

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:

22724-19-20

Child's Name:

M.P.

Date of Birth:

[redacted]

Parent/Guardian:

[redacted]

Counsel for Parent/Guardian

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Hearing Officer:

James Gerl, CHO

Date of Decision:

June 12, 2020

BACKGROUND

The guardian filed a due process complaint pro se. Later, counsel for the guardian filed an amended complaint on October 28, 2019 alleging the following from November 17, 2017 through the date of the amended complaint: a procedural violation of IDEA in failing to provide documents to the guardian in Spanish; a procedural violation of IDEA in failing to provide a sufficient number of trials of IEP goals; a denial of a free and appropriate public education because the student's IEPs did not include the related service of a one-on-one nurse; a denial of FAPE and/or inappropriate placement in that the school district did not provide the student with educational services in the home; a violation of Section 504 based upon the previous alleged IDEA violations; and an IDEA violation because the school district did not properly respond to a request for an independent educational evaluation at public expense. The school district asserted a defense that the guardian is not entitled to relief because the guardian impeded the school district's efforts to educate the student. I find in favor of the guardian that the school district failed to comply with the requirements of IDEA for responding to a request for an independent educational evaluation. I find in favor of the school district with regard to all other issues stated above.

PROCEDURAL HISTORY

This hearing required four sessions: two full-day in-person sessions and two partial day virtual hearings. Even with the presence of a Spanish interpreter, this hearing should reasonably have taken no more than one to one and a half hearing sessions. The hearing was unnecessarily protracted by a number of factors, including the failure to have the exhibits in front of the guardian in a form that the guardian could access during testimony, by excessive questioning of witnesses and by questioning of witnesses on topics that were clearly not relevant in any way to the issues presented by this

case. For example, one witness was asked “what would happen on a desert island tomorrow” (NT 489).

Twelve witnesses testified at the hearing. In addition, Exhibits P-1, P-5, P-9, P-10, P-14, and P-15 plus selected pages of exhibit P-2 and P-14 were admitted into evidence. All other parent exhibits were withdrawn by the guardian. School district Exhibits 1 through 31 were admitted into evidence.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that the 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 and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. 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 amended due process complaint raised other issues that were not argued as violations in the guardian’s post-hearing brief; specifically, issues pertaining to whether the student received adequate nutrition while at school and whether the student’s alertness/sleeping during school was appropriately addressed by the school district. Although a lot of testimony and documentary evidence was devoted to these issues, the guardian failed to address them in the arguments contained in the post-hearing brief.

Accordingly, these issues are deemed to have been withdrawn by the guardian and they have been waived for purposes of this proceeding. Assuming arguendo that these issues were not waived by the guardian's failure to present any argument thereupon, the evidence in the record does not support these allegations by the guardian.

The following issues were presented by the amended due process complaint and response thereto:

1. Whether the guardian has proven that the school district denied FAPE to the student from November 17, 2017 through the end of the 2018-2019 school year by committing an actionable procedural violation by not providing certain documents to the guardian in Spanish?
2. Whether the guardian has proven an actionable procedural violation by the school district in failing to provide a sufficient number of trials of goals?
3. Whether the guardian has proven that the school district denied FAPE to the student by failing to provide a one-on-one nurse as a related service?
4. Whether the guardian has proven that the school district denied a free appropriate public education to the student in the least restrictive environment by failing to provide educational services to the student in the student's home?
5. Whether the guardian has proven that the school district violated IDEA by failing to file a due process complaint when it did not agree to a request for an independent educational evaluation at public expense?
6. Whether the guardian has proven that the school district violated Section 504?

7. Whether the school district has proven that the guardian obstructed the school district's efforts to educate the student?

FINDINGS OF FACT

Based upon the parties' stipulations of fact, the hearing officer makes the following findings of fact.

1. The school district is the local education agency.
2. The student is [redacted].
3. The student is enrolled in the [redacted] grade in the school district.
4. The student transferred to the school district from a public school district in another state.
5. At all relevant times, the student has been assigned to the multiple disabilities support functional classroom operated by the Intermediate Unit at a high school in the district.
6. The student has been identified by the school district as having a disability and needing specially designed instruction under the primary eligibility category of multiple disabilities and the secondary category of speech language impairment.
7. The district was notified that the student has a history of grand mal seizures (since age 18 months), Rett Syndrome, [redacted].
8. The student's aunt, who is also the student's emergency contact, has acted as a Spanish language translator for the guardian and a point of contact with the school at times.
9. The school district completed a Reevaluation Report for the student on March 2, 2018.

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:¹

10. The student is a very peaceful and calm person. (NT 677; S-3)
11. The student resides with the student's grandmother, who is also the student's legal guardian. (S-7; S-20; NT 708-709)
12. Prior to 2007, the student was ambulating with a walker, communicating with eye contact and movements, and was learning to eat with assistance. From 2007 through the Spring of 2009, the student moved to another territory, and during that time frame the student received no services and almost totally regressed. Thereafter student attended schools in three states before enrolling in the school district. The student had issues remaining awake and alert during the school day in the prior school districts. (P-10; S-7; S-27; S-28)
13. The student registered to enroll in the school district on approximately October 10, 2017. (P-1)
14. The native language of the guardian is Spanish. (S-7)
15. Rett Syndrome is a severe and regressive neurodevelopmental disorder occurring primarily in females. Following an apparently normal early development, there is a loss of communication and hand function. Comorbidities include breathing dysfunction, scoliosis, epilepsy and gastrointestinal disorders. Feeding difficulties and poor muscle tone are also common. (S-29; NT 137-138, 476-478)
16. The student cannot communicate verbally. The student's guardian informed the school staff that it is uncertain whether the student

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT____").

comprehends spoken language in either English or Spanish and that the student does not appear to react directly to verbal stimuli in either language. The student requires hand over hand assistance to complete school tasks. The student is non-ambulatory and completely dependent upon adults for self-care, toileting, feeding and all activities of daily living. (S-7; S-28; NT 62, 81, 396, 455-456)

17. The school district convened an IEP team meeting for the student on November 17, 2017. The IEP that resulted from the meeting included specifically designed instruction, two goals related to eye gaze communication and alertness and the related services of occupational therapy and physical therapy. The IEP was comparable to the educational services from the student's IEP in the previous school district in another state. (S-3; S-4; S-5; NT 84-87)
18. At the November 17, 2017 IEP team meeting, the student's guardian and the guardian's daughter, who is the student's aunt, informed the IEP team members that it would be appropriate to send home documents regarding the student in English. (NT 100-101, 248, 276-278, 331)
19. The school district arranged for an interpreter service to translate IEP team meetings and telephone conferences with the guardian into Spanish. (NT 99-100; 111-112; 145; 278)
20. The student's grandmother/guardian actively participated at IEP team meetings and provided input to the IEP team on a number of issues. (S-3; S-8; S-14; NT 111-112, 409-411, 454-455)
21. In the multi-disabilities support – functional classroom, the student received a standard functional curriculum featuring personal care and toileting assistance. The student received weekly speech and language sessions. The student attended a music class, library and adaptive

physical education. The student interacted with nondisabled peers in music, and at assemblies and monthly based community field trips. There were seven or eight students in the class with one teacher and one or two teacher's assistants and various aides. (NT 45-50, 82-85, 226, 260-261-262, 468, 505)

22. The student frequently slept during class. The student was also alert for periods of time. The school district staff used various strategies to improve the student's alertness, including music, different textures and physical movement. The student's IEP in the district include a goal related to alertness. (NT 95-96, 241, 272-273, 275-276, 364-365; S-3)
23. The school district issued a Permission to Reevaluate the student on November 20, 2017. The guardian returned the Permission Reevaluate form in January 2018. (S-6; NT 143-144)
24. The school district staff consulted with the Intermediate Unit's feeding team regarding the student's nutritional needs. The feeding team observed the student in the classroom on November 20, 2017. (S-10; NT 90-91)
25. The school district completed an Evaluation Report for the student on March 2, 2018. The evaluation utilized use of a number of assessment tools, including a review of records, input from the guardian, an observation by a certified school psychologist, teacher input and assessments by related service providers, including an occupational therapist, a physical therapist, and a speech language pathologist. The speech language assessment included an analysis of the augmentative and assistive communication needs of the student. The evaluation was comprehensive and assessed the student in all areas of suspected disability. The evaluation was coordinated by an experienced certified

school psychologist. All instruments used were reliable and were used in conformity with their instructions. (S-7; NT 142-150, 395-398, 403-404, 457-471, 516-520)

26. Based upon the evaluation report, an IEP was developed for the student on March 14, 2018. The March 14, 2018 IEP adds an additional goal for auditory stimuli to help with the student's alertness during the school day. The IEP also provides for speech language therapy as a related service, which was not provided by the prior school districts attended by the student. (S-7; S-8; S-27, S-28; NT 89-90, 456-469)
27. The Intermediate Unit's feeding team conducted a feeding evaluation of the student, which included an assessment in the classroom, on March 26, 2018. The evaluation of the student's feeding and nutrition issues was thorough and comprehensive. The feeding team evaluation resulted in recommendations, including recommendations that improved the student's liquid intake. The feeding team trained the student's teachers and consulted with school district staff. The school district staff implemented the recommendations and utilized the strategies developed by the feeding team. (S-10; S-9; NT 91-93; 538-544)
28. The school district prepared an Evaluation Report for the student on May 7, 2018. The May 7, 2018 Evaluation Report incorporates the content from the March Evaluation Report and adds the evaluation by the Intermediate Unit's feeding team. (S-10; NT 538-541)
29. An IEP was developed for the student on May 7, 2018. The IEP reflects the results of the evaluation report. (S-11; NT 228-239)
30. The student made progress on the student's IEP goals during the 2017-2018 school year. (S-8; S-11; NT 104-105)

31. The student was eligible for extended school year services, but the guardian did not send the student to extended school year during the summer of 2018. (NT 105-106)
32. The student was frequently absent from school. The guardian would often not send the student to school if the weather was cold or if it was difficult to wake the student, and the guardian would often fail to notify the school that the student would be absent until after the absence. (P-5; P-2; NT 253, 290-292, 503, 514-515)
33. The student's guardian stopped sending the student to school on November 8, 2018. The student did not return to school until May 6, 2019. The student missed approximately 104 days of school during this period of time, ten of which were for documented medical reasons. (P-5; S-17; S-23; NT 270-271, 349-350)
34. On November 12, 2018, the school district received a Temporary Medical Excusal form from the student's neurologist. The neurologist enclosed a prescription asking for home-based schooling for the student for three weeks. (S-23)
35. Because the neurologist's note did not include all of the information that the school district needed for a temporary medical excusal, the school district's supervisor of health services contacted the neurologist's office. The neurologist's office informed the supervisor of health services that the student should be in school. The neurologist's staff clarified that no temporary medical excusal was being requested. The neurologist had issued the form because the guardian had represented to the neurologist that school wanted the student to be at home. (S-23; P-2; NT 179-180)
36. On November 28, 2018, the school district received a letter from the student's primary care physician requesting that the student's

guardian be permitted to provide education to the student through home schooling. (S-23)

37. Because the letter from the primary care physician did not include the information needed to process the request, the school district's supervisor of health services contacted the primary care physician's office and was informed that the guardian was asking for the student to stay home from school. The doctor's staff stated that the student should be in school. (NT 181-184)
38. The district's supervisor of health services conferred with the district's coordinator of special education and the supervisor of special education. Because both doctors' offices had told the supervisor of health services that the student needed to be in school, the district took no action to provide educational services to the student in the student's home as a result of the correspondence from the doctors. (NT 167-168, 184, 203, 323-324, 357-359, 608-609)
39. Prior to the placement of a feeding tube on December 6, 2018, the student did not need a one-on-one nurse in order to benefit from special education. The school district assigned a certified school nurse to the student and had available other R.N.s and LPNs in its nursing office, if needed. (NT 157, 195, 222, 266; S-23)
40. On January 21, 2019, the staff of the office of the student's neurologist informed the school district's supervisor of health services that the guardian was "adamant" that the student was not going to return to school. (P-2)
41. The school district staff attempted to convene a meeting with the student's guardian to discuss the correspondence from the doctors. The guardian replied that she declined to meet until after "winter

break.” The guardian resisted other requests to meet until February 1, 2019. (P-2; NT 183-185, 606-607)

42. The guardian participated in a February 1, 2019 telephone conference with the school district supervisor of health services, the coordinator of special education, a supervisor from the Intermediate Unit, a representative of the office of the student’s neurologist, a case manager for an outside agency that coordinated services for the student and an interpreter. During the February 1, 2019 meeting, the guardian and agency case manager stated that the student had been hospitalized since January 27, 2019 and that the student may be considered for in-patient rehabilitation after the hospitalization. The student’s guardian agreed to notify the school district two weeks prior to the student’s release from a rehabilitation facility so that the IEP team could meet to discuss the student’s needs at that time. The school district, at this meeting, agreed to excuse the student’s absences through February 1, 2019, if the guardian provided a doctor’s note; such excusal is typical when the district is dealing with families that have a truant student. (S-24; P-2; NT 183-192)
43. The student’s guardian did not call or respond to the district after the hospitalization. The student did not attend a rehabilitation facility after being released by the hospital. Efforts to conduct a meeting of the IEP team were unsuccessful because the guardian provided only one date and did not respond to other requests for dates. (NT 190-192)
44. On March 7, 2019, the student’s primary care physician wrote a letter to the school district stating that the student was able to return to school and recommending that the student return to school at that time. The letter noted a ten day hospitalization from January 27, 2019 to February 6, 2019, during which the student’s medication was

adjusted. The letter also noted that the student had a feeding tube placed on December 6, 2018. (S-23)

45. Because of the long period of time that the student had not attended school and the guardian's unresponsiveness to requests for meetings, the school district, after the receipt of the March 7, 2019 return to school letter from the student's primary care physician, contacted the Department of Children and Youth to report the student's truancy. The guardian returned the student to school on May 6, 2019, but the student did not attend school regularly after returning. (NT 192-194, 286, 336; P-5)
46. On April 8, 2019, the guardian's attorney e-mailed the attorney for the school district requesting an independent educational evaluation consisting of an evaluation by a bilingual psychologist, an augmentative communication evaluation, a feeding evaluation, a physical therapy evaluation and an occupational therapy evaluation. The letter also requests compensatory education, the assignment of a one-on-one nurse and attorney's fees. (S-18; NT 193)
47. The school district, by counsel, responded to the request for independent educational evaluations by e-mail on April 24, 2019. The e-mail from school district counsel noted that there were references in the request for an independent educational evaluation to the student's in-school behaviors and assertions that the student was sleeping while in class. The response states that the guardian unilaterally withdrew the student from school on November 8, 2018 and that the student had not returned since that time. The response requested clarification from counsel for the guardian as to whether the independent educational evaluation requests were being withdrawn in view of the fact that the student had not attended school for five months at that point. The email states that the guardian had resisted efforts by school

district staff to convene an IEP team meeting during the 2018/2019 school year. (S-19; NT 193)

48. The guardian did not respond to the district's inquiry concerning the requested independent educational evaluations. The school district did not file a due process complaint or offer to pay for the independent educational evaluation in response to the request. (Record evidence as a whole)
49. The IEP team for the student met on May 3, 2019, and the student's guardian attended the meeting. An IEP was developed at that meeting. (S-14)
50. On May 16, 2019, the student's primary care physician sent a letter to the school district supervisor of health services stating that the student should have a one-on-one nurse with the student's throughout the school day. The school district made a one-on-one nurse available, with the assistance of the Intermediate Unit, for the remainder of the 2018-2019 school year and for the 2019 summer extended school year program. The school district contracted with a nursing provider to provide a one-on-one nurse for the student for the 2019-2020 school year. During the summer and fall of 2019, the guardian did not respond to numerous requests for information that the nursing provider required to begin providing services. The guardian did not respond to requests for information required by the nursing provider until October 2019. (S-26; S-23; P-2; NT 196-198, 212-214, 216-218, 221-222)
51. The student made progress on the student's IEP goals when the student attended school. The long period of time in which the student did not attend school impaired the student's progress on the student's IEP goals. (S-15; NT 286-291, 465-466)

52. The student was eligible for extended school year services, but the guardian did not send the student to extended school year during the summer of 2019. The failure to attend extended school year services impaired the student's progress on the student's IEP goals. (NT 285-291)
53. In approximately September 2019, school district staff learned that the guardian's daughter, who is the student's aunt, who had been translating documents for the guardian, had moved out of state, and the district began sending documents home to the guardian in Spanish. (NT 276-278)
54. The guardian did not send the student to school regularly during the 2019-2020 school year. (NT 291, 602-605; S-19)
55. During the time that the student was enrolled in the school district, the guardian failed to respond to communications, resisted efforts to schedule meetings regarding the student and failed to provide doctors' orders and other information related to nursing, prescriptions and absences. (P-2; S-6; S-26; NT 190-192, 213, 216, 292, 606-607, 705-706)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as my own legal research, I have made the following conclusions of law:

1. A parent or a local education agency may file a due process complaint alleging one or more of following four types of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq, (hereafter sometimes referred to as "IDEA"): an identification violation, an evaluation violation, a placement violation or a failure to

provide a free and appropriate public education. IDEA §615(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. The United States Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as “FAPE”) to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program is reasonably calculated to enable the child to make progress in light of the child’s circumstances. *Endrew F by Joseph F v. Douglass County School District RE-1*, 580 U.S. ___, 137 S. Ct. 988, 69 IDELR 174 (2017); *Board of Educ., etc. v. Rowley*, 458 U.S. 178, 553 IDELR 656 (1982); *KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District*, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).
3. In order to provide FAPE, an IEP must be reasonable, not ideal. *KD by Dunn v. Downingtown Area School District*, *supra*.
4. The appropriateness of an IEP in terms of whether it has provided a free appropriate public education must be determined at the time that it was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; it requires an educational plan that provides the basic floor of educational opportunity. *Ridley School District v. MR and JR ex rel. ER*, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); *DS v. Bayonne Board of Education*, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); *Mary Courtney T. v. School District of Philadelphia* 575 F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009).

5. Where a student does not avail himself of the benefits of his IEP because he is frequently absent from school for reasons not related to a disability, a local education agency cannot be found to have denied FAPE to the student. See, *SS by Street v Dist of Columbia* 68 F. Supp.3d 1, 64 IDELR 72 (DDC 9/19/14); *Nguyen v. District of Columbia*, 681 F.Supp.2d 49, 54 IDELR 18 (D.DC 2010); *District of Columbia Public Schs*, (JG) 111 LRP 60125 (SEA DC 2011).
6. For a procedural violation to be actionable under IDEA, the parent must show that the violation 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. *Ridley School District v. MR and JR ex rel. ER, supra*; IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a).
7. IDEA requires that a parent of a student with a disability be afforded meaningful participation in the IEP process and in the education of the student. *DS & AS ex rel DS v. Bayonne Bd of Educ* 602 F.3d 553, 54 IDELR 141 (3d Cir 4/22/10); *Fuhrmann ex rel Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1036, 19 IDELR 1065 (3d Cir. 1993); 34 C.F.R. § 300.501. See, *Deal v. Hamilton County Bd of Educ*, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); *JD v. Kanawha County Bd of Educ*, 48 IDELR 159 (S.D. WVa. 2007).
8. The purpose of the IDEA regulations regarding translation of certain documents and interpreters for certain spoken language for parents whose native language is not English is to ensure that parents are able to participate meaningfully in the IEP process. *TR, et al v. Sch Dist of Philadelphia*, 74 IDELR 103 (E.D. Penna. 2019). See, 34 C.F.R. §§ 300.501, 300.29, 300.9(a), 300.322(e); 300.503(c)(1)(a).

9. A school district must provide a related service to a student with a disability when the related service is necessary for the student to benefit from special education. *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S. Ct. 3371, 555 IDELR 511 (1984); *Cedar Rapids Community School District v. Garrett F*, 526 U.S. 66, 119 S. Ct. 992, 29 IDELR 966 (1999); *RG v. Hill*, 70 IDELR 41 (D. NJ 2017)(one-on-one nurse not required where not needed for student to benefit from special education); IDEA § 602(26); 34 C.F.R. § 300.34.
10. To prevail on a claim of failure to implement an IEP, a parent must show that the school district failed to implement substantial or material provisions of the IEP. *School District of Philadelphia v. Williams, ex rel. LH*, 66 IDELR 214 (E.D. Penna. 2015). See, *Van Duyn v. Baker School District*, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007).
11. A school district must "...to the maximum extent appropriate, (ensure that), children with disabilities... are educated with children who are non-disabled and that special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2); IDEA § 612(a)(5)(A); 22 Pa. Code § 14.195)
12. The Third Circuit has ruled that the least restrictive environment requirement is a substantive requirement of IDEA. *Oberti v. Board of Education*, 995 F.2d 1204, 19 IDELR 908, @n. 18 (3d Cir. 1993).
13. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of a disability be excluded from participation and/or be denied the benefits of or be

subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code § 15.1. To establish a violation of Section 504, a parent must prove (1) that the student is disabled; (2) that the student was otherwise qualified to participate in school activities; (3) that the school district receive federal funds and (4) that the student was excluded from participation in or denied the benefits of or was subject to discrimination at the school. *Ridley School District v. MR and JR ex rel. ER*, 608 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

14. A parent has a right to an independent educational evaluation if the parent disagrees with an evaluation obtained by the public agency. 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 to show that its evaluation is appropriate; or (ii) ensure that the independent educational evaluation is provided at public expense. 34 C.F.R. § 300.502(b)(1) and (2).
15. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable. *Forest Grove School District v. TA*, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (n. 11) (2009); *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010); *CH by Hayes v. Cape Henlopen Sch Dist*, 606 F.3d 59, 54 IDELR 212 (3d Cir 2010); *School District of Philadelphia v. Williams ex rel. LH*, 66 IDELR 214 (E.D. Penna. 2015); *Stapleton v. Penns Valley Area School District*, 71 IDELR 87 (N.D. Penna. 2017). See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005); *Garcia v. Board of Education, Albuquerque Public Schools*, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); *In re Student with a*

Disability, 52 IDELR 239 (SEA W.V. 2009). The conduct of the parties is always relevant when fashioning equitable relief. *CH by Hayes v. Cape Henlopen Sch Dist*, 606 F.3d 59, 54 IDELR 212 (3d Cir 2010). See, *Branham v. District of Columbia*, 427 F.3d 7; 44 IDELR 149 (D.C. Cir. 2005).

16. The IEPs developed by the school district were reasonably calculated to provide meaningful educational benefit to the student in view of the student's individual circumstances.
17. The school district afforded the student's guardian an opportunity to meaningfully participate in the IEP process and in the student's education.
18. The Multiple Disabilities Support – Functional classroom operated by the Intermediate Unit at a high school in the district is the least restrictive environment appropriate for this student.
19. The school district implemented the student's IEP in all material respects.
20. The school district did not discriminate against the student on the basis of disability in violation of Section 504.
21. The school district did not, without unnecessary delay, file for a due process hearing in response to the guardian's request for an independent educational evaluation, and, therefore, is in violation of IDEA in that respect.
22. The student's guardian obstructed and impeded provision of a free appropriate public education by the school district.

DISCUSSION

Merits

As an initial matter, the school district contends that the amended complaint filed by counsel for the guardian does not specify a violation for denial of FAPE during the 2018-2019 school year. A fair reading of the amended complaint, however, reveals that the guardian has adequately pled a denial of FAPE for the 2018-2019 school year. The school district's objection to consideration of relief for the 2018-2019 school year as beyond the due process complaint, as amended, is rejected.

It should also be noted that both parties' written closings/posthearing briefs include references to documents that are not in evidence. In the guardian's brief, there is a quotation from page 18 of exhibit P-2 which was not one of the pages of P-2 that was offered and admitted into evidence. The school district's brief includes a footnote referencing a document about homebound instruction that was not offered into evidence. These documents were not considered; this decision is based solely upon the evidence that is in the administrative record.

Has the guardian proven that the school district denied a free and appropriate public education to the student from November 17, 2017 through the end of the 2018-2019 school year by committing a procedural violation by not providing documents to the guardian translated into in Spanish?

The guardian, who is the parent for purposes of IDEA, 34 C.F.R. § 300.30(a)(3), contends that the school district violated IDEA by failing to provide documents to the guardian that were translated into Spanish, the guardian's native language.

The evidence in the record is clear, however, that the guardian and the guardian's daughter, who was also the student's aunt, informed the school district members of the student's IEP team that documents for the student should be sent home in English. The student's aunt volunteered to translate any such documents for the guardian. The guardian agreed to this procedure. Thereafter, the school district sent home documents in English. When the school district staff later learned that the student's aunt had moved out of state, the district began sending home documents that were translated into Spanish.

Given that the guardian had agreed that the district should provide documents regarding the student in English, the guardian cannot now claim a violation of the law because the documents were not translated into Spanish. The guardian agreed to the arrangement. The school district complying with its agreement to provide the guardian with documents in English does not violate IDEA.

In addition, the guardian's contention that the guardian was denied meaningful participation because of the lack of receipt of documents in Spanish is not supported by the evidence. A fair reading of the evidence in the record necessitates a conclusion that the guardian provided input and otherwise actively participated at IEP team meetings and in the education of the student.

Even assuming *arguendo*, however, that the school district's failure to send documents to the guardian in Spanish is a procedural violation, the violation is harmless. The guardian has not shown any adverse effect upon the student's education as a result of the failure to provide documents to the guardian in Spanish. Indeed, when the student was present at school, the student made progress on the student's IEP goals. Moreover, the guardian has not shown that the failure to provide documents in Spanish seriously impaired the guardian's right to participate. As has previously been stated,

the guardian fully participated in the IEP process and the student's education. The guardian's arguments concerning the alleged procedural violation of failing to provide translated documents is rejected.

To the extent that the testimony of the guardian may be inconsistent with the testimony of school district staff, the testimony of school district staff is more credible and persuasive than the testimony of the guardian because of the demeanor of the witnesses, as well as the following factors: there were numerous inconsistencies and contradictions in the guardian's testimony. For example, the guardian's testimony regarding whether there was a medical need for the student to receive education in the home is contradicted by the due process complaint filed by the guardian in this matter before an amended complaint was filed by the guardian's counsel. The testimony is also contradicted by statements from two doctor's offices. There were also inconsistencies in the guardian's testimony concerning whether the student can communicate at all. After testifying that the student could not communicate, the guardian later testified that the student could communicate through blinking. When later confronted with documents from a previous school district that stated that the guardian had told the staff of the previous district that the student does not comprehend any spoken English or Spanish, the guardian changed her testimony again. The guardian's testimony also included inconsistencies or changed testimony with regard to whether or not the student slept during the school day; whether or not the student liked chocolate milk and concerning the guardian's own health conditions, particularly whether the guardian had diabetes and whether the guardian's physical conditions made her unable to care for the student.

It is concluded that the guardian has not proven that the school district committed an actionable procedural violation by failing to provide documents translated into Spanish.

Whether the guardian has proven an actionable procedural violation involving the school district failing to implement the student's IEP by failing to provide a sufficient number of trials on IEP goals?

The guardian contends that the school district denied FAPE by failing to provide a sufficient number of trials on the student's IEP goals in order to assess the student's progress.

Applying the two-part test developed by the U.S. Supreme Court to this issue, it is clear that the guardian is not attacking the appropriateness of the student's IEP here. According to the Supreme Court, the only other way to prove a denial of FAPE would be an actionable procedural violation by the school district. The guardian has not proven an actionable procedural violation with regard to this issue.

The record evidence indicates that the guardian kept the student home on many occasions without a medical basis for doing so, including one period of six months. The excessive absences continued even after the school district alerted the student's truancy to Children and Youth. Although the student made reasonable progress when the student attended school, the student was frequently absent without a good reason. When the student was present at school, the student's IEP was implemented by the school district in all material respects.

In view of the fact that the guardian kept the student out of school so frequently, it is not reasonable for the guardian to blame the school district for the low number of trials on some of the student's IEP goals. The guardian chose to not let the student attend school. The guardian has not proven a procedural violation with regard to the number of trials on the student's IEP goals for the 2019-2020 school year.

Even assuming *arguendo*, however, that the guardian had proven a procedural violation, it is harmless. The guardian has presented no evidence linking the alleged failure to provide the trials with either the student's educational progress or the guardian's participation rights. The discussion in the last section concerning the student's educational progress and the guardian's active participation in the student's education are incorporated by reference herein.

For the reasons stated in the previous section, to the extent that the testimony of the guardian is inconsistent with the testimony of school district officials concerning this issue, the testimony of the guardian is not as credible or persuasive as the testimony of the school district staff.

The guardian has not demonstrated an actionable procedural violation with regard to an alleged failure to provide sufficient trials.

Whether the guardian has proven that the school district denied a free and appropriate public education to the student by failing to provide a one-on-one nurse as a related service?

The guardian contends that the school district denied FAPE to the student because the student's IEPs failed to require the related service of a one-on-one nurse. The guardian has not established that the student needed one-on-one nurse in order to benefit from special education.

The evidence in the record shows that the student did not need a one-on-one nurse before May 2019. Prior to that time, no doctor requested that the student be assigned a one-on-one nurse and no member of the student's IEP team felt that the student required a one-on-one nurse. The district had assigned a certified school nurse to take care of the student and a team of additional nurses was available to care for the student, if necessary. Prior to the placement of a G-tube, the student did not require regular nursing

services while at school. No evidence in the record suggests that the student's nursing needs at school were not met. The school district assigned a one-on-one nurse after receiving a doctor's order, but the guardian failed to cooperate with the district's efforts and did not sign the necessary consent forms until shortly before the first session of the due process hearing.

It is clear from the evidence in the record that the school district provided appropriate nursing services to meet the student's needs. When the student attended school without a one-on-one nurse, the student made progress on IEP goals. The guardian has not proven that the student required the related service of a one-on-one nurse in order to benefit from special education.

To the extent that the testimony of the student's guardian is inconsistent with the testimony of school district staff who testified at the due process hearing, the testimony of the guardian is not as persuasive and credible as the testimony of school district staff. The discussion in previous sections of this decision concerning the analysis of credibility factors is incorporated by reference herein.

It is concluded that the student's IEPs were reasonably calculated to provide the student with educational benefit that is appropriate in view of the student's individual circumstances. This includes the related services portions of the student's IEPs.

Whether the guardian has proven that the school district denied a free appropriate public education to the student in the least restrictive environment by failing to provide educational services to the student in the student's home?

The guardian contends that the school district denied FAPE to the student by failing to provide the student with educational services in the student's home. The guardian also contends that the failure to convene an

IEP team meeting to discuss a placement of education in the home was a procedural violation of IDEA.

It is clear from the evidence in the record, however, that the student benefitted from the multiple disabilities support - functional classroom that is operated by the intermediate unit at the school district's high school. When the student was present at school, the student made progress on the student's IEP goals. The student was able to interact with regular education students during music, library, physical education, assemblies, group sessions and monthly field trips. Clearly the least restrictive environment appropriate for this student was the Multiple Disabilities Support - Functional classroom.

The student's neurologist sent the district a temporary medical excusal form on November 12, 2018 requesting home-based schooling for the student. When school district staff contacted the neurologist's office because the form lacked complete information, they were informed that the guardian had misrepresented that the school wanted the student to be at home. The neurologist's staff told school district that the student should be in school. Two weeks later on November 28, 2018, the school district received a letter from the student's primary care provider which requested that the guardian be permitted to instruct the student at home. When school district staff contacted the primary care provider's office to obtain more information, they were informed that the guardian had asked the doctor to have the student stay home from school. The staff of the primary care provider also stated that the student should be in school.

Accordingly, the evidence in the record reveals that there was no medical basis for the guardian's desire to have the student educated in the home. The placement of education in the home is among the most restrictive placements available. In order to comply with the least restrictive environment mandate of IDEA, a school district may not educate a child in

the home except as a last resort where medical or other reasons necessitate such a restrictive environment.

In the instant case, however, the guardian has not established any medical or other reason why the student would need to be educated in the home. Instead, it appears that the guardian wishes to have the student educated at home only because the guardian does not want the student to attend school. Obviously, this is not a good reason. Indeed, the record reveals that the guardian frequently kept the student home because the weather was cold or because it was difficult to wake the student. The guardian kept the student home from school every school day for six months, from November 8, 2018 through May 6, 2019. During this six month period of absence, the neurologist's office informed the school district staff that the guardian was "adamant" that the student would not return to school. It is clear that the guardian was misusing the various policies involving educational services delivered in the home as a means to avoid sending the student to school.

Moreover, during this period of time, the guardian failed to respond to a number of requests by school district staff to convene an IEP team meeting. Given the district's efforts to convene an IEP team meeting to discuss the notes submitted by the neurologist and the primary care physician, as well as district conversations with those doctors and their staff, the district did not commit a procedural violation by failing to convene an IEP team meeting to discuss the doctor's notes.

Assuming *arguendo* that the failure to convene an IEP team meeting was a procedural violation of IDEA, however, any such procedural violation is clearly harmless. The guardian has not established that the procedural violation resulted in any deprivation of educational benefit for the student or any significant impairment of the guardian's participation rights. See discussion in the preceding sections.

To the extent that the testimony of the guardian may be inconsistent with the testimony of school district staff concerning this issue, the testimony of the school district staff is more credible and persuasive than the testimony of the guardian. The discussion in previous sections of this decision concerning the analysis of credibility factors is incorporated by reference herein.

It is concluded that the guardian has not established that the school district's failure to educate the student in the student's home was a denial of FAPE. It is clear that education in the home would not be the least restrictive environment appropriate for this student.

Whether the guardian has proven that the school district has violated IDEA by failing to file a due process complaint when it did not agree to a request for an independent educational evaluation at public expense?

On April 8, 2019, the guardian, by counsel, requested an independent educational evaluation consisting of numerous assessments. The request did not identify any evaluation by the district with which the guardian disagreed. The school district, by counsel, responded to the guardian's request on April 24, 2019 requesting certain clarifications – including a statement in the IEE request regarding the student's behaviors during the school day. The district's response notes that the guardian had unilaterally removed the student from the student's educational program at the district on November 8, 2018, and that the student has not returned to school since. The district response also requests clarification concerning whether the student would return to school so that school staff might observe the student and determine whether an evaluation would be appropriate. The district's response also notes that it had made repeated attempts to convene an IEP team meeting throughout the course of the 2018-2019 school year, but the guardian had resisted the district's requests for a meeting. The

district's response requested clarification from counsel for the guardian concerning whether the IEE requests were being withdrawn at this time in view of the discrepancy in the request for an IEE concerning whether the student was in school.

The guardian did not respond to the school district's response to the IEE request. When the guardian's original due process complaint filed pro se was amended by counsel on October 28, 2019, the complaint renewed the requests for independent educational evaluations at public expense.

The school district argues that the guardian abandoned the request for an independent educational evaluation by failing to respond to reasonable requests for clarification by the school district. The school district's position is not consistent with the requirements of IDEA, however. When a parent requests an independent educational evaluation at public expense, a school district has two choices: it must, without unnecessary delay, either file a due process complaint to defend its evaluation in a hearing or else pay for the independent educational evaluation requested. In this case, the school district did neither. Although this may seem to be a strict reading of the requirement, the regulations leave no room for a clarification process. Accordingly, the school district violated IDEA by failing to comply with the independent educational evaluation requirements.

It is concluded that the guardian has proven that the school district violated IDEA's requirements concerning independent educational evaluations by not filing a due process complaint. The relief for this violation will be discussed below.

Whether the guardian has proven that the school district violated Section 504?

The guardian contends that the school district violated Section 504, as well as IDEA. In the guardian's post-hearing brief, however, the only specific violation of Section 504 alleged are the same violations alleged under the IDEA sections of the complaint.

The only violation of IDEA that the guardian has established in this matter concerns the provisions of the independent educational evaluation regulations. Inasmuch as the IEE regulations are IDEA specific requirements and do not pertain to Section 504, the guardian has proven no specific violations of Section 504. Indeed, the record evidence includes no facts that would show discrimination on the basis of a disability or that the student was excluded from participation in or denied the benefits of an education by the school district.

To the extent that the testimony of the student's guardian may be inconsistent with the testimony of school district staff concerning this issue, the testimony of the school district staff is more credible and persuasive than the testimony of the guardian. The discussion in previous sections of this decision concerning the analysis of credibility factors is incorporated by reference herein.

Whether the school district has proven that the guardian obstructed the school district's efforts to educate the student?

The school district asserts as a defense that the guardian should be foreclosed from receiving any relief in this matter because the guardian obstructed the school district's efforts to educate the student. The evidence in the record shows that the guardian did obstruct and impede the school district's efforts to educate the student.

On numerous occasions, the guardian failed to respond to communications from the school district and ignored requests to provide consents and other information. When enrolling the student, the guardian failed to return the November 20, 2017 Permission to Reevaluate form for months, thereby delaying the district's initial evaluation of the student. The guardian also did not timely provide doctors' orders, including the order for the G-tube. Later, the guardian did not respond to requests for information required by the nursing provider.

The guardian was also repeatedly non-cooperative when school district staff tried to schedule IEP team meetings or other meetings regarding the student. The resulting delays are attributable to the guardian's failure to cooperate.

The guardian simply did not want the student to go to school. The student was frequently absent throughout the time that the student was enrolled in the district. The guardian unilaterally kept the student home from school for a six-month period during the 2018-2019 school year. The guardian told the neurologist during this long period where the student was not receiving any educational services that the guardian was "adamant" that the student would not attend school again. Perhaps most significantly, the guardian attempted to justify this inappropriate action by providing inaccurate or misleading information to the student's neurologist and primary care physician in order to obtain doctor's notes requesting that the student receive educational services at home. When the neurologist and the primary care physician learned that the guardian and not the school district was behind the request for educational services in the home, they both informed school district staff that the student should be attending school. The guardian had obtained the doctors' requests inappropriately. It was only after the school district had reported the student's truancy to Children and Youth that the guardian finally returned the student to school. The student's

irregular attendance continued even after the student's return. In addition, the guardian without explanation failed to send the student to extended school year services in either the summers of 2018 or 2019. The student's extensive absences from school impaired the student's progress on the student's IEP goals and adversely affected the student's education.

It is clear from the evidence in the record that the guardian obstructed and impeded the school district's efforts to educate the student. The guardian resisted scheduling meetings, failed to provide necessary information to the school, kept the student home without a good reason and misrepresented facts to medical professionals in an attempt to justify keeping the student out of school. The school district has shown that these unfortunate and inappropriate actions by the guardian obstructed and impeded the school district's efforts to educate the student and they should be taken into account when balancing the equities in fashioning appropriate relief.

To the extent that the testimony of the student's guardian may be inconsistent with the testimony of school district staff who testified at the hearing, the testimony of school district staff is more credible and persuasive than the testimony of the student's guardian. The more detailed credibility analysis in previous sections of this decision are incorporated by reference herein.

RELIEF

All relief under IDEA is equitable in nature, and an IDEA hearing officer has broad equitable powers to remedy a violation of the Act.

In the instant case, the only violation of the law proven by the guardian was that the district did not comply with the requirements for responding to a request for an independent educational evaluation at public expense. On the other hand, the district proved that the guardian obstructed

the school district's efforts to educate the student and was unresponsive to requests to schedule meetings or provide information. This fact pattern, although in the context of an evaluation violation and not a denial of FAPE {See 34 C.F.R. § 300.507(a)}, is analogous to a harmless procedural violation. The guardian has not identified any evaluation by the school district with which she disagrees. More importantly, the evidence in the record shows that the evaluations conducted by the school district were appropriate and consistent with the requirements of IDEA. The student and guardian have not been harmed as a result of the violation.

The request for the IEE was made at a time when the student had been removed from school by the guardian for five months. It is clear that the guardian did not want the student to attend school. Moreover, the guardian and her counsel failed to respond to the reasonable and legitimate questions asked by the district in response to the IEE request. An order requiring an independent educational evaluation at public expense under these circumstances would not be fair or appropriate. Accordingly, it is concluded that a balancing of the equities does not favor the guardian with regard to the issuance of any individual relief for the guardian or the student.

The appropriate relief for the violation of the IEE requirements in this case is that the school district be ordered to conduct training for district staff who are involved in responding to independent educational evaluation requests by parents of students with a disability.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that:

1. Within 180 days of the date of this decision, the school district shall conduct training for all staff who participate in decisions about requests for independent educational evaluation at public expense

concerning the requirements of IDEA in responding to such requests,
and

2. All other relief requested by the instant due process complaint is
hereby denied.

IT IS SO ORDERED.

ENTERED: June 12, 2020

James Gerl

James Gerl, CHO
Hearing Officer