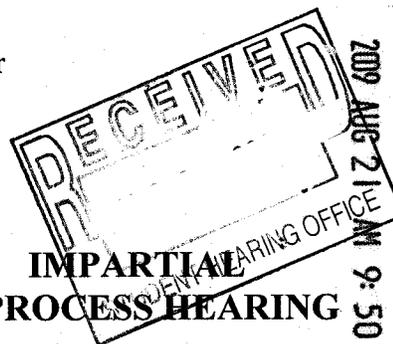


Office of Review & Compliance

Student Hearing Office
Van Ness Elementary School
1150 5th Street, S.E., 1st Floor
Washington, D.C. 20003
Telephone (202) 698-3819
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Confidential



OSSE
STUDENT HEARING OFFICE

The Student Through their)
Parents,*)
Case No.:)
Petitioner,)
vs.)
The District of Columbia Public Schools,)
Home School: Non Attending Student)
Attending:)
Respondent.)

IMPARTIAL HEARING OFFICE
DUE PROCESS HEARING

DECISION AND ORDER

Due Process Compl. Filed: July 6, 2009
Rescheduled Hr'g Date: Aug. 10, 2009
Held at: Van Ness Elementary School
1150 5th Street, S.E., 1st Floor
Washington, D.C. 20003
Pre-Hr'g Conference Held By-Phone on
Monday, July 20, 2009 at 3:30 p.m.

Counsel for the Parent/Student:

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District of Columbia Public Schools:

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Washington, D.C. 20005

Independent Hearing Officer:

Frederick E. Woods

- Party identification information is stated in Appendix A of this order and Appendix A shall be removed from this order before public dissemination.

I. Case Background and Procedural Information

A. JURISDICTION

This Decision and Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, codified at 20 U.S.C. §§ 1400 -1482, 118 Stat. 2647; and its implementing regulations codified at 34 C.F.R. §§ 300.01 – 300.818; 5 D.C.M.R. §§ 3000 - 3033.

B. DUE PROCESS RIGHTS

Before the hearing the parent had been advised of their due process rights.

C. FIVE-DAY DISCLOSURES

Petitioner: Admitted, without objection, a disclosure letter filed with the SHO on 08/04/09 that list six (6)-witnesses and attached twenty-three exhibits sequentially labeled and tabbed Parent-01 through Parent-23. Two witnesses were called to testify: (1) the parent; and (2) the education advocate.

Respondent: Admitted, without objection, a disclosure letter filed on 08/14/09 that list eight (8)-witnesses and attached fifteen exhibits sequentially labeled DCPS-01 through DCPS-15. No witnesses were present or called to testify. DCPS rested its case on the admitted exhibits and the testimony of the parent's witnesses.

D. STATEMENT OF THE CASE

The student, born _____ age _____-years 8-months, is a rising _____ grade student with a disability receiving special education and related services, according to his 05/27/09 IEP as a Other Health Impaired ("OHI") student at _____ located in Washington, D.C. (R. at Parent-03.)

The parent said that DCPS failed to conduct assessments on the student that it had agreed to perform according to the student's 05/27/09 Student Evaluation Plan ("SEP"); that DCPS did not include goals for Encopresis (soiling on himself) in the student's 05/27/09 IEP; that DCPS did not provide the student with Extended School Year Services ("ESY") in summers 2008 and 2009; and that DCPS did not provide the student an appropriate educational placement setting to implement the IEP for the 2009-10 school year. (R. at Parent-01, 02, 03.)

Consequently the parent filed the student's 07/06/09 Due Process Complaint ("DPC") alleging that DCPS as the LEA violated the IDEA and denied the student a Free Appropriate Public Education ("FAPE") by doing four things: (1) failing to conduct

assessments on the student that it had agreed to perform according to the student's 05/27/09 Student Evaluation Plan ("SEP"); (2) failing to include goals for Encopresis in the student's 05/27/09 IEP; (3) failing to provide the student with Extended School Year Services ("ESY") in summers 2008 and 2009; and (4) failing to provide the student an appropriate placement for the 2009-10 school year. (R. at Parent-01, 02, 03.)

As relief, the parent wants DCPS to place and fund the student at _____ of Washington, DC for the 2009-10 school year; to perform or fund the assessments called for in the student's 05/27/09 SEP; to place goals in the student's 05/27/09 IEP for Encopresis; and provide the student with a Compensatory Education award. (R. at Parent-01.)

The DCPS 07/14/09 written Response to the parent's DPC and its oral updated response to the DPC stated at the due process hearing denied the parent's claims for these reasons: (1) the assessment called for in the student's 05/27/09 SEP were completed on or about 07/27/09; (2) DCPS issued a 2009-10 school year Prior Written Notice of Placement ("PWNOP") for the student to attend _____ of Washington, DC; (3) the student had a dedicated aide to address his Ecopresis albeit it is not an IDEA disability; and (4) the student's MDT Team did not agree to provide the student with summers 2008 and 2009 ESY services.

The OSSE Student Hearing Office ("SHO") scheduled the due process hearing for 9:00 a.m. on Monday, August 10, 2009 held at Van Ness Elementary School, 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003. The parent selected to have a closed due process hearing that convened, as scheduled, 34-days after the 07/06/09 DPC was filed.

Attorney Nia M. Fripp appeared in-person representing DCPS. Attorney Zachary Nahass appeared in-person representing the student who was not present; and the student's mother who was present.

II. Issue

Did DCPS, as the LEA, violate the IDEA and deny the student a FAPE during the 2008-09 school year by doing four things: (1) failing to conduct assessments on the student that it had agreed to perform according to the student's 05/27/09 Student Evaluation Plan ("SEP"); (2) failing to include IEP goals for Encopresis in the student's 05/27/09 IEP; (3) failing to provide the student an appropriate educational placement setting for the 2009-10 school year; and (4) failing to provide the student with Extended School Year Services ("ESY") in summers 2008 and 2009? (R. at Parent-01, 02, 03.)

Brief Answer

(1) No. On or about 07/27/09 DCPS completed the assessments called for in the student's 05/27/09 SEP.

(2) No. Encopresis is not a recognized IDEA disability. It is, however, a unique need of the student that DCPS addressed by providing the student with a dedicated aide.

(3) No. Before the 2009-10 school year started, DCPS issued a PWNOP that placed and funded the student at the private special education school that the parent requested, _____ of Washington, DC.

(4) No. Albeit DCPS did provide the student with ESY services in summer 2008 but did not provide ESY services in summer 2009, the parent did not meet the legal requirements for a Compensatory Education award.

III. FINDINGS OF FACT

1. The student, born _____ age _____ years 8-months, is a rising (2nd) grade student with a disability receiving special education and related services, according to his 05/27/09 IEP as a Other Health Impaired ("OHI") student at _____ located in Washington, D.C. (R. at Parent-03.)
2. On 05/27/09 the student's mother participated in the development of and signed the student's 05/27/09 IEP noting under her signature that "she agreed with the special education [specialized instruction] and related services summary of the IEP but did not agree with the placement." That IEP called for the student to receive these services:
 - i. Specialized Instruction 24-hours/week;
 - ii. Speech-Language Therapy 1.5-hours/week;
 - iii. Occupational Therapy 0.5-hours/week; and
 - iv. Psychological Services 1.0-hour/week.

Those IEP services were to be provided in a general education classroom. (R. at Parent-03.)

3. Also on 05/27/09 the student's IEP Team developed a Student Evaluation Plan ("SEP") recommending "a Comprehensive Psychological Evaluation that included Behavior and Autism Rating Scales to determine the student's present levels of performance." (R. at Parent-03.)

4. The IEP did not, however, include goals for Encopresis; it did not include summer 2009 ESY; and there was no Prior Written Notice of Placement (“PWNOP”) for the 2009-10 school year offered into evidence at the due process hearing. (R. at Parent-03.)
5. According to the student’s mother, she selected _____ as the school for her child to attend for both the 2007-08 and 2008-09 school years. (R. at mother’s testimony.)
6. Also, according to the mother, on or about 07/27/09—two weeks before the due process hearing convened—DCPS conducted the evaluations called for in the student’s 05/27/09 SEP. She was present for those evaluations and asked the evaluator to send the evaluation report results to her lawyer. The evaluator agreed to send the report to the parent’s lawyer. (R. at mother’s testimony.)
7. Therefore, based on the mother’s candid and un rebutted testimony, the evaluations called for in the student’s 05/27/09 SEP that are at issue in this case had been completed by DCPS two weeks before the due process hearing convened. So, the parent’s failure to evaluate issue raised in the student’s 07/06/09 DPC is moot since the parent’s requested relief was to have DCPS either perform or fund independent assessments and DCPS has already performed them.
8. Also the mother testified that she received from DCPS a PWNOP for the student being placed and funded at public expense to attend _____ of Washington, DC for the 2009-10 school year. Towards this end, at the due process hearing the parent completed, signed, and submitted the DCPS Student Transportation Form to have school bus transportation in place to take the student to and from school by the start of the 2009-10 school year. (R. at mother’s testimony.)
9. Therefore, based once again on the mother’s candid and un rebutted testimony, the special education setting the mother sought for the student for the 2009-10 school year was provided to her before the due process hearing convened. So, the parent’s inappropriate placement issue raised in the student’s 07/06/09 DPC is moot since the parent’s requested relief was to have DCPS fund a private special education placement that the parent selected and before the due process hearing convened DCPS had issued a PWNOP to that placement—
_____ of Washington, DC. (R. at Parent—22.)
10. The parent offered no documented evidence about the student’s Encopresis. The parent said a doctor’s report diagnosed that condition but that report was not offered into evidence by the parent. And the

parent did not say what goals were sought in the student's 05/27/09 IEP to address Encopresis based on the doctor's report. The student did however, have a full time dedicated aide to assist with toileting. (R. at mother's testimony.)

11. Finally, there was no probative evidence presented that the student was to receive summer 2009 ESY services. ESY services are not indicated on the student's 05/27/09 IEP or in the student's 05/27/09 MDT Meeting Notes written by a member of that IEP Team. (R. at Parent-03.)
12. But as to summer 2008 ESY services, the student's 06/27/08 HOD ordered DCPS to update the student's IEP at that time to designate the student as eligible for [summer 2008] ESY services. (R. at Parent-01.)
13. There was no IEP offered into evidence to show whether an IEP had been developed to include summer 2008 ESY. But according to the 11/19/08 e-mail sent by another lawyer from the law firm of parent's counsel to OSSE, the student got the services he needed in the summer 2008. Here is why.
14. That e-mail states in pertinent part that "the [June 2008] HOD ordered an MDT Meeting to add ESY to the IEP. That meeting never took place. The student, however, did attend summer school and his 1:1 aide was present for summer school. The HOD was technically never complied with but the student did ultimately get what the student needed." (R. at DCPS-15.)
15. And the parent presented no evidence whatsoever about educational harm to the student and did not provide any evidence of what additional services should be given to the student in the form of Compensatory Education for any alleged harm even if the parent had presented evidence of harm.
16. Ergo, based on these findings the parent did not prove that DCPS denied the student a FAPE.

IV. DISCUSSION and CONCLUSIONS OF LAW:

I

The LEA, is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEA codified at 20 U.S.C. §§ 1400 - 1482. and 5 D.C.M.R. § 3000.1 requires the DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility

for special education and related services and, if eligible, provide them with special education and related services through an appropriate IEP and Placement.

The LEA met its legal obligation under the IDEA. Here is why.

1. "If a child's initial evaluation suggests [s/he] is entitled to a FAPE, IDEA then requires the school district to create and implement an IEP, which is the 'primary vehicle' for implementing the Act." Hoing v. Doe, 485 U.S. 305, 311 (1988).
2. Pursuant to 5 D.C.M.R. § 3002.1, LEA Responsibility, "[t]he services provided to the child must address all of the child's identified special education and related services needs and must be based on the child's unique needs and not on the child's disability."
3. Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."
4. Pursuant to 5 D.C.M.R. § 3025, Procedural Safeguards—Prior Written Notice, DCPS shall provide written notice to the parent of a child with a disability before it proposes...an educational placement of the child.
5. Pursuant to the IDEA at 20 U.S.C. § 1414 (d) (A), (B); 34 C.F.R. § 300.323 (a) Requirement that Program be in Effect—

At the beginning of each school year, each local educational agency ... shall have in effect for each child with a disability in the agency's jurisdiction an IEP.

6. The student's IEP team that included their mother and education advocate as team members complied with the IDEA when it did the following: (1) referred the student for an initial evaluation; (2) performed those evaluations and found the student eligible for special education services on 03/19/08; (3) developed an initial 03/19/08 IEP for the student; and (4) implemented that IEP at the parent's selected educational setting IDEAL P.C.S. (R. at DCPS-03; mother's testimony.)
7. Subsequently, and at issue in this case, on 05/27/09 the student's mother participated in the development of and signed the student's 05/27/09 IEP noting under her signature that "she agreed with the special education [specialized instruction] and related services summary of the IEP but did not agree with the placement." That IEP called for the student to receive these services:
 - i. Specialized Instruction 24-hous/week;

- ii. Speech-Language Therapy 1.5-hours/week;
 - iii. Occupational Therapy 0.5-hours/week; and
 - iv. Psychological Services 1.0-hour/week.
- (R. at Parent-03.)

8. Also on 05/27/09 the student's IEP Team developed a Student Evaluation Plan ("SEP") recommending "a Comprehensive Psychological Evaluation that included Behavior and Autism Rating Scales to determine the student's present levels of performance." (R. at Parent-03.)
9. However, two weeks before the due process hearing convened, DCPS conducted the evaluations called for in the student's 05/27/09 SEP. So, the parent's failure to evaluate issue raised in the student's 07/06/09 DPC is moot since the parent's requested relief was to have DCPS either perform or fund the parent's independent assessments called for in the 05/27/09 SEP but DCPS has already performed them.
10. As to an appropriate placement for the 2009-10 school year, the mother testified that she received from DCPS a PWNOP for the student being placed and funded at public expense to attend _____ of Washington, DC for the 2009-10 school year.
11. So, the parent's inappropriate placement issue raised in the student's 07/06/09 DPC is moot since the parent's requested relief was to have DCPS fund a private special education school placement that the parent selected for the 2009-10 school year and before the due process hearing convened DCPS had issued a PWNOP to that placement— _____ of Washington, DC. for the student to attend during the 2009-10 school year. (R. at Parent—22.)
12. As to the parent's claim that the student's 05/27/09 IEP did not have goals for Encopresis, while that statement is true, the parent offered no documented evidence about the student's Encopresis or proposed goals. The parent said a doctor's report diagnosed that condition but that report was not offered into evidence by the parent. And the parent did not say what goals were sought in the student's 05/27/09 IEP to address Encopresis based on the doctor's report. Moreover, the student did, however, have a full time dedicated aide to assist with toileting. (R. at mother's testimony.)
13. So albeit the parent did not claim or establish that Encopresis is an IDEA recognized disability, it is a unique need of the student that DCPS addressed by giving the student a full time dedicated aide. So DCPS did not deny the student a FAPE by not including goals in the 05/27/09 IEP for Encopresis.
14. Finally, the parent presented no probative evidence that the student was to receive summer 2009 ESY services. That is because ESY services are not

indicated on the student's 05/27/09 IEP or in the student's 05/27/09 MDT Meeting Notes. (R. at Parent-03.)

15. But as to summer 2008 ESY services, the student's 06/27/08 HOD ordered DCPS to update the student's IEP at that time to designate the student as eligible for [summer 2008] ESY services. (R. at Parent-01.)
16. There was no IEP offered into evidence to show whether an IEP had been developed to include summer 2008 ESY. But according to the 11/19/08 e-mail sent by another lawyer from the law firm of parent's counsel to OSSE, the student got the services he needed in the summer of 2008. Here is why.
17. That e-mail states in pertinent part that "the [June 2008] HOD ordered an MDT Meeting to add ESY services to the IEP. That meeting never took place. The student, however, did attend summer school and his 1:1 aide was present for summer school. The HOD was technically never complied with but the student did ultimately get what the student needed." (R. at DCPS-15.)
18. So by the parent's own admission, the student got summer 2008 ESY services.
19. And even if the student was harmed by any of the violations alleged by the parent, the parent presented neither evidence of that harm nor any evidence about how to remediate that harm through their requested Compensatory Education award. Here is why.
20. The D.C. Circuit Court held that: "only those procedural violations of the IDEA which result in a loss of educational opportunity or seriously deprive parents of their participation rights are actionable." Lesesne v. District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006) (citing Kruvant v. District of Columbia, 99 F. App'x 232, 233 (D.C. Cir. 2004) (holding that although DCPS admits it failed to satisfy its responsibility to assess the student within 120 days of the parents' request, the parents have not shown harm resulted from that error).
21. And "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than *de minimis* failure to implement all elements of that IEP, and, instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. ... 'Failure to implement all services outlined in an IEP does not constitute a *per se* violation of the IDEA.'" Catalan v. District of Columbia, 478 F. Supp. 2d 73, 75-76 (D.D.C. 2007) (holding that a failure to provide all of a student's weekly speech-language therapy outlined in their IEP did not constitute a FAPE deprivation).
22. So based on this hearing record, there does not exist evidence supporting the parent's claim that the student was denied a FAPE because the issues alleged

in the 07/06/09 DPC alone did not result in a *per se* denial of a FAPE to the student.

23. Moreover, even if there was educational harm to the student, beyond the relief the parent had received from DCPS before the due process hearing convened, the parent did not present evidence to support a Comp. Ed. Award in the manner required by the IDEA.
24. Herein, the parent did not present a written formal Comp. Ed. Plan, or any evidence regarding the form, amount, and duration for their requested Comp. Ed. Award. So no such relief is awarded.
25. Moreover, now that the student's full time initial IEP is be implemented in a full time day therapeutic special education program at a private school selected by the parent but funded at public expense, there was no evidence of what else the student needed on top of those full time therapeutic IEP services.
26. And pursuant to Reid v. District of Columbia, 401 F.3d 516, 522 (D.C. Cir. 2005), "[u]nder the theory of 'compensatory education' Courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program."
27. "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 at 524.
28. Joining sister circuits, the District of Columbia Circuit Court held that "Compensatory Education awards fit comfortably within the 'broad discretion' of courts fashioning and enforcing IDEA remedies, see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993)." Reid, 401 F.3d at 523.
29. In sum, the Reid decision expressly states that courts and hearing officers may award Compensatory Education. Reid, 401 F.3d at 522. However, a BLMDT, as required under the IDEA, includes the LEA and SEA representatives who are employees of the state, who, under the IDEA, cannot conduct due process hearings. So if a hearing officer ordered a BLMDT to decide the parent's Compensatory Education claim, that team is being ordered to engage in a function reserved to courts and hearing officers. And, according to Reid, "under the statute [IDEA] a hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer's functions." Reid, 401 F.3d at 526.
30. So in light of Reid, there was no qualitative evidence presented about the educational benefits that likely would have accrued [to the student] from special education services the school district should have supplied [the

student] in the first place.” Reid, 401 F.3d at 524. And in the absence of an agreement between the parties that a certain type, form and amount of Compensatory Education services are warranted, no Compensatory Education is ordered.

31. Further, in light of Reid, the hearing officer cannot send the matter of Compensatory Education to an IEP Team to decide if Compensatory Education services are warranted. Reid, 401 F.3d at 526.
32. Consequently, the parent’s claim for Comp. Ed. is denied.
33. Pursuant to 5 D.C.M.R. § 3030.3, “The burden of proof shall be the responsibility of the party seeking relief; either the parent/guardian of the child or the LEA. 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a Free Appropriate Public Education (FAPE).”
34. The parent, who filed the Due Process Complaint, had and did not meet their burden of proof in this case because the parent:
 - a. Failed to prove that DCPS denied the student a FAPE.

So in consideration of the hearing record, there is no finding that the student was denied a FAPE because the parent did not meet their burden of proof under the IDEA by proving any alleged violation of the IDEA that denied the student a FAPE. And based on the evidence and governing law the hearing officer issues this—

ORDER

1. The parent’s 07/06/09, Due Process Complaint (“DPC”) in Case No.:
is dismissed, with prejudice—meaning that the issues that were or could have been raised in the 07/06/09 DPC based on the same facts against the same parties or privies that arise from the same time period that formed the basis for the 07/06/09 DPC that is resolved herein by a final judgment on the merits cannot be relitigated. See Apotex, Inc. v. FDA, 393 F.3d 210, 217 (D.C. Cir. 2004).
2. There is no finding that the student was denied a FAPE.
3. This Order resolved all issues presented at the 08/10/09 due process hearing that were raised in the student’s 07/06/09 Due Process Complaint in Case Number 2009-0984 that is dismissed with prejudice.

4. And the hearing officer made no additional findings.

This is the final ADMINISTRATIVE DECISION. An appeal can be made to a court of competent jurisdiction within ninety (90)-days from the date of this Decision and Order pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B); 34 C.F.R. § 300.516 (b).

/s/ Frederick F. Woods

**Frederick E. Woods
Hearing Officer**

August 20, 2009

Date