DC Office of the State Superintendent of Education

Office of Compliance and Review

Student Hearing Office

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STUDENT HEARING OFFICE
2009 SEP -3 PM 12: 26

Confidential

STUDENT[1], by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.	**HEARING OFFICER DETERMINATION** **Date: September 3, 2009** **Hearing Officer: Wanda I. Resto, Esquire**

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On July 20, 2009, the Petitioner through counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to implement the Student's Individualized Education Program ("IEP") by not providing access or transportation to a school. The Petitioner requested as a relief a finding that the Respondent denied the Student a FAPE and be ordered to immediately fund and place the Student at a school of the Petitioner's choosing, with transportation. The Petitioner further requested that within 30 days of the Student's enrollment at an appropriate school, the Respondent convene a multidisciplinary team ("MDT") meeting to review all current evaluations and revise the Student's IEP as appropriate. Additionally, the Petitioner asked that the Respondent fund the independent implementation of compensatory education services.

On July 27, 2009, a telephonic pre-hearing conference for the above reference matter was conducted. The parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. Counsel for the Petitioner during the hearing acknowledged that the timeframe before the Hearing Officer's consideration started May 20, 2009.

The Petitioner was advised that the compensatory education award had to comply with the *Reid* requirements. The Petitioner at the hearing had to present evidence to establish compensatory education was warranted, and if so, what type and amount of compensatory education is most appropriate. The Petitioner had to prove that the Student's as a result of the violation of the IDEIA, the Petitioner suffered an educational deficiency, (2) that but for the violation, the Student would have progressed to a certain academic level, and (3) that there exists a type and amount of compensatory education services that could bring the Student to the level he would have been but for the violation by the Respondent. The Petitioner had an obligation to establish the need and reasonableness of the amount of compensatory education requested and how the hours will be integrated into the Student's current educational program.[2]

The Respondent had not filed a Response to the Complaint; Counsel was instructed to file a response by August 10, 2009. The Respondent filed on August 12, 2009, DCPS' Response, Notice of Insufficiency, and Motion to Dismiss Petitioner's Due Process Complaint Notice, the Respondent asserted it is insufficient under the IDEIA[3] ; it does not describe the nature of the problem of the child relating to the proposed or refused action, including facts relating to the problem. The Respondent alleged that the failure to provide sufficient facts to determine in what way the standard for FAPE has not been met, was it a procedural noncompliance, and is the IEP reasonably calculated to provide the Student with educational benefit. The Respondent asserted the Complaint does not allege that the Student has been harmed. The Respondent contends that

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[2] In *Reid v. District of Columbia,* 401 F.3d 516 (2005) the D.C. Circuit held, with respect to compensatory education, that "In every case, 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.

[3] Citing: 20 USC 1415(b)(7)(A)(ii)(I) and 34 CFR 300.508(b)

the allegations are based upon the same or similar facts which were addressed in the findings of fact and conclusion of law in a May 5, 2009 Hearing Officer Determination ("HOD"), making the current claim an improper attempt to collaterally attack the HOD.

The Petitioner was required by an Order on August 11, 2009 to demonstrate at an August 25, 2009 hearing; that the Respondent failed to implement the Student's IEP; how the Student was harmed and why the Petitioner's choice of placement is appropriate. The Respondent had an obligation to provide evidence that all the services prescribed in the Student's IEP, including transportation to a school were provided. The Respondent had also to prove that a FAPE was not denied.

The Hearing Officer decided the Respondent's claim of insufficiency of the Complaint was not substantiated and was untimely. Additionally, the allegation the Complaint was barred by a previous HOD was determined unfounded, as explained below.

The IDEIA does not require a due process complaint to reach the level of specificity and detail of a complaint in a court of law. The purpose of the sufficiency requirement is to ensure that the other party will have an awareness and understanding of the issues forming the basis for the complaint. Due process complaints should be construed in light of *Schaeffer v. Weast,* 126St.Ct.528, 532 (2005) and *Escambia County Board of Education v. Benton,* 406 F. Supp. 2d 1248, 1259-1260 (2005) The standard set in *Schaeffer and Escambia* for reviewing the sufficiency of a due process request is a minimal pleading standard and is lower than the standard for reviewing complaints in court.[4]

The Complaint filed by the Parent in this matter, contains all the relevant information along with a description of the failure to implement the Student's IEP by not providing access or transportation to a school as required. The Complaint also contains proposed resolutions by the Parent. Making the Complaint sufficient, and in conformity with the IDEIA[5]. Furthermore, during the prehearing discussion the dates relevant to the Complaint were identified as the timeframe after the Complaint that led to the May 2009 HOD.

A hearing was held on August 25, 2009 at 10:00 AM in room 4B, the Petitioner presented a disclosure letter dated August 18, 2009 to which nine documents were attached, labeled P-1 through 9 and which listed four witnesses. One witness testified. The Respondent presented a disclosure letter dated August 19, 2009 identifying four witnesses and no documents were attached. One witness testified. The documents were admitted without objections The Petitioner at the hearing withdrew her request for compensatory education.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

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[4] See: 20 U.S.C. 1415(b) (7)(A)(ii)

[5] See: 20 U.S.C. 1415(b)(7) and its regulations at 34 C.F.R. 300. § 508(b)

II. ISSUE(S)

1. Did the Respondent fail to implement the Student's IEP by not providing access or transportation to a school from May 20, 2009 through the start of school year 2009-2010?

2. Was the Student denied a FAPE?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student was enrolled in a DCPS for the school years of 2008-2009 and continues during 2009-2010.[6]

2. The Student is a student with disabilities under the IDEIA. The Student's most recent IEP is dated February 20, 2009 and provides 25.5 hours per week of specialized instruction, 60 minutes weekly of speech language pathology, 60 minutes of occupational therapy weekly, and transportation to and from school. The Student's disability classification is Autism. The Petitioner signed and agreed with the March 14, 2009 IEP. [7]

3. The undersigned concluded in a May 2009 HOD that the Petitioner did not attend a February 20, 2009 meeting because she went to the wrong place. The last meeting the Petitioner participated to discuss the Student was in 2008, because she had difficulties organizing herself and her other children to attend meetings. The Petitioner was not able to enroll the Student because she did not have transportation and didn't know who to contact to enroll the Student. The parent has not been provided any information about the School. The Student had not received services or bus transportation to school and neither the Petitioner nor her Educational Advocate were able to identify the address or enroll the Student. On March 20, 2009, the Respondent notified the Petitioner that the Student would be going to Autism program at and the Respondent had not provided any further information regarding the program nor a prior notice of placement. The Student had not received his IEP services since March 14, 2009. There was not a MDT meeting convened, nor had transportation been provided since March 14, 2000, when the IEP was signed.[8]

4. The Student did not receive transportation services starting May 20, 2009 as required and he stayed home during the summer recess. The Petitioner stated she never visited nor the The Petitioner claimed that neither she nor the Education Advocate, knew the address of the The Education Advocate is the same person who was her Advocate in the May 2009. The Petitioner went during July 2009 to Early Stages and was referred to the Student was enrolled at on August 24, 2009. The Petitioner did not receive any advice on where to enroll the Student from either the Law Firm or DCPS during the timeframe of May-August. The Student's first day of class was August 24, 2009 and the Petitioner transported him to school via the use of two public buses. [9]

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[6] P# 1 Complaint filed July 20 2009.

[7] P# 6 February 20, 2009 IEP.

[8] HOD - May 19, 2009, finding of fact of numbers 8 through 12.

[9] Testimony of the Mother. The Petitioner at a May 2009 hearing before the undersigned Hearing Officer also claimed she nor the education advocate knew the School's address.

5. In the May 2009 HOD the Hearing Officer determined *inter alia* the Petitioner did not attempt to get any information about the appropriateness of the schools' services, the address or the telephone number so that she could visit the school and make an informed decision. The Petitioner chose not to visit any school, and never indicated her preference to the Respondent. She had every opportunity to do so; instead she relied on her Educational Advocate and did not get a response. [10]

6. The Student was not enrolled in a DCPS from May 2009 approximately to the beginning of August 2009.[11]

7. The Respondent did not provide the Student with transportation to the on August 24, 2009 the date of the commencement of school year the 2009-2010.

IV. CONCLUSIONS OF LAW

FAPE Determination

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)." [12]

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

The Respondent met its legal obligation under the IDEIA. Here is why.

The IDEIA and 5 D.C.M.R. require the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to

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[10] See: May 19, 2009 HOD-page 9.

[11] Petitioner's Testimony.

[12] See: 20 USC § 1400(d)(1)(A) and 5 D.C.M.R. § 3000.2 (2006).

meet their unique needs and prepare them for further education, employment, and independent living.[13]

Transportation is a related service if necessary for student to access education. [14]

The Respondent could not provide transportation to the Student if he was not enrolled in a school on May 20, 2009. The evidence was that the Petitioner once again alleged lack of knowledge of the address of the school as her rationale for delaying the enrollment of the Student in a school until July 2009.

The Respondent violated its procedural obligations by failing to provide the student with one day of transportation to school as required in his IEP. However, an IDEIA claim based on procedural violations is viable only if those procedural violations affected the student's substantive rights. See, e.g., *Kruvant v. District of Columbia*, 99 Fed. App. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error"); *C.M. v. Bd. of Educ.*, 128 Fed. App. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education where procedural faults committed by Board did not cause the child to lose any educational opportunity).

The IDEIA at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer decisions on procedural issues, "[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

i. impeded the child's right to a free appropriate public education;
ii. significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
iii. caused a deprivation of educational benefits."

The Petitioner did not demonstrate that the Student suffered an educational harm or was affected by the procedural violation the Respondent committed. The Student did not provide sufficient evidence to establish that the failure to provide the Student with transportation denied the Student's right to a FAPE or deprived the Student of educational benefit or that the parent was impeded of an opportunity to participate in the decision making process. Particularly when according to the Mother; she chose to wait until July 2009 to make any efforts to identify the school address and enroll the Student in a DCPS. The Student was not denied a FAPE because of the procedural inadequacy.

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[13] See: 20 USC § 1400(d)(1)(A) and 5 D.C.M.R. § 3000.2 (2006).
[14] See: 20 U.S.C. § 1401 (26); 34 C.F.R. § 300.34.

Section 300.513(a)(1) and section 615(f)(3)(E) of the Act provide that, in general, a decision made by a hearing officer must be made on substantive grounds based on a determination of whether the child received FAPE. While the Petitioner has established a procedural violation of the IDEIA, the Petitioner has not established that the violation caused harm to the Student.

V. SUMMARY OF DECISION

The Petitioner did not demonstrate that the Student suffered an educational harm or was affected by the procedural violation the Respondent committed. The Student did not present sufficient evidence to establish that the failure to provide the Student with transportation denied the Student's right to a FAPE or deprived the Student of educational benefit or that the parent was impeded of an opportunity to participate in the decision making process. The Petitioner did not establish that that violation caused harm to the Student.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent did not denied the Student a FAPE and issues the following:

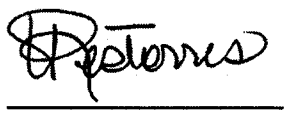
VI. ORDER

ORDERED, the Petitioner's **request for relief is denied.**

This order resolves all matters presented in the Petitioner's July 20, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)



Wanda Iris Resto - Hearing Officer

Signed: September 3, 2009