

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

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

STUDENT,¹)
through the Parent,)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
)
Respondent.)

Date Issued: May 21, 2012
Hearing Officer: Virginia A. Dietrich

OSSE
STUDENT HEARINGS OFFICE
2012 MAY 22 AM 9:03

HEARING OFFICER DETERMINATION

Background

On March 16, 2012, the mother (“Parent”) of Student filed a due process complaint alleging that the District of Columbia Public Schools (“DCPS”) had denied Student a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”). At the time the complaint was filed, Student was years old. By the time the due process hearing occurred on May 17, 2012, Student had turned 18 years old and proceeded as the Petitioner, as all of the rights afforded to Parent under the IDEA had transferred to Student as a matter of law upon him attaining the age of majority.² Both Parent and Student participated in the due process hearing in person.

Petitioner alleged that as of February 28, 2012, DCPS had failed to provide Student with a full-time outside of general education Individualized Education Program (“IEP”) that would allow him to achieve a high school diploma, that Student required a separate nonpublic school that could implement a full-time outside of general education IEP, and that the location of services proposed by DCPS to implement a full-time IEP that would allow Student to achieve a high school diploma was inappropriate. Petitioner also alleged that since September 22, 2011,

¹ Personal identification information is provided in Appendix A.
² See 34 C.F.R. 300.320(c), DC Code 21-104, 5 D.C.M.R. E-3023.1(b).

Hearing Officer Determination

DCPS had failed to provide Student with all of the specialized instruction that was required by Student's IEP.

DCPS asserted that the part-time IEP developed on 09/22/11 was appropriate, that the location of services at Student's current school was appropriate and that DCPS had provided Student with all of the specialized instruction that was prescribed by Student's IEP. DCPS asserted that it had not denied Student a FAPE.

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; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed on 03/16/12. This Hearing Officer was assigned to the case on 03/19/12.

Neither Petitioner nor DCPS waived the resolution meeting. A resolution meeting took place on 04/27/12, after the resolution period ended. The resolution period ended on 04/15/12, the 45-day timeline to issue a final decision began on 04/16/12 and the final decision was due on 05/30/12.

Neither party objected to the testimony of witnesses by telephone. Both Student and Parent participated in the hearing in person.

Petitioner presented five witnesses: Student; Parent; Admissions Coordinator at School, Largo Campus; an expert in the development of special education compensatory education plans for Learning Disabled and Intellectual Disability students; and an independent consultant in special education advocacy ("Advocate"). At the conclusion of Petitioner's case in chief, DCPS elected not to present any witnesses.

Petitioner's disclosures, dated 05/10/12, containing a witness list and Exhibits P-1 through P-15, were admitted into evidence without objection.

DCPS' disclosures dated 05/10/12, containing a witness list and Exhibits R-1 through R-5, were admitted into evidence without objection.

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

Hearing Officer Determination

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP and location of services since 02/28/12; specifically, Petitioner alleged that (a) DCPS failed to provide Student with an IEP that required full-time specialized instruction outside of general education and on the diploma track when Petitioner requested it at the Multidisciplinary Team meeting on 02/28/12, (b) Student required a separate and therapeutic location of services that could implement a full-time outside of general education IEP and provide truancy prevention services, and (c) the alternate location of services that DCPS proposed, _____ is designed for students with all disability classifications, the teachers are not content area certified, high school credits are obtained from computerized instruction, and there are no truancy prevention services.

Whether DCPS denied Student a FAPE by failing to implement Student's IEP since 09/22/11; specifically, Petitioner alleged that DCPS failed to provide Student with the full 15 hours/week of specialized instruction outside of the general education setting that was required by Student's IEP, rather, some of the instruction was provided inside the general education setting.

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented; that DCPS revise Student's IEP to reflect full-time specialized instruction outside of general education with an exit category of high school diploma; and an award of compensatory education for DCPS' failure to provide Student with a full-time IEP and placement since 02/28/12 and for DCPS' failure to provide Student with his full complement of specialized instruction outside of general education since 09/22/11.³

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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, age _____ resides in the District of Columbia and receives special education services as a child with a disability.

#2. Beginning in August 2009, Student received full-time specialized instruction outside of general education at _____ a nonpublic school placement that provides services only for disabled students and a school placement where Student would receive a certificate of achievement instead of a high school diploma.⁴ Student did well in that educational environment.⁵

³ Although Petitioner requested placement at a nonpublic school in the complaint and at the prehearing conference and at the beginning of the due process hearing, Petitioner withdrew this request in the closing argument as a result of the testimony provided by Student.

⁴ P-9-1, Parent, Student.

⁵ P-8-1, Parent, Student.

Hearing Officer Determination

#3. At the request of Student and Parent, Student transitioned from the full-time special education placement at _____ to the inclusion program at _____ over the summer of 2010.⁶ _____ is a nonpublic satellite program of _____ that is located within a public high school.⁷ The reason for the transfer was so that Student could obtain a high school diploma instead of a certificate of achievement. Prior to the transfer, Student worked diligently to demonstrate that he could master the class work and be successful in an inclusion program.⁸ _____ is able to provide Student with both pull-out (outside of general education)⁹ services and push-in (inclusion or inside general education) services.¹⁰

#4. While at _____ during the 2010-2011 school year, Student received specialized instruction both inside and outside of the general education classroom, from a special education teacher who was able to break down the academic material to Student in a way that he could understand it. As a result, Student enjoyed attending school, had no problems with receiving specialized instruction in the general education setting and did fairly well with academics when present in class.¹¹ However, from March – June 2011, Student had attendance problems that interfered with his ability to make progress towards attaining his IEP goals in mathematics, reading, and written expression.¹² Some of his attendance problems were related to arrests he incurred during the 2010-2011 school year.¹³

#5. While at _____ during the following 2011-2012 school year, Student's 09/22/11 IEP provided for 15 hours/week of specialized instruction outside of general education, 60 minutes/week of occupational therapy outside of general education, 90 minutes/week of speech-language services outside of general education, and 60 minutes/week of behavioral support services outside of general education, with a projected exit category of a high school diploma.¹⁴ From October 2011 - January 2012, Student had attendance problems that interfered with his ability to make progress towards attaining his IEP goals in mathematics, reading, and written expression.¹⁵ Some of Student's absences from school were attributable to arrests incurred during the 2011-2012 academic year.¹⁶

#6. During the 2011-2012 school year, Student received the assistance of a different special education teacher from the one who provided services during the 2010-2011 school year and this special educator provided specialized instruction outside of the general education classroom, but not inside of the general education classroom. Student was not able to understand the work as well due to the teaching style of this particular special education teacher and Student floundered in the general education classroom when unassisted by a special educator, and as a

⁶ P-2-11, Student.

⁷ Advocate, Parent, Student.

⁸ Parent, Student.

⁹ Parent, Student.

¹⁰ Student, Advocate.

¹¹ Student.

¹² P-11.

¹³ Parent, Student.

¹⁴ P-2.

¹⁵ P-12.

¹⁶ Parent, Student.

Hearing Officer Determination

result, Student came to school but avoided going to math, reading and language arts classes. Student did attend his music and art classes where he received instruction in the general education setting without the assistance of a special education teacher.¹⁷ Since Student did not express to any school staff the reason that he was having trouble understanding the material and since Student was absent from school due to arrests and absent only from his core academic general education classes,¹⁸ it would have been difficult for DCPS to reasonably ascertain that Student needed different and more supports in both the general education and special education settings, particularly in view of the fact that Student had done alright at during the preceding academic year.

#7. Student wants to be educated in and can be successful in the inclusion environment at _____ is not unable to implement Student's IEP and _____ is the least restrictive environment in which Student can receive special education services as long as Student receives the necessary modifications and supports, which includes special education services both inside and outside of the general education setting.²⁰

#8. DCPS did not fail to provide Student with all of the specialized instruction outside of general education that was required by Student's 09/22/11 IEP.²¹

#9. At a Multidisciplinary Team meeting on 02/28/12, Parent requested that Student be provided with full-time specialized instruction outside of general education in a location other than at _____. At that same meeting, DCPS proposed _____ as an alternate or lateral location of services where Student could receive special education services in accordance with his 09/22/11 IEP.²³

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:

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. Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school and are provided in conformity with an IEP that meets the requirements of the IDEA. 34 C.F.R. 300.17.

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

¹⁷ Student.

¹⁸ R-4, Student.

¹⁹ P-4-1, Student.

²⁰ P-4-1, Parent, Student.

²¹ Parent, Student.

²² P-4-1.

²³ P-4-2.

Hearing Officer Determination

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 burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005). 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 first issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP and location of services since 02/28/12; specifically, Petitioner alleged that (a) DCPS failed to provide Student with an IEP that required full-time specialized instruction outside of general education and on the diploma track when Petitioner requested it at the Multidisciplinary Team meeting on 02/28/12, (b) Student required a separate and therapeutic location of services that could implement a full-time outside of general education IEP and provide truancy prevention services, and (c) the alternate location of services that DCPS proposed, _____ was an inappropriate location of services because _____ is designed for students with all disability classifications, the teachers are not content area certified, high school credits are obtained from computerized instruction, and there are no truancy prevention services.

An IEP is a written statement for each child with a disability that includes a statement of the special education and related services and supplementary aids and services that are to be provided to the child, and a statement of the program modifications or supports that will be provided to enable the child to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum. 34 C.F.R. 300.320(a)(4).

To the maximum extent appropriate, children with disabilities must be educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment must occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114. This is known as the Least Restrictive Environment ("LRE") provision of the IDEA.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made in conformity with the LRE provisions of the IDEA, is based on the child's IEP, and is as close as possible to the child's home. The public agency must also ensure that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. 300.116.

Petitioner alleged that beginning on 02/28/12, when Petitioner requested it, Student required a full-time special education IEP with an exit category of a high school diploma and

Hearing Officer Determination

placement in school location and program other than not support this allegation.

but the evidence did

During the 2011-2012 school year, Student was enrolled in the inclusion program at but was chronically truant from his core academic classes in reading, mathematics and language arts. Student credibly testified that the reason for the majority of his truancy from class during the 2011-2012 school year was because he was unable to understand the class work in the general education setting when unassisted by a special education teacher within the general education classroom. Student also credibly testified that he had difficulty understanding the teaching style of this particular special education teacher when he received specialized instruction outside of the general education setting. These problems resulted in Student avoiding his core academic classes; however, Student did not express these problems to any school staff.

Student admitted that his performance and attitude about attending classes was much better during the 2010-2011 school year when he had the assistance of a special educator who could explain the work to him in a way that he could understand. Student also testified that he did not want to go to the nonpublic separate school in Maryland that originally had been proposed for him at the beginning of the due process hearing and that he preferred to stay in the inclusion environment at as long as the necessary supports and modifications were put in place. What became clear from Student's testimony is that he needed a different special education teacher to provide specialized instruction to him both inside and outside of the general education classroom in order to be as successful and comfortable as he was during the 2010-2011 school year.

DCPS was unable to reasonably ascertain the basis for Student's truancy from class for two reasons: (1) Student had multiple absences from school due to the repercussions of being arrested; and (2) Student did fairly well at during the 2010-2011 school year with the special education services provided.

Petitioner failed to meet the burden of proof that Student required full-time special education services outside of general education in a school only for disabled students. The evidence in the record was to the contrary, i.e., that Student could be successful in the inclusion environment at a public school with the proper supports and modifications to the general education curriculum.

Petitioner also failed to show by a preponderance of the evidence that Student required a school program that could provide truancy prevention services. Student attended school and some of his classes. With a bit of tweaking of the academic program, Student's aversion to attending reading, mathematics and language arts classes should be eradicated. The evidence was clear that Student wanted to learn and wanted to obtain a high school diploma.

There was no merit to Petitioner's assertion in the complaint that on 02/28/12, DCPS failed to provide Student with an IEP that would allow him to receive a high school diploma. Student's 09/22/11 IEP, which was in place at the time of the 02/28/12 Multidisciplinary Team meeting, provided that Student would receive a high school diploma upon graduation from high

Hearing Officer Determination

school. It very much mattered to Student that he obtain a high school diploma vice a certificate of achievement. In fact, the very reason for Student's transfer from _____ to the satellite program at _____ was so that Student could earn credits towards his high school diploma.

In response to Parent's request at the IEP meeting on 02/28/12 that Student be provided with special education services in a location other than _____ DCPS offered the lateral transfer or optional school of _____. This location of services was simply an alternative that could be exercised if desired. There was no evidence in the record that Student's IEP could not be implemented at _____ or that DCPS had issued a written notice that _____ would be Student's new location of services.

Petitioner failed to meet the burden of proof on the entirety of the first issue.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's IEP since 09/22/11; specifically, Petitioner alleged that DCPS failed to provide Student with the full 15 hours/week of specialized instruction outside of the general education setting that was required by Student's IEP, rather, some of the instruction was provided inside the general education setting.

Special education and related services must be made available to the child in accordance with the child's IEP. 34 C.F.R. 300.323(c)(2).

Petitioner failed to meet the burden of proof on this issue. Student's IEP required that Student receive 15 hours/week of specialized instruction outside of the general education setting, beginning on 09/22/11. Student credibly testified that he was provided with specialized instruction outside of the general education setting and did not receive any special education within the general education setting during the 2011-2012 school year. When questioned on the matter, Student could not be specific as to the duration of the services he received each week; therefore, Student's testimony was not concrete enough for the Hearing Officer to conclude by a preponderance of the evidence that Student had not been provided with all of the specialized instruction outside of general education that was required by his IEP. Additionally, but not as significant in the determination of this issue, Parent testified that she had queried the special education coordinator about the provision of specialized instruction and was told that Student was receiving all of the specialized instruction outside of general education that was required by his IEP. There was nothing in the record to show otherwise.

ORDER

The complaint is **DISMISSED** with prejudice. Petitioner failed to meet the burden of proof on any of the issues presented.

All relief requested by Petitioner is **DENIED**.

IT IS SO ORDERED.

Hearing Officer Determination

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: May 21, 2012

/s/ Virginia A. Dietrich

Hearing Officer