

<p>STUDENT¹, by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: July 30, 2009</p> <p>Date of Complaint: June 18, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Michael Eig, Esq. 5454 Wisconsin Avenue Suite 760 Chevy Chase, MD 20815</p> <p>Counsel for DCPS: Daniel McCall, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> Coles B. Ruff, Esq.</p>
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STUDENT ASSISTANT OFFICE

¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened July 30, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on June 18, 2009, alleging the issues outlined below.

DCPS counsel filed a notice of insufficiency and alleged the complaint did not meet the requirements of 20 U.S.C. 1415(b)(7) and 34 C.F.R. 300.508 specifically it not provide a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem. The Hearing Officer concluded the complaint met the requirements of 34 C.F.R. 300.508 and the matter proceeded to hearing.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1- 18 and DCPS Exhibits 1-3) which were admitted into the record.

ISSUE(S): ²

Did DCPS deny the student a free and appropriate public education by failing to reimburse his parents for related services provided to the student during the 2006-07 and 2007-2008 school years?

FINDINGS OF FACT ³:

The student is a -year-old who is currently attending School A, a private school located in Potomac Maryland, where the student has attended since the start of the

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party's Exhibit.

2008-09 school year. Prior to attending School A, the student attended the School B for three school years 2005-06, 2006-07 and 2008-09. (Petitioner's Exhibit 5 – May 11, 2009, HOD)

2. Prior to attending School B the student attended School C, a private full time special education school located in the District of Columbia, where his tuition was funded by DCPS. The student first started attending School B when he was in the first grade and six years old. (Petitioner's Exhibit 5)

3. The student has been diagnosed with Asperger Syndrome and Developmental Delay and has been determined eligible to receive special education and related services under IDEA. (Petitioner's Exhibit 5)

4. The student had a DCPS individualized education program ("EP") while attending School C which during the 2005-06 school year prescribed the following services: 24 hours of specialized instruction, 90 minutes of psychological counseling, 2 hours and 15 minutes of speech/language therapy, and 90 minutes of occupational therapy. The IEP did not prescribed extended school year ("ESY") services. (Petitioner's Exhibit 2 & 5)

5. On February 16, 2006, Petitioner filed a due process complaint against DCPS. DCPS entered into a settlement agreement (dated March 2, 2006) with the parent settling the due process complaint. Under the settlement agreement the parent agreed to withdraw the complaint and DCPS agreed to place and fund the student at School B for the 2005-06 school year, with all related services specified in the due process complaint.⁴ The settlement agreement was executed by Petitioner's counsel on March 6, 2006. (Petitioner's Exhibit 2, 3 & 5)

6. On April 3, 2006, DCPS issued a Prior Notice documenting the student's change of placement from the student's DCPS home school (at the time) to School B. (Petitioner's Exhibit 5)

7. The settlement agreement also stated that the parent represented the student was "a resident of the District of Columbia, has established residency, and has been registered as attending or non-attending at his/her local school." (Petitioner's Exhibit 5)

8. On July 28, 2006, the parent completed a DCPS Residency Verification form and submitted it to DCPS. (Petitioner's Exhibit 5)

9. The parent had funded the student's tuition at School B for the 2005-06 school year and DCPS reimbursed the parent for the tuition payment. It was not until after the end of that school year that DCPS reimbursed the parent for tuition for the 2005-06 school year. (Petitioner's Exhibit 5)

⁴ The February 16, 2006, due process complaint stated in its "Facts and Reasons of the Complaint" section: "[The student] is able to receive full-time specialized instruction in a full-time mainstream setting. He is also being provided with related services as arranged by his parents, Occupational Therapy, Speech/Language Therapy, Psychological Counseling, and Developmental Optometry."

10. The parent annually reconfirmed the student's status as a resident of the District of Columbia and reconfirmed the student's enrollment at the School B for the 2006-07 and 2007-08 school years at the top of the DCPS Residency Verification form. (Petitioner's Exhibit 5)

11. For the two subsequent school years, 2006-2007 and 2007-2008, the student continued in his placement at School B. The parent thought that he was doing what was required of him with respect to the student's special education placement and to obtain DCPS funding and/or reimbursement for the student's tuition at School B. (Petitioner's Exhibit 5)

12. During the time the student attended School B no one from DCPS ever met or observed the student at School B, nor did anyone contact the school to keep abreast of his progress. DCPS made no efforts to develop an IEP during his years at School B. There were no new evaluations and testing for the student. (Petitioner's Exhibit 5)

13. At the start of the 2008-09 school year the parent initiated the change of placement for the student from School B to School A. The parent completed and submitted the DCPS Residency Verification form on August 8, 2008, and indicated at the top of the form that the student was attending School A. (Petitioner's Exhibit 5)

14. Following the initial reimbursement of tuition for the 2005-06 school year at School B other than filing out the residency verification forms the parent did not request reimbursement for the student's tuition at School B until July 16, 2008, when the parent's counsel wrote DCPS requesting reimbursement for the student's tuition at School B for the 2006-07 and 2007-08 school years. (Petitioner's Exhibit 5)

15. DCPS did not provide the requested reimbursement and Petitioner filed a due process complaint seeking reimbursement for the tuition for School B for the 2006-07 and 2007-08 school years and reimbursement for the tuition at School A for the 2008-09 school year. (Petitioner's Exhibit 5)

16. School A is not certified by the State of Maryland as a special education school but provides some degree of specialized instruction and currently has several funded students attending. (Petitioner's Exhibit 5)

17. With no response or contact from DCPS on February 16, 2009, the parents filed a due process hearing request based on the school system's failure to monitor the student's placement and its violation of his rights under the Individuals with Disabilities Education Improvement Act ("IDEIA"). A due process hearing was convened on April 29, 2009, and the hearing officer issued his decision on May 21, 2009. This Hearing Officer found that School B remained the student's placement and that DCPS was, therefore, required to reimburse the parents for the tuition paid for the 2006-07 and 2007-08 school years. The order specifically did not include reimbursement for related services. (Petitioner's Exhibit 5)

18. The student's IEP during the 2004-05 school year while attending School C included the related services. However, during the two subsequent school years the student attended School

B there was no annual IEP developed as School B does not develop and/or follow IEPs as it is a general education school. (Petitioner's Exhibit 2 & 5)

19. While the student was at School B he also received occupational therapy, speech/language therapy and psychological counseling. Per the March 2, 2006 hearing request, DCPS was specifically required to pay for these services for the 2005-06 school year. While DCPS did reimburse for these services for the 2005-06 school year, DCPS failed to reimburse the parents for the cost of the related services for the 2006-07 and 2007-08 school years. Petitioner filed a due process complaint seeking reimbursement for the student's tuition at School B and School C. (Petitioner's Exhibit 1)

20. The student received and the parent paid⁵ for occupational therapy and psychological counseling during the 2006-07 school year in the amount of approximately _____ and _____ respectively. The parent was reimbursed by insurance for part of the payment for the psychological counseling. The student received and the parent paid for occupational therapy, psychological counseling and speech therapy during the 2007-08 school year in the amount of approximately _____ and _____ and _____ respectively. The parent was reimbursed insurance company for part of the payment for the psychological counseling and the occupational therapy in the 2007-08 school year.⁶ (Petitioner's Exhibit 17& 18)

21. This Hearing Officer conducted the hearing and rendered a Hearing Officer's Determination ("HOD") on May 21, 2009, concluding DCPS was obligated to reimburse the parent for tuition for the 2006-07 and 2007-08 school years at School B. The Hearing Officer did not grant requested relief for reimbursement for the 2008-09 school year at School A.

22. Following issuance of the HOD Petitioner requested clarification that the relief granted under the HOD included reimbursement for the related services the parent paid for and the student received during the 2006-07 and 2007-08 school years. This Hearing Officer stated to the parties that the HOD covered the relief requested for tuition and did not provide any further clarification of the HOD. Although the period for appeal of the HOD had not yet expired, Petitioner filed the current due process complaint on July 18, 2009, seeking reimbursement for the related services paid by the parent. (Petitioner's Exhibits 1, 5, 6, 7, 8)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

⁵ The amounts paid represent out of pocket expenses after any contribution to the total costs of services made to the parent from insurance.

⁶ This Hearing Officer does not find that the psychological evaluations and the cognitive evaluation and tutoring were services that were a part of the student's IEP at School A when the settlement agreement was reached and are not services for which the parent is entitled to be reimbursed.

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁷ In this case the student/parent is seeking relief and has the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Issue: Did DCPS deny the student a free and appropriate public education by failing to reimburse his parents for related services provided the student during the 2006-07 and 2007-2008 school years?

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the DCPS failed to reimburse the parent for the student's related services for the 2006-07 and 2007-08 school years.

The May 21, 2009, HOD concluded that DCPS was responsible for providing the student special education services for the 2006-07 and 2007-08 school years and the parent should be reimbursed for the student's tuition for those school years. Under IDEIA special education includes specialized instruction and related services provided to the student pursuant to an IEP. The student's IEP for the year prior, while he was attending School C, included related services. Presumably the student's special education services for the subsequent two school years would have included those related services in the IEP unless and until the services were removed by an IEP team.

DCPS asserts Petitioner is precluded from seeking reimbursement for the related services as Petitioner is barred by the principal of res judicata and collateral estoppel from asserting a claim that could have and should have been raised in the previous due process complaint and resulting due process hearing.

However, pursuant to the holding in *Serpas v. District of Columbia* (Not Reported in F.Supp.2d, 2005) WL 3211604 (D.D.C.), a party is not precluded from pursuing a claim that has not been previously litigated. Although, Petitioner asserted the claim of reimbursement in the February 16, 2009, complaint, there were no specific findings as to the student's receipt of and/or the parent's payment for related services in the due process hearing that resulted in the May 21, 2009, HOD. Therefore, this Hearing Officer concludes based on the holding in *Serpas* that the issue of reimbursement for the related services can be raised in this subsequent complaint and litigated in this due process hearing.

⁷ Based solely upon the 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 FAPE.

The facts of this case demonstrate that the student's special education services in his latest IEP included the related services of occupational therapy, psychological counseling, and speech/language therapy. Necessarily the services the student was entitled receive and for which the parent is entitled to be reimbursed included the related services in addition to tuition for instruction. Therefore, this Hearing Officer concludes the parent is entitled to reimbursement for the related services pursuant to the Order below.

ORDER:

1. DCPS shall reimburse the parent for occupational therapy, speech/language services and psychological counseling services provided to the student and paid out of pocket by the parent during the 2006-07 and 2007-08 school years (excluding summer months as the student did not qualify for ESY services) after submission to DCPS of receipt of payment for the out pockets costs.
2. The evidence presented by Petitioner demonstrates that for occupational therapy and psychological counseling during the 2006-07 school year the parent paid out of pocket in the amount of approximately _____ and _____ respectively; and for occupational therapy, psychological counseling and speech therapy during the 2007-08 school year the parent paid out of pocket in the amount of approximately _____ and _____ and _____ respectively. **The total amount of reimbursement is approximately _____**

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: August 9, 2009

⁸ The amounts have been rounded by the Hearing Officer to the nearest dollar.