

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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OSSE
Student Hearing Office
March 05, 2014

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: February 18, 2014</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on February 18, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student currently attends a DCPS elementary school (“School A”) where he is in fifth grade. A due process hearing was convened for the student on October 21, 2013, that resulted in a Hearing Officer’s Determination (“HOD”) issued November 1, 2013.

Pursuant to the November 1, 2013, HOD DCPS was to revise the student’s individualized educational program (“IEP”) to include among other things the student’s daily services of a reading specialist. Petitioner asserts that through counsel she repeatedly informed DCPS that she was requesting DCPS convene an IEP meeting to review and revise the student’s IEP. Petitioner asserts that on December 3, 2013, despite the numerous requests to convene an IEP meeting DCPS proceeded with an IEP meeting on December 2, 2013, without the parent’s presence or involvement or that of her representative(s).

On December 19, 2013, Petitioner filed the due process complaint. In addition to asserting DCPS convened the IEP meeting without her participation Petitioner also asserted that on August 17, 2013, by and through counsel, she made a written request to DCPS for an independent educational evaluation (“IEE”) as she disagreed with the assessment performed by DCPS. Petitioner asserted DCPS never responded to the request by either authorizing the independent evaluation or filing a due process complaint to demonstrate its evaluation/assessment was appropriate. Petitioner sought as relief an order directing DCPS to convene the student’s IEP team meeting with the parent and her representative(s) present to revise the student’s IEP as appropriate and that DCPS issue an authorization for the parent to obtain an IEE.

DCPS filed a response to the complaint on December 3, 2013. DCPS asserted there had been no denial of a free and appropriate public education (“FAPE”). DCPS asserted November 1, 2013, HOD had not required a meeting in order to make minor changes to the IEP to reflect the services the student was already receiving; DCPS had not convened another IEP meeting since the last meeting that the parent attended. At the parent’s request DCPS offered dates to convene a meeting but DCPS and parent could not agree on any dates prior to the end of the calendar year.

The parties attempted to convene a resolution meeting but no meeting was held. The 45-day period began on January 19, 2014, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on March 4, 2014.

This Hearing Officer convened a pre-hearing conference on February 5, 2014. During the PHC DCPS counsel offered to convene an IEP meeting to amend the student's IEP and discuss with her client the issuance of the IEE authorization. Petitioner's counsel stated that if DCPS issued the IEE authorization that issue would be moot.

On February 5, 2014, the Hearing Officer issued a pre-hearing order outlining, inter alia, the issues to be adjudicated. Prior to the hearing DCPS issued the parent an IEE authorization.² The parties appeared for hearing on February 18, 2014 and they agreed at the outset that the issue regarding the request for an IEE was resolved and withdrawn by Petitioner leaving a single issue to be adjudicated at hearing.

ISSUE:³

The issue adjudicated is:

Whether DCPS denied the student a FAPE in violation of 34 C.F.R. §300.322(a) & (d) and 34 C.F.R. §300.321(a) by convening an IEP team meeting without the parent present and failing to ensure that the parent was a participant in the meeting.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 23 and Respondent's Exhibits 1 through 14) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁴

1. The student currently attends School A where he is in fifth grade. (Petitioner's Exhibit 16-1)
2. A due process hearing was convened for the student on October 21, 2013, that resulted in a HOD issued November 1, 2013. Pursuant to the HOD DCPS was advised to revise the

² Petitioner's Exhibit 19 dated February 10, 2014

³ 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. At the outset of the hearing the parties agreed that one of the two issues that had been certified in the pre-hearing order had been resolved with the issuance of the IEE and withdrawn by Petitioner.

⁴ The evidence that is the source of the Finding of Fact ("FOF") 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 more than one party separately the Hearing Officer may only cite one party's exhibit.

student's IEP to include among other things the student's daily receipt of the services with a reading specialist. The IEP did not specifically require DCPS convene a meeting in order to revise the student's IEP. (Petitioner's Exhibit 8-13)

3. On October 23, 2013, DCPS conducted a functional behavior assessment ("FBA") that made a recommendation that a behavior intervention plan ("BIP") be developed for the student. (Petitioner's Exhibit 16)
4. On November 6, 2013, DCPS sent the parent a standard IEP amendment form that indicated DCPS would like to amend the IEP without a meeting. The form gave the parent an option to agree to the amendment or request an IEP meeting. (Witness 1's testimony, Petitioner's Exhibit 10)
5. Petitioner through counsel emailed the student's special education teacher at School A on November 7, 2013, and November 13, 2012, requesting that DCPS convene an IEP meeting to review and revise the student's IEP. (Witness 1's testimony, Petitioner's Exhibits 11, 12)
6. On November 20, 2013, DCPS sent Petitioner a letter of invitation to an IEP meeting scheduled for December 2, 2013. (Petitioner's Exhibit 13)
7. On November 25, 2013, Petitioner through counsel wrote to DCPS requesting that the IEP meeting be rescheduled and offering dates and times. Petitioner did not receive a response to the emails requesting changes in the IEP meeting dates. (Witness 1's testimony, Petitioner's Exhibit 14)
8. DCPS amended the student's IEP meeting without a meeting on December 2, 2013, to make the changes directed to be made by the November 1, 2013, HOD. (Witness 2's testimony, Petitioner's Exhibit 9-15)
9. On December 3, 2013, DCPS sent Petitioner's counsel an email that purported to include the amended IEP and a prior written notice ("PWN"). (Petitioner's Exhibit 9-1)
10. On December 3, 2013, and December 4, 2013, Petitioner's counsel sent emails to DCPS stating that no amendments to the IEP were forwarded, that the letter of invitation ("LOI") was for a date 2010, reiterating the request for an IEP meeting and proposing dates. (Petitioner's Exhibit 9-2, 9-10)
11. Later in the day on December 3, 2013, DCPS sent Petitioner's counsel an email that did include an amended IEP and PWN. (Petitioner's Exhibit 9-14 through 9-26)
12. Petitioner's counsel sent an email to DCPS on December 9, 2013, reiterating the parent's desire for an IEP meeting and proposing dates. The dates were not confirmed by DCPS. (Witness 1's testimony, Petitioner's Exhibit 9-11)

13. On December 11, 2013, the School A special education teacher explaining that she had sent the IEP and PWN and requested additional proposed meeting dates. (Petitioner's Exhibit 9-12)
14. On December 11, 2013, Petitioner counsel again offered the dates of December 16, 2013, and December 23, 2013. (Petitioner's Exhibit 9-13)
15. On December 12, 2013, Petitioner counsel acknowledged to DCPS he had received the IEP and wrote that Petitioner was still awaiting a date and time for an IEP meeting. (Petitioner's Exhibit 9-27)
16. On December 19, 2013, Petitioner filed the due process complaint asserting DCPS convened an IEP meeting at which the student IEP was amended and did so without the parent's participation and input at the IEP meeting. (Petitioner's Exhibit 2)
17. On January 31, 2014, DCPS sent Petitioner a letter of invitation for the student's annual IEP meeting scheduled for April 28, 2014. (Petitioner's Exhibit 17)
18. On February 7, 2014, Petitioner through counsel wrote DCPS stating that Petitioner did not object to the scheduled April 28, 2014, IEP meeting and noting that Petitioner was still awaiting a meeting to make the IEP changes directed to be made by the November 1, 2013, HOD. (Petitioner's Exhibit 18)
19. Neither the parent nor her educational advocate know for certain whether DCPS held an IEP meeting without them. As of the date of the hearing an IEP meeting with the parent has not yet been convened. The parent would like to have a meeting to discuss the student's grades, what he is doing with his reading specialist and why he is still having problems in school. The parent would also like to discuss at the meeting when it is held the student's behavior and the FBA that was conducted and whether DCPS will create a BIP. The student's IEP goals also need to be reviewed based on his work with the reading specialist. (Parent's testimony, Witness 1'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 FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of 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.⁵ *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) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a FAPE in violation of 34 C.F.R. §300.322(a) & (d) and 34 C.F.R. §300.321(a) by convening an IEP team meeting without the parent present and failing to ensure that the parent was a participant in the meeting.

Conclusion: Petitioner did not sustain the burden of proof by preponderance of the evidence that DCPS convened an IEP meeting without the parent present.

34 C.F.R. §300.322⁶ and §300.321(a)⁷ require that DCPS ensure that a parent is invited to and

⁵ 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.

⁶ 34 C.F.R. §300.322

(a) Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including--

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place...

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as--

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and
- (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

⁷ 34 C.F.R. §300.321(a) 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

present at any IEP meeting for his or her child, is a member of the IEP team and is afforded the opportunity to fully participate in the IEP meeting.

The evidence in this case demonstrates that the November 1, 2013, HOD directed DCPS to amend the student's IEP to include services that he was already receiving. The HOD did not require that DCPS convene an IEP meeting prior to amending the IEP as it advised.⁸ However, DCPS sent the parent a letter stating its intention to change the IEP without a meeting but giving the parent the option to request a meeting. The parent did so and DCPS sent a letter of invitation.⁹

Petitioner proposed alternative meeting dates and there were repeated attempts to arrive at a mutually agreeable date. On December 2, 2013, DCPS amended the student's IEP without a meeting being held.¹⁰ DCPS was willing to convene a meeting thereafter and the parties have been attempting to arrive at a meeting date up to including when the due process hearing was held but had not been able to agree on a date and time for the meeting.¹¹

The issue adjudicated is whether DCPS convened a meeting without the parent being present. The facts do not demonstrate that any IEP meeting was ever held at all after the November 1, 2013, HOD was issued.

There has been no violation of the provisions of IDEA Petitioner asserted were violated. Thus, Petitioner did not meet the burden of proving that there was a denial of a FAPE to the student or that the parent's opportunity to participate in the decision-making process regarding the provision of FAPE was impeded.

At the conclusion of the hearing the Hearing Officer encouraged the parties to quickly agree to an IEP meeting date so that the student's IEP could be reviewed and the parent's concerns could be addressed. Hopefully that meeting will occur soon if it has not already been held.

ORDER:

1. The complaint is hereby dismissed with prejudice.
2. All requested relief is denied.

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.

⁸ FOF # 2

⁹ FOF #s 4, 5, 6

¹⁰ FOF # 8

¹¹ FOF # 13, 14, 15

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: March 4, 2014