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DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
State Enforcement and Investigation Unit
Office of Review and Compliance

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CONFIDENTIAL

In the Matter of:	
STUDENT,	Case No. (LSD)
Petitioner,	
v.	
LOCAL EDUCATIONAL AGENCY,	**HEARING OFFICER DECISION**
Respondent.	

I. PROCEDURAL BACKGROUND

Petitioner, by and through her parent, filed a due-process complaint on February 13, 2009. Petitioner waived the resolution session. On March 3, 2009, Respondent answered the complaint with a response and motion to dismiss.

On March 16, 2009, the date of the original due-process hearing, I granted Petitioner's unopposed motion for a continuance to March 20, 2009; granted Petitioner's oral motion to amend her due-process complaint; and denied Respondent's motion to dismiss as moot in light of the complaint amendment.

On March 20, 2009, I held a due-process hearing under the applicable sections of the Individuals with Disabilities Education Improvement Act of 2004 (*see* 34 C.F.R. §§ 300.1-300.718) and of the District of Columbia municipal regulations (*see* 5 DCMR §§ 2500-3033). At the hearing, both parties were represented by counsel. Petitioner entered into evidence, without

objection, eighteen documents marked P-1 to P-18. Two witnesses, including Petitioner's father, testified on her behalf. Respondent entered into evidence, without objection, seven documents marked R-1 to R-7. Four witnesses testified on its behalf. Finally, I admitted into evidence four documents marked as HO-1 to HO-4, which were documents created by Respondent and late disclosed by Petitioner on March 16th.

II. ISSUES RAISED AND RELIEF SOUGHT

In the amended due-process complaint, Petitioner alleged Respondent denied her a free and appropriate education ("FAPE") by failing to (1) develop an appropriate individualized education program ("IEP") for her; (2) conduct a functional behavior assessment, an occupational therapy assessment, and a vision and hearing screening; and (3) provide Petitioner's school records, including her report cards.

For these lapses, Petitioner requests Respondent be ordered to conduct the three identified sets of evaluations, plus a neuropsychological assessment; hold a multidisciplinary team meeting to review those evaluations, revise Petitioner's IEP, and discuss placement; and produce Petitioner's school records.

III. FINDINGS OF FACT

Based on the witnesses' testimony, the documentary evidence presented by the parties, the arguments made by counsel, and my own observations at the due-process hearing, I find:

1. Petitioner is an -year old, other health impaired student attending School A. She began matriculating at School A during the 2007-08 school year as a general-education student.

2. During the first half of that school year, according to her special-education teacher and her school social worker (respectively, Witnesses 4 and 5), Petitioner exhibited a

number of behavior problems, including temper tantrums, crying fits, and other emotional outbursts. Additionally, her academic performance was below grade level. *See* P–16. Because of these behavioral and academic difficulties, School A convened a Student Support Team on January 22, 2008, which initiated her identification as a child with possible learning disabilities.

6. Nine days later, School A held a multidisciplinary team meeting to start the assessment process. Petitioner's parent signed an evaluation-consent form for his daughter that day.

7. Some evaluations already had been conducted of Petitioner because her father had previously requested testing in September. Those tests, however, were not special-education evaluations. Apparently, Petitioner's teacher misunderstood the nature of Petitioner's parent's request regarding "testing." *See* P–17.

8. When the evaluations were complete, a multidisciplinary team met again on April 9, 2008, and developed an individualized education program for Petitioner. An initial draft of that IEP called for eighteen and a half hours of special education; however, the team decided at the meeting to increase Petitioner's hours of special education to thirty-two hours—a full-time IEP. The special-education coordinator for School A (Witness Two) and Petitioner's special-education teacher (Witness Four) testified that, since Petitioner became eligible for special-education services, she has only been taught under the thirty-two hour final IEP.

9. Petitioner's IEP was updated on March 5, 2009. That is her current IEP. In it, Petitioner's primary disability is identified as "specific learning disability" instead of "other health impaired" as she originally was classified on April 9, 2008. Witness Two testified that she drafted Petitioner's current IEP with Respondent's new Easy IEP electronic form. She testified that, because of her unfamiliarity with the new form, she accidentally clicked the wrong selection

in the "Primary Disability" drop-down box and selected "specific learning disability" instead of "other health impaired." But, she noted the team discussion at the March 5th update meeting regarded Petitioner as other health impaired, not specific learning disabled.

10. Petitioner's father testified that his daughter presently cannot read; therefore, he believes she made no progress under the April 2008 and March 2009 IEPs. He questioned how she could receive "all Bs on her report card" in light of the fact that she cannot read.

11. Petitioner's educational advocate (Witness One), a former special-education teacher, testified that School A failed to provide him with documented evidence of Petitioner's progress since her identification as a child with special needs and listed a number of types of documents he would have expected to see if Petitioner's progress had been systematically monitored. The witness testified that he could not determine whether Petitioner had progressed because of the lack of documentation and because he himself had made no clinical assessments of her.

12. Petitioner's special-education teacher testified that, at the March 5, 2009 multidisciplinary meeting, she had provided Petitioner parent and education advocate with a portfolio of Petitioner's work, which she believed documented the student's academic progress. The witness stated that she had developed the academic goals in Petitioner's IEPs and noted that Petitioner's oral reading skills have improved from a pre-kindergarten level to a first-grade level, having mastered her sight words. She also noted that Petitioner's math skills had improved from a first-grade level to a second-grade level. Lastly, she testified that Petitioner has some continuing behavior problems in the classroom, but that too has improved significantly.

13. School A's school social worker testified that Petitioner's behavior, while a "big problem" last year, is not a major concern now. She had observed Petitioner in class and found

Petitioner to be more mature than most of her peers. She said she had developed the behavioral goals in Petitioner's IEPs and felt Petitioner had achieved both self-control and self-insight.

IV. CONCLUSIONS OF LAW

Petitioner shoulders the burden of proof in this due-process proceeding, *see* 5 DCMR § 3030.3, and must carry it by a preponderance of the evidence. *See* 20 U.S.C. § 1415 (i)(2)(c). Respondent is not held to a standard of perfection in meeting its obligations under the Individuals with Education Disabilities Improvement Act. *See Kruvant v. District of Columbia,* 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (petitioner denied relief because, while respondent failed to timely assess petitioner, petitioner could show no harm resulting from that error).

In the face of a procedural violation, a hearing officer can find Petitioner was denied a FAPE only if the violations impeded Petitioner's right to a FAPE, significantly impeded Petitioner's parent's opportunity to participate in the decision-making process regarding provision of a FAPE, or caused the child a deprivation of educational benefits. *See* 20 U.S.C. § 1415 (f)(3)(E)(ii); *see also Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (technical violations must interfere with substantive rights).

Petitioner has alleged procedural violations relating to Petitioner's IEPs, evaluations, and school records. I discuss each allegation in turn.

Inappropriate IEP

Petitioner has identified three deficiencies with Petitioner's March 5, 2009 IEP. None of them, however, caused a denial of FAPE.

Petitioner first claims that the number of special-education hours Petitioner received on the March 2009 IEP changed from eighteen and a half hours to thirty-two hours. This claim is incorrect. Witness Two testified that the March 2009 IEP showing eighteen and a half hours was

a draft that was never implemented for Petitioner; it was only used as a template to start the conversation about Petitioner's services at the multidisciplinary meeting. She testified that once the draft IEP had been entered in the new Easy IEP system either she did not know how to delete it or the program would not permit her to delete it. Notwithstanding the draft IEP, the special-education coordinator, special-education teacher, and school social worker all testified that Petitioner has only been taught, since March 5, 2009, under the thirty-two hour IEP.

This indeed was a change from the eighteen and a half hours called for by Petitioner's previous April 2008 IEP. Petitioner's educational advocate agreed with this changed IEP (*i.e.*, increasing Petitioner to a full-time special-education student). But her father refused to sign in agreement with the March 2009 IEP. He now objects to Respondent's apparent[1] failure to issue a written notice to Petitioner regarding the change in her services. This objection raises two practical concerns: (1) Petitioner objects to receiving more special-education services rather than less and (2) she has only been subject to her current IEP for twenty days. If it is the case that Petitioner made no progress under her old, eighteen and a half hour IEP and cannot now read as her father testified, then it makes no sense that providing her with more special services is detrimental to her (that is, unless Petitioner is challenging the types of service and not the hours of service, which apparently is not the case based on the evidence offered at the hearing). But, even it is potentially is more harmful to provide Petitioner with more academic and behavioral assistance than less, the extent of that harm likely has not manifested itself within twenty days. In any event, the point of notice is to give Petitioner an opportunity to object to an offensive administrative action. Here, Petitioner had already filed her due-process complaint before the offensive action occurred. I permitted her to amend her complaint to include the new allegations

[1] In its disclosures, Respondent did not provide any document showing notice was given to Petitioner as the reasons why Petitioner's IEP was being changed over his objection.

relating to the March 2009 IEP. Thus, Respondent's failure to give Petitioner notice of the increased special-services she would receive did not impair or impede her or her parent's substantive rights.

Petitioner's second alleged technical violation is that her disability classification was changed without notice. Witness Two admitted this mistake, stating that she was unfamiliar with the new IEP form required by Respondent. I find her error was harmless because the notes from Petitioner's multidisciplinary meeting on March 5th clearly indicate that School A's staff continued to treat Petitioner as other health impaired, which she was identified as in her old IEP. Because no change had been made in Petitioner's disability classification—just a clerical error—no written notice was required.

Petitioner third alleged procedural violation claims the multidisciplinary teams that met in April 2008 and March 2009 regarding Petitioner were not duly constituted because neither School A's principal nor Petitioner's general-education teachers attended those meetings. As to School A's principal, Witness Two, the special-education coordinator, testified that she had been designated by the school principal to act on her behalf. As to the absent general-education teachers, they were not necessary since Petitioner's only nonspecial education classes were noncore courses like art, music, and physical education. IDEIA does not require the attendance of such teachers at IEP meetings.

Failure to Conduct Certain Evaluations

Petitioner alleged that Respondent should have conducted an occupational therapy evaluation, a functional behavior assessment, and vision and hearing screening. Both Petitioner's special-education coordinator and teacher testified that they observed no need for an

occupational therapy evaluation of Petitioner. And Petitioner pointed to no evidence at the hearing that would indicate Respondent's missed such indicators.

The special-education coordinator testified no functional behavior assessment was conducted because the student support team had implemented a behavior intervention program for Petitioner. It appears that that program, along with Petitioner's IEPs, successfully improved Petitioner's behavior. So, it is unclear on what basis Petitioner claims this assessment was needed. Petitioner's parent testified to concerns he had about her ability to read; Petitioner's education advocate testified to concerns he had about her academic progress. Petitioner, thus, offered no evidence that not assessing Petitioner's functional behavior adversely affected her or impacted her or her parent's substantive rights.

Failure to Produce School Records

Petitioner's educational advocate testified that he requested certain documents at the IEP meeting held on March 5, 2009, and did not receive all of them. He testified that he received some of the records on a subsequent visit to School A, but not all that he had requested. Petitioner's special-education teacher testified that she provided Petitioner's parent and educational advocate with a portfolio of Petitioner's schoolwork, which she testified showed academic progress.

It was unclear from the testimony offered by the educational advocate and from Petitioner's cross-examination of Respondent's witnesses that the materials the advocate had requested were (1) essential to documenting Petitioner's progress, (2) required by law or school policy for School A to create and maintain, or (3) ever in existence. In the absence of such testimony, even if I found that Petitioner's parent was denied access to these records (and I do

not find that), it is impossible for me to determine how and to what extent Petitioner or Petitioner's parent's special-education rights under IDEIA were impaired.

I inferred from the educational advocates testimony that his interest in Petitioner's school records was to determine for himself whether Petitioner was progressing academically and behaviorally and to verify the basis for Respondent's assertions that Petitioner was, in fact, making such progress. Even without such documentation, Respondent's witnesses offered ample evidence of Petitioner's progress. Petitioner's teacher testified that, when she began teaching Petitioner, Petitioner was performing at a pre-kindergarten level. Now Petitioner's reading has advance to a 1.5 grade-level and her math skills to a 2.5 grade-level. Witness Five, one of School A's social workers, testified that she had personally observed Petitioner's behavior problems in class and now notes a marked decrease in bad behavior. The record evidence firmly supports a finding that Petitioner has received educational benefit under the April 2008 IEP.

Finally, the amended complaint asserts Petitioner's parent has not received his daughter's report cards since April 2008. Despite this claim, Petitioner's father testified his daughter received Bs on her report cards and cannot read. He, therefore, admitted he had recently reviewed and, thus, received some of Petitioner's report cards. Petitioner did not offer any evidence of how not receiving her report cards impeded her or her parent's substantive rights.

In sum, Petitioner failed to meet her burden and, therefore, Respondent prevails on all issues raised in Petitioner's amended due-process complaint.

V. ORDER

It is this 25th day of March 2009–

ORDERED that this case is DISMISSED, and it is further

ORDERED that this shall be a FINAL DECISION from which the parties have ninety days from today to file an appeal in a court of competent jurisdiction, and it is further

ORDERED that this matter is closed for all purposes.

Hearing Officer Latif Doman

Copies to: Counsel for the Parties
Student Hearing Office