District of Columbia

Office of the State Superintendent of Education

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STUDENT HEARING OFFICE
OSSE

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STUDENT'S GUARDIAN[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent. Case # 2012-0418	HEARING OFFICER'S DETERMINATION Hearing Date: August 7, 2012 Representatives: Counsel for Petitioner: Nina Isaacson, Esq. District of Columbia Public Defender Service 633 Indiana Avenue, N.W. Washington, D.C. 20 Counsel for DCPS: Maya Washington, Esq. Assistant Attorney General 1200 First Street, NW Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for one day on August 7, 2012, at the Office of the State Superintendent of Education ("OSSE") Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in grade attending a District of Columbia Public Schools ("DCPS") high school, hereinafter referred to as "School A." The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of emotional disturbance ("ED").

During the 2011-2012 school year ("SY") the student had repeated behavioral difficulties and was suspended on a number of occasions from School A which culminated in the student School A determining at the end of SY 2011-2012 that the school could not return to School A.

On June 7, 2012, the student's guardian filed a due process complaint against DCPS alleging, inter alia, DCPS failed to provide the student an appropriate educational placement. Petitioner sought as relief that the Hearing Officer order DCPS to fund independent evaluations and order the student's placement with DCPS funding at the Foundations School for the 2012-2013 school year.

DCPS filed a response to the complaint on June 15, 2012, and asserted, inter alia, that it conducted triennial evaluations of the student in November 2009 and new evaluations were not due until November 2012. DCPS also asserted that all the student's individualized education program ("IEP') services were provided to her at School A. DCPS acknowledged during the pre-hearing conference the student cannot return to School A for SY 2012-2013, but alleged School A was an appropriate placement for her while she attended.

The parties attempted mediation that was unsuccessful in resolving the disputes. The parties agreed not to hold a resolution meeting but expressed a desire during the pre-hearing conference not to proceed directly to hearing but to allow the full 30-day resolution period expire before the 45-day timeline began. Thus, the 45-day period began on July 7, 2012, and ends (and the HOD is due) on August 21, 2012.

A pre-hearing conference was conducted on July 5, 2012, at which the issues to be adjudicated were discussed and determined. On July 10, 2012, the Hearing Officer issued a pre-hearing order outlining the issues to be adjudicated and directing DCPS to disclose to Petitioner and the Hearing Officer any placement/location of services it proposed for the student for SY 2012-2013 on or before July 16, 2012. On July 15, 2012, the Hearing Officer issued a revised pre-hearing order stating the time for the second day of hearing if it was necessary.

ISSUES: [2]

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to conduct triennial evaluations: comprehensive psychological evaluation by February 2012 and occupational therapy evaluation ("OT") by October 2010.

2. Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disabilities, to wit, failure to conduct a functional behavioral assessment ("FBA") after it was recommended by the DCPS least restrictive environment ("LRE") Team in December 2011.

3. Whether DCPS denied the student a FAPE by failing to develop an appropriate individualized education program ("IEP") for the student on November 23, 2011, because the parent and student were not present when the IEP was developed.

4. Whether DCPS denied the student a FAPE by failing to issue prior notices to the parent for the decrease in hours of specialized instruction in the November 18, 2011, IEP and for DCPS' refusal to place the student in a more restrictive setting after the IEP team's referral to the DCPS LRE team.

5. Whether DCPS denied the student a FAPE by failing to implement the student's current IEP by not providing the student counseling, OT services and because of the student being placed in a certificate tract program rather than a diploma tract program.

6. Whether DCPS denied the student a FAPE by failing to implement the student's March 2011 behavior intervention plan ("BIP") as evidenced by the DCPS LRE team's report.

7. Whether DCPS denied the student a FAPE by failing to place the student in an appropriate school. Petitioner alleged the student's current school placement at School A is inappropriate and the student has experienced academic and behavioral difficulties since attending School A.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-61 and DCPS Exhibit 1-7) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B. DCPS disclosed witnesses, however,

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[2] The alleged violations and/or issues listed in the complaint do not directly correspond to the issues outlined here. The Hearing Officer restated the issues in the pre-hearing order and at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

it presented no witnesses at the hearing to refute the testimony presented by Petitioner's witnesses. The parties agreed to stipulations that are included in the findings of fact.

FINDINGS OF FACT: [3]

1. The student is age in grade attending School A, DCPS high school. The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of ED. (Petitioner's Exhibit 12-1)

2. For SY 2010-2011, the student's guardian enrolled the student at a DCPS public charter school, hereinafter referred to as "School B". School B developed an IEP for the student dated October 26, 2010, that prescribed that the student receive 27. 5 hours of specialized instruction outside general education and 1 hour per week of behavioral support services also outside general education. (Guardian's testimony, Petitioner's Exhibit 12-1, 12-7)

3. The student has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). She is taking medication to address her ADHD. (Guardian's testimony)

4. Because of the student's poor behavior at School B, the School B staff recommended the student attend a different school for SY 2011-2012. The student's guardian enrolled the student at School A at the start of SY 2011-2012 and provided the school a copy of the student's IEP from School B. (Guardian's testimony)

5. On October 11, 2011, School A developed an IEP for the student that also prescribed the student receive 27. 5 hours of specialized instruction outside general education and 1 hour per week of behavioral support services also outside general education. In addition, the IEP prescribed 30 minutes of occupational therapy per week outside general education. (Petitioner's Exhibit 13-1, 13-7)

[3] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

6. The student's IEP included BIP but the BIP was not implemented at School A. (Petitioner's Exhibit 15-6)

7. During SY 2011-2012, the student was repeatedly disrespectful to school staff and often fought with other students at school. When the student's guardian visited School A to meet with school staff and/or to check on the student she regularly observed students being disruptive in the school hallways. The student performed poorly academically at School A and routinely engaged in disruptive behaviors and was often sent home and sometimes suspended for her behavior. (Guardian's testimony)

8. The student's guardian attended an IEP meeting for the student at School A on November 18, 2012. The IEP team agreed to review whether the student should remain at School A. (Guardian's testimony)

9. The IEP team reconvened on November 23, 2011, and amended the student's IEP to reduce the instructional hours by 1.5 hours to fit within the school schedule. The student's guardian was not present for this meeting. (Guardian's testimony, Petitioner's Exhibit 14-7)

10. On December 14, 2011, DCPS staff conducted a classroom observation of the student at School A and prepared a report that recommended the student remain at School A, and that the services prescribed in her IEP be implemented. (Petitioner's Exhibit 15-1, 15-7)

11. The student's IEP dated November 23, 2011, requires her to work towards her diploma and be given the opportunity to earn diploma credits. (Stipulation)

12. From September 27, 2011 until June 14, 2012 the student was placed on the certificate track at School A. (Stipulation)

13. The student could not earn diploma credits while she was placed on the certificate track. (Stipulation)

14. The student cannot return to School A for SY 2012-2013. (Stipulation)

15. DCPS was required to provide a location of services for the student for the 2012-2013 school year by July 16, 2012. (Stipulation)

16. DCPS did not propose a location of services by July 16, 2012, and has not proposed a location of services since July 16, 2012. (Stipulation)

17. DCPS did not conduct a Functional Behavioral Assessment ("FBA") after it was recommended in December 2011 by the DCPS Least Restrictive Environment Team. (Stipulation)

18. In order for DCPS to assess the student's behavioral needs and determine appropriate services and strategies, a FBA needs to be conducted and DCPS agrees to fund an independent FBA. (Stipulation)

19. DCPS did not implement the student's March 2011 Behavior Intervention Plan ("BIP"). (Stipulation)

20. The student has been accepted to the Foundation School for SY 2012-2013. (Petitioner's Exhibit 59)

21. The School can implement the student's IEP, drafted November 23, 2011, and the annual cost of tuition including occupational therapy and behavioral support is (Stipulation)

22. The has received its Certificate of Approval from OSSE. (Stipulation)

23. DCPS has not conducted an occupational therapy ("OT") evaluation or reevaluation since October 22, 2007, and DCPS agrees to fund an independent OT evaluation. (Stipulation)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [4] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

[4] The burden of proof shall be the responsibility of the party seeking relief. 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.

Issue 1: Whether DCPS denied the student a FAPE by failing to conduct triennial evaluations: comprehensive psychological evaluation by February 2012 and occupational therapy evaluation by October 2010.

34 C.F.R.§ 300.303 provides:

> (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--
> (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
> (2) If the child's parent or teacher requests a reevaluation.
> (b) Limitation. A reevaluation conducted under paragraph (a) of this section--
> (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
> (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

Conclusion: There was insufficient evidence presented that DCPS failed to conduct a comprehensive psychological re-evaluation of the student. Therefore, the Hearing Officer concludes that Petitioner did not meet the burden of proof as to this evaluation. However, the parties stipulated that DCPS failed to conduct the student's OT evaluation and DCPS agreed to fund an independent OT evaluation. Because the parties stipulated to the remedy of the OT evaluation the issue of denial of FAPE as to this evaluation is moot.

Issue 2: Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disabilities, to wit failure to conduct a FBA after it was recommended by the DCPS LRE Team in December 2011.

Conclusion: The parties stipulated that DCPS had failed to conduct the student's FBA and DCPS agreed to fund an independent FBA. Because the parties stipulated to the remedy of the OT evaluation, adjudication of denial of FAPE on this issue is moot.

Issue 3: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student on November 23, 2011, because the parent and student were not present when the IEP was developed.

34 C.F.R.§ 300.322 provides:

> (a) Public agency responsibility-general. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including--
> (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
> (2) Scheduling the meeting at a mutually agreed on time and place.

Conclusion: Although the student's guardian testified that she was not present at the November 23, 2011, IEP meeting when the student's hours of specialized instruction were reduced, there was no specific testimony or other evidence presented that indicated the parent or student were harmed by the guardian's non-attendance. "an IDEA claim is viable only if [DCPS's] procedural violations affected the student's *substantive* rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) Consequently, the Hearing Officer concludes there was insufficient evidence on this issue to conclude that the guardian's non-attendance impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Issue 4: Whether DCPS denied the student a FAPE by failing to issue prior notices to the parent for the decrease in hours of specialized instruction in the November 18, 2011, IEP and for DCPS' refusal to place the student in a more restrictive setting after the MDT's referral to the DCPS LRE team.

34 C.F.R.§ 300.503 provides:

> (a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency--
>
> (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
>
> (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

Conclusion: There was no testimony or other evidence presented with regard to prior notices on this issue provided by Petitioner's witnesses. The Hearing Officer concludes there was insufficient evidence presented on this allegation and concludes there was no denial of a FAPE in this regard.

Issue 5: Whether DCPS denied the student a FAPE by failing to implement the student's current IEP by not providing the student counseling, OT services and by placing the student in a certificate tract program rather than a diploma tract program.

Conclusion: There was insufficient evidence presented that DCPS failed to provide the student counseling and OT services. Thus, the Hearing Officer concludes that Petitioner did not meet the burden of proof as to this allegation. The parties stipulated that DCPS had failed to conduct the student's FBA and DCPS agreed to fund an independent FBA. Because the parties stipulated to the remedy of the OT evaluation, adjudication of denial of FAPE on this issue is moot.

Issue 6: Whether DCPS denied the student a FAPE by failing to implement the student's March 2011 BIP as evidenced by the DCPS LRE team's report.

34 C.F.R.§ 300.323 (c) provides:

> Each public agency must ensure that--
>
> (1) A meeting to develop an IEP for a child is conducted within 30 days of a

determination that the child needs special education and related services; and
(2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

Conclusion: The evidence clearly demonstrates that the student's IEP included a BIP and the parties stipulated that DCPS did not implement the student's BIP. The guardian's credible testimony[5] clearly demonstrates the student regularly engaged in disruptive behaviors and was sent home and suspended because of her behaviors and performed poorly academically at School A during SY 2011-2012. Consequently, the Hearing Officer concludes that DCPS' failure to implement the student's BIP at School A caused her education harm during SY 2011-2012 and was a denial of a FAPE.

Issue 7: Whether DCPS denied the student a FAPE by failing to place the student in an appropriate school. Petitioner alleges the student's current school placement at Dunbar SHS is inappropriate and the student has experienced academic and behavioral difficulties since attending Dunbar.

Conclusion: The evidence clearly demonstrates through the student's guardian's credible testimony that the student experienced poor academic performance and engaged in repeated disruptive behaviors that resulted in her being sent home from school and suspended on a number of occasions. In addition, the parties have stipulated that the student's IEP required that she be provided services in a diploma tract program but that was not provided. Based upon the evidence and the stipulation regarding the non-diploma tract the Hearing Officer concludes the student was in an inappropriate educational placement at School A during SY 2011-2012 and was denied a FAPE as a result.

Consequently the Hearing Officer grants, in the order below, Petitioner's request for prospective relief that the student be placed at the Foundation School for SY 2011-2012. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). The parties have stipulated that Foundation School can implement the student's IEP and that it has been granted a Certificate of Approval from OSSE. The Hearing Officer concludes based on the evidence that the annual cost of the Foundation School is reasonable. Based on the foregoing, the Hearing Officer concludes that Foundation is an appropriate educational placement for the student. *Branham ex rel. Branham v. District of Columbia* 44 IDELR 149 427 F.3d 7

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, 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 522 & 524.* To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits

[5] This witness was found credible based on her demeanor.

resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

The evidence demonstrates that the student was not on the diploma tract during SY 2011-2012 while attending School A and earned no credits toward her high school diploma and was thus in an inappropriate placement and was denied a FAPE. The evidence demonstrates that the Foundation School can implement the student's IEP in SY 2012-2013, which was not done by DCPS during SY 2011-2012, and can help compensate for what the student was not provided by DCPS at School A. The Hearing Officer concludes that the student's placement at the Foundation School for SY 2012-2013 is also appropriate compensatory education, as requested by Petitioner, for the denials of FAPE that have been determined herein.

ORDER:

1. DCPS shall by Monday, August 27, 2012, place the student, and fund the student's attendance for SY 2012-2013, at the Foundation School as both the prospective remedy and as compensatory education for the denials of FAPE determined herein.

2. DCPS shall within thirty (30) calendar days of the issuance of this Order fund the following independent evaluations: Occupational Therapy and Functional Behavioral Assessment.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer 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. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: August 21, 2012