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STUDENT HEARING OFFICE
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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a year-old male student, who attends a DCPS senior high school.

On July 26, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that the program DCPS identified for Student is unable to provide Student with 25 hours per week of specialized instruction in an out of general education setting. As relief for this alleged denial of FAPE, Petitioner requested an Order requiring DCPS to fund an appropriate program that can meet Student's academic needs.

On August 17, 2011, DCPS filed its Response to the Complaint, asserting that there has been no denial of FAPE because DCPS issued a prior written notice to the DCPS high school for implementation of the IEP for SY 2011/12, DCPS can implement the IEP at the location selected, and location of services is an administrative decision as opposed to an MDT decision.

The parties concluded the Resolution Meeting process by failing to reach agreement on August 9, 2011 and electing to shorten the resolution process. However, the parties later agreed to hold an MDT meeting for Student prior to the due process hearing. As a result, on September 15, 2011, Petitioner filed a Motion for Continuance to extend the timeline by 15 days, which the chief hearing officer granted on September 15, 2011. Therefore, the 45-day timeline for this case started on August 10, 2011, and with the extension will end on October 8, 2011, which is the HOD due date.

On September 7, 2011, DCPS disclosed nine documents (Respondent's Exhibits 1 - 9), and Petitioner filed a disclosure. On September 22, 2011, Petitioner disclosed eight documents (Petitioner's Exhibits 1 – 8).

The hearing officer convened the due process hearing on September 29, 2011.[1] DCPS's disclosures and Petitioner's Exhibits 1-2 and 6-8 were admitted into the record without objection; Petitioner's Exhibits 3-5 were admitted into the record over DCPS's relevance objection. Petitioner made a motion for summary judgment, which the hearing officer denied because the documentary evidence of record failed to indicate exactly how many hours per week of special education Student is receiving, and the sole issue in the case is whether DCPS's assigned location of services is providing Student with 25 hours of specialized instruction per week. Thereafter, the hearing officer received opening statements, Petitioner presented testimonial evidence from two witnesses, DCPS declined to present any testimonial evidence, and the hearing officer received closing statements. The hearing officer then brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS assign an inappropriate program for Student because the neighborhood school cannot provide Student with 25 hours per week of specialized instruction out of general education?

FINDINGS OF FACT[2]

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

1. Student is a year-old male, and he attends his neighborhood DCPS senior high school pursuant to Prior Written Notices issued by DCPS on June 24, 2011 and August 9, 2011.[3]

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.
[2] To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.
[3] Testimony of Parent; Respondent's Exhibits 3-4; Petitioner's Exhibit 7.

2. Student's current IEP is dated June 24, 2011. The IEP identifies Student's primary disability as Specific Learning Disability ("SLD"), and it requires Student to receive 25 hours per week of specialized instruction outside general education, 240 minutes per month of speech-language pathology services outside general education, and 120 minutes per month of behavioral support services outside general education. The IEP contains annual goals in the areas of mathematics, reading, written expression, communication/speech and language, and emotional/social/behavioral development.[4]

3. Student's schedule varies every other day at his neighborhood DCPS school. On A days, Student takes the following classes: Developmental Reading I, Algebra I, Biology I, Advisory 1.0, and World History/Geo 1. On B days, Student takes the following classes: Developmental Reading 1, Fluency Skills A, Application Skills A, Advisory 1.0, and English 1. Of these classes, only the following are being taught by special education teachers: Developmental Reading 1, Advisory 1.0, Fluency Skills A, and Application Skills A. Hence, Student takes 5 classes each school day, and 2 of those classes are special education classes per on A days, while 4 of those classes are special education classes on B days.[5]

4. There is no evidence of record, either documentary or testimonial, indicating how long is each of Student's classes at the neighborhood DCPS high school. Hence, based on the evidence presented at the due process hearing, there is no way to determine exactly how many hours of specialized instruction Student is receiving each week.

5. The evidence of record offers no insight into what subjects are covered in the following special education classes Student is taking: Advisory 1.0, Fluency Skills A, and Application Skills A.

6. When Parent initially registered Student at the neighborhood DCPS school, one of the administrators at the school informed Parent that the school could not provide Student with full-time special education because the school does not offer full-time special education.[6]

CONCLUSIONS OF LAW

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

Placement/Location of Services

Under IDEA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met.

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[4] Petitioner's Exhibit 1; Respondent's Exhibit 8.
[5] Petitioner's Exhibits 4 and 5.
[6] Testimony of Parent.

See 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, are provided at an appropriate secondary school in conformity with an IEP. *See* 34 C.F.R. § 300.17. As the party seeking relief in this case, Petitioner bears the burden of proof. *See* 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

In this case, Petitioner is challenging the location of services DCPS has assigned for Student, contending that Student's neighborhood DCPS high school is unable to implement Student's IEP by providing him with 25 hours of specialized instruction per week. However, the evidence in this case is insufficient to allow the hearing officer to determine exactly how many hours per week of specialized instruction Student is receiving at the assigned DCPS neighborhood high school. Hence, the hearing officer concludes that Petitioner has failed to meet its burden of proof.

On the other hand, while Petitioner failed to meet its burden of proving that Student is not receiving the required amount of specialized instruction each week, the evidence produced by Petitioner was sufficient to raise a question as to whether Student is actually receiving the full amount of specialized instruction required under his IEP. Hence, the hearing officer will order DCPS to convene an MDT meeting with Parent and the appropriate IEP team members to clarify exactly how many hours of specialized instruction Student is receiving each week at his neighborhood DCPS high school, and if it is determined that the current school cannot provide the services Student requires, then DCPS will be required to provide a location of services that can implement the IEP. *See Letter to Armstrong*, 28 IDELR 303 (OSEP June 11, 1997) (due process hearing system must provide hearing officer with authority to grant the relief necessary to ensure child receives FAPE).

ORDER

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

1. All claims and requests for relief in Petitioner's July 26, 2011 Complaint are **DENIED**.

2. Within 10 school days of the issuance of this Order, DCPS shall convene an MDT meeting with Parent and the appropriate IEP team members to clarify exactly how many hours per week of specialized instruction Student is receiving at his current location of services. If it is determined at the meeting that Student is not receiving all of the services required pursuant to his IEP, then DCPS shall either alter Student's schedule at the current location of services to ensure that Student receives 25 hours per week of specialized instruction outside general education or assign another location of services for Student that can and will provide him with 25 hours per week of specialized instruction outside general education. If DCPS assigns a new location of services for Student, then DCPS shall ensure that Student can begin attending the new school within 7 calendar days after the meeting. On the other hand, if it is determined that Student is receiving the full amount of specialized instruction his IEP requires, then DCPS shall have no further obligations under this Order.

3. Parent shall cooperate with DCPS's efforts to schedule, and Parent shall attend and participate in, the IEP meeting ordered above in Paragraph 2. If Parent fails to cooperate with the scheduling of and/or participate in the meeting, DCPS shall document its efforts to obtain Parent's cooperation and participation, and DCPS shall then proceed with the meeting in accordance with Paragraph 2, above.

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).

Date: 10/8/2011

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer