



Office of Review & Compliance

Student Hearing Office
 Van Ness Elementary School
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Confidential

OSSE
 STUDENT HEARINGS OFFICE
 2009 SEP 28 PM 12:14

The Student Through their)	
)	
Parents,*)	
Case No.:)	
)	IMPARTIAL
Petitioner,)	Hearing Officer Decision
)	
vs.)	Due Process Compl. Filed: July 28, 2009
)	Schedul. Hr'g Dates: Sept. 9 & 16, 2009
The District of Columbia Public Schools,)	Held at: Van Ness Elementary School
Home School:)	1150 5th Street, S.E., 1st Floor
Attending:)	Washington, D.C. 20003
)	
Respondent.)	Pre-Hearing Conference Held By-Phone
)	Wednesday, Aug. 27, 2009 at 4:30 p.m.

Counsel for the Parent/Student: Zachary E. Nahass, Esq.
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 Attorneys at Law
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District of Columbia Public Schools: Harsharen Bhuller, Esq.
 Assistant Attorney General
 Office of the General Counsel, OSSE
 825 North Capitol Street, N.E., 9th Floor
 Washington, D.C. 20002

Independent Hearing Officer: Frederick E. Woods

- Party identification information is stated in Appendix A of this order and Appendix A shall be removed from this order before public dissemination

I. Case Background and Procedural Information

A. JURISDICTION

This Decision and Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, codified at 20 U.S.C. §§ 1400 -1482, 118 Stat. 2647; and its implementing regulations codified at 34 C.F.R. §§ 300.01 – 300.818; 5 D.C.M.R. §§ 3000 - 3033.

B. DUE PROCESS RIGHTS

Before the hearing the parent had been advised of their due process rights.

C. FIVE-DAY DISCLOSURES

Petitioner: Admitted, without objection, a disclosure letter filed with the SHO on 09/01/09 that list seven (7)-witnesses and attached nineteen exhibits sequentially labeled and tabbed Parent-01 through Parent-19. Three witnesses were called to testify: (1) the legal guardian grandmother; (2) a private community mentor case manger; and (3) the admission director.

Respondent: Admitted, without objection, disclosure letter s filed on 09/02/09 and 08/25/09 that list eight (8)-witnesses and attached ten exhibits sequentially labeled DCPS-01 through DCPS-10. Four witnesses were called to testify: (1) a DCPS school psychologist; (2) a special education teacher; and (3-4) two special education coordinators.

D. STATEMENT OF THE CASE

The student, born _____ age _____ years 10-months, is a student with a disability receiving special education and related services, according to his 01/26/09 IEP, as a _____ grade, Multiple Disabled (“MD”)—Emotional Disturbed (“ED”) and Other Health Impaired (“OHI”) ADHD student attending _____ in Washington D.C. 20011. (R. at Parent-10.)

The guardian believes that based on the student’s behavior problem at school he needs full time special education services and a therapeutic educational setting to implement his IEP. And the parent noted that concern on the student’s 01/26/09 IEP. (R. at Parent-10.) The student’s MDT, however, disagreed with the parent and provided the student a part time IEP and proposed _____ as the school to implement that IEP.

Consequently, on 07/28/09 the parent filed the student’s Due Process Complaint (“DPC”) alleging that DCPS as the LEA violated the IDEA and denied the student a Free

Appropriate Public Education (“FAPE”) by doing two things: (1) failing to provide the student with a full time IEP; and (2) failing to provide the student with full time special education setting to implement the IEP as called for in the student’s 11/21/09 PIW letter.(R. at Parent-01, 03.)

As relief, the parent wants the student’s IEP services hours increased to a full time IEP; and for DCPS to place and fund the student at public expense at in DC for the 2009-10 school year. (R. at Parent-01.)

The DCPS 08/05/09 written Response to the parent’s DPC and its oral updated response to the DPC provided at the due process hearing denied the parent’s claims for these reasons: (1) the student’s 01/26/09 IEP is appropriate; and (2) is an appropriate placement to implement that IEP during the 2009-10 school year.

The OSSE Student Hearing Office (“SHO”) scheduled the due process hearing for 11:00 a.m. on Wednesday, September 9, 2009 that convened, testimony taken, and was continued until 1:00 p.m. September 16, 2009 to complete the testimony. The hearings were held at Van Ness Elementary School, 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003. The parent selected to have closed due process hearings that convened, as continued.

Assistant Attorney General Harsharen Bhuller appeared in-person representing DCPS. Attorney Zachary E. Nahass appeared in-person representing the student who was not present; and the student’s mother who was present.

II. Issue

Did DCPS, as the LEA, violate the IDEA and deny the student a FAPE during the 2008-09 and 2009-10 school years by doing two things: (1) failing to provide the student with a full time IEP and (2) failing to provide the student with a full time special education setting to implement the IEP?

Brief Answer

No. Both the 01/26/09 IEP and the education placement setting to implement that IEP, are appropriate.

III. FINDINGS OF FACT

1. The student, born age -years 10-months, is a student with a disability receiving special education and related services, according to his 01/26/09 IEP, as a 6th grade, Multiple Disabled (“MD”)—

Emotional Disturbed (“ED”) and Other Health Impaired (“OHI”) ADHD student attending in Washington D.C. (R. at Parent-10.)

2. According to the student’s 01/26/09 IEP developed by DCPS along with the parent, the student was to receive these special education services in an inclusion model classroom:
 - a. Specialized Instruction—10.0-hours/week in a General Education setting; and
 - b. Behavioral Support Services—1.0-hour/week in a General Education setting. (R at Parent-10.)
3. According to the student’s mother she said that (1) the student can exhibit an explosive temper; he get into fights; does not follow directions; and sometimes he will not respect school staff. (2) He was expelled from his last attending school in November 2008. (3) After that, from 11/11/09 -11/21/08 he was evaluated at The Psychiatric Institute of Washington (“PIW”). (4) On 12/01/08 the student enrolled in _____ where he performed well until the last 6-weeks of school when he had two behavior incidents. (5) And she is not satisfied with both his IEP and setting at _____ (R. at guardian’s testimony.)
4. According to the student’s Community Based Intervention (“CIB”) case manger from First Home Care, he was a mentor to the student from 11/16/08 – 05/15/09. He saw the student from 6-8 hours per week at home and at school. Based on his observations of the student the student made academic progress, did not exhibit the behavior he was told the student had previously engaged in, and made good grades. But starting in April 2009 the student would leave his classroom before class was dismissed; and once climbed up a ladder outside of the school. (R. at CIB case manager’s testimony.)
5. There was no testimony or evaluator report presented to support the parent’s claim that the student needed full time special education services. And there were no progress reports offered into evidence.
6. According to the student’s special education teacher who has been his teacher since December 2008, the student receives 10-hours of specialized instruction in Math, Reading and Writing in an inclusion model classroom—where a general education teacher and a special education teacher provide instruction to the student in one classroom. The student is doing well in her classes and does not have behavior problems while in her classes. Two of his special education course

grades are "B" in Math and "B" in English. (R. at special education teacher's testimony.)

7. The special education coordinator said that the student is receiving all of his IEP called for services and is making progress. And the student benefits from his interaction with his non disabled peers by developing friendships with them and by participating in school activities. (R. at special education coordinator's testimony.)
8. As to the student's placement needs based on a full time IEP, the parent said the student needs a full time therapeutic education setting because the student's PIW 11/21/09 letter addressed To Whom It May Concern recommended that "the student be placed in a full-time 30-hour school placement." However, no reason was given in the letter nor in the student's 01/05/09 PIW Discharge Summary for that recommendation. And the writer of the letter and summary was not called to testify. (R. at Parent-02, 03.)
9. The DCPS school psychologist, who reviewed that letter and testified, said that she along with the student's MDT/IEP team disagreed with the PIW evaluator's recommendation because the student was performing well in school both academically and socially. The PIW evaluator did not mention in the letter or the summary anything about how the student was doing in school. (R. at Parent-02, 03; DCPS school psychologist's testimony.)
10. Based on these findings there is no probative evidence that the student needs a full time IEP. And since he does not need a full time IEP the student does not need a full time educational setting to implement an 11-hour IEP.
11. Therefore, DCPS did not deny the student a FAPE.

IV. DISCUSSION and CONCLUSIONS OF LAW:

I

DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEA codified at 20 U.S.C. §§ 1400 - 1482. and 5 D.C.M.R. § 3000.1 requires DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide them with special education and related services through an appropriate IEP and Placement.

DCPS met its legal obligation under the IDEA. Here is why.

1. "If a child's initial evaluation suggests [s/he] is entitled to a FAPE, IDEA then requires the school district to create and implement an IEP, which is the 'primary vehicle' for implementing the Act." Hoing v. Doe, 485 U.S. 305, 311 (1988).
2. According to the IDEA at 34 C.F.R. § 300.306 (a)(1)-(b)(2), Determination of Eligibility, "Upon completion of the administration of assessments and other evaluation measures—(1) a group of qualified professional and the parent of the child determine whether the child is a child with a disability ... in accordance with paragraph (b) of this section and the educational needs of the child. ... (b) A child must not be determined to be a child with a disability if ... the child does not otherwise meet the eligibility criteria under § 300.8, [Child with a Disability]."
3. Pursuant to 5 D.C.M.R. § 3002.1, LEA Responsibility, "[t]he services provided to the child must address all of the child's identified special education and related services needs and must be based on the child's unique needs and not on the child's disability."
4. Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."
5. To ensure that each eligible student receives a FAPE, the IDEA requires that an IEP be developed to provide each disabled student with a plan for educational services tailored to that student's unique needs. See 20 U.S.C. § 1414 (d)(3).
6. Pursuant to 34 C.F.R. § 300.321 (a)(5), IEP Team, "[t]he public agency must ensure that the IEP Team for each child with a disability includes—an individual who can interpret the instructional implications of evaluation results."
7. Pursuant to 34 C.F.R. § 300.116 (a)(1), Placements, "[i]n determining the educational placement of a child with a disability, each public agency shall ensure the placement decision is made by a group of persons, including the parent, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options."
8. Pursuant to 34 C.F.R. § 300.501(c), Parental Involvement in Placement Decisions, "[e]ach public agency shall ensure the parents of each child with a disability are members of any group that makes decisions on the education placement of their child."

9. Pursuant to 5 D.C.M.R. § 3025, Procedural Safeguards—Prior Written Notice, DCPS shall provide written notice to the parent of a child with a disability before it proposes...an educational placement of the child.
10. Pursuant to 34 C.F.R. §§ 300.323(a), (c)(2), IEP Must be in Effect, each public agency must provide special education and related services to a child with a disability in accordance with the child's IEP.
11. And the U.S. Supreme Court held that a state or district fulfills its obligation to provide a free appropriate public education ("FAPE") to a student with a disability "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Bd. of Educ. Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 203 (1982). "Implicit in the congressional purpose of providing access to a FAPE under the IDEA is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped student." Rowley, 458 U.S. at 200. Further, the Court held that "'the basic floor of opportunity' provided by the Act [IDEA] consists of access to a specialized instruction and related service which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201.
12. In this case, DCPS complied with those cited IDEA requirements and provided the student with the basic floor of opportunity designed to provide him educational benefit when the student's 01/26/09 MDT/IEP Team that included his mother as a team members did these things: (1) pre reviewed the student's PIW letter & Discharge Summary; (2) convened the student's 01/26/09 MDT/IEP Meeting to review the student's IEP and PIW Discharge Summary; (3) based on that review they found the student was still eligible for special education services with a MD disability classification; (4) developed the student's 01/26/09 11.00 hours per week part time IEP; and (5) on 01/27/09 issued the student's Prior Notice of Placement to his neighborhood school— (R. at Parent-02, 03, 10; DCPS-05, 06, 10; parent's and special education coordinator's testimony.)
13. And albeit the guardian wants a full time IEP and a full time private school placement to implement that IEP, there was no persuasive evidence presented that the student required a full time IEP and placement. In fact the credible evidence is to the contrary. Here is why.
14. The guardian testified that the student needed a full time IEP to address his behavior problems in school. And the behavior problems amounted to two incidents that occurred in school during the last six weeks of the 2008-09 school year. The guardian did not, however, specify what additional type of services should be provided and the amount of hours needed for those additional services. Nor did any witness called by the guardian specify the

type of special education services that the student needed more services hours for. (R. at parent's testimony.)

15. And based on the student's unique needs at this time, the student's behavior problem is being addressed in the student's 01/26/09 IEP with Behavior Support Services of one-hour per week. There was no evidence presented that the student needed more related service hours or any additional related services. (R. at Parent-10.)
16. And there was no evidence presented about why the student would need more than their IEP called for 10-hours per week of specialized instruction. Simply saying, as the guardian testified that the student needs more services combined with a PIW letter recommending a 30-hour IEP without saying why it is required is not a sufficient reason to increase the student's specialized instruction hours in their IEP. Particularly since there was no nexus made between increasing the student's special education service hours and remediating the student's behavior problems or academic performance. (R. at Parent-02, 03; parent's testimony.)
17. So based on this hearing record, there does not exist evidence supporting the guardian's claim that the student was denied a FAPE because the claims alleged did not result in a *per se* denial of a FAPE to their son.
18. And pursuant to 5 D.C.M.R. § 3030.3, "The burden of proof shall be the responsibility of the party seeking relief; either the parent/guardian of the child or the LEA. 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 a Free Appropriate Public Education (FAPE)."
19. The guardian, who filed the Due Process Complaint, had and did not meet their burden of proof in this case because the guardian:
 - a. Failed to prove that DCPS denied the student a FAPE by not providing him a full time IEP; and
 - b. Failed to prove the student required a full time educational setting to implement his 11.00-hour part time IEP.

So in consideration of the hearing record, there is no finding that the student was denied a FAPE because the guardian did not meet their burden of proof under the IDEA by proving their alleged violations of the IDEA; and even if true, the guardian did not prove that the alleged violations rose to the level to deny the student a FAPE. Ergo, based on the evidence and governing law the hearing officer issues this—

ORDER

1. The guardian's 07/28/09, Due Process Complaint ("DPC") in Case No.:
is dismissed, with prejudice—meaning that the issues that were or could have been raised in the 07/28/09 DPC based on the same facts against the same parties or privies that arise from the same time period that formed the basis for the 07/28/09 DPC that is resolved herein by a final judgment on the merits cannot be relitigated. See Apotex, Inc. v. FDA, 393 F.3d 210, 217 (D.C. Cir. 2004).
2. There is no finding that the student was denied a FAPE.
3. The 45-day time limit, from filing the Due Process Hearing Request to its Disposition after the expiration of the 30-day period under § 300.510 (b) — receipt of the final Hearing Officer's Decision (HOD) pursuant to 34 C.F.R. § 300.515 (a) (1)—was extended by the parent for good cause; and the time for disposition was extended, in accord with this Order, to accommodate the parent's requested and jointly agreed to continuances.

Furthermore, pursuant to SOP § 402 (B)(2) Continuances, states that "in general the parties' agreement to a continuance constitutes 'good cause' to reschedule the hearing to another date and to extend the deadline for issuance of a final determination."

4. This Order resolved all issues raised in the student's 07/28/09 Due Process Complaint in Case Number _____ that is dismissed with prejudice.
5. And the hearing officer made no additional findings.

This is the final ADMINISTRATIVE DECISION. An appeal can be made to a court of competent jurisdiction within ninety (90)-days from the date of this Decision and Order pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B); 34 C.F.R. § 300.516 (b).

/s/ Frederick F. Woods
Frederick E. Woods
Hearing Officer

September 27, 2009
Date