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

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

STUDENT,¹
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: July 25, 2010

Hearing Officer: James Gerl

Case No:

Hearing Date: July 19, 2010

Room: 5a

HEARING OFFICER DETERMINATION

BACKGROUND

The instant due process complaint was filed on May 24, 2010. This matter was assigned to this hearing officer on May 26, 2010. A resolution session was convened on June 23, 2010. A pre-hearing conference by telephone conference call was convened on June 23, 2010. The due process hearing was convened at the Student Hearing Office on July 19, 2010. The hearing was closed to the public, the student's parent attended the hearing, and the student did not attend the

¹ Personal identification information is provided in Appendix A.

hearing. One witness testified for the Petitioner and two witnesses testified for the Respondent. Petitioner's Exhibits 1 through 25 were admitted into evidence. Respondent's Exhibits 1 through 8 were admitted into evidence. The due date for the Hearing Officer Decision is July 29, 2010.

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.

Prior to the hearing, Respondent filed a written Motion for Default Judgment. Respondent filed a written response. For the reasons stated at the prehearing conference convened herein, and repeated in the Prehearing Order, the motion was denied.

ISSUE PRESENTED

A single issue was identified by counsel at the pre-hearing conference and evidence concerning this issue was heard at the due process hearing:

Did Respondent violate the child find provisions of IDEA by failing to evaluate and identify the student as eligible for special education and related services?

FINDINGS OF FACT

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

1. The student was born on _____ and is a first grade student in one of Respondent's elementary schools (P-11; T of the student's mother). (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; references to testimony at the hearing shall hereafter designated as "T".)
2. After the 2007-2008 school year, the student was retained in kindergarten and repeated kindergarten. (T of student's mother; P-10).
3. On October 2, 2008, at the request of the student's classroom teacher, a student support team (hereafter sometimes referred to "SST") meeting was convened for the student. The SST noted that the student had problems with memory and distractibility, although distractibility issues are not unusual in kindergarteners and first graders. The SST

analyzed the student's strengths and areas of academic, behavioral and personal concerns and then developed a number of strategies to attempt to improve her academic performance. Among the strategies recommended by the SST were the following: instructional accommodations, including one-on-one instructions; modified curriculum/demands; modification to materials, including letter, sound and number drill and practice; small group instruction; tutoring recommended; assistive technology; daily guided reading; supplemental reading, including practice book readers; problem solving conferences; attendance monitoring; and drill and practice with numbers. (P-11; R-1; T of student's teacher).

4. The SST for the student met again on November 20, 2008. Most of the strategies suggested at the previous SST meeting had been implemented. The team employed various assessment tools and shared the results with the mother. The results indicated small overall gains for the student in both phoneme awareness and math; the team concluded that

the modifications developed in the previous month were helping the student to show some academic progress. The team also discussed concerns regarding the student's attendance with the mother. In addition, the team developed further strategies for the student's memory problems and provided them to the parent to work with the student at home. (P-12; P-13; P-14; R-2; T of Respondent's special education coordinator; T of the student's mother)

5. For the period of time from August 18, 2008 to February 25, 2009, the student was absent from school a total of 42 schooldays, 27 of which were unexcused absences. The 15 excused absences during this period of time related primarily to nosebleeds suffered by the student. (R-3; T of student's teacher; T of student's mother)
6. The student's report card for the 2008-2009 year showed that she was approaching the standard with regard to reading; English language arts; mathematics; science and health and not meeting the standard in other subjects. The teacher's comments on the report card for the first advisory period

note that the student has made little progress and that frequent absences may contribute to the lack of progress. (P-17)

7. The student's attendance record for the period from August 17, 2009 to May 27, 2010 indicates that the student was absent from school a total of 48 schooldays during this time period. Of these, 32 were unexcused absences. However, during February 2010, the student was absent a total of only six days, three of which were excused. In March, 2010, the student had only one absence which was excused. In April, 2010, the student had one excused absence and two tardies. In May, 2010, the student reverted to an extreme number of absences. (R-8).
8. The student's report card for the 2009-2010 year shows that by the fourth advisory marking period, the student was approaching the standard in all subjects. (R-7)
9. During the period of time during which the student had fewer absences, especially the third advisory marking period, the student showed very good progress in her academic

subjects. The teacher comments for the third advisory marking period note the improved attendance and resulting better academic progress.(R-7; T of student's teacher; T of Respondent's special education coordinator)

10. The frequent absences by the student affected her academic progress and educational achievement. (P-17; P-19; R-5; T of Respondent's special education coordinator; T of Respondent's teacher)
11. The student's teacher informed the student's mother that the student would do better in school if her attendance improved. (T of student's mother)
12. At some point after the October 2008 SST meeting, the student's mother approached the Respondent's special education coordinator and requested that the student be tested for special education. Although the special education coordinator did not immediately know which student was the child of the student's mother, he conferred with SST members. Because of the student's extreme number of absences from school, it was determined that it was too early

to consider the student to be suspected of having a disability. Because the student was absent so often, she had not made herself available to receive instruction and intervention from Respondent's staff. In particular, the good progress shown by the student during those periods when she did attend school was evidence that she was likely not in need of special education and related services. It was concluded by Respondent's staff that it would be inappropriate to suspect her of being a child with a disability at that point. (T of Respondent's special education coordinator)

13. Respondent had in place appropriate procedures and policies in order to identify students who were suspected of having disabilities. In particular, with regard to this student, Respondent's pre-referral process, including the SST team, seemed to work effectively. The SST team developed a number of strategies, interventions and modifications designed to help the student succeed academically. The strategies and modifications seemed to be working inasmuch as the student made better academic progress during those

periods of time when she had fewer absences from school. When the student did make herself available for instruction and intervention, she made better academic progress. (T of Respondent's special education coordinator; T of student's teacher; R-1; R-2; R-6; R-7)

14. The student was treated at Children's Hospital for a number of problems, including the following: bedwetting, chest pain, constipation, attention deficit hyperactivity disorder, and nosebleeds. The only medical records that the mother shared with Respondent's school staff, however, were a letter from a school nurse requesting accommodation under Section 504 of the Rehabilitation Act and documentation regarding a medication that the student was to receive in the event that she had nosebleeds. The mother did not share the other medical documentation from Children's Hospital with anybody at the student's school. (T of student's mother; P-20; P-22; P-23; P-24; P-25)
15. The only medical records that the mother shared with Respondent's school staff were a letter from a nurse

requesting accommodation under Section 504 of the Rehabilitation Act and documentation concerning medication to be given to the student if she suffered nosebleeds. (T of student's mother)

16. Respondent had in place appropriate procedures and policies to determine whether the student should be suspected of being a child with a disability (record evidence as a whole).
17. It would be inappropriate for Respondent to have referred the student for a special education evaluation because the student made good academic progress during the periods in which she was not frequently absent and was, therefore, available to receive instruction as well as the interventions and modifications developed by the SST. The student is not in need of special education and related services by reason of a disability. (T of Respondent's special education coordinator)

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. Under IDEA, a child with a disability is defined as “a child:

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbances (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who by reason thereof needs special education and related services.”

IDEA § 603(3).

2. Under IDEA, a state must ensure that children with disabilities are identified, located and evaluated and that a practical method is developed and implemented to determine

which children with disabilities are currently receiving needed special education and related services. IDEA § 612(a)(3); Title 5-E, DCMR § 3002.1(d) To comply with this child find obligation, states must have in effect policies and procedures to ensure that all children with disabilities and who are in need of special education and related services are identified, located and evaluated and that a practical method is developed and implemented to determine which children are currently receiving special education and related services. Such policies and procedures must include children who are suspected of being a child with a disability and in need of special education even though they are advancing from grade to grade or are highly mobile children. 34 C.F.R. §§ 300.111(a) and (c).

3. In Washington, D.C., municipal regulations have placed the responsibility on local education agencies to ensure that procedures are implemented to identify, locate and evaluate all children with disabilities residing in the district who are in need of special education and related services. The child find obligation provisions of IDEA impose an affirmative duty on the

local education agency to identify, locate and evaluate such students. Hawkins v. District of Columbia, 539 F. Supp. 2d 108, 49 IDELR 213 (D.D.C. 2008); Title 5-E, DCMR § 3002.1(d).

4. Respondent complied with its child find obligations in the instant case by having in place policies and procedures in order to identify and evaluate children suspected of having disabilities. After the student began to struggle, the SST for the student developed a number of modifications and interventions for the student in order to help her succeed academically. The interventions and modifications developed by the SST for the student appeared to be working in that the student was making good academic progress during those periods of time when she attended school more frequently. Hawkins v. District of Columbia, 539 F. Supp. 2d 108, 49 IDELR 213 (D.D.C. 2008); Title 5-E, DCMR § 3002.1(d); 34 C.F.R. §§ 300.111(a) and (c).

5. Inasmuch as the student was making good academic progress under the modifications and interventions developed by the SST during the period of time when she was absent less frequently, the student is not a child with a disability because she

is clearly not in need of special education and related services by reason of having a disability. IDEA § 603(3).

DISCUSSION

Merits

Issue No. 1: Did Respondent violate its IDEA child find obligation?

IDEA defines the term "child with a disability" as follows:

"The term 'child with a disability' means a child –

- (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who by reason thereof needs special education and related services."

IDEA § 602(3).

The child find responsibility under IDEA is stated as follows: "all children with disabilities residing in the state, ... and who are in need of special education and related services, must be identified, located, and evaluated and a practical method developed and implemented to determine which children with disabilities are currently receiving needed special education and related services." IDEA § 612(a)(3); See, Title 5-E, DCMR § 3002.1(d).

The federal regulations provide that states must have in effect policies and procedures to ensure that all children with disabilities residing in the state and who are in need of special education and related services are identified, located and evaluated. The regulations also require that a practical method be developed and implemented to determine which children are currently receiving needed special education and related services. In implementing the child find obligation, children who are suspected of being a child with a disability and are in need of special education even though they are advancing from grade to grade, as well as highly mobile children, must be included in the child find procedures. 34 C.F.R. § 300.111(a) and (c).

In the District of Columbia, municipal regulations have placed the responsibility on local education agencies to ensure that procedures are implemented to identify, locate and evaluate children with disabilities residing in the district who are in need of special education and related services. Hawkins v. District of Columbia, 539 F. Supp. 2d 108, 49 IDELR 213 (D.D.C. March 7, 2008); Title 5E, DCMR § 3002.1(d).

In the instant case, it is clear that the student struggled academically, but it is also clear that Respondent had in place appropriate procedures to work on such struggles and, if necessary, identify the student as a child with a disability. Beginning on October 2, 2008, Respondent convened a student support team (hereafter sometimes referred to as "SST"), which is the first step in Respondent's pre-referral process for students who are having academic or social-emotional problems. At that time, the SST noted that the student had problems with memory, distractibility and various academic difficulties. The SST also developed a number of strategies, including giving one-on-one instructions, modifying curriculum, modifying materials with drill and practice, small group instruction,

guided reading, supplemental reading, problem solving conferences and attendance monitoring.

The SST for the student met again on November 20, 2008, after some of the interventions and strategies suggested by the SST had been implemented, and reviewed the progress that the student was making with the modifications being used. The team noted that the student was showing some progress as a result of the SST strategies that had been implemented, particularly with regard to small overall gains in phoneme awareness and math. Additional strategies concerning short-term memory were provided to the parent to work with the student on at home.

At some point after the second SST meeting, the student's mother spoke with Respondent's special education coordinator. Although he was not able to identify which student the mother referred to when she first requested that the student be considered for special education evaluation, he conferred with the SST members. After conferring with the SST members, the special education coordinator and the SST determined not to refer the student for a special education evaluation. The reason that the student was not referred is that her extreme

attendance problems prevented her from being exposed to instruction, as well as to the modifications and the interventions that were developed by the SST. In particular, the student's 1st grade classroom teacher noted that the student did make academic progress during the periods when her attendance was much better.

Even today, Respondent's staff cannot tell whether the student should properly be suspected of being a child with a disability because she has not been in school and sufficiently made herself available to instruction. Because of her extreme attendance problems, it is impossible to determine, at this point, whether the student should be suspected of being a student with a disability because she has not made herself available to receive the instruction and interventions developed by the SST. Because the evidence so far seems to suggest that instruction coupled with appropriate accommodations and interventions is successful when the student's attendance improves, it seems likely that the student is not a child with a disability because she does not need special education and related services.

It must be concluded that Respondent had in place appropriate procedures and policies to properly identify and evaluate children

suspected of having disabilities. In the instant case, the pre-referral process, including the SST team, developed modifications and interventions, which seemed to be working inasmuch as the student made some academic progress during those brief periods when her attendance was better. It cannot be concluded that Respondent violated its child find obligation by failing to identify the student as a child with a disability.

Petitioner introduced evidence that the student was being treated at Children's Hospital for a number of problems, including attention deficit hyperactivity disorder, chest pain,

and other conditions. The student's mother testified, however, that she failed to provide any medical records concerning such treatments to the student's teacher or other staff at Respondent's school. The only medical records that the student's mother provided to Respondent were documentation concerning the administration of a medicine to promote _____ when the child's nose would bleed and a nurse's note requesting accommodations under Section 504 of the Rehabilitation Act. Respondent cannot be deemed to have notice of medical information or medical records that it had never seen.

In their closing arguments, counsel for each party cited regulations that are inapplicable. Counsel for Petitioner cited 34 C.F.R. §300.111(e) (sic) and Title 5-E DCMR § 3002.1(d) to support an argument that attendance in public school is not required for the child find obligation to apply. A careful reading of the regulations referred to by Petitioner's counsel reveals that they merely include children attending private schools within the child find obligation. The student in the instant case was not attending private school. Petitioner's argument is rejected.

Counsel for Respondent cites 34 C.F.R. § 300.306(b) to support an argument that lack of exposure to "appropriate instruction" includes absenteeism. A careful reading of this regulation and its citation to the No Child Left Behind act reveals that it is concerned with children who attend school but do not receive high-quality instruction. There was no evidence in the instant case that the student's teachers were not highly qualified. The cited regulation is not applicable.

Although few facts in this matter are contested, to the extent that there are any contested facts, the testimony of Respondent's witnesses is more credible and persuasive than the testimony of Petitioner's

witnesses. In addition, the testimony of Respondent's witnesses is corroborated by the voluminous documentary evidence that has been admitted into the record in this case.

It is concluded that Respondent did not violate its IDEA child find obligation by failing to evaluate or identify the student. There is no basis to conclude that the child should be suspected of having a disability at this point. The Petitioner has failed to meet her burden, and the Respondent has prevailed with regard to this issue.

ORDER

Based upon the foregoing, it is **HEREBY ORDERED** that the Complaint in this matter is dismissed with prejudice. None of the relief requested by Petitioner is awarded.

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: July 25, 2010

/s/ ***James Gerl*** _____
James Gerl
Hearing Officer