

Hearing Officer Determination & Order

JURISDICTION

The due process hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and DC Code Title 38, Subtitle VII.

INTRODUCTION

On 07/21/09, a Due Process Complaint Notice ("Complaint") was filed by the parent ("Parent" or "Petitioner") on behalf of the ■ year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") in violation of IDEIA when DCPS failed to review Student's independent assessments, when DCPS failed to review and revise Student's Individualized Education Program ("IEP") based on the findings of the independent assessments, and when DCPS failed to provide Student an appropriate placement. In the Complaint, Petitioner asserted that Student is entitled to compensatory education due to the denials of a FAPE.

THE DUE PROCESS HEARING

The due process hearing convened on 08/31/09 but did not conclude within the time allotted. The due process hearing was continued at the request of Petitioner, and the hearing reconvened and concluded on 09/16/09.

Petitioner was represented by John Straus, Esq. ("Petitioner's Attorney") and DCPS was represented by Candace Sandifer, Esq. ("DCPS' Attorney"). Petitioner participated in the due process hearing in person.

Both parties declined to discuss settlement prior to the commencement of the due process hearing.

Disclosures:

Petitioner's Five-Day Disclosure letter dated 08/24/09 contained Petitioner's Exhibits #1-12. DCPS objected to the admission into evidence of Petitioner's Exhibits #3-6. Petitioner's Exhibits #1-2, and #7-12 were admitted into evidence without objection. Petitioner's Exhibits #3-5 were admitted into evidence over objection. Petitioner's Exhibit #6 was not admitted into evidence. Petitioner's Five-Day Disclosure letter dated 09/09/09 was admitted into evidence without objection; it did not contain any exhibits.

DCPS' Disclosure Statement dated 08/24/09 contained DCPS' Exhibits #1-2. DCPS' Exhibit #1 was admitted into evidence without objection. DCPS' Exhibit #2 was

Hearing Officer Determination & Order

admitted into evidence without objection except for pages 2-18 and 2-19 which were admitted into evidence over objection.

Witnesses:

Petitioner presented the following witnesses: (1) Admissions Coordinator at (via telephone); (2) Dr. Ida Jean Holman, educational advocate; and (3) Dr. Kellie McCants-Price, clinical psychologist.

DCPS presented no witnesses.

Issues For Litigation:

Issue #1 – Whether DCPS failed to review Student’s independent assessments, thereby denying Student a FAPE?

Issue #2 – Whether DCPS failed to review and revise Student’s IEP based on the results of the independent assessments, thereby denying Student a FAPE?

Issue #3 – Whether DCPS failed to provide an appropriate placement, thereby denying Student a FAPE?

* Issue #4, i.e., whether Student is entitled to compensatory education, was withdrawn by Petitioner.

Relief Requested by Petitioner:

- (1) A finding of a denial of a FAPE on Issues #1-3; and
- (2) DCPS to convene an IEP Team meeting to review the assessments, and review and revise the IEP to be consistent with the assessments; and
- (3) DCPS to issue a Notice of Placement to providing funding and transportation.

* Petitioner withdrew its request for relief for compensatory education.

FINDINGS OF FACT

#1. On 06/04/09, Student was a student with a disability classification of Multiple Disabilities with an IEP that prescribed 25.5 hours/week of specialized instruction outside of general education, 2 hours/week of behavioral support services outside of general education, and the support of a full time dedicated aide. (*Petitioner’s Exhibit #7, IEP dated 06/04/09*).

#2. On 07/02/09, a copy of an independent speech and language evaluation completed on 06/18/09 and a copy of an independent psychological assessment completed on 06/30/09 were provided by Petitioner via facsimile to the DCPS Office of

Hearing Officer Determination & Order

Special Education Legal Unit, the Special Education Coordinator at and the DCPS Office of General Counsel, with a request to convene a Multidisciplinary Team ("MDT")/IEP meeting to review the assessments within a reasonable time frame. (*Petitioner's Exhibit #10, Notice of Completed Independent Evaluation dated 07/02/09*).

#3. On 07/21/09, a Due Process Complaint Notice was filed alleging that DCPS denied Student a FAPE when DCPS failed to review Student's independent 06/18/09 speech and language and independent 06/30/09 psychological assessments, when DCPS failed to review and revise Student's IEP based on the findings of the independent assessments, and when DCPS failed to provide Student an appropriate placement. (*Petitioner's Exhibit #1, Due Process Complaint Notice filed 07/21/09*).

DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof in an administrative hearing... is properly placed upon the party seeking relief." *Schaffer v. Weast, 44 IDELR 150 (2005)*. "Based solely upon 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 with a FAPE." 5 D.C.M.R. 3030.3.

DCPS, as a local education agency, is required to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1, 300.2(b)(1)(ii); 38 D.C. Code 2561.01(2).

Issue #1 – Whether DCPS failed to review Student's independent assessments, thereby denying Student a FAPE? Petitioner alleges that on 07/02/09, Petitioner provided DCPS with copies of an independent speech and language assessment completed on 06/18/09 and an independent psychological assessment completed on 06/30/09 and requested that an IEP team meeting convene to review the assessments, and DCPS failed to meet and review the assessments.

Petitioner offered credible evidence that an independent speech and language assessment completed on 06/18/09 and an independent psychological assessment completed on 06/30/09 were provided to DCPS by facsimile on 07/02/09. (*Finding of Fact #2*). Petitioner cites 34 C.F.R. 300.502(c)(1) in support of its position that DCPS denied Student a FAPE when it failed to review the independent assessments in the 19 days that elapsed between the time the independent assessments were forwarded to DCPS and the time the Complaint was filed. (*Findings of Fact #2, #3*).

34 C.F.R. 502(c)(1) states that, "If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if

Hearing Officer Determination & Order

it meets agency criteria, in any decision made with respect to the provision of FAPE to the child.” Petitioner furthers its argument that DCPS is required to review the independent evaluations by citing 34 C.F.R. 324(b)(1) which states that, “each public agency must ensure that the IEP Team revises the IEP, as appropriate, to address... the results of any reevaluation conducted under 34 C.F.R. 300.303...”

IDEIA does not consider the two independent evaluations completed in this case as reevaluations. The Comments to 34 C.F.R. 300.303 (Reevaluations), p. 46641, clearly state that “An IEE (Independent Educational Evaluation) would be considered as a potential source of additional information that the public agency and parent could consider in determining whether the educational or related services needs of the child warrant a reevaluation, but it would not be considered a reevaluation.”

The statutory requirements of IDEIA pertaining to reevaluations as found at 34 C.F.R. 300.303, do not apply in this case since the independent assessments are not considered reevaluations under IDEIA. And, since Student had already been determined eligible for special education services at the time the independent assessments were completed (*Finding of Fact #1*), the independent assessments cannot be considered an initial evaluation subject to the time requirements of IDEIA as stated in 34 C.F.R. 300.301 and in 38 D.C. Code 2561.02(a).

Even if the independent assessments could be construed as reevaluations, which they cannot, the Hearing Officer determines that 19 days cannot be construed as an unreasonable amount of time to convene a MDT meeting to review the assessments, especially when the 19 days occurred over the summer when school was not in session.

Petitioner was unable to show that DCPS’ failure to review independent educational evaluations within 19 days of receipt was a denial of a FAPE under IDEIA.

Petitioner failed to meet its burden of proof on Issue #1.

Issue #2 – Whether DCPS failed to review and revise Student’s IEP based on the results of the independent assessments, thereby denying Student a FAPE?

Petitioner alleges that the speech and language assessment completed on 06/18/09 recommended that Student receive 1 hour/week of speech and language therapy services and that the 06/30/09 psychological assessment recommended a disability classification of Emotional Disturbance (“ED”) and placement in a school specialized in the education of students with significant social/emotional and behavioral difficulties. Petitioner further alleges that at the time of the filing of the Complaint, DCPS had failed to review the reevaluation data and make appropriate decisions regarding Student’s education.

The only requirement of IDEIA that pertains to these facts is 34 C.F.R. 502(c)(1), which states that the public agency must consider the information contained in the evaluations in any decision made with respect to the provision of FAPE to Student. Petitioner failed to show that DCPS convened a MDT meeting and failed to take the results of the assessments into consideration at the meeting. There is no requirement in

Hearing Officer Determination & Order

law that mandates that during the time period from 07/01/09 through 07/24/09, DCPS was required to convene a meeting to revise Student's IEP. Student's most current IEP was dated 06/04/09, and pursuant to IDEIA, the next annual update was to occur on or about 06/03/10. See 34 C.F.R. 300.324(b)(i). Under IDEIA, the independent educational evaluations could be used by DCPS and the parent to determine whether the educational or related service needs of the child warranted a reevaluation, but that is all that is required by IDEIA.

Petitioner failed to meet its burden of proof on Issue #2.

Issue #3 – Whether DCPS failed to provide an appropriate placement, thereby denying Student a FAPE? Petitioner alleges that the independent psychological assessment completed on 06/30/09 recommended that Student be placed in a full time special education setting that is a therapeutic milieu with crisis management services on site, and that Student's current school at _____ does not provide that type of educational environment.

There was no evidence in the record that Student's placement at _____ was inappropriate or that Student was not receiving the services prescribed by Student's 06/04/09 IEP. The testimony of Dr. Ida Jean Holman regarding the nature of the program offered at _____ was stale by one year. The recommendation contained in the independent psychological assessment completed on 06/30/09 was just that, i.e., a recommendation by a clinical psychologist who conducted a psychological assessment of Student.

In determining the educational placement of a child with a disability... each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (2) is made in conformity with the Least Restrictive Environment provisions of IDEIA; and that the child's placement (1) is determined at least annually; (2) is based on the child's IEP; and (3) is as close as possible to the child's home..." 34 C.F.R. 300.116. If anything, the recommendation by the psychologist would be provided to the placement team for consideration in determining an appropriate placement for Student.

Petitioner offered no evidence that _____ was an inappropriate placement for Student or that the members of a placement determination team made the decision that _____ was an inappropriate placement.

Petitioner failed to meet its burden of proof on Issue #3.

Hearing Officer Determination & Order

ORDER

WHEREFORE, this Complaint having been fully litigated and there being no basis in fact and law to support Petitioner's allegations that DCPS denied Student a FAPE, it is

ORDERED that this Complaint be and hereby is **DISMISSED** with prejudice.

IT IS SO ORDERED.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

Virginia A. Dietrich /s/

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

09/24/09

Date

Issued: September 24, 2009