

RECEIVED
MAR 17 2015
SPECIAL EDUCATION
STATE DEPARTMENT OF EDUCATION

BEFORE THE HEARING OFFICER FOR THE
IDAHO STATE DEPARTMENT OF EDUCATION

_____ as legal guardians and parents)	
of _____, a minor,)	Case No. H-15-01-30
)	
Petitioner,)	MEMORANDUM DECISION AND
)	ORDER GRANTING MOTION TO
vs.)	DISMISS OR IN THE ALTERNATIVE
)	MOTION FOR SUMMARY
BONNIVILLE JOINT SCHOOL DISTRICT)	JUDGMENT
No. 93,)	
)	
Respondent.)	
)	
)	
)	

INTRODUCTION

A Due Process Hearing Request under the Individuals with Disabilities Education Improvement Act ("IDEA") was received by the State Department of Education on January 30, 2015, asserting a violation of the IDEA by the Respondent School District. The parties participated in a Resolution Session with the Resolution Period ending on March 1, 2015. During the Resolution Period, the parties were unable to resolve the claim asserted by Petitioners.¹

On February 9, 2015, Respondent served upon Petitioners by U.S. Mail and email, RESPONDENT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR

¹ Petitioners are referred to herein as "Petitioners" or "Parents". Respondent is referred to herein as "Respondent" or "School District". The child who is the subject of this due process hearing is referred to as "Student" or "Child".

Page 1 of 13 MEMORANDUM DECISION AND ORDER GRANTING MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF. Said Motion was received by the Hearing Officer via email on February 10, 2015, and via U.S. Mail on February 11, 2015. On February 17, 2015, the Hearing Officer issued and served upon the parties a SCHEDULING ORDER ON RESPONDENT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT. Said Scheduling Order clarified the time period and manner in which Petitioners could submit a response to Respondent's Motion. No response was submitted by Petitioners.

On March 2, 2015, a prehearing conference was conducted by the Hearing Officer via telephone. Both parties participated in the prehearing conference. During the prehearing conference a schedule for the due process hearing was established and the Petitioners' claim subject to the due process hearing was clarified.

ISSUE PRESENTED

The only claims that may be raised in a due process hearing are those claims set forth in the Due Process Hearing Request. See County of San Diego v. California Special Education Hearing Office, 93 F.3d 1458, 1464-65 (9th Cir. 1996)(finding that the hearings officer properly limited the hearing to issues presented in the petitioner's complaint only). In Petitioners' Due Process Hearing Request ("DPHR"), Petitioners assert the following as the basis for their claim that the Child has been denied a Free Appropriate Public Education ("FAPE"):

"As per [the Child's] disability, she has difficulties with communication between she and her teachers and between she and her parents. She often agrees with whatever is being said to shorten or end a conversation that is difficult for her. As a result, her teachers report that she rarely/never comes to them for assistance or clarification.

"[The Child] previously had a 1 x 1 aide, who assisted with communication to education staff and the home, but this was removed to increase [the Child's] independence." DPHR, pt. B.

Petitioners then set forth in the DPHR a proposed resolution to resolve the claim:

“The parents would like a weekly tracking sheet – showing on the last school day of the week how [the Child] has done, concerns, and a list of what she can do to improve her work and improve her grades for her classes.” Ibid at Part C.

The claim, as framed from Petitioners’ DPHR and that is the issue to be resolved through these proceedings, is: Have Petitioners been denied FAPE by Respondent’s failure to provide a 1-on-1 aide?

SUMMARY JUDGMENT STANDARD

The Idaho State Board of Education has adopted rules which address the IDEA

Due Process Hearing procedures:

Due process hearing shall be conducted pursuant to IDAPA 04.11.01, “Idaho Rules of Administrative Procedure of the Attorney General,” Individuals with Disabilities Education Act (IDEA) requirements, and the Idaho Special Education Manual. In case of any conflict between IDAPA 04.11.01 and IDEA, the IDEA shall supersede the IDAPA 04.11.01, and the IDAPA 04.11.01 shall supersede the Idaho Special Education Manual.

IDAPA 08.02.03.109.05(e)

This Hearing Officer finds that the Idaho Rules of Administrative Procedure of the Attorney General (“IDAPA”) for purposes of considering a Motion for Summary Judgment are not in conflict with IDEA and the procedures set forth therein permit an SDE Hearing Officer to consider and decide pre-hearing motions. IDAPA 04.11.01.565.

There does not appear to be any Idaho authority on the standard for Summary Judgment in an administrative process, therefore, the standard employed by the Idaho courts is appropriate.

The standard then is whether there are any genuine issues of material fact and is Respondent entitled to Judgment as a matter of law. I.R.C.P. 56(c).

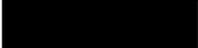
FINDINGS OF FACT

This Hearing Officer finds that there is no genuine issue of material fact as to the following facts:

1. The Student attends [REDACTED] Middle School in the Bonneville Joint School District. See DPHR, p.1.
2. The Student is a child with a disability eligible for FAPE under the IDEA. See DPHR, p.2; Affidavit of [REDACTED], p.2.
3. On January 14 2015, an Individualized Education Program (“IEP”) was implemented for the Student. Affidavit of [REDACTED] Exhibit B.
4. The IEP was implemented following an IEP Team Meeting. Team members in attendance included Petitioners, School District Representatives, General and Special Education teachers, a speech/language paraprofessional, and an intervention specialist. Ibid.
5. The IEP identifies a need for language speech fluency services to help the Student meet core curriculum standards and identifies six benchmarks/objectives relating to the Students speech development. Ibid.
6. The IEP provides for a weekly half-hour meeting with a school counselor and a weekly half-hour meeting with a Speech/Language Pathologist. Ibid.

7. The IEP provides the Student with accommodations to assist her in completing assignments and tests. The Student is also provided accommodations for participation in statewide and districtwide assessments. Ibid.
8. The IEP provides that “The student will participate entirely in the general education classroom, the general education curriculum, and the nonacademic and extracurricular activities with nondisabled peers.” Ibid.
9. The IEP further provides that the “Student is inside the general education classroom 80% or more of the school day. In a 6 hour school day, the student is inside the regular class at least 4 hours and 48 minutes.” Ibid
10. The Student has shown improvement in her grades over the 2013-2014 school year and the first semester of the 2014-2015 school year. Affidavit of [REDACTED] Exhibit C.
11. In general education classes during the first semester of the 2013-2014 school year the Student earned three A grades, three B grades and two C grades. Ibid.
12. In general education classes during the second semester of the 2013-2014 school year the Student earned five A grades and three B grades. Ibid
13. In general education classes during the first semester of the 2014-2015 school year the Student earned seven A grades and two B grades. Ibid.
14. The IEP does not include 1 x 1 aide services for the Student. Affidavit of [REDACTED] Exhibit B.
15. The benchmarks/objectives contained in the IEP relate solely to the Student’s speech and language fluency. The IEP does not include benchmarks/objectives relating to the Student’s academic progress. Ibid.

16. Respondent has established several processes to assist students in communicating with teachers and for parents to obtain information from and communicate with teachers. Such processes include: 1) a general education class ("Primetime") in which the Student can check grades, prioritize work, complete and redo assignments; 2) parent/teacher conferences; 3) an advisory class which provides support for filling out student agendas, checking grades, and doing skill-building activities; 4) a program whereby teachers are available before and after school to meet with students and parents; and 5) a program providing the ability for parents to receive daily email grade reports showing the students grades and email addresses of the teachers if the parents wish to seek clarification about the report or the student's grades. Ibid.

17. The Student is currently enrolled in the Primetime general education class. Affidavit of  Exhibit C.

ANALYSIS

The IDEA seeks to ensure that children with disabilities have access to a free appropriate public education. 20 U.S.C. § 1400. The IDEA " provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures." Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1469 (9th Cir.1993). One of these conditions is that states enact safeguards to ensure that disabled children receive an appropriate education. Among these safeguards is the opportunity for a party to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child." 20 U.S.C. § 1415(b)(6)(A). 34 C.F.R. § 300.507 implements this due process complaint requirement repeating that the scope of a complaint under

the IDEA is limited to matters “relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.” 34 CFR 300.507(a)(1).

The U.S. Supreme Court has held that “a court's inquiry in suits brought under [the IDEA] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?” Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnote omitted).

In the present action there is no allegation of a procedural violation nor do Petitioners allege that the IEP is not reasonably calculated to enable the Student to receive educational benefits. Rather, Petitioners allege that they are entitled to a related service, namely, a 1 x 1 aide to assist “with communication to education staff and the home. . .” See DPHR, p.2. The U.S. Supreme Court, in the case of Irving Independent School District v. Tatro, 104 S.Ct. 3371 (1984), established a three prong test for determining whether a particular service is a related service that should be provided under IDEA. To be entitled to a related service:

- 1) The child must have a disability so as to require special education under the IDEA;
- 2) The service must be necessary to aid the child with a disability to benefit from special education; and
- 3) The service must be able to be performed by a non-physician.

Id.

The parties agree that the Student has a disability so as to require special education under the IDEA thus satisfying the first prong. The third prong is also uncontested in that the 1 x 1 aide services of communicating with staff and the home can be performed by a non-physician. The pertinent question in the present case falls under the second prong from Tatro, and is whether a 1

x 1 aide is necessary for the Student to benefit from special education? For reasons stated below, I conclude that a 1 x 1 aide is not necessary for the Student to benefit from special education and, therefore, Petitioners are not entitled to this related service under the IDEA.

1. Methodology for Communication

In the DPHR, Petitioners identify removal of the 1 x 1 aide as the basis for denial of FAPE. However, rather than propose a resolution to reinstate a 1 x 1 aide for the Student, Petitioners propose, as a complete resolution to their claim, an alternative methodology for communicating with the home, to wit, a weekly tracking sheet. This inconsistency between Petitioners' claim and their proposed resolution exemplifies the fact that a 1 x 1 aide is not necessary and the role of the 1 x 1 aide as identified in Petitioners' DPHR can be fulfilled through other methods. Respondent has established alternative methods for assisting the Student to communicate with staff and the home. These methods include 1) a general education class ("Primetime") in which the Student can check grades, prioritize work, complete and redo assignments. The Student is currently enrolled in this general education class; 2) parent/teacher conferences; 3) an advisory class which provides support for filling out student agendas, checking grades, and doing skill-building activities; 4) making teachers available before and after school for students and parents; and 5) providing the ability for parents to receive daily email grade reports showing the students grades and email addresses of the teachers if the parents wish to seek clarification about the report or the student's grades.

The Supreme Court held in Rowley, that the IDEA does not require school districts to provide special education students with the best education available, or to provide instruction that maximizes the student's abilities. Instead, school districts are required only to provide a

“basic floor of opportunity” that consists of access to specialized instruction and related services individually designed to provide educational benefits to the student, and **the choice of methodology in providing special education and related services is the prerogative of the school district.** (Emphasis added). C.P. v. Prescott Unified School District, 631 F.3d 1117, 1122 (9th Cir.2011) (holding that IDEA allows educators the discretion to select from various methods in order to meet the individualized needs of a student if those practices are reasonably calculated to provide educational benefit).

Petitioners’ RDPH establishes that there are alternative methods for assisting the Student to communicate with staff and the home; two such methods being a 1 x 1 aide or a weekly tracking sheet. Additional methods of communication have been established by Respondent. Respondent has the discretion for determining the methodology to be used for providing a meaningful educational benefit to the Student and it is not a denial of FAPE if Respondent chooses methods different than those proposed by the Petitioner. See Lapine School District v. DW, 28 IDELR 734 (9th Cir. 1998); see also, DT & DT ex rel NT v. Seattle School District, 57 IDELR 249 (WD Wash. 2011); SM & GM ex rel ZM v. State of Hawaii, Dept. of Educ., 56 IDELR 193 (D Hawaii 2011). Accordingly, a 1 x 1 aide is not necessary for the Student to benefit from special education because there are multiple methods for providing the benefit sought by Petitioner. FAPE has not been denied because Respondent has implemented a different methodology than a 1 x 1 aide or the weekly tracking sheet proposed by Petitioners.

2. The Student benefits from Special Education without the assistance of a 1 x 1 aide.

In Rowley, the U.S. Supreme Court stated that “The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate

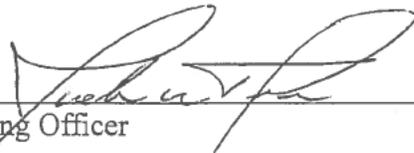
from our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act. Rowley, 73 L.Ed.2d at 712. In the present case, the Student's grades have improved over the past year and a half and she has passed from grade to grade both without a 1 x 1 aide. Not only have the Student's grades improved but she is obtaining high grades, seven A's and two B's, in general education classes where she is graded alongside her non-disabled peers. Although the Student's grades are not the only factor that may be considered to determine if an educational benefit is being derived, as noted in Rowley it can be an important consideration especially when the student is in general education classes. See Rowley, fn 25 (recognizing the court's holding that the student's academic progress was dispositive in that case on the issue of whether an educational benefit was being provided). The Student's high level of academic progress in general education classes in this case is, as it was in Rowley, an indication that she is receiving an educational benefit. Further, the Student is obtaining this educational benefit without the assistance of a 1 x 1 aide. Accordingly, the second prong of the test from Tatro is not satisfied because a 1 x 1 aide is not needed or necessary for the Student to benefit from special education.

CONCLUSION & ORDER

Petitioners' DPHR asserts one claim, namely, that FAPE has been denied due to Respondent's failure to provide a 1 x 1 aide. In this case, a 1 x 1 aide is not a related service to which Petitioners are entitled under the IDEA. Therefore, Respondent did not deny FAPE by implementing methodology assisting the Student in communicating with staff and the home different than the 1 x 1 aide methodology requested by Petitioners.

There are no factual disputes raising genuine issues of material fact and Respondent is entitled to Summary Judgment as a matter of law. The Due Process Hearing Request, H-15-01-30, received by the State Department of Education on January 30, 2015, shall be and is hereby DISMISSED in its entirety with prejudice.

So ORDERED this 16th day of March, 2015.



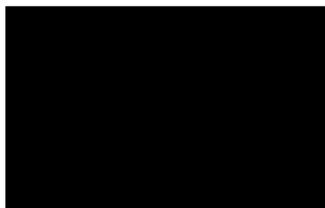
Hearing Officer

NOTICE

Any party aggrieved by the findings and decision herein has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under 20 U.S.C. §1415(i)(1). The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. (See 20 U.S.C. §1415(1)(2)). 20 U.S.C. §1415(i)(2)(a) provides that: Time limitation: The party bringing the action shall have 90 days from the date of this decision to file a civil action, **or if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by State law. (Emphasis Added).** IDAPA 08.02.03.109.05(g) provides that “An appeal to civil court must be filed within forty-two (42) calendar days from the date of issuance of the hearing officer’s decision.”

CERTIFICATE OF SERVICE

I DO HEREBY certify that on the 16th day of March, 2015, I caused to be served on the following a true and correct copy of the foregoing document by the method indicated below:



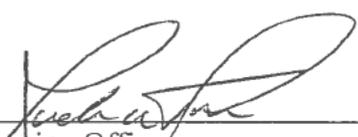
- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile
- Email

Elaine Eberharter-Maki
EBERHARTER-MAKI & TAPPEN, PA
818 La Cassia Drive
Boise, Idaho 83705
eemaki@emtedlaw.com

- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile
- Email

Dispute Resolution Coordinator
Special Education Division
Idaho State Department of Education
P.O. Box 83720 Boise ID 83720-0027

- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile
- Email

By: 
Hearing Officer