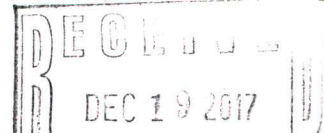


**BEFORE THE WEST VIRGINIA DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL PROGRAMS DUE PROCESS HEARING OFFICER**

**DUE PROCESS 18-003**



Party requesting Due Process

Student

Counsel for Student/Parent

Local Education Agency (LEA)

Counsel for LEA

Hearing Location

Hearing Dates

October 3 and 4, 2017

Type

Open

Transcription

Court Reporter

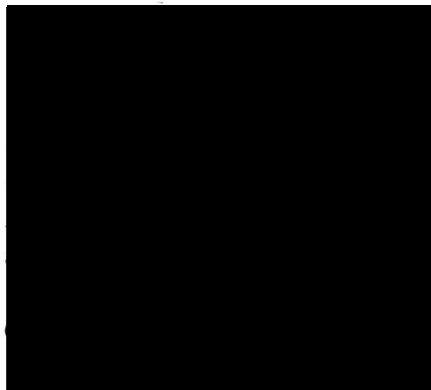
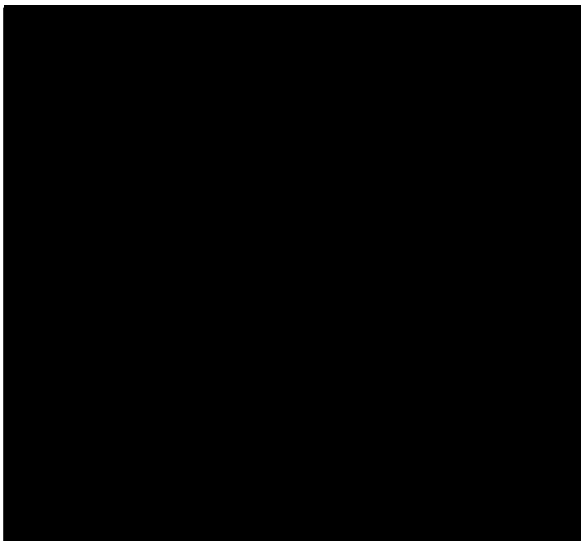
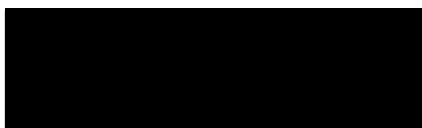
Student Present

Yes

Hearing Officer

Witnesses

For Student/Parent





**BEFORE THE WEST VIRGINIA DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL PROGRAMS  
DUE PROCESS HEARING OFFICER**

**Due Process No. 18-003**

**DECISION**

The West Virginia Department of Education, Office of Special Programs, designated the undersigned to serve as impartial hearing officer in the above-referenced matter. An evidentiary hearing was conducted on October 3 and 4, 2017, at a location agreed to by the parties and the hearing was recorded by certified court reporter. The purpose of the hearing was to consider evidence related to Student/Parent's due process request. Student/Parent was represented by counsel as was the County School System.

**PROCEDURAL HISTORY**

On August 14, 2017, the undersigned was notified of assignment by the Office of Federal Programs (OFP) to this due process hearing request and contacted the parties by letter dated same. The County School System filed its Answer on August 21, 2017, and a telephone scheduling conference was held August 29, 2017. The parties waived the resolution process and chose not to mediate. Parent elected to have Student present and the hearing open and the parties were able to agree on hearing dates of October 3 and 4, 2017.

As Parent had also filed complaints with both the federal Office of Civil Rights (OCR) and the West Virginia Department of Education (WVDoE) on some of the same issues, the issues to be decided in this due process were determined after receipt by the hearing officer of the

correspondence from OCR and WVDoE. The hearing officer determined by order dated September 14, 2017, that of the four (4) matters submitted for decision in this due process, one (1) (National Honor Society) had been previously decided by WVDoE and not appealed. One (1) other (Spanish class) was accepted for decision by OCR so only two (2) issues (English class and ACT) would be determined by this due process hearing. Subsequently, Parent requested an additional matter to be resolved at the hearing involving the working memory program ordered by a previous due process decision; County School System waived its objection to timeliness and the hearing officer allowed the complaint amendment so three (3) matters came on for hearing on October 3, 2017. The parties timely filed their exhibits and witness lists.

On October 3, 2017, the hearing was commenced and evidence received and a record of the proceedings made. Student and Parent each testified on her own behalf, presented two (2) witnesses and introduced sixteen (16) exhibits that were made part of the record at the hearing. County School System presented seven (7) witnesses and introduced twenty-two (22) exhibits that were made part of the record at the hearing. The parties elected to file proposed findings and conclusions and filed them electronically on the agreed date of November 30, 2017. This decision is issued on the agreed date of December 18, 2017.

### **ISSUES**

1. Whether County School System violated IDEA and/or WV Policy 2419 by failing to provide the accommodations contained in Student's Individualized Education Plan (IEP) in Student's Advanced Placement English class?
2. Whether County School System violated IDEA and/or WV Policy 2419 by failing to request accommodations for two (2) of Student's ACT examinations?

3. Whether County School System violated IDEA and/or WV Policy 2419 by failing to provide a working memory program to Student as required by the decision in Due Process D16-003?

### **MOTIONS**

All decisions rendered at the aforesaid hearings on motions filed in this action are hereby affirmed and all other motions filed in this action by either of the parties which were not previously ruled upon by the hearing examiner are hereby denied and rejected.

### **CREDIBILITY OF WITNESSES, TESTIMONY, AND EXHIBITS**

The hearing examiner was and is satisfied that all records and documents entered as exhibits are complete, authentic and valid and that they were entered with the proper evidentiary foundations. The hearing examiner was and is satisfied that the witnesses brought on by the parties were credible and truthful except as inconsistent with this decision. Neither the demeanor of the witnesses nor the substance of any testimony suggested any inconsistency, conflict, or ulterior motive except as noted below. No evidence suggested any personal gain to be achieved by any witness as a result of testifying except as noted below.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and the exhibits admitted into evidence and matters of which the hearing examiner took judicial notice during the proceedings, assessing the credibility of the



witnesses, and weighing the evidence in consideration of the same, this hearing examiner makes the following findings of fact and conclusions of law. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by the parties but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

Following a thorough review of the evidence, the hearing examiner makes the following findings of fact and conclusions of law:

### **FINDINGS OF FACT**

1. There are two relevant IEPs for this due process.
2. The first relevant IEP is dated May 26, 2016. The second is dated November 18, 2016. BoE Exhibit Nos. 1 and 2. Student/Parent Exhibit No. 2. TR II at 100-1.
3. The academic record of Student is relevant to this due process. BoE Exhibit No. 23.
4. In the 2016-17 school year, Student was enrolled in an Advanced Placement (AP) English class at the high school.
5. The AP English class was an on-line class provided by and through the Virtual School Program of the WV Department of Education.
6. In the 2016-17 school year, a certified advanced placement English teacher from Virginia Tech taught the class on-line and the high schools using the program were to hire a facilitator to be physically present in the local classroom. TR. II at 118-24.
7. County School System assigned a certified English teacher to facilitate the AP English

on-line program at the high school. TR. I at 15, TR II at 86 and 168-9.

8. Both teachers received Student's IEP from the IEP Coordinator and knew the accommodations to be provided to Student. Student/Parent Exhibit No. 2. BoE Exhibit Nos. 1 and 2. TR II at 88-9, 173-4.

9. The certified AP teacher had posted on-line in August 2016 a schedule guideline when papers and other assignments should be completed to be graded. BoE Exhibit No. 16. TR I at 63, TR II at 171.

10. The certified AP teacher also allowed all students to redo and resubmit after she had corrected and returned the assignment as long as it was graded before the school's final date. TR I at 65-6. TR II at 180.

11. Students were free to submit on their own schedule as the suggested due dates were not mandatory. TR I at 66-7. TR II at 171-72.

12. There was a final date by which all work had to be completed to meet the school grading deadlines. The deadline involved in this due process claim was May 10, 2017, about a month after the teacher's suggested deadline date for all work to be completed. All work was to be completed before the AP test date. TR I at 63-5, 70 and TR II at 89-91.

13. Student followed the guidelines the first semester and submitted her assignments over the course of the semester. She also took advantage of the certified AP teacher's generous correct and resubmit policy the first semester. The second semester, Student submitted the entire semester's work (about thirty assignments) between May 7 and May 10, 2017, and therefore was unable to avail herself of the policy. TR I at 65-6. TR II at 180. BoE Exhibit No. 16.

14. Student did not request additional time to complete her work and offered no reason why

she changed her mode of submission from the first to the second semester except general stress during the second semester. She also did not offer any reason why the addition of one (1) more day to submit would have been of benefit. TR I at 65-6, 74-82.

15. The certified AP teacher followed her usual method of instruction and graded Student's submissions (as well as other students' work) within her usual forty-eight (48) hours and posted the grades online. TR I at 67.

16. Students could check their grades in the Brain Honey system at any time. This student did not check her individual assignments in Brain Honey, although she could have, because she thought she had a 95 grade for the class. TR I at 67-8. BoE Exhibit No. 16.

17. Several weeks after the May 10, 2017, school deadline and the May 11, 2017, AP English exam, the certified AP teacher noticed that there was an error in the spread sheet that was provided to her to calculate the cumulative grades. TR II at 172-3.

18. She recalculated the grades and some students did a little better and some did a little worse. TR II at 176-7.

19. Student's numerical grade in this class went from a 95 to a 92.5. Student thought that reduced her grade from an A to a B and asked for a chance to do additional work or extra credit to return it to an A. She also finally looked at the Brain Honey and learned that she had failed two (2) of the assignments; upon further inquiry, she said she had submitted the wrong paper for one of the assignments and asked to file the correct paper. TR I at 18, 68, 74-77, 82. TR II 176-9. Student/Parent Exhibit Nos. 6, 7, 8 and 9. BoE Exhibit No. 11.

20. Since it was long past the school's deadline, the certified AP teacher referred the decision as to whether Student could resubmit the correct paper for the wrong paper to the school. TR II at 92. BoE Exhibit No. 11. Student/Parent Exhibit Nos. 6, 7, and 8.



21. The class facilitator denied Student's request as he determined she had not filed the same paper for both assignments as she had claimed and he thought she had the additional time listed in her IEP as she waited almost a month after the suggested due date to file her assignments. TR I at TR II at 94, 101. Student/Parent Exhibit Nos. 6,7, 8, and 9. BoE Exhibit No. 11.

22. Student's mother called the Virtual Schools Coordinator at the State Department of Education who also deferred the decision to the school's principal. The principal upheld the decision of the class facilitator. TR II at 63-4. Student/Parent Exhibit No. 6,7,8, and 9. BoE Exhibit No. 11.

23. No evidence was introduced that demonstrated that this late resubmission by Student and regrading the paper by the teacher would have affected Student's number grade in the class.

24. The only evidence offered by any witness was that it was the error in the spread sheet that caused Student's number grade to be reduced.

25. Student had been incorrect in her assumption that the recalculation after the discovery of the spreadsheet caused her grade to go from an A to a B as it remained an A on the school's grading system and she received an A as that class' grade for the second semester and the full year. TR I at 34, 71-2.

26. Student has taken the ACT college testing four times starting in her junior year. TR I at 50.

27. When any student with a disability registers for an ACT exam, Student/Parent must inform the ACT if they are seeking accommodations for that disability at that test. Student then receives a notice that they must tell the designated person at their school that they have asked for accommodations while registering. Once Student/Parent tells the school and gives the school the ACT reference number, the designated person then accesses the ACT system and selects the applicable disabilities from a list provided by ACT. When the designated school person selects

Student's disability from the ACT list, a drop down menu of available accommodations is shown on the computer screen and the designated person checks off the accommodations requested. Not all accommodations that might be on an IEP are on the drop-down list. The designated person then uploads Student's IEP and any other supporting documentation. The ACT people review all this and then notify Student and school by letter of the accommodations that they have approved and will be at the testing site. The letter also contains the steps to appeal if Student/Parent disagrees with the ACT accommodation decision. BoE Exhibit No. 9. TR II at 226-32.

28. In the autumn of 2016, the designated person at the high school was informed that Student had registered for the October 2016 ACT. She and the IEP coordinator completed the on-line request for accommodations for Student, following the steps including uploading all of Student's IEP accommodations as listed on the May 2016 IEP. The school received the list of accommodations that ACT would provide Student and it did not include an accommodation to allow Student to write directly on the test booklet and not use the scantron sheet. Student and Parent could not remember whether or not they received the notification of accommodations letter from ACT for the October 2016 ACT exam. Student took the exam. Parent claims that the scantron avoidance accommodation should have been given to Student. BoE Exhibit Nos. 5, 9, 20. TR I at 51-62, 149-52. TR II at 226-32.

29. In November 2016, Student's IEP team met and, among other things, amended Student's accommodations to include that Student be permitted to write directly on the test or test booklet reducing errors in transferring information to a scantron sheet. BoE Exhibit No. 2

30. This accommodation was requested when the designated person was informed that Student was registered for the June 2017 ACT exam. She followed the same procedure as before, uploading the newest IEP from November 2016, and at Parent's request asked that Student have one-on-one testing, permission to write in the test booklet and a DVD/CD to have test questions read for lengthy readings. The school records show ACT granted the writing directly on the booklet but denied the pre-recorded audio DVD/reader accommodation, the triple time and the small group



testing. Parent had a poor recollection of what was requested and received as accommodations, but after reviewing her emails and the responses, although her emails ask for these accommodations, she doesn't remember asking for them. TR I at 160-76. BoE Exhibit Nos. 3, 10 and 21.

31. Student also took the ACT in April 2017. Student/Parent Exhibit No. 3. BoE Exhibit No. 6.

32. The school has no record that Student/Parent brought the notice of the registration for the April 2017 test to request any additional accommodations and Student apparently took the April 2017 ACT with the same accommodations as were granted by ACT for the October 2016 examination. TR I at 160-76.

33. Parent recalls that she did ask for that additional accommodation for the April 2017 ACT exam but unfortunately could not offer any details, corroborating evidence or anything else to show that she had asked the school to request the additional accommodation. No emails were submitted reflecting any accommodation requests by the parent for this test, although multiple parental emails were submitted for accommodation for the student's third ACT test. TR I at 106-115, 149-76. BoE Exhibit No. 10.

34. Student recalled that her mother registered her for the ACT but she did not recall whether she received any letters from the ACT concerning her accommodation. TR I at 50-62.

35. The designated person at the school denies that Parent made the accommodation request for this April test and believes she was never approached with the April ACT registration number by Student or Parent to make the request for the additional accommodation. TR II at 233.

36. Student's ACT test scores both before and after the scantron avoidance accommodation was given to Student by the ACT do not document that the accommodation improved her scores,

although the student believes her scores improved because of this accommodation. Her scores, as do most students' scores, vary and some of her scores improved with the accommodation, many did not, and some actually declined. TR I at 60-2. BoE Exhibit No. 5, 6, and 7. Student/Parent Exhibit Nos. 3 and 4.

37. Student's fourth ACT test scores were not provided at the hearing. Parent testified that Student had received them and Student testified as to the composite score. TR I at 62, 175-6.

38. Due Process D16-003 awarded Student training to improve her working memory. BoE Exhibit No. 16.

39. That decision specifically states in Directives for Implementation on page 69:

*4. Student shall be provided, at LEA expense, a program or plan to assist her with her working memory issues so she can benefit from her remedial mathematics instructions. [REDACTED] or its functional equivalent would satisfy this directive, however the methodology chosen is for the school district to decide. (Emphasis added)*

BoE Exhibit No. 16.

40. County School System chose to provide Student with a program called [REDACTED] because it was recommended in the Independent Educational Evaluation (IEE) and Parent preferred this program. TR I at 187. Student/Parent Exhibit No. 1.

41. [REDACTED] is a computer based program that is administered on-line with trained coaches who facilitate the process, primarily by helping a student with technical problems. These trained coaches who can be school staff or psychologists or other outside professionals are trained by [REDACTED], the developer of the program and are certified by [REDACTED] as a coach when they complete the training. TR II at 263-4. BoE Exhibit No. 12, 13, and 22.

42. Student's case manager and two (2) other school employees completed the training and

were certified. TR I at 129-30. TR II at 133-66.

43. The program itself requires regular use by Student on a specific schedule but does not require a certain location. TR II at 133-66.

44. County School System, after consultation with Pearson, chose to provide the program at school for this student to insure compliance with the effective delivery that Pearson required.

45. The mother wanted the program to be given to Student at home.

46. Starting in January 2017, Student reported to her case manager every school day for six (6) weeks to complete the program. TR II at 133-66.

47. The program requires that Student's working memory be tested before the program and after Student finishes the program. TR II at 144-5.

48. The test results from the IEE were utilized as the before testing and Student was tested by the school psychologist after the training using the same test as had been used by the IEE and with the written permission of Parent. TR II at 144-51. BoE Exhibit No.22.

49. There was no significant improvement in Student's working memory after the training according to the test results. TR II at 33. BoE Exhibit No. 22

50. Parent believed that she was told at a meeting with the school certified coach and a representative from Pearson that although no progress was discerned in the Listen Up segment, some progress was shown in the Shape Up and Add Up segments. The case manager noted that some segments went up and then went back down and agreed with Parent about the Shape Up improvement. TR I at 136-8. TR II at 149-50.



51. Parent thought that she was told that the school psychologist who did the “after” test determined that Student’s working memory had improved. However the school psychologist testified that her testing showed no significant difference from the March 2016 IEE testing. TR I at 133-6. TR II at 33. BoE Exhibit No. 11.

52. On February 15, 2017, Parent requested an IEE to again evaluate Student’s working memory and County School System agreed, giving her a list of approved evaluators from which to choose. TR I at 138. TR II at 265. BoE Exhibit No. 11.

53. Student and mother selected a provider and Student was evaluated by the independent evaluator. TR I at 138-144. TR II at 10, 265. BoE Exhibit No. 11.

54. The test utilized by the independent evaluator was different because Student had obtained her eighteenth birthday and was outside the age range of the earlier test. TR I at 139-40. TR II at 10.

55. The results again showed that there was no significant improvement in Student’s working memory. TR I at 143-4. BoE Exhibit No. 11. Student/Parent Exhibit No. 12.

56. Parent determined that the working memory coaching should have been by a psychologist not a school staff member basing that on something said by someone she had spoken to on the telephone at Pearson. TR I at 144.

57. The written Pearson documentation admitted as exhibits at the hearing demonstrate that the certified coaches could be school staff, as long as they were trained and certified by Pearson. BoE Exhibit Nos. 12 and 13.

58. Parent claimed that the school’s coach was always calling the [REDACTED] people for answers to her questions which demonstrated to Parent that the school coach was not a good coach.

TR I at 132.

59. The school coach agreed that she called and emailed the [REDACTED] people if there was a question from the mother that she couldn't answer as she was not an expert or to get reassurance that she had done something correctly but she thought she was being helpful to the mother and the student. TR II 153-5.

60. Student did not seem very enthused about the program. Initially, she thought it helped her but later she didn't see a difference. TR I at 46-7, 50.

61. The psychology experts at the hearing opined that if the working memory training was not successful with this student it was not surprising as memory training programs have not been proven to work with students but that the [REDACTED] program is the most research based training program available. TR II at 18-20, 23-4, 33-36.

### **CONCLUSIONS OF LAW**

1. The long-held standard for the provision of free appropriate public education (FAPE) is contained in a 1982 US Supreme Court opinion. It held that when a student with a disability is being educated within the public schools, the child receives sufficient educational benefits if Student's IEP is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Board of Education v. Rowley, 458 U.S. 176, 188 (1982).

2. The Supreme Court established this year a new and arguably clearer standard in Endrew F. ex rel. Joseph F. v. Douglas Cty. School Dist., RE-1, 137 S. Ct. 988 (March 22, 2017) and the U.S. Department of Education issued a Q and A document on the meaning of the case on December 7, 2017. This new standard requires schools to meet their substantive obligations of IDEA by

offering an IEP that is reasonably calculated to enable a child to make progress in light of the child's circumstances and requires the child's placement to include challenging objectives that are appropriately ambitious in light of Student's circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. *Id.* at 999-1000.

3. While a school must provide specialized instruction and related services sufficient to confer benefit upon the handicapped child, the IDEA does not require the furnishing of every special service necessary to maximize each child's potential. A school district is not required to provide every service and accommodation which might bring a disabled student an educational benefit, nor to maximize Student's potential. Rowley, *id.* 458 US at 199.

4. The services must offer more than *de minimus* or trivial academic advancement. Carter v. Florence School Dist. Four, 950 F.2d 156, 160 (4<sup>th</sup> Cir. 1991); Board of Education of the County of Kanawha v. Michael M., 95 F. Supp.2d 600, 607 (S.D. W.Va. 2000); O. S. by Michael S. and Amy S. v. Fairfax School Board, 66 IDELR 151 (4<sup>th</sup> Cir. 2015).

5. A party may amend a due process complaint when granted permission to do so by the hearing officer. 34 CFR §300.508(d)(4) and *WV Policy 2419, Dispute Resolution, Chapter 11 §4, D., E. and K.* The hearing officer added another issue at the request of Parent/student and this decision addresses the additional issue.

6. A Parent has a right to obtain an Independent Educational Evaluation (IEE) at public expense if Parent disagrees with an evaluation conducted by the school district and the district has ten (10) days to agree to pay for the IEE after giving Parent the criteria or to file a due process or to request a mediation. *WV Policy 2419, Procedural Safeguards, Ch. 10, §7.A.1* and 34 CFR §300.502 (a) and (b)(1). The county school system met its procedural requirements when Parent requested an IEE to evaluate Student's working memory testing in spring 2017.

7. In matters alleging a procedural violation, a hearing officer may find that a student did not



receive a free appropriate education only if the procedural inadequacies...(i) impeded the child's right to a free appropriate education; (ii) significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of a free appropriate public education to Parents' child; (iii) caused a deprivation of educational benefits. 20 U.S.C. §1415(F)(3)(E)(ii) and *WV Policy 2419, Ch. 11 §4.M.*

## **DISCUSSION AND DECISION**

### **A. Overview**

Student is a female twelfth grade student in the County School System's high school. Immediately prior to her junior year, Student and her Parent filed a due process request (D16-003) that resulted in a decision dated October 28, 2016 (Student Exhibit No. 16); no party appealed that decision.

Subsequent to that decision, Parent filed a complaint with multiple issues with the United States Department of Education Office of Civil Rights (OCR); OCR responded by letter [REDACTED] dated January 9, 2017. OCR agreed to investigate Parent's claim that Student's Spanish teacher did not provide her study guides prior to each quiz or test as required by her IEP, agreed to investigate Parent's claim that Student was denied membership in the National Honor Society (NHS) because of her disability and agreed to investigate Parent's three (3) claims of retaliation by the County School System against Parent for filing a due process request in that County School System allegedly subjected Parent to multiple classroom observations, viewed her email and placed her on an improvement plan. OCR dismissed Student's discrimination claim that County School System had failed to give her the IEP mandated verbal and written directions for the appeal of her denial to the NHS on the basis that her IEP provisions apply to classes not activities/clubs such as NHS. OCR also denied Student's claim of discrimination by the Spanish teacher for grading her more harshly because Parent failed to provide additional information as requested. This OCR letter was not

appealed. No resolution to these claims by OCR was presented to the due process hearing officer.

Parent also filed a claim of discrimination concerning Student's failure to be elected into NHS with the WV Department of Education Office of Federal Programs (OFP) who issued its Letter of Findings dated March 9, 2017. This Letter was not appealed. The hearing officer, after review of the OCR letter and the OFP's Letter of Findings, held that those issues under review by OCR or already resolved by OFP should not also be heard in the due process hearing filed on August 14, 2017. The OCR had previously taken jurisdiction of those issues and the proper remedy for disagreeing with the OFP's Letter of Findings was to appeal that decision, not file a due process. The hearing officer also determined to not revisit the issues of the initial due process (DP16-003) decided by a different hearing officer last year and not appealed by either party.

During the 2016-17 school year, Student continued her matriculation at the high school and at the date of the hearing, October 3, 2017, she was a senior in high school and had been accepted by the college of her choice.

## B. Issues

### 1. Whether the County School System violated IDEA and/or WV Policy 2419 by failing to provide accommodations contained in Student's Individualized Education Plan (IEP) in Student's Advanced Placement (AP) English class?

In her junior (2016-17) year, Student was enrolled in an AP English class. The class was an on-line class through the Virtual School Program of the WV Department of Education. A certified advanced placement English teacher from Virginia Tech taught the class on-line and each high school using the program was to hire a facilitator to be physically present in the classroom. The County School System assigned a certified English teacher to facilitate the AP English on-line program at the Student's high school. Both teachers testified that they had received Student's IEP from the IEP Coordinator and knew the accommodations to be provided to Student. The IEP



language involved in this matter is the accommodation that Student was to be provided “extended time/ one extra day” to complete assignments.

The certified AP teacher had posted on-line in August 2016 a schedule guideline when papers and other assignments should be completed to be graded. The teacher also allowed Students to redo and resubmit after she had corrected and returned the assignment as long as it was graded before the final date. Students were free to submit on their own schedule as the suggested due dates were not mandatory but, of course, there was a final date by which all work had to be completed to meet the school grading deadlines. The deadline involved in this due process claim was May 10, 2017, about a month after the teacher’s suggested deadline date for all work to be completed. All work was to be completed before the AP test date of May 11, 2017.

Student followed the guidelines the first semester and submitted her assignments over the course of the semester. She also took advantage of the certified AP teacher’s generous correct and resubmit policy the first semester. The second semester, Student submitted the entire semester’s work (about thirty assignments) between May 7 and May 10, 2017. She did not request additional time to complete her work and offered no reason why she changed her mode of submission except general stress during the second semester. The certified AP teacher followed her usual course and graded Student’s submissions (as well as other students’ work) within her usual (48) hours and posted the grades online.

Students could check their grades in the Brain Honey system at any time. Student did not check her individual assignments in Brain Honey, although she could have, because she thought she had a 95 cumulative grade (A) for the class.

On or about May 23, 2017, and several weeks after the May 10, 2017, school deadline, the certified AP teacher noticed that there was an error in the spread sheet that was provided to her to calculate the cumulative grades. She redid the number grades and some students did a little better and some did a little worse. Student in this due process went from a 95 to a 92.5. Student thought

that reduced her grade from an A to a B and asked the certified AP teacher for a chance to do additional work or extra credit to return it to an A. Student also finally looked at the Brain Honey and learned that she had failed two (2) of the assignments; upon further inquiry, she said she had submitted the wrong paper for one of the assignments and asked to file the correct paper. The certified AP teacher, since it was so long past the school's deadline, referred the decision to the school. The class facilitator denied Student's request as he determined she had not filed the same paper for both assignments as she had claimed and he thought she had the additional time listed in her IEP as she waited almost a month after the suggested due date to file her assignments.

Student's mother called the Virtual Schools Coordinator at the State Department of Education who also deferred the decision to the school's principal. The principal upheld the decision of the class facilitator. There was no evidence that resubmitting and regrading the paper would have affected Student's number grade in the class; the only evidence offered by any witness was that it was the error in the spread sheet that caused this student's number grade to be reduced. It was also determined that Student had been incorrect in her assumption that the redo caused her grade to go from an A to a B as it remained an A on school's grading system and she received an A as her grade for the class for the second semester and the school year.

The school facilitator<sup>1</sup> was correct in his determination that Student had not filed duplicate papers but incorrect in his determination that she had already received additional time as she had delayed a month to submit her work after the guideline date. These were not mandatory dates but guidelines. The only mandatory date was May 10, 2017, so Student had, according to her IEP, one more day to complete her submissions. May 11, 2017, therefore, was her mandatory date. However, there was no evidence introduced that this additional day would have caused Student not to fail two

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<sup>1</sup>Parent and student testified as to difficulties with this individual and said that he and the principal behaved in retaliatory ways. *See TR I at 93-4*. Student called the facilitator mean. *See TR I at 23-4, 34*. However, the retaliation issues were earlier filed with OCR by Parent and are to be determined by OCR. As noted above, no matter what the attitudes of the facilitator and/or principal and even if Student had taken one more day to complete her work, there was no evidence at the hearing that this extra day would have changed the outcome.



assignments thus lowering her grade or that this additional day would have caused the certified AP teacher to allow her to resubmit after grading (which she actually might have if Student had looked at Brain Honey in the first few days after she submitted her work and found the two failures and asked to correct) or that this additional day would have changed the outcome of this class in any way.

2. Whether the County School System violated IDEA and/or WV Policy 2419 by failing to request accommodations for two of Student's ACT examinations?

Student has taken the ACT college testing four times starting in her junior year. This claim came from the ACT testing she took in October 2016 and in April 2017.

When any student with a disability registers for an ACT exam, Student/Parent must inform the ACT if they are seeking accommodations for that disability at that test. Student then receives a notice that they must tell the designated person at their school that they have asked for accommodations while registering. Once Student/Parent tells the school and gives the school the ACT reference number, the designated person then accesses the ACT system and selects the applicable disabilities from a list provided by ACT. When the designated school person selects Student's disability from the ACT list, a drop down menu of available accommodations is shown on the computer screen and the designated person checks off the accommodations requested. Not all accommodations that might be on an IEP are on the drop-down list. The designated person then uploads Student's IEP and any other supporting documentation. The ACT people review all this and then notify Student and school by letter of the accommodations that they have approved and will be at the testing site. The letter also contains the steps to appeal if Student/Parent disagrees with the ACT accommodation decision.

In the autumn of 2016, the designated person at the high school was informed that Student had registered for the October 2016 ACT. She and the IEP coordinator completed the on-line request for accommodation for Student, following the steps including uploading all of Student's IEP

accommodations as listed on the May 2016 IEP. The school received the list of accommodations that ACT would provide Student and it did not include an accommodation to allow Student to write directly on the test booklet and not use the scantron sheet. Student and Parent could not remember whether or not they received the notification of accommodations letter from ACT for the October 2016 ACT exam. Student took the exam. Parent claims that the scantron avoidance accommodation should have been given to Student.

In November 2016, Student's IEP team met and, among other things, amended Student's accommodation to include that Student be permitted to write directly on the test or test booklet reducing errors in transferring information to a scantron sheet. This accommodation was requested when the designated person was informed that Student was registered for the June 2017 ACT exam. She followed the same procedure as before, uploading the newest IEP from November 2016, and at Parent's request asked that Student had one-on-one testing, permission to write in the test booklet and a DVD/CD to have test questions read for lengthy readings. The school records show ACT granted the writing directly on the booklet but denied the pre-recorded audio DVD/reader accommodation, the triple time, and the small group testing requests.

Student also took the ACT in April 2017. The school has no record that Student/Parent brought the notice of the registration for the April 2017 test to request any additional accommodation and Student apparently took the April 2017 ACT with the same accommodation as were granted by ACT for the October 2016 examination. Parent recalls that she did ask for that additional accommodation for the April 2017 ACT exam but unfortunately could not offer any details, corroborating evidence, or anything else to show that she had asked the school to request the additional accommodation. Student did not recall whether she received any letters from the ACT concerning her accommodation. The designated person at the school denies that Parent made the accommodation request for this April test and believes she was never approached with the April ACT registration number by Student or Parent to make the request for the additional accommodation.



A review of Student's ACT test scores as provided as exhibits both before and after the scantron avoidance accommodation was given to Student by the ACT doesn't document that the accommodation improved her scores. Her scores, as do all students' scores, vary and some of her scores improved with the accommodation, many did not, and some actually declined.

The process for the ACT accommodation was undisputed at the hearing. The responsibility by the school to help a student do well on an ACT is clear. However, the evidence that the scantron avoidance accommodation should have been requested by and submitted to the ACT personnel for Student's October 2016 testing by the school was insufficient to meet the standard of proof as the accommodation was not listed on her IEP until November 18, 2017, and there was insufficient evidence that Parent asked for it to be submitted before it was listed on the IEP. Therefore, there is not enough evidence to sustain the claim that Student was denied any accommodation on the October 2016 ACT because of any conduct by the school.

The April 2017 ACT exam is less clear. It seems probable that the scantron avoidance accommodation would have been granted by the ACT staff as it was when it was requested by the school for Student's June 2017 ACT but, of course, that decision remains solely that of ACT. The ACT can not grant an accommodation unless it is requested by the school and the parties are in agreement that the school did not request the scantron avoidance accommodation for the April 2017 ACT. The designated school person testified that Student or mother did not bring her the registration number so that she could follow the ACT process and that she was not aware that Student was taking/had taken the April 2017 ACT until the mother sent emails and came in with the registration number for the June 2017 test to request additional accommodation. Student does not recall. The mother insists that she asked for the additional accommodation to be submitted by the school for the April 2017 test but is unable to identify a day or date that she did so. She also did not recall that she received a letter from ACT listing the accommodation Student would receive at the April 2017 ACT, if she did, and she was unable to use a calendar or any other outside information to pinpoint the date of her request to the school and the transmittal of the registration number to the designated school person.

The evidence reflects that the designated school person followed the appropriate procedure for requesting ACT accommodation for this student for the October 2016 and the June 2017 (although Parent did not agree with the wording she chose) and Student was granted some but not all of the requested accommodation which is consistent with ACT procedures. No evidence was offered by Parent that the designated person was untruthful or careless or subject to forgetfulness, Parent could not identify a date or day when she or Student followed the procedure and brought the registration number for the April 2017 ACT to the designated school person, and there is no email evidence unlike other test dates. There is not enough evidence to sustain the claim that Student was denied any accommodation on the April 2017 ACT because of any conduct by the school.

3. Whether the County School System violated IDEA and/or WV Policy 2419 by failing to provide a working memory program to Student as required by Due Process D16-003?

Due Process D16-003 awarded Student training to improve her working memory. Although there is substantial disagreement in the medical and education fields as to the benefit of this training, it was awarded by the previous hearing officer and not appealed as noted above. This decision did not specify the program or how or where any working memory program was to be delivered to Student.

County School System chose to buy a program called [REDACTED] to provide the to the student because it was recommended in the Independent Educational Evaluation (IEE) and Parent preferred this program. [REDACTED] is a computer based program that is administered on-line with trained coaches who facilitate the process, primarily by helping a student with technical problems. These trained coaches who can be school staff or psychologists or other outside professionals are trained by the Pearson, the developer of the program and are certified by Pearson as a coach when they complete the training. Student's case manager and two (2) other school employees completed the training and were certified.



The program itself requires regular use by Student on a specific schedule but does not require a certain location. County School System, after consultation with Pearson, chose to provide the program at school for this student to insure compliance with the effective delivery Pearson schedule. The mother wanted the program to be given to Student at home. The evidence reflected that starting in January 2017, Student reported to her case manager every school day for six (6) weeks to complete the program. Student thought the program helped her while she was doing it but later, she decided it didn't.

The program requires that Student's working memory be tested before the program and after Student finishes the program. The test results from the IEE were utilized as the before testing and Student was tested by the school psychologist after the training using the same test as had been used by the IEE and with the written permission of Parent. There was no significant improvement in Student's working memory after the training according to the test results<sup>2</sup>. On February 15, 2017, Parent requested an IEE to again evaluate Student's working memory and County School System agreed, giving her a list of approved evaluators from which to chose. Student and mother selected a provider and Student was evaluated by the independent evaluator. The test utilized was different because Student had reached her eighteenth (18th) birthday and was outside the age range of the earlier test. The results again showed that there was no significant improvement in Student's working memory.

Parent was obviously unhappy with the results of the training and determined that the

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<sup>2</sup>Parent believed that she was told at a meeting with the school certified coach and a representative from Pearson that although no progress was discerned in the [REDACTED], some progress was shown in the [REDACTED]. She also believed that she was told that the school psychologist who did the "after" test determined that Student's working memory had improved. However the school psychologist testified that her testing showed no significant difference from the March 2016 IEE testing.

administration of the six (6) weeks<sup>3</sup> of coaching should have been by a psychologist not the school staff. She offered no evidence that this was a requirement of the Pearson test except that someone she had spoken to on the telephone at Pearson told her that. This is inconsistent with the written Pearson documentation admitted as exhibits at the hearing. She also testified that the school's coach was always calling the [REDACTED] people for answers to her questions which demonstrated to Parent that the school coach was not a good coach. The school coach agreed that she called the [REDACTED] people if there was a question she couldn't answer or for reassurance as she was not an expert but she thought she was being helpful to the mother. Student did not seem very enthused about the program.

The evidence does not reflect that Student didn't try to benefit from the training or that the training was administered incompetently or incorrectly according to the Pearson program but it does reflect that the working memory training was not helpful to this Student. The testimony of the psychology experts at the hearing was that this result was not surprising as memory training programs have not been proven to work with students but that the [REDACTED] program is the most research based training program available.

Therefore, there is insufficient evidence to show that the school failed to provide a working memory program to this Student as directed by the decision in Due Process No 16-003. That decision specifically states in Directives for Implementation on page 69 :

*4. Student shall be provided, at LEA expense, a program or plan to assist her with her working memory issues so she can benefit from her remedial mathematics instructions. **A program such as [REDACTED] or its functional equivalent would satisfy this directive, however the methodology chosen is for the school district to decide. (Emphasis added)***

County School System purchased the program and provided it to Student as directed by the Pearson methodology. The fact that Student failed to improve her working memory does not mean that the

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<sup>3</sup>Student/Parent's Brief refers to twelve (12) weeks of training (page 10) but the remainder of the evidence refers to six (6) weeks.



program was provided in an incorrect way or that Student failed to try. It simply means that the [REDACTED] program, in common with other similar programs, is not always beneficial to some students in improving their working memories.

County School System has not violated IDEA and/or WV Policy 2419 by failing to provide a working memory program to Student as required by the IEP developed pursuant to the decision in Due Process D16-003.

### **DIRECTIVES FOR IMPLEMENTATION**

1. Although Parent/Student were able to demonstrate by sufficient evidence that County School System failed to provide the additional-day-to-complete-work accommodation contained in Student's Individualized Education Plan (IEP) in Student's Advanced Placement English class, they failed to meet the second part of the test by not showing any evidence that the additional day would have changed the outcome of her grade or confer any educational benefit. Therefore, the requested remedy of allowing Student to redo an assignment and resubmit it for grading when it will not change her grade is not granted.

2. As Parent/Student were unable to demonstrate by sufficient evidence that County School System failed to request accommodations for two of Student's ACT examinations, there is no violation of FAPE or WV Policy 2419. Therefore, the requested remedy of reimbursing Parent for the cost of the ACT exams is not granted.

3. As Parent/Student were unable to demonstrate by sufficient evidence that County School System failed to provide a working memory program to Student as required by the decision in Due Process D16-003, there is no violation of FAPE or WV Policy 2419. Therefore, the requested remedy of the provision again of the [REDACTED] program to the student by an outside psychologist

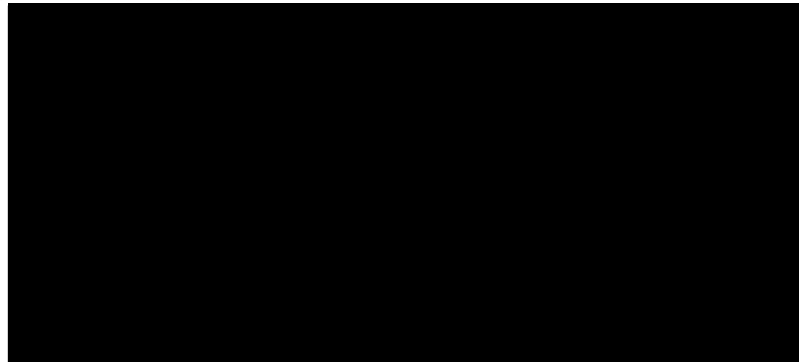
is not granted.

4. Parent/Student requested in the original complaint a general remedy that the school be given proper training and monitoring on laws regarding special education, and, in particular, the principal and superintendent be given training on requiring staff to follow accommodations, etc. Parent/Student alleged that the culture of denying educational rights needs attention as this has been an ongoing problem. Insufficient evidence at the hearing was provided to support this claim or this remedy. Therefore, the remedy of remedial training is not granted.

### **APPEAL RIGHTS**

Any party aggrieved by the findings and decisions made in the hearing has the right to bring a civil action with respect to the due process complaint in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety days of the issuance of the due process hearing officer's written decision.

DATE: December 18 , 2017

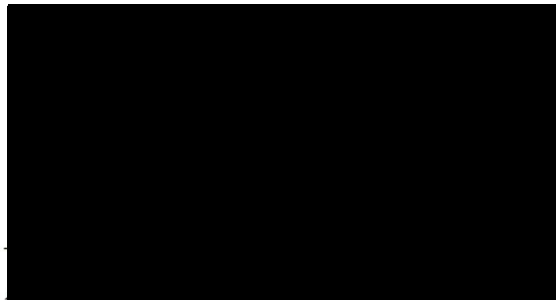
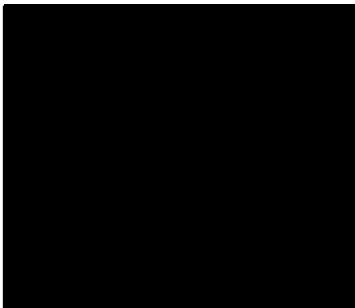


Impartial Due Process Hearing Officer

**BEFORE THE WEST VIRGINIA DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL PROGRAMS DUE PROCESS HEARING OFFICER  
DUE PROCESS DUE PROCESS NO. 18-003**

**Certificate of Service**

The undersigned, [REDACTED], do hereby certify that service of the foregoing Decision has been made by hand delivery or by forwarding a true copy thereof in an envelope deposited in the regular course of the United States mail, with postage prepaid, on this the 18<sup>th</sup> day of December 2017, addressed as follows:



Impartial Due Process Hearing Officer  
[REDACTED]