

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF YORK	)	BEFORE THE LOCAL DUE PROCESS HEARING OFFICER DOUGLAS F. DENT
In the Matter of:	)	
	)	
Rock Hill School District 3	)	
	)	FINAL ORDER
Petitioner	)	
V.	)	
	)	
J.G.,	)	
<u>Respondent.</u>	)	

This matter is before me as a result of a letter from the Petitioner School District asking that I serve as an independent hearing officer received on November 2, 2016. The letter was prompted by a Complaint and Due Process Hearing request submitted by the Petitioner School District on October 31, 2016. On November 7, 2016, a letter was sent to the Respondent Parent notifying her of my appointment and advising of her rights and responsibilities in an IDEA Due Process Hearing. On November 14, 2016, a Resolution Session was held which did not result in a settlement and on December 15, 2016, a teleconference was held with the parties. A Hearing date of January 9, 2017, was established with a document and witness list exchange to be held on January 2, 2017. A backup date for the Hearing was set for January 12, 2017 which became the eventual Hearing date because of a variety of circumstances. At the Respondent's request the Hearing was open.

On January 13, 2017, because of slow progress during the first day of testimony, an Order was issued extending the timelines until February 15, 2017, to obtain additional testimony pursuant to 34 CFR 300.515. New Hearing dates were established for February 9 and 10 with a final order due by February 15, 2017.

On February 9, 2017, the parties reconvened and testimony resumed. The Hearing continued through February 10 with all of the common witnesses testifying as well as several

who were unique to each side. In addition, the Respondent was allowed to add two school witnesses who were not originally contemplated.

FACTS

Based on that testimony and the exhibits accepted into the record, the following facts are found:

1. J.G. is a 10th grade Student at South Pointe High School. (Testimony witnesses).
2. The Student was identified some time ago as a student with disabilities and qualified for special education services under the Multiple Disabilities category of disability through middle school (Testimony of Dr. Nancy Turner, Petitioner's Exhibit 5).
3. In 10th Grade her disability category was changed to Other Health Impairment and her minutes of direct academic support (special education services) were reduced (Testimony of Dr. Turner and Petitioner's Exhibit 5).
4. The Student's IEPs have offered her education in the general education curriculum with accommodations and special education support (Testimony of Dr. Nancy Turner, numerous teachers and Petitioner's Exhibits 3, 4, 5, 6, 7, 8 and Respondent's Exhibits 3,4, and 5).
5. The Student has not only passed each grade as she has progressed in school, her grades have been A's and B's in High School and she is in the regular education Diploma curriculum (Petitioner's Exhibit 1, 2 and 9, Respondent Exhibit 7, Testimony of numerous District witnesses).
6. The Student's MAP and SRI scores while fluctuating have been progressing slowly as she has moved through her educational program (Testimony of Dr. Martin-Delaney and others, Respondent's exhibit 8).
7. In 2015, the Respondent filed a Complaint with the South Carolina Department of Education resulting in an investigation; the issuance of a Letter of Resolution (LOR) on January 8, 2016; and an agreement was entered into between the parties regarding Compensatory Education which has been completed (Respondent's Exhibit 6, Petitioner's Exhibit 8, Testimony).

8. The Respondent filed a Complaint with the Office for Civil Rights of the United States Department of Education (OCR). A final resolution of that Complaint is pending and anticipated in the near future (Testimony of Dr. Turner and Petitioner's Exhibit 16).
9. At the Respondent's request an independent educational evaluation (IEE) was performed by Dr. Antigo Martin-Delany who is an Associate Professor of Psychology at Winthrop University and a Licensed and Nationally Certified School Psychologist in May of 2015 which was presented to the IEP Team on September 10, 2015 (Respondent's Exhibit 8, Petitioner's Exhibit 7, Testimony of Dr. Martin-Delany, Dr. Turner, and others).
10. Dr. Martin-Delany's evaluation found the Student to be of average intelligence; with "academic aptitude in the *"average range"* ; very limited achievement in reading; limited proficiency in basic math but she had relative strength in this area; and with basic skills in written language skills (Respondent's Exhibit 8 and testimony of Dr. Martin-Delany).
11. The Student's vision issues have been listed as a secondary disability and while a significant problem, those issues do not qualify her for specific vision services (Testimony and Respondent's Exhibit 2).

ISSUES

Issues which require discussion were raised by both parties. The Petitioner sought a ruling on the following:

1. The Respondent's right to an additional IEE.
2. The Respondent's right to additional Compensatory Education.
3. Whether or not the Petitioner's IEP of September 29, 2016 is appropriate.
4. Whether or not the Petitioner has reasonably implemented that IEP and thus provided the Student with a FAPE.

The Respondent, in addition to the issues raised by the Petitioner's Complaint sought clarification as to the following:

1. A parent's role on an IEP Team.
2. Whether the reduction of minutes of various Special Education services between middle school and high school IEPs is appropriate.
3. Whether the District has paid proper attention to the Student's vision impairment.
4. Whether the Student's grades are real.
5. Whether the Respondent is entitled to financial reimbursement for time lost from work, and other expenses, while advocating for the Student.

DISCUSSION

This is a difficult case for several reasons. First, the Student is a charming, sensitive, determined and otherwise average teenager with good intelligence who wants to succeed in life and please her parents and educators. She has vision limitations and as a result finds reading difficult, which along with other health issues has held her back. Clearly, because reading is so vital to all of us and our ability to receive, process and utilize information, she has correctly received special education services during her academic career. The issue is, as she approaches the end of her secondary education, what services she needs.

Second, the Respondent is determined to help her daughter improve her abilities to learn and prepare for life after high school. She is like a diminutive momma Grizzly Bear protecting her cub. Unfortunately, her aggression is sometimes misplaced and overly protective. That aggression coupled with the fact that she has acquired a fair amount of knowledge regarding special education and the "system" that delivers it, has caused her to be a significant irritation to the Petitioner School District and all others in that "system". It also makes one feel that she may not have as much faith in her daughter's ability to succeed as have the school teachers and administrators. While prominently on display at the Hearing, that aggression and limited knowledge of the law and the process within which we have to operate, does not and will not play into my decision. I actually do admire her determination and desire to protect her child.

Finally, the Student has been in a modified regular education setting and is actually doing well, exceeding the expectations of her educators and her mother. Her quiet determination to achieve and go to Cosmetology School or possibly college is not a "pipe dream". Because of the fact that she has blossomed academically, those dreams are very possible. This academic growth is a testament to her spirit and the educational support she has received up to now.

Hopefully, a discussion of the issues individually beginning with the Petitioner's offerings will be helpful to both parties.

1. Is the Respondent entitled to a new IEE?

Section 34 CFR 300.502 (b)(1) of the Regulations implementing IDEA states:

"(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section."

Section 300.502 (b)(2) states:

"(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either-

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to Sections 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria:"

In this case, the District had not determined in an IEP meeting that an additional educational evaluation was needed for the Student. Thus, no evaluation had been performed by the District from which the Respondent can disagree; and in accordance with the Regulations, the Petitioner requested a Due Process Hearing.

In addition, when asked by the Respondent directly, Dr. Martin-Delaney testified that another evaluation was not necessary or even desirable. Thus, I find no legal or other reason for the Petitioner School District to perform a new evaluation or commission an IEE for the Student.

2. Is the Respondent entitled to additional compensatory education services beyond what was ordered by the State Department of Education for her child?

Whether I agree or disagree with the State Department of Education's findings relating to the Student's entitlement to compensatory education is immaterial at this point since the parties

entered into an agreement for compensatory education services and that agreement and those services have now been completed. Although, I will say both the State and the Respondent seem fixated on the number of minutes of service. I tend to believe that the number of minutes of service are not nearly as important as the quality of the services provided.

As with all children, with or without a disability, as they progress through the educational system, the type and intensity of educational services they receive changes. In elementary school, it has to be assumed that children know very little about the fundamentals that they will need to learn; i.e. reading, math, comprehension, written language and cognitive thinking. As a result, a great deal of attention is paid to those skills in elementary school in very protected and concentrated settings. In middle school, while these skills should be reinforced, more emphasis is placed on broadening the child's outlook and exposure to new information, i.e. social studies, science and electives such as art and music. In high school, it is generally assumed that many of the basic skills have been mastered or learned to a degree that a different emphasis is appropriate and efforts are made to broaden the child's horizon's even more with emphasis on life skills and more advanced knowledge and problem solving.

While the Student still requires assistance with the basic skills, her education has progressed along the path outlined above and she has adapted well to these changes in environment. To continue to treat her as a younger student and protect her from the need to accomplish on her own does her a disservice and based on her accomplishments to date is unnecessary,

Therefore, the concept of compensatory education does not seem to be appropriate here. However, some additional courses of action are discussed later in this Order.

3. Is the Petitioner's proposed September 29, 2016 IEP appropriate?

All of the school district's witnesses, when asked, dutifully responded in the affirmative, stating it is designed to offer meaningful educational progress and then with prodding from the Petitioner's counsel, explained why. In most cases their belief was based on the fact that the Student progressed in school and actually exceeded their expectations academically making excellent grades.

In its opening and closing statements the Petitioner offers that this is a classic case to be interpreted by the standard set in *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176 (1982). Which basically ruled, among other things, that a school district is not required to provide the *optimum* or very best possible educational plan for a disabled child, but rather one that is designed to help the student make meaningful educational progress. The Student's IEPs have done that and in fact have been successful for her. So in that regard, the IEP in question is appropriate for her.

4. Has the Petitioner reasonably implemented the Student's IEP and thus provided her with FAPE?

From the testimony provided, it appears that the teachers and other school officials who have interacted with the Student have great affection and appreciation for her and her efforts to gain a good education to prepare her for the future. It also appears that they have made a good faith effort to implement her IEP and provide her with a FAPE. However, that is not to say that their efforts may need additional work in some specific areas. These will be discussed later on in this Order, but as far as the general principal of whether or not the Petitioner has done what it said it would do and thus provided FAPE, I find they have. In *Van Duyn ex rel Van Duyn v. Baker Sch Dist SJ*, 481 F. 3rd 770, 7 IDELR 182 (9th Cir. 4/3/7) the Court ruled that "a school district's failure to implement an IEP must be **material** to constitute a violation of the IDEA.

Such is not the case here.

With regard to the Respondent's issues:

1. What is the Parent's role on the IEP Team?

Section 34 CFR 300.322 of the Regulations implementing IDEA states:

"(a) *Public agency responsibility-general.* Each public agency must take steps to ensure that one or both of the parents of a child with disabilities are present at each IEP Team meeting or are offered the opportunity to participate, including-

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place."

Based on the testimony and statements of the Respondent she has attended every recent IEP meeting and participated fully except when she chose to leave the meeting. However, the Respondent has questioned the fact that her desires and specific requests are not honored. It is well settled that the IEP Team is just that; a team. Its decisions are made based on the beliefs of the team not any one participant, including the parent. In *JD by Davis v. Kanawha County Bd of Educ*, 48 IDELR 159 (SD WV 8/3/7), the Court ruled that although parents have a right to meaningful participation in the IEP process, they do not have the right to dominate the process.

In this case, the Petitioner actively participated, her expert witness participated and the child participated. Each providing information and submitting recommendations some of which were adopted. In addition, based on their participation, several IEPs were amended. The District has met the standard of participation required by IDEA, its regulations and the standards established by the Courts.

2. Was the reduction in minutes of direct service between middle school and high school appropriate?

The changes a student goes through during the progression of her education has been discussed previously in this Order. It appears from the testimony presented, the reduction of

minutes of direct service is appropriate because of the Student's academic success. However, in the State Complaint process, it was determined that the District's practice of using 30 minutes of the allotted academic support to do assignments from other classes with direct services only upon request, was a violation of her IEP, which was one of the reasons for the award of compensatory education. While often the actual amount of compensatory education ordered in these cases is a little arbitrary, I do not quarrel with the concept that direct service means just that. In the future, it is important that the full 150 minutes of direct service per week be direct service.

3. Has the District paid proper attention to the Student's vision impairment?

The Respondent offered the testimony of Marty McKenzie, Principal for Outreach Services for the South Carolina School for the Deaf and Blind, to show the Student has a loss of peripheral vision and other vision deficiencies leaving her with visual acuity only correctable to 20/50 in the right eye and 2/200 in the left eye and that is her primary disability. She wears glasses for that correction.

The Petitioner countered with a teacher of visual impaired students with the appropriate credentials who was a part of the IEP team who followed the Student's progress. In addition, to accommodate her difficulty seeing they have provided the Student with an IPAD for her use at school and home as well as access large print materials and computers while in most classrooms. Finally, they have provided additional accommodations in her IEPs to address her vision deficiency such as additional time for assignments and up front seating in class.

Mr. McKenzie testified that while the Student has peripheral vision losses; a vision deficiency, commonly known as lazy eye; and vision acuity which is only partially correctable,

her vision disabilities are not severe enough to qualify her for services associated with truly visually impaired individuals. The District's teacher of the visually impaired testified that she and the other vision teacher in the school system monitored the Student's progress and determined the services and technology offered were sufficient to provide the Student with an opportunity to learn. Their belief is partially born out in the fact that while reading is often difficult, the Student has done well academically. The Respondent did not accept this testimony and continued to attempt to assert the Student's vision deficiencies were her primary disability.

With the consent of both parties, I was able to have a private discussion with the Student about numerous subjects. One subject related to the assistive technology provided by the Petitioner and it appears that the IPAD's camera does not work. Thus she can't take pictures with it and enlarge them so she can read material more easily. She is forced to use her personal cell phone, which has a much smaller screen for that purpose. In addition, she indicated that the textbooks that were available by computer could not be reached with her IPAD. These were issues also raised by the Respondent during the hearing along with a complaint that there was a delay in the provision of the IPAD. The delay was caused by the District having to clean the IPAD to remove information it contained from a previous user and I find that to be acceptable. However, I don't find the fact that the IPAD doesn't work to be acceptable. The District shall check the IPAD and make sure it is in working condition and if not, replace it or provide a laptop computer at its expense.

4. Are the Student's grades real?

All of the Student's teachers testified that other than the accommodations and assistance provided in her IEP, the Student is doing regular education work and making "A's" and "B's". None of them equivocated or in any way indicated that she was being

given grades because of her status of being a student with a disability. In fact, each of them specified that she was an active, attentive, and conscientious student who worked extremely hard and earned her grades. Her success is a testament to her determination and focus on her work even in the face of her disabilities as well as the positive impact her support from the District staff has provided.

That being said, there is also agreement that she is below grade level in reading and to a lesser degree in math. The Student is in the 10th grade. Assuming she continues on her current course, she will graduate with a high school diploma in two years. At that time, hopefully she will attend some form of post-secondary education. If she is going to be successful in that effort and in life, she must improve her reading. Because she has been academically successful so far, the Petitioner has met its legal responsibility of providing a FAPE, but I urge the IEP team to explore new options to give the Student additional opportunities to improve her reading skills before she graduates.

5. Is the Respondent entitled to financial reimbursement for lost time from work and other expenses while advocating for her child?

In short, the law only allows reimbursement for expenses in certain circumstances and it sets up specific tests that must be met for me to even consider this request. The Respondent has not provided any evidence that even approaches the legal standard. Therefore, she is not entitled to reimbursement or a financial award through this process.

DECISION

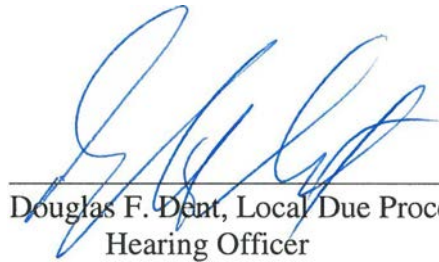
This is a case where the subject of the due process hearing has succeeded academically with the assistance of Special Education Services, because of her own determination and the support of her family. It is a success story, but like all stories that does not mean that there are not areas where improvement is warranted.

THEREFORE, IT IS ORDERED that:

1. The Respondent is not entitled at this time to an IEE at public expense.
2. The Petitioner is not ordered to provide additional compensatory education although it is required to utilize the full 150 minutes per week of academic support for direct services and it is urged to seek additional methods to assist the Student in improving her reading skills.
3. The Student's current IEP of September 2016 is appropriate.
4. The District has attempted to implement the IEP and thus has provided a FAPE. However, it shall ensure that the Student's IPAD is working and she has access to all the technological assistance and accommodations included in the IEP. If it is found that the IPAD is not working, the Petitioner shall provide a new one or a laptop computer at its expense.

IT IS SO ORDERED.

Greenville, South Carolina
February 15, 2017



Douglas F. Dent, Local Due Process
Hearing Officer

APPEAL

Should either party wish to appeal this ruling they may do so by writing a letter to the South Carolina Department of Education, Office of General Counsel, 1429 Senate Street, Rutledge Building, Columbia, South Carolina 29201 within ten (10) days of receipt of the Hearing Officer's Order.