

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

OSSE
STUDENT HEARING OFFICE
2012 MAY -2 AM 9:17

Parent ¹ , on behalf of)	
Student,)	
)	
Petitioner,)	
)	Hearing Officer: James McKeever
v.)	
)	
DISTRICT OF COLUMBIA PUBLIC)	
SCHOOLS)	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction and Procedural Background

This is a due process proceeding brought in accordance with the Individuals with Disability Education Act of 2004 (“IDEA”) and its implementing regulations codified at 20 U.S.C. Section 1400 *et seq.*, against Respondent, District of Columbia Public Schools (DCPS).

Petitioner is the parent of “Student,” a year-old girl recently classified as a student with a disability, who attends the grade at a Non-Public in the District of Columbia. On February 17, 2012,² Petitioner filed a Due Process Complaint (“DPC”) against DCPS alleging violations of the IDEA. Respondent did not challenge the sufficiency of the DPC. On February 24, 2012, Respondent filed its Response to the DPC. The Resolution session was held on February 27, 2012. The parties did not resolve the issues raised in the DPC, but continued the resolution period. The initial HOD timeline began on March 19, 2012.

¹ Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

² The case was filed twice previously and withdrawn without prejudice due to the parties availability.

The Prehearing Conference (PHC) was held on March 29, 2012. Counsel for Petitioner and counsel for DCPS participated. It was agreed that the Due Process Hearing (DPH) would be held on April 24, 2012 and April 25, 2012. The Hearing actually concluded on April 24, 2012, however. The disclosures were filed as agreed on April 17, 2012. Petitioner's Exhibits 1-25 were admitted into evidence. Respondent's Exhibits 1-10 were also admitted into evidence.³ Respondent's Exhibit 9 was entered into evidence over the objection of Petitioner because I found the documents contained in this exhibit were relevant to the issues set forth in the DPC.

At the impartial hearing, DCPS moved to dismiss this matter based on lack of subject matter jurisdiction because DCPS asserted that the issues in this case only concerned location of services, which is a decision made at the discretion of the LEA, not the parent. The motion was denied because DCPS did not file the motion 5 business days prior to the initial hearing date as per the PHC Order and because this issue was addressed in my Order, dated January 25, 2012 under case number under 2011-1109 (P-17).⁴

The following witnesses testified on behalf of the Petitioner: Parent, Evaluator (Evaluator) and Curriculum Specialist at Non-Public School (Curriculum Specialist).

The following witnesses testified on behalf of the Respondent: DCPS Principal and Progress Monitor.

II. JURISDICTION

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEA"), and its implementing regulations at 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. This decision constitutes the Hearing Officer's Determination (HOD) pursuant to 20 U.S.C. §1415 (f); 34 C.F.R. §300.513.

III. ISSUES PRESENTED

The following issues were certified for adjudication at the due process hearing:

³ A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

⁴ As indicated above, this case was filed previously and withdrawn without prejudice. The issues, however, remained the same.

1. Whether DCPS denied the Student a FAPE by failing to timely propose a program and placement prior to the beginning of the 2011-2012 school year when an IEP was not developed for the Student until October 5, 2011;⁵

2. Whether DCPS denied the Student a FAPE by predetermining the Student's placement at the DCPS School one week before the IEP meeting as indicated in the Prior Written Notice;

3. Whether DCPS denied the Student a FAPE by denying the parents meaningful participation in the IEP process when DCPS refused to answer questions about placement and location of services at the IEP meeting on October 5, 2011;

4. Whether DCPS denied the Student a FAPE by failing to develop an appropriate IEP with the Student's correct present levels of performance, information about the Student's class size and related services;⁶ and

5. Whether DCPS denied the Student a FAPE by failing to propose a placement and/or location of service that could implement the proposed IEP, dated October 5, 2011.

Petitioner requests an Order directing DCPS to fund the Student's placement at the Non-Public School for the 2011-2012 school year.

IV. FINDINGS OF FACT

Based upon the evidence adduced at the Due Process Hearing, I make the following findings of fact:

The Student is a year-old girl who resides in the District of Columbia. By Hearing Officer Determination (HOD), dated July 7, 2012, the Student was found eligible for special education and related services under the IDEA as a student with a Specific Learning Disability (SLD)(P-5). The Hearing Officer (HO) in that case found a denial of FAPE based on DCPS' failure to find the Student eligible for special education services under the IDEA and directed DCPS to fund the Student's placement at the Non-Public School, where she is currently attending, during the 2010-2011 school year. The HO also directed DCPS to convene an IEP meeting within 30 days of the HOD to develop an IEP and propose a placement for the 2011-2012 school year. The HO directed DCPS to maintain the Student at the Non-Public School for the 2011-2012 school year

⁵ At the hearing, Counsel for Petitioner limited the time period for this issue from September 7, 2011 to October 5, 2012.

⁶ Petitioner's counsel withdrew this issue at the impartial hearing.

unless DCPS was able to provide an appropriate placement within the public school system or another non-public school, *inter alia* (P-5).

The Student is considered “gifted and talented” with an SLD because the Student’s cognitive ability is in the “High Average” range. The Student has strong reading comprehension skills compared to her peers (Testimony of Evaluator). However, the Student struggles with math fluency and written expression and has difficulty reading social cues (Testimony of Evaluator). The Student also suffers from anxiety, which is triggered in social situations, that requires a lot of adult support (Testimony of Curriculum Specialist).

The parties waived the thirty-day period in which to convene the IEP meeting, as per the HOD, due to the unavailability of the staff from the Non-Public School (Testimony of Parent and Principal).

On September 7, 2011, DCPS convened the IEP meeting at the Student’s neighborhood school. At this meeting, DCPS created a draft IEP that provided for 3 hours per week of specialized instruction within the general education setting with related services of speech and occupational therapy (P-7). Under every “Area of Concern” listed on the IEP, DCPS wrote that this information was “being written as part of an HOD”...and that...“this professional does not concur with the decision, but is required to draw up an IEP as part of the HOD” (P-7). The parent objected to DCPS’ recommendation, among other things, and the parties agreed to reconvene another meeting on October 5, 2012 (Testimony of Parent and Principal).

On October 5, 2011, DCPS held a second IEP meeting. At this meeting, DCPS developed an IEP that provided for 31.5 hours of specialized instruction outside of the general education setting with related services of speech and occupational therapy (P-9). Under the “Areas of Concern,” DCPS removed its commentary about not concurring with the HOD, but kept the language that the IEP was “being written as part of an HOD” (P-9). This IEP included the goals and objectives developed by the Non-Public School (P-3).

AT the IEP meeting, DCPS gave the parent Prior Written Notice (PWN), dated October 5, 2012, which designated the Student’s neighborhood school as DCPS’ proposed location of service (P-25). An employee at DCPS, who was not present at the IEP meeting, signed the PWN and the document indicates that it was faxed to DCPS on September 28, 2011, which was a week before the IEP meeting (P-25, Testimony of Parent).

The Student’s neighborhood school has self-contained classes for students with autism and “pull-out” services for student’s identified as eligible for special education services under the IDEA (Testimony of Principal). The school does not

have self-contained classes for student's with SLD (Testimony of Principal). The Principal at the DCPS school testified that she would have been willing to create a self-contained class for the Student had the Student attended her school (Testimony of Principal). Implementation of the Student's IEP at the proposed location was not discussed with the parent at the IEP meeting because the self-contained class did not exist at the time (Testimony of Principal).

The DPCS Progress Monitor, who is not a special education teacher, observed the Student at the Non-Public School and believed that the Student was ready to transition to a public school (Testimony of Progress Monitor). The Progress Monitor did not discuss the Student's academic needs and/or the Student's social/emotional deficits with the Student's teachers at the Non-Public School or with the Student's parents (Testimony of Progress Monitor).

A private Educational Evaluation was administered to the Student in November 2011 (Testimony of Evaluator, P-16). The Evaluator reported that the Student was obtaining an educational benefit at the Non-Public school and recommended that the Student remain at the Non-Public school (P-16). The parent did not provide DCPS or the Non-Public School with a copy of the evaluation (Testimony of Parent).

The Student is receiving an educational benefit at the Non-Public School (Testimony of Curriculum Specialist, Testimony of Evaluator, P-16, P-18 and P-20).

V. BURDEN OF PROOF

The burden of proof in a special education due process hearing lies with the party seeking relief. DCMR 5-3030.3; see, Schaffer v. Weast, 546 U.S. 49 (2005).

VI. SUMMARY

Petitioner has prevailed with respect to issues (2), (3) and (5). Petitioner has not met her burden of proof with respect to issue (1).

VII CREDIBILITY DETERMINATIONS

This Hearing Officer finds that all of the witnesses at the due process hearing provided credible testimony. Although the Evaluator testified that the Principal at the DCPS school told her that the school could not implement the Student's IEP, the Principal denied that she stated this to the Evaluator. No other evidence was offered at the hearing with respect to the alleged conversation. As such, I make no findings with respect to whether the conversation occurred.

VII STATUTORY FRAMEWORK

Under the IDEA, the federal government provides funding to state and local educational agencies, including those of the District of Columbia, see 20 U.S.C. § 1401(31), for the education of disabled children. As a condition of receiving that funding, an educational agency must maintain policies and procedures ensuring that a "free appropriate public education is available to all children with disabilities residing in the [jurisdiction] between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "central component of a disabled student's special education under the IDEA" is the individualized education program ("IEP"), which is a written statement setting out the student's "individually tailored goals and the means of achieving them." District of Columbia v. Doe, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010) (citing 20 U.S.C. § 1414(d)). The IDEA also guarantees a student's parents "both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." Id. at 890 (quoting Honig v. Doe, 484 U.S. 305, 311-12 (1988)) (internal quotation marks omitted).

VI. ANALYSIS AND CONCLUSIONS OF LAW

Issue (1):

Whether DCPS denied the Student a FAPE by failing to timely propose a program and placement prior to the beginning of the 2011-2012 school year when an IEP was not developed for the Student until October 5, 2011.⁷

Pursuant to C.F.R. §300.323, at the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.

Here, the evidence shows that the parties waived the thirty-day period in which to convene the IEP meeting, as per the HOD dated July 7, 2012, due to the unavailability of the staff from the Non-Public School (Testimony of Parent and Principal). As such, the first IEP meeting was held in September 2011 instead of July 2011. Thereafter, the parties agreed to adjourn the IEP meeting that was held on September 7, 2011 to October 5, 2011 in order to continue discussing the services offered on the IEP (Testimony of Parent and Principal). Therefore, I find that any delay in developing the subject IEP was based on the consent of the parents. Accordingly, I find that the Student was not denied a FAPE based on DCPS' failure to develop an IEP prior to the beginning of the school year.

⁷ At the hearing, Counsel for Petitioner limited the time period for this issue from September 7, 2011 to October 5, 2012.

Issue (2):

Whether DCPS denied the Student a FAPE by predetermining the Student's placement at the DCPS School one week before the IEP meeting as indicated in the Prior Written Notice.

Here, the evidence shows that at the end of the IEP meeting held on October 5, 2012, DCPS gave the parent Prior Written Notice (PWN), also dated October 5, 2012, that designated the Student's neighborhood school as the proposed location of service (P-25). However, the evidence also shows that the PWN was signed by a person who was not present at the IEP meeting and that the notice was faxed to DCPS on September 28, 2011, which was a week before the IEP meeting (P-25, Testimony of Parent). Accordingly, based on these facts, I find that DCPS predetermined that the Student would be removed from the Non-Public School, where she was placed during the prior school year, to a DCPS school prior to the IEP meeting held on October 5, 2011. I also find that DCPS made the decision to remove the Student from her current placement without any input from the Student's parents. Although this is a procedural violation of the IDEA, the facts herein demonstrate that it denied the parent meaningful participation in the IEP process, which resulted in a substantive harm and denied the Student FAPE Spielberg v. Henrico Cty. Public Schools, 853 F.2d 256 (4th Cir. 1988).

Issue (3):

Whether DCPS denied the Student a FAPE by denying the parent meaningful participation in the IEP process when DCPS refused to answer questions about placement and location of services at the IEP meeting on October 5, 2011.

Here, the evidence shows the implementation of the Student's IEP at the proposed location was not discussed with the parent at the IEP meeting because, in part, a full-time self-contained class did not exist at the proposed school at the time (Testimony of Principal, Testimony of Parent). Although the Principal testified that she would have been willing to create a self-contained class for the Student, had the Student attended her school, I find that DCPS' inability to provide the parent with any information concerning the Student's program at the proposed school deprived the parent of meaningful participation in the IEP process and resulted in the substantive denial of FAPE N.S. v. District of Columbia, 709 F. Supp. 2d 57 (D.D.C. 2010).

Issue (5):

Whether DCPS denied the Student a FAPE failing to propose a placement/location of services that can implement the proposed IEP, dated October 5, 2011.

A free appropriate and public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). Under Rowley, a child is deprived of a free and appropriate public education: (a) If the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or (b) if the IEP is not reasonably calculated to enable a child to receive educational benefits.

While the IDEA requires parental participation in educational placement decisions, it does not mandate that parents be involved with site selection Sherril A.D. v. Kirby, 19 IDELR 339 (5th Cir. 1992).

The Student's IEP provides for 31.5 hours of specialized instruction in a self-contained setting. The Student's neighborhood school has self-contained classes for students with autism and pull-out services for student's identified as eligible for special education services under the IDEA (Testimony of Principal). The school does not have self-contained classes for student's with SLD (Testimony of Principal). Although the evidence shows that the Principal was willing to create a self-contained class for the Student (Testimony of Principal), the evidence shows that at the time the subject IEP was developed, and at the time of the impartial hearing, no such program existed. I find DCPS' assertion that a program could have been created for the Student had she attended the proposed school is too speculative to amount to an offer of a FAPE because no information and/or details were provided about the program in order for the parent and/or this HO to make an assessment as to appropriateness of the program for this Student. Accordingly, I find that the Student was denied a FAPE because DCPS failed to propose a placement and/or location of service that could implement the IEP, dated October 5, 2011.

Further, the conclusion of the DPCS Progress Monitor that the Student was ready to transition to a public school is unpersuasive. As indicated above, the evidence shows that the Progress Monitor is not a special education teacher and that she was not sufficiently familiar with the Student's academic and/or social emotional needs to make such a determination. Accordingly, I find that the Progress Monitor's testimony did not support the Student's removal from the Non-Public School.

Private School Placement:

The Student's IEP provides for 31.5 hours of specialized instruction in a self-contained setting. The Student is considered "gifted and talented" but struggles with math fluency and written expression (Testimony of Evaluator). The Student also suffers from anxiety, which is triggered in social situations, which requires a lot of adult support in order for the Student to engage with her peers (Testimony of Curriculum Specialist). The Non-Public School is a self contained school that developed its own IEP for the Student. The goals and objectives generated by the Non-Public School were incorporated into the DCPS IEP. The Curriculum Specialist and the Evaluator, both of whom were qualified as experts in special education at the impartial hearing, testified that the Non-Public School was appropriate for the Student (Testimony of Curriculum Specialist and Evaluator). Accordingly, I find that that Non-Public School is an appropriate placement for the Student. Additionally, there was no showing that the Student's needs could be met at a DCPS school or any other school.

Further, I find that the Non-Public School is the Student's least restrictive environment (LRE), as the evidence shows that the Student should not be placed in the general education setting (Exhibit P-16). Additionally, DCPS conceded that placement in a full-time out of general education setting was appropriate for this Student. As such, I find the Non-Public School is presently the Student's LRE.

Accordingly, Petitioner's request for funding for the Student's placement at the Non-Public School for the 2011-2012 school year is granted, Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

Equities:

Nothing in the hearing record suggests that the parent failed to cooperate with the IEP process and DCPS was on notice that the Student was placed at the Non-Public School. As such, I find that the equities support an award of funding for placement of the Student at the Non-Public School for the 2011-2012 school year.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 1st day of May, 2012, it is hereby

ORDERED, that DCPS shall fund the Student's placement at the Non-Public School for the 2011-2012 school year;

Dated May 1, 2012

By: /s/ James McKeever
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination 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. Section 1415(i)(2).