

WEST VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF ASSESSMENT AND ACCOUNTABILITY

HEARING OFFICER DECISION
COVER SHEET

DOCKET NO: D11-008

SCHOOL DISTRICT (LEA): ██████████ COUNTY SCHOOLS

SCHOOL DISTRICT COUNSEL: ██████████, ESQ.

STUDENT: ██████████

PARENT: ██████████

COUNSEL FOR STUDENT: PRO SE

INITIATING PARTY: PARENT

DATE OF REQUEST: OCTOBER 27, 2010

DATE OF HEARING: DECEMBER 7, 2010

PLACE OF HEARING: ██████████ COUNTY SCHOOL BOARD
OFFICE

OPEN V CLOSED: CLOSED

STUDENT PRESENT: NO

DUE DATE FOR
HEARING OFFICE DECISION: JANUARY 4, 2011 (BY AGREED
EXTENSION)


HEARING OFFICER: PATRICK LANE, ESQ.

WEST VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF ASSESSMENT AND ACCOUNTABILITY


Petitioner,

v

Patrick Lane, Hearing Officer
Case# D11-008

 COUNTY SCHOOLS
Respondent.

HEARING OFFICER DECISION

PRELIMINARY MATTERS

Subsequent to the Hearing, both parties submitted proposed findings of fact and conclusions of law. Both have been reviewed and considered in offering this Decision. To the extent that any witness testimony is not in conformity with the findings of fact contained herein, such testimony is not found to be credible. To the extent that facts presented during the hearing are not pertinent to the issues presented and/or determinative to this Decision, they may have been omitted from this Decision. Petitioner exhibits will be referred to as P-1, P-2, etc. LEA exhibits will be referred to as LEA-1, LEA-2, etc. One joint exhibit was offered at the conclusion of the Hearing and will be referred to as LEA-15. Testimony given during the hearing will be noted and cited to as being on a transcript page and line, i.e., Tr. 34:1.

PROCEDURAL HISTORY

The request for Hearing in this matter was filed on October 27, 2010. The Petitioner waived resolution in a correspondence dated November 8, 2010 and the LEA accepted and waived resolution for its part on November 9, 2010. By waiving resolution the parties agreed to go

directly to Due Process Hearing. Based upon the November 9, 2010, waiver date, the Due Process Decision was due on December 24, 2010. However, the parties agreed, given their availability for hearing dates and the upcoming holidays, the Due Process Decision would be due on January 4, 2011. A Prehearing Conference to clarify the issues presented and provide a framework for the Hearing was held on November 16, 2010, the results of which are reflected in the Prehearing Conference Order issued on November 18, 2010. Motions were filed by both parties and were ruled upon prior to the Hearing. A Second Prehearing Conference was held on December 3, 2010. The Second Prehearing Conference Order was issued the same day. The Hearing was held on December 7, 2010. During the hearing, Petitioner called eight witnesses and offered forty exhibits into evidence. Petitioner also submitted audio and video recordings on a CD which is included in the Petitioner's binder. LEA called no witnesses¹ and offered fourteen exhibits into evidence. Prior to the conclusion of the Hearing, the parties agreed to request a full academic record from the student's immediate prior public school and offer the record into evidence. The academic records were faxed to the Hearing location, reviewed by the parties and jointly offered into evidence. The parties were Ordered to submit post hearing briefs and proposed findings of fact and conclusions of law. To the extent that such have been submitted, they have been reviewed and considered in formulating this Decision.

ISSUES PRESENTED

As presented in the Complaint, clarified during the Prehearing Conference and reflected in the Prehearing Conference Order, the issues presented are as follows:

¹ Many of the witnesses called by Petitioner were LEA employees and had been disclosed as witnesses to be called by LEA also. In keeping with the informality of Due Process Hearings and in an effort to save time, LEA presented facts through these witnesses during cross examination rather than recalling each witness as an LEA witness.

- a. Is the LEA denying the student FAPE by failing to implement an IEP which is more than one year old where the student is transferring to the public school from home school?
- b. Is the LEA denying the student FAPE by unlawfully delaying the eligibility determination and subsequent development of an IEP for the student?

FINDINGS OF FACT²

1. The student is a 13 year old male who has been diagnosed with separation anxiety disorder, post traumatic stress disorder and school phobia with anxiety. *Testimony of mother. Tr. 40:3.*
2. The student was enrolled in LEA to attend school during the 2010/11 school year on August 23, 2010. *R-1.*
3. Prior to enrolling with LEA, the parents chose to home school student for the 2009/10 school year. *Testimony of mother. Tr. 57:13-15.* During the 2008/09 school year, the student was homeschooled in a county other than LEA. *Testimony of mother. Tr. 1-12.* During the 2007/08 school year, the parents chose to send the student to a private school during which time the student received speech services under a service plan from a public school system other than LEA. *LEA-15.*
4. During enrollment, the parents did not inform the LEA that student needed special education services or that the student had any medical, psychological or emotional problems. *LEA-1, LEA-2.*
5. The parent made a written request for an IEP to be developed for the student on August 30, 2010. *P-38.*

² To the extent that facts are not pertinent to the Decision in this case, they may have been omitted.

6. LEA mistakenly believed when it received student's educational records that student was under an IEP. LEA later correctly determined that as a student who was parentally placed in private school, the student received services under a service plan rather than an IEP. *Testimony of LEA Spec. Ed. Coord. Tr. 170:7. LEA-6.*
7. Parents presented no evidence of a current IEP. Parents disputed that the service plan was the most relevant special education plan. Parents did not offer into evidence the IEP upon which they based the allegation that the LEA denied student FAPE by failing to implement an IEP. *Parents' response to question by Hearing Officer. Tr. 262:13-264:1.*
8. LEA evaluated student and determined student to be eligible for special education and related services under IDEA. The final determination was made during an Eligibility Committee meeting on October 22, 2010. As part of the Eligibility Committee, the parents attended this meeting. *LEA-9 pg 37.*
9. The IEP team developed an IEP for student at an IEP team meeting on November 19, 2010. *LEA-10.*³
10. Because student had not previously received services under an IEP from the LEA and there was not a current IEP in place, during the November 19, 2010, IEP meeting, LEA requested parental consent for the initial placement. *LEA-10 pg 66.* Parents failed to sign the consent for initial placement because the meeting was ended before the IEP was presented to them for signature. *Testimony of mother. Tr. 33:12-20.*

CONCLUSIONS OF LAW

Based upon the facts and arguments presented by the parties and the Hearing Officer's own independent research the conclusions of law are as follows:

³ Testimony of the parties confirmed that the IEP meeting was held on November 19, 2010. However, the IEP developed during the meeting incorrectly notes that the meeting was held on November 22, 2010.

1. The provision of FAPE is determined by a two prong test: First, has the LEA complied with procedures of IDEA. Second, is the IEP reasonably calculated to provide the student with educational benefit? *Bd. of Educ. V Rowley, 102 S. Ct. 3034 (1982).*
2. A student is eligible for services under IDEA if the student has a disability and who, by reason of the disability, needs special education and related services. *20 U.S.C. 1401, 34 C.F.R. 300.8*
3. The applicable statutory authority is found at 20 U.S.C. 1400. et seq. (IDEA) and its regulatory interpretations at 34 C.F.R. 300, et seq. Additionally, state implementation of federal law is found in West Virginia Board of Education Policy 2419 as filed in the Code of State Regulations 126CSR16.
4. Student is a disabled child within the meaning of 20 USC 1400, et seq. (IDEA), its implementing regulations at 34 CFR 300, et seq. and West Virginia Policy 2419.
5. The LEA has the burden of proof as to the appropriateness of any proposed action. *WV Policy 2419.*
6. The student was not covered by a current IEP when he enrolled with LEA.
7. The LEA did not deny student FAPE by failing to implement a current IEP.
8. Because student was not enrolled in the public school system the prior school year and the only evidence submitted of prior special education services was a service plan to provide speech services to student while he was parentally placed in private school, LEA is required to perform an initial evaluation when parents' requested an IEP.
9. The LEA must complete the initial evaluation within sixty days of consent unless a different timeframe is established by State policy. *34 CFR 300.301(c)(1).* West

Virginia has established that initial evaluations must be completed within eighty days of consent. *126CSR16, Chapter 4, Section 1*. Accordingly, LEA has eighty days from consent to complete initial evaluations and determine eligibility. Eighty days expired on November 18, 2010.

10. Consent was provided by parent on August 30, 2010. *P-38*.
11. The student was determined eligible on October 22, 2010. This was the fifty third day from consent and well within the eighty day requirement.
12. LEA did not deny student FAPE by failing to timely determine eligibility of student.
13. LEA must develop and implement an IEP within thirty days of the determination that student needs special education and related services. *34 CFR 300.323(e)*. Based upon the October 22, 2010, eligibility date, LEA had to develop an IEP by November 21, 2010.
14. LEA did not deny student FAPE by delaying the development of a new IEP for student.

DISCUSSION

The Petitioner has presented two issues for determination as outlined above. The first issue presented is resolved rather simply by a failure of the Petitioner to offer any evidence in support of the claim. Petitioner alleges that at the time student was enrolled in LEA an IEP was in place for the student. LEA refutes this assertion and offers the most recent public school records of student. It is important to note that student was homeschooled during the school year immediately prior to the school year at issue in this matter. Consequently, there are no public school educational records for such year. Additionally, the most recent public school records, which are two years prior to the school year at issue in this matter, indicate that student was

enrolled in private school and only received speech services through a service plan. It is clear from a review of these documents that they are not an IEP. The LEA has met its burden in showing that no current IEP existed when student enrolled at the beginning of the 2010/11 school year. Therefore, as to the first issue presented, the LEA did not deny student FAPE by failing to implement an IEP which is more than one year old where the student is transferring to the public school from home school.

The second issue presented is really two separate timeline issues and is resolved rather easily once the proper legal timeline is established. The eligibility determination is to be completed within eighty days of parental consent. Assuming that the language of the August 30, 2010, letter from parent to LEA is a grant of consent, the eligibility must be determined by November 18, 2010. LEA met this requirement by determining eligibility on the fifty third day during an Eligibility Committee meeting on October 22, 2010. LEA then had thirty days or until November 21, 2010, to develop an IEP. Petitioner filed the Complaint on October 27, 2010. LEA has met its burden of proof by showing that it was well within the deadlines to determine eligibility and develop an IEP. Therefore, as to the second issue presented, the LEA did not deny student FAPE by unlawfully delaying the eligibility determination and subsequent development of an IEP for the student.

ORDER

This Due Process proceeding is hereby complete and therefore the file may be closed.

APPEAL RIGHTS

Any party aggrieved by this decision or any part thereof may appeal to any state or federal court of competent jurisdiction within 90 days of the date of issuance of the decision.

Entered on January 3, 2011, by

/s/ Patrick Lane
Impartial Hearing Officer