DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, D.C. 20003

STUDENT,[1]

Petitioner,

v

District of Columbia Public Schools,

Respondent.

Date Issued: December 8, 2010

Wanda I. Resto Torres, Hearing Officer

Case No:

Hearing Date: November 23, 2010 Room 2009

HEARING OFFICER DECISION

On October 7, 2010, the Petitioner filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") and invoking rights under the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 5 District of Columbia Municipal Regulations ("D.C.M.R."). On October 13, 2010, the Hearing Officer was assigned the Complaint.

On October 28, 2010, Respondent filed DCPS's *Response*. The Respondent alleged that the multidisciplinary team ("MDT") after various attempts did meet on October 26, 2010, it crafted an individualized education program ("IEP") and the parent signed in agreement. The Respondent argued that the student has not been a denied a FAPE and no relief is warranted.

On November 4, 2010, a pre-hearing conference was held the parties reiterated their positions.

On November 10, 2010, Petitioner filed a Motion for Summary Judgment. On November 15, 2010, the Respondent, filed a Reply to Petitioner's Motion for Summary Decision and Cross Motion for Summary Decision and simultaneously filed a Motion to Dismiss the Due Process Complaint.

On November 18, 2010, it was determined that the Petitioner established through documents that an IEP was not developed in a timely manner and the student was without services for approximately two months[2]. The issues remaining for the consideration by the Hearing Officer was whether the student has been harmed and denied a FAPE? Is the student entitled to compensatory education, and if so, in what form and amount? The Petitioner was ordered to present evidence at the hearing to establish what harm if any had come to the student; and to provide a reasonably calculated and individually-tailored compensatory

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[1] Personal identification information is provided in Appendix A.
[2] At the hearing the evidence was that the missed services period was actually from October 1-29, 2010.

education award that demonstrates a causal relationship between the student's current educational deficits and any denial of a free and appropriate public education.

On November 23, 2010, a closed hearing was held, representing the Petitioner was Nicholas Ostrem; and the Respondent was represented by Blair Matsumoto. During the preliminary matters discussion the parties cross objections to their respective disclosures were overruled because both disclosures were untimely filed. The parties also stipulated the compensatory education plan was no longer a remedy for the consideration of this Hearing Officer. Five documents labeled P-1 through 5; were admitted for the Petitioner. Two witnesses testified on behalf of the Petitioner: the Mother, and the Education Advocate.[3] The Respondent presented nine documents, labeled DCPS 1 through 9 which were admitted into evidence. The Case Compliance Manager testified on behalf of the Respondent.

The hearing was conducted in accordance with the rights established under federal and local laws and the implementing regulations, and the SOP. [4] No written closing arguments or briefs were submitted.

ISSUES

The issues to be determined are as follows:

1. Whether after finding the student eligible for special education on August 31, 2010 as required in 34 CFR§ 300. 323 (c), did DCPS fail to provide the student 26 hours a week of specialized instruction and 60 minutes of behavior support services weekly from October 1, 2010 through October 26, 2010? Was the student harmed as a result?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The child is a boy attending a DCPS school as a grader. On August 31, 2010, an IEP team including the Petitioner found the child eligible for special education services as a student with emotional disturbance. The IEP team including the Petitioner agreed to reconvene in mid-September 2010 to reviewed the drafted IEP and determine the location of services for the school year 2010-2011.[5]
2. On October 4, 2010, an E-mail requesting visiting instruction services documents from the parent and confirmation of the October 19, 2010 meeting was sent to Petitioner's counsel.[6] On October 7, 2010, the Petitioner filed a due process complaint.
3. On October 26, 2010, the IEP was reviewed the student was provided 26.5 hours a week of specialized instruction hours out of general education, 60 minutes a week of behavior support in a small group setting, with transportation services; and the parent signed in agreement with the IEP.

[3] The parties stipulated the expertise of the witness as Special Education.
[4] 20 U.S.C. §§1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), re-promulgated on February 19, 2003; and Title 38 of the D. C. Code, Subtitle VII, Chapter 25, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").
[5] DCPS 1 August 31, 2010 IEP
[6] DCPS 4-E-mail correspondence and DCPS 6- October 4, 2010-Confirmation of Meeting Notice.

The IEP team also granted 25 hours of independent mentoring services to the student as a compensatory education plan for missed services; mentoring services was granted instead of tutoring based on recommendation of the Education Advocate.[7]

4. During October 2010, DCPS students did not have classes on: Columbus Day; one day for Parent conference; one day for professional development for teachers and one afternoon where dismissal occurred at 12:15 p.m. there were approximately 17 school days.[8]

5. The student missed approximately two and a half months of academic instruction from April to the end of school year 2009-2010, when he was out of school for medical reasons. This school year 2010-2011, he is to attend middle school; to assist in the transition to middle school; DCPS offered twenty-five hours of tutoring. However because the student's academic performance had not suffered the Education Advocate and the IEP team decided that twenty-five hours of mentoring services would be more appropriate for the student as a compensatory education plan. It was also determined that a functional behavior assessment would be conducted once the student started attending classes.

6. The Expert Witness testified that the student's behavior worsened significantly because of the missed services and his self-esteem suffered. The witness however was not able to provide any facts, data or analysis to sustain her belief of harm to the student.

7. The student cried and felt rejected because he could not go to school.[9]

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:

Under IDEA, states and territories, including the District of Columbia, that receive federal educational assistance must establish "policies and procedures to ensure," among other things, that FAPE," is available to disabled children. School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that "all children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Reid v. District of Columbia,* 365 U.S. App. D.C. 234, 401 F.3d 516, 519 (D.C. Cir. 2005) (internal citations omitted) (emphasis omitted); *Branham v. District of Columbia,* 427 F.3d 7, 8 (D.C. Cir. 2005).

The applicable regulations at 34 C.F.R. § 300.17 define a Free Appropriate Public Education (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

[7]DCPS 8 IEP October 26, 2010, testimony of the education advocate and case compliance manager, DCPS 9 Prior Action Notice, and P-4 Compensatory Education Plan.
[8] Hearing Officer Exhibit 1-DCPS Class schedule for school year 2010-2011.
[9] Testimony of the Mother.

are provided in conformity with an individualized education program (IEP)." DCPS has met its statutory obligations under the IDEIA. Here is why.

In the instant matter, the evidence was the student's special education eligibility determination was made on August 31, 2010, and his IEP services began on November 1, 2010. DCPS did not provide the 26.5 hours of specialized instruction and 60 minutes of behavior support services per week from October 1 through October 29, 2010, during that period there were 17 school days.

The IDEIA at 20 U.S.C. § 1414 (d) (A), (B); 34 C.F.R. § 300.323 (c)(1)and (2) require a meeting to develop an IEP for each child is conducted within 30 days of the determination that the child needs special education and related services; and as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. Similarly, 5 D.C.M.R. § 3010.2 requires DCPS to implement an IEP as soon as possible after the meeting where the IEP is developed or revised.

In the case before us the evidence was that the DCPS did not provide the student services during 17 days in October 2010. The Petitioner had an obligation to present evidence to establish the harm if any that the student suffered as a consequence of missed services. The Petitioner had to demonstrate a causal relationship between the student's current educational deficits if any and the alleged denial of a free and appropriate public education; there was no

The Hearing Officer finds DCPS failed to comply with its statutory obligation pursuant to the IDEIA requirements, by not completing in a timely manner the student's IEP and failing to provide specialized instruction during approximately 17 school days. The Respondent has committed a procedural violation.

Based on these findings, however, DCPS' failure to develop and implement an IEP in a timely manner is a procedural violation of the IDEIA that did not rise to a denial of a FAPE. Here is why.

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 student was not denied a FAPE because of the alleged procedural inadequacy. The student did not prove that a failure timely develop an IEP and to provide services during seventeen school days denied the student's right to a FAPE or deprived the student of an educational benefit.

As indicated above, DCPS violated its procedural obligations by failing to timely develop and implement the student's 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. Appx. 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. Appx. 876, 881 (3d Cir. 2005) (per curiam)

The Petitioner did not demonstrate that the student suffered an educational harm or was affected by any procedural violations the DCPS may have committed. 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 that violation caused harm to the student that the IDEIA is intended to address.

Accordingly, the student has failed to meet the burden of proof and his claims fail on the merits. The Petitioner failed to provide any evidence of harm to warrant a determination that there has been a denial of FAPE.

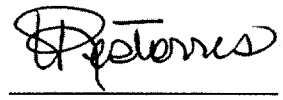
ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered: Petitioner's request for relief is DENIED and the Complaint filed on October 7, 2010, is DISMISSED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1415(i)(2)(B).

Dated: December 8, 2010



Hearing Officer