

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
Frances Raskin, Due Process Hearing Officer
1150 – 5th Street, S.E.; Room 3
Washington, D.C. 20003
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Confidential

STUDENT, through the legal guardian,¹)
Petitioner,)
) Complaint Filed: April 27, 2009
)
) Hearing Date: June 15, 2009
)
)
Respondent.)
)
)

HEARING OFFICER DETERMINATION

Counsel for Petitioner: Joy Freeman Coulbary, Attorney at Law
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Washington, D.C. 20011
(202) 270-2537; Fax: (202) 723-8939

Counsel for DCPS: Ellen Douglass Dalton, Attorney at Law
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¹ Personal identification information is provided in Attachment A.

I. JURISDICTION

This hearing was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 (“IDEIA”), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia (“District” or “D.C.”) Municipal Regulations (“DCMR”), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. INTRODUCTION

Petitioner is the mother of a -year-old, learning disabled, special education student (“Student”) attending a District of Columbia public charter school (“School”) that serves as its own local educational agency. Petitioner and the Student reside in the District of Columbia.

On April 27, 2009, Petitioner filed a Due Process Complaint Notice (“Complaint”). The Complaint alleges that Charter failed to (1) provide the Student an appropriate placement while she was suspended for forty-five days; (2) provide the Student an alternate placement or home-based instruction while she was suspended for 45 days; (3) timely evaluate the Student; and (4) timely review and revise the Student’s individualized educational program (“IEP”). The Complaint further alleges that Charter allowed the parent of another student to physically and verbally accost the Student and that a teacher at the school physically accosted the Student and utilized force and restraints in an inappropriate manner. The Complaint also alleges that Charter is “an inappropriate placement which has contributed to the Student’s 45-day suspension . . .” Finally, counsel for Petitioner asserted during the prehearing conference that Charter should have been on notice that the Student should have been evaluated for emotional disturbance based on her inappropriate behavior.²

The Complaint seeks as relief an order requiring Charter to:

1. Provide an appropriate placement;
2. Fund a full-time, special education, non-public placement.
3. Fund independent evaluations, including social history, psychiatric, and comprehensive psychological evaluations, with the comprehensive psychological evaluation to include cognitive, clinical, and academic components;
4. Convene a meeting of the multidisciplinary team (“MDT”) to review the evaluations and revise the Student’s IEP, as warranted;
5. Fund a full-time, dedicated, para-professional aide;

² This last allegation is not in the Complaint. The Complaint is poorly drafted and contains no factual assertions to support its claims other than the minimal facts alleged about the Student’s suspension. The Complaint fails to state why the placement at Charter is inappropriate; when the Student was last evaluated and what evaluations were previously conducted for the Student; and the details of the Student’s IEP, including most importantly when the last IEP was developed and the number of hours of specialized instruction and related services specified on the IEP. If counsel for Respondent had filed a notice of insufficiency, this Hearing Officer likely would have dismissed this Complaint for failure to state a claim.

6. Fund the “parent-counsel devised comp ed plan;”
7. Provide a personal tutor while the Student is on suspension; and
8. Update and implement the Student’s IEP.

Scrawled across the fax cover page to which the Complaint was attached for filing, was a handwritten request stating: “Expedited request due to the student being on long-term suspension without an alternative placement.” This Hearing Officer interpreted the “expedited request” as a request for an expedited hearing concerning a discipline matter pursuant to *OSSE Standard Operating Procedures* § 1008. On May 7, 2009, this Hearing Officer granted the request for an expedited due process hearing and setting the date of the expedited hearing. Counsel for Petitioner subsequently sent this Hearing Officer and opposing counsel an email stating “expedited is not necessary.” Counsel for Petitioner then emailed this Hearing Officer a document captioned: “Petitioner’s Motion to Withdraw Expedited Request for Due Process Hearing and or Motion to Continue.” On May 12, 2009, this Hearing Officer issued an order granting the motion to withdraw the expedited hearing and placing the hearing on the regular 45-day due process hearing timeline.

Counsel for Respondent filed a timely Answer on May 7, 2009. The Answer contains specific admissions and/or denials of every allegation in the Complaint. The Answer specifically denies that Charter allowed the parent of another student to physically and verbally accost the Student. It further denies that a teacher at the school physically accosted the Student and utilized force and restraints in an inappropriate manner. The Answer also asserts that the Student arrived at Charter with a disability classification of learning disabled and was most recently evaluated in 2007; she received a speech and language evaluation in March 2007 and a psycho-educational evaluation in July 2007. The Answer also asserts that the Student has a current IEP, developed on June 11, 2008. The Answer denies that Charter has failed to provide or attempt to provide the services agreed upon at the manifestation meeting.

On May 12, 2009, the parties engaged in a resolution session prior to the due process hearing. At the resolution session, the parties agreed that Charter would fund independent psycho-educational, comprehensive clinical, and speech and language evaluations.

On May 19, 2009, a prehearing conference was held in the above matter. Participating in the conference were Joy Freeman Coulbary, counsel for Petitioner, Ellen Douglass Dalton, counsel for Respondent, as well as Hearing Officer Frances Raskin. During the prehearing conference, both counsel agreed the due process hearing would be scheduled for June 15, 2009. This Hearing Officer informed counsel for Petitioner that she does not delegate compensatory education issues to charter schools to decide, and that, if counsel for Petitioner wants to prevail on this issue, she must be prepared to present her proof at the due process hearing, including a compensatory education plan that meets the standards established in *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). This Hearing Officer also advised that Petitioner will proceed first at the due process hearing and carry the burden of proof at the due process hearing.

Both counsel exchanged and filed timely disclosures on June 8, 2009. The letter attached to Petitioner’s disclosures included a section entitled “Motion to Compel Attendance and Notice to Appear.” Because this Motion to Compel was untimely and not filed in accordance with the Standard Operating Procedures, which requires any such request to compel the attendance of

witnesses to be filed fourteen days prior to the hearing, served on the Chief Hearing Officer, signed by the Chief Hearing Officer, and served on the witnesses whose testimony the party is seeking to compel, at the outset of the due process hearing, counsel for Respondent objected to the compelled testimony of these witnesses. Because both witnesses were present at the hearing, this Hearing Officer ruled that the witnesses would be allowed to testify.

At the outset of the due process hearing, counsel for Petitioner represented that the evaluations agreed upon in the resolution session will be conducted on June 19, 2009. The parties then agreed that independent clinical evaluation would include a social history as long as the cost of the clinical evaluation does not exceed the guidelines of the Office of the District of Columbia Public Schools Superintendent. They also agreed that all of the independent evaluations shall be completed and that the evaluators shall provided the evaluations and reports to counsel for Petitioner by June 30, 2009. The parties agreed that counsel for Petitioner then must send the evaluations to Charter and its counsel by July 3, 2009. The parties further agreed that, within ten (10) business days from date it receives copies of the independent evaluations from counsel for Petitioner, Charter shall hold an MDT meeting to review the evaluations, revise the Student's IEP, and discuss placement. Counsel for Petitioner represented that the only issue before the Hearing Officer was the appropriateness of the Student's educational placement and the remedy issues of whether the Student was entitled to a non-public placement at Charter's expense and compensatory education.

Prior to the start of the due process hearing, counsel for Petitioner informed the Hearing Officer that the Student's suspension ended on May 20, 2009.

In her opening statement, counsel for Petitioner raised for the first time the additional issue of whether the Student's IEP should have included the additional disability classification of emotional disturbance. Counsel further asserted for the first time that the Student's placement has been inappropriate for the past two years due to her inappropriate disability classification. At this time, this Hearing Officer warned counsel for Petitioner that the Complaint she drafted failed to allege sufficient facts to put the opposing party on notice of these new allegations. Counsel for Petitioner then agreed to proceed only on whether the Student's behavioral issues and Charter's use of discipline rendered her placement inappropriate, as well as the allegation that Charter failed to implement the Student's IEP while she was on suspension. Counsel at this time stated that she intended to prove that Charter failed to provide an appropriate placement by failing to update the Student's clinical evaluation and re-evaluate the Student every three years, despite that the former claims was not plead in the Complaint.

Petitioner's first witness was a clinical psychologist who this Hearing Officer qualified as an expert witness in developmental child psychology. The psychologist testified that the Student has a long history of fighting and oppositional behavior dating back to her second grade year and was retained due to behavior and academic problems.

During the testimony of the psychologist, counsel continued to question the witness in areas that she failed to plead in the Complaint, such as the adequacy and appropriateness of the educational plan developed during the manifestation meeting for the Student's suspension. Counsel for Petitioner repeatedly asked probing questions of the psychologist on issues that

appeared to be critical to proving Petitioner's claims but that counsel had failed to raise in the Complaint. As a result, counsel for Petitioner had failed to provide notice of these claims to opposing counsel and the Hearing Officer. Thus, this Hearing Officer had no option but to inform counsel for Petitioner that the testimony she sought to elicit would not be allowed due to her failure to raise these allegations in the Complaint. Counsel for Petitioner responded each time that she would not raise the issues she was attempting to explore. After the third attempt by counsel for Petitioner to explore issues not raised in the Complaint, this Hearing Officer admonished counsel that it appeared that Petitioner was not adequately represented by counsel in her failure to include the factual assertions that appeared essential to Petitioner's claims. This Hearing Officer the offered Petitioner an opportunity to withdraw the remainder of her claims without prejudice. Counsel for Respondent strenuously objected, but this Hearing Officer explained that she was allowing the withdrawal in the interest of not harming the Student for the failings of her counsel. Counsel for Petitioner then agreed to withdraw the claims not resolved at the resolution session and before the start of the hearing.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the response thereto, the agreement of the parties, and Petitioner's withdrawal of her remaining claims, this 25th day of June 2009, it is hereby

ORDERED that Charter shall fund independent psycho-educational, comprehensive clinical, and speech and language evaluations, and that the independent clinical evaluation shall include a social history but not exceed the cost guidelines of the Office of the District of Columbia Public Schools Superintendent;

IT IS FURTHER ORDERED that all independent evaluations and reports shall be completed and provided to counsel for Petitioner by June 30, 2009;

IT IS FURTHER ORDERED that counsel for Petitioner shall send the evaluations to Charter and its counsel by July 3, 2009;

IT IS FURTHER ORDERED that Charter shall convene a meeting of the MDT within ten business days of receipt of the evaluations and at the meeting shall review the Student's evaluations, review and revise the Student's IEP, if necessary, and discuss the Student's placement;

IT IS FURTHER ORDERED that Charter shall include among the participants at this MDT meeting the evaluators who conducted and/or supervised the Student's evaluations and Petitioner;

IT IS FURTHER ORDERED that Charter shall receive one day of delay for every day of delay caused by Petitioner;

IT IS FURTHER ORDERED that Petitioner's remaining claims are **DISMISSED WITHOUT PREJUDICE**; and

IT IS FURTHER ORDERED, that this Order is effective immediately.

/s/
Frances Raskin
Hearing Officer

Notice of Right to Appeal Hearing Officer's Decision and Order

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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

Copies to:
Joy Freeman Coulbary, Counsel for Petitioner
Ellen Dalton, Counsel for Respondent
Student Hearing Office