

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

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

RECEIVED
AUG 09 2010

STUDENT,¹

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: August 9, 2010

Hearing Officer: James Gerl

Case No:

Hearing Date: July 21 and 30, 2010

Room: 5b

HEARING OFFICER DETERMINATION

BACKGROUND

The instant due process complaint was filed on June 4, 2010. This matter was assigned to this hearing officer on June 8, 2010. A resolution session was convened on June 28, 2010. A pre-hearing conference by telephone conference call was convened on June 29, 2010. The due process hearing was convened on July 21, 2010 at the student hearing office. The record of the hearing was held open until July 30, 2010 based upon the unopposed motion of Petitioner to permit an opportunity to file additional documentary evidence. The record of the

¹ Personal identification information is provided in Appendix A.

due process hearing was closed on July 30, 2010. The hearing was closed to the public, the student attended the hearing, and the parent of the adult student did not attend the hearing. Three witnesses testified on behalf of Petitioner, and one witness testified on behalf of Respondent. Petitioner's Exhibits 1 through 31 were admitted into evidence. Respondent's Exhibits 1 through 12 were admitted into evidence. The due date for the Hearing Officer Decision to be issued is August 9, 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 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.

ISSUE PRESENTED

The following one 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 IDEA by changing the location of the student's placement to a school that cannot implement the student's IEP?

FINDINGS OF FACT

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

1. The student's date of birth is (Stipulation No. 1 by counsel). (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 was placed at School No. 1 by Respondent in 2008.(Stipulation No. 2 by counsel).
3. The most recent IEP for the student calls for a full-time special education program, including: 27.5 hours per week of specialized instruction, 2.5 hours per week of behavioral support services and 0.5 hours of occupational therapy services per week. (Stipulation No. 3 by counsel)
4. On October 26, 2009, this Hearing Officer issued a Hearing Officer Determination concerning this student after a Due Process Hearing. Said Hearing Officer Determination finds

that Respondent violated IDEA by failing to conduct a vocational assessment and by failing to offer the student an adequate transition plan. As a result of the violations, the Hearing Officer Determination required Respondent to pay for an independent evaluation of the student's vocational needs, as well as to reimburse her for tutoring one hour per week for a period of a year and for family counseling for one hour per week for one year. The compensatory services awarded in said Hearing Officer Determination were reduced, in part, because of the student's previous problems in failing to attend school. (R-2)

5. On March 15, 2010, Respondent developed an IEP for the student. The IEP calls for a full-time special education placement with the student to receive 27 hours per week of specialized instruction outside the general education setting, as well as 2.5 hours of behavioral support services per week and 0.5 hours of occupational therapy services per week. The transition plan contained in the IEP notes the student's interest in cosmetology vocational training and contains a

number of post-secondary education and training goals, as well as employment-type goals, and goals in areas of mathematics, reading, written expression and emotional, social and behavior development. (R-5; P-6; T of Petitioner's educational advocate)

6. The Petitioner, as well as her educational advocate and representatives of Respondent, participated in the March 15, 2010 IEP meeting. At the March 15, 2010 IEP meeting, the student's excessive number of absences was pointed out to her and discussed. At the meeting, the student was informed that her attendance had to improve. When asked at the meeting why she is absent so much, the student noted that there are issues at home and that one class was particularly irritating to her. (P-6, P-8; R-5; T of Petitioner's educational advocate)
7. An additional meeting to discuss the student's attendance was called on March 24, 2010. Since the meeting on March 15, the student had only been present at school on one day, and she was tardy that day. The student stated that

she did not want to come to school and did not have to. Near the end of this meeting, the student promised that she would come to school in the future. (R-6)

8. An additional meeting concerning the student was scheduled for June 1, 2010. (P-12)

9. At the June 1, 2010 meeting, the student and her educational advocate were present, as well as representatives of Respondent and of School No. 1. At the meeting, it was noted that the student had had 125 unexcused absences to date that school year. The record of the meeting shows that previous attendance meetings were held on March 15, March 24, and April 27, 2010 and that at such meetings, the team discussed that a lack of improvement in attendance could lead to a change in the location of services for the student. The record notes that the team had previously adjusted the student's schedule in order to accommodate her and assigned a case manager, but that the case manager was unable to successfully contact the student. As a result of the student's non-attendance, the

team determined that the student would be reassigned to School No. 2. (R-7)

10. On June 4, 2010, Respondent issued a prior written notice changing the location of the student's services to School No. 2. (R-9)
11. School No. 2, the school to which the student was assigned by Respondent on June 4, 2010, was not capable of implementing the student's full-time special education IEP. (T of Petitioner's educational advocate)
12. Respondent's staff attempted to observe the student at School No. 1 but were unsuccessful in doing so because she was absent. (R-11)
13. On July 13, 2010, Respondent's program coordinator emailed Petitioner's educational advocate to attempt to set up a placement meeting. Additional emails were exchanged between Petitioner's educational advocate and Respondent's program coordinator through July 14, 2010. (P-29, P-31; T of Respondent's program coordinator; T of Petitioner's educational advocate)

14. A resolution meeting for the instant Due Process Complaint was held on June 28, 2010. No resolution was achieved. (R-4)
15. The student was absent a total of 126 days during the 2009-2010 school year. Of the 44 school days that she was present at school during said school year, she was tardy 32 times. (R-10)
16. The student has stated that she was absent so frequently because of difficulty with her home situation, not enough new clothing, disputes regarding bus tokens, motivational problems, a dislike of her academic classes, a dislike of her homeroom, a dislike of seeing other special education students receive IEP services in her presence, a dislike of the repetitive nature of school work, and a belief that she did not have to attend school. (R-6, R-7, R-8; P-9, P-13, P-14; T of the student; T of Petitioner's educational advocate)
17. Since July 16, 2010, Respondent has offered a location of services for the student that is a combination of School No. 3 and School No. 4. The combination of School No. 3 and

School No. 4 can appropriately implement the student's full-time special education IEP. (T of Respondent's program coordinator)

18. The student suffered no educational harm as a result of Respondent's decision to locate her services at School No. 2 from June 1, 2010 to July 16, 2010. (Record evidence as a whole).
19. The student's behavior in failing to attend school was unreasonable and was not caused by the student's disabilities. (R-10; T of the student; T of Petitioner's educational advocate; 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. 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 set forth in the Individuals with Disability 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 the child to receive some 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).

2. In order to provide FAPE, a school district must implement the substantial, significant and material portions of a student's IEP. Catalan v. District of Columbia, 47 IDELR 223 (D.D.C. 2007); See, Van Duyn v. Baker School District, 41 F.3d 770, 47 IDELR 182 (9th Cir. 2007).
3. Changes to the student's placement, or other significant alterations of the student's IEP must be made by the

student's IEP team through the IEP development process.
IDEA §614; 34 C.F.R. §300.320 to 300.324.

4. Respondent committed a substantive violation of IDEA by changing the location of services for the student on June 1, 2010 to School No. 2, which could not implement the student's full-time special education IEP. IDEA §614, 34 C.F.R. §300.320 to 300.324; TT v. District of Columbia 48 IDELR 127 (D.D.C. 2007).
5. Awards of compensatory education under IDEA are qualitative in nature and must be based upon a showing by a petitioner that the student suffered educational harm as a result of violations of IDEA and that a particular compensatory education program will remedy the harm caused to the student. In the instant case, Petitioner failed to make a showing that the violation of IDEA by Respondent resulted in educational harm. Petitioner has not provided a factual basis of harm upon which an award of compensatory education may be justified. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/2005).

6. Compensatory education and other relief available under IDEA is equitable in nature. Accordingly, the conduct of the parties is always relevant. The conduct of the student, in failing to attend school in such an extreme manner, must be taken into account when determining the relief to be awarded to the student for the violation of the Act by the Respondent. The student's extremely high number of absences during the 2009-2010 school year indicate that the student would not likely avail herself of other services, including compensatory education, if Respondent were ordered to provide it to her. Accordingly, compensatory education is not appropriate for this student. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/2005).
7. IDEA does not require a school district to maximize the potential of a child with a disability; rather, it requires that an IEP be reasonably calculated to confer some educational benefit and that the significant portions of said IEP be implemented. 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).

DISCUSSION

Merits

Issue No. 1: Whether Respondent violated IDEA by changing the location at which the student would receive services to a school that could not implement her IEP?

A local education agency, such a Respondent, must implement the substantial, significant or material portions of a student's IEP. Catalan v. District of Columbia, 47 IDELR 223 (D.D.C. 2007); See, Van Duyn v. Baker School District, 41 F.3d 770, 47 IDELR 182 (9th Cir. 2007).

It follows then that in the event that Respondent changes the location of services for the delivery of an IEP, that it must change the location to a school that can implement an IEP. In the instant case,

the unrebutted and credible testimony of the student's educational advocate was that the school to which the student's location was changed on June 1, 2010, School No. 2, was not able or capable of implementing the student's full-time special education IEP.

Respondent argues that it was not required to go through the IEP process to change the student's location of services. It is true that "location" is different from "placement." If, in fact, the only thing changed by Respondent was the location of services, it would be true that Respondent could make such a change under the provisions of IDEA. Unfortunately for Respondent, however, the change of location in this case, to School No. 2, resulted in the student being assigned to a school that could not implement her IEP. It is understandable why Respondent might want to remove the student from the more expensive School No. 1, which she was refusing to attend. The result here, however, was that the student was merely warehoused in a school that could not deliver her IEP until such time as the Respondent could identify a school that could implement her IEP. By failing to deliver the services that the student needed, according to her IEP team, Respondent denied FAPE to the student. 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).

Respondent argued in closing argument that the allegations herein constitute a mere procedural violation, citing TT v. District of Columbia 48 IDELR 127 (D.D.C. 2007). Such argument, however, is misplaced. By reassigning the student to a school that could not implement her IEP, respondent clearly committed a substantive violation of IDEA. The IEP of a child with a disability is the medium through which FAPE is delivered; delivery of IEP services is the IDEA mechanism for the provision of FAPE. 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). Clearly the IDEA violation in this case was substantive in nature. Respondent's argument is rejected.

Thus, it is clear that Respondent has violated IDEA by changing the student's location of services to School No. 2, which could not implement her IEP. The denial of FAPE lasted from June 1, 2010 when the decision to change the location to School No. 2 was made to July 16,

2010 when an appropriate location for delivery of the student's IEP, a combination of Schools No. 3 and 4, was identified and Petitioner's advocate was notified of the placement. The credible and persuasive testimony of Respondent's program coordinator established that Schools No. 3 and 4 could appropriately implement the student's IEP. Petitioner has met her burden of persuasion and has prevailed as to this issue.

RELIEF

Petitioner seeks as relief ten hours per week of tutoring, plus additional mentoring services, as compensatory education for the violation of IDEA committed by Respondent.

Awards of compensatory education for violations of IDEA are equitable in nature and should be qualitative to compensate a student for educational harm suffered by a deprivation of FAPE or other violation of the Act, rather than quantitative, or hour-per-hour replacement for denial of FAPE. Reid ex rel Reid v. District of Columbia, 43 IDELR 32, 401 F.3d 516 (D.C. Cir. 3/25/2005).

Counsel were reminded at the prehearing conference, as well as in the Prehearing Order following the prehearing conference, that the requirements of the Reid decision concerning compensatory education

must be complied with. Despite these warnings, however, there is no testimony or other evidence in the record concerning any educational harm that may have been suffered by the student as a result of Respondent's actions in wrongfully changing the location of the receipt of her IEP services from June 1, 2010 to July 16, 2010. There was a lot of testimony concerning what the student "wants," but no testimony concerning what harm the student may have suffered or what compensatory education would be appropriate to remedy such harm. In closing argument, counsel for Petitioner requested that relief be awarded "in the best interest of the child." In so arguing, counsel applies the wrong standard. A school district is not required, under IDEA, to maximize the potential of a child with a disability or to do what is best; rather, it is required that the school district provide an appropriate IEP and implement the IEP in order to achieve some educational benefit for the student. Rowley, supra; Kerkham, supra.

Moreover, compensatory education, like other relief available under IDEA, is equitable in nature. Reid, supra. In the instant case, the student missed 126 school days with absences during the school year. She was tardy on an additional 32 school days. The student's

conduct in failing to avail herself of the educational services and opportunities made available to her by Respondent must be taken into account in any relief awarded under IDEA. The student had no good reason for missing so many days of school. Some of the reasons offered by the student for her excessive and chronic absenteeism involve failure to have a suitable clothing outfit; problems with regard to her family situation; disputes concerning bus tokens; motivational problems; distaste by the student for having to listen to other special education students receive their IEP services while she is in the room and distaste by the student with the repetitive nature of school work. In short, the student could not offer any good reason for failing to attend school. The student's unwillingness to take advantage of educational opportunities precludes an award of compensatory education.

In closing argument, counsel for Petitioner made an argument that the student's disabilities caused her to fail to attend school. The evidence in the record, however, simply does not support this argument. Instead, the record shows that the student was indeed quite able to attend school when she felt like it. There is no evidence to show that any disability of the student caused her to fail to attend school.

In closing argument, counsel for Petitioner also attempted to distinguish the cases employing equitable factors because this student participated in IEP team meetings. Although it is commendable that the student participated in IEP meetings concerning her education, such participation does not explain or excuse her apparent refusal to attend school except under such circumstances as she demands. The student's conduct in being excessively and chronically absent from school militates against any relief being awarded to her for the violation of the Act by Respondent herein.

Accordingly, no relief is awarded to Petitioner for the violation of IDEA by the Respondent.

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: August 9, 2010

/s/ James Gerl

James Gerl
Hearing Officer