

██████████
STUDENT

v.

BALTIMORE CITY

PUBLIC SCHOOLS

BEFORE WILLIAM F. BURNHAM,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-CITY-OT-19-16673

**RULING ON BALTIMORE CITY PUBLIC SCHOOLS' MOTION FOR SUMMARY
DECISION**

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STATEMENT OF THE CASE

On May 28, 2019, ██████████ (Parent), on the Student's behalf, filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH). In the Complaint, the Parent alleges that the Baltimore City Public Schools (BCPS) has violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2018),¹ by denying the Student a free appropriate public education (FAPE) by failing to have the Student's math teacher (██████████) present at the annual IEP² meeting. The Parent's requested remedy is that the math teacher be sanctioned, and a full apology in writing be provided.³

¹ U.S.C.A. is an abbreviation for United States Code Annotated.

² IEP means Individualized Education Program.

³ During argument, the Parent additionally requested the Student receive a tutor and transportation for the balance of the 2019 summer.

On June 12, 2019, I conducted a telephone pre-hearing conference and subsequently issued a Pre-Hearing Report and Order on June 13, 2019. On the morning of the telephone pre-hearing conference, the BCPS filed a Motion to Dismiss the Complaint (MTD), and a Motion for Summary Decision (MSD or collectively, Motions).⁴ During the pre-hearing conference, the Parent was informed that he would have until June 24, 2019 to file any response to the Motions, and I set the date for my hearing on the Motions, pending the Parent's response, if any, for June 24, 2019. The Parent timely filed a response to the MSD (Response) on June 19, 2019. The BCPS filed a reply⁵ memorandum (Reply) to the Response on June 19, 2019. The Parent filed a response to the Reply (Surreply) on June 24, 2019. I heard argument on the Motions on June 24, 2019. Because the decision in this matter is due by July 15, 2019, I heard the merits of the case following the Motions hearing. I informed the parties that my decision would be issued on motion or the merits, on or before July 15, 2019.

Gerald Loiacono, Esquire and Darnell L. Henderson, Esquire argued on behalf of the BCPS. The Parent presented argument on behalf of the Student.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 13A.05.01.15C; COMAR 28.02.01.

ISSUE

Should the MSD filed by the BCPS be granted?

⁴ Because I am ruling on the MSD, the MTD is moot and is not addressed.

⁵ The BCPS titled their reply a surreply.

EXHIBITS

The BCPS attached the following exhibits to its MSD:

- BCPS Ex. #1 Twenty-nine page Individualized Education Program (IEP), IEP Team Meeting
Date of March 7, 2019
- BCPS Ex. #2 Notice of IEP Team Meeting, January 22, 2019
- BCPS Ex. #3 Affidavit of [REDACTED] June 11, 2019
- BCPS Ex. #4 IEP Meeting Attendance Sheet, March 7, 2019
- BCPS Ex. #5 BCPS Prior Written Notice, March 7, 2019

The Parent attached his affidavit and the following exhibits⁶ to the Response:

- Student Ex. A Social Work Report, undated; Notice of IEP Meeting, January 22, 2019
- Student Ex. A1 [REDACTED] Camden Orders, printed on March 7, 2019
- Student Ex. A2 [REDACTED] verification of the Student's appointment, March 7, 2019
- Student Ex. B Three of the Student's Report Cards, numbered 2, 3, and 4 from three grading periods from November 12, 2018 to May 20, 2019; Certificate of Improvement for Third Quarter Attendance, undated
- Student Ex. C Pages from the Student's IEP
- Student Ex. D Special/General Educator Progress Report, February 13, 2019
- Student Ex. F March 2019 calendar pages with annotations
- Student Ex. G Copies of text messages between the Parent and Ms. [REDACTED] February 25, 2019 and March 13, 2019
- Student Ex. 3 BCPS Prior Written Notice, March 7, 2019
- Student Ex. 4 BCPS Notice of IEP Team Meeting

⁶ For purposes of this decision, I retained the numbers and letters as labeled by the Parent and there was no Exhibit "E."

UNDISPUTED MATERIAL FACTS

1. The Student is eleven years old and attends [REDACTED] Elementary School ([REDACTED]) in Baltimore City.
2. The Student has an IEP and his primary disability is “Other Health Impairment” that affects his math, English language academics, and social and emotional behavior skills.
3. The Student receives regular education services in math and English language with accommodations and supports identified in the Student’s IEP.
4. On January 22, 2019, the BCPS sent the Parent notice of the annual IEP meeting (Notice) at which it intended to review and, if appropriate, revise the Student’s IEP. In addition, the BCPS’s notice indicated it would consider Extended School Year services and special transportation at the meeting.
5. The Notice indicated titles of personnel that the BCPS expected to attend, including “General Education Teacher.”
6. The Notice provided that “[i]f you wish, you may invite others who have knowledge or special expertise regarding your child to attend this meeting with you. If others will attend, please indicate their names below,” and provided lines for the BCPS or the Parent to identify names of those whom they wished to attend.
7. Prior to March 7, 2019, neither the Parent nor the BCPS requested any particular person to attend via the Notice.
8. On March 7, 2019, the IEP Team meeting was attended by [REDACTED] IEP Chair/Administrative Designee, [REDACTED], the Student’s regular education English/Language Arts teacher, [REDACTED], the Student’s special educator, [REDACTED], the Student’s social worker, [REDACTED], therapist, and the Parent.

9. At the March 7, 2019 IEP meeting, the Parent asked whether Ms. [REDACTED] would attend IEP meeting.

10. At the March 7, 2019 IEP meeting, the Student's assessments and progress in math were discussed.

DISCUSSION

The identification, assessment, and placement of students in special education is governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 (2018 & Supp. 2018); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE, which “emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living” 20 U.S.C.A. § 1400(d)(1)(A).

During the telephone pre-hearing conference, the following issue was identified pursuant to the Parent's due process complaint for hearing, and was outlined in the Pre-Hearing Report and Order issued on June 13, 2019:

Whether the BCPS's failure to have Ms. [REDACTED] present at the Student's annual IEP meeting on March 7, 2019 violated the IDEA, and if so, whether the relief requested can be granted for the violation.

In its MSD, the BCPS argued the following grounds for summary decision:

1. There is no requirement under State or federal law that every one of the Student's regular⁷ educators attend each IEP team meeting convened for the Student, and;

⁷ The BCPS used “general” educator as the term to identify regular educators and education services at the BCPS. The Code of Federal Regulation refers to regular educators and general education. For simplicity sake, I will use regular educator where applicable in accordance with the Code of Federal Regulation.

2. The IEP Team was legally constituted because there was a regular educator of the Student present, along with the other required members of the IEP Team.

The BCPS cited Title 34 of the Code of Federal Regulation for its assertion that the IEP Team was legally constituted if not less than one regular education teacher of the Student was present at the annual IEP meeting. Further, according to the BCPS, which regular educator who attends an annual IEP Team meeting, was at the discretion of the school system.

In the Response, the Parent stated that Ms. [REDACTED] was a required member of the IEP Team whose presence was mandatory unless the Parent consented in writing that she could be excused, and the Parent provided no such written consent. According to the Response, Ms. [REDACTED] has a personal agenda against the Student due to the Parent's filing of a complaint related to the Student's preclusion from a field trip in December 2018.

The Parent cited the Special Education Rights a Handbook for Maryland Families and Professionals⁸ and the Title 34 of the Code of Federal Regulation for his proposition that the Parent and the BCPS must agree that IEP members may be excused from attending the IEP meeting. Additionally, according to the Parent, the IEP Team member may be excused if their area of knowledge will not be discussed or the IEP will not be modified in that area. Because the Student was failing math, the Parent believes that the area of math must be discussed with the regular education math teacher, Ms. [REDACTED]. The Parent believes the BCPS has "lost insight" of Title 34 of the Code of Federal Regulations, and, absent its ability to produce a written copy of the agreed upon consent to excuse Ms. [REDACTED] relief should be granted as a matter of law.

⁸ A copy of the Special Education Rights a Handbook for Maryland Families and Professionals was not provided as an exhibit to the MSD, the Response, the Reply or the Surreply.

Standards for Motion for Summary Decision

The OAH's Rules of Procedure provide for consideration of a motion for summary decision under COMAR 28.02.01.12D. That regulation provides as follows:

D. Motion for Summary Decision.

(1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavit.

(2) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit.

(3) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

In deciding a motion for summary decision, an ALJ may consider the complaint, admissions, exhibits, affidavits, and sworn testimony for the purpose of determining whether a hearing on the merits is necessary. *See Davis v. DiPino*, 337 Md. 642, 648-50 (1995).

In considering a motion for summary decision, the ALJ does not decide any disputed issue of fact or assess credibility but only determines whether such issues exist. *See Eng's Mgmt. Servs., Inc. v. Maryland State Highway Admin.*, 375 Md. 211, 226 (2003). "The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried." *See Jones v. Mid-Atl. Funding Co.*, 362 Md. 661, 675 (2001); *Coffey v. Derby Steel Co. Inc.*, 291 Md. 241, 247 (1981); *Berkey v. Delia*, 287 Md. 302, 304 (1980). All disputes of facts and all inferences that can be drawn from the evidence and pleadings must be resolved in favor of the nonmoving party. *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 489 (1995).

As the moving party, the BCPS bears the burden to demonstrate both the absence of genuine disputes of fact and that it is entitled to judgment as a matter of law. *See Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); *Comm’r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996).

Analysis

There is no dispute that Ms. ██████ did not appear at the yearly IEP Team meeting on March 7, 2019. The question raised in the MSD, and argued at the hearing on the MSD, is whether the IEP Team was legally constituted absent Ms. ██████ presence. Each party relied on and cited Title 34 of the Code of Federal Regulations, which provides:

(a) General. The public agency must ensure that the IEP Team for each child with a disability includes—

- (1) The parents of the child;
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who—
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (ii) Is knowledgeable about the general education curriculum; and
 - (iii) Is knowledgeable about the availability of resources of the public agency.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (7) Whenever appropriate, the child with a disability.

(b) Transition services participants.

(1) In accordance with paragraph (a)(7) of this section, the public agency must invite a child with a disability to attend the child’s IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals under § 300.320(b).

(2) If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered.

(3) To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

(c) Determination of knowledge and special expertise. The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section must be made by the party (parents or public agency) who invited the individual to be a member of the IEP Team.

(d) Designating a public agency representative. A public agency may designate a public agency member of the IEP Team to also serve as the agency representative, if the criteria in paragraph (a)(4) of this section are satisfied.

(e) IEP Team attendance.

(1) A member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(2) A member of the IEP Team described in paragraph (e)(1) of this section may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(i) The parent, in writing, and the public agency consent to the excusal; and

(ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(f) Initial IEP Team meeting for child under Part C. In the case of a child who was previously served under Part C of the Act, an invitation to the initial IEP Team meeting must, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services.

34 C.F.R. 300.321; *see also* Code of Maryland Regulations (COMAR) 13A.05.01.07 (Emphasis added). The Parent interprets subsection (e)(1) to mean that all IEP Team member teachers must be present in the IEP meeting unless they are excused in writing by agreement of the BCPS and the Parent. Subsection (e)(1) refers to subsection (a)(2) which provides that “[t]he public agency must ensure that the IEP Team for each child with a disability includes...[n]ot less than one

regular education teacher of the child (if the child is, or may be, participating in the regular education environment).” 34 C.F.R. 300.321(a)(2). That means if the Student received regular education classes, there can be no less than one regular education teacher at the IEP meeting. There is no dispute that the Student receives regular education services in math and English language with the accommodations and supports provided in his IEP.

There is no dispute that the BCPS notified the Parent that the IEP annual meeting would take place on March 7, 2019, and the Parent attended the meeting. Also in attendance were [REDACTED] IEP Chair/Administrative Designee, [REDACTED] the Student’s regular education English/ Language Arts teacher, [REDACTED] the Student’s special educator, [REDACTED] the Student’s social worker, and [REDACTED] therapist.

Therefore, the Parent attended the IEP annual meeting, as did one regular education teacher, and one special education teacher. *See* 34 C.F.R. 300.321(a)(1)-(3); *and see* COMAR 13A.05.01.07A(1)(a)-(c). Additionally, there was no dispute that Ms. [REDACTED] was the representative of BCPS responsible for ensuring case management of IEPs at [REDACTED] and chaired IEP meetings, like the March 7, 2019 at issue, at [REDACTED] *See id.* at (a)(4); and .07A(d). Neither party argued that there was no one present who could interpret the instructional implications of evaluation results, nor that the Student should have been present, but was not. *See id.* at (a)(5), (7); and .07A(e), (g). I find, according to the Code of Federal Regulation and the COMAR, that there must be at least one regular educator present at an IEP Team meeting, and there is no dispute that there was one regular educator present on March 7, 2019. That one regular educator was not required to attend if the Parent and the BCPS had agreed, in writing, that the attendance was not necessary. *See* 34 C.F.R. 300.321(e); COMAR 13A.05.01.07C.

There is no contention that a regular educator was not present on March 7, 2019, only that a second regular educator, Ms. ██████ should have been present.⁹

At the discretion of the parent or the agency, other individuals with knowledge or special expertise regarding the Student could have been present. *See* 34 C.F.R. 300.321(a)(6); and COMAR 13A.05.01.07A(f). The Parent argued that he specifically asked for Ms. ██████ presence at the start of the IEP Team meeting on March 7, 2019. Notice of the meeting was provided on or about January 22, 2019. The Notice provided that “[i]f you wish, you may invite others who have knowledge or special expertise regarding your child to attend this meeting with you. If others will attend, please indicate their names below.” The exhibits representing copies of the January 22, 2019 notice attached to the MSD and the Response do not show any names in the space provided, and according to the parties, there was no request for Ms. ██████ presence until May 7, 2019 during the IEP annual meeting. It is undisputed that the Parent did not ask for the presence of Ms. ██████ before March 7, 2019.¹⁰

In any event, it is also undisputed that math was part of the discussion of the Student’s IEP Team meeting on March 7, 2019. In Exhibit 5, attached to the BCPS’s MSD, the BCPS indicates that the Parent was frustrated with the math curriculum, and in the Response, the Parent denied he was frustrated with the curriculum and indicated that he was upset that his son was failing math. Therefore, it is undisputed that the Student’s assessments and progress in math was discussed at the IEP Team meeting, as outlined in the Present Level Of Academic Achievement

⁹ The Parent acknowledged that he did not ask for Ms. ██████ presence until he came to the IEP Team meeting on March 7, 2019. Therefore, even if the Parent wanted to exercise his discretion to invite other individuals with knowledge or special expertise regarding the Student to be present, he did not do so before March 7, 2019. *See* 34 C.F.R. 300.321(a)(6); and COMAR 13A.05.01.07A(f).

¹⁰ It is not reasonable to expect that a teacher, even if present at the school, can drop what she is doing and attend a meeting for which she is not scheduled. Ms. ██████ could have been teaching at the time of the annual IEP Team meeting, planning lessons, or not present at the school at all.

And Functional Performance section of the Student's IEP.¹¹ The Parent did not dispute that math was discussed, but the Parent was not satisfied that the math teacher did not attend the annual IEP Team meeting to discuss the Student's assessment and progress in math.

Because there is no dispute of material fact that a regular educator appeared for the IEP Team meeting, and the regulations provide that not less than one must appear, the IEP Team was legally constituted in accordance with the Regulations, the Student's assessments and progress in math were discussed, and summary decision is appropriate. The BCPS's MSD is granted.

The Parent argued at the Motions hearing for monetary damages for the alleged conduct by the BCPS. The Parent requested that the BCPS pay for a tutor and transportation services for the remainder of the summer. The Student's Complaint sought a sanction for Ms. [REDACTED] and that he receive a written apology. I do not address whether either remedy is available, because I have found there is no genuine dispute to any material fact, and that the Parent has not demonstrated a denial of a FAPE to the Student, so the BCPS is entitled to judgment as a matter of law, and therefore any relief is unwarranted.

CONCLUSION OF LAW

The BCPS' Motion for Summary Decision is granted because there are no genuine disputes of material fact that the Student was not denied a FAPE by the BCPS due to Ms. [REDACTED] lack of attendance at the IEP Team meeting on March 7, 2019. COMAR 28.02.01.12D; 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401 through 8-417; COMAR 13A.05.01.

¹¹ The Parent omitted that section from the exhibits attached to the Response, but attached other pages from the Student's twenty-seven page IEP.

ORDER

I **ORDER** that the Motion for Summary Decision filed by the Baltimore City Public Schools is **GRANTED**.

I further **ORDER** the Parent's due process complaint in OAH Case Number MSDE-CITY-OT-19-016673 is **DISMISSED**, and no further proceedings in this matter will be held.

July 8, 2019
Date Ruling Issued

William F. Burnham
Administrative Law Judge

WFB/sw

#180855

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2018). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.

Copies Mailed To:

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