OSSE
Student Hearing Office
August 08, 2013

District of Columbia

Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

Confidential

Parent on Behalf of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent. Case #	HEARING OFFICER'S DETERMINATION Hearing Dates: July 24, 2013 July 25, 2013 <u>Representatives:</u> Counsel for Petitioner: Carolyn Houck, Esq. 5614 Connecticut Avenue, N.W. Suite 169 Washington, D.C. 20015 Counsel for DCPS: District of Columbia Assistant Attorney General Maya Washington, Esq. 1200 First Street, NW Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

BACKGROUND AND PROCEDURAL HISTORY:

The student is a child with a disability under IDEA who resides with his parents in the District of Columbia. The student attends a private full-time special education school ("School A") with DCPS funding. The student was diagnosed with an intellectual disability in 2001 an at one point carried that disability classification on his individualized education program ("IEP"). The student's more recent IEP dated December 5, 2011, classified him with multiple disabilities ("MD") including other health impairment ("OHI") and speech and language impairment ("SLI").

The student was scheduled to graduate h grade from School A at the end of school year ("SY") 2012-2013 with a regular high school diploma, until his IEP team determined on May 3, 2013, that he was not ready socially to function independently and was thus not yet ready to graduate high school.

At the May 3, 2013, IEP meeting the team reviewed a recent independent psychological evaluation and independent speech language evaluation and agreed to change the student's disability classification to Autism Spectrum Disorder ("Autism'). The student's parent agreed that the student's IEP would be changed to reflect the new disability classification.

At the May 3, 2013, meeting the IEP team also agreed that the student needed continued social/emotional and transition services at least during the extended school year ("ESY") for Summer 2013 to prepare him to ultimately graduate high school at some point in the future. However, there was a dispute subsequent to the May 3, 2013, meeting between DCPS and student's parents as to whether the team agreed the student would continue in special education for an additional school year for SY 2013-2014, as DCPS was and is of the opinion that the student has met all the academic requirements at School A for a regular high school diploma.

On May 13, 2013, DCPS provided the student's parents a draft IEP with the agreed upon change in disability classification but no additional or new goals for ESY. DCPS provided the parents a letter of invitation to attend and IEP meeting to further develop the student's IEP. However, because of communication between DCPS and the parent's counsel that clarified DCPS' view that the student had met the requirements for a high school diploma and would be exited from special education and would not be eligible for another academic year of special education services the parents did not agree to participate in an IEP meeting for the student but instead filed the current due process complaint.

On May 24, 2013, Petitioner filed this complaint. Petitioner seeks an order directing DCPS not to exit the student from special education, to fund a vocational assessment and develop an appropriate IEP and provide an appropriate full-time placement for the student for SY 2013-2014.

DCPS filed a timely response the complaint on June 3, 2013. DCPS denied any alleged denial of a FAPE and specifically asserted that the student has a current IEP and placement at School A under "stay-put," and was eligible to attend School A for ESY. However, DCPS maintained the student has met the qualifications to be exited from special education and Petitioners refused to participate in an exit meeting.

A resolution meeting was convened on June 11, 2013. The resolution meeting was not successful in resolving the disputes. The parties did not agree to waive the remainder of the resolution period. Thus, the 45-day timeline began to run on June 24, 2013, and ends, and the Hearing Officer's Determination ("HOD") is due, on August 7, 2013. A pre-hearing conference was held on June 21, 2013, and a pre-hearing conference order was issued June 26, 2013, outlining, inter alia, the issue to be adjudicated.

THE ISSUE ADJUDICATED: [2]

The issue adjudicated is:

Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to develop an appropriate IEP and provide an appropriate placement for the student at or following the May 3, 2013, MDT/IEP meeting for SY 2013-2014.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-37 and DCPS Exhibit 1-20) that were admitted into the record and are listed in Appendix A. If any documents were not admitted into the record it is so noted in Exhibit A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [3]

1. The student is a special education student who resides with his parents in the District of Columbia. The student who attends School A with DCPS funding. The student was diagnosed with an intellectual disability in 2001 an at one point carried that disability classification on his IEP. His subsequent IEP classified him as MD including OHI and SLI. (Petitioner's Exhibit 14-2)

---

[2] The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

[3] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

2. The student was scheduled to graduate h grade from School A at the end of SY 2012-2013 with a regular high school diploma, until an IEP team determined on May 3, 2013, that the student was not prepared socially to graduate high school and needed services at least through ESY 2013. (Petitioner's Exhibits 14-2, 16-5, 16-6)

3. In March 2013 an independent comprehensive psychological evaluation was conducted of the student that DCPS funded pursuant to a consent order issued in April 2013. The evaluator determined the student had borderline intellectual abilities and extremely low adaptive functioning and a high probability of Autism based upon rating scales provided by the student's parents. The evaluator also determined the student was operating academically between fifth and seventh grade with his reading passage comprehension level at mid third grade. The evaluator recommended the student be placed in a structured vocational training program with therapeutic components to assist him in developing independent living skills and to help remediate his academic, behavioral and social/emotional deficits. (Witness 3's testimony, Petitioner's Exhibits 14-4, 14-7, 14-8, 14-10, 14-13, 15)

4. At the May 3, 2013, IEP meeting the team reviewed the independent evaluation and a recent speech language evaluation and agreed to change the student's disability classification from MD to Autism. The student's parents agreed that the student's IEP would be changed to reflect the new disability classification. (Petitioner's Exhibits 9, 14, 16-5)

5. At the May 3, 2013, IEP meeting the team also agreed that that the student needed continued social/emotional development and transition to prepare him to ultimately graduate high school at some point in the future. The meeting notes state: "[the student's] IEP will be updated with an appropriate transition plan to include the transition coordinator and RSA and/or DDS and goals focusing on independent living skills i.e. job search, public transportation, self-care skills, etc. that will prepare him to be more independent and progressive after high school." (Petitioner's Exhibit 16-5)

6. The May 3, 2013, meeting notes also state: "DCPS proposed that the student was not prepared socially to graduate and needed to work during ESY an the regular school to make sufficient progress towards new social and emotional goals and transition goals in preparation to graduate next year. The parent and MDT agreed. [The student] will attend ESY to work on new IEP goals the MDT will reconvene at the end of ESY to determine progress. The [School A] EDU Team will create goals to include Autism spectrum disorder. DCPS/[School A] will send home by certified mail the drafted IEP. The parents will agree or disagree to the IEP and notify DCPS if it is ok to finalize." (Petitioner's Exhibit 16-6)

7. On May 13, 2013, DCPS issued a prior written notice of amendment of the student's IEP to change the student's disability classification and issued an

amended IEP dated May 13, 2013 with the disability classification change only. The notice stated that the parents agreed to amend the IEP to change the classification without an IEP team meeting. (Respondent's Exhibit 3, Petitioner's Exhibit 17)

8. Although DCPS provided the parents with an invitation to attend an IEP meeting, the parties were distracted from the task the IEP team set forth to draft IEP goals and for the student to attend ESY by DCPS' insistence that the student would not continue in special education any longer than ESY and Petitioner's insistence that he would. (Petitioner's Exhibit 37)

9. While at School A the student has made progress on his IEP goals and has been provided accommodations and modifications to enable him to access the general education curriculum. With the accommodations School A provides the student is able to generally read at an eighth grade level. Given the student's disability and academic deficits he has been provided access and exposure to the general education curriculum and has met the requirements according to School A and DCPS standards to receive a high school diploma. The student has earned the grades he has received during his 12th grade year at School A and was on tract to graduate high school with the rest of his School A class in June 2013. (Witness 7's testimony, Witness 8's testimony, Respondent's Exhibits 4, 6, 8)

10. Since attending School A the student has been on a high school diploma tract and not a certificate tract as was the other students in his senior class at School A. The student had average academic functioning relative to his classmates. However, socially the student was functioning below average relative to his classroom peers. All the students in his class, except the student, graduated high school at the end of SY 2012-2013. (Witness 7's testimony)

11. At School A the student earned sufficient Carnegie units to qualify for high school graduation at the end of SY 2012-2013. There are other programs that are available to the student in the community that will prepare him to function independently. However, the student is unable to access these programs that are administered through other agencies other than DCPS unless and until he is exited from special education and is no longer attending high school. (Witness 5's testimony, Respondent's Exhibit 4)

12. The student was disappointed by not being able to graduate and he lost his academic momentum and his affinity for School A and its staff. Since the student has met the academic standards for graduation the School A staff believe it is best for him is to reach out to the other agencies that can provide him life skills development to assist him in making the transition beyond high school. (Witness 8's testimony)

13. It is not certain whether an additional year of academic instruction will make any significant difference in the student's functioning. The student has significant

deficits and is unlikely to be able to reach grade level in academic functioning within any reasonable time. (Witness 8's testimony)

14. The student has significant social and communication and functional academic deficits that indicate that he is currently not ready to function independently and he is in need of continued services to enable him to acquire needed skills to be able to safely navigate in environment outside his home and school. (Witness 1's testimony, Witness 3's testimony, Witness 4's testimony)

15. The student's parents have been concerned for sometime that the student is not functioning academically consistent with the excellent grades that he has received since attending School A. At home is unable to complete some of the academic work that his younger siblings are able to perform. The student's parents do not believe the student actually earned the grades he received at School A but was simply given the credits. They believe the student does not have sufficient functional skills to be exited from special education. The student's parents understood from the May 3, 2013, meeting that the student would continue in special education for at least another year at an appropriate placement for SY 2013-2014 to gain sufficient social/emotional and transition skills and that an appropriate IEP with those services would be developed following the meeting. (Father's testimony)

16. The student has felt demoralized since not being allowed to graduate and lost motivation to attend school after the May 3, 2013, meeting. The parents called DCPS transportation at the start of ESY and were informed that the student was not scheduled for transportation services for the summer. The parents were never contacted and told that the student should attend School A during the summer 2013. Consequently, he did not attend ESY at School A. The student has not had the benefit of social skill development and the student has missed valuable time toward acquiring the social emotional and transition skills he needs to be a productive citizen in society. (Father's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of a FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (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 Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.[4] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

Issue: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP and provide an appropriate placement for the student at or following the May 3, 2013, MDT/IEP meeting for SY 2013-2014.

Conclusion: The evidence supports a finding that DCPS failed to provide the student an appropriate IEP following the May 3, 2013, IEP meeting that addressed the social/emotional and transition services the IEP team agreed that the student needed prior to graduating from high school and exiting special education. DCPS, thus, denied the student a FAPE and the Petitioner sustained the burden of proof by a preponderance of the evidence.

Congress passed the IDEA to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C.§1400(d)(1)(A). The IDEA provides funding to assist states in implementing a "comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families." 20 U.S.C.§1400(d)(2).

Under the IDEA, all states, including the District of Columbia, receiving federal education assistance must establish policies and procedures to ensure that "[a] free

---

[4] The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the 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.

appropriate public education [FAPE] is available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A).

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F.Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1.

"The IEP must, at a minimum, `provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

On May 3, 2013, after review of two independent evaluations DCPS changed the student's disability classification to Autism. A new IEP for the student was not developed at that meeting. The evidence of this case clearly demonstrates that the student's current IEP does not include the goals and services the IEP team determined after reviewing recent evaluations were necessary to confer upon the student educational benefit and prepare him for post-secondary life. At the May 3, 2013, IEP meeting the team agreed that that the student needed continued social/emotional development and transition to prepare him to ultimately graduate high school at some point in the future.[5]

Although DCPS provided the parents an IEP subsequent to the May 3, 2013, meeting with the agreed upon disability classification change, that IEP did include the anticipated new goals that were to be addressed during ESY as the team agreed would be done. [6]

Although DCPS provided the parents with an invitation to attend an IEP meeting, the parties were distracted from the task the IEP team clearly set forth by DCPS personnel's insistence that the student would not continue in special education longer than ESY or for the entire 2013-2014 school year. [7]

There is clearly a dispute between DCPS and Petitioner as to whether the team agreed the student would continue in special education for an additional school year for SY 2013-

---

[5] Finding of Fact ("FOF") # 5

[6] FOF # 7

[7] FOF # 8

2014, as DCPS is of the opinion that the student has met all the academic requirements for a regular high school diploma. The due process complaint highlighted the student's recent change in disability classification and his social/emotional deficits that Petitioner alleges necessitates the student continuing in special education for at least another academic school year.

However, the issue in the complaint and certified in the pre-hearing order is whether DCPS failed to provide the student an appropriate IEP and placement following the May 3, 2013, IEP meeting and for the following school year.

Petitioner alleged that the language in the May 3, 2013, meeting notes indicate the student would be in special education for the entire next school year.[8] However, the author of the notes was present at the hearing but did not testify. The Hearing Officer did not infer anything from that person not testifying and does not conclude based upon the language of the notes that the May 3, 2013, IEP team concluded the student automatically would be in special education the entire following school year.

The fact that that an IEP is to be developed for the student that may be implemented during SY 2013-2014 does not necessarily require that the student remain in special education for the full academic year or beyond. That decision is to be made by an IEP team and as of the filing of the current due process complaint and the hearing that team decision has not been made.

The issue of whether the student has in fact met the requirements for high school graduation and to exit special education was not the central issue to be adjudicated in the case. Albeit much of the evidence Petitioner presented addressed the student's social and academic deficits and opinions of expert witnesses that the student is not ready to graduate high and/or exit special education.

Since the student has attended School A he has been on a high school diploma tract and not a certificate tract as was the other students in his classroom at School A. The Petitioners are not requesting that the student's IEP now be changed to put him on a certificate tract and DCPS is of the opinion the student has at least met the Carnegie units to graduate even though the student is functioning well below grade level. The evidence indicates that the student's instruction at School A was sufficiently modified for the student to access the general education curriculum and meet the requirements with accommodations to satisfy all the academic requirements over the past years for him to graduate high school.[9]

DCPS is of the opinion that the best course of action (beyond the ESY he should have received) would be for the student to access services that apparently are not available to him if he remains in special education. Petitioner, however, is insistent that the student is not ready to exit special education and graduate high school and wants the student to

---

[8] FOF #6

[9] FOF #s 9, 10, 11

continue to have the protections afforded under IDEA until he has acquired or at least worked on those skills.

Nonetheless, the evidence reveals that DCPS has not actually exited the student from special education and the student has not yet graduated. The evidence clearly points out that there is no dispute that the student as the May 3, 2013, and up to and including the date of this order is still not ready to graduate and exit special education because he has yet to fulfill the requirements the IEP team agreed on May 3, 2013, he needs, specifically the IEP goals and services that he would have presumably been provided during ESY 2013.[10] Petitioner and perhaps even Respondent are attempting to litigate the issue of the student's exit from special education when in actuality that issue is not yet ripe for adjudication.

IDEA anticipates that an IEP team including the parent(s) of a child will participate in the development of an IEP and the determination of an appropriate placement for the student. Unless and until the student is provided the services pursuant to new IEP goals that the IEP team determined he was in need of at the May 3, 2013, meeting it is premature to determine whether the student is ready to graduate high school and/or exit special education by some other means.

The parent's counsel informed DCPS following the filing of the complaint that if DCPS' position was that the student would be exited from special education due to his completion of high school requirements that the parents were not interested in attending a meeting. However, the student's IEP team had agreed as the meeting notes reflect that DCPS and school A would draft an IEP with new goals and provide it to the parents. Although DCPS provided the parents an IEP after the May 3, 2013, meeting, the IEP only reflected the change in disability classification. There were no additional transition and social/emotional goals as the team notes indicated.[11]

In addition, the evidence reflects that DCPS took no action to ensure that the student would be provided the ESY services that the IEP team concluded the student needed. There is no evidence that the parents refused to send the student to School A for ESY. The evidence reflects the parent attempts, although modest, were made for the student to attend. There is no evidence of any action toward that end made by DCPS other than an attempt to convene a meeting, the subject of which was to exit the student from special education.[12]

Although DCPS invited the parent to a meeting and the parent did not agree to attend, DCPS also did not take the requisite action to ensure the student attended ESY and was provided the services in ESY the IEP team agreed he should have. For whatever reason the student was never assigned the required transportation to attend ESY and the parent

---

[10] FOF # 5

[11] FOF #s 6, 7

[12] FOF # 16

even inquired of DCPS transportation whether the student was assigned to go to ESY.

The student has not been in school during Summer 2013, as the May 3, 2013, IEP team anticipated and has consequently missed valuable time toward acquiring the requisite social/emotional and transition skills he needs to be a productive citizen in society and has indeed been harmed and denied a FAPE.

Consequently, the Hearing Officer concludes DCPS did not fulfill its obligation to provide the student an appropriate IEP and the ESY services that were the prerequisite to determining the next steps for the student thereafter.

The student was disappointed and lost his momentum academically and his affinity for School A and the school staff changed drastically after he was informed that he would not be graduating.[13] Petitioner is not certain what location, school or setting is best for the student and did not present any options during the hearing. The parties appear to have been in agreement that the student's return to School A beyond the ESY for SY 2013-2014 may not be the ideal setting for the student to address the skills sets and deficits on which the student's IEP team and both parties agree the student needs to work.

The Hearing Officer, therefore, directs in the Order below that DCPS promptly convene the IEP meeting to develop the student's IEP to include the appropriate social/emotional and transition goals and that DCPS and the parent determine an appropriate location for those services to be delivered at least through the first semester of SY 2013-2014[14] and that an IEP team convene on or after January 23, 2014, to determine the next appropriate steps for the student in his transition to post secondary status and whether he is either ready to graduate high school or otherwise exit special education.

ORDER:[15]

1. DCPS shall within thirty (30) calendar days of the issuance of this Order convene an IEP/placement meeting for the student to develop the student's IEP to include the appropriate social/emotional and transition goals and for DCPS and the parent determine an appropriate location for those services to be delivered to the student at least through the first semester of SY 2013-2014 and to determine whether that location will be School A or some other location.

2. DCPS shall provide the student's appropriate social/emotional and transition and

---

[13] FOF # 12, 16

[14] Mid school year is a logical and traditional point at which it seems reasonable to determine whether the student is equipped and ready to graduate and/or exit special education.

[15] Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

functional remedial academic services pursuant to his IEP, developed pursuant to this Order, through the first semester of SY 2013-2014.

3. DCPS shall convene an IEP team meeting on or after January 23, 2014[16], to determine the next appropriate steps for the student in his transition to post secondary status and whether he is either ready to graduate high school or otherwise exit special education.[17]

4. All other requested relief is hereby denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer 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. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: August 7, 2013

[16] This date is designated because of its proximity to the end of DCPS' first term in SY 2013-2014, however, the parties are free select a sooner date by mutual assent.

[17] 34 CFR 300.102 (a)(3): If an IDEA student graduates with a regular high school diploma, obligations for FAPE and related IDEA services end. Graduation with a special education diploma or certificate of mastery, however, does not terminate the eligibility of a student with a disability to receive educational programming under the IDEA. A school district's obligation to provide FAPE to a graduating student with a disability continues if that student does not receive a regular high school diploma. Because graduation is a change in placement under the IDEA, districts must provide the student and parents with adequate notice of graduation and the rights available upon termination of education. 34 CFR 300.503 ; and Letter to Richards, 17 IDELR 288 (OSERS 1990).