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| **Before The**  **State Of Wisconsin**  **DIVISION OF HEARINGS AND APPEALS** |

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| In the Matter of [Student]  v.  Milwaukee Public Schools | **DECISION**  DHA Case No. DPI-16-0014  DPI Case No. LEA-16-0008 |

The PARTIES to this proceeding are:

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|  | [Student], by    Attorney Brendan Corcoran  Law Offices of Corcoran & Foster  814 East Center Street  Milwaukee, WI 53212-3048 | Milwaukee Public Schools, by  Attorney Naomi Gehling  Milwaukee City Attorney’s Office  200 E. Wells Street, Room 800  Milwaukee, WI 53202-3551 |

PROCEDURAL HISTORY

On May 3, 2016, the Department of Public Instruction received a request for a due process hearing from [Parent] (the Parent), on behalf of [Student] (the Student) against Milwaukee Public Schools (the District), filed under Wis. Stat. Ch. 115 and the Individuals with Disabilities Education Improvement Act (IDEA), and forwarded it to the Division of Hearings and Appeals for hearing.

The due process hearing was held on July 12, 2016. The record closed on August 8, 2016, and the decision is due by August 15, 2016.

ISSUES

1. Did the District violate state and federal special education laws by preventing the Student’s Parent from attending individualized education program (IEP) team meetings during the 2015-16 school year?
2. Did the District refuse to transfer the Student’s placement to [Technical College] and fail to provide written notice of that refusal to the Student and Parent?

FINDINGS OF FACT

1. The Student (d.o.b. XX/XX/XX) is currently 17 years of age and is a resident of the District. He has been identified as a child with a disability in the area of other health impairment (OHI) who needs special education services. (Ex. 1, p. 11) As a high school student, the Student has been attending [High School] in the District.
2. On October 22, 2015, the District held an IEP team meeting, which the Parent and Student attended, to review and revise the Student’s IEP. (Ex. 1, p. 7) The IEP was not completed at that meeting, so the District scheduled a continued IEP team meeting for November 17, 2015. The District’s three efforts to provide notice to the Parent of the November 17, 2015 IEP meeting were documented in the IEP. (Ex. 1, p. 9)
3. By written notice dated November 16, 2015, the District rescheduled the November 17th IEP meeting to November 19, 2015. (Ex. 5)
4. On November 18, 2015, the Parent and Student attended a meeting at [High School] with an assistant principal, a chemistry teacher, and a female high school student and that student’s father. The meeting was held to resolve a dispute between the Student and the female student who had been having ongoing arguments in chemistry class. (Tr. p. 47) A confrontation occurred between the Parent and the female student’s father during the meeting, so assistant principal [High School Assistant Principal A] called for assistance to break up the meeting. Although no physical contact was made between the two parents, [High School Principal], Principal of [High School], issued a Notice of No Trespassing to the Parent and to the female student’s father. (Tr. pp. 48-50)
5. The Notice of No Trespassing stated that it would be unlawful for the Parent to enter upon the premises of [High School] until the Notice was “officially rescinded IN WRITING by the administrator in charge.” (emphasis in original) The Notice was signed by [High School Principal], as the Administrator in Charge, and a notation on the Notice indicates that it was sent to the Parent via certified mail on November 18, 2015. (Ex. 2) The Parent did not receive the Notice on November 18, 2015. (Tr. pp. 22-23)
6. Principal [High School Principal] and administrator [School Administrator] told the Parent on November 18, 2015 that a No Trespassing notice had been issued against her, and the Parent’s understanding from their conversation was that she was prohibited from going to the school and from contacting or talking to school staff. (Tr. pp. 23-34, 38-39)
7. On November 19, 2015, the IEP team reconvened to continue the IEP meeting. The Parent was not allowed to enter [High School] to attend the IEP team meeting. (Tr. pp. 15, 23-24, 58, 75) During the IEP meeting, [District Special Education Supervisor], a special education supervisor who served as the local educational agency (LEA) representative at the meeting, called the Parent to have her participate in the meeting by telephone. (Tr. pp. 24, 75) The Parent informed the IEP team that she could not participate in the IEP meeting by telephone because she was subject to a No Trespassing notice. [District Special Education Supervisor] and assistant principal [High School Assistant Principal B] told the Parent that the No Trespassing notice did not prevent her from participating in the IEP meeting by telephone but the Parent did not agree to participate by telephone. (Tr. pp. 59, 76) The IEP team continued the meeting without the Parent participating. (Ex. 1; Tr. pp. 70, 76)
8. The IEP team meeting held on November 19, 2015 was not for the annual IEP development. The IEP meeting was held for purposes of: IEP review/revision, placement, and development of transition goals and services and functional behavioral assessment/behavioral implementation plan. (Ex. 1, p. 9)
9. The District convened another IEP team meeting on March 22, 2016. The Student, the Parent and their attorney attended the meeting. (Ex. 4)
10. At the March 22, 2016 IEP team meeting, the IEP team briefly discussed placement, and the Parent stated that she would like the Student placed at [Technical College], [Another District High School] or a suburban school district. (Tr. pp. 61-62, 79) The LEA representative, [District Special Education Supervisor], stated that the IEP team could not place him at [Technical College] because that placement location needed approval by a Regional MPS supervisor. (Tr. pp. 79-80, 93-94) The IEP team did not discuss whether [Technical College] would be an appropriate placement for the Student and did not make an actual determination regarding placement. (Tr. pp. 37, 43, 64, 93, 95)
11. Sometime after the IEP team meeting, [District Special Education Supervisor] spoke with a Regional supervisor, [District Regional Supervisor], who told her that [Technical College] was not a placement option for the Student. (Tr. p. 94)
12. On March 24, 2016, the Parent spoke with [District Special Education Supervisor] by telephone and again stated that she would like the Student placed at [Technical College]. (Ex. 3; Tr. p. 101)
13. The District did not reconvene another IEP team meeting to further discuss and make a determination regarding the Student’s placement at [Technical College], [High School], or [Another District High School]. (Tr. pp. 94-95, 97-98, 100-101)
14. The Student’s IEP dated April 4, 2016 included a Notice of Placement that stated that a placement determination was made on March 22, 2016 that the IEP would be implemented at [High School]. (Ex. 4, p. 38)
15. The District did not send the Parent prior written notice that it refused her request to change the Student’s placement to [Technical College]. (Tr. pp. 42, 98)
16. [Technical College] is an educational agency that is not part of the District. The District contracts with [Technical College] to place certain students who are “at risk” of not graduating from high school, as defined in chapter 118 of the Wisconsin Statutes, in [Technical College]’s [Program], which is not designed as a special education program. (Tr. pp. 111-112, 114)
17. There is no evidence on the record that the Student is an “at risk” student under chapter 118 of the Wisconsin Statutes or that [Technical College] could provide the Student with the special education services and supports required by his IEP. (Ex. 4; Tr. pp.114, 118-119)

DISCUSSION

The U.S. Supreme Court has ruled that the burden of proof in an administrative hearing challenging an IEP is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the complainant in this matter, the burden of proof is on the Parent.

The IDEA requires that all children with disabilities are offered a free, appropriate public education (FAPE) that meets their individual needs. 20 USC § 1400 (d); 34 CFR § 300.1. The U.S. Supreme Court has set forth a two-prong test to determine if a child has received FAPE: (1) whether there has been compliance with the IDEA’s procedural requirements; and (2) whether the IEP is reasonably calculated to provide educational benefits. *Board of Educ. v. Rowley*, 458 U.S. 176, 206-207 (1982).

The federal regulations implementing the IDEA mandate that, in a due process proceeding involving a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (1) impeded the child’s right to a FAPE; or (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefit. 34 CFR § 300.513 (a)(2). The FAPE determination aside, a hearing officer may order an LEA to comply with the procedural safeguard provisions of the IDEA. 34 CFR § 300.513 (a)(3).

In this case, the Parent alleged that the District engaged in procedural violations of the IDEA by holding an IEP team meeting on November 19, 2015 without ensuring the Parent’s participation and by failing to provide the Parent with prior written notice of its refusal to change the placement of the Student to [Technical College] as requested by the Parent.

Parental Participation in IEP Team Meeting

Parents of a child with a disability are members of the child’s IEP team, and the IEP team is responsible for evaluating the child, developing the child’s IEP and determining the child’s special education placement. Wis. Stats. § 115.78 (1m) and (2). LEAs must take steps to ensure that the child’s parents are present at each IEP team meeting or are afforded the opportunity to participate. 34 CFR § 300.322 (a). If neither parent can attend an IEP team meeting, the LEA must use other methods to ensure parental participation, such as video or telephone conference calls. 34 CFR § 300.322 (c). Districts should only utilize alternative meeting procedures when parent participation is not otherwise available. *See Drobnicki v. Poway Unified Sch. Dist.,* 53 IDELR 210 (9th Cir. 2009, *unpublished*).

An IEP team meeting may be held without a parent in attendance if the LEA is unable to convince the parent that they should attend. *See Bd. of Educ. of the Toledo City Sch. Dist. v. Horen,* 55 IDELR 102 (N.D. Ohio 2010). In such a case, the LEA must keep a record of its attempts to arrange a mutually agreed upon time and place for the IEP meeting. 34 CFR § 300.322 (d).

Here, the District documented three attempts to notify the Parent of the IEP team meeting scheduled for November 17, 2015. However, the District documented only one attempt to notify the Parent that the IEP meeting was being rescheduled to November 19, 2015, namely, a notice that was dated November 16, 2015. On November 18, 2015, in a matter unrelated to the Student’s IEP, the Parent was verbally informed by the principal of the school that the Student attends that the Parent was subject to a No Trespassing notice for the school. The Parent’s belief from speaking with another school administrator that day was that she could not be on the school premises or have contact with school staff. The Parent was not told on November 18, 2015 that the IEP team would contact her by telephone to participate in the IEP team meeting the next day.

On November 19, 2015, the IEP team convened and placed two telephone calls to the Parent to allow her to participate in the meeting by telephone. The Parent answered the second call and informed the IEP team that she could not participate in the IEP team meeting by telephone because of the No Trespassing notice that was in effect against her by the school principal. The LEA representative and an assistant principal who were on the IEP team informed the Parent that she could not attend the IEP team meeting in person at the school but could participate in the IEP team meeting by telephone. The Parent refused to participate by telephone and the parties ended the phone call. (Although the assistant principal testified that the Parent “hung up” the telephone, the LEA representative testified that “they” hung up the telephone after

the Parent did not agree to participate in the meeting by telephone.) The IEP team did not discuss rescheduling the meeting to another location or another date to allow the Parent to participate in the IEP meeting. (Tr. pp. 77-78)

Based upon the totality of the evidence on the record, I find that the District did not fully comply with the procedural requirements of the law by holding the IEP team meeting on November 19, 2015 without the Parent’s participation and by not keeping detailed records of attempts to involve the Parent in the IEP meeting. The IEP team meeting did not need to be held on November 19, 2015 in order to meet a statutory deadline and could have been rescheduled to a different location and/or date in order to allow the IEP team and District additional time to try to ensure the Parent’s participation in the IEP meeting.

However, I do not find that the procedural inadequacies rose to the level of a denial of a FAPE. The District did not fully comply with the procedural requirements to take steps to ensure the Parent’s participation and document those efforts, but because the IEP team did telephone the Parent on November 19, 2015 in an attempt to have the Parent participate in the IEP team meeting, I cannot reasonably find that the District “significantly impeded the parent’s opportunity to participate” in the IEP team meeting. There is no evidence on the record that the District’s procedural violation regarding the November 19, 2015 IEP team meeting caused a deprivation of educational benefit or impeded the Student’s right to a FAPE.

Prior Written Notice of Refusal to Change Placement

The Parent’s second allegation stems from her request that the IEP team change the Student’s placement from [High School] to [Technical College].

An LEA must establish and maintain procedures to ensure that a child’s parents are provided prior written notice whenever the LEA proposes to initiate or change, or refuses to initiate or change, the identification, evaluation or educational placement of the child, or the provision of a FAPE to the child. 20 USC 1415 (b)(3)(B); Wis. Stats. § 115.792 (1)(b). Among other things, the prior written notice must include:

1. A description of the action proposed or refused by the LEA.
2. An explanation of why the LEA proposes or refuses to take the action.
3. A description of any other options that the LEA considered and the reasons why it rejected those options.

Wis. Stats. § 115.792 (2); 34 CFR § 300.503.

Here, the District did not provide the Parent with prior written notice that it was refusing to change the Student’s placement to [Technical College], as requested by the Parent at the March 22, 2016 IEP team meeting. The Parent did not receive an explanation of why the District refused her request to change the Student’s placement. Moreover, the District did not reconvene the IEP team after March 22, 2016 in order for the IEP team to fully discuss and determine the Student’s

placement. Instead, the IEP dated April 4, 2016 stated [High School] as the Student’s placement simply as a continuation of his placement at the time. The LEA representative and the assistant principal who participated in the March 22, 2016 IEP team meeting both testified that the IEP team did not fully discuss and make a determination at that IEP meeting about what was the appropriate placement for the Student. The District violated the procedural requirements of the law by not providing the Parent with prior written notice that the IEP team was not changing the Student’s placement to [Technical College].

As with the first issue, there is no substantive and reliable evidence on the record showing that the District’s refusal to change the Student’s placement from [High School] to [Technical College] resulted in a denial of a FAPE or meaningful educational benefit to the Student. The Parent testified sincerely about her concerns with the Student attending [High School] and her belief that there is false information about the Student at [High School]. Those concerns certainly may be valid but simply are not sufficient to prove that the Student did not receive meaningful educational benefit and a FAPE at [High School] or that [Technical College] would have been the appropriate placement to implement the Student’s IEP and meet his individual educational needs. On the contrary, the credible and detailed testimony of [District Regional Manager], the District’s Regional Manager of Specialized Services with contracted schools, indicates that the [Technical College] program and placement would not provide the special education services to the Student required by his IEP. Accordingly, the Parent’s request for relief in the form of an order changing the Student’s placement to [Technical College] is denied.

All of the arguments presented by the parties were carefully considered in rendering this decision. Any arguments or evidence on the record that were not specifically mentioned were determined to not merit comment in the decision.

CONCLUSIONS OF LAW

1. The District violated procedural requirements of state and federal special education laws by not taking sufficient steps to provide the Parent with the opportunity to participate in the November 19, 2015 IEP team meeting and by failing to document attempts to ensure the Parent’s participation in that IEP meeting.
2. The District failed to provide prior written notice to the Parent of its refusal to change the Student’s placement to [Technical College] as requested by the Parent and failed to reconvene the IEP team in order for the IEP team to discuss and determine the Student’s placement in the April 4, 2016 IEP.

ORDER

It is hereby ordered that the District forthwith convenes an IEP team meeting for the purpose of determining the appropriate special education placement of the Student and complies with legal procedural safeguard requirements, including taking steps to ensure that the Parent is provided the opportunity to participate in the IEP meeting and documenting its efforts to ensure participation by the Parent.

Dated at Madison, Wisconsin on August 15, 2016.

STATE OF WISCONSIN

DIVISION OF HEARINGS AND APPEALS

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By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Sally Pederson

Administrative Law Judge

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| **NOTICE OF APPEAL RIGHTS** |
| APPEAL TO COURT: Within 45 days after the decision of the administrative law judge has been issued, either party may appeal the decision to the circuit court for the county in which the child resides under §115.80(7), Wis. Stats., or to federal district court pursuant to U.S.C. §1415 and 34 C.F.R. §300.512.  A copy of the appeal should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.  **The Division will prepare and file the record with the court only upon receipt of a copy of the appeal. It is the responsibility of the appealing party to send a copy of the appeal to the Division of Hearings and Appeals. The record will be filed with the court within 30 days of the date the Division of Hearings and Appeals receives the appeal.** |