**STATE DEPARTMENT OF EDUCATION**
**STATE OF OKLAHOMA**

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| **[Parent]** | ) | |
| | ) | |
| **Petitioner** | ) | **Appeal of Due Process No. 2116** |
| | ) | |
| **v.** | ) | |
| **[School District]** | ) | |
| **Respondent** | ) | |

**Appealable Order: Hearing Decision**

**Decision Date: July 28th 2017**

**Hearing Officer Hugh V. Rineer**

**ORDER**

**Statement of the Case**

The student was born on August 21st [year] and at all relevant times attended [Name] Public Schools. The student has been identified as a student with a disability and in need of special services. The student's category of eligibility is emotional disturbance.

During the [date] school year the student attended [Name] Elementary in [Name] School District and was in the [number] grade. The student has been on an Individualized Education Plan (IEP) since that time. The student was initially placed on an IEP on September 23rd [year]. A determination was noted in the initial IEP that Assistive Technology was not necessary to implement the requirements of that document. Additionally, the initial IEP determined that the student was not eligible for an Extended School Year (ESY). The Parent signed the September IEP evidencing her agreement.

As of November [date] the District's Assistive Technology Team (AT Team) conducted an AT evaluation of the student. The AT team interviewed the staff at the elementary school

[and]the parent and observed the student in his classrooms. On November [date] a Student Environment Tasks and Tools Meeting (SETT) was had to discuss possible Assistive Technology for the student. The Parent was present at the meeting.

On December [date] the Parent delivered a written request for an []

request for an Independent Educational Evaluation (IEE) for Assistive Technology (AT). Eventually the parties agreed that an IEE could be had, but disagreed as to the rate of compensation for that evaluation. The District stated that they had criteria for publicly funded evaluations based on reasonable rates. As a result, that rate should be $2,500. The Parent disagrees and believes the district should be responsible for the quoted price of $4,195.00 from the provider they selected.

The Hearing Officer found that the Parent could use her IEE provider [name]. She could use other evaluators as long as they met the District's minimum requirements. In any event, the hearing officer determined that the District would be responsible to pay no more than $2,500 for the evaluation.

On September [date], the IEP team determined that Extended School Year Services were not needed for the student. The Parent was at this meeting and signed the IEP. She now claims she was denied meaningful participation in the process because various notices of the meeting were deficient. Specifically, the notices failed to inform her that ESY would be a topic of the meeting. The Parent claims that the student meets the eligibility requirements for ESY and since certain procedures were not followed the student should be entitled to said services.

**Standard of Review**

Under the IDEA and special education rules, this Appeal Officer is required to make an "independent decision" reviewing the entire record of the hearing below. This Appeal Officer has done so, including not only the Parents' appeal document and subsequent record but also the post hearing briefs of both parties as submitted to this Appeal Officer.

There is no controlling authority in the Tenth Circuit our Court that has addressed the degree of deference an appeal officer should give to the determinations of a hearing officer. This appeal officer finds the reasoning and approach of the Third Circuit Court of Appeals in *Carlisle Area Sch Dist v Scott P.,* 22 IDELR 13 (3rd Cir 1995), persuasive. In that case, the court noted that in two-tier systems under IDEA a state review officer must exercise "plenary" review to make the "independent decision" IDEA requires. However, in doing so, it held that a state review officer should give deference to a local hearing officer's findings based on credibility judgments "unless the non-testimonial, intrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." This appeal officer utilized this standard in conducting this review, *See also Caledonia Community Schools Michigan State Educational Agency* 44 IDELR 118, 105 LRP 1244 (2005). Further, the Hearing Officer's finding of facts will be adopted unless specifically contradicted by the record and noted by the Appeal Review Officer.

**Issues addressed at the hearing**

1. Whether the student was entitled to ESY services for the school years [1st year] and [2nd year].
2. Whether the student was entitled to an IEE for AT; and if so what limitations can be imposed by the District.

**Issues raised on Appeal**

The Parent raises fourteen issues for Appeal. Some of these issues share common facts and legal principals. Therefor the Appeal Officer will address each proposition of error but will group them based on the aforementioned similarities.

**Procedural violations of the IDEA.**

The Parents first proposition of error asserts that at a pre-hearing telephone conference the Hearing Officer excluded "numerous" issues raised by the Parent from the hearing included evidence of violations of procedural safeguards and denial of FAPE.

In the second proposition of error, the Parent asserts the Hearing Officer erred in finding a failure to provide the student with a FAPE as it related various issues surrounding the determination not to provide the student with Extended School Year (ESY) services. The Parent's complaint about ESY centers on the failure to provide the proper meeting notices. Further, the Parent complains that notices provided after meetings where ESY was discussed did not evidence the decision not to provide ESY.

The Parent's third proposition of error centers around the goals on an IEP. Specifically, The Parent contends that the failure to adequately draft the student's IEP when no measurable goals were added to the IEP is a violation of FAPE.

Parent's proposition of error 5 and 6 appear to be duplicative. These propositions generally refer to procedural safeguards and improper meeting notifications. They will be dealt with in the same manner as other procedural violations.

Contrary to Parent's counsel's assertion, procedural violations of the IDEA do **not** in and of themselves constitute a failure to provide a FAPE. Respondent's counsel is correct when she cited 34 C.F.R. § 300.513(a)(2) which states:

> (2) 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.

Therefore, even if there were procedural violations as it related to various meeting notices or IEP goals they would not be actionable absent an educational deprivation or significant participation in the decision making process.

Generally, a student receives an educational benefit when he receives passing grades and advances from grade to grade *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 3042, 73 L.Ed.2d 690 (1982). An educational benefit does not need to be perfect but simply provides a basic floor of

education for the student. The record in this case included documents and witness testimony is that the student did advance from grade to grade. Indeed, at the hearing there was testimony that the student was prepared to advance to the next grade. Consequently, since the evidence suggests the student received an educational benefit no procedural violation is a denial of FAPE.

The hearing officer also found that the parent was allowed meaningful participation in the decision making process as it related to the provision of FAPE. The District's responsibility regarding notice and participation are found at 34 CFR 300.322. That provision provides in-part that the District must take steps to assure that the Parent be allowed the opportunity to attend and participate in any IEP meeting. The hearing officer found that the Parent had attended the IEP meetings and signed the IEP form evidencing her participation. As a result of the Parent's participation any procedural deficiencies complained of by the Parent do rise to the level of a violation of FAPE.

The Hearing Officer correctly limited the issues litigated in the hearing. The issues that should have been addressed in the due process hearing are governed by the Amended Due Process Complaint. In addition to the procedural issues previously addressed, the Complaint makes allegations as to the evaluation for Assistive Technology, Extended School Year and discriminatory and harassing conduct directed toward the student.

The Hearing addressed the necessary issues. The issue of an IEE for Assistive technology was extensively address. Further evidence was submitted in the hearing about ESY. The issue of discrimination was not allowed because it is beyond the jurisdiction of a hearing officer. The hearing officer's authority is limited to violations of the IDEA. Any allegations of discrimination or harassment would be a potential violation of other statutory constructs and would be beyond the purview of a due process hearing.

**Issue: Whether the student was entitled to ESY services for the school years [1st year] and [2nd year]**.

The Parent's raised allegations that the student was eligible for ESY services. The Parent seems to rest her claim on various supposed defects in the notice requirements regarding IEP meetings where ESY was discussed resulting in her having a lack of meaningful participation in those meetings. The hearing officer found the Parent was present for the meetings and therefor was allowed meaningful participation and denied the claim. These findings are well founded in the record and will not be disturbed.

Even if the notice regarding meetings to discuss ESY were deficient it was harmless error. In *Buffalo Lake-Hector School District #2159-01* the court found that a school district was not liable for failing to mention ESY in its prior written notice absent educational harm to the student. In this case there is no evidence of educational harm for any failure to provide the Parent with proper notice regarding meetings where ESY was discussed.

In any event, there is insufficient evidence in the record to indicate the student was eligible for ESY. It should be noted that ESY services are the exception not the rule under the IDEA regulatory scheme, *Cordrey v. Euckert* 917 F.2d 1460 (6th cir. 1990). To be eligible for ESY, it is incumbent on the Parent in a specific way to show that ESY services are necessary Id. To be entitled to ESY the Parent must show that student regressed in the educational environment. The regression must be beyond normally recoverable educational deficiencies, *See Colorado Springs District 11 Colorado State Educational Agency* 110 LRP 22639 (2010).

The evidence in this matter suggests that the evidence of regression did not rise to the level for the need of ESY services. In *Colorado Springs District 11* the court said the student did not need ESY because regardless of any regression he was progressing in the general curriculum. The evidence in this case demonstrates clearly that the student was progressing in the general curriculum and performing satisfactorily various testing protocols.

For all the forgoing the hearing officer is affirmed regarding the ESY issue.

**Issue: Whether the student was entitled to an IEE for AT; and if so what limitations can be imposed by the District.**

Proposition 7, 8, & 9 deal with Parent's complaints regarding the provision of an Independent Education Evaluation (IEE) as it relates to assistive technology (AT). The record indicates that the parties agreed that the Parent was entitled to have an IEE for AT. Additionally, the Hearing Officer in his decision allowed that [2nd parent provider] could conduct the IEE. The record reflects that [2nd parent provider] was the evaluator selected by the Parent. Further, such an evaluation should be done at the expense at the District. The Hearing Officer did limit the amount the District would pay for the IEE to $2,500. The Parent believes this amount is inadequate and that she should be entitled to the full amount of the evaluation as quoted by [2nd parent provider].

A Parent's right to a publicly funded IEE is governed by 34 CFR 300.502. The parent may have a publicly funded IEE if they disagree with the district unless:

1) The district demonstrates in a due process hearing that its own evaluation of the child was appropriate or
2) The district demonstrates in a hearing that the evaluation obtained by the parent did not meet district criteria.

The District is claiming that the evaluation did not meet its criteria.

The District gave a list of evaluation AT evaluation providers in the Oklahoma City area to the Parent. The list only really contained one provider. That provider was rejected by the parent and she selected her own. The Parent claims that the list was inadequate, but since the hearing officer allowed the Parent to use the provider she selected the sufficiency of the list is of little importance.

The District established criteria for IEE's that were not satisfied by [2nd parent provider]. The regulations governing IEE's are found at 34 CFR 300.502. In such cases, the District must prove at a hearing that the evaluation obtained by the parent did not meet agency criteria.

In the instant case the District alleged that the Parent's provider failed to meets its criteria as it related to costs. The Hearing Officer found that the District's cost cap on evaluations was $2,500. This was based on commensurate rates in the area. As a result, the cost ceiling was reasonable. Upon that finding the burden shifts to the Parent to show why she should be entitled to greater reimbursement. She failed to do so.

For all the forgoing reasons the Hearing Officer is **affirmed** as to his order regarding the IEE for AT.

**Post hearing issues**

The Parent's allege that the Hearing Officer's fourteen day delay in issuing his ruling is somehow actionable by this Appeal Officer. Further, that the Special Education Resolution Center was negligent in overseeing its regulations. The Parent cites no authority that gives the Appeal Officer the ability to deal with these issues because there are none. A Hearing Officer's authority is limited and does not extend to issues such as these. In any event, these issues arose after the hearing and could not be the subject of the due process hearing. Therefore, they are not ripe for any appellate determination.

Although not mentioned in the Parent's request for ma Appeal review, in her brief reference is made to a violation of "stay put". Since this issue was not raised in the request the issue could be summarily dismissed. However, in an effort to illuminate this issue the matter will be addressed.

There is no evidence in the record that stay put was violated. Stay put is a doctrine that requires that the placement of a student remain unchanged during the pendency of a due process hearing procedure. However, a district may suspend a student for up to ten days without implicating stay put. The record indicates that the student may have been suspended for less than ten days. As a result, there is no violation of stay put and any criticism of Hearing Officer in that regard is completely unfounded, *See 34 CFR 500.18 and 34 CFR 500.530.*

IT IS THEREFOR the order that the Hearing Officer's Due Process Hearing Decision is **affirmed**.

Date September 25th 2017

/s/ David Blades
APPEAL REVIEW OFFICER

***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 controversy within ninety (90) day of receipt of this Order.

**Certificate of Mailing**

I the undersigned certify that on the 25th day of September the forgoing was transmitted via e-mail and certified mail return receipt requested to:

Parent Attorney

School District Attorney

Special Education Resolution Center

/s/ David Blades
_____
David Blades