

DC Office of the State Superintendent of Education
Office of Compliance & Review

State Enforcement & Investigation Division
STUDENT HEARING OFFICE

Van Ness Elementary School
1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003
Phone: (202) 698-3819
Facsimile: (202) 442-5556

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

CONFIDENTIAL

In Re the Matter of:

Parent on behalf of Student *

Petitioner,

vs.

The District of Columbia Public Schools

Respondent.

*
*
*
*
*
*
*
*
*
*
*
*

CASE NO.

Complaint Date: 03/26/09
Hearing Dates: 04/29/09, 05/14/09

Hearing Site:
Van Ness Elementary School
1150 5th Street, S.E., 1st Floor
Washington, D.C. 20003

HEARING OFFICER DETERMINATION

Petitioner's Attorney:

Zachary Nahass, Esq.
James E. Brown & Associates, PLLC
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Respondent's Attorney:

Tanya Chor, Esq.
Assistant Attorney General
Office of the Attorney General as Counsel
for D.C. Public Schools
825 North Capitol Street, N.E., 9th Floor
Washington, D.C. 20002

*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

2009 MAY 18 AM 9:42

OSSE
STUDENT HEARING OFFICE

Hearing Officer Determination & Order

JURISDICTION

The due process hearing was convened and this Hearing Officer Determination (“HOD”) and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation (“C.F.R.”) Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations (D.C.M.R.).

INTRODUCTION

On March 26, 2009, a Due Process Complaint Notice (“Complaint”) was filed by the parent (“Parent” or “Petitioner”) on behalf of the year old student (“Student”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a Free Appropriate Public Education (“FAPE”) in violation of IDEIA when DCPS failed to implement Student’s Individualized Education Program (“IEP”) and when DCPS failed to provide Student with an appropriate placement, with each failure resulting in the denial of a FAPE. Petitioner alleges entitlement to compensatory education for the denials of a FAPE.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

THE DUE PROCESS HEARING

The due process hearing convened on April 29, 2009. DCPS requested a continuance, when at the end of the day DCPS’ witness became unavailable by telephone despite the witness having confirmed availability with DCPS’ Attorney the preceding day by email. April 29, 2009 was a District of Columbia school wide testing day, and DCPS’ attorney speculated that the unavailability of DCPS’ witnesses was due to a conflict with the school testing schedule. The case was continued to May 14, 2009 over the objection of Petitioner. The case resumed on May 14, 2009 with the presentation of DCPS’ heretofore unavailable witness, and the hearing concluded on that same day.

Petitioner was represented by Zachary Nahass, Esq. (“Petitioner’s Attorney”) and DCPS was represented by Tanya Chor, Esq. (“DCPS’ Attorney”). Petitioner was present on both due process hearing dates.

DCPS’ Attorney was not amenable to settlement discussions with Petitioner’s Attorney.

Disclosures:

Petitioner’s Five-Day Disclosure letter dated 04/22/09, contained Exhibits #1-21. DCPS objected to the admission of all evaluations, i.e., Petitioner’s Exhibits #4-13, on the basis that there were no witnesses available to testify regarding the contents and interpretation of the evaluations. Petitioner’s Exhibits #1-3 and #14-21 were admitted

Hearing Officer Determination & Order

into evidence without objection. Petitioner's Exhibits #4-13 were admitted into evidence over objection. Parties agreed that Petitioner's Exhibit #7 was dated 02/05/09, and that Petitioner's Exhibit #21 was dated 02/04/09.

DCPS' Disclosure Statement dated 04/22/09, containing Exhibits #1-20, was admitted into evidence without objection. Parties agreed that DCPS' Exhibit #11 was part of the 02/04/09 meeting.

Witnesses:

Witnesses for Petitioner included: (1) Petitioner, (2) Shelly Nichols, educational advocate, and (3) Admissions Director at School, Washington DC (via telephone).

Witnesses for DCPS included: (1) special education coordinator ("SEC") at School (via telephone).

Relief requested:

Petitioner requested the following relief: (1) a finding of a denial of a FAPE on Issues #1 and #2, (2) DCPS to place and fund Student at a full-time therapeutic school of Petitioner's choice, with transportation; and (3) within 30 days of Student's placement at a full-time therapeutic school, DCPS to convene a Multidisciplinary Team ("MDT") meeting to review current evaluations, review and revise the IEP as appropriate, and discuss and determine appropriate compensatory education for the denials of a FAPE.

Stipulation #1 – At the 02/04/09 MDT meeting, the MDT agreed that Student required an alternate full time setting.

Stipulation #2 – An eligibility determination was made on 03/28/06, and an IEP existed on that date.

Stipulation #3 – Student has been accepted at School, a full time special education school.

Stipulation #4 – DCPS' Exhibit #4 and Petitioner's Exhibit #7, a Functional Behavior Assessment, is dated 02/05/09.

Stipulation #5 – Petitioner's Exhibit #21, Site Review Consideration Form, is dated 02/04/09.

Stipulation #6 – DCPS' Exhibit #11, Compensatory Education Plan, is dated 02/04/09.

Hearing Officer Determination & Order

FINDINGS OF FACT

#1. Student's IEP dated 02/20/08, developed while Student attended Center, classified Student as Emotionally Disturbed ("ED") and prescribed 24.5 hours/week of specialized instruction, 1.5 hours/week of psychological services, 1.0 hours/week of speech/language services, and .5 hours/week of occupational therapy. (*Petitioner's Exhibit #10, IEP dated 02/20/08; Petitioner's Exhibit #12, MDT Meeting Notes dated 06/20/08*). Student's educational program at Center consisted of an out of general education class setting; a combination/general education setting had been rejected by the MDT. (*Petitioner's Exhibit #10, IEP dated 02/20/08*).

#2. While attending Hamilton Center during the 2007-2008 school year, Student made progress in academic and occupational therapy goals, but failed to master any social emotional goals. (*DCPS' Exhibit #17, IEP Notes dated 02/20/08*). Student's failure to master social emotional goals at Center did not warrant a determination of a lesser restrictive setting such as the self contained ED cluster program at *(Testimony of SEC at*

#3. On 06/20/08, the MDT at Center determined that Student's educational needs could be met in a lesser restrictive, self-contained classroom environment for the 2008-2009 school year. This change of setting was not reflected in an updated IEP. DCPS issued a Prior Notice of Placement to to an out of general education and resource classroom setting, i.e., a combination setting. (*DCPS' Exhibit #14 and Petitioner's Exhibit #12, MDT notes dated 06/20/08*).

#4. Student attended during the 2008-2009 school year. During the 1st advisory, Student received all failing grades (*DCPS' Exhibit #13, MDT Notes dated 11/03/08; Petitioner's Exhibit #14, Report to Parents on Student Progress dated 10/24/08*), the school telephoned Petitioner many times to assist with controlling Student's behaviors of roaming the halls, disrespecting staff and not following directions (*Testimony of Petitioner; Testimony of SEC at* and student was involved in school infractions (*DCPS' Exhibit #13, MDT Notes dated 11/03/08*) and suspensions (*Testimony of Petitioner*). was and is an inappropriate placement for Student. (*Testimony of SEC at*

#5. Student's 02/04/09 IEP prescribes 1470 minutes/week of specialized instruction, 90 minutes/week of behavioral support services, and 60 minutes/week of speech-language pathology services, all to be provided in an out of general education setting. (*DCPS' Exhibit #9, IEP dated (02/04/09)*).

#6. On 02/04/09, the MDT at determined that Student required a more restrictive educational setting, and changed Student's setting from combination to out of general education (*DCPS' Exhibit #15, Site Review Consideration Form dated 02/04/09*). The MDT determined that placement in a more restrictive setting was

Hearing Officer Determination & Order

warranted and that Student required a full time placement in a special education school. (DCPS' Exhibit #5, Placement Review Summary Document dated 02/12/09).

#7. A few days after the 02/04/09 IEP meeting, an educational placement packet was sent by the SEC at _____ to the cluster supervision for dissemination to prospective educational placements for Student. As of 05/14/09, the SEC at _____ did not know whether or not any efforts had been made by DCPS to secure a full time special education school for Student. (Testimony of, _____ SEC at _____)

#8. Student has been accepted for admission to High Road School, Washington DC, a full time special education school for ED students (Stipulation #3). School employs certified special education teachers, clinical licensed social workers and a reading specialist. The school also offers occupational therapy and speech/language therapy services. _____ School can meet Student's educational needs per Student's IEP. (Testimony of _____ School Admission Director).

DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof shall be the responsibility of the party seeking relief. Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. 3030.3. "The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast*, 44 IDELR 150 (2005).

"Free appropriate public education or FAPE means special education and related services that (1) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324." 34 C.F.R. 300.17.

Issue #1 - Whether DCPS failed to implement Student's IEP, thereby denying Student a FAPE?

Petitioner specifically alleges that (a) DCPS failed to implement Student's IEP while Student attended _____ Center during the 2007-2008 school year by failing to provide all services prescribed in the IEP(s); and (b) DCPS failed to implement Student's 06/20/08 IEP and 02/04/09 IEP while Student attended _____ during the 2008-2009 school year by failing to provide all of the services prescribed in those IEPs.

Included in the record was a 02/20/08 IEP that prescribed 24.5 hours/week of specialized instruction, 1.5 hours/week of psychological services, 1.0 hour/week of

Hearing Officer Determination & Order

speech/language services, and .5 hours/week of occupational therapy services. Petitioner did not present any documentary evidence that the services prescribed in the 02/20/08 had not been provided to Student at Center from 02/20/08 until the end of the 2007-2008 school year. The only testimony regarding missed services came from Petitioner who stated that Student was not being provided with a reading specialist while at Center. Student's 02/20/08 IEP does not specifically provide for the services of a reading specialist, and there was no other IEP in the record that pre-dated the 02/20/08 IEP. Thus, Petitioner failed to meet its burden that DCPS failed to provide all services prescribed in Student's IEP for the 2007-2008 school year while Student attended Center.

The record did not contain a 06/20/08 IEP. The record showed that the 02/20/08 remained in effect from 02/20/08 until a new IEP was developed on 02/04/09. (*See DCPS' Exhibit #9*). Petitioner did not present any evidence that the services stated in Student's 02/20/08 IEP were not implemented at from the beginning of the 2008-2009 school year until 02/04/09 when a new IEP was developed. Included in the record were service tracker forms for speech/language services for the months of January and February 2009 (DCPS' Exhibit #7). The evidence contained in these documents was insufficient for the Hearing Officer to conclude that Student had been denied a FAPE due to one missed speech/language session due to the unavailability of the service provider. A failure to implement the IEP is a denial of FAPE only if it is a material failure (*Van Duyn v. Baker School District*, 502 F.3d 811 (United States Court of Appeals, 9th Circuit (2007))). The Hearing Officer concludes that one missed speech/language therapy session does not constitute a material failure to implement the IEP. Thus, Petitioner failed to meet its burden of proof that DCPS failed to implement Student's 02/20/08 IEP with a resulting denial of a FAPE while Student attended

Student's 02/04/09 IEP prescribed 1470 minutes/week of specialized instruction, 90 minutes/week of behavioral support services, and 60 minutes/week of speech language pathology services. (*Finding of Fact #5*). The only pertinent evidence presented regarding DCPS' failure to provide special education services from 02/04/09 forward was the service tracker form for speech language services for the month of February 2009, and this form indicated that only one speech language session was not provided due to the unavailability of the service provider. Petitioner offered no evidence that one missed speech/language session harmed the student or caused the loss of an educational benefit that resulted in the denial of a FAPE. Petitioner failed to meet its burden of proof that DCPS failed to implement the services in Student's 02/04/09 IEP with a resulting denial of a FAPE.

Petitioner failed to meet its burden of proof on Issue #1 in its entirety.

Issue #2 - Whether DCPS failed to provide Student with an appropriate placement, thereby denying Student a FAPE?

Hearing Officer Determination & Order

Petitioner specifically alleges that neither [redacted] Center or [redacted] Center have been appropriate placements in that (a) at [redacted] Center during the 2007-2008 school year, Student did not receive any educational benefit; and (b) at [redacted] Center during the 2008-2009 school year, Student regressed in reading abilities and displayed behaviors such as roaming the hallways, leaving the school, non-compliance with school rules, immature talking, noncompliance, depression, hyperactivity and lack of motivation; and (c) at a MDT meeting on 02/03/09, the MDT agreed that [redacted] was not an appropriate school for Student, but DCPS did not offer an alternative placement.

The evidence in the record showed that while Student attended [redacted] Center, Student made progress in academic areas but not in mastering social emotional goals. (*Finding of Fact #2*). A school has met its obligation to provide a FAPE if the IEP provides services that allows the student to receive some meaningful educational benefit. (*Kerkam v. McKenzie, 441 IDELR 311, 862 F.2d 884 (United States Court of Appeals, District of Columbia (1988))*). Since Student made some educational improvement or progress while attending [redacted] Center, Student was not denied a FAPE at [redacted] Center during the 2007-2008 school year.

However, the evidence in the record was clear that Student's placement at [redacted] was inappropriate. The decision of the MDT on 06/20/08 that Student required the lesser restrictive environment of a combination setting was clearly in error and not supported by the then current guiding document, the 02/20/08 IEP, that expressly rejected a combination setting. (*Finding of Fact #1, #3*). Moreover, after Student faltered badly at [redacted] by failing classes, chronically misbehaving, and experiencing school infractions and suspensions (*Finding of Fact #4*), the MDT finally acknowledged on 02/04/09 that [redacted] was an inappropriate placement and that Student's academic needs could only be met in the more restrictive setting of a full time special education school. (*Finding of Fact #6*). The evidence supports the statement of the SEC at [redacted] that [redacted] was and is an inappropriate placement for Student. (*Finding of Fact #4*). The Hearing Officer concludes as a matter of law that [redacted] was an inappropriate placement for Student for the entire 2008-2009 school year. Student was denied a FAPE in that the placement at [redacted] was inappropriate and not provided in conformity with Student's IEP. *See 34 C.F.R. 300.17.*

Petitioner seeks placement of Student at [redacted] Washington DC, a private full time special education school for ED students; a school where Student has been accepted and where Student's IEP needs can be met. (*Finding of Fact #8*). The record was devoid of evidence that DCPS made any meaningful effort since 02/04/09 to find an appropriate school placement for Student. (*Finding of Fact #7*). Three months have elapsed since Student's 02/04/09 IEP made it clear that [redacted] was an inappropriate placement and that Student required a full time special education school placement. In spite of knowledge of the pending litigation and in spite of ample opportunity to find a public placement for Student, DCPS did not proffer one possible placement for Student, public or otherwise.

Hearing Officer Determination & Order

Petitioner met its burden of proof on Issue #2 with respect to Student being denied a FAPE during the 2008-2009 school year while Student attended

Issue #3 - Whether Student is entitled to compensatory education for DCPS' failure to implement Student's IEP and to provide an appropriate placement.

Petitioner specifically alleges that DCPS failed to implement Student's IEPs and failed to provide an appropriate placement since the beginning of the 2007-2008 school year and therefore Student is entitled to compensatory education.

The Hearing Officer did conclude in Issue #2 that Student was denied a FAPE due to inappropriate placement at _____ from the beginning of the 2008-2009 school year until the date of this HOD. However, Petitioner's request for relief is that the MDT be ordered to determine compensatory education.

The qualitative standard for determining compensatory education is that "compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia*, 43 IDELR 32 (2005). The Hearing Officer cannot determine on these facts that Student is entitled to an award of compensatory education because Petitioner did not present any evidence regarding Student's specific educational deficits resulting from the loss of FAPE and the specific compensatory measures needed to best correct the deficits. On this record, compensatory education entitlement cannot be determined and an award of compensatory education cannot be granted.

Therefore, Petitioner failed to meet its burden of proof that Student is entitled to an award of compensatory education for the denial of a FAPE while Student was placed at MacFarland MS during the 2008-2009 school year.

ORDER

WHEREFORE, Student having been denied a FAPE, it is

ORDERED, that

(1) DCPS issue a Notice of Placement to _____ School, Washington DC within ten (10) business days of the date of this Order, thereby providing Student with funding and transportation, and

(2) Within 30 days of Student's placement at _____ School, Washington DC, DCPS shall convene a MDT to review current evaluations, review and revise the IEP as appropriate, and further assess Student's current educational needs.

IT IS SO ORDERED.

Hearing Officer Determination & Order

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

Virginia A. Dietrich /s/

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

05/16/09

Date

Issued: May 16, 2009