

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

OSSE
STUDENT HEARING OFFICE
2009 MAY 11 AM 7:58

on behalf of,

Student,
(DOB STARS

Petitioner,

Case No.
Bruce Ryan, Hearing Officer

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing: April 29, 2009
Decided: May 9, 2009

Respondent.

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on March 25, 2009, on behalf of a -year old student (the "Student") who resides in the District of Columbia and attends

Petitioner was represented by Chike Ijeabunwu, Esq., and Respondent District of Columbia Public Schools ("DCPS") was represented by Harsharen Bhuller, Esq., Assistant Attorney General for the District of Columbia. The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations.

The complaint alleges that DCPS denied the Student a free appropriate public education ("FAPE") by failing to perform required triennial evaluations, failing to provide an appropriate placement, and failing to develop an appropriate individualized education program ("IEP"). Petitioner alleged, *inter alia*, that the Student is struggling in academics and performing below grade level in reading and math; that DCPS has placed him in a regular education class; that he is not being provided specialized instruction in math; that the Student exhibits poor social skills toward peers; that DCPS has failed to provide him counseling; and that DCPS recently convened an IEP team meeting without all relevant and necessary team members.

DCPS filed a response on April 6, 2009, which denies the allegations and objects to any and all relief requested in the complaint. Specifically, DCPS' response asserts that: (a) the Student's triennial evaluations do not need to be updated until June 2009; (b) the Student's 3/13/09 IEP team meeting included all appropriate and necessary team members; (c) DCPS has not failed to provide access to the Student's school records; and (d) DCPS has not denied the Student a FAPE. As indicated at the prehearing conference, DCPS also asserts that it has fully implemented the IEP, including all specialized instruction.

A Prehearing Conference ("PHC") was held on April 20, 2009; five-day disclosures were filed by both parties on or about April 22, 2009; and a Prehearing Order was issued April 28, 2009. The parent elected for the hearing to be closed.

The Due Process Hearing convened on April 29, 2009. At the hearing, eight (8) documentary exhibits submitted by Petitioner (identified as "P-1" through "P-8") and four (4) documentary exhibits submitted by DCPS (identified as "DCPS-1" through "DCPS-4") were admitted into evidence. Testifying at the hearing were Petitioner; the Special Education Coordinator at _____ and the Special Education Case Manager at _____

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUE(S) AND REQUESTED RELIEF

The complaint filed in this case was not a model of clarity as to the specific issues being raised and relief being requested. As a result, the PHC was devoted largely to clarifying the issues and relief. As summarized in the Prehearing Order, and as discussed further at the outset of the Due Process Hearing, the following issues were presented for determination:

- a. *Whether DCPS failed to conduct required triennial reevaluations of the Student pursuant to 34 CFR Section 300.303 and/or failed to evaluate in all areas of suspected disability;*
- b. *Whether DCPS has failed to develop an appropriate IEP;*
- c. *Whether DCPS has failed to provide an appropriate placement and/or failed to implement the IEP through an appropriate program; and*
- d. *Whether any of the above failures constitute a denial of FAPE or otherwise constitute a substantive ground for granting relief.*

As relief, the complaint requested (*inter alia*) findings of FAPE denial, an immediate appropriate placement, and an order requiring DCPS to perform necessary evaluations and convene an MDT/IEP team meeting. At the close of the hearing, however, Petitioner's counsel stated more specifically that the relief Petitioner was seeking consisted of an order requiring (1) completion of a comprehensive psychological re-evaluation, and (2) when completed, an MDT/IEP team meeting to be held to review all evaluations, and review and revise the IEP as warranted.

III. FINDINGS OF FACT

1. The Student is a _____ year old resident of the District of Columbia whose date of birth is _____. The Student attends _____ and is currently in the _____ grade. See P-2; Petitioner Testimony.

2. The Student's current IEP is dated March 13, 2009. See P-4. The IEP requires 15 hours per week of specialized instruction, consisting of seven (7) hours outside general education

and eight (8) hours within general education (*i.e.*, inclusion services). *Id.*, p. 5. The Student has a disability classification of Specific Learning Disability ("SLD"). *Id.*, p. 1.

3. The Student's prior IEP dated March 13, 2008, also required 15 hours per week of specialized instruction, but specified the setting as entirely outside general education. *See* P-6, p. 1. Under the Least Restrictive Environment ("LRE") Determination section, the IEP explained that the Student "requires small structured environment to accommodate disabilities." *Id.*, p. 6.

4. The Student's Multi-disciplinary Team ("MDT") last met on March 13, 2009. DCPS sent letters of invitation for this meeting on January 26, February 17, and March 6, 2009. *See* DCPS-2; DCPS-3; DCPS-4. The stated purposes of the meeting were to (a) revise existing IEP, (b) discuss post-secondary transition, (c) discuss placement, (d) discuss ESY, and (e) discuss compensatory education. *Id.* DCPS also contacted Petitioner by telephone to confirm a March 13, 2009 meeting. *See* SEC Testimony; Case Manager Testimony.

5. As DCPS had made several attempts to contact Petitioner, and March 13 was the last date for DCPS to conduct a timely annual review of the IEP, the team decided to go forward with meeting and updating the IEP despite the parent's non-attendance. *See* SEC Testimony.

6. On or about March 13, 2009, the MDT/IEP team decided to continue providing 15 hours per week of specialized instruction. However, the team determined to change the setting in which the Student's specialized instruction would take place from entirely outside general education to 7 hours outside and 8 hours within general education. *See* P-4. The SEC testified that this was done in part to accommodate "LRE" concerns. SEC Testimony.

7. Throughout the 2008-2009 school year, (the special education case manager) has provided specialized instruction to the Student both in the (outside general education) and via "inclusion support" within the general education classroom. *See* SEC Testimony; Case Manager Testimony. Thus, the specialized instruction provided prior to the 3/13/09 IEP revision was not provided in conformity with the 3/13/08 IEP. *See* SEC Testimony (cross examination).

8. On or about March 13, 2009, the MDT/IEP team also developed a Student Evaluation Plan ("SEP") to facilitate conducting the Student's evaluations. However, Petitioner declined to sign the necessary consent form for the evaluations to go forward. *See* SEC Testimony; Parent Testimony.

9. On or about March 18, 2009, Petitioner visited and signed the 3/13/09 IEP. At the same time, DCPS set up an impromptu team meeting to review and explain the changes being made in the IEP and to address any questions or concerns of the parent. *See* SEC Testimony; Parent Testimony. Petitioner testified that she left the meeting abruptly because she was not satisfied and became upset, but she did not communicate any particular concerns to the team regarding the IEP. *See* Parent Testimony (cross examination).

10. DCPS' most recent psychological re-evaluation of the Student occurred on May 2, 2006, and was reported on June 5, 2006. *See* DCPS-1. The reason the evaluation was conducted at that time was that the Student had been referred for a triennial re-evaluation. *Id.*, p. 5.

11. The Student is one of about 15-20 students receiving special education and related services under IEPs who are assigned to There generally are between three and seven of his students in each "inclusion" classroom setting. is in the general

education classroom working with the Student approximately 4-5 times per week. *See* Case Manager Testimony; SEC Testimony.

12. The Student struggles academically and performs well below grade level in reading and math. *See* Parent Testimony; *see also* P-1 (transcript); P-5 (progress report). However, she is currently making progress in both subjects. *See* Case Manager Testimony.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also* *Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to develop an appropriate IEP.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

B. Issues/Alleged Violations by DCPS

(1) ***Whether DCPS failed to conduct required triennial reevaluations of the Student pursuant to 34 CFR Section 300.303 and/or failed to evaluate in all areas of suspected disability.***

3. Petitioner primarily claims that DCPS failed to complete a comprehensive triennial evaluation of the Student, as required under 20 U.S.C. §1414 and 34 C.F.R. §300.303. The Hearing Officer concludes that Petitioner has not carried her burden of proving this claim by a preponderance of the evidence.

4. IDEA provides that an LEA “shall ensure that a reevaluation of each child is conducted ...at least once every 3 years, unless the parent and [LEA] agree that a reevaluation is unnecessary.” 34 C.F.R. §300.303 (b)(2); *see, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). The reevaluation must be conducted “in accordance with §§ 300.304 through 300.311.” 34 C.F.R. §300.303(a). This includes the requirement that the evaluation be “sufficiently comprehensive to identify all of the child’s special education and related services needs....” *Id.* §300.304(c) (6); *see also* *Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation “must be a complete evaluation of the child in all areas of the child’s suspected disability....”).

5. The complaint in this case was filed March 25, 2009, and the most recent psychological re-evaluation was completed June 5, 2006, pursuant to an earlier triennial. Petitioner does not point to any other relevant evaluations at issue that may be more than three years old. Thus, it would appear that an updated triennial is not due until June 2009, and Petitioner’s claim is not ripe.

6. In addition, IDEA makes clear that if a parent refuses to consent to an evaluation or re-evaluation, a public agency does not violate its statutory obligations if it does not pursue the evaluation or re-evaluation. 34 C.F.R. §300.300(4)(c)(1)(iii).

7. Accordingly, the Hearing Officer concludes that DCPS has not been shown to have violated IDEA's triennial reevaluation requirement; nor has it failed to evaluate the Student in all areas of suspected disability.

(2) *Whether DCPS has failed to develop an appropriate IEP for the Student.*

8. Petitioner next claims that DCPS has failed to develop an appropriate IEP. The Hearing Officer also concludes that Petitioner has not carried her burden of proving this claim by a preponderance of the evidence.

9. FAPE is not defined as a potential maximizing education. Generally speaking, a school has met its obligation to provide a FAPE if the IEP is reasonably calculated to enable the child to receive some meaningful educational benefit. *See Board of Education v. Rowley*, 102 S. Ct. 3034 (1982); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The MDT is the right entity to make this determination, not a hearing officer, unless a complainant proves that the team got it wrong.

10. In this case, Petitioner did not prove (or even attempt to prove) that the hours of specialized instruction were inadequate, that the goals/objectives were inappropriate, or that the 3/13/09 IEP is not reasonably calculated to enable the Student to receive meaningful educational benefit. Moreover, IDEA allows an IEP team meeting to be conducted without a parent in attendance "if the public agency is unable to convince the parents that they should attend" and the agency keeps a record of its attempts to arrange a mutually agreed time and place for the meeting. 34 C.F.R. §300.322(d). Those requirements were met here.

(3) *Whether DCPS has failed to provide an appropriate placement for the Student and/or failed to implement the IEP through an appropriate program.*

11. Petitioner next appears to argue that DCPS has failed to provide an appropriate placement and/or has failed to implement the IEP through the current program at The Hearing Officer concludes that Petitioner has not carried her burden of proof on this issue with respect to the current 3/13/09 IEP and placement. Petitioner did not demonstrate that the Student's current placement is inappropriate, that her services are not being implemented at her current placement, or that any type of alternative placement is warranted for the Student.

12. However, the undisputed evidence does show that DCPS did not provide all hours of specialized instruction outside the general education setting from September 2008 to March 2009, as called for under the Student's 3/13/08 IEP, but instead provided the hours partly on an inclusion basis. Thus, by definition, DCPS denied a FAPE to the Student because it admittedly failed to provide special education and related services in conformity with the then-current IEP. *See* 34 C.F.R. §300.17(d).

(4) ***Whether any of the above failures constitute a denial of FAPE or otherwise constitute a substantive ground for granting relief under IDEA.***

13. As explained above, DCPS has not been shown to have committed any denials of FAPE or violated statutory requirements, other than with respect to delivery of "inclusion" services prior to revision of the Student's IEP to conform to that mode of delivery in March 2009. Petitioner did not demonstrate any educational detriment or other harm resulting from this discrepancy or non-conformity with IEP requirements for a portion of the current school year.

14. At the close of the hearing, the primary relief sought by Petitioner's counsel was an order requiring DCPS to take steps to complete a triennial re-evaluation of the Student. However, the record shows that DCPS has not violated the triennial re-evaluation requirement because an updated re-evaluation of the Student is not due until June 2009. Moreover, DCPS has already offered the parent such relief, but the parent has declined to sign a consent to evaluate that would permit the process to move forward.

15. Accordingly, the requested relief is inappropriate and will not be granted. Nor has Petitioner demonstrated that any other form of relief is necessary and appropriate to address the technical denial of FAPE determined herein. *See generally Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d at 521-23; 20 U.S.C. §1415(i)(2)(C)(iii).

V. ORDER

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

1. Petitioner's requests for relief be, and hereby are, **DENIED**; and
2. Petitioner's due process complaint be, and hereby is, **DISMISSED, with prejudice.**
3. This case shall be, and hereby is, **CLOSED.**

Dated: May 9, 2009


/s/ _____

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).