DC Office of the State Superintendent of Education

Office of Compliance & Review

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Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

In Re the Matter of:	)	
	)	**CASE NO.**
	)	
Parent on behalf of Student*	)	
	)	
Petitioner,	)	**Complaint Filed: 06/04/09**
	)	
vs.	)	
	)	
The District of Columbia Public Schools	)	
	)	
Respondent.	)	
	)	

HEARING OFFICER DETERMINATION**

Petitioner's Attorney:

Douglas Tyrka, Esq.
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Respondent's Attorney:

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*Personally identifiable information is attached as an Index to this document and must be removed prior to public distribution.
**This Hearing Officer Determination is issued as a judgment on the pleadings, i.e., Parent's Motion for Summary Judgment and pleadings filed in response thereto.

BACKGROUND

On 06/04/09, a Due Process Complaint Notice ("Complaint") was filed by the parent ("Parent" or "Petitioner") on behalf of the 13 year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a Free Appropriate Public Education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEIA") when DCPS failed to comply with a Hearing Officer Determination ("HOD") and when DCPS failed to properly form an Individualized Education Program ("IEP") team. A due process hearing was scheduled for 07/07/09.

In the Complaint, Petitioner alleges that DCPS' failure to comply with the 11/28/08 HOD consisted of a failure to convene a valid Multidisciplinary Team ("MDT")/IEP team following the receipt of independent evaluations. Petitioner specifically alleges that on the scheduled MDT/IEP meeting date of 06/01/09, Petitioner and Petitioner's advocate arrived at the MDT/IEP meeting to find not only IEP team members, but also two DCPS attorneys who insisted on unrestricted interaction with the MDT/IEP team. Petitioner asserts that Petitioner was not notified in advance that the two attorneys would be attending the MDT/IEP team meeting, and that this lack of notification was improper under IDEIA. Petitioner argues that the presence and participation of the two DCPS attorneys at the MDT/IEP team meeting resulted in the formation of an improper MDT/IEP team because the DCPS attorneys were interacting with members of the IEP team in a non-legal advisory capacity. Consequently, Petitioner declined participation and left the MDT/IEP meeting. The MDT/IEP meeting took place and an IEP was developed without the participation of Petitioner. Thus, according to Petitioner, Student remains without a school placement that was determined through a legal IEP process that included Petitioner's participation.

Additionally, Petitioner argues that attorneys are not members of the IEP team pursuant to 34 C.F.R. 300.321, and can attend MDT/IEP meetings only in the capacity of providing legal advise to their clients. Petitioner alleges that at the 06/01/09 MDT/IEP meeting, DCPS refused to limit the participation of their two attorneys to the role of legal advisors.

In summary, Petitioner alleges that DCPS violated IDEIA in that DCPS (1) failed to give proper written notice regarding the composition of the IEP Team as required by 34 C.F.R. 300.322(b), (2) failed to convene a MDT/IEP team meeting in accordance with a HOD Order dated 11/28/08, and (3) failed to convene a proper IEP team pursuant to 34 C.F.R. 300.321 in that DCPS insisted on including two attorneys at the MDT/IEP meeting and refused to limit the attorneys' participation to a legal advisory role. Petitioner alleges that these procedural violations of IDEIA significantly impeded Petitioner's ability to participate in the decision making process regarding the provision of a FAPE to Student.

Based on representations made by Douglas Tyrka, Esq. ("Petitioner's Attorney") and Kendra Berner, Esq. ("Respondent's or DCPS' Attorney") at the pre-hearing

conference that occurred on 06/19/09, a Pre-Hearing Conference Order was issued on 06/21/09 that ordered the following motions schedule: Petitioner's Attorney was ordered to file a motion for summary judgment no later than 06/23/09, if desired, and he did so; Respondent's Attorney was ordered to file a response to the motion for summary judgment no later than 06/25/09, if desired, and she did so; and Petitioner's Attorney was ordered to file a reply to DCPS' response no later than 06/26/09, if desired, and he did so.

The issues alleged in the Complaint, as memorialized in the Pre-Hearing Conference Order issued on 06/21/09, are as follows:

Issue #1 – Whether DCPS failed to comply with a HOD, thereby denying Student a FAPE? Specifically, Petitioner alleges that a 11/28/08 HOD ordered DCPS to convene a MDT/IEP team meeting following receipt of independent evaluations for the purpose of reviewing evaluations, revising Student's IEP and determining placement. Petitioner further alleges that on 05/22/09, DCPS sent notice of the meeting without identifying which MDT/IEP team members would be present, and this constituted improper notice under IDEIA. Petitioner alleges that on 06/01/09, DCPS attempted to convene a MDT/IEP team that included two attorneys, which Petitioner considered to be illegal under IDEIA. Petitioner objected and upon the advise of counsel, left the meeting and therefore could not participate in the development of an IEP or the determination of placement for Student.

Issue #2 – Whether DCPS failed to properly form an IEP team, thereby denying Student a FAPE? Specifically, Petitioner alleges that DCPS refused to limit the participation of their two attorneys to a legal, advisory role during the 06/01/09 MDT/IEP team meeting, and by refusing to limit DCPS' counsels' participation in the meeting in any way, the DCPS attorneys became de facto members of the IEP team, in contravention of 34 C.F.R. 321 which clearly delineates and limits the necessary members of the IEP team. Again, Petitioner alleges that DCPS failed to give proper notice of persons who would attend the MDT/IEP team meeting, and this failure was a violation of IDEIA that limited Petitioner's participation in a decision making process regarding the provision of a FAPE. Petitioner contends that DCPS' wrongful actions prevented Petitioner from participating in the development of an IEP and determining an appropriate placement during the 06/01/09 MDT/IEP team meeting.

The relief requested by Petitioner is as follows:

(1) A finding of a denial of a FAPE on Issues #1 - #2;

(2) DCPS to convene a MDT/IEP team meeting within 10 days, with a prohibition on the presence of DCPS' attorneys in the room during the meeting, and at that meeting DCPS is to complete all of the meeting objectives identified in the 11/28/08 HOD;

(3) In the event that DCPS fails to timely convene a meeting within 10 days, DCPS is to fund placement at a private school of Petitioner's choice; and

(4) At the MDT/IEP meeting, DCPS is to develop an appropriate compensatory education plan for the denials of a FAPE as identified in the Complaint, with the denial of a FAPE beginning on 06/01/09 and ending when the MDT/IEP team reconvenes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Fed. R. Civ. P. 56(c), a court should grant summary judgment if "the pleadings, depositions, answers to interrogatories and admissions..., together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Although a court should draw all reasonable inferences from the records submitted by the nonmoving party, the mere existence of a factual dispute, by itself, is insufficient to bar summary judgment. *See Anderson*, 477 U.S. at 248.

Findings of Fact

When Parent's Motion for Summary Judgment ("Parent's Motion") filed on 06/23/09, District of Columbia Public Schools' Opposition to Petitioner's Motion for Summary Judgment and Cross Motion for Summary Judgment ("DCPS' Opposition") filed on 06/25/09, and Parent's Reply and Opposition Regarding Summary Judgment filed on 06/26/09 are considered together, the Hearing Officer finds that by mutual agreement between the parties, the following Findings of Fact are not in dispute:

(1) A HOD issued 11/28/08 required DCPS to convene an MDT/IEP team, with all necessary personnel, within 30 calendar days of receipt of all updated evaluations to review the evaluations, review and revise Student's IEP as appropriate, determine an appropriate placement for Student, issue a Notice of Placement, and discuss Extended School Year services and compensatory education;

(2) On 05/22/09, DCPS confirmed a MDT/IEP meeting for 06/01/09; however, the confirmation notice did not identify the MDT/IEP members to be present;

(3) On 06/01/09, Petitioner and Petitioner's advocate arrived at the MDT/IEP meeting and learned for the first time that two DCPS attorneys would be present during the MDT/IEP meeting;

(4) During a recess in the MDT/IEP meeting, Petitioner's Attorney informed one of the DCPS attorneys that Petitioner objected to the presence and participation of DCPS' attorneys in the MDT/IEP meeting in a non-legal capacity, and objected because Petitioner was not given proper notice of the presence and participation of the two DCPS attorneys; and

(5) In a telephone conversation between Petitioner's Attorney and DCPS' attorney during a recess in the MDT/IEP meeting, Petitioner's Attorney offered compromises to let the MDT/IEP meeting proceed; however, DCPS would not commit to any limitation on DCPS' attorneys' interaction with MDT/IEP members during the meeting; and

(6) Immediately following DCPS' refusal to limit the interaction of DCPS' attorneys with the MDT/IEP members, Petitioner and Petitioner's advocate left the MDT/IEP meeting.

The following Findings of Fact are deduced from documents attached to pleadings:

(7) DCPS' Confirmation of Meeting Notice dated 05/22/09 specified that the purpose of the 06/01/09 meeting was to develop/review the IEP, review evaluations, discuss placement, and discuss compensatory education *(Petitioner's Exhibit attached to Petitioner's Motion for Summary Judgment);* and

(8) An IEP was developed and a Notice of Placement was issued at the MDT/IEP team meeting on 06/01/09, without the participation of Petitioner *(DCPS' assertion of fact and DCPS' Exhibit #2 of DCPS' Opposition).*

Conclusions of Law

The above stated Findings of Fact, when applied to relevant laws, regulations and OSEP opinions, offer a sufficient basis for the Hearing Officer to conclude that as a matter of law, Petitioner is entitled to judgment on the pleadings and to have its Parent's Motion for Summary Judgment granted with respect to a finding of a denial of a FAPE on the issues presented in the Complaint; however, Petitioner is not entitled to all of the relief requested in the Complaint. The rationale is elucidated below.

The Hearing Officer concludes based on the evidence presented that DCPS did not send proper notice of the MDT/IEP team members to be present at the MDT/IEP meeting and DCPS did not convene a valid IEP team, both of which prevented DCPS from carrying out the orders of the 11/28/08 HOD. These procedural defects significantly impeded the parent's opportunity to develop an IEP and determine an appropriate placement for Student. Petitioner was denied the opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. As a result, Student was denied a FAPE.

34 C.F.R. 300.321(a) delineates the members of an IEP team as (1) the parents of the child; (2) not less than one regular education teacher of the child...; (3) not less than one special education teacher of the child...; (4) a representative of the public agency who is qualified to provide or supervise the provision of special education, general education

and the availability of public resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) whenever appropriate, the child with a disability. Additionally, 34 C.F.R. 300.321(c) requires that the determination of whether or not an individual has knowledge or special expertise of any individual described in 34 C.F.R 300.321(a)(6) must be made by the party (parent or public agency) who invited the individual to be a member of the IEP team. Moreover, pursuant to the notice requirements of 34 C.F.R. 300.322(b), the parent must be notified in writing of who will be in attendance at the meeting and specifically of any individuals with knowledge or specialized expertise who are being offered as IEP team members.

Office of Special Education Programs' ("OSEP") *Letter to Anonymous* (March 31, 2008), 50 IDELR 259, addresses the issue of inviting attorneys to IEP meetings as follows: "A district that invites its attorney to an IEP meeting without a parent's knowledge could be doing itself a disservice… A parent who objects to an attorney's presence can ask that the meeting be rescheduled due to lack of proper notice. In addition to stating the time, location and purpose of an IEP meeting, the district's written notice must identify the individuals who will be attending the meeting." "Under 34 CFR 300.322(b)(1)(i), the notice must indicate the purpose, time, and location of the meeting and who will be in attendance. The notice must inform the parents of the provisions in 34 CFR 300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child). 34 CFR 300.322(b)(1)(ii). As a practical matter, if a public agency fails to fulfill the notice requirements in 34 CFR 300.322, the parent may request that the IEP team meeting be rescheduled…The list of mandatory IEP team members, found at 34 CFR 300.321(a), does not include attorneys for either the district or the parent. Attorneys generally are not invited to IEP meetings unless they have knowledge or special expertise regarding the student. If an attorney does have specialized knowledge or expertise about the student, the attorney becomes a discretionary meeting participant under 34 CFR 300.321(a)(6). In such circumstances, the district's written notice must disclose that its attorney will be attending as a person with knowledge or specialized expertise about the student. A parent can ask that the meeting be rescheduled if the district fails to provide proper notice of its attorney's presence. A district can also opt to conduct the IEP meeting without its attorney."

OSEP also clarified in *Letter to Clinton* (July 23, 2001), 37 IDELR 70, the question of whether it was appropriate for a district to invite its attorney to IEP meetings. OSEP opined that "the Federal rules pertaining to this situation do not disallow the school district from inviting the district's attorney to the IEP meeting. However, regulations permit attendance at meetings by "other individuals who have knowledge or special expertise regarding the child, including related service personnel as appropriate. However, even if the attorney possessed knowledge or special expertise about the student, his or her presence would have the potential of creating an atmosphere that would not necessarily be in the child's best interest, and this applied also to the presence of the parent's attorney at the meeting. Therefore, the best interests of the child

compelled OSEP to strongly discourage attendance of attorneys for either districts or parents at IEP meetings."

A particular case where the district's attorney's presence at an IEP meeting was not considered inappropriate by the District of Columbia Office of the Office for Civil Rights ("OCR") was *Buncombe County (NC) Schools* (April 8, 2005), 44 IDELR 257, where throughout the meeting, the district's attorney responded only to questions of a legal nature and at no time appeared to intimidate the parent. It was noted that the district's attorney rarely participated in IEP meetings, but participated that particular time in order to explain the legal requirement of signing a release of information form in order for the student to be evaluated, and after the legal guidance and clarification was provided, the attorney left the meeting; and it was concluded by OCR that the district's attorney could provide legal guidance and clarification so that the meeting could proceed to a successful conclusion. OCR concluded that the district's reason for including its attorney in the IEP meeting was legitimate and nondiscriminatory.

In this case before this Hearing Officer, DCPS relies on *Horen v. Board of Education of the Toledo City School District*, 594 F. Supp. 2d 833 (January 23, 2009), 51 IDELR 273 in support of its position, by stating that prior to review by a federal district court of a claim that Toledo Public Schools ("TPS") violated Section 1983, Section 504 and the Americans with Disabilities Act, an Impartial Hearing Officer ("IHO") authorized and confirmed TPS' ability to have its attorney present during IEP meetings. However, the Court in *Horen* stated that parents could not rely on an IDEIA violation to bring a Section 1983 claim, which is what the *Horen* decision addressed. The *Horen* decision did not specifically address an appeal of an IDEIA violation, and therefore the holdings of the *Horen* case are inapplicable to the case at hand.

This Hearing Officer concludes that DCPS' failure to provide proper notice of MDT/IEP team participants for the 06/01/09 MDT/IEP meeting constituted a procedural violation of IDEIA. This Hearing Officer also concludes that DCPS' insistence on the participation of their attorneys in the MDT/IEP meeting without limitation made them de facto IEP team members, and this constituted a procedural violation of IDEIA. These two violations, individually and collectively, resulted in forcing Petitioner to leave the MDT/IEP team meeting. As a result, DCPS did not properly comply with carrying out the Orders of the 11/28/08 HOD.

In this circuit, a procedural violation does not, standing alone, establish a failure to provide a FAPE. See *Lesesne v. Dist. Of Columbia*, 447 F.3d 828, 834 (D.C.Cir. 2006)." A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. *34 C.F.R. 300.513(a).*

In the case at hand, Petitioner was unable to participate in the decision making process of developing an IEP and determining an appropriate placement for Student due to DCPS' procedural violations of IDEIA. The procedural violations consisted not only of defective notice regarding all MDT/IEP participants, but also DCPS' inclusion of its attorneys as de facto members of the IEP team by not limiting their participation to a legal advisory role. DCPS did not give specific notice of its attorneys as expected participants at the MDT meeting, and despite offers of compromise by Petitioner's Attorney that would enable the meeting to go forward with the participation of Petitioner, DCPS was unwilling to limit the participation of its attorneys during the meeting. This non-restriction of the DCPS' attorneys' role significantly impeded Petitioner's right to participate in the decision making process regarding the provision of a FAPE to Student, i.e., developing an IEP and determining an appropriate placement. The presence and unrestricted participation of DCPS' attorneys created a very unpalatable position for Petitioner. Petitioner left the meeting, and an IEP and Notice of Placement were developed absent the input and participation of Petitioner. DCPS had the possible option of having its attorneys wait outside the meeting room and provide legal advise to DCPS if necessary or the possible option of having the attorneys remain in the IEP meeting but restrict the attorneys' function to providing legal advice only, but DCPS declined to do either. After Petitioner left the meeting, which was tantamount to requesting that the meeting be reconvened and proper procedures followed, the IEP team developed an IEP and issued a Notice of Placement.

In the same vein that proceeding with an IEP meeting despite a parent's objection to the absence of key team members resulted in a hearing officer decision that parent's participation in the development of an IEP was significantly restricted and resulted in the denial of a FAPE (See *In re: Student with a Disability,* Alaska State Educational Agency (August 22, 2006), 47 IDELR 119), so too does this Hearing Officer conclude that failure to identify IEP team members and the de facto inclusion of attorneys as IEP team members significantly restricted Petitioner's participation in the development of an IEP and a determination of appropriate placement. Petitioner appeared for the 06/01/09 MDT meeting with Petitioner's advocate, ready to develop an IEP and determine placement, but was thwarted by DPCS' procedural violations of improper notice and improper formation of an IEP team. Therefore, the IEP developed on 06/01/09 and the Notice of Placement issued on 06/01/09, are both invalid. DCPS must start all over again with proper notice to Petitioner, and reconvene the MDT/IEP team and carry out the Orders of the 11/28/08 HOD.

Petitioner met its burden of proof on Issues #1 and #2 of the Complaint. DCPS failed to comply with the 11/28/08 HOD by failing to give proper notice regarding the participants of the MDT and failing to form a valid IEP team. This HOD resolves all issues identified in the Complaint, and Petitioner is the prevailing party. Student was denied a FAPE on Issue #1 and Issue #2.

With regard to the relief requested, Petitioner requests that DCPS fund a private placement of Petitioner's choice if DCPS fails to convene a valid IEP team meeting within the timeframe herein prescribed by the Hearing Officer. A hearing officer "may

order school districts to implement educational programs for handicapped students only after finding, based on record evidence, that the programs are tailored to meet the students' specific educational needs." "Specifically, courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." *Branham v. District of Columbia,* 427 F.3d 7 (D.C. Cir. 2005), 44 IDELR 149.

Petitioner offered no evidence from which the Hearing Officer could conclude that a private placement, or any placement, was appropriate and could meet the educational needs of Student. No IEPs, evaluations or academic records were offered into evidence. Therefore, the appropriateness of a generic placement, i.e., a private placement, could not be determined on this record. As such, Petitioner's request for an Order giving Petitioner the power to make a unilateral placement upon DCPS' failure to convene a MDT meeting is denied.

With respect to Petitioner's request for relief in the form of an Order for DCPS to develop an appropriate compensatory education plan for Student for the denial of FAPE from 06/01/09 until the MDT/IEP team reconvenes; this request for relief is also denied. "Compensatory education is designed to make up for harm resulting from inappropriate IDEIA services. In order to craft an appropriate remedy, there must be a showing of the educational benefits denied to the student as a result of the District's failure to comply with IDEIA." See *Gregory-Rivas v. District of Columbia*, 577 F. Supp. 2d 4 (2008), 51 IDELR 42. In the case at hand, Petitioner has made no evidentiary showing that Student suffered any loss of educational benefits as a result of DCPS' IDEIA violations. No past or present IEPs or school records were offered as evidence; therefore, no determination of loss of educational benefits can be made. On this record, Student is not entitled to compensatory education from 06/01/09 until the MDT reconvenes pursuant to the Order below. As such, Petitioner's request for a Order of delegation to the MDT for a determination of any compensatory education due when there has been no showing of entitlement to compensatory education, is unsupported by fact and is therefore denied.

With respect to Petitioner's request for an Order prohibiting the presence of DCPS' attorneys in the room during an MDT/IEP meeting; there is no law or precedent that prohibits attorneys from attending MDT/IEP meetings as legal advisors to their clients. However, attorneys attending IEP meetings run the risk of running afoul of IDEIA by creating an atmosphere of intimidation for parents, as is what happened in this case.

ORDER

WHEREFORE, it is

ORDERED, that Parent's Motion for Summary Judgment is **GRANTED**, and Petitioner is the prevailing party on Issue #1 and Issue #2 of the Complaint; and it is

ORDERED, that DCPS' Motion for Cross Judgment is **DENIED**; and it is

ORDERED, that DCPS is to convene a MDT/IEP meeting within 10 business days, with proper notice to Petitioner regarding all MDT/IEP participants; and it is

ORDERED, that the role of DCPS' attorneys, if they choose to attend the MDT/IEP meeting, shall be restricted to a legal advisory capacity only unless they are duly qualified as members of the IEP team pursuant to 34 C.F.R. 300.321; and it is

ORDERED, that at the MDT/IEP meeting, DCPS is to complete all of the meeting objectives identified in the 11/28/08 HOD; and it is

ORDERED, that the due process hearing scheduled for July 7, 2009 is hereby **VACATED.**

IT IS SO ORDERED.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

06/29/09
Date

Virginia A. Dietrich /s/
Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

Issued: June 29, 2009