

DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT  
OFFICE OF COMPLIANCE AND REVIEW

---

STUDENT,  
through the Parent,<sup>1</sup>

Petitioner,

v

James Gerl. Hearing Officer  
Case No. 2009-1242

DISTRICT of COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

---

2009 OCT 23 PM 2:39  
OFFICE OF COMPLIANCE AND REVIEW

**HEARING OFFICER DECISION**

**BACKGROUND**

The instant due process complaint was filed on August 31, 2009. This matter was assigned to this hearing officer on September 3, 2009. A prehearing conference by telephone conference call was convened on September 22, 2009. The due process hearing was held at the Student Hearing Office on October 13, 2009. The due date for the Hearing Officer Decision is October 23, 2009.

**JURISDICTION**

This proceeding was invoked in pursuant to the provisions of the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia

---

<sup>1</sup> Personally identifiable information (for the student, parent and witnesses called at the hearing) is provided in Attachment A and must be removed prior to distribution of this decision. 20 USC §1232g; and 20 USC §1417(c).

("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

### PRELIMINARY MATTERS

All proposed exhibits and testimony received into evidence and all supporting arguments submitted by the parties have been considered. To the extent that the evidence and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

The start of the due process hearing of this matter was delayed by approximately ninety minutes because the parents' attorney failed to appear. When parents' counsel did not arrive at the hearing, the hearing officer telephoned counsel, who stated that he had filed a withdrawal of this and another hearing scheduled for the same day. After a short telephone discussion, counsel for petitioner decided to rescind the withdrawal. Upon arriving at the hearing, petitioner's counsel provided a handwritten document rescinding the withdrawal. The hearing officer permitted the hearing to go on but agreed with counsel for the respondent that the action of petitioner's counsel had unduly protracted the due process hearing herein.

The respondent then objected to the convening of the due process hearing on the basis that the resolution period had not been concluded because the parties were recently pursuing settlement discussions flowing from discussions at the resolution meeting. That objection was overruled. The parties agreed that a

resolution meeting had been conducted. That the resolution meeting must be held, subject to certain specific exceptions, is the only prerequisite to hearing. It is not required that all settlement discussions be completed. 34 C.F.R. §300.510. Accordingly, Respondent's motion was denied and the hearing proceeded.

### **ISSUES PRESENTED**

The following two issues were identified by counsel at the prehearing conference and evidence concerning these issues was heard at the due process hearing:

1. Whether Respondent failed to evaluate the student on a timely basis in all areas of suspected disability; and
2. Whether Respondent failed to convene an MDT and/or IEP team to develop an IEP with an appropriate placement.

It should be noted that at the prehearing conference, Petitioner also identified an issue concerning whether Petitioner and counsel were denied access to certain educational records. At the outset of the due process hearing, counsel for petitioner withdrew this issue and no evidence concerning this issue was presented at the hearing.

### **FINDINGS OF FACT**

Based upon the evidence in the record, the hearing officer has made the following findings of fact:

1. Petitioner was born on January 26, 2002. (Petitioner Exhibit 3) (References to exhibits shall hereafter be referred to as "P-1," etc. for the petitioner's

exhibits, "R-1," etc. for the respondent's exhibits and "HO-1," etc. for hearing officer exhibits)

2. Petitioner attends an elementary school at Respondent and is now in second grade. Previously he had been held back a year and repeated first grade in elementary school at the request of his mother. (Testimony of mother; P-3) (References to testimony at the hearing is hereafter designated as "T")
3. On April 23, 2009, the petitioner's team met and referred him for evaluations in areas of suspected disabilities. The team referred Petitioner for evaluations of his needs in the following areas: speech, language, social history, psychological and educational. The parents consented to the evaluations on the same date, April 23, 2009. (P-5)
4. The speech-language evaluation report was issued on July 14, 2009. The report identified difficulties and delays that may inhibit Petitioner's academic performance in certain ways. (R-A)
5. The educational needs evaluation report was issued on May 13, 2009. The evaluation found low-average performance in mathematics and math calculation skills and low performance in broad reading, written language and written expression. (R-2)
6. The psychological evaluation report was completed on May 22, 2009. The evaluation found a full-scale I.Q. within the average range (84) and the report made specific recommendations (P-4)
7. The social history evaluation was completed on June 4, 2009. (R-4)
8. Petitioner's eligibility team met on June 4, 2009 and determined that the student had a specific learning disability and found him to be eligible for

- special education and related services. The eligibility committee referred the student for an occupational therapy evaluation on the same date (R-4)
9. The occupational therapy evaluation was completed by October 13, 2009, the date of the due process hearing. (Stipulation by the parties at the outset of the due process hearing)
  10. Petitioner's IEP team met on June 5, 2009 and developed an IEP for Petitioner. Said IEP places the student in a general education classroom with certain accommodations, with the exception of fifteen (15) hours per week during which the student receives specialized instruction in a resource room (P-3)
  11. The IEP team determined to reconvene on September 29, 2009 but was unable to do so because Respondent's staff had a scheduling conflict. (T of P's mother; T of R's special education coordinator)
  12. The IEP team meeting was rescheduled for October 8, 2009. That meeting was cancelled because the petitioner's educational advocate had a scheduling conflict. (T of R's special education coordinator; T of P's mother)
  13. Petitioner is making educational progress under his IEP. (T of R's special education coordinator.)
  14. Petitioner requires approximately thirty (30) minutes of occupational therapy and approximately forty-five (45) to sixty (60) minutes of speech/language therapy in order to continue to benefit from the special education provided for in his IEP, but his IEP team has not been able to meet and consider the speech/language and occupational therapy evaluations since they were completed. (T of R's special education coordinator)

15. The untimeliness of the occupational therapy evaluation did not result in any educational harm to Petitioner (Record as a whole)
16. Because the occupational therapy evaluation was not overdue until more than a month after the due process complaint herein was held, equitable considerations preclude compensatory education as a remedy. (Record as a whole)
17. The parties hereto have not embraced the collaborative nature of the IDEA process (Record as a whole)

#### CONCLUSIONS OF LAW

1. Petitioner's counsel unnecessarily protracted the due process hearing herein by appearing late for the hearing. The Individuals with Disability Education Act, 20 U.S.C. §§1400 et seq. (hereafter sometimes referred to as "IDEA") §615(f); 71 Fed. Register No. 156 at p.46704-466705 (OSEP April 14, 2006).
2. The recent occupational therapy evaluation report for Petitioner was not timely completed. D.C. Code §38-2561.02(a).
3. The other evaluations complained of herein were timely completed and properly conducted and considered by Respondent. D.C. Code §38-2561.02(a); IDEA §614; 34 C.F.R §§300.301, 300.304-300.305.
4. Respondent properly utilized the data and information resulting from the evaluations of Petitioner to determine eligibility and then develop an appropriate IEP for the petitioner that was reasonably calculated to confer educational benefit and provide a free and appropriate public education. . . IDEA §614; 34 C.F.R §§300.306 and 300.320 through 300.327; Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982). See

Braham ex rel Braham v. District of Columbia, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 10/25/2005).

5. Subsequent to the development of the Petitioner's IEP, Respondent's staff determined that in addition to the special education provided by the student's IEP, the student needs certain amounts of occupational therapy and speech/language therapy as related services to continue to benefit from his IEP. Consequently, the petitioner's IEP team must be reconvened to reconsider the occupational therapy and speech/language evaluations of Petitioner. IDEA §§602.26, 614; 34 C.F.R §§300.34(a), 300.304-305, 300.320(a)(4).
6. The IEP process is meant to be a collaborative and cooperative process. Shaffer v. Weast, 546 U.S. 49; 44 IDELR 150 (U.S.S.Ct. 11/14/2005). It would run counter to said collaborative process to award relief to parents who file a due process complaint before the school district has an opportunity to do what it is required to do under the Act.
7. To the extent that Respondent committed a procedural violation by not completing the occupational therapy evaluation of the petitioner on a timely basis, Petitioner has failed to demonstrate that such violation has resulted in any educational harm to Petitioner and therefore Petitioner is not entitled to any relief as a result of the violation. Lesesne ex rel BF v. District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 5/19/2006); See IDEA §615(f)(3)(E)(ii); Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/2005).

## DISCUSSION

### Merits

Issue No. 1: Whether Respondent failed to evaluate the student on a timely basis in all areas of suspected disability.

In Washington, D.C., the law requires that Respondent "...shall assess or evaluate a student who may have a disability and who may require special education services within 120 days of the date that the student was referred for an evaluation or assessment." D.C. Code §38-2561.02(a). The federal regulations expressly permit a state education agency to establish a timeframe for the completion of an evaluation. 34 C.F.R. §300.301(c)(1)(ii).

In the instant case, the record is clear that the student was referred for evaluations on April 23, 2009, when the student's team met and identified areas in which to evaluate him for suspected disabilities. At that time, the student was referred for educational, speech/language, social history and psychological evaluations.

These evaluations were thus due to be completed on or before August 21, 2009, which is 120 days after the date of referral. The speech/language evaluation report was issued on July 14, 2009. The educational evaluation report was issued on May 13, 2009. The psychological evaluation was completed on May 22, 2009. The social history evaluation was completed on June 4, 2009. None of these evaluations were untimely.

At a meeting of the student's eligibility committee on June 4, 2009, the team found the student eligible and also referred him for an occupational therapy evaluation. The occupational therapy evaluation was due to be completed by October 2, 2009, or 120 days from the date of referral. The parties stipulated at

the outset of the due process hearing on October 13, 2009, that the occupational therapy evaluation had been very recently completed. Clearly, this evaluation was not timely, and Respondent violated IDEA by failing to timely evaluate the petitioner for his occupational therapy needs.

The relief, if any, that should be awarded for this violation is discussed in a later section of this Decision.

Petitioner has prevailed on this issue as to the timeliness of the occupational therapy evaluation. The respondent has prevailed as to the timeliness of the other evaluations for which the student had been referred.

Issue No. 2: Whether Respondent failed to convene an MDT or IEP team and develop an IEP with an appropriate placement.

Respondent is required to utilize the data and information learned from assessments or evaluations to determine eligibility and then, if a student is eligible, develop an appropriate IEP. See 34 C.F.R. §§300.306 and 300.320 through 300.307, and the corresponding sections of IDEA.

Although issues such as these would be considered premature prior to an eligibility determination, this student has been found to be eligible.

In the instant case, the eligibility/MDT team was convened on June 4, 2009 and determined that the student is eligible because he has a specific learning disability. On June 25, 2009, the student's IEP team was convened and it developed an IEP for the student, placing him in a general education classroom with certain accommodations, with the exception of fifteen (15) hours per week during which the student receives specialized instruction in a resource room.

The IEP team determined to reconvene on September 29, 2009 to consider the speech/language evaluation report and the occupational therapy report. The September 29, 2009 IEP team meeting was cancelled because personnel of Respondent were not available. The meeting was rescheduled for October 8, 2009. The October 8, 2009 meeting was cancelled because Petitioner's advocate had a scheduling conflict. Both cancellations came at the last minute and they reflect badly upon the enthusiasm of the participants for the important collaborative process underlying IDEA. See Shaffer v. Weast, 546 U.S. 49; 44 IDELR 150 (U.S. S.Ct. 11/14/2005).

In order to provide a Free and Appropriate Education (hereafter "FAPE") under the IDEA, an IEP must be developed under the procedures established by the Act, and the IEP must be reasonably calculated to provide educational benefit. Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982). See Braham ex rel Braham v. District of Columbia, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 10/25/2005).

In the instant case, it was the undisputed testimony of the special education coordinator called as a witness by the respondent that the student was making educational progress under his IEP. Nonetheless, the special education coordinator also testified that it had been the intention of Respondent's staff to add certain related services to the student's IEP at the IEP team meetings that had been scheduled for September 29 and October 8. Accordingly, it must be concluded that Respondent concedes that the student needs approximately thirty minutes per week of occupational therapy and approximately forty-five to sixty minutes of speech/language therapy to continue to benefit from the special

education provided in his IEP. See 34 C.F.R. §300.34(a) and the related portions of IDEA.

Nonetheless, the failure to convene the IEP team was the result of the inability of both parties to get the appropriate persons to the IEP team meetings. Accordingly, it is concluded that FAPE for the student requires the IEP team to meet and consider the admitted need of the student for related services of speech/language and occupational therapy. Otherwise, the student's IEP provided FAPE and an appropriate placement.

Petitioner's counsel also appears to be making an argument that the student's report cards for previous years should have triggered a child find obligation on the part of Respondent. The evidence submitted, two report cards, was vague, however, and does not support the conclusion that a child find obligation had been triggered. The references to the benefits of a tutor were made by the student's teacher about a month before the referral for evaluations and does not substantially affect the timeliness of the evaluations or otherwise affect the rights of the student herein. This argument is not supported by the record evidence, and it is rejected.

On this issue the parent prevailed to the extent that there will be an order requiring the IEP team to meet and consider the addition of the needed related services of speech/language and occupational therapy to the student's IEP. Otherwise, Respondent has prevailed with regard to this issue.

#### Relief

The allegations of the complaint concerning untimely evaluations were sustained only to the extent that the occupational therapy evaluation was late.

Counsel for the petitioner was asked, beginning at the prehearing conference herein and continuing through the hearing, to put on evidence of any educational loss or substantive harm sustained by the student as a result of any procedural violation alleged herein. There are two reasons for the request for evidence regarding the impact of any late evaluations upon the education of the student. First, a late evaluation is a procedural error. In order for a procedural error to be actionable, additional evidence is required. Specifically, a party must show that a procedural violation impeded FAPE, significantly impeded the parents' opportunity to participate in the process or caused a deprivation of educational benefits. IDEA §615(f)(3)(E); 34 C.F.R. §300.513(a)(2); Lesesne ex rel BF v. District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 5/19/2006).

Second, in the District of Columbia Circuit, it is required that any award of compensatory education be based upon analysis of the educational harm suffered by a student as a result of a violation of IDEA. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/2005).

In the instant case, the only evidence or argument provided by the petitioner's counsel concerning educational harm concerns a sentence in the speech/language evaluation that notes that the student's speech/language delays "...may inhibit his academic performance...."

This argument is rejected. First, the speech/language evaluation was not untimely. Only the occupational therapy evaluation was untimely, and Petitioner produced no evidence that the untimeliness of the occupational therapy evaluation caused any educational harm to the student.

Moreover, compensatory education is equitable in nature. Reid, supra. In the instant case, the occupational therapy evaluation was not due until October

2, 2009, thirty-two days after the due process complain had been filed herein. It would not be equitable to award relief for a due process complaint that was prematurely filed. Such relief would also thwart the collaborative relationship between parents and school districts contemplated by IDEA. Shaffer v. Weast, supra. Accordingly, no relief is awarded for the untimely occupational therapy evaluation.

Concerning the second issue, however, it is clear that an order requiring the IEP team to meet and discuss the petitioner's speech/language and occupational therapy needs is needed. Although two meetings of the team were scheduled before the hearing, each party had a scheduling conflict that necessitated cancellation of the meetings. The parties need to schedule and have the IEP team meeting.

The special education coordinator called as a witness by the respondent testified in response to questions by the hearing officer that the student requires approximately thirty minutes per week of occupational therapy and between forty-five and sixty minutes per week of speech/language therapy as related services in order to continue to benefit from his special education program. Thus, it is clear that the petitioner's IEP team needs to meet and discuss his related services needs. Otherwise, there has been no showing by petitioner of a denial of FAPE. With the exception of an order requiring the petitioner's IEP team to meet, no other relief requested by Petitioner is warranted.

**ORDER**

Based upon the foregoing, the following is HEREBY ORDERED:

1. Unless the parties agree otherwise, Respondent shall convene Petitioner's IEP team within forty-five days of the date of this Hearing Officer decision in order to consider any appropriate changes to the petitioner's IEP as a result of the reports of the previously conducted speech/language and occupational therapy evaluations of Petitioner.
2. All other relief requested in the foregoing due process complaint is hereby denied.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).

Date Issued: October 23, 2009

s/ *James Gerl*  
James Gerl  
Hearing Officer