District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office
Frances Raskin, Due Process Hearing Officer
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STUDENT HEARING OFFICE
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Confidential

STUDENT, through the legal guardian[1]	)	
	)	
Petitioner,	)	
	)	Complaint Filed: April 20, 2009
v.	)	
	)	Hearing Date: May 9, 2009
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	
	)	
	)	
Respondent.	)	
	)	

HEARING OFFICER DETERMINATION

Counsel for Petitioner:
Zachary Nahass, Attorney at Law
James E. Brown & Associates
1220 L Street, N.W.; Suite 700
Washington, D.C. 20005
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Counsel for DCPS:
Nia Fripp, Attorney at Law
Office of the General Counsel, DCPS
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[1] Personal identification information is provided in Attachment A.

I. JURISDICTION

This hearing was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. INTRODUCTION

Petitioner is the mother of a year-old student ("Student") attending a District of Columbia public school. Petitioner and the Student reside in the District of Columbia.

On April 20, 2009, Petitioner filed a Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS") and an independent charter school ("Charter"). The Complaint alleged that the Student attended until Charter until the end of the 2007-2008 school year, and that Charter had failed to (1) timely determine the Student's eligibility for specialized instruction and related services; (2) evaluate the Student in all areas of suspected disability and review all evaluations; (3) develop an appropriate individualized educational program ("IEP") for the Student; and (4) determine and provide an appropriate educational placement for the Student. The Complaint further alleges that due to numerous behavioral incidents, officials at Charter asked Petitioner to remove the Student from Charter at the end of the 2007-2008 school year.

The Complaint further alleges that a June 2008 psychological evaluation of the Student found that the Student meets the criteria for a diagnosis of oppositional defiant disorder and of ADHD combined type. It alleges that the evaluation further found that the Student meets the criteria for a diagnosis of seriously emotionally disturbed. The Complaint alleges that Petitioner enrolled the Student at a DCPS school at the beginning of the 2008-2009 school year, and that Petitioner provided the June 2008 psychological evaluation and a June 2008 social history evaluation to DCPS at the time she enrolled the Student.

The Complaint alleges that DCPS failed to find the Student eligible for specialized instruction and related services as a child with multiple disabilities until October 2, 2008, and thus failed to timely determine the Student's eligibility for specialized instruction and related services. It further alleges that DCPS developed an inappropriate IEP for the Student that fails to include an accurate disability classification, sufficient specialized instruction or counseling, a behavior intervention plan, and appropriate annual goals and descriptions of how progress toward those goals would be measured. The Complaint further alleges that the Student has regressed behaviorally and academically over the course of the 2008-2009 school year.

The Complaint further alleges that neither Hyde nor DCPS ever conducted a functional behavioral assessment ("FBA") of the Student. Finally, the Complaint alleges that DCPS has never provided an appropriate placement for the Student.

The Complaint seeks as relief an order finding that:

1. Charter denied the Student a free, appropriate, public education ("FAPE") by failing to timely identify the Student's eligibility for special education and related services and failing to provide an appropriate educational placement; and

2. DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to timely identify the Student's eligibility for special education and related services; failing to timely conduct and review evaluations in all areas of the Student's suspected disability; failing to timely develop an IEP for the Student' and failing to provide an appropriate educational placement.

The Complaint also sought an order requiring:

3. DCPS to fund and place the Student at a full-time, therapeutic school of Petitioner's choosing and transportation for the Student to the school;

4. DCPS to fund an independent FBA of the Student;

5. DCPS to convene an MDT meeting to review all evaluations and develop an appropriate IEP for the Student, including a behavior implementation plan ("BIP");

6. DCPS to invite Charter to attend the MDT meeting to discuss compensatory education, or in the alternative,

7. DCPS and Charter to fund an independent evaluation to determine whether additional services are necessary to compensate the Student for their denial of a FAPE to the Student.

Counsel for DCPS filed a timely Response to Parent's Administrative Due Process Notice ("Response") on April 30, 2009. The Response asserted that DCPS found the Student eligible within 38 days of his enrolling at and thus the eligibility determination was timely. The Response further asserts that DCPS completed an FBA and that a BIP meeting was scheduled for April 20, 2009. Finally, the Response asserts that the Student's placement is reasonably calculated to provide educational benefit and that the Student has been absent for more than 60 days from his science and math classes, more than 40 days in his homeroom class, and at least ten days in all of his other classes during the 2008-2009 school year and that his lack of attendance has impeded his educational progress.

Before the due process hearing, settled with Petitioner all claims against

On May 14, 2009, a prehearing conference was held in the above matter. Participating in the conference were Zachary Nahass, counsel for Petitioner, Ellen Dalton, counsel for Respondent Nia Fripp, counsel for Respondent District of Columbia Public Schools, as well as Hearing Officer Frances Raskin. During the prehearing conference, both counsel agreed the due process hearing would be scheduled for June 9, 2009. This Hearing Officer informed counsel for Petitioner that she does not delegate compensatory education issues to either DCPS or charter schools to decide, and that, if counsel for Petitioner wants to prevail on this issue, he must be prepared to present his proof at the due process hearing, including a compensatory education plan that meets the standards

established in *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). Counsel for Petitioner also was advised that Petitioner will proceed first at the due process hearing and carry the burden of proof.

At the outset of the due process hearing on June 9, 2009, counsel for DCPS represented that on June 5, 2009, she had made a settlement offer to counsel for Petitioner and that counsel for Petitioner rejected the offer. The terms of the offer as represented by both counsel were that DCPS would place the Student in a non-public school for the 2009-2010 school year and would provide the Student transportation to and from the non-public school. Counsel also represented that DCPS had revised the Student's IEP on March 5, 2009, to specify that the Student required a full-time, therapeutic, special education setting, and to require DCPS to provide the Student 27.5 hours of specialized instruction and one hour of counseling per week. Counsel also represented that on March 5, 2009, and again on April 29, 2009, the IEP team acknowledged that the current DCPS educational placement was inappropriate for the Student.

Counsel for Petitioner then represented that he was willing to accept the DCPS offer of placement at the non-public school, and both parties agreed that this Hearing Officer should order a meeting of the multidisciplinary team to occur thirty days after the Student enrolls at the non-public school to review the Student's evaluations, review and revise the Student's IEP, if necessary, and develop a BIP. Counsel for DCPS represented that DCPS admitted that it had denied the Student a free, appropriate, public education from March 5, 2009, until the date the Complaint was filed on April 20, 2009, and that this Hearing Officer may reflect this admission in her decision.

Counsel for Petitioner admitted that he was seeking no further relief other than a declaratory judgment that the Student was denied a FAPE from October 2, 2008, to March 5, 2009. Counsel for Petitioner stated that he was unprepared to present testimony on compensatory education at the hearing because he first wanted this Hearing Officer to make a finding as to whether the Student was denied a FAPE from October 2, 2008, to March 5, 2009. This Hearing Officer reminded counsel for Petitioner that she had instructed him to be prepared to present his proof on compensatory education, including a compensatory education plan, at the due process hearing. This Hearing Officer also reminded counsel for Petitioner that she had informed him during the prehearing conference that if he failed to present his proof on compensatory education, he would be deemed to have waived it. Counsel for DCPS concurred that this was an accurate representation of the discussion during the prehearing conference, but counsel for Petitioner had different recollection.

This Hearing Officer further informed counsel for Petitioner that, considering that the only issue to be proved was whether the Student was denied a FAPE from October 2, 2008, to April 20, 2009, and the appropriateness of any award of compensatory education resulting from any denial of FAPE between October 2, 2008, and April 20, 2009, including the period during which DCPS stipulated the Student was denied a FAPE (from March 5, 2009, and April 20, 2009). This Hearing Officer further advised counsel for Petitioner that, based on the conversations during the prehearing conference, he should have been prepared, at a minimum, to prove a denial of FAPE between October 2, 2008, and March 5, 2008. This Hearing Officer further advised counsel for Petitioner that, based on the conversations during the prehearing

conference, counsel should have disclosed compensatory education plans for each time period and been prepared to prove that those plans met the *Reid* standard. Instead, counsel for Petitioner failed to disclose any compensatory education plan. Thus, this Hearing Officer informed counsel for Petitioner that he would be unable to prove the appropriateness of any award of compensatory education for any denial of FAPE during the 2008-2009 school year.

Thus, counsel for Petitioner was unprepared to present a compensatory education plan for either time period, which left the Hearing Officer with no relief to order if she had granted counsel for Petitioner's request to hold a hearing on whether DCPS denied the Student a FAPE between October 2, 2008, and March 5, 2009.. This Hearing Officer informed Petitioner that she would not issue an advisory opinion, and extensively attempted to get counsel for Petitioner to understand the rationale behind her decision, to no avail. This Hearing Officer then ruled that, because Petitioner had been granted all of the relief requested, in the Complaint with the exception of the compensatory education issue counsel was not prepared to litigate, the due process hearing would be resolved by summary order. Counsel for DCPS did not object to the terms of the proposed order or this Hearing Officer resolving this case by summary order.

III. DECISION

This Hearing Officer hereby finds that DCPS denied the Student a FAPE from March 5, 2009, to April 20, 2009, based on the admission by DCPS. This Hearing Officer finds that, by agreement of the parties, DCPS shall be required to fund the Student's placement and transportation services at the non-public school for the 2009-2010 school year. This Hearing Officer further finds that, by agreement of the parties, DCPS shall convene a meeting of the multidisciplinary team ("MDT") thirty days after the Student enrolls at the non-public school. At this meeting, the MDT shall review the Student's evaluations, review and revise the Student's IEP, if necessary, and develop a BIP. The participants at this MDT meeting shall include representatives of the non-public school, the evaluators who conducted or supervised the Student's evaluations, and Petitioner.

This Hearing Officer also finds that counsel for Petitioner failed to disclose and present at the due process hearing a compensatory education plan that complies with the standard established by in *Reid*, 401 F.3d 516. Thus, Petitioner has waived any claim for compensatory education for any denial of FAPE between October 2, 2009, and April 20, 2009.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the response thereto, and agreement of the parties, this 19th day of June 2009, it is hereby

ORDERED that DCPS shall fund the Student's placement and transportation services at the non-public school for the 2009-2010 school year;

IT IS FURTHER ORDERED that DCPS shall convene a meeting of the MDT thirty days after the Student enrolls at the non-public school to review the Student's evaluations, review and revise the Student's IEP, if necessary, and develop a BIP.

IT IS FURTHER ORDERED that DCPS shall include among the participants at this MDT meeting representatives of the non-public school, the evaluators who conducted or supervised the Student's evaluations, and Petitioner;

IT IS FURTHER ORDERED that Petitioner's claim for compensatory education is **DISMISSED WITH PREJUDICE**; and

IT IS FURTHER ORDERED, that this Order is effective immediately.

/s/
Frances Raskin
Hearing Officer

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision 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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

Copies to:
Zachary Nahass, counsel for Petitioner
Nia Fripp, counsel for Respondent
Student Hearing Office