

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Child,¹)	
Petitioner,)	
)	
v.)	Hearing Officer: Michael Lazan
)	Case No.: 2018-0258
Office of the State Superintendent of)	
Education,)	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old child (“the Child”). A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS”) pursuant to Part C of the Individuals with Disabilities Education Act (“IDEA”) on October 9, 2018. An amended Complaint was filed on October 19, 2018, stating similar allegations and adding Office of the State Superintendent of Education (“OSSE”) as a Respondent.

On October 19, 2018, DCPS filed a Notice of Insufficiency and Motion to Dismiss, contending that the Complaint did not contain a description of the nature of the Child’s problem relating to the proposed or refused initiation or change, including facts related to the problem. DCPS also contended that claims cannot be brought against it pursuant to Part C of the IDEA, and that a hearing officer therefore has no jurisdiction.

¹Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

On October 24, 2018, this Hearing Officer denied DCPS's motion to dismiss and granted Petitioner's application to amend the Due Process Complaint, with the new date of filing for the amended Complaint set at October 19, 2018.

OSSE moved to dismiss the amended Due Process Complaint on October 25, 2018, contending that the date of filing cannot logically be before the date of a hearing officer's decision authorizing that filing. This motion was denied by this Hearing Officer's order dated November 8, 2018.

On November 7, 2018, DCPS moved for dismissal of Count One, contending that the amended Due Process Complaint failed to state a claim. Petitioner admitted that DCPS was not liable pursuant to Count One through an email to this Hearing Officer dated November 16, 2018, and Count One against DCPS was deemed to be withdrawn and dismissed. On December 13, 2018, Petitioner moved to withdraw Count Two against DCPS, therefore withdrawing all claims against DCPS in this case.

On December 21, 2018, OSSE moved to dismiss the remaining claim. OSSE contended that the claim could not succeed at hearing because no facts exist to support such claim. OSSE also contended that Petitioner's claim is legally infirm because "at-risk" infants and toddlers such as the Child do not qualify for services under page 16 of OSSE's "Policies for Implementing Part C of the Individuals with Disabilities Education Act," and that all claims that accrued prior to October 9, 2016, should be dismissed because of the two-year statute of limitations for Part C claims. 34 CFR 303.440(a)(2). Petitioner submitted opposition papers on December 28, 2018, contending that issues of fact precluded an order dismissing the case, but agreed that all claims accruing prior to October 9, 2016, should be barred from consideration in the case. OSSE's motion to

dismiss was denied on January 8, 2019, which order also dismissed the remaining claims against DCPS.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to Part C of the Individuals with Disabilities Act (“IDEA”), 20 U.S.C. Sect. 1439 et seq., and its implementing regulations, including 34 C.F.R. Sect. 303.443, and the District of Columbia Municipal Regulations, Title 5-A, Chapter 31.

III. Prehearing Conference

On December 6, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for the Child’s parents, appeared. Attorney B, Esq., counsel for DCPS, appeared. Attorney C, counsel for OSSE, appeared. During the conference, the parties agreed to litigate different issues than the issues pleaded in the Complaint. A prehearing conference order was issued on December 15, 2018, summarizing the rules to be applied in the hearing and identifying the issues in the case.

IV. Hearing Date and Closing Arguments

There was one hearing date: January 10, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. OSSE was represented by Attorney C, Esq., and Attorney D., Esq. Petitioner moved into evidence exhibits 1-19. There were objections to exhibits 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19. Objections were sustained in regard to exhibits 10, 11, and 13. Exhibits 17 and 18 were withdrawn. All other objections were overruled. Petitioner’s exhibits 1-9, 12-16, and 19 were admitted. Respondent moved into evidence exhibits 1-18. There were no objections. Exhibits 1-18 were admitted. Petitioner presented as witnesses: herself. OSSE presented as witnesses:

Witness A, a speech and language pathologist, and Witness B, a Special Assistant on Part C. The parties presented written closing arguments on January 15, 2019.

V. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined in this case are as follows:

Did Respondent OSSE fail to provide the Child with services pursuant to Part C from October, 2016, through to the Student's third birthday? If so, did OSSE violate provisions requiring such services in Part C of the IDEA and accompanying regulations?

Petitioner contended that the Child was improperly denied an Individualized Family Service Plan ("IFSP") to address the Child's speech and language needs and feeding needs. Petitioner seeks reimbursement for the cost of the replacement services that were provided to the Child, including speech and language services and "feeding" services. Petitioner also seeks the following evaluations: a) psychoeducational evaluation; b) speech and language evaluation; c) physical therapy evaluation; and d) occupational therapy evaluation.

VI. Findings of Fact

1. The Child was born prematurely after twenty-four weeks of gestation. Thereafter, the Child spent six months in Hospital X, suffering from a variety of problems, including respiratory issues and severe reflux. The issue with reflux resulted in the Child being fed through a tube ("NG tube") attached to the Child's nose. The Child ended up spending approximately 169 days in the intensive care unit at Hospital X after birth. Testimony of Petitioner; P-1-4; R-9.

2. In or about June, 2015, staff at Hospital X initiated an evaluation for early intervention services for the Child through Strong Start, the District of Columbia's early intervention program. When the Child was referred for the evaluation, the referring person from Hospital X did not check off a box on the referral form to indicate that the Child had been diagnosed with a physical or mental condition known to have a high probability of resulting in significant delays in development (even if no delays are apparent at the time). Testimony of Petitioner; Testimony of Witness A; Testimony of Witness B; R-1.

3. Strong Start arranged for the Child's evaluation. As part of this evaluation, Strong Start staff interviewed Petitioner, who said that the Child was a good communicator. Strong Start staff were told that the Child was born prematurely and that, due to reflux and digestive issues, the Child used an NG tube for feeding. At the time, the Child had difficulty with drinking, sucking, and swallowing. R-3-3; R-3-6; R-5.

4. On or about July 27, 2015, Strong Start staff, including an occupational therapist, a speech and language pathologist, an occupational therapy graduate intern, and a speech and language pathology intern, assessed the Child for cognitive delays, social and emotional delays, adaptive delays, fine motor delays, and gross motor delays. The Child was deemed to be in the average range in social and emotional development, adaptive functioning, fine motor functioning, gross motor functioning, and cognitive functioning. P-1-5-6; P-2.

5. In regard to communication functioning, the Child was assessed through the "Assessment, Evaluation and Programming System for Infants and Children, 2nd Edition." The Child was observed to turn toward a noise and to cry when hungry or

uncomfortable. The Child's communication issues were deemed to be within the average range by the speech and language pathologist. R-3-5-6, R-5.

6. On October 15, 2015, a meeting was held to discuss the Strong Start evaluation. Petitioner attended the meeting and discussed the Child's speech, weight, movement and feeding issues. Petitioner requested occupational therapy, physical therapy, and speech and language therapy at this meeting. Testimony of Petitioner.

7. Because of the Child's premature birth, Strong Start automatically deemed the Child eligible for services, and an IFSP was created for the Child. The IFSP, dated October 19, 2015, provided for two sixty-minute sessions per week of "developmental therapy" and two sixty-minute sessions per week of physical therapy. The IFSP also contained information about the results of the Child's evaluation and the Child's present levels of performance, as reported by Petitioner. The IFSP provided the Child with two measurable outcomes, relating to the Child's ability to turn his/her head and pick up objects. P-1-13-14; Testimony of Witness A.

8. In or about November, 2015, the Child no longer required the NG tube and began to be fed through a "g-tube" instead. The g-tube worked by connecting a tube to a small piece of equipment (a "mickey button") attached to the Child's stomach area. The mickey button was approximately three inches wide by three inches long. When it was time for feeding, the Child would be fed through the g-tube attached to the mickey button. Occasionally, the mickey button would fall out, which resulted in visits to an emergency room. Testimony of Petitioner.

9. As a result of the new approach to feeding, the Child gained weight, which in turn led to fewer feeding sessions through the g-tube. By February, 2016, the Child

was no longer fed through the g-tube during ordinary work hours; the Child was fed through the g-tube only early in the morning and at night. Testimony of Petitioner.

10. The Child was in child care during this time. The child care service providers assisted the Child with speech issues and eating issues through June, 2016. Testimony of Petitioner.

11. The Child was again assessed by Strong Start in or about June, 2016. The Child had already achieved the desired outcomes provided in the IFSP of October, 2015. Strong Start staff found that the Child was starting to engage in babbling and vocal exchanges, and recognized his/her own name. The Child also started to follow oral directions with context clues. However, Petitioner continued to express concerns about the Child's communication skills. R-8; R-9; Testimony of Witness A.

12. As a result of this assessment, the Child's services were modified. A new IFSP, dated June, 2016, provided the Child with only physical therapy, twice a month for sixty minutes per session. New outcomes were introduced regarding grasping a spoon and walking with better balance and coordination. R-9.

13. The Child was again assessed on or about September 30, 2016. The evaluators included an occupational therapist, physical therapist, speech and language pathologist, and graduate clinician. The Child was determined to be in the 84th percentile in adaptive testing. The Child could drink from an open cup, attempt to feed him/herself, and assist with dressing him/herself, though the Child was not yet toilet-trained. By this time, the Child was eating solid foods, though the Child also used the g-tube early in the morning and at night. The Child's mickey button was not deemed to affect the Child's movement. The Child was considered to be above average in cognitive ability. An

assessment of the Child's physical ability revealed no issues with gait and movement, though the Child did appear to be slightly bowlegged. The Child's physical development was deemed to be in the "high average" range, and no issues were found with respect to fine motor skills or adaptive skills. P-3; R-11-10; Testimony of Witness A.

14. In regard to communication, the Child was assessed through the "Batelle Developmental Inventory, 2nd Edition." The Child scored in the 37th percentile in receptive speech and the 84th percentile in expressive speech. The evaluator found that the Child was attentive, followed one-step directions, could associate spoken words with specific objects, and was able to use a word for some objects. The Child could also make eye contact, imitate words spoken by others, label a ball, and be quieted by his/her mother's voice. No speech and language deficits were noted by the evaluators. R-11; Testimony of Witness A.

15. Petitioner was also interviewed as part of the Child's evaluation. Petitioner told Witness A that the Child's speech was "great" and that there were no concerns about the Child's speech. Petitioner felt that the Child's speech was greatly enhanced by this time, and that the Child's speech was "much more clear." R-11; Testimony of Petitioner.

16. An IFSP meeting was held on or about October 17, 2016, to discuss the Child's evaluations. The meeting lasted about two hours. During this meeting, Strong Start indicated to Petitioner that the Child was no longer eligible for Part C services. Petitioner did not object, and consented to this determination, though she did not know she had any other options. On or about October 17, 2016, Strong Start sent a Prior

Written notice to Petitioner, finding that the Child was not eligible for services. P-5; R-13; R-14; P-4-38; Testimony of Petitioner.

17. Currently, the Child no longer uses the g-tube for feeding. The Child's mickey button was removed in or about January, 2017. Testimony of Petitioner.

VII. Conclusions of Law

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

The burden of proof in District of Columbia IDEA cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

See D.C. Code § 38-2571.03(6)(A)(i).

This section specifically references 20 U.S.C. Sect. 1439, the section of the IDEA that relates to procedural safeguards for parents seeking early intervention services for their children. As a result, even though the language above refers to an "individual education program" rather than an IFSP, the 2014 changes to the burden of persuasion should be deemed to apply to Part C cases. Since Petitioner is challenging the lack of an

IFSP in this case, the burden of persuasion falls upon OSSE to show that the eligibility determination for the Child was correct, provided that Petitioner establishes a *prima facie* case on the claims at issue.

Did Respondent OSSE fail to provide the Child with services pursuant to Part C from October, 2016, through to the Child's third birthday? If so, did OSSE violate provisions requiring such services in Part C of the IDEA and accompanying regulations?

As noted previously, at the prehearing conference, the parties ended up agreeing to litigate different issues than the issues raised in the Due Process Complaint. At the prehearing conference, Petitioner contended that the Child was eligible for Part C services in October, 2016, for only two reasons: the Child had speech and language delays, and the Child had feeding issues. The parties agreed that no other issues would be raised at the hearing, as memorialized by the prehearing order issued on December 15, 2018. Accordingly, testimony at the hearing was limited to testimony on the Child's speech and language and feeding issues.

Part C of the IDEA provides that certain infants or toddlers may be provided with early intervention services after an evaluation that assesses the infant or toddler in all areas of suspected disability. 34 CFR 303.21(a). Under Part C, an infant or toddler is an individual under three years of age who needs early intervention services because the individual:

- (1) Is experiencing a developmental delay as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas:
 - (i) Cognitive development.
 - (ii) Physical development, including vision and hearing.
 - (iii) Communication development.
 - (iv) Social or emotional development.
 - (v) Adaptive development; or
- (2) Has a diagnosed physical or mental condition that:

- (i) Has a high probability of resulting in developmental delay; and
- (ii) Includes conditions such as chromosomal abnormalities; genetic or congenital disorders; sensory impairments; inborn errors of metabolism; disorders reflecting disturbance of the development of the nervous system; congenital infections; severe attachment disorders; and disorders secondary to exposure to toxic substances, including fetal alcohol syndrome.

See also 5A-DCMR Sect. 3108.3.

Early intervention “services” are designed to meet the developmental needs of an infant or toddler with a disability, and the needs of the family to assist appropriately in the infant’s or toddler’s development, as identified by the IFSP team, in any one or more of the following areas: physical development, cognitive development; communication development, social or emotional development; or adaptive development. 34 C.F.R. §303.13(a)(4). Types of early intervention services include assistive technology devices and services; audiology services; family training, counseling, and home visits; health services; medical services; nursing services; nutrition services; occupational therapy; physical therapy; psychological services; service coordination services; sign language and cued language services; social work services; special instruction; speech-language pathology services; transportation and related costs; and vision services. 34 C.F.R. §303.13(b).

Through the testimony of Witness A, OSSE established that the Child did not exhibit any significant delays in communication development in or about September, 2016. Testing of the Child in September, 2016, by Witness A (through the Batelle measure), indicated that the Child was functioning above level, in the 84th percentile, in terms of expressive language. The Child also tested in the 37th percentile in terms of

receptive language. Witness A, the lone speech and language pathologist who testified, said that a score in the 37th percentile is average, and Petitioner did not argue otherwise. *Witness A also testified that Petitioner herself said, in or about September, 2016, that the Child's speech was "great" and that Petitioner was not concerned about the Child's speech at that time.*

The application of OSSE's "Policies for Implementing Part C of the Individuals with Disabilities Act" is consistent with this analysis. These policies indicate that, in October, 2016, the Child would have been eligible for speech and language services under Part C only if the Child had had a "fifty-percent delay" in communication skills. As defined by Witness B, a fifty-percent delay means that a two-year-old child communicates like a one-year-old. Witness A established that the Child did not have a fifty-percent delay in speech and language issues. In fact, Witness A indicated that the Child did not have even a twenty-five percent delay in speech and language issues (which could have warranted an award of services when combined with a twenty-five percent delay in another developmental area).

Petitioner did not argue any of these points in her closing brief. In fact, in her brief, Petitioner did not clearly argue that the Child's expressive or receptive speech levels in September, 2016, should have resulted in an award of Part C services. Petitioner's main argument in her brief was that the Child's feeding issues constituted a physical or mental condition that had a high probability of resulting in developmental delay, pointing to 34 CFR Sect. 303.21(a)(2).

However, all testing conducted at the time of the review indicated that the Child was able to feed as well as a typical child. As discussed by Witness A, Strong Start

conducted adaptive testing on the Child in September, 2018. The Child was determined to be in the 84th percentile in adaptive testing. The Child could drink from an open cup and tried to feed him/herself as would a typical child of his/her age. By this time, the Child was eating solid foods and not using the g-tube at school. Though the Child did have a mickey button on his/her stomach in September, 2016, the mickey button merely allowed the Child's food intake to be supplemented through the g-tube early in the morning and at night. There is no evidence or testimony to suggest that the mickey button significantly impacted the Child's day, or presented problems that could have been dealt with through the provision of Part C services.

It is important to underscore that Petitioner did not present any witnesses with expertise in digestive or feeding issues, nor did Petitioner present any documentation to the effect that the Child's issues with digestion could be characterized as a physical condition that could result in developmental delay. Moreover, it is clear from the record that these digestive issues were likely to *resolve* in the future, not result in developmental delay in the future. In fact, the Child's digestive issues do appear to have resolved, since, by or about January, 2017, the g-tube was no longer used.

It is notable that a form filled out by staff from Hospital X supports OSSE's position that the Child did not, in October, 2016, have a physical or mental condition that was likely to result in developmental delay. In June, 2015, staff from Hospital X needed to complete a form to have the Child referred to Strong Start. The form had a box that, if checked, would have specifically indicated that the Child had a physical or mental condition that was known to have a high probability of resulting in significant delays in development. Staff at Hospital X did not check that box.

In her closing argument, Petitioner pointed to the fact that the applicable regulations indicate that a dietitian's services can be deemed Part C services. However, no dietitian or other health professional testified to establish that the Child's digestive issues should, or even could, be addressed through a dietitian's services. Indeed, during her testimony, Petitioner did not say that the Child needed a dietitian's help, or even mention a dietitian. There also is no documentation in the record to support the claim that the Child needed a dietitian in October, 2016. The record strongly suggests that Petitioner understood that the Child's digestive issues were adequately addressed through use of the g-tube, and that the use of the mickey button did not require the services of any Part C service provider.

Parenthetically, Petitioner's brief included sundry arguments that were not pleaded in the Complaint, or mentioned at the prehearing conference, or raised during opening statements. Since these issues were not mentioned in the prehearing conference or memorialized in the prehearing order, this Hearing Officer does not have jurisdiction to hear those claims.

Moreover, all such arguments were entirely without merit. Only at the briefing stage did Petitioner contend that the IFSP team failed to conduct a thorough evaluation, arguing that the team did not speak to any of the Child's service providers. However, Petitioner did not point to any authority suggesting that it is necessary or even important to contact every service provider of a child during the course of an evaluation. Petitioner did not suggest that Strong Start failed to conduct a particular test in September, 2016. During her testimony, Petitioner never even alluded to Strong Start's purported failure to conduct a comprehensive evaluation. On the other hand, Witness A presented

unrebutted, credible testimony that the Strong Start evaluation was appropriately comprehensive. It is noted that two qualified professionals conducted the assessments of the Child, and that the pair used criteria-referenced and norm-referenced instruments, in addition to observing the Child and interviewing Petitioner.

In her brief, Petitioner also argued for the first time that, at the meeting in October, 2016, Strong Start failed to “even consider” whether the Child had a physical condition that had a high probability of resulting in developmental delay. This argument suggests a claim about the quality of Strong Start’s deliberation at the meeting, not a claim contesting the results of the meeting. But there is no testimony about this issue in the record. Petitioner herself never mentioned this issue during her rather thorough examination, and neither did OSSE’s witnesses. It is also noted that Petitioner admitted that she consented to Strong Start’s findings at the IFSP review in October, 2016.

In sum, Petitioner’s concerns are understandable. The Child was born prematurely and spent almost a half-year in intensive care. Thereafter, the Child did receive services through Strong Start, via an IFSP created in October, 2015. However, that IFSP only provided services because the Child was born prematurely, after twenty-six weeks of gestation. Such children benefit from OSSE’s policy to characterize this kind of premature birth as a physical condition with a high probability of resulting in developmental delay. However, it is undisputed that such prematurely-born children are eligible for services only for one year. R-2, Appendix A, p. 29; R-2, Sect. VI, “Continued Eligibility and Discharge from Early Intervention Services,” pp. 16 (allowing for a determination that the Child is no longer eligible when the Child’s status changes). After the age of one, if a child’s condition is associated with age (such as prematurity),

the child may be found to be ineligible for services, unless there exists a fifty-percent delay in a developmental area, a twenty-five percent delay in two developmental areas, or a specific “physical or mental condition” that has a high probability of resulting in a developmental delay or disability. Id. In October, 2016, there was simply no evidence that the Child exhibited any such delays or physical or mental conditions. Petitioner therefore failed to present a *prima facie* case on the issues certified by this Hearing Officer at the prehearing conference, as memorialized by the prehearing order.

VIII. Order

As a result of the foregoing, the Complaint is hereby dismissed with prejudice.

Dated: January 21, 2019

Michael Lazan
Impartial Hearing Officer

cc: Attorney A, Esq.
Attorney C, Esq.
Attorney D, Esq..
OSSE Division of Specialized Education
Office of Dispute Resolution

IX. Notice of Appeal Rights

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: January 21, 2018

Michael Lazan

Impartial Hearing Officer