

STATE DEPARTMENT OF EDUCATION
DUE PROCESS APPEAL REVIEW
STATE OF OKLAHOMA

[Parent]
on behalf of [], student,

Petitioner,

vs.

Due Process Hearing No. 2060

[PUBLIC
SCHOOL],

Respondent.

FINAL APPELLATE ADMINISTRATIVE ORDER

APPEARANCES:

[School District Attorney] for Appellant
[Parent Attorneys] for Appellee

Protective Order

In order to provide confidentiality and insure privacy, throughout this Order, the Appellant shall be referred to as "School," "District," or "Appellant." The Appellee shall be referenced as "Parent" or "Appellee." The minor child who is the subject of this action has been referenced as "Child" or "Student."

As part of this Final Administrative Order, a protective order is hereby entered. No party to these proceedings shall publish to any third-party the name or identify of student. All documents pertaining to these proceedings shall be sealed and any copy of any documents made pursuant to the legal request of a third-party shall be redacted as to names, birthdates, and other private or sensitive information.

Federal Law Applicable to Case

The Individuals with Disabilities Education Act (IDEA) is the major federal statute for the education of children with disabilities. 20 U.S.C. § 1400 *et seq.* Oklahoma receives federal funding under this Act, which sets out the principles under which special education and related services are to be provided. The requirements are detailed and replete with special definitions and acronyms.

Every individual independent school district in Oklahoma must make available a free appropriate public education (FAPE) to all children with disabilities, generally between the ages of three to twenty-one. 20 U.S.C. § 1401. States and school districts identify, locate, and evaluate all children with disabilities, regardless of the severity of their disability, to determine which children are eligible for special education related services. All children with a disability, as defined by 34 C.F.R. § 300.8, must be educated in the least restrictive environment. *See* 34 C.F.R. §

300.114.

Each child receiving services has an individual education program (IEP) spelling out the specific special education and related services to be provided to meet his or her needs. The IEP must include a statement of the child's present levels of academic achievement and functional performance; a statement of measurable annual goals; a description of how these goals are to be met; a statement of the special education and related services to be provided; and an explanation of the extent to which the child is to be educated with children without disabilities. The parent must be a partner in planning and overseeing the child's special education and related services as a member of the IEP team. *See* 34 C.F.R. § 300.116. "To the maximum extent appropriate," children with disabilities must be educated with children who are not disabled. Oklahoma school districts must provide procedural safeguards to children with disabilities and their parents, including a right to a due process hearing and right to appeal.

Procedural History of Appeal

A due process hearing decision was issued in this case on January 20, 2014 pursuant to 20 U.S.C. § 1415(0)(10)(A) et. seq. The hearing officer determined that: (1) the District failed in its Child Find Identification duties; (2) the District failed to devise appropriate measurable goals and objectives based on present levels of performance because the District has never determined what is driving the Student's behavior and lack of success in school; (3) the District failed to implement the Student's Behavior Intervention Plan as evidenced by its efforts with three different Behavior Intervention Plans, none of which have proved successful; and (4) the District failed to provide a complete and thorough Independent Educational Evaluation (IEE). The District timely requested an appeal hearing pursuant to 20 U.S.C. § 1415(g)(1) & (2).

Findings of Fact

In addition to any findings of fact specifically set forth in this Order, the Findings of Fact set forth in the Hearing Officer's decision are adopted as Findings of Fact for purposes of this appeal. If there is any conflict with a specific Finding of Fact set forth herein and those adopted by the Hearing Officer, the Finding(s) of Fact set out in this Order shall prevail.

A reading of the record as a whole compels this Appeal Officer to question the actions of the District. This child, at a minimum, has diagnoses of Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder ("ODD"). Parent believes child also has a learning disability, namely dyslexia. The child has had several behavior plans in place, and all have failed. No behavior consultant has been utilized, and no objective data exists as to the child's current behaviors. An IEP is in place.

Issues on Appeal

The issues raised on appeal are: (1) whether the hearing officer over-stepped his authority in ruling outside of the allegations raised in the Amended Complaint; (2) whether the hearing officer erred in ruling that the District erred in its child find duties; (3) whether the hearing officer erred by adding a new claim not raised in the Amended Complaint but part of his ruling; (4) whether the hearing officer erred by shifting the burden of proof from the Parent to the District; (5) whether the hearing officer exceeded his authority and substituted his personal judgment as to the education of the student over that of the IEP Team and the District and exceeded his authority to rule within the allegations raised in the Amended Complaint; (6) whether the hearing officer's finding that the District failed to devise appropriate measurable goals and objective based on present levels of performance violates IDEA and case law, as well as being outside the scope of his authority; (7) whether the hearing officer erred in finding that the District failed to implement

the student's behavior intervention plan; (8) whether the hearing officer's decision to order a new Independent Educational Evaluation (IEE) is outside the scope of his authority when such order is outside the scope of the Amended Complaint; (9) whether the hearing officer erred by making no finding that the parent met her burden of proof on her allegation that the District failed to provide a free, appropriate public education (FAPE); and (10) whether the hearing officer erred by ordering a remedy outside that which was requested in the Amended Complaint.

Appellee/Parent raises some issues as well; however, she is not the aggrieved party, and this appellate hearing officer questions why she would not simply respond to the issues raised on appeal rather than attempting to further confuse the issues in this matter and slow this process for the child. Appellee's/Parent's issues raised are not relevant to this decision based on the procedural posture of this case.

Conclusions of Law

IDEA obligates District personnel to provide children, including this Parent's child, with a free appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1). The burden of proof in this administrative hearing was placed on the Parent as the party seeking relief. *See Schaffer v. Weast*, 546 U.S. 49 (2005). A Hearing Officer may find that a child did not receive FAPE only if the procedural inadequacies: (1) impeded the child's right to a free appropriate public education; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (3) caused a deprivation of educational benefit. *See* 20 U.S.C. § 1415(f)(3)(E).

The Tenth Circuit Court of Appeals has previously explained that in enacting IDEA, Congress explicitly mandated, through the least restrictive environment requirement, a specific mandate that disabled children be educated in the regular classroom to the maximum extent

possible. 20 U.S.C. § 1412(a)(5)(A). *Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512*, 959 F. Supp. 1338, 1351 (D. Kan. 1997), aff'd 153 F.3d 727 (1998). The IDEA does not require a public school to maximize a child's potential or to provide the best possible education or psychological program. *Johnson v. Independent Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022, 102829 (citing *Board of Educ. v. Rowley*, 485 U.S. 197 n. 21). Under IDEA, school districts have a legal, affirmative obligation to identify all students with disabilities within the district. See 20 U.S.C. § 1412(a)(3). If a child is identified as a child suspected of having a disability, the school must evaluate the child in all areas of suspected needs. See 20 U.S.C. § 1414(b); see also *Wisenberg v. Board of Educ.*, 181 F. Supp. 1307, 1311 (D.Utah 2002).

Standard of Review

The hearing officer's factual findings based on strict credibility judgments are deferred to unless the non-testimonial evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. See *O'Toole v. Olathe*, 144 F.3d 692, 699 (10th Cir. 1998). Further the scope of review applied on appeal is enunciated in *Carlisle Area School District v. Scott P.*, 62 F.2d 520 (3rd Cir. 1995), with the court's holding that:

We thus hold that appeals panels reviewing the fact findings of hearing officers . . . should defer to the hearing officer's findings based upon credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion.

In making Findings of Fact, the impartial hearing officer weighed all the evidence and assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to: the demeanor of the witnesses; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is

reasonable; and whether the testimony is consistent with all believable evidence in the case.

Because the Hearing Officer considered the entire record and enumerated the undisputed facts, there is no reason to set aside any of his Findings of Fact based upon the records as a whole or credibility judgments.

Therefore, this review is limited to the application of legal concepts and requirements. The Parent did attempt to introduce new evidence in this appeal. That attempt is rejected. The evidence attempted to be introduced post-dates the due process filing or hearing. It does not appear that any solid reason for seeking to introduce new evidence is justified.

Discussion

Before this Appellate Review Officer is a child of [age] on an IEP under the Other Health Impaired classification for his ADHD. The child has measurable intelligence with the high-average classification range with a full-scale IQ of 109. (District Ex. 26). The child has had numerous and significant behavioral issues that have persisted throughout his education. The Behavior Intervention Plans (BIP) that have been in place for this child have been wholly ineffective and have led to significant time away from instruction and the ability to concentrate on the tasks in the learning environment. Indeed, the child has spent more time outside the class school with behavior disruptions than in the classroom receiving instruction. The IEP in place for the student, coupled with the BIPs, have failed and are failing this student. The District cannot ignore the fact that an IEP is likely incomplete, and at a minimum, failing this child. *See O'Toole v. Olathe Dist. Sch.*, 144 F.3d 692, 702) (10th Cir. 1998). The IEP is not providing educational benefit to this child.

A Hearing Officer may find that a child did not receive FAPE only if the procedural inadequacies: (1) impeded the child's right to a free appropriate public education; (2) significantly

impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (3) caused a deprivation of educational benefit. *See* 20 U.S.C. § 1415(f)(3)(E).

While the *pro se* Amended Complaint filed by Parent may be rambling and hard to discern, the law states that this child was and is entitled to a free appropriate public education, which includes educational benefit. At a minimum, when a child cannot succeed in the classroom, is a constant behavior interruption with three different BIPs having been in place, and has a Parent — as well as at least one District employee — raising concerns as to learning disability (at a minimum, dyslexia) and possible emotional disturbance, the District has failed on some level to identify the child's issues and/or to provide FAPE.

While the hearing officer classified this as a child find issue, the reality is this child was on an IEP, making the child find issue hard to digest. The child was certainly found, even if his issues were not all discovered. Nonetheless, the hearing officer is correct in his assessment that multiple behavior plans have been in place with no measurable date as to how they are working for this child. The only data, so to speak, is that the child is out of the classroom and learning environment more than he is in. No behavioral consultant has been utilized, though the child is not making educational progress. This child is entitled to an IEP and a behavior plan (considering his behavioral issues) that are providing educational benefit.

The District is correct in asserting that the child was certainly found and known to the District as a student at the District receiving special education services. The District, however, misses the nuance that the child's disabilities likely were not properly identified, as the child has been out of the classroom more than he has been in, and he is not receiving the educational benefit. Either way, and without arguing whether this is a true child find or FAPE issue, this child should

have been flagged by the District as being deprived of an educational benefit when there was such a disparity in the child's IQ and his learning the instructional material, even with three different behavior plans in place.

No matter how rambling or disjointed the Amended Complaint may be, the District failed to fully investigate the complete disconnect in the child's inability to garner an educational benefit and reconcile that with the evaluation of the child in all areas of suspected needs.'

The hearing officer was extremely generous in ordering an IEE for this child and not holding this hearing open to further order services once the evaluation was complete. The District should seize on this opportunity to bring in behavioral consultants; implement an appropriate IEP that will lead to educational benefit; and do anything else in its power to make certain another due process is not filed following the completion of the IEE and continued denial and apparent resistance by the District.

This appellate hearing officer finds that the hearing officer was extremely generous to the District in ordering nothing more than an IEE.

Decision

The January 20, 2014 decision of the hearing officer is upheld and affirmed. The District denied FAPE and failed in devising and implementing an appropriate behavior intervention plan (BIP). Moreover, the child's IEP has not resulted in educational benefit to this child. The IEE ordered by the hearing officer is upheld. It is this appellate hearing officer's opinion that the

As purely dicta, but nonetheless a hopeful wake-up call to the District and Parent, the prisons in the United States of America are filled with far too many individuals with dual diagnoses of ADHD and ODD. Here, a child with such diagnoses — coupled with a suspicion of a learning disability with no proper evaluation or consideration of said disability when devising the IEP — who is in the classroom receiving instruction for less time daily than he is out of the classroom as a discipline issue, is in grave danger of becoming another statistic unless the District realizes that the IEP and BIP in place are failing the student. Parent may also not be without blame or fault, as the record is devoid of whether the Parent is utilizing the tools the child needs, including, but not limited to, glasses and medications.

District should then with great haste devise both an IEP and a behavior plan that is calculated to benefit this child with a system to collect data and ensure this child is receiving the education he is entitled to under the law.

Notice of Appeal Rights

Pursuant to 20 U.S.C. § 1415(g) & (i) and 34 C.F.R. § 300.516, the decision of the Appeal Review Officer is final except that any party involved in such hearing who feels aggrieved by the findings and decision made shall have the right to 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) day of receipt of this Order.

[Signature]
Catherine Welsh
Appellate Review Officer

CERTIFICATE OF MAILING

This is to certify that on this
23^rd day of May, 2014, a true and
correct copy of the above and foregoing
Order was e-mailed and mailed, postage
pre-paid, to the following individuals:

[School District Attorney] for Appellant

[Parent Attorneys] for Appellee

[Special Education Resolution Center]

[Signature of Appellate Officer]