

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 1st Street, N.E., 2nd Floor
Washington, DC 20003

STUDENT,¹
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: January 28, 2011

Hearing Officer: James Gerl

Case No:

Hearing Date: January 11, 2011

Room: 2007

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HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on November 16, 2010. The matter was assigned to this hearing officer on November 17, 2010. A resolution session was not convened for this matter. Counsel submitted a written waiver of the resolution session signed by both attorneys on January 11, 2011. The 30-day resolution period expired on December 16, 2010. The parties agreed that the decision of the hearing officer is due on or before January 30, 2011. A prehearing conference was

¹ Personal identification information is provided in Appendix A.

convened on December 23, 2010. The due process hearing was convened at the Student Hearing Office on January 11, 2011. The hearing was closed to the public. The student's parent did not attend the hearing but testified by telephone, and the student did not attend the hearing. One witness, the parent, testified on behalf of the Petitioner and one witness testified on behalf of the Respondent. Petitioner's exhibits 1-16 were admitted into evidence at the hearing. Respondent's exhibits 1-15 were admitted into evidence at the hearing.

Counsel for Petitioner withdrew an alleged violation regarding an IEP meeting being held without the parent's participation at the outset of the due process hearing. Accordingly, said issue is not considered in this decision. In addition, no evidence was submitted at the due process hearing pertaining to the issues mentioned in the complaint regarding evaluations other than reevaluations. Accordingly, the issues pertaining to evaluations other than reevaluations are deemed to have been withdrawn and are not considered in this decision.

JURISDICTION

This proceeding was invoked pursuant to the provisions of the Individuals With Disabilities Education Act (hereafter sometimes referred to as "IDEA"), 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title 5-E of the District of Columbia (hereafter sometimes referred to as "District" or "D.C.") Municipal Regulations (hereafter sometimes referred to as "DCMR"); 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.

ISSUES PRESENTED

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

1. Did Respondent violate IDEA by failing to have an IEP in place at the beginning of the 2010-2011 school year when the student began attending Respondent's high school?
2. Did Respondent violate IDEA by failing to conduct a triennial speech reevaluation?
3. Did Respondent violate IDEA by failing to implement the student's IEP to the extent that Respondent did not provide a dedicated aide for the student during the 2010-2011 school year?

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, I find the following facts:

1. The student was born on _____ (P-4) (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 the hearing officer exhibits; references to testimony at the hearing is hereafter designated as “T”.)

2. The student’s sister was awarded custody of and educational decision making power for the student by the Superior Court of the District of Columbia Family Court – Juvenile Branch in 2010. She served as the student’s educational decision maker at the time of his reentry into school at Respondent near the beginning of the 2010-2011 school year. (T of parent; R-2)
3. On April 6, 2007, Respondent conducted a speech language evaluation of the student. The history portion of the report of the evaluation shows that the student frequently missed class, roamed the hallways or refused to come to therapy. The report notes that the student either refuses therapy or insists that it be on his terms when he wants to receive it. The report recommended that the student no longer presented as a student in need of formal language therapy. The report notes that his language abilities were commensurate with his I.Q. and that his refusal for therapeutic intervention made him a candidate for dismissal from formal language therapy at that time. The report

went on to make specific recommendations concerning vocabulary building and other specialized education classroom techniques for the student. (P-6; R-11)

4. Respondent convened an IEP team meeting for the student on December 10, 2008. Said IEP determined goals for the student in the areas of mathematics, reading, written expression, speech language and emotional, social and behavior development, as well as present levels of performance for each area in which a goal was selected. The IEP provided a number of accommodations, including: small group work and defining appropriate behavior, test administration over several days and at the best time for the student, breaks and extended times on subtests, extra time for completion of tasks, breaks between work periods, reduced visual stimuli, seating in a low traffic area, small group testing, location with minimal distractions, repetition of directions, simplification of oral directions, interpretation of oral directions, the reading of test questions and translation of words for math only, assisted reading of comprehension passages and assisted reading of entire comprehension tests. Said IEP called for specialized instruction

outside the general education environment for 25.5 hours per week. Said IEP called for related services of speech language pathology 60 minutes per week, and behavioral support services 60 minutes per week. Said IEP called for the student to have a dedicated aide. (P-4; R-7)

5. The student did not attend school at all during the 2009-2010 school year. (T of parent)
6. The parent enrolled the student at Respondent's high school at or near the beginning of the 2010-2011 school year. (T of parent; T of Respondent's special education coordinator)
7. At or near the time the student was enrolled in Respondent's high school for the 2010-2011 school year, the parent had a conversation with the Respondent's special education coordinator that lasted over an hour. The parent and the special education coordinator agreed that because the student had been out of school for a whole year, Respondent would implement the December 10, 2008 IEP for the student until Respondent had an opportunity to observe the student in school and assess his needs. In addition, the parent had other conversations regarding the student's

educational program and his progress with other staff of Respondent. (T of Respondent's special education coordinator)

8. Respondent did not have an IEP in place for the student when he enrolled in Respondent's high school. The staff members of Respondent who were on the student's IEP team developed a draft IEP for the student on October 19, 2010, but the parent and student did not attend the meeting and an IEP was not finalized for the student. (R-8; T of Respondent's special education coordinator)
9. Respondent conducted educational testing upon the student and conducted a vocational assessment of the student during the 2010-2011 school year. (T of Respondent's special education coordinator)
10. Respondent did not conduct further testing of the student's speech language needs or have any team meet to determine whether any changes to his speech language therapy as a related service were necessary during the 2010-2011 school year. (T of parent; T of Respondent's special education coordinator)

11. Respondent largely implemented the student's December 10, 2008 IEP during the 2010-2011 school year. Respondent overlooked the portion of the IEP that provided for a dedicated aide for the student. Respondent delivered counseling services as a related service and it delivered at least some speech language therapy as a related service. (T of Respondent's special education coordinator; R-4)

12. During the 2010-2011 school year, the student was doing well academically when he attended class. During the first advisory marking period in the 2010-2011 school year, the student received the following grades: A- in World History, A- in Geography; C in Learning Lab; D in Algebra I; and C in Writing Workshop. During the first reporting period for the 2010-2011 school year, the student made progress on all four of his IEP goals that were introduced during that period. On October 8, 2010, the student won Student of the Week honors in his history class for doing a "great job." The student made academic progress during the 2010-2011 school year. (T of Respondent's special education coordinator; T of parent; R-13, R-14; P-12)

13. The student stopped coming to school in mid-November 2010 and he has been absent from school from then until the date of the due process hearing herein. (T of Respondent's special education coordinator; R-12)
14. The student's parent meaningfully participated in the student's education at Respondent. (Record evidence as a whole)
15. The student suffered no educational harm during the 2010-2011 school year. (Record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the evidence in the record, the arguments of counsel, as well as my own legal research, I make the following Conclusions of Law:

1. A parent is defined under IDEA as follows:

(a) Parent means--

(1) A biological or adoptive parent of a child;

(2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(5) A surrogate parent who has been appointed in accordance with Sec. 300.519 or section 639(a)(5) of the Act.

(b) (1) Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

(2) If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this section.

34 CFR § 300.30; See IDEA, § 602(23).

2. For purposes of the instant case, the student's sister has the legal right to make educational decisions on his behalf pursuant to an order of the Superior Court of Washington, D.C. - Family Court – Juvenile Branch. Accordingly, the Petitioner's sister is his parent for purposes of IDEA. References to "parent" throughout this decision refer to the student's sister.
3. The United States Supreme Court has established a two-part test for determining whether a school district has provided a free and appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be a

determination as to whether the schools have complied with the procedural safeguards as set forth in the Individuals With Disabilities Education Act, 20 U.S.C. §§1400 et seq. (hereafter sometimes referred to as "IDEA") and an analysis of whether the Individualized Educational Plan (hereafter sometimes referred to as "IEP") is reasonably calculated to enable a child to receive some educational benefit. A school district is not required to maximize the potential of a student or to guarantee his success. Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkham v. Superintendent D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

4. A school district is required to have an IEP in place at the beginning of a school year. IDEA § 614(d)(2)(A); 34 CFR § 300.323(a).
5. A school district is required to conduct a reevaluation process for a student with a disability at least every three years, unless the parent and the LEA agree that a reevaluation is unnecessary. The reevaluation process does not necessarily require that each evaluation be repeated, but it does require a review of existing

evaluation data and a decision as to what additional evaluation data, if any, are required to determine whether the student is still eligible and what the child's current educational needs are. IDEA §614(a)(2); 34 CFR §§ 300.303, 300.305(a)

6. A school district is required to implement all material provisions of a student's IEP. Catalan v. District of Columbia, 47 IDELR 223 (D.D.C. 2007); See VanDuyn v. Baker School District, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007).
7. The process of the development of an IEP under IDEA requires a collaborative relationship between the parent and the school district. Shaffer v. Weast, 546 U.S. 49; 44 IDELR 150 (U.S.S.Ct. 11/14/2005).
8. To the extent that the violations of IDEA are procedural violations, they are only actionable when they cause educational harm to the student or seriously impair the parent's right to participate in the IEP process. Lesesne ex rel BF The District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.D.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii). In the instant case, to the extent that Respondent committed procedural violations of IDEA, the

student suffered no educational harm during the 2010-2011 school year and the student's parent participated meaningfully in the process.

9. In the instant case, Respondent did not deny FAPE to the student. Respondent has not violated IDEA.

DISCUSSION

Issue No. 1: Did Respondent fail to have an IEP in place for the student at the beginning of the 2010-2011 school year?

IDEA requires that a school district have an IEP in place for students with disabilities at the beginning of a school year. IDEA § 614(d)(2)(A); 34 CFR § 300.323(a).

In the instant case, it is clear that Respondent did not have an IEP in place for the student at the beginning of the 2010-2011 school year. However, the parent conceded during her testimony on cross-examination that she had held the student out of school for the entire 2009-2010 school year.

When the parent reenrolled the student in one of Respondent's high schools for the 2010-2011 school year, it was the unrebutted testimony of Respondent's special education coordinator that the parent made an agreement with Respondent that the schools would continue to implement the 2008 IEP for the student until the student's needs could be determined. It was the testimony of the special education coordinator that this conversation took over an hour and that she and the parent had an extensive discussion regarding the services the student would receive during the 2010-2011 school year and a plan for future assessments. Because the student had been out of school for an entire school year, the parent agreed with this arrangement. The testimony of the special education coordinator in this regard was credible and persuasive.

After the beginning of the 2010-2011 school year, Respondent conducted some educational testing and a vocational assessment of the student. Respondent prepared a draft IEP for the student on October 19, 2010, but the parent and the student did not attend the IEP meeting, and an IEP was not finalized.

Under these circumstances, it must be concluded that Respondent has not violated IDEA. IDEA assumes a collaborative relationship between the parent and the school district. Shaffer v. Weast, 546 U.S. 49; 44 IDELR 150 (U.S.S.Ct. 11/14/2005). Given that the parent agreed that Respondent could implement the previous IEP until the student was assessed and that Respondent made a diligent effort to convene an IEP meeting and drafted a draft IEP prior to the meeting, it is clear that Respondent attempted in good faith to comply with the requirements of the Act as they pertain to this student as well as to live up to the agreement made by the parties. Accordingly, Respondent's failure to have an IEP in place at the beginning of the school year or as soon thereafter as the student enrolled cannot be construed to be a violation of the Act.

Moreover, even assuming arguendo that the failure by Respondent to have an IEP in place as soon as the student enrolled in Respondent's school, was a violation of the Act, such a violation is clearly a procedural violation of IDEA. Accordingly, such a violation is only actionable if it caused education harm to the student or seriously impaired the parent's right to participate in the IEP process. Lesesne ex rel BF The District

of Columbia, 447 F.3d 828, 45 IDELR 208 (D.D.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii). In the instant case, the parent clearly had meaningful participation. She participated in a meeting with the special education coordinator at the student's school that covered the educational plan for the student and lasted over an hour. In addition, she had other conversations with the special education coordinator and others at the school. She was also invited to an IEP team meeting to discuss the evaluation results and possibly make changes to the student's IEP.

Moreover, it is abundantly clear from the record that the student was not harmed by the procedural violation by Respondent. The parent conceded during her testimony that the student was doing well in school and showing progress. This testimony was corroborated by the testimony of Respondent's witness, the special education coordinator, who testified that the student did well when he attended class. The student's progress is also confirmed by the documentary evidence. During the first advisory marking period for the 2010-2011 school year, the student received grades of A-, A-, C, D and C. During the same period, he was making progress on all four of his IEP goals that had

been introduced. In fact, the student was named Student of the Week for doing a great job in his history class in October 2010.

The argument posed by the parent during her testimony that the student is doing well now and showing progress in his academic work during the period of time that he spent at school during the current school year, but that without dramatic changes to his education, he will not do well in the future, is specifically rejected. Respondent is not required to maximize the potential of a student or ensure his future success. Instead, respondent is only required to develop an IEP that is reasonably calculated to confer current educational benefit. Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkham v. Superintendent D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). Moreover, the argument is based upon speculation, and it is not credited.

Accordingly, it must be concluded that the alleged procedural violation, if in fact it was a violation at all, by Respondent did not result in any educational harm to the student.

Based on the foregoing, it is concluded that Petitioner has not carried its burden with respect to this issue. Respondent has prevailed on this issue.

Issue No. 2: Did Respondent violate IDEA by failing to conduct a triennial speech reevaluation?

A school district is required to conduct a reevaluation process for a student with a disability at least every three years, unless the parent and the LEA agree that a reevaluation is unnecessary. The reevaluation process does not necessarily require that each evaluation be repeated, but it does require a review of existing evaluation data and a decision as to what additional evaluation data, if any, are required to determine whether the student is still eligible and to determine what the child's current educational needs are. IDEA §614(a)(2); 34 CFR §§ 300.303, 300.305(a)

Petitioner contends that Respondent violated IDEA because the last speech language evaluation of the student occurred on April 6, 2007 and that the student was not reevaluated again within three years thereof.

It is concluded from the testimony of all witnesses, that the parent had a conversation with the special education coordinator of Respondent when he was enrolled in Respondent's school. Because of the collaborative nature of IDEA, it is concluded that Petitioner cannot now complain about the failure to reevaluate the student when she agreed to an education and reevaluation plan for the student with the special education coordinator previously. See discussion of Issue No. 1 above. In addition, the discussion between the parent and the special education coordinator was equivalent to an agreement to defer the triennial review process that is permitted under IDEA.

Moreover, it must be noted that the parent held the student out of school for the previous school year. This is not a case where the school district had the child for three years but failed to conduct a reevaluation process. Respondent only had the child for two of the previous three years.

In addition, the premise of Petitioner's complaint seems to be that each evaluation instrument must be repeated every three years. This is not required by the law. Instead, a school district is required, unless the parent and it agree otherwise, to conduct a reevaluation process for

each child with a disability every three years which includes a review of evaluation data and a determination as to what additional data is required.

However, even assuming *arguendo* that the failure to conduct a new speech evaluation within three years of the previous evaluation was a violation of IDEA, it must be concluded that it was clearly a procedural violation. In order to be viable, a procedural violation must either seriously impair the parent's right to participate in the process, or else have an adverse impact upon the student's education. In this case, neither consequence occurred as a result of the procedural violation and, accordingly, Respondent has not committed an actionable violation of IDEA. See, citations and discussion regarding procedural violations in the discussion of Issue No. 1 above.

In view of the foregoing, it is concluded that Petitioner has failed to meet her burden on this issue. Respondent has prevailed with regard to this issue.

Issue No. 3: Did Respondent violate IDEA by failing to implement the student's IEP to the extent that it did not provide a dedicated aide for the student?

A school district must implement all substantial and material provisions of the student's IEP. IDEA § 614; Catalan v. District of Columbia, 47 IDELR 223 (D.D.C. 2007); see VanDuyn v. Baker School District, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007).

It should be noted that Petitioner presented some evidence at the due process hearing concerning allegations that Respondent did not implement speech language and counseling related services contained on the student's IEP. However, such issues were not stated in the Petitioner's due process complaint and, therefore, they are not considered here. IDEA §615(f)(93)(B); 34 CFR § 300.511(d).

In the instant due process complaint, Petitioner alleged that Respondent failed to provide a dedicated aide for the student. Respondent's special education coordinator conceded at the due process hearing that Respondent committed an oversight and failed to implement the portion of the 2008 IEP for the student that required him to have a dedicated one on one aide.

It is concluded, however, that Respondent did not violate IDEA by failing to provide a dedicated aide for the student. The student's parent had a long conversation with Respondent's special education coordinator and agreed to a specific education plan, as well as an evaluation schedule for the student. Given this agreement, it would not be consistent with the collaborative nature of IDEA to find a violation on these facts. See discussion and citations contained in the discussion of Issue No. 1 above.

Moreover, even assuming arguendo that Respondent's action in not providing a dedicated aide for the student could be construed to be a violation of IDEA, it is clearly a procedural violation. Accordingly, it is not actionable unless it results in either a significant impairment of the parent's right to participate or in educational harm to the student. In this case, the parent clearly had meaningful participation in the process and the student suffered no educational harm. See citations and discussion concerning procedural violations contained in the discussion of Issue No. 1 above.

In view of the foregoing, it is concluded that Petitioner has failed to meet her burden on this issue. Respondent has prevailed with regard to this issue.

ORDER

In view of the foregoing, it is HEREBY ORDERED that the due process complaint in this matter is dismissed with prejudice. None of the relief sought by the Petitioner herein is awarded.

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: January 28, 2011

/s/ **James Gerl**
James Gerl,
Hearing Officer