

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

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE
STUDENT HEARING OFFICE
2012 MAY 21 AM 11:45

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a -year old male, who currently attends a DCPS middle school.

On March 12, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS (1) failed to allow Parent to conduct an appropriate independent educational evaluation in violation of 34 C.F.R. § 300.502(a), and (2) failed to allow Parent to participate in the decision-making process regarding the provision of FAPE in violation of 34 C.F.R. § 300.512(a)(2)(ii). As relief for these alleged denials of FAPE, Petitioner requested findings in its favor; that DCPS be required to immediately allow Parent's advocate to conduct an educational evaluation, including an observation of Student in his educational setting; that DCPS certify in writing that Parent and/or her advocate are allowed to conduct an observation of Student in his school setting at any time with a prior appointment; that DCPS convene an IEP team meeting within 10 days of receipt of the independent evaluation to review and revise Student's IEP as appropriate and discuss and determine an appropriate placement; and that DCPS either discuss and determine appropriate compensatory education at the ordered IEP meeting or fund an independent evaluation to determine appropriate compensatory education.

On March 19, 2012, DCPS filed its Response, which primarily asserted the following: Parent previously filed a Complaint alleging denial of FAPE for failure to allow the advocate to observe Student and the Complaint was dismissed with prejudice; the consent form provided to DCPS failed to identify the type of evaluation and who would pay for it; DCPS later determined that it did not authorize an IEE, and therefore, DCPS notified Petitioner that an IEE pursuant to 34

C.F.R. § 300.502 was not at issue and DCPS would permit the evaluation at the school; Petitioner failed to provide evidence of teaching credentials or certifications in DC; Parent participated in the last two IEP meetings in April of 2010 and 2011; and DCPS advised Parent of its willingness to convene a meeting for Student regarding his academic and behavioral progress and to perform an educational evaluation if requested by Parent.

The parties concluded the Resolution Meeting process by participating in a resolution session on April 6, 2012. No agreement was reached, and the parties agreed to shorten the 30-day resolution period. Therefore, the 45-day timeline began on April 7, 2012 and will end on May 21, 2012, which is the HOD deadline.

On April 12, 2012, the hearing officer convened a prehearing conference for this case and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer ordered that Petitioner would be allowed to file either a brief or summary judgment motion on or before April 20, 2012, and DCPS would be allowed to file an Opposition to same on or before April 25, 2012. On April 13, 2012, the hearing officer issued a Prehearing Order.

On April 20, 2012, Petitioner filed a Motion for Summary Judgment. However, Petitioner did not analyze or address the following issues identified by the hearing officer at the prehearing conference: (1) whether an IEE per § 300.502 is at issue in this case, and if so, were the proper procedures followed; and (2) if not, whether Parent has an independent right (pursuant to her right to be involved in the decision-making process) to have an independent evaluation that includes an observation in the educational setting over DCPS's objection. Instead, Petitioner merely recounted the factual circumstances of the case and cited to several cases in which Petitioners were allowed to conduct observations in connection with administrative due process proceedings, independent evaluations and the like.

On April 25, 2012, DCPS filed its Opposition to Petitioner's Motion for Summary Judgment and Cross-Motion for Summary Judgment. DCPS noted that Petitioner failed to address the specific issues set forth in the Prehearing Order. DCPS also argued, *inter alia*, that the evaluation sought by Petitioner was not an IEE as defined by IDEA, and that IDEA does not provide parents of children with disabilities or their professional representatives with an entitlement to observe their children in the classroom.

On May 1, 2012, the hearing officer issued an Order that denied the parties' cross-motions for summary judgment.

By their respective letters dated May 4, 2012, Petitioner disclosed fourteen documents (Petitioner's Exhibits 1 – 14) and DCPS disclosed four documents (Respondent's Exhibits 1 – 4).

The hearing officer convened the due process hearing on May 11, 2012, as scheduled.¹ DCPS's documents and Petitioner's Exhibits 1-6 and 14 were admitted without objection. Petitioner's Exhibits 7-13 were admitted over DCPS's relevance objection. Neither party sought to have any emails included in the administrative record. Thereafter, both parties waived opening statements and Petitioner presented its testimonial evidence.

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

At the close of Petitioner's case, DCPS moved for a directed finding on grounds that Petitioner failed to present any testimony about whether an IEE pursuant to IDEA was at issue and about Parent not being allowed to participate in the decision making process. After receiving Petitioner's argument on the issue, the hearing officer granted a directed verdict in DCPS's favor on the issue of DCPS's alleged failed to allow Parent to conduct an appropriate independent educational evaluation, based on the hearing officer's determination that an IEE pursuant to IDEA is not at issue in this case. In making this determination, *inter alia*, the hearing officer referred to the provisions of 34 C.F.R. § 300.502 and noted that there is no public evaluation with which Parent disagreed. The hearing officer denied DCPS's motion for directed verdict with respect to Petitioner's claim that DCPS failed to allow Parent to participate in the decision-making process regarding the provision of FAPE. Thereafter, DCPS rested on the record and the hearing officer received closing arguments prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to allow Parent to participate in the decision-making process regarding the provision of FAPE to Student in violation of 34 C.F.R. § 300.512(a)(2)(ii)?

FINDINGS OF FACT²

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 a -year old male, who currently attends a DCPS middle school.³
2. Student's current IEP is dated April 11, 2012, and it requires Student to receive 30.5 hours of specialized instruction outside general education and 1.5 hours of behavioral support services outside general education.⁴

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ See Complaint at 1.

⁴ Petitioner's Exhibit 8.

3. Student's most recent evaluations included in the administrative record for this case are an August 17, 2009 independent comprehensive psychological evaluation and a November 30, 2010 independent psychiatric evaluation.⁵
4. On or about January 19, 2012, Parent's advocate emailed the SEC at Student's current school and asked to conduct an independent educational needs assessment for Student.⁶
5. Ultimately, DCPS denied the advocate's request to conduct the evaluation at the current DCPS school on grounds that, *inter alia*, the evaluation was not an IEE pursuant to 34 C.F.R. § 300.502, and therefore, DCPS would not allow the evaluation to take place on school premises. DCPS advised Parent's counsel that DCPS is willing to conduct an educational evaluation of Student upon receipt of parental consent.⁷
6. Parent wants the advocate to conduct the evaluation of Student because Parent wants to know on what level Student is performing. Parent also questions whether Student's IEP is being implemented and whether the current DCPS school is the correct school for Student.⁸
7. Parent has visited Student's classroom and did not like the work that was being handed out. However, Parent is concerned that she may be acting on emotions.⁹
8. Parent wants to have the evaluation of Student conducted by someone who is licensed to conduct evaluations.¹⁰
9. The advocate is not licensed as a psychologist, school psychologist, or special education teacher in the District of Columbia.¹¹

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:

Parental Participation in the Decision-Making Process

IDEA provides that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, 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 caused a deprivation of educational benefit. 34 C.F.R. § 300.512(a)(2)(i)-(iii).

⁵ Petitioner's Exhibits 10-11.

⁶ Testimony of advocate.

⁷ Respondent's Exhibit 4.

⁸ Testimony of Parent.

⁹ Testimony of Parent.

¹⁰ Testimony of Parent.

¹¹ Testimony of advocate.

In the instant case, Petitioner has alleged that the independent evaluation at issue “is essential in order for [Parent] to meaningfully participate in the decision making process regarding the provision of FAPE to [Student].” Complaint at 3, ¶ 16. However, the hearing officer has already determined on DCPS’s motion for directed verdict that the independent evaluation at issue is not an IEE pursuant to 34 C.F.R. § 300.502. As a result, the hearing officer concludes that it would be improper to hold DCPS liable for committing a procedural violation, and thereby denying Student a FAPE under the provisions of 34 C.F.R. § 300.512(a)(2), where, as here, Petitioner has failed to prove that DCPS violated a provision of IDEA. Hence, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.

In reaching this decision, the hearing officer has taken into account that DCPS has offered in writing to conduct an educational evaluation of Student upon Parent’s request and such an evaluation would address Parent’s concern about the level on which Student is performing, but Parent has failed to request such an evaluation. To the extent that Parent has other concerns that may not be addressed by the educational evaluation DCPS has offered to conduct, the hearing officer encourages Parent and DCPS to work together to determine how the parties can best address Parent’s concerns. *See Letter to Mamas*, 42 IDELR 10 (OSEP May 26, 2004) (although IDEA does not provide parents or their representatives with a general entitlement to observe disabled children in their current classrooms, school district personnel and parents are encouraged to work together to meet the needs of parents and the school system).

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Petitioner’s March 12, 2012 Complaint is hereby **DISMISSED WITH PREJUDICE**.

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: 5/21/2012

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer