

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parents], on behalf of
[Student],¹

Date Issued: February 2, 2012

Petitioners,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 FEB - 2 PM 12: 34

HEARING OFFICER DETERMINATION
On Cross Motions for Summary Adjudication

I. Background

The Complaint in this matter was filed with the Student Hearing Office (SHO) and served on the Respondent on December 21, 2011. The Respondent filed a response on January 3, 2012. A prehearing conference was held, via telephone, on January 9, 2012. Participating in the prehearing were Petitioners' Counsel, Paula Rosenstock, Esq. and Respondent's Counsel, Daniel McCall, Esq. A prehearing order was issued January 9, 2012.

A scheduling order for dispositive prehearing motions in the prehearing order. Such motions were to be filed no later than January 23, 2012, and any reply to a dispositive motion within five business days. A decision would then be issued within five business days of any reply. Both parties filed dispositive motions on January 23, 2012. The Petitioners filed a reply to the Respondent's motion on January 27, 2012, and the Respondent filed a reply to the Petitioners' motion on January 30, 2012. This decision is issued on February 2, 2012.

The Petitioners' motion was styled as one for summary judgment and the Respondent's motion as one to dismiss. After careful consideration of the pleadings, motions, and undisputed facts of this case, this matter is dismissed for the reasons stated herein. In sum, the issues raised, the provision of free appropriate public education (FAPE) to the Student, and the educational

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

placement of the Student, have already been litigated and the Respondent is entitled to judgment as a matter of law.

II. Standard for Summary Adjudication

There are no rules under the Individuals with Disabilities Education Improvement Act (IDEA) or the District of Columbia Municipal Regulations for special education hearings dealing with summary disposition. Hearing Officers have the "authority and responsibility" to "take actions necessary to complete the hearing in an efficient and expeditious manner[.]" Student Hearing Office Standard Operating Procedure (SOP) § 600.1. Thus, to ensure the efficient and expeditious use of time and resources, this Independent Hearing Officer (IHO) closely examines the requirements for due process complaints and decisions under the IDEA and makes a determination based on those requirements and under the authority to complete the hearing in an efficient and expeditious manner.

III. Findings of Undisputed Fact

After considering the pleadings of both parties, including their motions, this Hearing Officer's findings of material undisputed fact are as follows:

1. The Petitioners filed a due process complaint on April 1, 2011, (Case #2011-0349, IHO Ryan) concerning the Respondent, and went to hearing on the issues of whether or not the individualized education program (IEP) proposed in November 2010 was reasonably calculated to provide a FAPE and whether the proposed placement for the Student in November 2010 was appropriate. Further, if the Student was denied a FAPE, whether the non-public school the Student was parentally placed in (the _____ was proper.
2. A Hearing Officer Determination (HOD) for Case #2011-0349 was issued on July 7, 2011, finding that the proposed IEP was reasonably calculated to provide a FAPE to the Student, that the Respondent's proposed educational placement was appropriate, and denying relief to the Petitioners (specifically reimbursement for the non-public school) and dismissing the complaint.
3. The Petitioners appealed the HOD for Case #2011-0349 to Federal District Court for the District of Columbia asserting the Student was denied a FAPE, that he was not provided an appropriate placement by the Respondent, and seeking reimbursement and future funding for the Student's enrollment at the _____. The appeal is currently pending.
4. The Petitioners notified the Respondent on August 5, 2011, that they intended to keep the Student at the non-public school _____ because they believed that the Respondent "has failed to provide [Student] an appropriate IEP or placement." The Student remains enrolled there at this time.²

² The Respondent does not "confirm" that the Student is enrolled at the _____ School, nor does it deny it, basing much of its argument on the fact that the Student is enrolled in a non-public school.

5. The Respondent has not proposed a revised IEP or placement since the IEP and placement proposed in November 2010 that was litigated in Case #2011-0349 and is now on appeal in Federal Court.

IV. 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:

1. A due process complaint may be filed on any matter concerning the identification, evaluation, educational placement of a child with a disability, and the provision of FAPE to a child with a disability. *See*, 34 C.F.R. § 300.507(a). Once a decision is made on an issue, that decision is final and may be appealed to a court of competent jurisdiction. *See*, 34 C.F.R. §§ 300.514(a), 300.516(a). A due process complaint on an issue separate from an issue in a complaint already filed is not to be precluded. *See*, 34 C.F.R. § 300.513(c).
2. The issues of FAPE and placement have been litigated and a final decision rendered. The present complaint is precluded by this final decision.
3. The Petitioners' claims are styled as new issues - whether the Student was denied a FAPE because the individualized education program (IEP) was not revised and a different placement proposed for the 2011-2012 school year and whether, if FAPE was denied, the non-public school the Student is attending is a proper placement for the Student? These issues, the provision of FAPE to the child and the educational placement of the child, are not new and have already been litigated in Case #2011-0349. Petitioners' argue that they are new because they are about a new school year. This argument is unpersuasive. There is no new IEP, subsequent to the HOD in the prior case, nor a new placement proposed to which there is disagreement. Nor is a new IEP required where a student has been unilaterally placed and the parents have notified the LEA of their intention to keep the student enrolled in the private school, as was the case here. *See e.g., Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, 111 LRP 32532 (Question B-5)(OSERS 2011).
4. It is true that "[d]isagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520." 34 C.F.R. § 300.148(b). The Petitioners argue that their case is about the failure of the Respondent to, in fact, propose a new IEP or placement, thus creating a new disagreement regarding the availability of a program appropriate for the child. The Student is entitled to a FAPE and one was offered to her, as determined by the HOD in case #2011-0349. Since that HOD determined a FAPE was offered with the IEP formulated and placement offered in November 2010, the Petitioners had two choices: Either take the program and placement offered (because the IHO determined they were appropriate for the Student), or keep the Student at the non-public school they placed her in at their own expense. (It is possible they

could have sought an injunction when they filed their appeal, but that is not a question for this tribunal.) They chose to keep the Student at the non-public school they had placed her in and notified the Respondent of their intent to keep her there. Rather than seek an injunction in their civil case, they are attempting another approach to obtain what they failed to get from the prior complaint, placement at public expense in the non-public school. Since the prior HOD is final, they cannot have this second bite at the apple in this forum.

5. Students who are unilaterally placed by their parents in a non-public school do not have "an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a). Rather, they are entitled to "equitable services" from the local education agency (LEA) that are formulated by the equivalent of an IEP team and include the same components of an IEP. *See* 34 C.F.R. § 300.138. However, disputes about the services plan are not subject to a due process hearing. 34 C.F.R. § 300.140. Framing the issues as new because they involve a new school year is not sufficient in this case because the question had already been determined by an IHO and the Petitioners informed the Respondent of their intent to keep the Student at the non-public school rather than enroll in the public school, despite the ruling of the IHO that the program and placement at the public school were appropriate. The Respondent no longer had the responsibility to formulate an IEP, but rather had the responsibility to offer equitable services to the non-public school child enrolled in the non-public school by her parents. Thus, the Petitioners' complaint must be dismissed.

Determination

The Respondent prevails because the issues of FAPE and placement have already been litigated and determined by an IHO and are on appeal in Federal District Court and the Respondent is not required to propose a revised IEP while the Student is unilaterally placed by her parents in a non-public school.

Order

The complaint is dismissed with prejudice.

IT IS SO ORDERED.

Date: February 2, 2012



Jim Mortenson,
Independent 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 USC §1415(i).