

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

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STUDENT HEARING OFFICE
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STUDENT,¹
through the Parent,

Petitioner,

v.

Respondent.

Date Issued: March 21, 2011

Hearing Officer: Virginia A. Dietrich

Case No:

Hearing Date: 03/14/11 Room: 2003

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of Student, filed a due process complaint notice on 01/18/11, alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner complained that the District of Columbia Public Schools ("DCPS") denied Student a FAPE by failing to provide Student with an appropriate program and placement with the level of support that he required and by failing to provide Student with a placement that could implement Student's Individualized Education Program ("IEP"), all beginning on 11/10/10. More specifically, Petitioner alleged that on 11/10/10, the IEP team met and determined that Student required more intensive services than could be provided at his current school and agreed to identify a location where more intensive services could be provided, but up until the date of the due process hearing, DCPS had failed to do so and Student remained in an inappropriate placement at his current school in the District of Columbia.

DCPS admitted that on 11/10/10, DCPS agreed that Student needed a smaller and more structured educational setting and the IEP team agreed to make a referral to the DCPS Least Restrictive Environment ("LRE") unit to obtain a different setting, but at the time of the due process hearing, DCPS had failed to provide Student with another setting. However, DCPS argued that Student's most current IEP, as written, was being implemented at Student's current school because the services were being provided; therefore, DCPS had not violated the IDEA and had not denied Student a FAPE with respect to the implementation of Student's IEP.

¹ Personal identification information is provided in Appendix A.

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Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

Procedural History

This Hearing Officer was assigned to the case on 01/21/11. A resolution meeting took place on 02/04/11 and on 02/07/11, parties fully executed a written agreement to proceed to a due process hearing. The 30-day resolution period ended on 02/07/11, the 45-day timeline to issue a final decision began on 02/08/11, and the final decision is due by 03/24/11. See 34 C.F.R. 300.510, 300.515.

The due process hearing was a closed hearing that began and concluded on 03/14/11. Petitioner was represented by Donovan Anderson, Esq. and DCPS was represented by Linda Smalls, Esq.. Neither party objected to the testimony of witnesses via telephone.

Petitioner presented the following two witnesses: Petitioner, who appeared in person; and the Program Director at the _____ in Laurel, Maryland, who participated by telephone. DCPS presented no witnesses and rested its case upon the submission of its disclosures into evidence.

Petitioner's disclosures dated 03/05/11, containing a witness list and Exhibits P-1 through P-6, were timely filed and admitted into evidence without objection. DCPS' disclosures dated 03/07/11, containing a witness list and Exhibits R-01 through R-06, were timely filed and admitted into evidence without objection. DCPS' Exhibit R-06, mislabeled in DCPS' disclosures, consisted of the resume of Dr. Marquita A. Elmore. DCPS' disclosures erroneously referenced Exhibit R-07, which did not exist.

Parties agreed to the following stipulations:

Stipulation #1 - Student is currently a special education student at _____ for the 2010-2011 school year.

Stipulation #2 - Student has a full-time IEP dated 11/10/10 that classifies Student with a primary disability of Specific Learning Disability and prescribes 15.5 hours/week of specialized instruction outside of general education, 3.5 hours/week of reading outside of general education, 3.5 hours/week of written expression outside of general education, 3.5 hours/week of mathematics outside of general education, and 120 minutes/month of speech and language services outside of general education, for a total of 26.5 hours/week of specialized instruction and 30 minutes/week of speech and language services all outside of general education.

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Stipulation #3 - At the IEP meeting on 11/10/10, the IEP team indicated that Student was in need of a different placement and that a referral would be sent to the DCPS LRE team for a different placement to be identified. The IEP team determined that Student was in need of a placement in a more restrictive setting that included a smaller school and class size, and a smaller teacher to student ratio.

Stipulation #4 – As of 03/14/11, DCPS had not identified another placement for Student.

Both parties waived opening statements, but presented closing statements.

The two issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS failed to provide Student with an appropriate program and placement with the level of support that Student requires, beginning on 11/10/10.

Whether DCPS failed to implement Student's IEP by failing to provide a placement where Student's IEP could be implemented.

For relief, Petitioner requested a finding of a denial of a FAPE on the above stated issues and DCPS to place and fund Student at The _____ in Laurel, Maryland, with transportation. Petitioner withdrew her request for compensatory education beginning on 11/10/10 and the compensatory education claim was dismissed with prejudice since the due process hearing had begun.

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. Student is currently a special education student at _____ for the 2010-2011 school year. (Stipulation #1).

#2. Student has a full-time IEP dated 11/10/10 that classifies Student with a primary disability of Specific Learning Disability and prescribes 15.5 hours/week of specialized instruction outside of general education, 3.5 hours/week of reading outside of general education, 3.5 hours/week of written expression outside of general education, 3.5 hours/week of mathematics outside of general education, and 120 minutes/month of speech and language services outside of general education, for a total of 26.5 hours/week of specialized instruction and 30 minutes/week of speech and language services all outside of general education. (Stipulation #2).

#3. At the IEP meeting on 11/10/10, the IEP team indicated that Student was in need of a different placement and that a referral would be sent to the DCPS LRE team for a different placement to be identified. The IEP team determined that Student was in need of a placement in a more restrictive setting that included a smaller school and class size, and a smaller teacher to student ratio. (Stipulation #3).

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#4. As of 03/14/11, DCPS had not identified another placement for Student. (Stipulation #4).

#5. The population at the school that Student currently attends includes nondisabled peers. This large school environment is not conducive to learning for Student who is afraid to show his academic weaknesses in a mixed population school environment. After being at his current high school for almost two years, Student is still unable to transition from class to class by himself successfully. (Testimony of Petitioner). For the 2nd Advisory of the 2010-2011 school year, Student received grades of "F" in all classes except for a grade of "D" in physical education, and although Student had excessive absences from classes, he was not excessively absent from school. (R-04).

#6. The _____ in Laurel, Maryland is a full-day special education school for students in grades 3 through 12 where students can graduate with either a high school diploma or certificate of completion. The _____ has a Certificate of Approval from the Office of the State Superintendent of Education in the District of Columbia. The school provides services to a total of 102 students with disability classifications of Specific Learning Disability and Emotional Disturbance. Academic classes contain nine students or less, and core class teachers are certified in special education while elective class teachers are content certified. The school can implement Student's IEP by providing 26.5 hours/week of specialized instruction outside of general education and 30 minutes/week of speech and language services outside of general education. The _____ has a school wide behavior program with five levels that are attached to varying incentives with positive intervention support. Students are intensively supervised in the hallways while transitioning from class to class, at all times. Of the 102 students attending The _____ 40 are from the District of Columbia. The _____ can effectively program for Student based on his needs and disability, and the school program appears to be appropriate for Student. (Testimony of Program Director at The School; P-6).

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:

"Based solely upon 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 with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

The first issue to be addressed is whether DCPS failed to identify an appropriate program and placement with the level of support that Student requires, beginning on 11/10/10.

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The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1. 34 C.F.R. 300.116 requires that the placement decision be made by a group of persons that includes the parents, be made in conformity with the least restrictive environment provisions of the IDEA and that the child's placement be based on the child's IEP and be as close as possible to the child's home, and to the extent possible, the child is to be educated in the school that he or she would attend if not disabled. The least restrictive environment provisions of the IDEA require that to the maximum extent appropriate, children with disabilities are to be educated with children who are nondisabled and removal of children with disabilities from the regular educational environment should occur only if the nature or severity of the disability is such that regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114. DCPS is required to provide Student with a FAPE; i.e., an appropriate school where services can be provided in conformity with Student's IEP. 34 C.F.R. 300.17.

The parties stipulated that on 11/10/10, while Student attended _____ the IEP team determined that Student was in need of a different placement and that a referral would be sent to the DCPS LRE team for a different placement to be identified. The IEP team determined that Student was in need of a placement in a more restrictive setting that included a smaller school and class size, and a smaller teacher to student ratio. (Findings #1, #3). 34 C.F.R. 300.115 requires DCPS to provide Student with a placement along the continuum of alternative placements that can meet Student's educational needs. At the time of the due process hearing on 03/14/11, DCPS still had failed to identify a placement that could meet Student's needs for a more restrictive setting with a strong behavior support system to assist with classroom transitioning. (Findings #4, #5).

Petitioner proposed The _____ as a placement that could provide the small school and class size that Student requires, along with a behavior management program that can meet Student's needs in transitioning from class to class. Although The _____ services exclusively disabled peers, there was no evidence in the record that a special education school was not the least restrictive environment where Student's educational needs could be met. The _____ can implement Student's 11/10/10 IEP that prescribes 26.5 hours/week of specialized instruction and 30 minutes/week of speech and language services. (Finding #6). Petitioner met her burden of proof that The Phillips School is an appropriate program and placement for Student.

38 D.C. Code 2561.02(c) prescribes the order of priority in placing a special education student: Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia. DCPS is not required to consider a private school placement when appropriate public placement options are available. In the pending case, DCPS failed to provide Student with *any* alternative placement since 11/10/10.

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Petitioner met her burden of proof that DCPS failed to identify an appropriate placement with the level of support that Student requires, beginning on 11/10/10. A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The Hearing Officer determines that since 11/10/10, Student was deprived of educational benefit because his receipt of grades of "F" in all but one subject due to excessive absences from classes (Finding #5), was clear evidence that he required an educational environment with more structure and behavioral monitoring support than what he was receiving at [redacted]. As a result of not having the school and classroom behavior support system that he needed, Student cut classes and received extremely poor grades for the 2nd Advisory of the 2010-2011 school year. In this way, Student was deprived of an educational benefit that resulted in the denial of a FAPE.

The second issue to be addressed is whether DCPS failed to implement Student's IEP, beginning on 11/10/10. Petitioner argued that DCPS failed to implement Student's IEP beginning on 11/10/10 when the IEP team determined that the special education program and services at [redacted] could not meet Student's educational needs.

DCPS argued that Petitioner failed to prove that the actual special education and related services prescribed in Student's IEP were not being provided to Student since 11/10/10.

34 C.F.R. 300.323(c)(2) mandates that the special education and related services specified in Student's IEP be provided to Student as soon as possible after development of the IEP. DCPS is required to provide Student with a FAPE; i.e., an appropriate school where services can be provided in conformity with Student's IEP. 34 C.F.R. 300.17.

Petitioner failed to provide any evidence that the specialized instruction and related services prescribed by Student's IEP were not being provided to Student since 11/10/10. It was actually the environment that the services were offered in, i.e., a large school with nondisabled peers that had no behavior monitoring system that could ensure that Student timely transitioned from class to class, that hindered Student from going to class so that he could receive educational benefit from the special education services offered.

The Hearing Officer determines that Petitioner failed to meet her burden of proof on the allegation that DCPS failed to implement Student's IEP beginning on 11/10/10.

ORDER

DCPS shall place and fund Student at The [redacted] in Laurel, Maryland within thirty (30) calendar days, with transportation.

IT IS SO ORDERED.

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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).

Date: March 21, 2011

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner (U.S. mail)
Petitioner's Attorney: Donovan Anderson, Esq. (electronically)
DCPS' Attorney: Linda Smalls, Esq. (electronically)
DCPS (electronically)
SHO (electronically)