District of Columbia

Office of the State Superintendent of Education

Office of Review and Compliance
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Confidential

STUDENT[1], by and through her Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Dates: June 17, 2011 <u>Representatives:</u> Counsel for Petitioners: Roberta Gambale, Esq. Brown and Associates 1220 L Street, NW #700 Washington, D.C. 20005 Counsel for DCPS: Assistant Attorney General Harsharen Bhuller, Esq. 1200 First Street, NW Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[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 June 17, 2011,[2] at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2006.

BACKGROUND:

Student or "the student" is age in high school and has been determined eligible as a child with a disability under IDEA with a disability classification of multiple disabilities ("MD"). The student attends a private full time special education program, hereinafter referred to as "School A." The student's placement at School A is funded by DCPS.

Prior to attending School A the student attended a DCPS public high school, hereinafter referred to as "School B." The student began attending School B soon after the start of the 2010-2011 school year. The student began attending School A on November 29, 2010, pursuant to a settlement agreement dated November 9, 2011, for a prior due process complaint. The settlement agreement also provided for DCPS to convene an individualized educational program ("IEP") meeting for the student by January 30, 2011, to review and revise the student's IEP, if necessary, and to discuss compensatory education.

On January 20, 2001, an IEP meeting was convened at School A. The IEP team reviewed and revised the student's IEP. There was no agreement as to compensatory education.

On February 10, 2011, the parent made a request to the principal of School A that psychiatric evaluation be conducted of the student. On March 25, 2011, an IEP meeting was convened for the student at School A to discuss his school behavior and lack of attendance. The parent renewed her request for the psychiatric evaluation.

On April 22, 2011, Petitioner filed a due process complaint alleging, inter alia, DCPS had failed to provide the student the requested psychiatric evaluation, failed to provide the student compensatory education and failed to provide the student consistent transportation services to and from School A.

On May 5, 2011, a resolution meeting was convened. The parties did not resolve the complaint. On May 24, 2011,[3] this Hearing Officer convened a pre-hearing conference and issued a pre-

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[2] On May 31, 2011, Petitioner's counsel submitted a motion to continue the hearing and date of final decision. The Hearing Officer granted the motion and issued an interim ordering continuing the hearing for ten calendar days to June 17, 2011.

[3] The Hearing Officer made attempts to schedule the PHC within a week of the resolution meeting; however, this date was the first date that was mutually available for both counsel.

hearing order on May 27, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses.

Petitioner originally sought as relief: (1) an independent psychiatric evaluation, (2) an IEP meeting to review the evaluation and determine if the student is in need of a residential placement, (3) compensatory education and (4) reimbursement to the parent for out of pocket transportation costs.

A few days prior to the hearing DCPS authorized the parent to obtain an independent psychiatric evaluation. Thus, at the outset of the hearing Petitioner withdrew the claim for the psychiatric evaluation. Petitioner sought to obtain compensatory education from the start of 2010-2011 school year until the student began attending School A and for days he allegedly missed because of the lack of transportation services. Petitioner also sought as reimbursement for public transportation Petitioner claimed she funded for the student get to and from school when the transportation fare cards had not yet been provided.

DCPS maintained that the IEP team discussed compensatory education at the January 20, 2011, meeting and determined the student is due no compensatory education and thus Petitioner is barred by the settlement agreement from now seeking compensatory education.[4] DCPS also maintained the student has been consistently provided transportation services and no reimbursement was due.

ISSUES: [5]

The issues adjudicated are:

(1): Did DCPS deny the student a FAPE by failing to provide the student compensatory education for alleged denials of FAPE from the start of the 2010-2011 school year until the student began attending School A? [6]

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[4] The pre-hearing order directed both counsel to file a brief on the issue of whether compensatory education for matters that were the subject of the settlement agreement could be adjudicated. The briefs were to be filed June 8, 2011. Petitioner's counsel filed a brief. DCPS counsel did not. On June 13, 2011, after the deadline for disclosures had passed DCPS counsel filed a motion to dismiss asserting compensatory education was barred by the settlement agreement. The Hearing Officer did allow the motion because it was filed untimely. However, the Hearing Officer allowed DCPS to assert the settlement agreement as a defense in its case in chief. In addition, on the day of hearing DCPS made an oral motion based on communication allegedly provided to the parent stating that the student was not a resident of the District of Columbia. The Hearing Officer disallowed the motion as unfair surprise.

[5] The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here and as stated in the r pre-hearing order are the issue(s) to be adjudicated. Petitioner alleged in the complaint DCPS denied the student a FAPE by failing to provide the requested psychiatric evaluation which the parent requested to determine if the student is in need of a more restrictive educational setting; specifically, a residential setting. However, at the outset of the hearing DCPS stipulated that it had authorized the parent to obtain an independent psychiatric evaluation and Petitioner's counsel thus withdrew this issue.

[6] Petitioner alleges the student is due compensatory education for (1) services the student was not provided because he was not in an appropriate placement from the beginning of the 2010-2011 school year until November 29, 2010, when he started at School A, which includes missed services from the time the settlement agreement was signed

(2): Did DCPS deny the student a FAPE by not providing the student consistent transportation services.[7]

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-57 and DCPS Exhibit 1-10) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.[8]

FINDINGS OF FACT: [9]

1. The student is age sixteen in high school and has been determined eligible as a child with a disability under IDEA with a disability classification of multiple disabilities. ("MD"). The student attends a private full time special education program, School A. The student's placement at School A is funded by DCPS. (DCPS Exhibit 5 & 10-1)

2. At the start of the 2010-2011 school year the student's family became homeless. As result, the parent, the student and his sibling were living temporarily with friends in the District of Columbia and later relatives outside the District of Columbia until the parent could obtain permanent housing in the District of Columbia. At the time of the hearing the parent was still seeking housing in the District of Columbia. (Parent's testimony)

3. The student began attending School B in September 2010, sometime after the start of the 2010-2011 school year. During time the student attended School B he exhibited behavioral difficulties and received disciplinary actions including suspensions. (Ms. Miskel's testimony, Petitioner's Exhibits 39, 40, 41)

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until the student began attending School A on November 29, 2011. Petitioner submitted a proposed compensatory education plan requesting 10 hours per week of independent tutoring for one academic year, 80 hours of independent counseling services and a 5-week summer camp. Petitioner presented no price for the summer camp and the plan did not differentiate which services were being proposed for which alleged category of missed services.

[7] Petitioner alleges the student is due compensatory education for seven school days Petitioner alleges the student missed because DCPS did not provide transportation services to the student. Petitioner alleges the student was provided some but not all of the fare cards he was due as the related service of transportation in his IEP and as a result the parent has incurred the expense of transportation and seeks reimbursement for these costs.

[8] The Hearing Officer also reviewed the brief filed by Petitioner on June 8, 2011, and the DCPS' written motion to dismiss filed July 13, 2011.

[9] 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.

4. The student began attending School A with DCPS funding on November 29, 2010, pursuant to a settlement agreement dated November 9, 2011, for a prior due process complaint. (Petitioner's Exhibit 14; DCPS Exhibit 10)

5. On November 17, 2011, DCPS issued prior notice of placement ("PNOP") placing the student at School A. (Petitioner's Exhibit 14)

6. The settlement agreement was signed by the parent on November 9, 2010, and signed by the DCPS representative on November 10, 2010. The language of paragraph 4 of the agreement reads as follows:

   "The parties agree to the following:

   For the 2010-2011 School Year, DCPS will fund and place the student, with transportation, at [School A].

   By January 30, 2011, DCPS will convene an IEP meeting to review and revise the student's IEP, if necessary; and to discuss compensatory education." [10] (DCPS Exhibit 10-2, 10-3)

7. The student began attending School A on November 29, 2011, although the settlement agreement was signed by DPCS on November 10, 2011, and the PNOP was dated November 17, 2010. There were nine school days from the date the settlement agreement was signed and the student began attending school. During this time the student was not in school at all. (Parent's testimony, DCPS Exhibit 10)

8. The parent conferred with the staff at School A and agreed that it made sense for the student to begin attending School A after the Thanksgiving break, thus the student began attending November 29, 2010. (Parent's testimony)

9. On January 20, 2001, an IEP meeting was convened at School A. The IEP team reviewed and revised the student's IEP. The team raised the issue of compensatory education. The DCPS staff at the meeting stated the student was not due any compensatory education. The parent's advocate attended the meeting and expressed her opinion the student was due compensatory education from the start of the 2010-2011 school year until he arrived at School A. There was no agreement as to compensatory education by the team and no compensatory education was granted. (Ms. Miskel's testimony, DCPS Exhibit 4-3)

10. When the student first began attending School A he used public transportation to get to school or the parent drove him. In early January 2011 the School A provided the student a Metro fare card to be used for school. Because the student was not regularly attending school using the Metro, on January 25, 2011, the parent requested the student

[10] The settlement agreement also contained a provision (paragraph 10) that states: "The Settlement Agreement is in full satisfaction and settlement of all claims contained in the pending Complaint, including those claims under IDEA and § 504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement.

be provided bus transportation. The student was provided bus transportation from January 25, 2011, until April 4, 2011, when the parent requested that the school resume giving the student Metro fare cards. On April 5, 2011, the student was provided a fare card. The student was frequently absent from school and even after being provided the bus transportation and fare cards he did no consistently attend school. The student told School A's principal he often used the fare cards to attend a non-school related band practice. As a result, the student's fare cards ran out and he did not have fare to get to school. The student was provided enough money in fare cards to more than cover the cost of his transportation to school for the days he attended. The student did not miss any school days because he was not provided transportation services. During the student's time at School A he did not seem motivated to engage in his educational program. May 19, 2011, is the last day the student attended school prior to the hearing. testimony)

11. From November 29, 2010, to January 15, 2011, the parent incurred the costs of providing the student Metro fare cards to enable the student to attend School A. The parent incurred a total cost of to provide the student fare cards during this period. (Parent's testimony, Attachment to Petitioner's Brief and Request for Reimbursement filed June 8, 2011.)

12. The student has not attended school since May 19, 2011, due illness and a lack of motivation and because School A staff informed the student that because of his lack of progress and poor attendance he would likely fail for the school year. (Parent's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §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. [11] *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.

[11] 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): Did DCPS deny the student a FAPE by failing to provide the student compensatory education for alleged denials of FAPE from the start of the 2010-2011 school year until the student began attending School A?

Conclusion: The evidence does not support a finding that the student is entitled to compensatory education. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

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

Petitioner entered into a settlement agreement on November 9, 2010, settling a prior due process complaint. DCPS agreed under this settlement to place and fund the student at a private full-time special education program, provide transportation, convene an IEP to review and revise the student's IEP if necessary; and discuss compensatory education. As to compensatory education the terms of the agreement did not state that the student was entitled to compensatory education or that DCPS agreed to provide the student compensatory education. The terms simply state that at the IEP meeting compensatory education would be discussed.

Petitioner alleges that at the meeting DCPS did not engage in a discussion but simply stated the student was due no compensatory education. Although Ms. Miskel testified that in her opinion there was no discussion of compensatory education, the Hearing Officer was not convinced of this by her testimony. Compensatory education was an item clearly brought forth in the meeting and Ms. Miskel made a request for compensatory education. The meeting notes reflect that compensatory education was addressed. The DCPS members of the team did not agree compensatory education was warranted. The Hearing Officer concludes this evidence demonstrates there was a discussion at the meeting of compensatory education as the settlement agreement required. [12]

The settlement agreement terms regarding compensatory education may have been due to inartful drafting. However, the Hearing Officer is not going to attempt to redraft the agreement. The Hearing Officer concludes based on the language of the meeting notes that compensatory education was discussed and the provision of the agreement were satisfied. Consequently, the Hearing Officer concludes that the compensatory education the student might have been due for any violations alleged in the complaint that was the subject of the settlement agreement will not be granted.

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[12] Although Petitioner's counsel in her brief cited case law to support her assertion that compensatory education for periods prior to the settlement agreement could be reviewed, the Hearing Officer did not conclude there was any basis for such a review in this instance because the language of the agreement was clear and had been satisfied.

Pursuant to contract law "where the language in question is unambiguous, its interpretation is a question of law for the court. A court must honor the intentions of the parties as reflected in the settled usage of the terms they accepted in the contract...and will no torture words to import ambiguity where the ordinary meaning leaves on room for ambiguity. *Independence Manufacturing Co Inc. v. Anderson and Summers LLC*, 874 A.2d 862, 867 (D.C. 2005).

It is clear from the evidence that the IEP team discussed whether or not compensatory education was warranted and that is all that was required by the settlement agreement. This is not a case of breach of a settlement agreement, but apparently Petitioner's dissatisfaction with the results of the terms of the settlement agreement after the fact.

After the settlement agreement was ratified on November 10, 2010, DCPS issued PNOP for the student to attend School A on November 17, 2011. It was agreed by the parent in conferring with the school staff that it was better for the student to begin the new school after the Thanksgiving holiday. Thus, the student began school on November 29, 2010. Although it might be significant that the student was not in school right away, Petitioner did not present specific evidence of what the student missed during this time and any specific harm to the student.

The student had attendance problems even after he began attending School A. These factors combined, lead the Hearing Officer to conclude the student suffered no harm for any perceived delay in starting school and thus was not denied a FAPE and is due no compensatory education in this regard. [13]

ISSUE : (2): Did DCPS deny the student a FAPE by not providing the student consistent transportation services?

Conclusion: The evidence supports a finding that the parent is entitled to reimbursement for transportation costs.

34 C.F.R. § 300.17 provides:

> A free appropriate public education or FAPE means special education and **related services** [emphasis added] 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.

34 C.F.R. §300.34(a) provides:

> Related services means **transportation** [emphasis added] and such developmental, corrective, and other supportive services as are required to assist a child with a disability

[13] In addition, the compensatory education plan presented does not specifically state what portions of the proposal are related to a delay from the settlement agreement until November 29, 2010. The hours of tutoring and mentoring proposed are lumped together.

> to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

The parent testified that from the time the student began attending School A, November 29, 2010, until he was provided fare cards by School A the parent incurred the cost of the student's transportation. The parent also stated that the student missed some school days because she did not have money to provide the student to travel on Metro to school. However, the parent did not testify how many days, or on what days this was the case. The parent also testified the student often did not attend school because of other reasons including of illness and a lack of motivation.

credibly testified the student was provided fare cards in early January 2011 that exceeded the amount that was required for his transportation to and from school until January 25, 2011, when the student began being provided bus transportation. The student then returned to Metro fare cards on April 5, 2011. He was provided a total fare card dollar amount that exceeded what he needed to travel to and from school on the days he actually attended. Although the parent testified that the student missed some school days because she had no fare money to give him, these days were not clearly defined by the parent in her testimony. The Hearing Officer concludes the Petitioner did not sufficiently demonstrate the student missed school due to not being provided transportation services and the student is thus due no compensatory education in this regard.

However, also testified that the student was not provided fare cards until early January 2011. This means from the time the student began attending School A on November 29, 2011, until the time he was first provided a fare card in January 2011, the parent provided the student either Metro fare or drove him to school. The November settlement agreement clearly states DCPS is to provide the student transportation services. Transportation is apparently a necessary component to enable the student to attend school and was term of the settlement agreement. The fact that the student was not provided transportation services from November 29, 2010, to early January 2011 caused the child a deprivation of educational benefits he was due to be provided and the parent is entitled to reimbursement for the costs incurred. The evidence presented demonstrates the parent incurred a total cost of in providing the student transportation services between November 29, 2010, and January 15, 2011, and the Hearing Officer orders below that DCPS reimburse the parent for these costs.

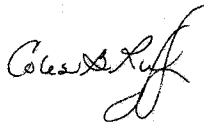
ORDER:

1. DCPS shall, within 30 calendar days of the issuance of this order, reimburse the parent for the transportation services she provided the student to attend School A from November 29, 2010, through January 15, 2011.

2. All other relief requested by the Petitioner is hereby denied and all other issues in the complaint are hereby dismissed with prejudice

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).



Coles B. Ruff, Esq.
Hearing Officer
Date: June 29, 2011