

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

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

PETITIONER,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: December 26, 2012

Hearing Officer: Peter B. Vaden

Case No: 2012-0602

Hearing Date: December 13, 2012

Student Hearing Office, Room 2009
Washington, D.C.

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the "Petitioner" or "STUDENT"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In his Due Process Complaint, Petitioner, an adult student, alleges that DCPS denied him a free appropriate public education ("FAPE") by unilaterally changing his school placement from NON-PUBLIC SCHOOL to CITY HIGH SCHOOL PROGRAM.

¹ Personal identification information is provided in Appendix A.

Petitioner, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on September 4, 2012, named DCPS as respondent. The case, which was originally assigned to Impartial Hearing Officer Chisholm, was reassigned to the undersigned Hearing Officer on September 26, 2012. The parties met for a resolution session on September 21, 2012 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on October 5, 2012. On October 1, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing was scheduled for October 29, 2012. However, due to the storm-related closing of the Student Hearing Office that day, the hearing had to be postponed and the Chief Hearing Officer granted a 38-day continuance in order to reschedule the hearing and issue this decision.

The due process hearing was held before the undersigned Impartial Hearing Officer on December 13, 2012 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified. No other witness was called by either party. Petitioner's Exhibits P-1 through P-22 were admitted into evidence without objection. DCPS' Exhibits R-1 through R-19 were admitted without objection. Counsel for both parties made opening and closing statements. At the conclusion of the presentation of evidence, the parties made cross-motions for a directed finding, which I took under advisement. There was no request for post-hearing briefing.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUE AND RELIEF SOUGHT

- WHETHER DCPS DENIED STUDENT A FAPE BY CHANGING HIS PLACEMENT/LOCATION OF SERVICES FROM NON-PUBLIC SCHOOL TO CITY HIGH SCHOOL PROGRAM, WHICH IS NOT CAPABLE OF FULFILLING STUDENT’S IEP NEEDS.

In his request for due process, Petitioner complained of DCPS’ May 8, 2012 Prior Written Notice (“PWN”) changing his placement from Non-Public School to City High School Center for the 2012-2013 school year. The relief sought by Petitioner was an order for DCPS to continue to fund his enrollment at Non-Public School until the end of the 2012-2013 school year. On October 22, 2012, DCPS issued another PWN restoring Student’s placement at Non-Public School for the 2012-2013 school year. Before issuing the October 22, 2012 PWN, DCPS funded Student’s ongoing enrollment at Non-Public School pursuant to the “stay-put” requirement of the IDEA. *See* 20 U.S.C. §1415(j). Hence, there has been no interruption in DCPS’ funding of Student’s enrollment at Non-Public School. The relief now sought by Petitioner is an order for DCPS to continue to fund his attendance at Non-Public School for the remainder of the school year.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where he resides with his MOTHER and other family members. Testimony of Student.
2. Student has been evaluated as having a Specific Learning Disability (“SLD”) as

his primary disability, and by reason thereof, needs special education and related services.

Exhibit P-2.

3. For the 2012-2013 school year, Student is enrolled at Non-Public School, where he is in the GRADE. He has good grades and is on track to graduate with a regular DCPS high school diploma at the end of the school year. Testimony of Student.

4. Student has attended Non-Public School since the 2010-2011 school year.

Testimony of Student.

5. At an IEP meeting at Non-Public School on May 8, 2012, DCPS REPRESENTATIVE informed Student that he would have to attend City High School Program for his last year of high school. Student was not assisted by an educational advocate, attorney or other adult at the IEP meeting. Testimony of Student, Exhibit P-2.

6. DCPS Representative stated at the May 8, 2012 IEP meeting that City High School Program was very similar to Non-Public School and that it was the best location of services for Student. Exhibit P-4.

7. On May 8, 2012, the same day as the IEP meeting, DCPS issued a PWN changing Student's location of services to City High School Program. The reason for the action stated on the PWN was that Student had exhibited very limited behavior difficulties over the past year and had made progress in the small classroom setting, which could also be provided by City High School Program. Exhibit P-5.

8. During summer 2012, Student took summer school classes, which he needed for graduation, at City High School in the general education setting. He passed those classes.

Testimony of Student.

9. On August 27, 2012, in a telephone call with DCPS, Mother stated she was not in

favor of Student's attending City High School Program and that Student refused to enroll in or attend the City High School Program. Mother was adamant about Student's not attending the program. Exhibit R-19.

10. Student's complaint for due process in this case was filed on September 4, 2012. Exercising his "stay-put" rights under the IDEA, Student returned to Non-Public School, at public expense, at the beginning of the 2012-2013 school year. He is currently taking seven classes, all of which he needs to graduate at the end of the school year. Student is passing all of the classes and he has no reason to be concerned that he would not graduate at the end of the school year. Testimony of Student.

11. On October 22, 2012, DCPS issued a PWN offering Non-Public School as "the appropriate location of services" for Student "at this time." The reason for the action stated on the PWN was that Student was on track and expected to graduate with a DCPS High Diploma in June 2013. Exhibit R-19. At the due process hearing, DCPS Counsel represented that DCPS had decided to keep Student at Non-Public School for the rest of the 2012-2013 school year.

12. Petitioner has received no indication from officials at DCPS that he will not be allowed to remain at Non-Public School for the remainder of the 2012-2013 school year. Testimony of Student.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Legal Standard for Prospective Non-Public Placement

The grounds for Petitioner's September 4, 2012 due process complaint are that DCPS denied him a FAPE by issuing a Prior Written Notice on May 8, 2012, which changed his

location of IEP services from Non-Public School to City High School Center. On October 22, 2012, DCPS reversed itself and restored Student's placement at Non-Public School for the current school year. Because DCPS honored Student's stay-put rights under the IDEA, Student's DCPS-funded attendance at Non-Public School was not interrupted. Although Petitioner secured the substantive relief he sought from DCPS before the due process hearing, instead of withdrawing his due process complaint, Petitioner elected to proceed with the hearing and seek an order for DCPS to continue to fund his enrollment at Non-Public School, lest the agency again decide to change his location of services.

The IDEA ensures 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." 20 U.S.C. § 1400(d)(1)(A). Under the Act, DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991). If no suitable public school is available to fulfill the child's IEP needs, DCPS must pay the costs of sending the child to an appropriate private school; however, if there is an "appropriate" public school program available, *i.e.*, one "reasonably calculated to enable the child to receive educational benefits," DCPS need not consider private placement, even though a private school might be more appropriate or better able to serve the child. *Id.* (citing *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

IS STUDENT ENTITLED TO RELIEF BECAUSE HE WAS DENIED A FAPE BY DCPS' DECISION TO CHANGE HIS PLACEMENT/LOCATION OF SERVICES FROM NON-PUBLIC SCHOOL TO CITY HIGH SCHOOL PROGRAM?

On May 8, 2012, DCPS issued a Prior Written Notice changing the location of services for Student from Non-Public School to City High School Program. Mother objected to the change of schools and on September 4, 2012, Student, who is an adult, filed the present complaint for due process. On October 22, 2012, DCPS “recanted” and issued a new PWN changing Student’s location of services back to Non-Public School. In this PWN, DCPS acknowledged that Student was on track and was expected to graduate from Non-Public School with a DCPS High School Diploma in June 2013. Because Student exercised his stay-put rights under the IDEA, his attendance at Non-Public School was not interrupted. Petitioner has received no indication from officials at DCPS that he will not be allowed to remain at Non-Public School for the remainder of the 2012-2013 school year.

Although no evidence was offered at the due process hearing that DCPS would consider changing Student’s placement from Non-Public School before the end of the 2012-2013 school year, Petitioner still requests the Hearing Officer to order DCPS to do what it is already doing – that is, to fund Student’s enrollment at Non-Public School for the rest of the school year.

Petitioner argues that this relief is necessary to assure that the October 22, 2012 PWN will be “definite and not illusory.”²

A hearing officer or court may award appropriate equitable relief, including a prospective private placement at public expense, only when there has been an actionable violation of IDEA. 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Branham v. District of Columbia*, 427 F.3d 7, 11–12 (D.C.Cir.2005). *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012). In this case, Petitioner seeks equitable relief – an award of private school placement at public expense – but he has not proven that DCPS violated the IDEA. Student alleges that DCPS’ May 8, 2012 PWN, which was later recanted, denied him a FAPE by changing his educational placement to City High School Center. Presumably because Student never had to leave Non-Public School to attend City High School Program, he offered no evidence at the due process hearing that his placement at City High School Program had not been reasonably calculated to enable him to receive educational benefits. *See Rowley, supra*, 458 U.S. at 207.

Moreover, even if DCPS had violated the IDEA by issuing the May 8, 2012 PWN, the violation was procedural. *See, e.g., Petties v. District of Columbia*, 238 F.Supp.2d 88, 97-98 (D.D.C.2002) (Procedural safeguards include the right to prior written notice when agency proposes to change the child’s placement or program.) Not every procedural violation of the

² Counsel for both parties at the due process hearing argued extensively the issue of whether Petitioner’s IDEA claim was moot because DCPS has decided to allow Student to remain at Non-Public School for the 2012-2013 school year. Petitioner maintained that an exception to the mootness doctrine, “capable of repetition yet evading review,” applied. *See, e.g., Zearley v. Ackerman*, 116 F.Supp.2d 109, 111-112 (D.D.C. 2000). In this case, DCPS did not file a motion to dismiss for mootness. In any event, both the doctrine of mootness and the “capable of repetition” exception are rooted in the Article III case-or-controversy requirement of the United States Constitution, which limits jurisdiction of the federal courts. *See, e.g., NBC-USA Housing, Inc., Twenty-Six v. Donovan*, 674 F.3d 869, 872, 400 U.S.App.D.C. 86, 89 (D.C.Cir. 2012). The IDEA, 20 U.S.C. § 1415(b)(6), – not Article III – is the source of the hearing officer’s jurisdiction. I am not persuaded that the doctrine of mootness, *per se*, is applicable to due process hearings.

IDEA is sufficient to support a finding that a student was denied a FAPE. To succeed on a procedural claim, a petitioner must demonstrate that the school district's procedural violation affected the student's ability to receive the educational benefit that the IDEA requires. See *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 42 (D.D.C. 2006), citing *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). In this case, although DCPS issued the May 8, 2012 PWN changing Student's location of services to City High School Program, DCPS never stopped paying for Student to attend Non-Public School. Therefore, Student's ability to receive the educational benefit that the IDEA requires was not affected by the May 8, 2012 PWN.

I conclude, therefore, that Petitioner has not met his burden of proof to show that he was denied a FAPE by DCPS' initial decision to change his placement to City High School Center or that DCPS' issuance of the May 8, 2012 PWN was an actionable procedural violation of the IDEA. Accordingly, I deny Petitioner's request for equitable relief.³

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

All relief requested by the Petitioner herein is denied.

Date: December 26, 2012

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

³ At the conclusion of the due process hearing, the parties made oral cross-motions for a "directed finding," which I understand to be cross-motions for summary judgment. Having made findings of fact based upon the evidence offered by the respective parties, and having addressed the substantive claims asserted by the Petitioner, I deny both parties' motions.

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 U.S.C. §1415(I).