

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹)
through the Parent,)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
)
Respondent.)

Date Issued: February 24, 2012

Hearing Officer: Virginia A. Dietrich

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

Background

Petitioner, the grandmother and legal guardian (“Parent”) of -year old Student, filed a due process complaint notice on December 15, 2011 alleging that the District of Columbia Public Schools (“DCPS”) had denied Student a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that DCPS had failed to provide Student with a location of services that could implement Student’s Individualized Education Program (“IEP”) since October 2011. Petitioner sought funding from DCPS for a private school placement.

DCPS asserted that it had provided Student with a location of services that could implement Student’s IEP and that Student had not been denied a FAPE.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

The due process complaint was filed on 12/15/11. This Hearing Officer was assigned to the case on 12/18/11.

Neither Petitioner nor DCPS waived the resolution meeting. The resolution meeting took place on 12/28/11 at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The resolution period ended on 01/14/12, the 45-day timeline to issue a final decision began on 01/15/12 and the final decision is due on 02/28/12.

The due process hearing was a closed hearing that took place on 02/23/12. Petitioner was represented by Miguel Hull, Esq. and DCPS was represented by Linda Smalls, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

Petitioner presented five witnesses: Petitioner; Student; Educational Advocate; Academic Director at _____ School; and Program Director at _____ School. DCPS elected not to present any witnesses.

Petitioner’s disclosures dated 02/15/12, contained a witness list and Exhibits P-1 through P-40. Petitioner withdrew P-40. Exhibits P-1 through P-39 were admitted into evidence without objection.

DCPS’ disclosures dated 02/15/12, containing a witness list and Exhibits R-01 through R-14, were admitted into evidence without objection.

The parties agreed to the following stipulations of fact:

#1. _____ School cannot implement an IEP with 26.5 hours/week of specialized instruction outside of general education.

#2. Student’s 08/15/11 IEP prescribes 26.5 hours/week of specialized instruction outside of general education and 60 minutes/week of behavioral support services.

#3. On 08/15/11, Petitioner agreed with the content and implementation of the 08/15/11 IEP, but not the site location at _____

#4. _____ School is a DCPS public school that Petitioner chose to enroll Student in.

The sole issue to be determined in this Hearing Officer Determination is as follows:

Hearing Officer Determination

Whether DCPS denied Student a FAPE by failing to provide Student with a location of services that could implement Student's IEP from October 2011 through 12/15/11 (the date of the filing of the complaint); specifically, Student's IEP required that all specialized instruction be provided in an out of general education setting and the location of services provided by DCPS per the Prior Written Notice issued on 08/15/11, cannot provide Student with 26.5 hours/week of specialized instruction outside of general education.

For relief,² Petitioner requested a finding that Student was denied a FAPE and that DCPS fund and place Student at School.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

#1. Student, age is a resident of the District of Columbia. During the summer of 2011, Student attended summer school at School at public expense.³ Student enjoyed summer school very much, performed well and was always eager to attend school.⁴

#2. On 08/05/11, a Hearing Officer Determination concluded that Petitioner had failed to meet her burden of proof that was unable to implement Student's 05/20/11 IEP that prescribed 21 hours/week of specialized instruction outside of general education and behavioral support services outside of general education.⁵ Petitioner filed another complaint on 08/18/11, once again alleging that was unable to implement Student's IEP. That complaint was dismissed on 09/27/11, with a finding that the issue had been previously litigated and was barred under the theory of res judicata.⁶

#3. Student's most current IEP, developed on 08/15/11, prescribes 26.5 hours/week of specialized instruction outside of special education and 60 minutes/week of behavioral support services outside of general education. The IEP mandates that educational services, i.e., 26.5 hours/week of specialized instruction, are to be provided in a self-contained setting. Petitioner participated in the development of the IEP on 08/15/11 and agreed with its contents and its implementation. However, Petitioner did not agree with as the site location for implementation of the IEP.⁷ On 08/15/11, DCPS issued a Prior Written Notice that identified

² Petitioner withdrew her request of relief for compensatory education for DCPS' failure to provide Student with a location of services that could implement her IEP since October 2011. This request for relief was dismissed with prejudice.

³ Educational director at School, P-10-5.

⁴ Petitioner, Student.

⁵ P-6, P-11.

⁶ R-03.

⁷ P-3.

Hearing Officer Determination

as the neighborhood school and site location that would implement Student's 08/15/11 IEP.⁸

#4. Student attended _____ for one day at the beginning of the 2011-2012 school year and refused to return after she had an argument with some students.⁹

Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

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

The overall purpose of the IDEA is 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 and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with a location of services that could implement Student's IEP from October 2011 through 12/15/11 (the date of the filing of the complaint); specifically, Student's IEP required that all specialized instruction be provided in an out of general education setting and the location of services provided by DCPS per the Prior Written Notice issued on 08/15/11, cannot provide Student with 26.5 hours/week of specialized instruction outside of general education.

As soon as possible following development of the IEP, special education and related services must be made available to the child in accordance with the child's IEP. 34 C.F.R. 300.323(c)(2).

Free appropriate public education or FAPE means special education and related services that are provided at public expense; meet the standards of the State Education Agency; include

⁸ R-10.

⁹ Petitioner, Student.

Hearing Officer Determination

an appropriate school; and are provided in conformity with an IEP that meets the requirements of the IDEA. 34 C.F.R. 300.17.

This is Petitioner's third attempt to avoid having Student attend [redacted] and have DCPS fund a private placement at the private school where Student attended summer school during the summer of 2011. Once again, Petitioner failed to meet her burden of proof that [redacted] was unable to implement Student's IEP by providing Student with 26.5 hours/week of specialized instruction outside of general education. The only substantive evidence presented by Petitioner was the testimony of the educational advocate and the advocate's testimony was insufficient for Petitioner to sustain her burden of proof.

The advocate testified that while speaking with the Dean of Students and the special education case manager at [redacted] in October 2011 with respect to other students he was representing as an educational advocate, he was advised that [redacted] could not implement a "full-time" IEP. That sole statement became the basis for the filing of the instant complaint. When speaking with representatives at [redacted], the advocate did not quantify what a "full-time" IEP was; the advocate did not ask relevant [redacted] personnel, such as the special education coordinator, specifically about the number of hours of specialized instruction that could be provided outside of general education; the advocate did not ask any personnel specifically whether Student's IEP could be implemented at [redacted], the advocate did not inquire of anyone at [redacted] about whether or not the school could meet Student's specific educational needs; nor did the advocate conducted any observations at [redacted]

In fact, according to the advocate, DCPS had denied him the opportunity to conduct any observations of other students at [redacted]. In his testimony, the advocate never identified what services provided by Student's IEP could not be provided by [redacted]. The Hearing Officer found that the advocate's testimony with respect to reiteration of what was told to him by staff at [redacted] was very selective and repeated outside of the context in which statements were made. The advocate's testimony was not only substantively insufficient, it was not credible. The Hearing Officer concludes that there was no basis in fact for the assertion by the advocate that [redacted] could not implement Student's IEP.

Student's testimony that she attended [redacted] for one day and received instruction in very large classes was equally unpersuasive to support a conclusion that [redacted] could not implement her IEP. It was clear from the testimony of Student and Petitioner that neither Student nor Petitioner wanted Student to attend [redacted]. After one day at [redacted] Student refused to return because she had a verbal altercation with some students. That one day was the extent of Student and Petitioner's contact with [redacted]

The evidence presented by Petitioner was insufficient for her to sustain her burden of proof. All relief requested by Petitioner is DENIED.

ORDER

The complaint is dismissed with prejudice.

IT IS SO ORDERED.

Hearing Officer Determination

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: February 24, 2012

/s/ Virginia A. Dietrich

Hearing Officer