

DUE PROCESS HEARING

Case Number D09-016

LEA: [REDACTED]
Local Education Agency

COUNSEL: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

PARENTS: [REDACTED]
Parents of Student
Initiators

COUNSEL: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

STUDENT: [REDACTED] (Joined as an Initiator on May 7, 2009)

DATE OF BIRTH: [REDACTED]

DATE OF REQUEST: April 20, 2009

DATE OF RECEIPT BY
LEA: April 21, 2009

DATE OF RECEIPT OF
MEMORANDUM OF
APPOINTMENT BY
HEARING OFFICER: April 24, 2009

DATE OF HEARING: July 27, 2009

PLACE OF HEARING: [REDACTED]
[REDACTED]
[REDACTED]

TRANSCRIPTION: [REDACTED] Court Stenographer

STATUS OF HEARING: Open to Public

STUDENT PRESENT: Yes

POST HEARING
SUBMISSIONS: August 21, 2009

DECISION DATE: September 18, 2009

HEARING OFFICER: [REDACTED]

WITNESSES FOR THE LOCAL
EDUCATION AUTHORITY:

[REDACTED]
Director of Special Education

WITNESSES FOR STUDENT/PARENTS:

[REDACTED]
Father of the Student

[REDACTED]
Student

[REDACTED]
School Psychologist

DUE PROCESS HEARING

PROCEDURAL BACKGROUND

On the 20th day of April, 2009, the parents of the student, through counsel, filed a Complaint in this matter requesting a Due Process Hearing, which was received by the West Virginia Department of Education, Office of Assessment and Accountability, on the 21st day of April, 2009. By Memorandum dated the 21st day of April, 2009, I was informed of my appointment as the Impartial Hearing Officer in this matter. In keeping with the 45-day rule allowing for the resolution period, the decision in this matter was due by the 6th day of July, 2009.

On the 23rd day of April, 2009, counsel for the LEA submitted a Motion to Dismiss the April 21, 2009, Complaint of the parents of the student arguing that the student is now over the age of eighteen (18) years and is considered an "adult student" and by law should have been the initiator in this Due Process Complaint.

A Telephonic Pre-Hearing Conference Call was conducted on the 1st day of May, 2009, at 1:30 p.m. between this Impartial Hearing Officer, counsel for the parents of the student, and counsel for the LEA, on the LEA's Motion to Dismiss this Complaint. It was determined by this Impartial Hearing Officer that the student reached her eighteenth birthday on April 14, 2009, or six (6) days prior to the filing of the Due Process Complaint.

Thereafter, by letter to this Impartial Hearing Officer dated the 7th day of May, 2009, the student requested that she be included as a party with her parents in this Due Process Complaint.

A Telephonic Pre-Hearing Conference Call was conducted on the 19th day of May, 2009, at 10:00 a.m. between this Impartial Hearing Officer, counsel for the parents of the student, and counsel for the LEA. The LEA's Motion to Dismiss was denied inasmuch as the student had

requested to be named as a party to this Complaint and was permitted to join as a party to this Due Process Hearing, as an "adult student".

That a resolution meeting in this matter was required to be conducted within fifteen (15) calendar days of the receipt of the Complaint by the West Virginia Department of Education or by the 6th day of May, 2009. The resolution session in this matter has not been waived. The forty-five days for a decision commences to run after the thirty (30) day resolution period, which ended the 21st day of May, 2009 with the decision in this matter to be in compliance with the forty-five day rule, due on the 6th day of July, 2009.

The Due Process Hearing in this matter was scheduled for the 27th and 28th days of July, 2009, beginning at 9:00 a.m. in the offices of Bowles, Rice, McDavid, Graff & Love, LLP, 501 Avery Street, Parkersburg, West Virginia 26101 and the deadline for the decision in this matter was extended at the written request of both parties from the 6th day of July, 2009, to the 18th day of September, 2009. Pre-hearing submissions, including proposed evidence, exhibits, and witness lists, were to be submitted by each party, to the opposing party, and to me as Impartial Hearing Officer five (5) business days prior to the Hearing or on or before the 20th day of July, 2009. Post-hearing submissions or Memoranda of Law, shall be submitted by each party, to the opposing party, and to me as Impartial Hearing Officer on or before the 21st day of August, 2009. A Pre-Hearing Conference Order dated the 22nd day of May, 2009, setting forth the matters above was prepared and forwarded to all parties.

On the 6th day of July, 2009, counsel for the LEA filed its Second Motion to Dismiss this matter inasmuch as the student graduated from high school with a regular diploma on the 29th day of May, 2009.

This Impartial Hearing Officer by Order dated the 17th day of July, 2009, ruled that the LEA's Second Motion to Dismiss the Complaint in this matter be held in abeyance until presented and argued at the Due Process Hearing in this matter on the 27th and 28th days of July, 2009. The Motion was denied at the commencement of the Due Process Hearing.

The Due Process Hearing in this matter was held on the 27th day of July, 2009, in the offices of Bowles, Rice, McDavid, Graff & Love, LLP, 501 Avery Street, Parkersburg, West Virginia 26101.

Post-hearing briefs were timely received by this Hearing Officer from counsel for the LEA and counsel for the parents of the student.

PRELIMINARY STATEMENT

FOLLOWING THE DUE PROCESS HEARING IN THIS MATTER, COUNSEL FOR BOTH PARTIES WERE INVITED TO SUBMIT MEMORANDA INCLUDING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF THEIR RESPECTIVE POSITIONS. ALL PROPOSED FINDINGS, CONCLUSIONS AND SUPPORTING ARGUMENTS SUBMITTED BY THE PARTIES HAVE BEEN CONSIDERED. TO THE EXTENT THAT THE PROPOSED FINDINGS, CONCLUSIONS, AND ARGUMENTS ADVANCED BY THE PARTIES ARE IN ACCORDANCE WITH THE FINDINGS, CONCLUSIONS AND VIEWS AS STATED HEREIN, THEY HAVE BEEN ACCEPTED, AND TO THE EXTENT THAT THEY ARE INCONSISTENT THEREWITH, THEY HAVE BEEN REJECTED. CERTAIN PROPOSED FINDINGS AND CONCLUSIONS HAVE BEEN OMITTED AS NOT RELEVANT OR NOT NECESSARY TO A PROPER DETERMINATION OF THE MATERIAL ISSUES AS PRESENTED. TO THE EXTENT THAT THE TESTIMONY OF VARIOUS WITNESSES IS NOT IN ACCORD WITH FINDINGS AS STATED HEREIN, IT IS NOT CREDITED.

ISSUES

1. Whether the student was denied a Free Appropriate Public Education (FAPE) by the LEA?
2. Whether the student's grade of "F" can or should be changed because the LEA was found in violation of West Virginia State Policy 2419 by failing to implement all IEP-specific modifications in the student's Spanish 2 class?

FINDINGS OF FACT

1. The student is a female child, eighteen years of age, and has been determined to be an eligible disabled student under Policy 2419, Regulations for the Education of Students with Exceptionalities (126 CSR 16-1 et seq.) and who by reason thereof, is eligible to receive special education and related services.
2. The LEA's Director of Special Education (DSE) is in charge of the complaint resolution process; trains teachers and administrators under the guidelines of State Policy 2419; and assists administrators in hiring. (Tr. p. 13)
3. The DSE received a letter dated September 17, 2008, from the West Virginia Department of Education, Office of Assessment and Accountability ("WVDE, OAA"), attaching a September 16, 2008, complaint from the parents of the student asking if the LEA had implemented the student's IEP for the student's Spanish 2 class. (Tr. pp. 13 & 14) (Exhibit No.1)
4. The DSE received a letter of findings dated November 7, 2008, from the WVDE, OAA stating that a violation occurred; that the LEA must eliminate the identified deficiencies relevant to IEP team responsibilities and IEP implementation; and setting forth the corrective actions the LEA must take. (Tr. pp. 14 & 15) (Exhibit No. 2)
5. A communication form documenting a meeting held at the student's high school on November 20, 2008, to discuss compensatory education options for the student as required by the State's corrective action plan was signed by the DSE. (Tr. p. 15) (Exhibit No. 3)
6. At the meeting on November 20, 2008, options were presented by the LEA for the student to repeat the Spanish 2 class: evening hours; summer hours; or virtual school (taking the class through a computer instead of a classroom setting). The student did not meet the

prerequisites for a virtual class, which required at least a C grade in Spanish 1. The LEA proposed hiring a Spanish teacher for the student to attend class in the evening. Summer hours were not an option because it would be after the student graduated. (Tr. pp. 15 & 16)

7. The DSE said the student's parents felt the evening hours option was beyond the school day and not viable and would be punishment for the student. The student's parents knew there was a letter of findings from the WVDE, OAA. (Tr. pp. 16 & 17)
8. The DSE sent a letter to the WVDE, OAA dated November 20, 2008, attaching a Compensatory Education Plan for the student signed by those attending the November 20, 2008 meeting; a written statement concerning the requirements of Policy 2419, which was a page from the student's September 26, 2007, IEP delineating services; and a written affirmation statement signed by those from the student's high school after they discussed their responsibilities for supplementary aids and services, and whether to convene an IEP team meeting if there was no progress toward the student's annual goals. Part of the violation was that accommodations were not being provided. The page from the student's IEP specified what types of supplemental services the student would require from the special education teacher who would be providing consultation to the Spanish Teacher. (Tr. pp.17 & 18) (Exhibit No. 4)
9. The DSE received a response letter from the WVDE, OAA, dated November 25, 2008, making the determination that the documentation provided by the DSE was acceptable as verification of the previously ordered corrective activities, and that the case was considered closed. (Tr. p. 18) (Exhibit No. 5)

10. A posting of a vacancy at the student's high school for a Spanish teacher for Monday through Thursday, four hours per evening, for the student was presented by the DSE. (Tr. pp. 18 & 19) (Exhibit No. 6)
11. The DSE presented the "Proposed Material for Board Agenda" dated January 13, 2009, for the Board's approval for a teacher to teach the student Spanish 1 in the evening at the high school. (Tr. p. 19) (Exhibit No. 7)
12. The DSE said they knew from the beginning that the evening class for the student was not acceptable to the student or the student's parents and that she would not attend, but the teacher was hired on the chance that the student would attend. The DSE does not believe the student attended. (Tr. pp. 19 & 20, 33-35)
13. Prior Written Notice verified to the student's parents that the student would graduate with a standard diploma, having met all of the requirements for graduation from the LEA and the State Board of Education. (Tr. p. 20) (Exhibits Nos. 8 & 9)
14. The student's problems with Spanish began in her sophomore year and continued into her junior year. According to the student's junior year transcript, she did well in all subjects except Spanish 2. (Tr. pp. 21 & 22) (Exhibits Nos. 10, 11 & 12)
15. Neither the student's father nor the student's Spanish teacher ever discussed during the student's junior year that she was having problems with Spanish 2 with the DSE. (Tr. pp. 22 & 23)
16. The DSE does not know if any of the LEA's Spanish teachers have both a special education degree and are education-certified to teach Spanish. (Tr. p. 24)
17. At the November 20, 2008 meeting, the student's father disagreed with the LEA's plan that the student be provided with Spanish class outside of normal school hours and with what

the State listed as compensatory education. She said that the LEA was complying with the requirements of the State, but the student's father disagreed. According to the DSE, in order to receive credit, the student would have to repeat the class which according to the DSE was a requirement set by the WVDE, OAA in its corrective action. (Tr. pp. 25-27)

18. The student's IEP was reviewed at least annually. (Tr. p. 25)
19. Other than the letter of findings as directed by the State, the DSE does not recall any other proposal for accommodation provided to the student so that she could receive proper instruction in Spanish. (Tr. p. 26 & 27)
20. The student's grades for Spanish 2, as adjusted by the school principal were: first quarter D, second quarter F, third quarter D, fourth quarter F, final grade D. (Tr. pp. 28-31) (Exhibit No. 11)
21. The DSE said the LEA had to provide compensatory education to the student. The options were summer hours, evening school or virtual school. The DSE provided hearsay evidence that by telephone communication with [REDACTED] with the WVDE, OAA, [REDACTED] stated that the student had to repeat the class. (Tr. pp. 31 & 32, 36-37)
22. In page 6 of its letter of findings, the WVDE, OAA said the LEA had to develop compensatory education for the student. The LEA was required to submit as documentation that the student's parents had to provide part of the input for the class. (Tr. pp. 32 & 33) (Exhibit No. 2)
23. Compensatory education can be provided to a student through virtual school but in order to take virtual school in Spanish 2, a student would have to have a C or B grade or better in Spanish 1. (Tr. p. 35 & 36)

24. The DSE said the asterisks on Exhibit No. 10 were placed there by the student's parents in lieu of having her grades be on the official transcript. The School and the teacher contended that was unacceptable because it would be changing the student's grade and they would not change the grade. The DSE said it was the position of the student's parents from the beginning that they were not interested in discussing educational services but in having her grade changed. (Tr. p. 41)
25. The DSE said that even before the student's parents filed their complaint, they were asked about additional educational services to make up the credit for this class, but the parents were not interested. The student's father from the beginning wanted the student's grade removed from the transcript. (Tr. pp. 42)
26. The student had a D in Spanish 1 and the prerequisites for virtual school set by the State for Spanish 2 were that she have a C or better. The DSE did not propose virtual school to ~~_____~~ at the WVDE, OAA. (Tr. p. 43) (Exhibit No. 12)
27. The Complaint was filed by the student's parents during the student's twelfth grade. (Tr. at p. 44)
28. There are 2,400 students with IEPs in the LEA's County and the DSE does not review all of them. Teachers communicate with parents; and parents receive mid-term reports. The DSE believes the student had the same teacher for Spanish 1 and Spanish 2. (Tr. pp. 44 & 45)
29. The student's extracurricular activities were discussed at the November 20, 2008 meeting, and compensatory education would be planned around her practices. (Tr. p. 120)
30. The LEA's superintendent and someone from the high school discussed a Rosetta Stone Spanish language program for the student. The DSE understands that the program did not

meet the content standards and objectives of the State of West Virginia for class credit.

The student needed to repeat the class to get grade credit. (Tr. pp. 121 & 122)

31. The student's father has worked for the LEA for 13 years as a special education specialist dealing with the mentally impaired population. He has worked in special education for 38 years. (Tr. pp. 46 & 47)
32. The student attended the LEA's high school during her sophomore, junior and senior years. She was found eligible for special education services in the fall of 2006. (Tr. p. 47)
33. As part of her IEP, the student received special education services through the LEA. Her IEP required that she was to have preferential seating, extended time for her class work and tests, testing in small group, and repetition of directions when new material was presented. Her special education teacher helped her. She was considered a candidate for inclusion classes where there was extra support and help. (Tr. pp. 47 & 48)
34. The student took Spanish 1 class during her sophomore year - 2006 - 2007. The IEP does not specify particular classes; just what is needed for a student to succeed in the classes that they are taking because of their special needs. (Tr. at pp. 48 & 49)
35. The student's father said that with the exception of the Spanish class, the student did surprisingly well with support. (Tr. at p. 49)
36. The student's father thinks the student's difficulties in Spanish 1 were the result of the way it was being taught and the style being used. The student was falling behind. The student's father discussed it once or twice with her teacher and asked the student if anything had changed. The student told her father that the teacher was teaching the same way; just moving on; and that the student was not getting it. (Tr. pp. 49 & 50)

37. The student's father talked to the student's LD support teacher about the student's problems in Spanish class once or twice during the 2006-2007 school year. The LD teacher said that it was difficult to find support in foreign language classes because none of the special education personnel had any background in foreign languages. He talked to the student's Spanish teacher once. (Tr. at pp. 50 & 51, 57)
38. At the end of the 2006-2007 school year, the student's father talked to the student's teacher but did not find extra help for the student in Spanish that year. In her junior year, 2007-2008, he had a discussion with the Spanish teacher and asked her to adjust the student's grade to a D and that he would make sure that she was rescheduled into the Spanish 1 class and take it over in her junior year and she could take Spanish 2 in her senior year. (Tr. pp. 51 & 52)
39. In July of 2007 there was a glitch in the LEA's computer system. As a result, the student's father got notification through the mail that she was scheduled for Spanish 2 for the next year. However, he wanted her back in Spanish 1. In the meantime, he tried to contact the scheduler at the high school (the assistant principal), but she had not come back to work. Some time late in the first or second week of August 2007, he was able to talk to her. She told him that it might not be possible to change the student's schedule because she had a vocational class that took up two blocks and she desperately wanted to stay in that class and they would have to shift that class around so she could take Spanish 1. (Tr. pp. 52 & 53)
40. The assistant principal told the student's father this was the first year the school was going to teach a Spanish 2 class to students who didn't have to speak the language in order to stay

in the class and thought it would be all right for the student to be there. The student's father agreed and said he would hire a private tutor for her. (Tr. pp. 53 & 54)

41. The student's father found a tutor with a Master's Degree in Spanish to tutor her two or three times per week before the 2007-2008 school year started. The tutor tutored the student through January of her junior year when he left for a job in Washington, D.C. (Tr. p. 54)
42. There was a review of the student's previous IEP for her junior year at a September 24, 2008 meeting. The student's father talked to his lawyer about the accommodations and modifications needed for the student and indicated at the IEP meeting that he had a tutor for her. The September 26, 2007 IEP noted for her to have preferential seating away from distractions, extended time for classwork/tests, test in small groups as requested by student, use of notebook/agenda book and repetition of directions broken down into simpler form. (Tr. pp. 55 & 56) (Exhibit No. 4)
43. A review must be held every year or marking period for a special needs or general education student and notice given to parents. The student's reviews say: November 7, 2007: "doing great except Spanish;" December 18, 2007: "continues to struggle in Spanish." January 25, 2008: "continues to struggle with Spanish"; April 28, 2008 (the end of the student's junior year when taking Spanish 2: "Spanish a concern." Each time the student's father got these notices in the mail, he was at the school asking the principal what they could do. (Tr. pp. 56 & 57)
44. The principal told the student's father they would work something out. Nothing happened. (Tr. p. 57)

45. The student's father met with the principal around March of 2008 and told him it looked like the student was going to fail because she had all Fs and asked the principal if he could do anything. The principal said he could make a grade change and said, "matter of fact, I'll just do it right now." This took place later and the student's father decided to wait and see what happened. (Tr. pp. 58 & 59)
46. Toward the end of the 2008 school year, the student's father went back to the principal who said he had the authority to change grades. This is shown by the exhibit with "principal" written on it. The principal changed the grade and gave the student a D and said everything would be okay. In June of 2008, the principal called the student's father and said he was sorry, but some people there did not understand grade adjustment and he didn't know what he was going to do. (Tr. pp. 59 & 60) (Exhibits Nos. 11 & 12)
47. The student's father went to the supervisor of secondary schools who said he would ask the DSE or the high school to review the student's IEP and get back to him as to whether it was appropriate. The student's father does not remember who the supervisor asked, but he was told the student's IEP was appropriate and the supervisor said there was nothing they could do, the IEP was appropriate. (Tr. p. 60)
48. The student's father went to the superintendent and made the same appeal who also denied his request. (Tr. p. 61)
49. The principal told the student's father he could not change her grade because the West Virginia Code noted that grades could not be changed unless the teacher agreed and she did not agree. The student's father said the school was concerned if they did something with the student's grade they would lose a grievance filed by the teacher who evidently threatened to grieve. (Tr. p. 61)

50. The student's father thought as a compromise he would put a mark on the page that the student completed the course and he cited the appeal to the superintendent and the findings in the document; that the school failed to provide the student's IEP needs and that's what the asterisk represented; that she successfully completed the course. (Tr. p. 62) (Exhibit No. 10)
51. August 18, 2008, the superintendent wrote a letter to the student's father saying he directed the DSE to review the student's IEP who informed him that it was implemented properly. Based on the information he received, the superintendent did not believe he had the authority to direct a grade change for the student. (Tr. pp. 62 & 63)
52. The student's father filed a formal complaint on September 11, 2008, with the WVDE, OAA on behalf of the student. (Tr. p. 63)
53. On September 17, 2008, the student's father submitted to the WVDE, OAA a resolution of his complaint. In this resolution, the student's father noted his conversation with the high school principal when he formally changed the student's grade to a D. (Tr. pp. 64 & 65, 68 & 69) (Exhibit No. 11)
54. The student's father attended a meeting on November 20, 2008, when the evening class was proposed for the student and her father objected. (Tr. pp. 65 & 66)
55. The student's father was concerned about her grade in Spanish because of the No Child Left Behind program and the continued pressure for more and more credits for all students. The student's father thinks she will be successful in college and he was concerned that by not having those credits it could hold her back from getting in. (Tr. pp. 66 & 67)
56. Along with his Complaint, the student's father submitted a copy of the letter from the tutor agreeing to provide those services. (Tr. pp. 67 & 68) (Exhibit No. 13)

57. The student's father's options for resolution of this matter to the WVDE was to indicate on the student's transcript, a symbol or an asterisk indicating she had successfully completed the class and the IEP was not followed, in place of a grade. (Tr. pp. 68 & 69) (Exhibit No. 11)
58. The student's father was at the November 20, 2008, meeting because the State mandated that the LEA sit down with him and be part of a resolution to the problem. He was invited and was going to listen to what they said, but he thought his proposal was still legitimate. (Tr. pp. 69 & 70)
59. The student's father did not agree with the LEA's proposal for evening hours for the student because she was involved with athletics all year long and would not have been able to participate. He thought it was punitive to have the student who was not able to successfully complete the class to make her go after school and not participate in sports she was involved in her senior year through no fault of her own. (Tr. pp. 70 & 71)
60. The student had the same teacher for both Spanish classes. (Tr. p. 71)
61. The student's father did not request an IEP meeting to be convened to discuss the difficulties the student was having with Spanish 1 in her school year. Each time he got a notice from the school, he called the school and asked what to do. He thought it was the school's problem and that they would schedule an IEP meeting to correct it. (Tr. pp. 71 & 72)
62. After the student's father got her schedule placing her in the Spanish 2 class, he went to the assistant principal and she told him it was going to be hard to adjust her schedule because she had a broadcasting class that took up two blocks and there was no way to get her into a Spanish 1 class. The assistant principal told him that this year's Spanish 2 class was going

to be for non-Spanish speaking kids to be able to take the class and get credit for it and that's when he agreed to her placement there. (Tr. pp. 73 & 74, 85)

63. The student's father talked with the student's counselor who said she understood the Spanish 2 class was for non-Spanish speaking students. He decided to tell the assistant principal to go with that schedule and that he was going to hire a tutor for the student. (Tr. pp. 74, 85)
64. The student's father said the teacher should be equipped to handle the accommodations under the service section of the student's IEP. It did not require any special ed expertise. There are inclusion classes where the teachers go into class with the regular ed teachers to make sure they understand how those things are to be implemented. It is not just for special needs students. (Tr. pp. 74 & 75)
65. The student's father did not have any conversations with the student's Spanish teacher indicating she was not implementing the accommodations under the student's IEP. If the teacher was implementing the IEP, he should not be getting mid-term reports saying the student had problems in Spanish. If the teacher was doing the accommodations, the student should not have been failing and should have been at least passing. It was a concern of those reviewing the IEP that nothing was happening. (Tr. pp. 76 & 77)
66. It is possible for a student to not be successful, even when an IEP is implemented, if the students do not turn in assignments or do poorly on tests. (Tr. p. 77)
67. The student's father does not contend that she passed Spanish 2, but it is his contention that she got no support in the class. The student's private Spanish tutor said she was doing fine; well enough to pass and shouldn't be failing. The student felt good working with the tutor. (Tr. pp. 77 & 78)

68. The student's father opined that if a student with an IEP is failing, he would question that, from a professional standpoint. Students with IEPs can fail; but they should not fail and should be successful if their IEP is being implemented. If it's not, it's the LEA's failure, not the students. (Tr. pp. 78 & 79)
69. The student's father does not want her grade changed, but that it be indicated on her official transcript that she completed the class and that no grade was given because the LEA failed to implement her IEP as cited in the WVDE Letter of Findings. (Tr. pp. 79 & 80) (Exhibit No. 2)
70. The student's father has dropped his request that the student be given a grade of D, but is asking that her official grade record be modified to include asterisks rather than a letter grade, noting she took the class and that the LEA failed to deliver services in accordance with her IEP. (Tr. p. 80)
71. Modifications given to the student were that she took tests outside the classroom with the special ed teacher. She received assistance in Algebra and advanced science class. She was in several inclusion classes with support. He does not believe she was offered any of these accommodations in Spanish class. (Tr. pp. 81 & 82)
72. The student's father does not know if the student refused to take Spanish tests separately. He testified that after the tutor left, the student fell completely off the edge in terms of what was going on in class. As a parent, he believes the student knew she didn't have a chance whether she went in another room or whether she stayed in the classroom, with passing those tests, because she had no support during the year except the tutor, and he was gone. (Tr. pp. 83 & 84)

73. The student's father remembers the tutor telling him that he had talked with the student's Spanish teacher. (Tr. p. 84)
74. Although one corrective action was a conference with the special education director, the school principal, Spanish teacher, and special education teacher to review the findings of the State Complaint, the student's father said the student's Spanish teacher never attended any of the IEP meetings or any other meetings. The only time the student's father talked with her was when it was arranged to give the student a D for her self-esteem in Spanish 1. He also met with her during the beginning of the student's junior year when he told her he had hired the tutor and if she wanted to talk with him, he was available. (Tr. pp. 85 & 86)
75. When the student's father signed a document indicating he attended the November 20, 2008 meeting, it was not with the intent to approve the LEA's suggestions. He signed it to note he was there because in the IEP process, people sign in who attend. He did not sign that he approved the proposal. (Tr. pp. 115 & 116)
76. The day after the November 20, 2008 meeting, the student's father sent a letter to the superintendent of the LEA concerning his proposal that the asterisk be either handwritten or electronically represented to replace a grade, saying it represents successful completion of Spanish 2 course for the school year 2007-2008 and that the student's IEP was not properly implemented due to the LEA's failure to provide necessary supports, modifications, and accommodations. (Tr. pp. 116 & 117) (Exhibit No. 14)
77. The student has been accepted into college this fall 2009. (Tr. p. 118)
78. The student's father had no input in the November 20, 2008 meeting. The proposal was presented to him. He disagreed with it and suggested he would like to have the asterisk in place. (Tr. p. 118)

79. The student's father was able to suggest at the November 20, 2008 meeting that he did not agree with the proposal and immediately wrote a memo the next day to the superintendent. (Tr. pp. 118 & 119)
80. The student became eighteen years old on April 14, 2009. (Tr. p. 88)
81. The student sent a letter dated May 7, 2009, to the Hearing Examiner stating that she approved of the complaint filed by her parents in this action and asked that she be joined as a party. (Tr. pp. 88 & 89)
82. The student was receiving accommodations and help in classes other than Spanish, such as English. Her Spanish 1 teacher, when she would ask questions, she knew but she didn't really know. Going into Spanish 2 class, it was supposed to accommodate students who didn't do well in Spanish 1 and you were told you would pass that class. The Spanish teacher would tell her that she could not talk or leave the classroom. The student said the teacher made her feel stupid. (Tr. pp. 89-91)
83. The student did not want to go to another room to take her test and do the exact thing she would be doing in the classroom. She knew one of her accommodations was to take her test out of the classroom, but she wasn't going to do any better without any help outside the classroom than she would in the classroom. (Tr. p. 91)
84. In all of her other classes, a teacher would accompany her to a testing room outside of the regular classroom. She never took a test by herself in any of her other classes. (Tr. p. 91)
85. In her other classes sometimes there would be another teacher in the room with the regular teacher that the student could ask for additional assistance but not in the Spanish classroom. There was specific seating and she felt like the teacher looked at her like she didn't know

what she was talking about. She felt comfortable with her Spanish tutor and could ask him questions. (Tr. pp. 91 & 93)

86. Evening classes outside the regular school day would interfere with the student's sports activities. It was her senior year and she wanted to participate in sports and she felt it was punishment. She felt it was not something she needed to do because it was the school's problem, not hers, for not helping her. (Tr. pp. 92 & 93)
87. The student said it was important to have someone while she was in the classroom and also taking a test to help her through the test and make her feel more comfortable. There should have been someone in the classroom with her helping her more than her actual teacher who was not helping her. She felt she would have done better on a test if somebody was in the room to help her get through it by reassuring her and by helping her through a test question, but not answering the question. (Tr. pp. 94 & 95)
88. The student said the Spanish teacher told her where to sit in the classroom but the student felt if she was to take tests out of the room by herself, that she was not having her accommodations met. She did not think it was to fair to her during the test or to sit in front of everyone and not taking the test. (Tr. p. 96)
89. The student felt she needed more guidance. This class was different from the way it was in her other classes. The student said the way the teacher looked at her during the test when she asked a question, made her feel bad about herself. (Tr. p. 97)
90. The Spanish teacher did not normally answer the student's questions. (Tr. p. 97)
91. When the teacher felt the student failed to take tests, do homework, or make up work, the student said she did not have a tutor and she was in a downfall. She would ask for tutoring but the teacher would not help her. The student said she would ask to come in during lunch

but the teacher would not do this at lunch. At the end of the school year, the student realized that she needed to start picking it up and the teacher was not available to help her. The student said she never handed in a test with just her name on it; she tried. (Tr. pp. 97 & 98)

92. The student does not know what time the evening class was to be held. She has sports activities in the evening. She has no trouble getting assistance in her other classes. (Tr. pp. 98 & 99)
93. The student played tennis in the spring; volleyball in the fall; and swimming in the winter. (Tr. pp. 99 & 100)
94. The LEA's school psychologist is certified in the State of West Virginia, but not licensed; with a degree in clinical psychology. He does IQ testing and other types of testing, crisis response for the LEA. Rarely he attends IEP meetings when requested. He reviews IEPs to make sure they are correct for the LEA's gifted program. His duties have an emphasis on special education students in the LEA for students who are pre-school through grade twelve. (Tr. pp. 100-102)
95. The Psychologist met the student in late 2006 when he did an assessment and IQ testing of her for a potential learning disability. She had achievement testing which he interpreted but did not administer. He was involved in her case quarterly and in planning for her individual education plan. (Tr. p. 102 & 103)
96. The Psychologist attended the November 20, 2008, meeting concerning the State's findings of violations of her special education needs. The proposal by the LEA was that the student retake the Spanish class. (Tr. pp. 103, 107)

97. The Psychologist was somewhat aware of some of the accommodations to be provided to the student in her IEP. (Tr. pp. 104 & 110)
98. It is difficult for the Psychologist to compare the accommodations the student received in other classes with those in her Spanish class. Students with a learning disability learn at a slower rate, particularly with foreign languages and may need more time and questions reframed to make them more comprehensible. (Tr. p. 104)
99. The Psychologist knew that the student generally performed above average in her other classes but below average in Spanish class. A foreign language is much more of a challenge for a student with a learning disability. Testing indicated the student has excellent verbal skills and he understood that a lot of times things in Spanish class were written on the board, a weakness for her, and she also had a deficit relative to a working memory. (Tr. p. 105)
100. The Psychologist never interviewed the student's Spanish teacher, but got the information on her instruction methods from the student and the student's father and had no direct observation of the student in the classroom other than information received from the student and her father. The Psychologist did not ask the Spanish teacher to provide any input to him. (Tr. pp. 106 & 107)
101. The Psychologist was present at the November 20, 2008, meeting and the LEA proposed options that would enable the student to receive further instruction to obtain credit in Spanish. He vaguely remembers she did not meet the prerequisites for virtual school because of her grade in Spanish 1. (Tr. p. 107)

102. The Psychologist is familiar with WVEIS and with the student's father's suggestion to enter an asterisk in the WVEIS program to reflect course work, but he does not know if it is possible to enter this in the software program. (Tr. pp. 107 & 108)
103. The Psychologist is familiar with the grade policies of the West Virginia Department of Education. He does not know if there is anything in the policy concerning entering an asterisk to reflect a student's performance. He knows that the teacher has the trump card in terms of what is done with a grade. (Tr. p. 108)
104. The Psychologist knows there is State law that a teacher's grade can not be changed unless there was demonstration that there was a calculation error. (Tr. pp. 108 & 109)
105. There has been no suggestion that the student's grade in Spanish 2 was the result of a calculation error. One way for the student to get a grade in Spanish 2 besides the F would be to take additional instruction and demonstrate she mastered the content. (Tr. p. 109)
106. The Psychologist said they really do not know how the student would have achieved since she has a learning disability. (Tr. p. 109)
107. The Psychologist said there is a possibility that the student could test out of an F grade. She would also need accommodations with the testing. (Tr. p. 110)
108. The Psychologist does not believe placing a student in the back of the classroom would be free of distraction. However, he did not interview the student's Spanish teacher so he does not know her reasons for placing the student in the back of the class. However, he feels comfortable criticizing her without even talking to her. (Tr. pp. 111 & 112)
109. The Psychologist believes giving the student as much time as she needed on a test would be a partial accommodation. More is needed. The IEP had handwritten on it that Spanish

was a problem. Testing in small groups as requested by the student is appropriate. He also said one with the student's learning disability does not always comprehend what is being asked. (Tr. pp. 112 & 113)

110. The student received a standard diploma from the school. (Tr. pp. 114 & 115)

CONCLUSIONS OF LAW

1. The student is a disabled child within the meaning of 20 U.S.C., Section 1400 et seq. of the Individuals with Disabilities Education Act (IDEA) and W.V. Policy 2419 - Regulations for the Education of Students with Exceptionalities. 126 CSR 16-1 et seq.
2. The purpose of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C., Section 1400, et. seq., is to make available a Free Appropriate Public Education (FAPE) for every disabled child regardless of the severity of the child's disability. Timothy W. v. Rochester, New Hampshire School District, EHLR 441:393 (CA-1 1989); 20 U.S.C., Section 1400, et. seq., W.V. Policy 2419-126 CSR 16-1 et seq.
3. "Free Appropriate Public Education" (FAPE) means, among other things, special education and related services that are provided in accordance with the Individualized Education Program (IEP). 20 U.S.C., Section 1400 et seq., W.V. Policy 2419-126 CSR 16-1 et seq.
4. The provision of an IEP is a procedural requirement set forth in the IDEA. 20 U.S.C., Section 1400 et. seq., W.V. Policy 2419-126 CSR 16-1 et seq.
5. The IDEA requires that disabled children, to the maximum extent appropriate, shall be educated with children who are not disabled, i.e., they should be mainstreamed. Each public agency shall ensure that a continuum of alternative placement is available. 20 U.S.C., Section 1400, et. seq., W.V. Policy 2419-126 CSR 16-1 et seq.
6. The Federal mandate to mainstream students to the maximum extent possible is to be balanced with the primary objective of providing handicapped children with an appropriate education. Wilson v. Marana Unified School District of Pine County, 735 F.2d 1178 (9th Cir. 1984).

7. A child is receiving an appropriate education if the IEP is reasonably calculated to enable the child to receive educational benefit. Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).
8. The educational benefit must be more than trivial. Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171 (3rd Cir. 1988). Carter v. Florence County School District Four, 950 F.2d 156, 160 (4th Cir. 1991) aff'd 510 U.S. 7; 114 S. Ct. 361; 126 L.Ed.2d 284 (1993) citing Hall ex rel. Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir. 1985). But neither is it required to provide every service or accommodation which might bring a child with disabilities an educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 199; 102 S.Ct. 3034, 3047; 73 S.Ed.2d 690 (1982).
9. W.V. Policy 2419-126 CSR 16-1 et seq. defines Free Appropriate Public Education (FAPE) as:

Special education and related services which: a) are provided at public expense, under public supervision and direction, and without charge to the parent; b) meet the standards of the state education agency, including the requirements of these regulations; c) include pre-school, elementary school or secondary school education in the State; and d) are provided in conformity with an Individualized Education Program. See also 34 C.F.R. §300.17.
10. W.V. Policy 2419-126 CSR 16-1 et seq. defines Special Education as:

Specially designed instruction, at no cost to parents, to meet the unique educational needs of an eligible student, with an exceptionality, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education. The term includes speech-language pathology services, vocational education, and teacher training, if it consists of specially-designed instruction, at no cost to the parents, to meet the unique needs of a student with an exceptionality See also 34 C.F.R. §300.39.
11. W.V. Policy 2419-126 CSR 16-1 et seq. defines Related Services as:

Transportation and such developmental, corrective and other supportive services as are required to assist an eligible exceptional student to benefit from special education. The term includes, but is not limited to, assistive technology, audiology, speech and language pathology, psychological services, physical and occupational therapy, clean intermittent catheterization (CIC), recreation, including therapeutic recreation, counseling services, including rehabilitation counseling, orientation and mobility services, social work services in schools, school health services, and school nurse services, early identification and evaluation of disabling conditions in students, medical services for diagnostic or evaluative purposes only, and parent counseling and training. See also 34 C.F.R. §300.34. (See Page 457 – Glossary)

DISCUSSION

The student, in her sophomore (2006-2007) year of high school, took Spanish 1 at the LEA. The student did well with support in all her classes except Spanish 1. This issue was discussed with the LEA by the student's father during that school year and he was repeatedly told it was difficult to find support in foreign languages because the special education personnel did not have a background in foreign languages. The student's father discussed this concern with the Spanish 1 teacher who agreed to change the student's Spanish 1 grade from an F to a D and that the student would repeat Spanish 1 in her junior (2007-2008) year and would take Spanish 2 in her senior (2008-2009) year. Because the scheduling for the students is computer-driven, and apparently a glitch occurred, the student was scheduled for Spanish 2 instead of Spanish 1. The student's father was reassured that the student could handle the Spanish 2 class and the student's father agreed and hired a Spanish tutor to assist the student. (FOF 34-41)

The student's previous IEP, dated September 26, 2007, was reviewed for her senior year (2008-2009) on September 24, 2008. The services portion of the IEP provided for preferential seating, extended time for classwork/tests, tests in small groups, repetition of directions, and breaking down new material and complex directions into smaller portions and the use of a notebook/agenda book for organization. (FOF 42) (Exhibits Nos. 2 & 4) The student's 2007-2008 IEP stated, according to the OAA Letter of Findings, C09007 (Exhibit No. 2) that the student's strengths included a positive attitude, energetic, having a desire to learn, attendance, being prepared for class, and demonstrating a good work ethic. (This Hearing Officer was only provided one page of the student's 9/26/07 IEP, so information must be gleaned from other exhibits.) Notices sent to the student's parents, indicate that the student was doing great in school except Spanish. Such notices were sent to the parents on November 7, 2007 - "doing

great except Spanish"; December 18, 2007 - "continues to struggle in Spanish; January 25, 2008 - "continues to struggle in Spanish"; April 28, 2008 - "Spanish a concern." (FOF 43) The student's parents filed an official Complaint with the West Virginia Department of Education, Office of Assessment and Accountability (OAA) on September 16, 2008, with the issue being whether the LEA implemented the student's IEP in the student's Spanish class. A thorough and accurate investigation was done by the OAA and a Letter of Findings was issued on November 7, 2008, finding that violations occurred and that corrective actions must be completed by the LEA. (Exhibit No. 2). The OAA found the LEA to be in violation because no subsequent IEP team meeting was convened during the student's 2007-2008 (junior) school year, despite the student's failing grades in Spanish, and the district failed to review and revise, if necessary, the student's IEP to address the student's lack of progress. The student's Spanish teacher was found to have implemented some of the student's modifications, but did not implement all modifications specified in the student's IEP. (Exhibit No. 2)

The OAA ordered that the LEA develop a compensatory education plan for the services denied the student during the 2007-2008 school year. It was ordered that the plan should be developed *with parental input* and that *a copy of the compensatory education plan for the student include evidence of parental input.* (Exhibit No. 2)

Several documents were submitted to OAA by the LEA which included a Communication Form dated November 20, 2008, indicating those in attendance and a Compensatory Education Plan and written Affirmation that the Letter of Findings had been reviewed. (Exhibits Nos. 3 and 4) It was quite evident that the student's parents were not given any true input into the ordered corrective actions as evidenced by the Communication Form which clearly states that the student's father felt that evening hours for retaking Spanish 2 would

be punitive toward the student. (Exhibit No. 3) The Spanish teacher, who was found to have not implemented all modifications in the student's IEP, did not participate in the meeting when compensatory education options were presented. The options presented at the November 20, 2008, meeting were truly a sham because the DSE only offered three options, two of which were not available to the student because she did not qualify for virtual school and summer hours would be after the student graduated. (FOF 11, 17, 21, 22 & 23)

In summary, the student took Spanish 1 in her sophomore year (2006-2007) and received an F which was changed to a D, with the student to retake Spanish 1 in her junior year (2007-2008) which did not occur because of a computer glitch and scheduling problems and was placed in a Spanish 2 class and received an F. A Complaint was filed on September 16, 2008, during the student's senior year (2008-2009) and was given only one option to get credit for Spanish 2, which was night school which was summarily rejected by the student and her parents. (FOF 17, 19) In essence, the parents and the student were given no options. The amazing thing is that the DSE and the LEA then advertised the Spanish night school position for the proposed compensatory education plan (Exhibit No. 6) and hired a teacher to teach night classes to the student (Exhibit No. 7) even though that "option" was rejected by the parents and the student. (FOF 12 & 17)

The student's quarterly grades for Spanish 2 were straight F's with a final grade of F. (Exhibit No. 12) The father of the student met with the principal at the student's high school and the principal, at the student's father's behest, changed the student's grades to reflect a D for the first quarter, an F for the second quarter, a D for the third quarter, and an F for the fourth quarter with an overall grade of a D. (FOF 46) (Exhibit No. 11) The principal later told the student's father that the Spanish teacher objected and he could not change the student's grades. (FOF 49)

The student's father then suggested that an asterisk be placed on the student's transcript and grade report instead of grades with the explanation that the asterisk represents completion of the Spanish 2 course and that no grade was given due to the LEA being in violation of the student's IEP as cited in the West Virginia Department of Education Letter of Findings, C09007 dated November 7, 2008. (Exhibits Nos. 10 & 14) (FOF 50, 57)

The student's parents then filed this Due Process Complaint and the student joined in as a party by letter dated May 7, 2008, to this Hearing Officer, since she became eighteen (18) years of age on April 14, 2009, a week before the Due Process request was made. (FOF 81) The student is now attending a university in West Virginia.

Throughout the student's sophomore, junior, and senior years, at the school neither the parents nor the LEA requested an IEP meeting to investigate and remedy the implementation of the student's IEP as it related to her Spanish course when the grades in that class were so out of line with the other courses in which the student was enrolled. (Exhibit No. 12)

It is not for this Hearing Officer to rule on the State Complaint filed by the student's parents and the Letter of Findings, C09007, issued by the OAA in its official capacity. However, the parents and the student have the right and responsibility to exhaust their administrative remedies if they are not satisfied with the decisions reached below. I did not hear any testimony concerning the outcome of the State Complaint and the OAA's findings, but rather how the mandated corrective actions were going to be orchestrated. The LEA contends that the student was given three options to satisfy the Spanish 2 course requirements, which was decided by the LEA to be some form of retaking of the course with constant referral to "they" said that's what we had to do. Such reference to "they" was made by the DSE and was referring to the OAA. No evidence or witnesses were presented to corroborate the hearsay statements of the DSE. One of

the finest special education attorneys represented the LEA. Why weren't those legal issues addressed to their legal scholar instead of pointing the finger at the OAA and what "they" said.

In actuality, there were no options presented to the student and parents in obtaining compensatory education for the student. It was after hours or nothing and the LEA gave the parents of the student no meaningful input into the pre-decided decision of the DSE, who then hired a teacher to do the compensatory education knowing the student was not going to attend. In my twenty years as a Hearing Officer, it has been very impressive how imaginative and effective the teachers in special education are in being able to find ways, be it new ideas or strategies, to "get through" to students so they can learn no matter what their disability. What happened here is not one of those cases, but is an example of an educator trying to practice law instead of attending to the special education needs of a student whose IEP was not properly implemented and a violation of Policy 2419, Regulations for the Education of Students with Exceptionalities, occurred as stated by the OAA.

It should be noted that neither the father of the student nor the student ever mentioned that night classes were not possible because of needed time to study and prepare for other courses in which she was enrolled. The only reason set forth was that she would miss out on her sport activities. Also, there was no testimony that they made any inquiry of other strategies or ways to satisfy the required compensatory education.

In reviewing Exhibit No. 4, the Written Affirmation Form, which was signed by the Spanish teacher and the student's grade report card, (Exhibit No. 12) both documents indicate that N.S. was the student's Spanish teacher. The new Spanish teacher hired for the student for compensatory education was not the same individual. (Exhibit No. 7) It is truly amazing that some discussion about time for the compensatory education and the possibility to offer the

student meaningful options to receive the compensatory education to which she was entitled were not really addressed. Both the father of the student and the DSE came to the meeting on November 20, 2008, entrenched in their thoughts on compensatory education. With a new Spanish teacher hired, why was there not an IEP meeting to discuss the compensatory education? A stalemate occurred and the student did not receive her compensatory education.

The parents and student were never interested in obtaining compensatory education and according to their lawyer, are not asking for post graduation education or post graduation services to be provided. They are asking for a correction to the transcript or an addition made to the transcript that the student would not suffer any harm applying for college or transferring to other colleges as a result of not successfully completing this Spanish class.

The reasonableness of the LEA's efforts to provide compensatory education was irrelevant from the genesis of the dispute that arose following the student's failure of her Spanish 2 course. The student and the parents were never interested in entertaining compensatory education as a remedy in any form. The student and her parents have never receded from their demand that the grade record be changed.

The student's father wanted this Hearing Examiner to order that the student's official grade record be modified to include an asterisk rather than a letter grade indicating that she took the class, but that the LEA failed to implement her IEP properly.

The parents of the student and student's Due Process Complaint Request has no reference to the allegation that the LEA failed to provide a FAPE to the student, except a box checked on page 1 of the Complaint Form. All statements of issues referenced in the Due Process Complaint related to their desire to have the student's grade record and transcript altered to reflect that the student completed Spanish 2 but no grade was given because of the LEA being found in

violation by the OAA. Throughout this entire process, the student's father has attempted to have the student's grade modified and at the hearing in this case, stated that their only interest was to have the student's grade changed. The student and the parents of the student expressed absolutely no interest in compensatory education or post-graduate services.

It was the student's father's unsuccessful efforts to achieve an administrative change in the student's grade report that prompted him to file a complaint with the OAA and he stated under oath at the hearing that all he sought was a grade change. It should be noted that WV Policy 2419, Regulations for the Education of Students with Exceptionalities, Chapter 1, FAPE, Section 3, Exceptions to FAPE, states that the obligation to provide a FAPE does not apply to students who have graduated high school with a standard high school diploma. The student received a standard diploma as indicated in the Prior Written Notice (PWN) to the student's parents dated September 24, 2008, and the student's school records. (Exhibits Nos. 8 & 9)

The student's parents and the student claim that the LEA failed to provide a FAPE to the student. In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528 (2005), the Court held that parents who initiate a due process hearing challenging a district's IEP bear the burden of persuasion on their claims, and if the parents fail to meet that burden, they are not entitled to relief.

No evidence was produced by the parents of the student or the student concerning the student's disability or how the LEA failed to provide the student with a FAPE. In fact, the student's IEP was not even presented to the Court and no direct, meaningful expert testimony covering the LEA's failure to provide a FAPE was offered. The student could not verbalize any true lack of accommodation by the Spanish teacher except that she would not help her, but could not verbalize how she didn't help her. The School Psychologist testified but did not have any direct knowledge of the student or her IEP and based the majority of his testimony upon what he

was told by the student's father. He was certainly very supportive of the student and her father, but his testimony is entitled to no significant weight. No expert or opinion evidence was offered that any failure to implement modifications lead to the student's F in Spanish 2. Therefore, there is absolutely no evidence on which to base a ruling concerning the provision of a FAPE to the student.

The student's father has worked for the LEA for thirteen years as a special education specialist and has worked in special education for 38 years. It is obvious that he used his association with other school personnel, i.e., the superintendent, the principal, and assistant principal, to obtain a passing grade for his daughter in Spanish 1 and then again in Spanish 2. He was successful in Spanish 1 but the Spanish teacher would not change the grade a second time for Spanish 2. It is obvious that the student's father is a true advocate for the student, but with 38 years' experience in special education, he should have known to request an IEP meeting to rectify any deficiencies he believed were occurring instead of trying to get his daughter's grades changed to passing. As a matter of fact, the student's father did not file the State Complaint until after he was unsuccessful in his bid to obtain a passing grade for his daughter and has in that proceeding and by Due Process Complaint and Mediation tried to obtain a change of grade for the student. When the student started to have problems with Spanish 2, and if the father of the student believed it was because of the improper implementation of the student's IEP, he should have requested an IEP team meeting to rectify the problem, but he didn't. Instead, he became entrenched in the position to have the student's grades changed, and I am of the opinion had absolutely no interest in seeing that the student received compensatory education. The student's father has consistently persisted and continues in his efforts to have the student's grade changed in some fashion or another as a remedy in this case.

As previously stated, there was no evidence introduced to give this Hearing Officer the opportunity to rule upon the provision of a FAPE to the student.

The 9th Circuit held in VanDuyn v. Baker Sch. Dist. 5J., 47 IDELR 182, 502 F.3d 811 (9th Cir. 2007) that:

Minor discrepancies between services provided and the services called for in an IEP do not give rise to an IDEA violation which would entitle a student to compensatory education. A material failure occurs when services provided fall significantly short of the services in the student's IEP. A child's educational progress, or lack of it, may be probative of whether a significant shortfall occurred. There was no evidence presented to this Court to show any failure of services to the student other than a failing grade.

A careful review of the transcript of this hearing reveals that a Free Appropriate Public Education or FAPE was never mentioned by anyone and no probative evidence was introduced concerning the provisions of a FAPE to the student.

The student's father has tried every avenue possible, i.e., Complaint, Mediation and Due Process, to obtain the student's grade change, not her compensatory education, and such entrenchment has lead to the entrenchment of the DSE and the LEA, which is extremely unfortunate and a large waste of time, money and resources which could have been expended on real issues. There is no doubt that the student's father cares what is best for the student, and I'm sure the DSE cares about the students (2,400 with IEPs) in the LEA, and their educational needs, but to reach such an impasse is ridiculous.

If either the parents or the LEA had requested an IEP meeting to address the issues with Spanish 2, and Spanish 1 for that matter, and discuss the student's performance and problems, either in the student's sophomore or junior year, maybe the student could have had more

educational benefit instead of the benefit she received. The student has graduated with a regular education diploma and is now in a university and has no desire or interest in compensatory education in Spanish at this time.

The 10th U.S. Circuit Court of Appeals affirmed a decision that denied a former high school student's request for compensatory education because the student had stopped attending school and there was insufficient evidence that the student would benefit from compensatory education even though the LEA may have violated its FAPE obligations by failing to review the student's IEP, but that did not entitle the student to compensatory education. The Court further held that courts can withhold relief based on equitable principles. Garcia v. Board of Educ. of Albuquerque Pub. Schs., 49 IDELR 241 (10th Cir. 2008)

The U.S. District Court, Southern District of Mississippi, in Hills v. Lamar County Sch. Dist., 49 IDELR 188 (S.D. Miss. 2008) found that the district had no obligation to award the student a diploma after he had dropped out of high school and dismissed the student's suit. The student had requested that the district provide him with a completed transcript and a certificate of graduation. The Court held that "the fact that he simply desires his grades changed and to be given a diploma is not a remedy under the IDEA."

In the case of Gregory-Rivas v. District of Columbia, 51 IDELR 42 (D.D.C. 2008), the Court ruled that a high school graduate was not entitled to compensatory education for alleged defects in his educational program even if the LEA failed to provide appropriate services since the student did not demonstrate that he suffered educational harm as a result. The student offered no evidence to show that he lost educational benefits as a result of inadequate services and the district's alleged IDEA violation.

The parents and the student did not provide any evidence whatsoever that the LEA did not provide a FAPE to the student that provided more than de minimus educational benefit, which would entitle the student to compensatory education or to have the student's official transcript and grade records altered to reflect a grade increase or a reference to the Letter of Findings of the West Virginia Department of Education, Office of Assessment and Accountability. The OAA issued a Letter of Findings which stands on its own and needs no interpretation or explanation.

CREDIBILITY OF THE WITNESSES, TESTIMONY AND EXHIBITS

The hearing officer is satisfied that the witnesses testified credibly. After considering the demeanor of the witnesses, any inconsistencies, conflict or any motive on their behalf, the hearing officer is satisfied that any inconsistencies were not a result of deliberate untruthfulness. Rather, any inconsistencies in the testimony were a result of a difference of opinion or a lack of knowledge or miscomprehension. The expert witnesses testified to the best of their abilities and the credentials of those witnesses was unquestioned. The hearing officer is satisfied that all records and documents entered as exhibits by the LEA at the time of hearing are authentic and valid and that they were entered with the proper evidentiary foundation; all records and documents entered by the parents of the student as exhibits at the time of hearing are authentic and valid and they were entered without the proper evidentiary foundation and over objection of counsel for the LEA. Any evidence submitted after the conclusion of the hearing was not properly submitted and is not considered herein.

DECISION

I find that there was absolutely no evidence introduced upon which to base a decision on whether the LEA failed to provide a FAPE to the student and the student and parents of the student failed to meet their burden of persuasion. Therefore, the student was provided a FAPE by the LEA. The request to alter the student's official transcript and grade records to reflect a grade increase or a reference to the Letter of Findings of the West Virginia Department of Education, Office of Assessment and Accountability is denied. This Due Process Complaint is dismissed with prejudice.

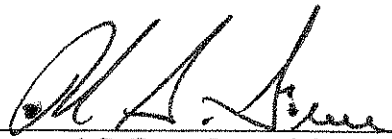


RAYMOND G. FRERE
IMPARTIAL DUE PROCESS
HEARING OFFICER

DATE: September 18, 2009

APPEAL RIGHTS

A decision made in a hearing is final unless a party to the hearing appeals the decision through civil action. Any party aggrieved by the findings and decision made in a hearing has the right to bring a civil action in any state court of competent jurisdiction within 120 days of the date of the issuance of the hearing officer's written decision or in a district court of the United States.

By: 
Raymond G. Frere, Impartial
Due Process Hearing Officer

Date: September 18, 2009