

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

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OSSE
STUDENT HEARINGS OFFICE

Parent ¹ , on behalf of)	
Student,)	
)	
Petitioner,)	
)	Hearing Officer: James McKeever
v.)	
)	
DISTRICT OF COLUMBIA PUBLIC)	
SCHOOLS)	Hearing Date: February 22, 2012
)	
Respondent.)	

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 year-old girl who resides in the District of Columbia and who presently attends a non-public school in the District of Columbia (Non-Public School). The Student is classified as a Student with a disability under the IDEA.

On December 19, 2011, Petitioner filed a Due Process Complaint (DPC) against DCPS alleging that DCPS denied the Student a Free and Appropriate Public Education (FAPE) by failing to determined an appropriate placement and/or location of services at the IEP meeting held of December 16, 2011 and by failing to comply with the a Hearing Officer Determination (HOD), dated March 21, 2011, with respect to determining the location of services for the Student.

¹ Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

On January 3, 2012, DCPS filed its response. DCPS asserted a general denial to the allegations contained in the DPC and asserted that Petitioner and the Student participated in the IEP meeting held on December 16, 2012 and that the Student's placement was not changed. DCPS also asserted that a Hearing Officer is not permitted to enforce a prior HOD (Exhibit P-3). The Resolution Session was held on January 10, 2012. The parties did not resolve the issues raised in the DPC, but continued the resolution period to 1/18/12. The initial forty-five day HOD timeline began on 1/19/12.

The Prehearing Conference (PHC) was held on January 31, 2011. Counsel for Petitioner and counsel for DCPS participated. During the PHC, the parties discussed the issues raised in the DPC and Petitioner's requested relief (set forth below). It was agreed that the Due Process Hearing (DPH) would be held on February 22, 2012 and that the disclosures would be filed by February 15, 2011.

The disclosures were filed as agreed on February 15, 2012. Petitioner's Exhibits 1-25 were admitted into evidence. Respondent's Exhibits 1-8 were also admitted into evidence.²

At the impartial hearing, counsel for Petitioner advised that the requested relief was modified to placement at the Non-Public School until December 16, 2012 and not the entire 2012-2013 school year (Statement of Petitioner's Counsel).

The following witnesses testified on behalf of the Petitioner: Parent, Student, Psychologist, Advocate and Director of Non-Public School (Director).

The following witnesses testified on behalf of the Respondent: Progress Monitor.

II JURISDICTION

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEA), 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.

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:

A. Whether DCPS denied the Student a free and appropriate public education by failing to determine an appropriate placement and/or location of service at the IEP meeting held of December 16, 2011.

B. Whether DCPS denied the Student a free and appropriate public education by failing to comply with the HOD dated March 21, 2011 with respect to determining the location of services for the student.

DCPS contends that Petitioner and the Student participated in the IEP meeting held on December 16, 2012 and that the Student's placement was not changed. DCPS also asserted that the Non-Public School does not have a Certificate of Approval to service Students with an ED classification and that DCPS' proposed location of services at a different non-public school in Virginia is able to implement the Student's IEP. Finally, DCPS asserted that this HO does not have jurisdiction to enforce prior HODs (Exhibit P-3).

Petitioner requests an Order directing DCPS to continue to fund the Student's placement at the Non-Public School she is currently attending for the remainder of the 2011-2012 and up to December 16, 2012, when the Student's current IEP would expire (Exhibit P-2)

IV. FINDINGS OF FACT

Based upon the evidence adduced at the Due Process Hearing, I make the following findings of fact:

The Student is a year-old girl who resides in the District of Columbia and is eligible under the IDEA to receive special education services as a Student Classified with an Emotional Disturbance (ED).

During the 2009-2010 school year, the Student attended a DCPS middle school with an IEP that provided 15 hours per week of specialized instruction outside of the general education setting (Exhibit P-6). During this school year, the Student often fought with her classmates and engaged in oppositional behavior. The Student also received F's and D's in all of her core academic subjects (Testimony of Petitioner).

In September 2010, the Student was unilaterally placed at the Non-Public school she is currently attending (Exhibit P-2). The Non-Public School has a total of 33 students with various classification including, ED, Other Health Impaired (OHI), Learning Disabled (LD) and Specific Learning

Disability (SLD) (Testimony of Director). Students are taught in small classes and the annual tuition is \$35,000 per year (Testimony of Director).

On or about November 26, 2010, Petitioner filed a DPC against DCPS alleging a denial of FAPE and sought reimbursement for the Student's placement at the Non-Public School for the 2010-2011 school year (Exhibit P-2).

On or about January 20, 2011 an HOD was issued, which found a denial of FAPE based on DCPS' inability to implement the Student's IEP at her neighborhood school. The HO directed DCPS to convene an MDT meeting to revise the Student's IEP to include a Behavior Intervention Plan (BIP) and to determine how much specialized instruction was required to meet the Student's needs, *inter alia* (Exhibit P-6).

On January 28, 2011, DCPS convened an MDT meeting and developed an IEP that increased the Student's hours of specialized instruction to 21 hours per week outside the general education setting (Exhibit P-2). DCPS then offered the same school that was previously found by a HO as unable to implement the Student's IEP (Exhibit P-6, Exhibit P-2).

On or about January 31, 2010, 2011, Petitioner filed a DPC against DCPS alleging a denial of FAPE and again sought reimbursement for the Student's placement at the Non-Public School for the 2010-2011 school year (Exhibit P-2, Exhibit P-8).

On or about March 21, 2011 an HOD was issued, which found a denial of FAPE and directed DCPS to fund the Student's placement at the Non-Public School retroactive to January 20, 2011 and up until DCPS provided an appropriate location of services for the Student that offers a therapeutic environment and can implement the Student's IEP (Exhibit P-8). The HOD also directed that "when determining an appropriate location for services for the Student, DCPS shall convene an MDT meeting and present as least one or more options to the MDT and then "discuss, determine, and confirm with the MDT the appropriateness of the proposed location of services before issuing Prior to Action Notice" (Exhibit P-8).

On March 23, 2011, DCPS issued a Prior Written Notice for funding the Student's placement at the Non-Public School (Exhibit P-7).

On June 2, 2011, a independent comprehensive psychological report was generated which found that the Student suffers from dysthymic disorder, attention deficit hyperactivity disorder (ADHD), al learning disorder and borderline intellectual functioning. The evaluator recommended

classification as ED and LD as well as OHI based on the Student's ADHD diagnosis, among other things (Exhibit P-20).

On September 21, 2011, an MDT meeting was convened. At this meeting it was agreed by all team members, including DCPS, that the Non-Public school was appropriate for this Student (Exhibits P-9, P-10). During the meeting, DCPS advised that a PNOP would be issued for the Student's continued placement at the Non-Public school and requested that Petitioner waive consideration of all other prospective placements or locations of service. Petitioner agreed to waive consideration of all other prospective placements or locations of service based on DCPS' representation that they would continue to fund the Student's placement at the Non-Public School (Exhibit P-10, Testimony of Petitioner).

On December 16, 2011, an MDT meeting was convened to develop the Student's IEP. At the meeting, the team, which included DCPS and the Non-Public school as well as Petitioner and the Student, developed an IEP that provided 26 hours of specialized instruction per week outside the general education setting, 30 minutes per week of speech and language therapy and 60 minutes per week of behavior support services as well as extended year services (ESY). During the meeting, it was confirmed by all parties that the Student had made progress with respect to her academic and social/emotional performance. Specifically, the Student "was showing more confidence in class" and she had made progress on 3 of her 4 reading goals and on 3 of her 4 writing goals (The Student was not in a math class at the time, however, goals were developed for her) (Exhibit P-10). Additionally, the IEP team confirmed that the Student's was receiving individual counseling twice a week for 30 minutes and that she was "very" engaged in her therapy (Exhibit P-15, page 2). The Meeting Notes also indicate that the Student had increased her self-advocacy skills (Exhibit P-15, page 2) and it was noted that the Student was making slow, but steady progress toward her speech and language goals (Exhibit P-10).

With respect to instruction at the Non-Public school, some of the Student's teachers are not certified in special education or in their specific content area (Testimony of Director and Exhibits R-6). However, the two special education teachers on staff at the Non-Public school modify all instruction for the Student and provide direct instruction in English (Testimony of Director). The Student is also receiving simplified and repeated direction, modeling and guided instruction. She is also provided extended time, rewording of directions and a graphic organizer (Exhibit P-15).

The Student's suicidal ideation and oppositional behaviors have decreased significantly since her enrollment at the Non-Public school (Testimony of Psychologist). The Student's counselor has just completed a Master Degree in social work and she is supervised by the Psychologist who is has a PhD in counseling and is certified in suicide prevention therapy (Testimony of Psychologist).

At the end of the December 16, 2011 IEP meeting, DCPS advised Petitioner and the MDT that the location of services would be changed to a different Non-Public school, which is located in Virginia. No representative from the proposed school was present at the IEP meeting and DCPS did not advise Petitioner or anyone else on the MDT that a change in the location of services was being considered for the Student until the end of the IEP meeting on December 16, 2011 (Testimony of Director, Petitioner and the Psychologist). Additionally, DCPS' concern about the lack of special and/or general education certifications of some of the teachers at the Student's Non-Public School was not communicated to the Petitioner until the day of the impartial hearing (Testimony of Progress Monitor).

The Non-Public school is approved by OSSE (Testimony of Director). However, the Non-Public School does not have specific approval to service children with an ED classification (Testimony of Progress Monitor).

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. SUMMARY

The Hearing Officer concludes that Petitioner has met her burden of proof with respect to issue A, but not with respect to issue B.

VII CREDIBILITY DETERMINATIONS

This Hearing Officer finds that all of the witnesses at the due process hearing provided credible testimony. However, I do not credit the testimony of the DCPS Progress Monitor with respect her testimony regarding the English language skills of the Student's teachers at the Non-Public School as these alleged concerns were not previously made known to anyone on the MDT and were not corroborated by any evidence entered into the record.

VIII. ANALYSIS AND CONCLUSIONS OF LAW

A. Whether DCPS denied the Student a free and appropriate public education by failing to determine an appropriate placement and/or location of service at the IEP meeting held of December 16, 2011.

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 IDEA also guarantees a student's parents "both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Id.* at 890 (quoting Honig v. Doe, 484 U.S. 305, 311-12 (1988)) (internal quotation marks omitted).

While the IDEA requires parental participation in educational placement decisions, it does not mandate that parents be involved with site selection Sherri A.D. V Kirby, 19 IDELR 339 (5th Cir. 1992). In addition, referring to 20 USC 1414(d)(1)(A)(vi), the provision [of the IDEA] that requires the IEP to specify the location, is primarily administrative; "it requires the IEP to include such technical details as the projected [dates of services],...frequency, and their duration" White v. Ascension Parish School Board, 343 F.3d. 373 (5th Cir. 2003). Although the LEA has the discretion with respect to the location of services, that discretion cannot be exercised in such a manner 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).

In Block v. District of Columbia, 748 F Supp. 891 (U.S. District Court, District of Columbia) the court acknowledged that although a public school might be appropriate for a 13 year-old learning disabled student, there was substantial evidence to support a finding that a “mid-year change of placement” would pose a serious educational risk to the student. Id 748.

In this case, the evidence demonstrates that the Student has made significant academic and social/emotional progress during her placement at the Non-Public school (Testimony Petitioner, Student, Director and the Psychologist and Exhibits P-15). DCPS’ own documents confirm the Student’s progress at the Non-Public School (Exhibit P-15). Additionally, it is undisputed that the upon entering the Non-Public School in September 2010, the Student’s social/emotional functioning was severely compromised by depression and suicidal ideation. Nevertheless, after receiving extensive counseling at the Non-Public School, the Student is stabilized and making progress in her current educational setting (Testimony of Psychologist). Further, the Student has established relationships with her teachers and her peers at the Non-Public School and she enjoys going to school (Testimony of Petitioner and Student). For these reasons, I find that removing the Student from her current placement, mid year, would pose a “serious educational risk” and DCPS’ decision to do so December 16, 2011 denied the Student a FAPE.

Finally, although the DCPS Progress Monitor testified about the proposed placement in Virginia, no one from the proposed school was at the IEP meeting when DCPS made the decision to remove the Student from her current Non-Public School, and no one from the proposed placement in Virginia testified at the impartial hearing. As such, there is insufficient evidence in the record to demonstrate that the proposed school in Virginia was an appropriate location of services for the Student.

With respect to the issue of whether DCPS denied the Student a FAPE by failing to comply with the HOD dated March 21, 2011, I find that Petitioner has not met her burden of proof on this issue. The evidence shows that pursuant to the Order, an MDT meeting was convened on September 21, 2011. During the meeting, DCPS advised that a PNOP would be issued for the Student’s continued placement at the Non-Public school and requested that Petitioner waive consideration of all other prospective placements or locations of service. Petitioner agreed to waive consideration of all other prospective placements or locations of service at this meeting (Exhibit P-10, Testimony of Petitioner). Additionally, no evidence was presented at the hearing to support a finding that DCPS convinced Petitioner to waive consideration of other prospective placement with the intention of withdrawing support for placement at the Non-Public School at a later date (Testimony of Progress Monitor). Accordingly, I find that Petitioner has

failed to demonstrate that DCPS' failure to comply with the HOD dated March 21, 2011, resulted in a denial of FAPE.

Private School Placement:

Although the Student is classified as a Student with ED, the evidence shows that she also has dysthymic disorder, ADHD and a learning disorder as well as borderline intellectual functioning (Exhibit P-20). The evidence shows that the Student requires a small, structured educational setting with full time special education services provided in a high teacher to student ratio. The Student also requires speech and language services as well as behavior supports in the form of counseling (Exhibit P-15)

The Non-Public School is approved by OSSE and services students with multiple classifications (Testimony of Director). Although the Non-Public school is not specifically designated to service students with an ED classification, and not all of its teachers are certified in special education, the evidence shows that the curriculum is modified by a special education teacher to meet the Student's individual needs and that the Student has obtained a significant academic and social/emotional benefit since her placement at the Non-Public School in September 2010 (Testimony of Petitioner, Student, Director and Psychologist) (Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7[1993]). The evidence also shows that the Non-Public School employs a Psychologist who has a PhD in counseling and advanced certification in suicide prevention and a graduate level social worker, both of whom provide counseling services to the Student (Testimony of Director and Psychologist). Based on these facts, I find that the program and services offered at the Non-Public School are appropriate to meet the Student's needs. Additionally, there was no showing that the Student's needs could be met at a DCPS school or any other school. Finally, the school is approved by OSSE³ and the annual tuition is \$35,000 (Testimony of Director), which I find is not unreasonable.

Further, I also find that the Non-Public School is the Student's least restrictive environment (LRE), as the evidence shows that the Student should not be placed in the general education setting, but in a small class with a small student to teacher ratio (Exhibit P-20). Additionally, DCPS conceded that placement in a Non-Public School was the Student's LRE. As such, I find the Non-Public School is presently the Student's LRE.

Petitioner's request for continued funding for the Student's placement at the Non-Public School is granted Branham v. District of Columbia, 427

F.3d 7, 12 (D.C. Cir. 2005). Nevertheless, funding for placement at the Non-Public School is limited to the remainder of the 2011-2012 school year. DCPS shall reconvene an IEP meeting at the end of the current school year to assess the appropriateness of the Student's placement. In the event DCPS fails to reconvene an IEP meeting to assess the

Equities:

The evidence shows that Petitioner cooperated with the IEP process and no evidence was presented to warrant a denial of prospective funding for the Non-Public School. As such, I find that the equities support an award of prospective funding for placement at the Non-Public School for the remainder of the 2011-2012 school year.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 1st day of March, 2012, it is hereby

ORDERED that DCPS shall continue to fund the Student's placement at the Non-Public School for the remainder for the 2011-2012 school year.

ORDERED that DCPS shall reconvene an IEP meeting by June 15, 2012 to assess the appropriateness of the Student's placement for the 2012-2013 school year.

Dated March 1, 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).