speech/language pathologist. One session was individual for Student. The speech/language therapist worked on the IEP goal relating to articulation during those sessions. (N.T. 205-08, 213, 215, 219-20; S-12)
34. Speech/language therapy session notes provided to the Parent in the fall of 2015 did not indicate that Student was receiving those services in a small group. (S-12)
35. Student demonstrated improvement in articulation by the time of the due process hearing. (N.T. 208, 217)
36. Student's report card for the first quarter of the 2015-16 school year reflected outstanding performance in all subjects. Student was on target with kindergarten expectations with respect to instructional reading level, but needed improvement in letter identification and matching sounds to letters. At that time, Student was performing in the average to above average range in kindergarten. (N.T. 113-17, 120, 127-28, 130-31; S-1, S-16)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown*

Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to testify credibly to the best of their recollections. The Parent presented as a devoted and loving guardian and advocate with a keen understanding of special education and Student's needs; and the District personnel all presented as dedicated and qualified professionals. It is evident that all of the witnesses and participants at the hearing are concerned about Student and Student's education, despite their conflicting positions.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' closing arguments. The objections to P-21, S-16, S-21, and S-28 are overruled, on the basis that those documents provide context for the current disagreement, although their probative value on the issues presented is somewhat limited.

IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" to a student who qualifies for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

The IEP is developed by a team, and a child's educational placement must be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.116. Parents play "a significant role in the IEP process."

Schaffer, supra, at 53. Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

When a child transitions to school-aged programming from early intervention, the IEP team may agree to implement the program from the early intervention provider, or it may develop a new IEP. 20 U.S.C. § 1414(d)(2); 34 C.F.R. § 300.323(b). The Pennsylvania Department of Education has explained that the team may also agree to adopt the early intervention program with revisions. Basic Education Circular Early Intervention Transition: Preschool Programs to School-Age Programs (October 19, 2009). That same Basic Education Circular describes the transition process, which must include a meeting with the parents, involving consideration of the program to be implemented and whether or not a reevaluation is necessary.

Implementation of IEP

In this matter, the Parent did not receive notice of the transition meeting from the early intervention provider despite having completed an Intent to Register form. Upon her inquiry in May,³ the District issued a NOREP that provided for weekly speech/language therapy only for a period of 90 days so that an evaluation could be conducted. I conclude that the Parent's signature on that NOREP was not the product of a collaborative meeting and was not truly informed consent, but rather served as mere acquiescence so that Student would receive the services that were most critical.

According to the most recent IEP from the early intervention service provider, Student

³ The Parent raised a concern that the District did not timely evaluate Student, but that issue was not developed at the hearing. In light of the Parent's revocation of consent for the District to conduct any evaluations, it does not appear that the initial District educational evaluation is currently at issue.

was to receive three hours of specialized instruction and one half hour of speech/language therapy each week, both on an individual basis, in addition to bus transportation. Since entry into the District, student did not receive the specialized instruction or transportation, and speech/language therapy was provided in a small group with the exception of one session. It is of no moment that the early intervention service provider may have conducted group speech/language therapy sessions; it is the language of the IEP and agreed NOREPs that are controlling. Additionally, while it is clear that the District had difficulty securing certain records from the early intervention provider, it had a copy of Student's most recent IEP at least as of the end of the second week of school. Thus, it is reasonable to conclude that Student should have been receiving all special education services in the most recent IEP no later than October 1, 2015.

It is not clear from the IEP what the three hours per week of specialized instruction would have addressed. Student had two IEP goals that were related to something other than articulation and occupational therapy: turn taking and attending to tasks. As of June 2015, Student had met the goal for attending to tasks; and, the kindergarten teacher worked with Student, as she does with all students, on this skill. However, Student did demonstrate frustration, including with turn taking, particularly at the beginning of the school year. Although the teacher believed Student had made improvement in that area, there was no data or other objective measurement of progress since the District did not work with Student on that IEP goal. Moreover, as noted above, the speech/language therapy sessions were not provided to Student individually, and the Parent was not advised of the group sessions as they occurred or participate in that decision. Finally, Student was entitled to transportation services. These flaws amount to a denial of FAPE.

The next question is what remedy is due for the failure to implement the IEP. It is well

settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

I conclude that, because the speech/language therapy was provided in small group rather than individual sessions, and the Parent was not aware of or involved in that programming decision at the time it was made, some compensatory education is appropriate. However, because Student did make progress toward the only speech/language goal, the award will not be for the total number of hours specified in the IEP. Thus, this portion of the award will be for half of those hours. With respect to the specialized instruction, I equitably estimate that one hour per week of compensatory education would remedy the lack of any involvement or consultation with a special education teacher who would have monitored Student's frustration and turn-taking skills and any other areas of need. As for the transportation issue, there is no evidence that the absence of this service operated to deny Student FAPE in any substantive respect; therefore, no relief will be ordered on this portion of the claim. Finally, as school has been in session this school year for approximately 13 weeks from October 1, 2015 when services should have been in place through the date of this decision, the compensatory education awarded will be based upon that duration with fractions rounded up. Thus, Student will be awarded 17 hours of compensatory education (4 hours for speech/language services and 13 hours for specialized instruction).

The hours of compensatory education, other than for speech/language services, are subject to the following conditions and limitations. Student's Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age ten (10).

There are financial limits on the Parent's discretion in selecting the compensatory education; the total cost to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the average of the hourly salaries and fringe benefits that would have been paid to the District teaching professional(s) who would have provided educational services to Student during the period of the denial of FAPE.

Speech/Language Evaluation

The District requests that I grant its request to conduct a speech/language evaluation of Student. The Parent is opposed to such an order. However, it is clear that Student must be evaluated for current speech/language functioning since the last information available is from January 2014.

The Parent expressed significant distrust of the District as the reason she would not consent to any evaluation of Student. There is no suggestion that the District's Speech/Language

Pathologist who is providing services to Student is not qualified to conduct such an evaluation. Nevertheless, particularly at this very early stage of Student's school career, it is extremely important for the parties to work together collaboratively and as a team. In an exercise of the hearing officer's broad discretion to fashion an appropriate remedy under the IDEA,⁴ and further based upon my authority to order an independent educational evaluation at public expense as part of a due process hearing, 34 C.F.R. § 300.502(d), the District will be required to provide an independent speech/language evaluation. This remedy is designed to provide the parties with a neutral, balanced perspective on Student's needs in that area to guide them in future programming decisions. Accordingly, I will order an independent speech/language evaluation of Student to include assessment of articulation.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District denied Student certain specific services to which Student was entitled pursuant to the most recent IEP; and that an independent speech/language evaluation is necessary to determine Student's needs in that area.

⁴ *Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009).

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District denied Student FAPE with respect to failing to implement the IEP of the early intervention service provider when Student entered kindergarten.
2. Student is entitled to, and the District is ordered to provide, seventeen (17) hours of compensatory education for services not provided in accordance with the most recent IEP, as follows:
 - a. Four (4) hours of speech/language therapy by the District Speech/Language Pathologist; and
 - b. Thirteen (13) hours of other special education services.
 - c. The hours of compensatory education, other than for speech/language therapy services, are subject to the following conditions. Student's Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs.
 - d. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age ten (10).
 - e. There are financial limits on the Parent's discretion in selecting the compensatory education; the total cost to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the average of the hourly salaries and fringe benefits that would have been paid to the District teaching professional(s) who would have provided educational services to Student during the period of the denial of FAPE.
3. Within ten calendar days of the date of this Order, the District shall provide to the Parents, in writing, a list of not less than three qualified individuals to perform an Independent Speech/Language Evaluation of Student.
 - a. Within ten calendar days of receipt of the District's list of qualified individuals to perform the Independent Speech/Language Evaluation, the Parent shall notify the District, in writing, of the selection of evaluator. The Parent may utilize the ten-

day period to contact the proposed evaluators in order to gather information to make their decision.

- b. If the Parent does not notify the District, in writing, of the selection of evaluator within ten calendar days of sending its list of qualified individuals, the District shall make the selection from that same list.
 - c. The selected evaluator shall be given access to Student's education records, and shall determine the scope of the evaluation to include assessment of articulation.
 - d. The selected evaluator shall provide a written report of the Independent Speech/Language Evaluation within a reasonable time, not to exceed 30 calendar days from the date of engagement, unless otherwise agreed by the parties.
 - e. The Independent Speech/Language Evaluation shall be at public expense.
4. Following completion and receipt of the Independent Speech/Language Evaluation Report, Student's IEP team shall meet to consider the Report and all other relevant information and develop a new educational program.
 5. Within five calendar days of the IEP meeting described in Paragraph 4, the District shall issue a NOREP to the Parent, to which all procedural safeguards shall attach.
 6. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
January 10, 2016