

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

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

OSSE
Student Hearing Office
March 11, 2013

ADULT STUDENT, ¹)	
)	
Petitioner,)	Date Issued: March 10, 2013
)	Hearing Officer: Virginia Dietrich
v.)	
)	
District of Columbia Public Schools)	
Respondent.)	
)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, the adult Student, filed a due process complaint notice on December 28, 2012 alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that he was entitled to special education services and a FAPE beginning in October 2012 despite having graduated from a nonpublic special education school in June 2012 with a modified high school diploma. Petitioner alleged that beginning in October 2012, when he returned to District of Columbia Public Schools (“DCPS”) to enroll in the three classes that he needed to acquire his regular high school diploma, DCPS denied him a FAPE by placing him in a school that could not provide those classes in an out of general education setting, as was required by his Individualized Education Program (“IEP”). Petitioner specifically alleged that DCPS failed to provide him with a location of services that could implement his IEP.

DCPS argued that Petitioner failed to carry his burden of proof that public high school #1 could not implement Student’s IEP by providing the services specified in Student’s IEP. Specifically, DCPS argued that Petitioner failed to show that a special education teacher could not be placed in a classroom with Student at public high school #1. DCPS also argued that the nonpublic school placement (“nonpublic school #1”) proposed by Petitioner was inappropriate.

¹ Personal identification information is provided in Appendix A.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the 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 12/28/12. This Hearing Officer was assigned to the case on 01/02/13. DCPS timely filed a response to the complaint on 01/07/13. A prehearing conference took place on 01/31/13 and a Prehearing Order was issued the same day. Petitioner requested mediation, but DCPS declined to mediate. A resolution meeting took place on 01/11/13 and no agreement was reached. Parties did not agree to terminate the 30-day resolution period prior to its expiration. The 30-day resolution period expired on 01/27/13, the 45-day timeline to issue a final decision began on 01/28/13, and the final decision is due by 03/13/13.

The due process hearing was a closed hearing that took place on 02/28/13. Petitioner was represented by Nina Isaacson, Esq. and DCPS was represented by Lynette Collins, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person. Both parties rejected the opportunity to discuss settlement at the beginning of the hearing.

On 02/26/13, Petitioner filed a Motion To Exclude Any Documents And Witnesses That May Be Disclosed By Respondent. The basis of the motion was that DCPS’ disclosures had not been served upon Petitioner. Through review of e-mail correspondence, it became apparent that DCPS timely filed disclosures with the Hearing Officer and with the Student Hearing Office on 02/21/13, but sent the disclosures to Petitioner’s Attorney at an incorrect e-mail address. Consequently, Petitioner’s Attorney was not served with DCPS’ disclosures until 02/26/13. Per the Prehearing Order issued on 01/31/13 and per the mandate of 34 C.F.R. 300.512(a)(3) that allows parties five business days to review disclosures prior to the hearing, any disclosures filed after 02/21/13 would not be admitted into evidence over the objection of the opposing party. On 02/26/13, the Hearing Officer offered 3/5/13 and 3/7/13 as possible dates for rescheduling the hearing, but Petitioner’s Attorney was unavailable on those dates.

DCPS’ Disclosure Statement dated 02/21/13, containing a witness list and Exhibit R-1 was excluded from evidence as a result of the Hearing Officer’s ruling that 34 C.F.R. 300.512(a)(3) entitled Petitioner to five business days to review any disclosures that DCPS intended to introduce at the hearing. The Hearing Officer ruled on the record that there was no prejudice to DCPS with respect to the exclusion of Exhibit R-1, as most of the information in Exhibit R-1 was included in Petitioner’s disclosures. DCPS objected and argued that the one witness she had intended to call and the proposed testimony of that witness had been identified in the Prehearing Order; therefore, the witness had been disclosed and there was no prejudice or unfair surprise to Petitioner. DCPS’ objections were noted for the record.

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The due process hearing is not governed by formal rules of procedure or evidence.² The conduct of the due process hearing is left to the discretion of the Hearing Officer, subject to review under 34 C.F.R. 300.514, 300.516. *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995). The Prehearing Order specifically stated that the witnesses to be called at the hearing would be controlled by the party's disclosure statement. Petitioner's Motion To Exclude Any Documents And Witnesses That May Be Disclosed By Respondent was granted. DCPS was precluded from introducing any documentary and testimonial evidence into the record.

Petitioner's disclosures dated 02/21/13, containing a witness list and Exhibits P-1 through P-81, were admitted into evidence without objection.

Petitioner presented four witnesses in his case in chief: Petitioner; clinical psychologist at the nonpublic school that Student attended during the 2011-2012 school year ("clinical psychologist"); Associate Head of School at nonpublic school #1; and an investigator.

DCPS, over objection, was precluded from presenting any witnesses.

Parties stipulated to the following fact:

1. Student has a modified high school diploma and Student needs three additional credits to graduate with a District of Columbia high school diploma.

The sole issue to be determined in this Hearing Officer Determination is as follows:

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate location of services since October 5, 2012; specifically, public high school #1 could not provide Student with the specialized instruction outside of general education as was required by Student's Individualized Education Program ("IEP"), in the three classes that Student needed to graduate with a District of Columbia high school diploma.

For relief, Petitioner requested a finding of a denial of a FAPE on the issue presented, DCPS to place and fund Student at nonpublic school #1, with transportation, until Student obtains his high school diploma; DCPS to convene a Multidisciplinary Team meeting within 30 days of Student's placement at nonpublic school #1 to update Student's IEP; and an award of compensatory education in the form of 1:1 tutoring for DCPS' failure to provide Student with an appropriate location of services since October 5, 2012.

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

² District of Columbia Public Schools Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP") Section 700.4.

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 [REDACTED] is a resident of the District of Columbia who for the eight years that preceded June 2012, received full-time special education services at nonpublic schools in [REDACTED]. During the last four years preceding June 2012, Student attended a school for Learning Disabled students only because his behavior had improved to the point that it no longer interfered with learning.³

#2. Student's most recent IEP, dated 12/19/11 with an expiration date of 12/18/12, classified Student with Multiple Disabilities that included Attention Deficit Hyperactivity Disorder, Other Health Impairment and Mild Mental Retardation.⁴ Student's IEP provided for 27.5 hours/week of specialized instruction, 1.5 hours/week of speech-language pathology services and 2 hours/week of behavioral support services, with all services to be provided outside of general education.⁵

#3. Student required specialized instruction because he struggled with classes and grasping the material, and independently working out problems.⁶ Student required specialized instruction outside of general education because Student was unable to make progress in the general education setting.⁷ Student required behavioral support services to assist him with asking for clarification with assignments and asking for help. Student required intensive speech-language therapy to develop vocabulary and concepts critical to success in accessing the curriculum.⁸

#4. During the 2011-2012 school year, Student was in the 12th grade and on the diploma track for graduation in June 2012. Student began the year with courses in chemistry and trigonometry, but voluntarily withdrew from these courses in November 2011 because he was failing. Higher mathematics and chemistry were too difficult for Student; he could memorize, but he couldn't grasp the concepts necessary for mastery of higher mathematics and science despite 1:1 assistance in a special education classroom.⁹ Student, realizing that he would not be able to graduate with a regular high school diploma without passing the required math and chemistry courses, elected to drop the courses and graduate in June 2012 with a modified high school diploma and later pursue a District of Columbia high school diploma.¹⁰ Student had the option of staying in school throughout the 2012-2013 school year in order to graduate with a regular high school diploma, but he elected not to do so.¹¹

³ Petitioner.

⁴ P-15-1, P-16.

⁵ P-16-9.

⁶ P-14-4.

⁷ P-16.

⁸ P-16-10.

⁹ Petitioner, clinical psychologist.

¹⁰ Petitioner.

¹¹ Petitioner, P-25-1.

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#5. At an IEP meeting on 12/19/11 that included Student, the IEP team agreed that summer school or credit recovery would be a better option for Student to complete the DCPS diploma criteria after Student graduated from high school in June 2012 with a modified diploma.¹²

#6. Following graduation in June 2012 with a modified diploma,¹³ Student tried to enroll or participate in a community based hotel training program that would provide Student with job training and allow him to work while he pursued his educational interests or aspirations, including attending community college. When the job training program did not materialize for Student, Student decided to return to school to earn a regular high school diploma.¹⁴

#7. On 10/05/12, Student enrolled in public high school #1 and informed DCPS of his desire to take the three classes that he needed to graduate with a District of Columbia high school diploma. Since Student enrolled in public high school #1 in the middle of the school semester, Student was informed that he could begin classes in the following semester that began in January 2013.¹⁵

#8. Student began attending public high school #1 on 01/28/13. Student was provided with a class schedule for the second semester of the 2012-2013 school year that included Algebra II & Trigonometry, Probability & Statistics, and Chemistry.¹⁶ Student needed the following three credits to graduate with a District of Columbia high school diploma: (A) A lab science consisting of Biology II, Chemistry, Physics or Physical Science; (B) Algebra II; and (C) an upper level math course consisting of Probability and Statistics or Pre-Calculus.¹⁷

#9. Student attended his math classes at public high school #1, was able to get individual instruction when he requested it, but Student was hesitant about asking for help. Most of the work Student encountered in his Algebra class was familiar to Student because it was a repetition of work he had received at the nonpublic school he attended in [REDACTED] during his 12th grade year. The work Student received in his Probability and Statistics class was new and Student struggled with it.¹⁸

#10. There was no evidence in the record as to how the instruction was provided to Student in his math classes other than in the Probability and Statistics class, the lessons were taught by Powerpoint, and Student worked from textbooks and did a lot of copying down and notetaking.¹⁹ Student's math teacher was not a special education teacher,²⁰ but the special education teacher consulted with Student's math teacher with respect to Student receiving

¹² Petitioner, P-14-5, P-15-2.

¹³ Petitioner, P-18-1, P-29-1, Stipulation #1.

¹⁴ Petitioner.

¹⁵ Petitioner, P-65-1.

¹⁶ Petitioner, P-78-1, P-79-1.

¹⁷ Petitioner, P-32-1, P-79-1.

¹⁸ Petitioner.

¹⁹ Petitioner.

²⁰ Investigator.

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specialized instruction in math. The math teacher was able to provide Student with assistance, but not continuous 1:1 assistance.²¹

#11. Student's science teacher at public high school #1 was not a special education teacher and no other teachers taught in the science class.²² There was no evidence in the record regarding how the instruction in science was to be provided to Student. As of the date of the due process hearing, Student had not attended his chemistry class²³ and the reason for Student's non-attendance was not made part of the record.

#12. Student did not receive any behavioral support services or speech-language services since he began attending public high school #1 on 01/28/13.²⁴

#13. Nonpublic school #1, a special education school program with non-traditional programming and an independent study component, can provide Student with specialized instruction outside of general education in the classes that Student needs to graduate with a District of Columbia high school diploma. Transition services, speech-language services and behavioral support services can be provided as well. Student would not receive 1:1 continuous specialized instruction at nonpublic school #1. The cost of nonpublic school #1 is \$38,142.00 per year.²⁵

Discussion/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:

"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 burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

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 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 sole issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate location of services since October 5, 2012; specifically,

²¹ Petitioner.

²² Investigator.

²³ Petitioner.

²⁴ Petitioner.

²⁵ Associate head of school at nonpublic school #1.

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public high school #1 could not provide Student with the specialized instruction outside of general education as was required by Student's Individualized Education Program ("IEP"), in the three classes that Student needed to graduate with a District of Columbia high school diploma.

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 the IEP. 34 C.F.R. 300.17.

Student elected not to extend his formal schooling for another year beyond the 2012-2013 school in order to obtain a regular District of Columbia high school diploma. Rather, Student opted for a modified high school diploma from his nonpublic school in [REDACTED] so that he could graduate in June 2012. On 12/19/11, prior to graduation, the recommendation of the IEP Team that included Student, was that Student attend summer school over the summer of 2012 or participate in a credit recovery program in order to obtain a regular high school diploma after graduation. After Petitioner graduated in June 2012, he followed neither one of the recommendations of the IEP Team. Instead, Petitioner pursued a community based work-study program that never materialized.

On 10/05/12, Student enrolled in public high school #1 so that he could acquire the three credits that he needed to obtain a District of Columbia high school diploma. Student was advised by DCPS that he could begin classes in January 2013. Student began school on 01/28/13 and had been attending for one month prior to the due process hearing.

The due process complaint was filed on 12/28/12, before Student actually began attending public high school #1, and therefore was premature. As of 12/28/12, it was impossible for DCPS to have denied Student a FAPE as DCPS had not yet begun to provide services to Student. The Hearing Officer determines that Student was not entitled to receive special education services until 01/28/13, when he began attending nonpublic school #1 during the second semester. The record was clear that it was impossible for Student to begin his higher level math and science classes when he enrolled in school on 10/05/12, which was the middle of the first semester. Under this analysis, Petitioner failed to prove that DCPS had denied Student a FAPE as of the date the complaint was filed. The complaint was premature.

Putting aside the above analysis, the Hearing Officer also concludes that DCPS did not deny Student a FAPE during the one-month period of time that Student began school on 1/28/13 until the time of the due process hearing on 02/28/13, assuming that the services in Student's expired IEP were still appropriate.

A procedural violation of the IDEA "can itself constitute the denial of a free appropriate education." *Blackman v. Dist. of Columbia*, 277 F.Supp.2d 71, 79 (D.D.C.2003). But it is important to note that, in this circuit, a procedural violation does not, standing alone, establish a

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failure to provide a FAPE. See *Lesesne v. Dist. Of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006).” An IDEA claim is only viable if those procedural violations affected the student’s substantive rights.” *Id.* In the absence of a showing that the child’s education was substantively affected, no relief may be awarded. *Id.* Quoted from *O.O. v. District of Columbia*, et.al., Defendants, Civil Action No. 07-1783 (JBD) (2008).

Public high school #1 was the location of services for Student to receive instruction in the three classes that Student needed to graduate with a District of Columbia high school diploma. Petitioner proved that Student did not receive speech-language services and behavioral support services for a one-month’s period of time, and this constituted a procedural violation of 34 C.F.R. 300. 323(c)(2) which states that special education and related services are to be made available to the child as soon as possible following development of the IEP. Student’s testimony that he did not receive these services, was credible and uncontroverted. However, since Student had been out of school for seven months and Student’s IEP had expired on 12/18/12, it was no longer certain that Student required these related services and to what degree.

There was evidence in the record that Student required behavioral support services in the past to assist him with self-advocacy for help in instruction and there was evidence in the record that Student was having difficulties with the work in his mathematics classes at public high school #1 and was reluctant to ask for help. Student’s testimony on that point was believable and credited. However, there was no evidence in the record that Student was failing his math classes or that he was failing to make progress in his math classes. In the past, Student had been provided with 1:1 assistance in a trigonometry class in a special education classroom, which was a maximum amount of support, and still failed. The evidence in the record was insufficient for the Hearing Officer to conclude that Student had been denied an educational benefit or that his right to a FAPE had been impeded because he did not receive a total of 8 hours of behavioral support services (2 hours/week for 4 weeks). Likewise, Petitioner did not prove and the evidence in the record was insufficient for the Hearing Officer to conclude that DCPS’ failure to provide Student with a total of 6 hours of speech-language services (1.5 hours/week for 4 weeks) resulted in the denial of a FAPE. Petitioner failed to show harm through the loss of an educational benefit or that Student’s right to a FAPE was impeded. Petitioner failed to show that Student’s education was substantively affected.

Petitioner also failed to prove that DCPS denied Student a FAPE by failing to provide Student with specialized instruction outside of general education in science. There was no evidence in the record as to the content and method of delivery of science instruction to Student. The evidence in the record, i.e., that Student’s science teacher was a general education teacher, was insufficient for Petitioner to carry his burden of proof. There was no evidence in the record about whether or not the special education teacher consulted with the science teacher. Most importantly, Student never attended the science class and the reasons for his non-attendance were unknown. As such, there was no evidence that the instruction received by Student was insufficient, lacking or at odds with the expired IEP.

Lastly, with respect to public high school #1’s ability to provide Student with specialized instruction outside of general education in mathematics, the evidence was credible, uncontroverted, and provided by Student, that the work received in Student’s Algebra class was a

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repeat of what he had been given his previous year while in the 12th grade. Student did not indicate that he had any problems grasping the work that had been presented to him thus far in Algebra. Student was credible in his statement that Probability & Statistics was giving him a difficult time; however, there was no evidence in the record that he was failing the course or not making educational progress. Additionally, Student was only one month into his studies and that was too short a time for the Hearing Officer to conclude that Student had been denied a FAPE by the loss of an educational benefit or that Student's right to a FAPE had been impeded. Again, Petitioner failed to show that Student's education was substantively affected.

Finally, the statements made by Petitioner's Attorney in the e-mails that were admitted into the record, with respect to whether or not public high school #1 could implement Student's IEP, were given no weight. Petitioner's Attorney chose to litigate the case rather than appear as a witness; therefore, she could not testify and be cross-examined by the opposing party. District of Columbia Bar Rules of Professional Conduct Rule 3.7 prohibits an attorney from acting as an advocate in a trial in which the lawyer is likely to be a necessary witness, except whether the testimony relates to an uncontested issue. In this case, the issue was contested.

Summary

When Student began attending public high school #1 on 01/28/13, his IEP was expired. That IEP was developed when Student was a full-time student in the 12th grade. Student's educational situation is now different. He only needs three very specific courses in order to obtain a District of Columbia high school diploma. Placement in a nonpublic special education school program until Student graduates with a District of Columbia high school diploma, as proposed by Petitioner's request for placement at nonpublic school #1, is not the solution. Student had these very same classes in this very same nonpublic school environment with 1:1 assistance during his 12th grade year, and still he was unable to grasp the material.

Student's IEP no longer reflects his current educational needs. Pursuant to 34 C.F.R. 300.320(a), 300.324(b), the IEP must be reviewed annually and include a statement of the special education and related services a child needs to access the curriculum and it must include annual goals designed to meet the child's educational needs that result from the child's disability. Student's current educational needs are unique. He needs passing scores in three higher level math and science classes in order to obtain a District of Columbia high school diploma, and he is unlikely to achieve that even with maximum 1:1 assistance in a special education classroom, due to his cognitive inability to grasp higher level concepts.

Student appears to be interested in obtaining a job and becoming a productive member of the community. Student needs to be linked to vocational services through school and/or community based programs, especially programs designed to help students diagnosed with Mild Mental Retardation. Success in a community college is a lofty goal for Student.

Under one analysis, the Hearing Officer determined that Petitioner's complaint was premature; it was filed prior to Student beginning classes at public high school #1. Therefore, there was no way to determine whether or not the location of services could implement the IEP

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because DCPS had not yet had the opportunity to provide services to Student. Under that analysis, DCPS had not denied Student a FAPE.

Under a second analysis, the Hearing Officer determined that DCPS was not required to make a FAPE available to Student until 01/28/13, the date that Student actually began attending public high school #1. From 01/28/13 until the day of the due process hearing, DCPS was required to provide Student with a FAPE. Even though Petitioner proved that DCPS had failed to provide Student with all of the services required by Student's expired IEP, Petitioner failed to prove that Student's substantive rights were affected. Petitioner failed to show that Student suffered from the loss of an educational benefit or that Student's right to a FAPE was impeded during a one-month period of time.

Overall, Petitioner failed to meet his burden of proof that DCPS denied him a FAPE by failing to provide Student with a location of services that could implement his IEP since 10/05/12. Even if Petitioner had met his burden of proof that Student had been denied a FAPE, placement in nonpublic school #1, which would have provided educational conditions less intensive than what Student experienced in 12th grade where he had 1:1 assistance in a special education classroom in chemistry and trigonometry and where he still failed both subjects, would not be appropriate.

ORDER

Petitioner failed to meet his burden on proof on the issue presented in the complaint. All requests for relief are **DENIED**. The complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

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: March 10, 2013

/s/ Virginia A. Dietrich
Hearing Officer