

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],¹

Date Issued: April 2, 2012

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 APR - 2 PM 4: 30

HEARING OFFICER DETERMINATION

I. Background and Procedural Posture

The Complaint in this matter was filed with the Student Hearing Office (SHO) on February 29, 2012. The Respondent filed a response on March 8, 2012. A prehearing conference was held, via telephone, on March 15, 2012.

A prehearing order was issued that date, permitting the filing of dispositive motions. The Petitioner moved, on March 20, 2012, for a summary determination that the Petitioner is entitled to a determination as a matter of law. The Respondent replied to the motion on March 22, 2012, seeking a denial of the motion and support for its position that it has the authority to change the Student's location of services and that it is offering transportation to that new location.

The Student was placed at the _____ School, a non-public special education school, by the undersigned following a hearing in August 2010. (Case #2010-0796). In the Hearing Officer Determination (HOD) for case #2010-0796 it was determined that the Student was denied a free appropriate public education (FAPE) because the Respondent failed to comply with two prior HODs (Cases #2009-0587 and #2009-1274) which had required it to comply with the IDEA. The equitable remedy applied was to remove the Student from the public supervision of the Respondent and place her at the _____ School. The Respondent remained responsible for the cost of the Student's education and was specifically given the right to challenge any services for

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

which it was billed in a due process hearing. This was an equitable consideration given that the Petitioner had not unilaterally placed the Student.

Case #2010-0796 was not appealed and there are no subsequent agreements between the parties modifying the relief provided. Another complaint was filed in December 2011, Case #2011-1227, concerning the Respondent's attempt to alter the Student's placement unilaterally. In that case the Petitioner sought enforcement of the HOD for #2010-0796. The complaint was dismissed because the matter concerned a determination already made in the prior HOD, that HOD had not been appealed, and the Respondent was not challenging the services the Student was receiving. Thus, there was no new relief that could be awarded. The Respondent was advised it must comply with the HOD for case #2010-0796 because it had not been appealed and altered. It was also noted that if the Respondent had a specific objection to the services for the Student it was being billed for, pursuant to the prior HOD, it could request a hearing. It was also noted that if the Respondent continued to attempt to unilaterally alter the remedy granted the Petitioner and Student in Case #2010-0796, the Petitioner could seek enforcement of the HOD through the State Education Agency complaint process (34 C.F.R. § 300.152(c)(3)) or seek legal recourse in a court of competent jurisdiction.

II. Issue

Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to provide the Student the related service of transportation in her individualized education program (IEP) when it refused to transport her to _____ School?

III. Findings of Fact²

1. The Student is a child with a disability who was placed at the _____ School by the undersigned following a due process hearing in 2010 (Case #2010-0796). The order specifically provided:
 1. The Petitioner prevails because the Respondent failed to comply with the HODs of May and November, 2009, by failing to provide the Petitioner with written progress reports on the annual goals in the middle of and at the end of each advisory, and by failing to include in the Student's IEP measurable annual goals that address her executive functioning and social/emotional needs that affect her involvement in and progress in the general education curriculum.
 2. The Student will be immediately placed at _____ School at the Respondent's expense. While the Respondent remains responsible for the cost of the Student's educational programming, including related services, the Petitioner may work directly with the _____ School to determine the appropriate services for the Student. The Respondent has the right to challenge any services billed for in a due process hearing, but shall not have the right to dictate what services will or will not be provided. This remedy is appropriate for the Student in this case because the Respondent

² These findings are drawn from the administrative record, including the prior HODs, and the pleadings and filings in the present case. No material facts are in dispute, only a question of law. Respondent notes in its reply and cross-motion that there are facts in dispute. It did not identify which facts it believes are in dispute nor provide evidence in its pleadings contrary to those stated or provided by the Petitioner.

repeatedly failed to adhere to the requirements of the law and the orders of the IHO. This demonstrated either a disregard for or ignorance of the law and, consequently, the rights the Student and Petitioner. Thus, to ensure the Student obtains a FAPE, and to fairly remedy the violations of Petitioner's due process rights, the Respondent is effectively removed from the role of serving the Student.

3. If the Student is, for any reason but for graduation or aging out, no longer able to attend School, the Student will again become the direct responsibility of the Respondent and all of the procedures and obligations under IDEA will become applicable. Nothing in this order requires placement at another non-public placement, unless the IEP team determines that such a placement is necessary for the Student.

The decision was not appealed by either party.

2. The Petitioner and the non-public school have determined the Student requires transportation services to and from school as a related service.
3. The Respondent attempted to move the Student from School to Spectrum Program at School in December 2011. This prompted a complaint from the Petitioner (Case #2011-1227) that sought to enforce the prior HOD. That complaint was dismissed by the IHO (undersigned) because the

matter concerns a determination already made in a prior HOD, and that HOD has not been appealed and the Respondent is not challenging the services the Student is receiving, there is no relief that can be awarded. The Student has already been awarded relief that includes a non-public placement at public expense and without public supervision by the Respondent. There is no additional relief to award and the Respondent already must comply with HOD for case #2010-0796 because it has not been appealed and altered. Therefore, this matter is dismissed with prejudice.

It was noted in the order:

If the Respondent has a specific objection to the services for the Student it is being billed for, pursuant to the prior HOD, it may request a hearing. If the Respondent continues to attempt to unilaterally alter the remedy granted the Petitioner and Student in Case #2010-0796, the Petitioner may seek enforcement of the HOD through the State Education Agency complaint process (34 C.F.R. § 300.152(c)(3)) or seek legal recourse in a court of competent jurisdiction.

4. The Respondent has not requested this hearing and is not objecting to transportation services billed for. The Respondent refuses to provide transportation to the Student's school, School, instead offering transportation to the Program at School.

IV. Conclusions of Law

1. There are no rules under the Individuals with Disabilities Education Improvement Act (IDEA) or the District of Columbia Municipal Regulations for special education hearings dealing with summary adjudication. Hearing Officers have the "authority and responsibility" to "take actions necessary to complete the hearing in an efficient and expeditious manner[.]" Student Hearing Office Standard Operating Procedure

(SOP) § 600.1. Since there are no material facts in dispute in this case, this hearing, based on the briefing of the parties through their pleadings and motions, provides an efficient and expedition hearing process and an evidentiary hearing is not required.

2. A hearing officer's decision is final unless appealed. *See* 34 C.F.R. § 300.514. The decision in case #2010-0796, placing the Student at _____ School, was not appealed and is a final decision.
3. The Respondent argues that it has the authority to remove the Student from _____ and send her to _____ because it is not a change in placement, and that is a reason, under paragraph 3 of the HOD for Case 2010-0796, that the Student can no longer attend _____ under the HOD. The Respondent's argument is misplaced because the Student was placed by IHO, not the Respondent. Further, the reason for that remedy was to remove the Student from the Respondent's supervision due to its repeated disregard of HODs and the law. Nor has there been an agreement between the parties to alter that remedy, a court of competent jurisdiction has not altered that remedy, the Petitioner has not removed the Student from _____ and _____ has not refused to serve the Student. Furthermore, the Respondent has not challenged the services it is being billed for, which it could do under the HOD for case #2010-0796. Thus, this case is not about whether there has been a change in placement or location, but rather whether the Respondent has the authority to unilaterally modify the HOD for case 2010-0796? Under 34 C.F.R. § 300.514 and the HOD, it does not.
4. Respondent argues that an appeal of a different case, resulting in a Federal District Court decision, Dist. of Columbia v. Nelson, 57 IDELR 192 (D.D.C. September 21, 2011), requires it to maintain supervision of the Student's program, despite the HOD #2010-0796. While such a decision may provide guidance for future court and administrative decisions it does not control an HOD that was not appealed. Furthermore, the HOD in Nelson is distinguishable from the HOD for Case #2010-0796 and its impact on the present case because the HOD underlying Nelson specifically directed DCPS to maintain "supervision" of the student's education program. The Respondent was specifically removed from the supervision of the Student's educational program, which is appropriate in some cases as determined by the Court or Hearing Officer. *See e.g. Florence County Sch. Dist. Four v. Carter*, 114 S.Ct. 361 (1993), *citing School Comm. of Burlington v. Department of Ed. of Mass.* 105 S. Ct. 1996 (1985), (repeating that IDEA grants courts authority to provide appropriate relief and that equitable considerations are relevant in establishing such relief, including that public supervision will not make sense in some cases, such as when parents unilaterally place their child in a private school for which they seek public reimbursement.) The Respondent's argument does not show it regained its authority to supervise the Student's educational program.
5. The HOD for Case #2010-0796 only required the Respondent to pay for related services, not provide them. Thus, the Respondent may be billed for the cost of transporting the Student to _____ School, but was not and will not be required to

provide the transportation service itself. To require the Respondent to provide any special education or related services while the Student is enrolled at _____ would run counter to the rationale behind the remedy, which was the Respondent's inability or unwillingness to provide a FAPE to the Student. If the Petitioner wishes to have the Respondent provide special education or related services directly, she may reenroll her child in one of the Respondent's schools.

V. Order

The HOD for case #2010-0796 remains in effect including, but not limited to, the Respondent's responsibility for the cost of related services such as transportation.

IT IS SO ORDERED.

Date: April 2, 2012



Jim Mortenson,
Independent Hearing Officer

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 USC §1415(i).