

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

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

OSSE
Student Hearing Office
September 09, 2013

PETITIONER,
on behalf of STUDENT,¹

Date Issued: September 8, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No:

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: August 28, 2013

Respondent.

Student Hearing Office, Room 2004
Washington, D.C.

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 “MOTHER”), 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 (“DCMR”). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (“DCPS”), as the local education agency (“LEA”) for PUBLIC CHARTER SCHOOL (“PCS”), has denied Student a free appropriate public education (“FAPE”) by failing to offer Student an appropriate educational setting in May 29, 2013 Individualized Education Program (“IEP”).

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed _____ named DCPS as respondent. The parties met for a resolution session on July 25, 2013 and were unable to reach an agreement. On July 25, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on August 28, 2013 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. DCPS was represented by DCPS COUNSEL.

Petitioner testified and called as witnesses, Student, PSYCHOLOGIST and NONPUBLIC SCHOOL ADMINISTRATOR. DCPS called, as its only witness, COMPLIANCE CASE MANAGER. Petitioner's Exhibits P-1 through P-6 and DCPS' Exhibit R-1 were admitted into evidence without objection. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case are:

- Whether Student has been denied a FAPE by PCS' May 29, 2013 IEP which provides all Specialized Instruction services in the general education setting, when Student allegedly requires a full-time, therapeutic, outside of general education setting; and

– Whether DCPS has denied Student a FAPE by failing to provide Parent access to all of Student’s educational records, which allegedly have not been located since Student transferred to PCS.

For relief, Petitioner seeks an order for DCPS to convene Student’s IEP team to revise and update, appropriately, IEP and for DCPS to fund Student’s prospective private placement at Nonpublic School for the 2013-2014 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, an AGE , and twin reside with Mother in the District of Columbia. Testimony of Mother.

2. For the 2012-2013 school year, Student was enrolled in the GRADE at PCS. Testimony of Student. PCS is a public charter school located in the District of Columbia. DCPS serves as the LEA for PCS. Hearing Officer Notice.

3. Student has been in special education since was in 1st grade. Testimony of Mother. Primarily Disability is identified as Specific Learning Disability (“SLD”). Exhibit P-3. has been enrolled at PCS since the 2011-2012 school year. Mother enrolled Student and twin brother at PCS because she did not want to send her sons to a regular DCPS public high school. The PCS staff told Mother that they could provide a small classroom setting for Student. Testimony of Mother.

4. Student’s June 5, 2012 PCS IEP provided that would receive 20 hours per week of Specialized Instruction in the General Education setting. Exhibit P-2. May 29, 2013 PCS IEP continued 20 hours per week of Specialized Instruction in the General Education setting and added 60 minutes per week of Speech-Language Pathology. Exhibit P-3.

5. Student did not do well at PCS. Testimony of Mother. According to the Present Levels of Performance (“PLOP”) sections of May 29, 2013 IEP, Student was failing Algebra and English due to poor school attendance. Exhibit P-3. At the May 29, 2013 IEP meeting at PCS, Mother, Student’s teacher and Speech Pathologist all expressed concerns about Student’s school attendance. The Speech Pathologist stated that Student did not report for services. Student’s general education teacher stated that she rarely saw Exhibit R-1.

6. When Mother enrolled Student at PCS, she provided PCS copies of Student’s school records, which she had obtained from former DCPS school. Student’s last special education eligibility meeting date is reported in IEPs to have been September 28, 2010. Exhibits P-1, P-2, P-3. When Petitioner’s Counsel attempted to obtain copies of Student’s special education evaluations prior to filing the due process complaint, PCS was unable to produce any evaluations. Representation of Petitioner’s Counsel. PCS has provided all of the documentation for Student that it has. Representation of DCPS Counsel.

7. As of the date of the due process hearing, Student was not currently attending any school. Testimony of Mother.

8. DCPS is able to implement, at one of its public high schools, the hours of Specialized Instruction and Speech-Language Pathology services specified for Student in the May 29, 2013 IEP. Testimony of Compliance Case Manager.

9. Nonpublic School is a nonprofit school in suburban Maryland for children with disabilities, primarily learning disabilities. It provides individualized instruction based on a student’s learning style. Nonpublic School offers small class size, with no more than 9 students per classroom. Each classroom is staffed with a special education teacher and a teaching assistant. The course of instruction includes reading, language arts, mathematics, small group

science, social studies and electives. The school provides a therapeutic program and its staff is trained for students' therapeutic needs. Testimony of Administrator.

10. The tuition cost at Nonpublic School is approximately \$38,000 per year. The school holds a current Certificate of Approval issued by the DC Office of the State Superintendent of Education ("OSSE"). Students at Nonpublic School have no in-school contact with non-disabled peers. Testimony of Administrator.

11. Student has been offered admission to Nonpublic School. The school admissions team interviewed Student in August 2013 and showed Student and Mother the school facility. After interviewing Student, the admissions team determined [redacted] would be a good fit for the school. The school's admission team would normally review an applicant's psychological and speech-language evaluations, social history and transcripts. Nonpublic School had none of this data for Student, but decided to admit [redacted] anyway based upon [redacted] interview and current PCS IEP. Testimony of Administrator.

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:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. See DCMR tit. 5-E, § 3030.3. *See, also, Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 95 (D.D.C.2008) (Plaintiff, as the party challenging the IEP, had the burden of proof to show that the plan was inappropriate, citing *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).)

Analysis

The following issues are asserted by Petitioner in this case:

1. HAS STUDENT BEEN DENIED A FAPE BY PCS' MAY 29, 2013 IEP WHICH PROVIDES ALL SPECIALIZED INSTRUCTION SERVICES IN THE GENERAL EDUCATION SETTING, WHEN STUDENT REQUIRES A FULL-TIME, THERAPEUTIC, OUTSIDE OF GENERAL EDUCATION SETTING; and
2. HAS DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE PARENT ACCESS TO ALL OF STUDENT'S EDUCATIONAL RECORDS, WHICH ALLEGEDLY HAVE NOT BEEN LOCATED SINCE STUDENT TRANSFERRED TO PCS.

The second issue may be addressed summarily. Under the IDEA, DCPS must provide parents an opportunity to inspect and review their child's educational records. *See* 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy*, 2006 WL 2711524, 4 (D.D.C. Sept. 21, 2006). Petitioner, through her counsel, has requested copies of Student's educational evaluations, which PCS was unable to locate. Counsel for DCPS represents that PCS had produced all of the documentation for Student that it had. I cannot find that DCPS' inability to produce records, which no longer exist, denied Petitioner the opportunity to inspect such records. In *Murphy, supra*, the Court noted that the LEA had "some statutory obligation to maintain student records." *Id.*, n.9. A parent's remedy, if any, for an LEA's failure to maintain complete and accurate educational records is to request a hearing under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g), *et seq.* *See* 34 CFR §§ 300.618, 300.621. The IDEA does not empower due process hearing officers to conduct FERPA hearings.

PCS' development of Student's IEPs, without the IEP teams' considering the results of evaluations, casts doubt upon the appropriateness of the IEPs. The IDEA requires that to provide a FAPE, "[t] IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'"

Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). “[T] ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are *individually designed* to provide educational benefit to the handicapped child.” *Rowley, supra*, 458 U.S. at 201 (emphasis supplied). 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. *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003).

Here, the PCS IEP team did not comply with the IDEA’s procedures when it developed Student’s May 29, 2013 IEP. When developing an IEP, an IEP team is required to “review existing evaluation data on the child, including—(i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers.” 20 U.S.C. § 1414(c)(1)(A). After reviewing that information, the IEP team then determines whether additional data are needed to complete the IEP. 20 U.S.C. § 1414(c)(1)(B). If needed, the LEA should administer an assessment or evaluation. 20 U.S.C. § 1414(c)(2). In developing the IEP, the IEP team must consider “the results of the initial evaluation or most recent evaluation of the child.” 20 U.S.C. § 1414(d)(3)(A) (iii). The importance of evaluation data to the development of an appropriate IEP would appear to be self-evident. In fact, the IDEA expressly requires that the IEP team members include an individual who can interpret the instructional implications of evaluation results. *See* 34 CFR § 300.321(a)(5). Yet PCS’ IEP

team developed Student's May 29, 2013 IEP without access to this essential data. (Apparently Student's evaluation data was also not available when the June 5, 2012 IEP was developed.) Therefore, I find that PCS did not comply the IDEA's procedures when it developed Student's May 29, 2013 IEP without considering evaluation data.

Procedural violations of IDEA do not, in themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (“[A]n IDEA claim is viable only if those procedural violations affected the student's substantive rights.”) In this case, Student's evaluations were apparently lost – either by PCS or by DCPS. How those evaluations may have informed the IEP team's considerations or affected the substance of Student's IEP cannot be known. However, I have no hesitation in concluding that Student's substantive rights were affected by the PCS IEP team's development of May 29, 2013 IEP without considering existing evaluations or obtaining new ones. An IEP developed, without consideration of a child's evaluation data, cannot be considered “individually designed” for the child or “reasonably calculated to enable the child to receive educational benefits.” *See Rowley, supra*. Therefore, I find that Student was denied a FAPE.

Whether student requires a full-time, therapeutic, outside of general education setting as alleged by Petitioner, was not established by the evidence. However, I will order Student's IEP team to reconvene to determine Student's educational placement after new evaluations are conducted. Accordingly, I will deny this placement claim without prejudice.

Remedy for Denial of FAPE

In this decision, I have found that PCS denied Student a FAPE because PCS' May 29, 2013 IEP was not reasonably calculated to provide Student educational benefits. Specifically, I have found that the IEP was not appropriate because Student's IEP team did not have access to – and did not consider – the results of Student's evaluations. As a remedy, Petitioner seeks an order for DCPS to fund Student's private placement at Nonpublic Placement. "Where an [LEA] has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. See, also, e.g., *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). The failure of PCS to offer Student an appropriate IEP does not, *ipso facto*, entitle Student to private school placement at public expense. "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Branham v. District of Columbia*, 427 F.3d 7, 9 (D.C. Cir.2005). Placement awards, must be tailored to meet the child's specific needs. *Branham, supra*, at 9. To inform this individualized assessment, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12.

In this case, there is a vacuum of information as to Student's educational needs due to the absence in the record of any educational or psychological evaluations. The evaluations of

Student conducted in the past by DCPS were apparently lost and there was no assessment obtained by the Petitioner offered into evidence. (Petitioner's expert, Psychologist, who first met Student the morning of the hearing, had not conducted an evaluation.) Therefore, the nature and severity of Student's disability, Student's needs or the link between those needs and the services offered by Nonpublic School have not been shown. I find that Petitioner has not established whether Student's placement at Nonpublic School would be proper under the IDEA and I make no finding as to whether Nonpublic School is, or is not, a suitable placement or location of services.

When a material violation of the IDEA occurs, a Hearing Officer has broad discretion to fashion an equitable remedy. *See* 20 U.S.C. § 1415(i)(2)(C)(iii) (“[T] court . . . shall grant such relief as the court determines is appropriate”). I find that appropriate relief in this case is for DCPS to convene an IEP team to identify what assessments and evaluations are needed to determine Student's current needs for special education and related services; for DCPS to conduct the evaluations; and for DCPS to reconvene Student's IEP team, after the evaluations are completed, to consider the updated data and to revise, as appropriate Student's IEP. DCPS must then match Student with a school capable of fulfilling IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C.Cir. 1991). It is concerning that, as of the hearing date, Student was not enrolled in any school. However, Student's IEP cannot be appropriately reviewed and revised until current evaluation data is obtained. DCPS is prepared to implement Student's May 29, 2013 IEP at one of its public high schools in the interim.

ORDER

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

1. Within 10 school days of this Order, DCPS shall convene an IEP team for Student to identify what assessments, evaluations and other data are needed in order to

determine Student's current educational needs. Subject to obtaining Petitioner's consent, DCPS shall assure that such evaluations or reevaluations are conducted within a reasonable time period. Within 10 school days of receipt of the completed evaluation reports, DCPS shall reconvene Student's IEP team to revise IEP as appropriate and DCPS shall match Student with a school that is able to implement the revised IEP;

2. Petitioner's claim that Student requires a full-time, therapeutic, outside of general education setting is dismissed without prejudice; and
3. All other relief requested by the Petitioner in this matter is denied.

Date: September 8, 2013

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

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).