District of Columbia

Office of the State Superintendent of Education

Office of Review and Compliance
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OSSE
Student Hearing Office
May 27, 2014

Confidential

Parent on Behalf of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION

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 May 15, 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 2007.

BACKGROUND AND PROCEDURAL HISTORY:

The student is in first year at a DCPS middle school ("School A"). Prior to attending School A the student attended a DCPS elementary school ("School B'). In April 2013 DCPS convened an individualized educational program ("IEP") meeting for the student at which the parent and her representatives attended and requested that the student be placed in a full time out of general education program based on his academic deficits. The DCPS team members did not agree but increased the student's services to provide him a total of 15 hours of specialized instruction per week outside general education and his IEP was updated to reflect those services.

From the time the student began attending School A he has had significant academic difficulties. On December 16, 2013, Petitioner, through counsel, requested an IEP meeting to discuss the student's difficulties. A meeting was held February 5, 2014. It was shared that the student was receiving a combination of general education classes and inclusion classes (but no pull out) from August 2013 through early January 2014 and the student was then placed in a full time out of general education program. DCPS did not agree, however, to amend the student's IEP to reflect the level of services of his new program.

Petitioner filed the due process complaint on March 10, 2014. Petitioner sought as relief that the student's IEP be amended to prescribe full time out of general education services and that the Hearing Officer order DCPS to provide the student with compensatory education.

DCPS filed a timely response to the complaint on March 20, 2014, and asserted there has been no denial of a free and appropriate public education ("FAPE") to the student. DCPS eventually agreed to amend the student's IEP to prescribe a full time out of general education placement.

A resolution meeting was held March 26, 2014. The complaint was unresolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on April 10, 2014, and ends (and the Hearing Officer's Determination ("HOD") was due) on May 24, 2014. The Hearing Officer convened a pre-hearing conference on April 10, 2014, and issued a pre-conference order outlining, inter alia, the issues to be adjudicated. The parties appeared for hearing on May 15, 2014. [2]

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[2] Respondent filed pre-hearing motion to dismiss that was ruled on, at Respondent's request, at the conclusion of Petitioner's case in chief. The motion was denied on the record.

ISSUE(S): [3]

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to implement his IEP from the start of SY 2013-2014 to early January 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 through 26 and Respondent's Exhibits 1 and 2) 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 is in his first year at School A.
   Prior to attending School A the student attended School B. In April 2013 DCPS convened an IEP meeting for the student at School B at which the parent and her representatives attended and requested that the student be placed in a full time out of general education program based on his academic deficits. The DCPS team members did not agree but increased the student's services to provide him a total of 15 hours of specialized instruction per week outside general education and his IEP was updated to reflect those services. (Petitioner's Exhibits 6, 7)

2. The IEP finalized at the April 18, 2013, meeting classified the student with multiple disabilities ("MD") and prescribed the following services: 5 hours of specialized instruction outside of general education in the area of reading, 5 hours of specialized instruction outside of general education in the area of mathematics, and 5 hours of specialized instruction outside of the general education in written expression and 120 minutes per month of behavioral support services outside of the general education setting. (Petitioner's Exhibit 6-1, 6-8)

3. The student's most recent comprehensive psychological evaluation was completed on April 3, 2012, when the student was age ten and in fourth grade. The student's full-scale

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[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.

IQ was measured at 87. Most of his cognitive scores were commensurate with the FSIQ. The student's scores on the WJ-III were the following:

Letter-Word Identification: 2.3 GE
Reading Fluency: 2.3GE
Passage Comprehension: 1.8 GE
Broad Reading composite: 2.2 GE
Calculation: 2.9 GE
Math Fluency: 3.6 GE
Math Calculation Skills: 3.1 GE
Spelling: 1.5 GE
Writing Fluency: 2.1 GE
Academic Skills: 2.2 GE (Petitioner's Exhibit 25-1, 25-12)

4. From the time the student began attending School A he has had significant academic difficulties and made little progress in his IEP goals. On December 16, 2013, Petitioner, through counsel, requested an IEP meeting to discuss the student's difficulties. A meeting was held February 5, 2014. It was shared that the student was receiving a combination of general education classes and inclusion classes (but no pull out) from August 2013 through early January 2014. (Witness 1's testimony, Petitioner's Exhibits 17, 18, 20)

5. DCPS explained that when they did realize that they had not been implementing the IEP they unilaterally moved the student to a full-time self-contained special education program as "compensatory education." This was not done through a meeting and was not a team decision. The parent through counsel requested that the student's IEP be revised to reflect what he was already getting in the self-contained classroom: 25 hours of specialized instruction outside of the general education setting. DCPS claimed that they did not have sufficient data to increase the student's IEP and refused. The student's most recent IEP progress report from January 2014 reflects that the student is not making progress in many areas and requires intensive support and prompts to complete work. (Witness 1's testimony, Petitioner's Exhibits 17, 18, 20)

6. DCPS amended the student's IEP to prescribe a full time out of general education placement and on April 5, 2014, DCPS amended the student's IEP to update his IEP goals. (Respondent's Exhibit 1)

7. The parent's educational consultant proposed a compensatory education to compensate the student for the alleged denials of FAPE and proposed that the student be provided an assessment and tutoring at Lindamood Bell. (Witness 2's testimony, Petitioner's Exhibit 1)

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 1: Whether DCPS denied the student a FAPE by failing to implement his IEP from the start of SY 2013-2014 to early January 2014.

Conclusion: Petitioner sustained the burden of proof by preponderance of the evidence.

5E DCMR 3002.3 provides that:

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[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.

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible with a disability served by the LEA.

(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP…

(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

"To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the …authorities failed to implement substantial or significant portions of the IEP "*Savoy v. District of Columbia* (DC Dist. Court) February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

The evidence demonstrates that DCPS did not implement the student's IEP from the start of SY 2013-2014 until January 2014 and then put the student in a full time out of general education program in January 2014 to make up for the student's IEP having not been appropriately implemented. The evidence demonstrates that the student made little academic progress and suffered harm as result of not being provided the appropriate services his IEP prescribed. The student was not provided out of general education specialized instruction and his academic performance suffered as a result.[6] Consequently, the Hearing Officer concludes the student was denied a FAPE.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid, 401 F.3d 522 & 524.* To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Petitioner submitted a compensatory education plan that considered the time the student's IEP was not implemented. There was a reasonable basis that the time the student's IEP was not implemented can be appropriately compensated with a reading assessment and tutoring services requested.

[6] FOF #s 4, 5

ORDER:

1. The student's IEP is hereby amended to include the following additional goals: [7]

   Reading:

   Given a reading passage on his instructional level, Aaron will identify the main idea and supporting details in 4 out of 5 attempts as measured by a teacher-made or formal assessment.

   Writing:

   Given an instructional level writing prompt, Aaron will use vocabulary on his instructional level to write a complete and coherent sentence in 4 out of 5 attempts on a teacher-made or formal assessment.

   Given an instructional level writing prompt, and graphic organizer, Aaron will write a coherent five sentence paragraph with an introduction, three supporting sentences, and a conclusion sentence in 4 out of 5 attempts on a teacher-made or formal assessment.

2. DCPS shall within ten (10) school days of this issuance of this order provide the student as compensatory education an educational assessment by Lindamood Bell and 75 hours of independent tutoring at the DCPS/OSSE prescribed rates to be used by Petitioner by December 31, 2014.[8]

3. All other requested relief is 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

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[7] The parties agreed to add the following three goals at the hearing that resolved the claims concerning goals in the IEP. DCPS did not admit to any wrongdoing in entering into this agreement.

[8] The Hearing Officer concludes that the number of hours of tutoring requested did not take into account that the student was receiving some specialized instruction during the first semester of SY 2013-2014 albeit not in an outside general education setting. Thus, the Hearing Officer did not consider that the actual loss of services to the student was as extreme as delineated in the proposed compensatory education plan and the Hearing Officer awarded what he considered a reasonable compensation for the actual missed services and what the student would need to make up for the loss.

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*

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Coles B. Ruff, Esq.
Hearing Officer
Date: May 24, 2014