

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

STUDENT,
through the Parent,¹

Petitioner,

v

James Gerl. Hearing Officer
Case No. 2009-1174

DISTRICT of COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DECISION

BACKGROUND

The instant due process complaint was filed on August 13, 2009. This matter was reassigned to this hearing officer on September 30, 2009. A prehearing conference by telephone conference call was convened on October 6, 2009. The due process hearing was held at the Student Hearing Office on October 16, 2009. The due date for the Hearing Officer Decision is October 26, 2009.

JURISDICTION

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

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

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STUDENT HEARING OFFICE

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

PRELIMINARY MATTERS

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

ISSUES PRESENTED

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

1. Did Respondent conduct the vocational assessment of the student that was agreed to by the parties at the March 19, 2009 multidisciplinary team meeting?
2. Did Respondent prepare and implement an adequate transition plan as ordered by an August 10, 2008 Hearing Officer Decision and as agreed to at the November 24, 2008 and the March 19, 2009 multidisciplinary team meetings (hereafter sometimes referred to as "MDT")?
3. Has Respondent offered appropriate compensatory education to Petitioner?

FINDINGS OF FACT

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

1. Petitioner was born [REDACTED] (Respondent Exhibit 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 hearing officer exhibits)
2. At a March 19, 2009 meeting of the multidisciplinary team (hereafter sometimes referred to as "MDT") for the student, Petitioner and Respondent agreed that Respondent would conduct a vocational assessment of the student (Level-Voc II). (P-14; R's response to due process complaint)
3. Respondent has never conducted said vocational evaluation of the student.
(R's response to due process complaint; Testimony of Student; Testimony of Student's Mother) (References to testimony at the hearing is hereafter designated as "T")
4. A previous due process proceeding involving the same parties as this case resulted in a hearing officer decision on August 10, 2008 ordering Respondent to complete an appropriate transition plan for the student. Completion of an appropriate transition plan for the student by Respondent was also agreed to by the parties at MDT meetings convened on November 24, 2008 and March 19, 2009. (P-29, P-14, P-17, R's response to due process complaint)
5. Respondent has never completed an appropriate transition plan for the student. (R's response to due process complaint; T of Student; T of Student's Mother)

6. The student has multiple disabilities, including an emotional disturbance and a learning disability. (P-13)
7. A psychological and clinical evaluation of the student on September 26, 2007 conducted by a psychologist had recommended that vocational training and experience be a strong component of the student's educational program. Tutoring in academic subjects, individual therapy, specific classroom accommodations, a vocational evaluation and vocational planning, among other evaluations, and family therapy were recommended. (P-7; T of P's expert witness- psycho-educational evaluator)
8. The student needs a vocational program with concrete and realistic goals in order to properly prepare her for a somewhat independent life after school. In addition, the student needs intensive tutoring with a tutor familiar with students with learning disabilities, because her academic skills were very low in relation to her average range cognitive functioning ability (T of P's expert witness – psycho-educational evaluator; P-33; P-7)
9. A neurological evaluation of the student on September 4, 2008 noted that the student's educational program had been inappropriate because it had not addressed skills necessary to facilitate independent living and that vocational evaluation and development was critical for the student. The evaluation report also strongly recommended that the student's educational program include practice and rehearsal techniques and that her educational program should support her interest in cosmetology, with appropriate interventions (P-8)
10. A career assessment for the student was conducted on June 12-13, 2007. The evaluation report notes that the student has a strong career interest in

cosmetology, which would be her dream job. Other jobs that interested the student included information clerk and office helper. The evaluation report suggests another vocational assessment at a later date. (P-9)

11. A psychiatric evaluation of the student was conducted on September 19, 2008. The report finds that the student has atypical bipolar disorder. The report notes the student's interest in enrolling in cosmetology school and that although her cognitive limitations could hinder her plans, her cognitive performance has been reported to increase when she is emotionally stabilized.(P-10)

12. An occupational therapy evaluation of the student conducted on September 26, 2008 concluded that the student needs a program which can address vocational skills. (P-11)

13. On October 30, 2008, a psychological evaluation report of the student was conducted. The report finds that the student's intellectual functioning varies and that her academic performance may be affected by her emotional problems. The report recommends that the student receive family therapy and that she receive educational services based upon her deficit. (P-12)

14. From January 12, 2009 through the end of that school year, the student was enrolled at her current school. During that timeframe, the student was late 5 days, absent 51 days and present (and on time) 41 days. The student has not had a good record with regard to school attendance. (R- 6)

15. Respondent concedes that compensatory education is owed to Petitioner because of Respondent's violations of IDEA as alleged in the due process complaint herein. The most recent offer by Respondent of compensatory education for the petitioner is one hour of counseling (not to exceed

\$90.00/hour) per week for eight months; five prevocational or life skills classes through a community provider (not to exceed \$500.00); and one hour per week of tutoring for ten months in addition to funding the vocational (Level II) evaluation of the student by an independent evaluator. (R-3; R's response to due process complaint)

CONCLUSIONS OF LAW

1. Respondent denied a free and appropriate public education to the student by failing to comply with a hearing officer decision and agreements at MDT meetings to provide a vocational evaluation (Level II) and to provide the student with an appropriate transition plan. The Individuals with Disability Education Act, 20 U.S.C. §§1400 et seq. (hereafter sometimes referred to as "IDEA") §§612(a)(1); 34 C.F.R. §§300.101; Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982). See Braham ex rel Braham v. District of Columbia, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 10/25/2005).

2. Awards of compensatory education should be flexible and qualitative in nature so that they compensate a student for the educational harm caused by deprivation of FAPE. An award of compensatory education consisting of one hour of counseling per week for one year, ten prevocational or life skills classes by a community provider, one hour per week of tutoring in academic subjects with a tutor familiar with students with learning disabilities for one year, as well as an order requiring reimbursement for the independent vocational evaluation and a review of said evaluation by the student's IEP team in order to make appropriate changes to her transition plan based upon said evaluation report, is appropriate to remedy for the aforesaid violations of IDEA given the now known

pre-vocational and transition needs of this student. Reid ex rel Reid v. District of Columbia, 43 IDELR 32, 401 F.3d 516 (D.C. Cir. 3/25/2005)

3. Because compensatory education is a form of equitable relief, the conduct of both parties is relevant to the calculation of an award of compensatory education. Here the student's conduct in being excessively absent from school and tardy for school warrants a small reduction in the amount of compensatory education. Similarly, respondent's delay in conducting the necessary evaluations of Petitioner preclude it from objecting to stale data and evaluations. Reid ex rel Reid v. District of Columbia, 43 IDELR 32, 401 F.3d 516 (D.C. Cir. 3/25/2005)

DISCUSSION

Merits

Issue No. 1: Whether Respondent conducted the vocational assessment that was agreed to by the parties at the March 19, 2009 meeting

Respondent concedes that it did not conduct the aforesaid vocational assessment. See 34 C.F.R. §300.304(c)(4). Accordingly, Petitioner has prevailed on this issue.

Respondent concedes that it failed to perform the vocational Level II assessment for Petitioner and that a letter was issued on September 2, 2009 to Petitioner so that she might obtain an independent vocational II evaluation within the parameters of DCPS guidelines for such evaluations. Respondent will be ordered to fund such an assessment of the petitioner within the next thirty days and after the assessment report has been completed, the student's IEP

team will be ordered to meet within thirty days to review the report and amend the student's IEP as may be appropriate given the assessment.

Issue No. 2: Did Respondent prepare and implement an adequate transition plan as ordered by an August 10, 2008 Hearing Officer Decision and as agreed to at the November 24, 2008 and the March 19, 2009 multidisciplinary team meeting

Respondent concedes that it did not offer an adequate transition plan as aforesaid. See IDEA §614(d)(A)(i)(VIII). Accordingly, Petitioner has prevailed on this issue.

Issue No. 3: Has Respondent offered appropriate compensatory education to Petitioner?

Respondent has conceded that Petitioner is owed compensatory education for its violations of IDEA in failing to prepare an adequate transition plan and by failing to complete a vocational assessment of the student as aforesaid.

The due process complaint also contends that Petitioner is also owed additional compensatory education because Respondent allegedly violated the Act by failing to have any placement in place for the student for a period of time. The due process complaint states that the respondent conceded this point at the March 19, 2009 MDT meeting. Neither Respondent's record of that meeting nor the notes of the meeting taken by Petitioner's Advocate mention said admission. Although there is a letter in the record evidence that notes that the student had

reenrolled (P-4), and some vague testimony from the student as to this point, there is no clear evidence in the record that the student had no placement for any specific period of time. This argument is rejected as not supported by credible and persuasive evidence in the record. This alleged violation of the Act was not proved by petitioner at the due process hearing. Accordingly, the award of compensatory education will be limited to the violations regarding the failure to perform the vocational assessment and the failure to provide Petitioner with an appropriate transition plan.

Awards of compensatory education should be flexible and qualitative in nature so as to compensate or make a student whole for educational harm caused by the deprivation of FAPE. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/2005). Compensatory education is an equitable remedy that requires an analysis of the behavior of the parties as well as the harm caused to the student. Reid, supra.

In the instant case, respondent has offered a compensatory education program with the following components:

- One hour per week of counseling for the student for eight months, not to exceed \$90.00 per hour;
- Five prevocational or life skills classes through a community provider, not to exceed \$500.00;
- One hour per week of tutoring for ten months.

Petitioner on the other hand, seeks, in addition to her normal school day, the following compensatory education:

- Six hours per week of tutoring for eleven months to help the student pass the cosmetology entrance exam;
- One hour per week of tutoring until the student completes the cosmetology program;
- Respondent funding of the cosmetology program.

The position of Petitioner misses the mark. The purpose of compensatory education is to make the student whole for the respondent's violation of the law. In this case, if Respondent had not violated the law by failing to conduct the vocational assessment and prepare an adequate transition plan, there is no guarantee that the student would have successfully completed a cosmetology program. Instead, to make the student whole, the respondent must provide compensatory education that would help prepare the student to take steps toward her life after her school career. IDEA §614(d)(1)(A)(i)(VIII); 34 C.F.R. §§ 300.43, 300.320(b)

The testimony of Petitioner's expert witness from the vocational school in this regard is useless. Said expert, who has never evaluated or even met the student, testified as to a compensatory program based on the student's desires and some documentary evidence that was not anchored in any way to the violations of IDEA by Respondent's failure to conduct and consider a vocational evaluation of the student and failure to prepare an adequate transition plan. The testimony of the parents' expert from the vocational school was not credible and it was not helpful or persuasive concerning compensatory education, the contested issue in this proceeding.

Concerning the concept of making the student whole, respondent's proposed compensatory education plan is a good start toward an appropriate plan. However, it does not go far enough. Respondent's plan does not address at least some of the student's pre-vocational needs. Because the updated vocational assessment has not been completed, it is not yet possible to accurately determine the student's current transition needs, and it will be ordered that the student's transition plan will be updated after the vocational assessment is completed. However, from the evidence in the record, it is apparent that in the meantime, in addition to the components offered by Respondent, an appropriate compensatory education program should also contain a family counseling component. Family counseling or therapy was identified in two previous evaluations: a psychiatric evaluation in September 2008 and a psycho-educational evaluation in October, 2008.

In addition, because of the extreme delays by Respondent in completing an appropriate transition plan for the student, the amount of counseling, tutoring and life skills classes being ordered as compensatory education are for longer periods of time than those offered by Respondent.

The psycho-educational evaluator who conducted an evaluation of the student on October 23, 2007, testified at the hearing that the student needed vocational programming with concrete and realistic goals in order to properly prepare the student for a somewhat independent life after school. Said evaluator also testified that the student needed intensive tutoring with a tutor familiar with students with learning disabilities because her academic skills were very bad in relation to her cognitive functioning potential. The testimony of this expert psycho-educational evaluator was very credible and persuasive. Respondent

argues that this witness had not evaluated the student for over two years. This argument is expressly rejected. The paucity of data and information as to the student's needs is a direct result of Respondent's failure to have her vocational needs properly assessed. Respondent, therefore, cannot now complain about the staleness of the information available. Because compensatory education is equitable relief, the equities of these facts compel the conclusion that such an argument must be rejected. The longer periods of time being ordered herein for tutoring and counseling more fairly reflect what is now known about the student's pre-vocational needs as reflected by the evidence in the record.

The periods of time that the student is to receive counseling, tutoring and family counseling as compensatory education is limited, however, to one year because of equitable considerations. The time periods would have been slightly longer given respondent's extreme neglect of its obligations to provide a vocational assessment and an appropriate transition plan, but respondent correctly raises the equitable concern that the student has been absent or tardy more than she has been present at her current school. Given that the student is not putting forth a serious effort and that there is some doubt that the student will take advantage of tutoring, counseling and family counseling as ordered herein, the time period to these items of compensatory education shall be limited to one year. Such equitable considerations must be considered in determining compensatory education awards.

To the extent that more compensatory education is ordered than offered by Respondent, Petitioner has prevailed on this issue. To the extent that Petitioner's theory that relief should require successful completion of

cosmetology school by the student has been rejected, Respondent has prevailed on this issue.

ORDER

Based upon the foregoing, the following is HEREBY ORDERED:

1. Unless the parties agree otherwise, Respondent shall provide Petitioner the following as compensatory education:
 - a. Reimburse Petitioner for one hour per week of counseling for a period of one year by a provider of Petitioner's choice at a rate not to exceed \$90.00 per hour;
 - b. Reimburse Petitioner for ten pre-vocational or life skills classes to be completed within one year by a community provider of Petitioner's choice, not to exceed a total cost of \$1,000.00;
 - c. Provide or reimburse Petitioner for one hour per week of tutoring in academic subjects with a tutor familiar with students with learning disabilities for a period of one year consistent with the guidelines and procedures of Respondent;
 - d. Provide or reimburse Petitioner for family counseling for one hour per week for a period of one year consistent with the guidelines and procedures of Respondent; and

2. Unless the parties agree otherwise, Respondent shall pay for an independent evaluation of Petitioner's vocational needs, to be completed within forty-five days of the date of this Hearing Officer Decision; and

3. Unless the parties agree otherwise, Respondent shall convene the student's IEP team within thirty days of the receipt of the report of the aforesaid vocational evaluation and make any appropriate changes to Petitioner's transition plan or educational program.

NOTICE OF RIGHT TO APPEAL

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

Date Issued: October 26, 2009

s/ James Gerl
James Gerl
Hearing Officer