Owens, Tawanda (OSSE)

From: McKeever, James (OSSE-Contractor)
Sent: Friday, November 23, 2012 10:08 AM
To: dc.disabilitylawgroup@gmail.com; Douds, Justin (DCPS); Due, Process (OCTO); HearingOffice, Student (OSSE); Merced, Deusdedi (OSSE-Contractor)
Subject: Robertson, D. 2012-0599
Attachments: HOD-Robertson, D. 2012-0599.doc

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STUDENT HEARING OFFICE
2012 NOV 23 PM 12: 06

Dear Counsel:

Attached, please find the HOD for the above referenced matter.

Thank you.

James McKeever

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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

Parent, on behalf of Student[1],	)
	) **Case Number: 2012-0599**
Petitioner,	)
	) **Hearing Officer: James McKeever**
v.	)
	) **Hearing Room 2009**
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)
	) **Hearing Date: November 13, 2012**
Respondent.	)

2012 NOV 23 PM 12: 06
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. Introduction and Procedural Background

This is a due process proceeding brought in accordance with the Individuals with Disability Education Act 2004 ("IDEA"), and its implementing regulations codified at 20 U.S.C. Section 1400 et seq., against Respondent, District of Columbia Public Schools (DCPS).

Petitioner is the Parent of the Student, a fifteen year-old special education student who attends a non-public school (NPS), in the District of Columbia (Due Process Complaint-DPC). The Student is eligible for special education and related services as a student with a disability under the IDEA.

On August 30, 2012, Petitioner filed a DPC against DCPS alleging that the DCPS denied the Student a free and appropriate public education (FAPE) by changing the Student's location of services to a different NPS for the 2012-2013 school year (DPC).

On September 7, 2012, DCPS filed a Response to the DPC and asserted that DCPS offered Student a FAPE because the new location of services can implement the Student's Individualized Education Plan (IEP) (DCPS' Response).

[1] Case information listed at Appendix "A."

A resolution session was held on September 11, 2012. The parties were unable to resolve the complaint, but continued the resolution period to September 29, 2012. The 45-day timeline began on September 30, 2012.

The Prehearing Conference (PHC) was held on October 11, 2012. Counsel for Petitioner, and counsel for DCPS participated. During the PHC, the parties discussed and clarified the issues and the requested relief. It was agreed that the Due Process Hearing (DPH) would be held on November 13, 2012 and that the five-day disclosures would be filed by November 5, 2012.

During the PHC counsel for DCPS requested a ten-day continuance due to his unavailability for the due process hearing. Petitioner's counsel consented to the request and the request was granted by Order dated October 23, 2012. As such, the HOD due date was extended from November 13, 2012 to November 23, 2012.

The Five-day disclosures were filed as directed on November 5, 2012 and the DPH was held on November 13, 2012. Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-20 were admitted into evidence. DCPS Exhibits 1-6 were admitted into evidence.[2]

The following witnesses testified on behalf of the Petitioner: Parent, Student, Expert in Special Education Programming, Head of Non Public School and School Psychologist at NPS.

The following witnesses testified on behalf of the DCPS: Compliance Case Manager and Admissions Director from NPS.

II JURISDICTION

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEIA"), and its implementing regulations at 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. This decision constitutes the Hearing Officer's Determination (HOD) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513. The HOD is due by November 23, 2012.

III. ISSUES PRESENTED

[2] A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

The following issues were certified for adjudication at the due process hearing:

1. Whether DCPS denied the Student a free and appropriate public education by failing to comply with an HOD dated April 4, 2012 that required the IEP team to remove the justification for the Student's transition to the general education setting on the Student's IEP dated December 2011 and to revise the Student's IEP to include accurate present levels of performance, goals and accommodations.

2. Whether DCPS denied the Student a free and appropriate public education when the DCPS changed the Student's placement his current NPS School to a different NPS at the IEP meetings held in July and August 2012 because High Road does not offer French, which is a class that the Student needs to graduate, and because High Road is too large of a school and is connected to a school that services ED students. The Petitioner also claims that DCPS' decision to move the Student to High was not based on the Student's needs but on a bias that DCPS has against the Monroe School.

3. Whether DCPS denied the Student a free and appropriate public education by predetermining the Student's placement without any input from the Student's parent at the IEP meetings in July and August 2012.

4. Whether DCPS denied the Student a free and appropriate public education by issuing an inappropriate and insufficient Prior Written Notice, dated July 24, 2012, that failed to include any information with respect to the reason the IEP team decided to move the Student from the Monroe School to High Road.

Petitioner requests an Order directing DCPS to continue placement at the Monroe School and for reimbursement for transportation and tuition expenses incurred during the 2012-2013 school year.

IV. FINDINGS OF FACT

The Student is a [redacted] special education student who attends a NPS in the District of Columbia (Testimony of Parent).

The Student is eligible for special education and related services under the IDEA as a child classified with a "Specific Learning Disability" (SLD) (Exhibit P-9-IEP dated 12/2/12).

The Student's Individualized Education Plan (IEP) dated December 2, 2011 provided for 26.5 hours of specialized instruction outside the general

education setting with 60 minutes per week of behavioral supports outside the general education setting (Exhibit P-9). The Student is functioning at the Sixth grade level in math and at a third grade level is reading and writing (Exhibit P-9, testimony of Head of School).

By HOD dated December 20, 2012, it was determined that the Student required a small class setting in a full-time special education program with individualized attention. (Exhibit P-10). Pursuant to that HOD, the Student was placed at his current NPS for the remainder of the 2010-2011 school year (Exhibit P-10).

At an IEP meeting in December 2011, DCPS attempted to change the Student placement/location of services (LOS) from the NPS to a "Contract Program at a City High School (CHS). Thereafter, on January 23, 2012, Petitioner filed a DPC alleging that DCPS denied the Student a FAPE by changing the Student's placement/LOS from the NPS to the (CHS) (Exhibit 11).

By HOD dated April 4, 2012, the HO found that the Student "did well" and "made good academic progress" at his current NPS (Exhibit P-11 page 4). The HO also found that based on the Woodcock-Johnson III (WJ-III), the Student "had made a year's progress in most areas, since enrolling in the [NPS] in January 2011" (Exhibit P-11, page 5). The HO ordered DCPS to continue to fund the Student's placement at the NPS for the remainder of the 2011-2012 school year, with transportation, and that "prior to the end of the 2011-2012 school year, DCPS was directed to convene an IEP team to revise and update the Student's IEP pursuant to 34 CFR section 300.324(b), as necessary . The HO also directed DCPS to "then match the Student with a school capable of fulfilling the Student needs as my be establish in the revised IEP (Exhibit P-11, page 14).

DCPS held convened a meeting on July 17, 2012, but did not revise the Student's IEP. During the meeting, the Student's teachers from NPS indicated that the Student was doing well and that the academic and social/emotional goals on the Student's IEP, dated December 2, 2012, were appropriate and that the "present" level of academics on the Student's IEP remained appropriate (Exhibit R-3).

During the meeting DCPS stated that they were concerned that not all of the Student's teachers at his NPS were certified in special education (Testimony of Compliance Case Manager). The NPS indicated that the "paperwork" for their teacher certifications was submitted to the Office of State Superintendent for Education (OSSE) and that the school was waiting for OSSE to issue the certifications (Testimony of Head of School). At the end of this meeting, DCPS indicated that another NPS would be the Student's

LOS for the 2012-2013 school year (Testimony of Compliance Case Manger Exhibit R-3). Nevertheless, the team agreed to reconvene prior to the beginning of the 201202-2013 school year to discuss the "certification[s] issue" (Exhibit R-3).

On July 24, 2012, DPCS issued Prior Written Notice (PWN) for another NPS as the LOS for Student for the 2012-2013 school year (Exhibit P-6). The PWN indicated that the Student was making progress at his current NPS and that he "should remain" at his current NPS and that the "Team agreed that the special education certification issue will be discussed prior to the beginning of the 2012-2013 school year to determine if the Student's [current NPS] would be an appropriate option." (Exhibit P-6, page2)

On August 24, 2012, DCPS convened a second MDT meeting. The DCPS Special Education Coordinator (SEC), the Student' attorney and the Head of School at the Student's current NPS were present (Exhibit R-4). DCPS continued to recommend the NPS identified in the PWN. The teacher certifications at the Student's current NPS were not provided to DCPS, but were provided to OSSE (R-4).

The Student is at risk for behavioral problems when provoked by other Student's and when he is in a large school environment (Testimony of Expert in Special Education Programming). The Student had a history of being bullied when he was placed at a DCPS school (Testimony of Student). The Student does not want to be removed from this current NPS and the Student is presently "acting out" at school because he is afraid that DCPS will be transfer to him to another school (Testimony of Student and School Psychologist).

The Student does not do well with transitions. When the Student was placed at his current NPS, it tool him several months to trust his teachers and become acclimated to his program. If the Student were moved to another school, he will regress academically and behaviorally (Testimony of School Psychologist). The Student requires a small school with few distractions and small class sizes with a high teacher to student ratio as well as opportunities for 1:1 instruction (Testimony of Special Education Programming Expert).

The Student is doing very well at his current NPS and he has made progress with academic and social emotion goals (Testimony of Head of School, Parent and School Psychologist). The Student has also developed a bond with his behavior specialist at the NPS, whom he sees three times per week (Testimony of Student, Parent).

The Student's current NPS has twenty-three students and class sizes range from 5-6 students with one teacher. The NPS is on an eleven-month school calendar. The Student has taken French as his foreign language requirement toward graduation. The NPS has a Certificate of Approval (COA) by OSSE.

DCPS did not provide the Student with transportation to his current NPS during the pendency of this matter. During the PHC, DCPS counsel advised that transportation would be put in place promptly and then confirmed to this HO shortly thereafter, via email, that transportation was in place. At the impartial hearing, the Parent testified that transportation was not put in place and that the Parent was compelled to spend 4 dollars a day in order to transport the Student to school (Testimony of Parent).

The NPS identified by DCPS is presently on probation with respect to its COA by OSSE and cannot accept any DCPS students. This NPS does not offer French and is on 10-month program. However, the NPS does offer Extended School Year services (ESY) (Testimony of Admission Director at NPS). The NPS has approximately 65 students and class sizes range from 10 to 12 students with one teacher and an assistant teacher. If the Student were to attend this school he would have to take Spanish and he would not get credit for taking French at his current NPS because this NPS does not offer French (Testimony of Admission Director at NPS).

The DCPS Compliance Case Manager, who was present at the July 17, 2012 IEP, testified that she is not a member of the IEP team (Testimony of Compliance Case-Manger). The DCPS representative who was present at the impartial hearing the DCPS SEC at the August 24, 2012 IEP meeting was did not testify on behalf of DCPS.

V. BURDEN OF PROOF

The burden of proof in a special education due process hearing lies with the party seeking relief. DCMR 5-3030.3; see, Schaffer v. Weast, 546 U.S. 49 (2005).

VI. ANALYSIS AND CONCLUSIONS OF LAW

A free appropriate and public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). Under Rowley, a

child is deprived of a free and appropriate public education: (a) If the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or (b) if the IEP is not reasonably calculated to enable a child to receive educational benefits.

Under the IDEA, the federal government provides funding to states and local educational agencies, including those of the District of Columbia, see 20 U.S.C. § 1401(31), for the education of disabled children. As a condition of receiving that funding, an educational agency must maintain policies and procedures ensuring that a "free appropriate public education is available to all children with disabilities residing in the [jurisdiction] between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "central component of a disabled student's special education under the IDEA" is the individualized education program ("IEP"), which is a written statement setting out the student's "individually tailored goals and the means of achieving them." *District of Columbia v. Doe,* 611 F.3d 888, 892 n.5 (D.C. Cir. 2010) (citing 20 U.S.C. § 1414(d)).

The first issue is whether DCPS denied the Student a free and appropriate public education by failing to comply with an HOD dated April 4, 2012 that required the IEP team to remove the justification for the Student's transition to the general education setting on the Student's IEP dated December 2011 and to revise the Student's IEP to include accurate present levels of performance, goals and accommodations.

As indicated above, the HOD dated April 4, 2012 directed DCPS to continue to fund the Student's placement at the NPS for the remainder of the 2011-2012 school year, with transportation, and that "prior to the end of the 2011-2012 school year, DCPS was directed to convene an IEP team to revise and update the Student's IEP pursuant to 34 CFR section 300.324(b), as necessary (Exhibit P-11, page 14).

34 CFR section 300.324(b) provides that each public agency must ensure that, subject to paragraphs (b)(2)and (b)(3) of this section, the IEP Team—(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address—(A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), among other things.

Here, the evidence shows that DCPS held an IEP meeting on July 17, 2012 and that the Student's IEP was not revised. However, the evidence shows that the Student's teachers from his NPS indicated at the time that the Student was doing well and that the academic and social/emotional goals

on the Student's IEP, dated December 2, 2012, were appropriate. The evidence also shows that at the time of the IEP meeting the Student's "present" level of academics on the Student's IEP remained appropriate (Exhibit R-3). As such, I find that the DCPS complied with the HOD date April 4, 2012 in that 34 CFR section 300.324(b) provides that IEP should be revised "as appropriate." Here, the evidence shows that it was "appropriate" to keep that IEP as it was. Accordingly, I find that Petitioner has not met her burden of demonstrating that the Student was denied a FAPE with respect to this issue.

Additionally, with respect to whether to DCPS failed to comply with the HOD provision that that required the IEP team to "remove the justification for the Student's transition to the general education setting on the Student's IEP dated December 2011," the HOD does not indicate that DCPS was ordered to do so and Petitioner failed to present any evidence on this issue at the impartial hearing. Accordingly, I find that Petitioner's has not met her burden of proof in demonstrating that the Student was denied a FAPE with respect to this issue.

The next issue raised by Petitioner was whether DCPS denied the Student a free and appropriate public education when the DCPS changed the Student's placement from the his current NPS to another NPS at the IEP meetings held in July and August 2012, because the second NPS does not offer French, which is a class that the Student needs to graduate, and because the school and the class sizes at the new NPS are too large for the Student to make progress. Petitioner also claims that DCPS' decision to move the Student to another NPS was not based on the Student's needs, but on a bias that DCPS has against the Student's current NPS.

It is undisputed that DCPS, as the LEA, has the discretion with respect to the identification of the Student's location of services White v. Ascension Parish School Board, 343 F.3d. 373 (5th Cir. 2003) However, that discretion cannot be exercised in such a manner as to deprive a Student of a FAPE Holmes v. District of Columbia, et al, 680 F. Supp. 40 (U.S. District Court, District of Columbia).

Here, the evidence shows that the Student is doing very well at his current NPS and that he has made significant progress with respect to his academic and social/emotional goals (Exhibit P-11 page 4, Testimony of Head of School and School Psychologist). The evidence also shows that the Student does not do well with transitions and that when the Student was initially placed at his current NPS, it took him several months to develop relationships with his teachers and become acclimated to his program (Testimony of School Psychologist and Head of School). Significantly, the evidence shows that if the Student were moved to another school, the Student

would regress academically and behaviorally (Testimony of School Psychologist). Accordingly, I find that DCPS' decision to change the Student's LOS to another NPS, one that is currently on probation and one that cannot accept any DCPS students, is inappropriate. Although the evidence shows that some of the Student's teachers at his current NPS are not fully certified in special education (Exhibit R-5), this is not an automatic bar to the Student's placement at such a school Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13 (1993). Further, it is undisputed that the Student's current NPS has a COA issued by OSSE (Testimony of Head of School). Therefore, since it appears that the Student is doing well at his current NPS and because it is likely that the Student would regress if he was transferred to another school at this time, I find that removing the Student from his current school and placing him at a NPS that cannot accept DCPS students because OSSE has placed that school "probation," would pose a serious and unnecessary educational risk to the Student. Block v. District of Columbia, 748 F Supp. 891 (U.S. District Court, District of Columbia). Thus, I find that DCPS' decision to do so at the IEP meetings held in July and August of 2012 resulted in a denial of FAPE and that Petitioner has prevailed with respect to this issue.

With respect t Petitioner's allegation that DCPS' decision to change the Student's LOS was based on a bias that DCPS has against the Student's current NPS, there is nothing in the record to support such a claim. As such, I find that Petitioner's has not met her burden of proof with respect to this issue.

Finally, although the evidence shows that if the Student were to attend the NPS proposed by DCPS he would not get credit for taking French at his current NPS because the new NPS does not offer French (Testimony of Admission Director at NPS), I do not find that this fact would deny the Student a FAPE because is appears that the Student would still receive and educational benefit at the new NPS Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982).

The next issue raised by Petitioner is whether DCPS denied the Student a FAPE by predetermining the Student's placement without any input from the Student's parent at the IEP meetings in July and August 2012. As indicated above, DCPS held IEP meetings in July and August of 2012 and recommended that the Student's LOS be changed to a different NPS. (Exhibits R-2, R-3). The evidence shows that the reason for the change in the NPS was because DCPS was concerned about the lack of teacher certifications at the Student's current NPS. The Parent was present at the July meeting and was provided an opportunity to participate (Testimony of DCPS Compliance Case Manager). The Parent's attorney at the time was

present at the August meeting and he was provided an opportunity to participate (Testimony of Petitioner' former attorney). Although the Parent and his attorney disagreed with DCPS' decision to change the Student's LOS, I find that DCPS' decision to change the Student's LOS, although inappropriate, was not predetermined Sherri A.D. v. Kirby, 19 IDELR 339 (5th Cir. 1992)

The next issue was whether DCPS denied the Student a free and appropriate public education by issuing an inappropriate and insufficient Prior Written Notice, dated July 24, 2012, that failed to include any information with respect to the reason the IEP team decided to move the Student from his current NPS to another NPS.

CFR 34 § 300.503 Prior notice by the public agency provides that written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (b) *Content of notice.* The notice required under paragraph (a) of this section must include—(1) A description of the action proposed or refused by the agency; (2) An explanation of why the agency proposes or refuses to take the action; (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part; (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and (7) A description of other factors that are relevant to the agency's proposal or refusal. (Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1)).

Here, the PWN issued by DCPS on July 23, 2012 indicates that the student' location of services will change from the NPS he was attending in the 2011-2012 school year to a different NPS for the 20120-2013 school year, because the teachers at the Student's current NPS lacked special education certification. Although the PWN is not entirely clear with respect to the "description of other options consider," it is undisputed that Petitioner and his attorney were aware as to why DCPS proposed changing the Student's NPS (Testimony of Petitioner and his attorney). As such, I find that the PWN issued by DCPS substantially complies with CFR 34 § 300.503 and that any

deficiency with respect to the PWN did not result in a denial of FAPE Spielberg v. Henrico Cty. Public Schools, 853 F.2d 256 (4th Cir. 1988).

Transportation:

Petitioner requests an Order directing DCPS to reimburse Petitioner for transportation expenses incurred during the 2012-2013 school year when DCPS failed to provide the Student with bus transportation to his current NSP as per his IEP.

The pendency provisions of the Individuals with Disabilities Education Act (IDEA) require that a child remain in his or her then current placement, unless the child's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the child (20 U.S.C. § 1415[j]; 34 C.F.R. § 300.514[a]. Pendency has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Drinker v. Colonial Sch. Dist., 78 F.3d 859 [3d Cir. 1996]; Zvi D. v. Ambach, 694 F.2d 904 [2d Cir. 1982]). The purpose of the pendency provision is to provide stability and consistency in the education of a child with a disability (Honig v. Doe, 484 U.S. 305 [1987]).

As indicated above, DCPS did not provide the Student with transportation to his current NPS during the pendency of this matter. During the PHC, DCPS counsel advised that transportation would be put in place promptly and then confirmed to this HO that transportation was in place. At the impartial hearing, the Parent testified that transportation was not put in place and that the Parent was compelled to spend 4 dollars a day in order to transport the Student to school each day (Testimony of Parent). Accordingly, I find that the parent is entitled to reimbursement of the transportation costs incurred as a result of DPCS' failure to provide bus transportation to the Student's current NPS during the "pendency" of this matter Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). To that end, DCPS is directed to reimburse the parent 4 dollars for each school day that DCPS failed to provide the Student with bus transportation to his current NPS which is to be calculated from the first day of the 2012-2013 school year until the date of this HOD.

Compensatory Education:

Where a school system fails to provide special education or related services to a disabled Student, the Student is entitled to compensatory education, which is the replacement of educational services that the child

should have received in the first place. Reid v. District of Columbia, 401 F 3d. 516 (D.C. Cir. 2005).

Although I found that the Student was denied a FAPE based on DCPS' decision to change to the Student's NPS, the evidence shows that the Student remained at this current NPS and received all of this special education services during the "pendency" of this matter. As such, there are no educational services to replace.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 23rd day of November 2012, it is hereby

ORDERED that DCPS shall fund the Student's placement at his current NPS for the 2012-2013 school year and provide transportation to and from school.

ORDERED that DCPS is directed to reimburse the parent 4 dollars for each school day that DCPS failed to provide the Student with bus transportation to his current NPS, which is to be calculated from the first day of the 2012-2013 school year until the date of this HOD.

Dated November 23, 2012

By: /s/ James McKeever
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. Section 1415(i)(2).

Distributed to:

Copies to:
Alana Hecht, Esq., counsel for Petitioner
Justin Douds, Esq. counsel for Respondent
Student Hearing Office
dueprocess@dc.gov