

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

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

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through

Petitioner,

v

Respondent.

Date Issued: June 5, 2010

Hearing Officer: Kimm Massey, Esq.

HEARING OFFICER DETERMINATION

BACKGROUND

Student is classified with the disability of other health impairment (for ADHD).

On March 26, 2010, Petitioner filed a Complaint against Respondent Charter School and DCPS, alleging that Respondents denied Student a FAPE by failing to develop a BIP, failing to provide an appropriate IEP and appropriate special education and related services, and failing to convene a placement meeting and provide an appropriate placement.

On April 5, 2010, DCPS filed a Motion to Dismiss, asserting that as the Charter School is an LEA, and the factual allegations in the Complaint are limited to the 2009/10 school year, when Student continuously attended the Charter School, the Complaint fails to state a claim against DCPS and DCPS should be dismissed as a party to this action. On April 6, 2010, Petitioner filed a Motion to Withdraw Against DCPS. Upon consideration of these pleadings, on April 9, 2010, the hearing officer issued an Order of Dismissal as to Respondent DCPS only.

On April 5, 2010, the Charter School filed a Response and Partial Consent Motion to Join the D.C. Office of the State Superintendent of Education (OSSE), asserting as its response, that Student's IEP hours had been increased from 7 to 19.5, that the Charter School is implementing

the revised IEP, that the IEP and the Charter School are appropriate for Student, and that Student does not have significant behavioral concerns. With respect to its Partial Consent Motion, the Charter School, with DCPS's consent, sought to join OSSE as an indispensable and necessary party, asserting that OSSE would be responsible for recommending any placement location and/or financing any placement outside of the Charter School that the hearing officer might ultimately order. On April 12, 2010, the hearing officer issued an Order denying the Partial Consent Motion, on the ground that OSSE was not an indispensable or required party because the absence of OSSE as a party would not prevent the hearing officer from providing complete relief between the existing parties, and OSSE was not claiming an interest in the subject of the case.

On April 29, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. During the conference, the Charter School advised Petitioner's counsel of the revised IEP for Student, as well a BIP that it had already prepared for Student. Upon Petitioner's counsel's assertion that Petitioner was unaware of the BIP and the revised BIP, the hearing officer adjourned the PHC to allow the Charter School an opportunity to provide counsel with the documents and to allow Petitioner an opportunity to revise its position in this case, if appropriate, after review of the documents.

On May 4, 2010, the hearing officer reconvened the prehearing conference. Petitioner's counsel took the position that the BIP was not properly prepared because it contained no dates and signatures and was not developed with Parent's input. Petitioner's counsel also asserted that the IEP was improperly drafted because it was not drafted at an IEP team meeting. The Charter School's counsel noted that, pursuant to 34 C.F.R. § 300.324(a)(4)-(6), an LEA and a parent may agree to amend an IEP without holding a formal IEP meeting and without revising the entire document. Counsel further represented that the Charter School amended the IEP upon Parent's request subsequent to Student's last IEP meeting, and that Parent later came to the school and signed the IEP. The hearing officer ruled that evidence would be received at the hearing concerning the draft BIP and its suitability or lack of suitability; the amended IEP and the services that were provided thereunder, as well of the appropriateness and/or lack of appropriateness of same; and the appropriateness and/or inappropriateness of the Charter School as a location of services for Student. The hearing officer issued the Prehearing Order on May 7, 2010.

By their respective cover letters dated May 19, 2010, Petitioner disclosed 22 documents (Petitioner's Exhibits 1 through 22), and the Charter School disclosed 16 documents (Respondent's Exhibit 1 through 16).

On May 26, the hearing officer convened the due process hearing for this case.¹ The Charter School's documents were admitted into the record without objection. Petitioner's Exhibits 1 – 7, 9 – 15, and 17 – 22 were admitted into the record without objection, while Petitioner's Exhibits 8 and 16 were admitted into the record over the Charter School's objection. Thereafter, Petitioner presented the testimony of Parent, Student's educational advocate, and a representative from a private special education school prior to concluding its case. The Charter School promptly made

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

a motion for judgment, asserting that Petitioner had failed to meet its burden of proof on all claims. The hearing officer construed the motion as one for a directed verdict and granted the motion with respect to Petitioner's claim of an inappropriate placement, on the ground that Petitioner had failed to present any evidence on the claim. The hearing officer also ruled (1) that on the issue of whether the Charter School had developed a BIP for Student, the motion for a directed verdict was granted in part because the Charter School had prepared a BIP for Student, but the motion was also denied in part because the Charter School had failed to take the final required step of obtaining signatures on and convening the IEP team to review and approve implementation of the BIP, and (2) that the motion for a directed verdict was also granted in part and denied in part with respect to Petitioner's claim of an alleged failure to develop an appropriate IEP because although the evidence demonstrated that Parent agreed to have the IEP amended subsequent to the last IEP meeting, the evidence did not clearly demonstrate that Parent knowingly agreed that no IEP meeting would be held after the amendments were made.

Thereafter, the Charter School presented the testimony of one witness concerning the Charter School's efforts to hold a meeting to review the BIP and the issue of Parent's "informed consent" with respect to the amendment of the IEP in the manner allowed by 34 C.F.R. § 300.324(a)(4)-(6). The hearing officer received oral closing statements. When the Charter School requested a ruling on whether Petitioner was the "prevailing party," the hearing officer indicated a disinclination to issue such a ruling but agreed to hold the record open until close of business on May 27, 2010 to allow the parties to submit written argument and citations on the issue. The parties submitted their written statements on May 27, 2010 by or before the deadline.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUES

The issues to be determined are as follows:

1. Were the Charter School's efforts to convene a meeting to review the draft BIP sufficient to relieve the Charter School of its obligation to finalize the draft BIP at an IEP team meeting?
2. Did Parent knowingly waive her right to have an IEP meeting in connection with the Charter School's recent amendment of Student's IEP?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student's initial IEP, dated February 13, 2009, classified Student as OHI (ADHD) and required Student to receive 5 hours of specialized instruction, 1 hour of speech services, .5 hour of occupational therapy ("OT") services, and .5 hour of counseling, for a total of 7 hours of special education and related services per week.²
2. At Student's initial eligibility meeting on February 13, 2009, Parent and the advocate requested a full-time out-of-general-education placement. However, the team determined that Student would remain at the Charter School in a combination general and special education setting with the inclusion model and accommodations. The team agreed to meet again in three months to determine Student's progress.³
3. The Charter School did not reconvene Student's IEP meeting at the beginning of SY 2009/10.⁴
4. On December 16, 2009, the Charter School reconvened Student's IEP meeting to discuss concerns about Student's behavior and academics. Oral reports from Student's special education teacher and his general education teacher revealed a lack of communication between the two educators, with the result that the general education teacher was unaware of what Student was doing in his special education class and her grade book did not reflect the work Student was doing with the special educator. The special education teacher also indicated that she and Student were not working well together, and Student would sometimes shut down and refuse to continue working with her.

The team agreed to create a BIP for Student. The team also suggested changing Student's special education teacher to his previous special education teacher, with whom he had worked very well the previous year, and the Charter School offered to increase Student's specialized instruction so that he would be receiving 10 hours of pullout specialized instruction in reading and 7.5 hours of pullout specialized instruction in reading, with the same related services he was already receiving. However, Parent and the educational advocate once again requested a full-time out-of-general-education placement for Student. Moreover, although Parent wanted more IEP hours for Student, she indicated at the meeting that she did not want the Charter School to move forward on that. The meeting ended after Parent indicated that she planned to research/visit alternative placements.⁵

5. After the December 16th IEP meeting ended and Parent had a chance to speak with the advocate in private, Parent changed her mind about the increase in IEP hours for Student. Parent and the educational advocate caught up with the SEC while the SEC was making or on her way to make copies of the Meeting Notes and told the SEC of Parent's decision. The SEC stated that either they needed to reconvene Student's IEP team meeting or the advocate could send the SEC a written request for the increased hours. The SEC did not state that if the advocate sent a writing, Parent would be waiving her right to an IEP meeting concerning the amended IEP. It was agreed that the advocate would send a

² Respondent's Exhibit 8; Petitioner's Exhibit 15.

³ Petitioner's Exhibit 15.

⁴ Testimony of Parent.

⁵ Petitioner's Exhibit 13; Respondent's Exhibit 4; testimony of Parent; testimony of SEC.

writing to the SEC, which was done on December 16, 2010. The advocate stated in the letter that parent wished to have Student's hours of specialized instruction increased to 17.5, that Parent would visit alternative placements for Student in "the winter interim," and that Parent was requesting that the MDT reconvene at the start of the next semester to determine an appropriate placement. It was not the advocate's intent to waive Parent's right to an IEP meeting by sending the December 16th letter.⁶

6. In or about January 2010, the SEC called Parent to come in and sign the amended first page of the IEP, which included 17.5 hours of specialized instruction. When Parent came to the school, she met the SEC at the front desk when the SEC was on her way to lunch, and Parent signed the document. It was Parent's intent to have Student's IEP hours increased to 17.5 hours as a result of her signature, but Parent did not agree to not have an IEP meeting and still believes an IEP meeting should be held to finalize everything. When Parent signed the amended first page of the IEP, the SEC did not verbally explain that no IEP meeting would be held or that Parent was waiving her right to an IEP meeting by signing, but the SEC knew that Parent understood that the amended IEP would be implemented via increased services and Student would only be in his general education class during the afternoons from that point forward.⁷
7. On February 17, 2010, the advocate sent the SEC an email with the advocate's December 16, 2010 letter attached, and the advocate faxed the SEC confirmation of the initial December 16th fax of the letter to the SEC. The advocate also spoke with the SEC several times. Through these actions, the advocate was seeking to have Student's IEP meeting reconvened to discuss the increased IEP hours and placement.⁸
8. The Charter School has not invited Parent to attend another IEP meeting since the December 16, 2009 meeting, and no follow-up IEP meeting has been held since that time.⁹
9. After Petitioner filed the March 26, 2009 Complaint that initiated this matter, a resolution meeting was held on April 16, 2010. The advocate first learned of the amended IEP when it was presented at the resolution meeting. The advocate also learned for the first time at the resolution meeting that a draft BIP had been prepared for Student. The advocate received a copy of the BIP by fax approximately one week after the resolution session concluded.¹⁰
10. The BIP that the Charter School developed for Student is dated March 2, 2010, and it contains signature and date lines for Parent, the classroom teacher and an administrator; however, the document is unsigned.¹¹

⁶ Respondent's Exhibit 5; Petitioner's Exhibit 18; testimony of advocate; testimony of SEC.

⁷ Testimony of Parent; testimony of SEC.

⁸ Petitioner's Exhibits 19 and 20; testimony of advocate.

⁹ Testimony of SEC; testimony of advocate.

¹⁰ Testimony of advocate.

¹¹ See Respondent's Exhibit 2; Petitioner's Exhibit 6.

11. At the resolution meeting, the Charter School attempted to discuss each of the claims asserted in the Complaint and the Student's current circumstances, but the advocate was unwilling to engage in such a discussion. Although the alleged failure to develop a BIP was a claim asserted in the Complaint, and the SEC had Student's IEP whole team, including the team member who developed the draft March 2010 BIP for Student, at the meeting, the advocate stated that the meeting was not the time to review the BIP. The advocate indicated that the Charter School should fax the BIP to the advocate so that the advocate could review it with Parent and get back to the Charter School. After the Charter School faxed the BIP to the advocate, it never heard anything back from the advocate concerning the BIP or a meeting to review same.¹²
12. During the April 29, 2010 prehearing conference for this case, the hearing officer decided to adjourn the conference to allow the Charter School an opportunity to provide Petitioner's counsel with copies of the draft BIP and the amended IEP for Student and to allow the parties an opportunity to schedule a meeting to review and discuss those documents. However, when the hearing officer reconvened the prehearing conference on May 4, 2010, the hearing officer was informed that no meeting had been scheduled because of the pending Complaint, and Petitioner's counsel further informed the hearing officer that the IEP was not appropriately drafted because it had not been drafted at a team meeting and the BIP did not contain any signatures or dates.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. Review and Finalization of the BIP

The evidence in this case demonstrates that the team agreed at Student's December 16, 2009 IEP meeting to develop a BIP for Student and that the Charter School subsequently developed a draft BIP for Student on March 2, 2010, but the Charter School failed to finalize the BIP by reconvening Student's IEP team to allow the team, including Parent, to review, agree to implement, and to the extent appropriate, sign the BIP.

The Charter School argues that it attempted to review and finalize the BIP at the resolution meeting, but the advocate refused to participate. Then, the advocate failed to follow through after she was provided with a copy of the BIP by fax.¹³ On the other hand, Petitioner asserts that the advocate was not prepared to review the BIP at the resolution session, and that the offer to review the BIP at the resolution session is irrelevant because that was not an IEP meeting.

¹² Testimony of SEC.

¹³ The Charter School initially argued that it was not required to develop a BIP for Student subsequent to the February 2009 IEP meeting because there has been no change in placement, and even if Student's behavior is impeding his learning or the learning of others, the school is only required to implement positive behavior strategies. See 34 C.F.R. § 300.324(a)(2)(i). However, as the evidence in this case demonstrates that the team agreed at Student's December 16, 2009 IEP meeting to create a BIP for Student, the hearing officer finds it unnecessary to address this argument.

Where a Complaint has been filed, the IDEIA requires the LEA to convene a resolution meeting with the parent and the relevant member(s) of the Student's IEP team "to discuss the due process complaint, and the facts that form the basis of the complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint." 34 C.F.R. § 300.510(a)(2).

In this case, the first claim listed in the Complaint is that the Charter School denied Student a FAPE when it failed to develop a BIP for Student. As a result, the Charter School was acting in accordance with the regulation cited above when it presented and attempted to review the BIP at the resolution meeting so that the BIP could be finalized, thereby resolving Petitioner's first claim. On the other hand, as Parent and the advocate were being presented with the BIP for the first time and without any advance notice that the BIP had already been drafted, and there is no indication in the record why the March 2, 2010 BIP had not been presented to Petitioner prior to the April 16, 2010 resolution meeting, it was not unreasonable for the advocate to request additional time to review the BIP. However, between late April when the Charter School provided the advocate with a copy of the BIP and May 26, 2010 when the due process hearing was held for this case, Petitioner made no attempt whatsoever to cooperate with the Charter School's desire to finalize the BIP. Indeed, even when the hearing officer adjourned the April 29, 2010 prehearing conference for this case to allow the Charter time to provide Petitioner's counsel with, *inter alia*, the draft BIP and to allow the parties an opportunity to discuss the possibility of meeting to finalize the BIP, Petitioner stated its lack of interest in meeting to review the BIP. Under these circumstances, the hearing officer concludes that it would be inappropriate to rule that the Charter School denied Student a FAPE by failing to finalize his BIP. *Nevertheless, the hearing officer strongly encourages the parties to review and finalize Student's BIP as soon as possible.*

2. Waiver of Right to an IEP Meeting

Under IDEIA, "[I]n making changes to a child's IEP after the annual IEP Team meeting for a school year, *the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes*, and instead may develop a written document to amend or modify the child's current IEP." 34 C.F.R. § 300.324(a)(4) (emphasis supplied). Moreover, "[c]hanges to the IEP may be made . . . as provided in paragraph (a)(4) . . . by amending the IEP rather than by redrafting the entire IEP." 34 C.F.R. § 300.324(a)(6).

In this case, Parent agreed that the Charter School should increase Student's hours of specialized instruction by amending Student's IEP rather than by redrafting the entire IEP, and Parent did so by agreeing that the advocate would send the SEC a writing asking for such an increase and by signing the amended first page of Student's IEP. However, there is no evidence that Parent agreed not to convene an IEP team meeting for the purpose of making, or in this case, finalizing those changes. To the contrary, the evidence shows that the advocate's writing requesting the increased IEP hours included a request for a reconvened IEP meeting at the start of the next semester, and that the advocate subsequently resent the letter to the SEC on February 17, 2010 and also had several conversations with the SEC in an attempt to have the IEP meeting

reconvened, but the Charter School failed to reconvene the IEP meeting. Although the SEC believed that Parent had waived her right to an IEP meeting by requesting the increase in hours and signing off on the revised IEP, the SEC never actually told the Parent that no follow-up IEP meeting would be held and/or that Parent was waiving her right to a follow-up IEP meeting. Under these circumstances, and based on the evidence outlined herein, the hearing officer concludes that Parent did not knowingly waive her right to a follow-up IEP meeting concerning the amendment of Student's IEP, with the result that the Charter School denied Parent a FAPE by failing to convene a follow-up IEP meeting to finalize the changes to Student's IEP. See 34 C.F.R. § 300.513(a)(2)(ii). (Hearing officer may find that child did not receive FAPE if procedural inadequacies significantly impeded parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child.)

3. Other Matters

The hearing officer declines to make a prevailing party determination.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within 12 calendar days of the issuance of this Order, the Charter School shall reconvene a follow-up IEP meeting to discuss and finalize the recent amendment to Student's IEP.
2. Petitioner's March 26, 2010 Complaint is **DISMISSED**, and all requests for relief therein not granted in this Order are **DENIED**.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination 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 Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: 6/5/2010

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer