

District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
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OSSE
Student Hearing Office
September 24, 2013

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case #</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: September 18, 2013</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner:</p> <p>Counsel for DCPS:</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened for one day on September 18, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age seventeen, resides with parent in the District of Columbia and is a child with a disability under IDEA with a classification of multiple disabilities (“MD”). The student has had a history of behavioral difficulties both in and out of school and juvenile criminal court involvement due in part to in-school behaviors.

During school year (“SY”) 2012-2013 the student was attending a private full-time special education day school (“School A”) with DCPS funding. School A conducts an 11th month program and its students attend school each school year until early August.

After an incident at School A in which the student was considered to have attempted suicide an individualized educational program (“IEP”) team, on May 31, 2013, concluded the student was no longer appropriately placed at School A and the team needed to find another school for the student to attend. At the meeting the student’s parent requested reevaluation(s) of the student.

DCPS proposed another private full time special education school (“School B”) for the student at the IEP meeting. There was no representative from School B who participated in the May 31, 2013, IEP meeting to describe its services, program and capabilities to implement the student’s IEP. DCPS thereafter issued a prior written notice (“PWN”) for the student to attend School B. The student’s last day attending School A was May 31, 2013. The student never attended School B and did not attend school at all during Summer 2013.

Petitioner filed the current complaint on July 8, 2013, alleging DCPS failed to provide the requested evaluations, failed to place the student in an appropriate school that could implement the student’s IEP and did not involve a staff member of the proposed school in the May 2013 IEP meeting.

Prior to the hearing being held DCPS issued a PWN for the student to attend a different private full time special education school (“School C”). Petitioner is satisfied with School C and that it can implement the student’s IEP. The student began attending School C at the start of SY 2013-2014. Petitioner, however, is still seeking the requested evaluation and compensatory education for the student having missed services from the time stopped attending School A until began attending School C.²

² Petitioner was originally also seeking the student’s placement at any of a number of proposed schools including

DCPS filed a timely response to the complaint on July 9, 2013. DCPS denied any denial of a FAPE and specifically asserted that DCPS determined an appropriate location of services at School B after the student was terminated from School A. The parent was notified of the change in location and School B could implement the student's IEP. DCPS stated that it would conduct the reevaluation when the new school year began.

A resolution meeting was held on July 22, 2013, and all matters were not resolved. The parties expressed no desire to proceed directly to hearing; instead they expressed a desire to allow the full 30-day resolution period to expire before the 45-day timeline began. The 45-day period began on August 8, 2013, and originally ended (and the Hearing Officer's Determination ("HOD") was due) on September 21, 2013.

The Hearing Officer convened a pre-hearing conference on August 19, 2013, and issued a pre-hearing conference order on August 28, 2013, outlining the issues to be adjudicated. On September 16, 2013, the date of the hearing was to convene Petitioner submitted a motion for a two day continuance and extension of the HOD due date because of Petitioner's counsel was unavailable. Respondent did not object to the continuance and Petitioner's motion was granted. The HOD due date was extended to September 23, 2013.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits and DCPS Exhibit) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

ISSUES: ³

The issues adjudicated are:

1. Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to complete the comprehensive psychological reevaluation the parent allegedly requested at the May 31, 2013, IEP meeting.
2. Whether DCPS denied the student a FAPE failing to provide the student an appropriate placement/location of services when it placed the student at School B.
3. Whether DCPS denied the student a FAPE by failing to comply with 34 C.F.R. §300.325(a)(2) by failing involve the staff representative of School B at the placement

School C. Once the student was placed at School C Petitioner withdrew placement as an item of requested relief.

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

meeting to determine the selection of the student's placement/location of services at School B.

FINDINGS OF FACT: ⁴

1. The student is age seventeen, resides with parent in the District of Columbia and is a child with a disability under IDEA with a classification of MD. The student has had a history of behavioral difficulties both in and out of school and juvenile criminal court involvement due in part to in-school behaviors. (Petitioner's Exhibits 7-1, 9)
2. During school year SY 2012-2013 the student was attending School A. School A conducts and 11th month program and its students attend school each school year until early August. (Witness 1's testimony, Petitioner's Exhibit 19)
3. After an incident at School A in which the student was considered to have attempted suicide a , IEP team concluded the student was no longer appropriately placed at School A and the team needed to find another school for the student to attend. As a result of the student's behavioral concerns, including the incident at School A, the student's parent and her educational advocate who both attended the May 31, 2013, meeting requested that DCPS conduct a reevaluation of the student.⁵ (Witness 1's testimony)
4. Pursuant to the student's most recent IEP the student is to be provided specialized instruction and behavioral support services to address academic deficits and social/emotional concerns. The IEP indicates the student is operating on mid 4th to 5th grade levels in reading and math although is currently in ninth grade. The student's IEP states that the student should have access to a psychiatrist to assist in monitoring and administering medication. The IEP does not prescribe ESY services. (Petitioner's Exhibit 7-1, 7-3, 7-4, 7-5, 7-8, 7-12)
5. DCPS proposed School B for the student at the May 31, 2013, IEP meeting. There was no representative from School B who participated in the meeting to describe its services, program and capabilities to implement the student's IEP. DCPS thereafter issued a PWN for the student to attend School B. (Witness 1's testimony, Petitioner's Exhibits 12, 13)
6. Petitioner filed the current complaint on July 8, 2013, asserting DCPS failed to provide the requested evaluations, placed the student in an inappropriate school that could not implement the student's IEP because it did not have psychiatrist on staff and because

⁴ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

⁵ The original request was for both a psychiatric and a comprehensive psychological evaluation. Petitioner later withdrew the request for the psychiatric evaluation.

DCPS and did not involve a School B staff member in the May 2013 IEP meeting. (Petitioner's Exhibit 2)

7. School B did not have a psychiatrist on its staff. (Petitioner's Exhibits 15, 16, 17, 18)
8. The student's last day attending School A was May 31, 2013. The student never attended School B and did not attend school during Summer 2013. The student began attending School C at the start of SY 2013-2014. As a result of the student not having an immediate placement upon leaving School A the student missed instruction and services including specialized instruction and behavioral support services. (Parent's testimony, Witness 1's testimony)
9. DCPS has not yet conducted the requested comprehensive psychological evaluation. (Witness 1's testimony)
10. On August 5, 2013, DCPS issued a PWN indicating it would conduct the requested comprehensive psychological evaluation. (Respondent's Exhibit 3)
11. The parent's educational advocate proposed a compensatory education program to compensate the student for the alleged denials of FAPE that allegedly included the student not receiving services after May 31, 2013, until [redacted] was placed at School C at the start of SY 2013-2014.⁶ (Witness' 1's testimony, Petitioner's Exhibit 24)

CONCLUSIONS OF LAW:

Pursuant to IDEA §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").

Pursuant to IDEA §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. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's *substantive* rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;

⁶ The proposed plan assumed the student missed 5 weeks of instruction and services from the time [redacted] left School A and during Summer 2013 and proposed as compensation that the student be awarded 4 hours per week for 5 weeks in each of the following academic areas: reading, math and written expression for a total of 70 hours of tutoring and 5 hours of individual therapeutic services.

(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ⁷ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to complete the comprehensive psychological reevaluation the parent allegedly requested at the May 31, 2013, IEP meeting.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence. There was insufficient evidence that the student was harmed by the requested reevaluation not being conducted prior to the complaint being filed.

34 C.F.R. § 300.303(a)(2) make clear that, “A local education agency (“LEA”) *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” (emphasis added). 34 C.F.R. § 300.305(d)(2) also clarifies that the parent must be advised by the LEA of the right to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child’s educational needs. *See also Letter to Copenhagen*, 108 LRP 16368 (OSEP 2007).

The evidence demonstrates that Petitioner requested that the student be reevaluated soon after an incident in which allegedly attempted suicide. Although this was a significant incident and apparently prompted the parent to request the evaluation, DCPS has indicated intention to conduct the evaluation and there was insufficient evidence that the student has been significantly harmed as a result of the evaluation not having yet been conducted. The Hearing Officer does not consider the period from the May 31, 2013, meeting until the complaint was filed to be an inordinate time for the reevaluation to have been conducted. Thus, the Hearing Officer does not conclude that the student was denied a FAPE as a result of the evaluation not being conducted. Nonetheless, current data that might come from an reevaluation is not yet available to School C where the student is currently in attendance. DCPS has issued a PWN for the evaluation to be conducted. However, since the school year has begun and the evaluation has not yet been completed the Hearing Officer will, in the order below, direct that the evaluation be conducted by a date certain.

ISSUE 2: Whether DCPS denied the student a FAPE failing to provide the student an appropriate placement/location of services when it placed the student at School B.

⁷ The burden of proof shall be the responsibility of the party seeking relief. 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.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

IDEA ensures 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." 20 U.S.C. §1400(d)(1)(A). The IDEA guarantees children with disabilities the right to a FAPE. *Id.* In seeking an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an IEP to meet the child's unique needs. See 20 U.S.C. §1414(d)(1)(B). "The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458U.S. 176, 203 (1982)). Local school officials utilize the IEP to assess the student's needs and assign a commensurate environment. See 20 U.S.C. § 1414(d)(1)(A).

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

The evidence in this case clearly demonstrates that an IEP team on May 31, 2013, determined that the student's continued placement at School A was inappropriate. The student never attended School B, although the evidence demonstrates that because School B did not have access to a psychiatrist the student's IEP could not be fully implemented there. The student was not placed in an appropriate placement until the start of SY 2013-2014. Although Petitioner asserted the student missed services the entire summer because School A was an 11th month program the student's IEP does not prescribe ESY services. Therefore, the Hearing Officer concludes the services the student missed were from May 31, 2013, until the end of the regular school DCPS school year. The Hearing Officer takes administrative notice that the school year ended on or before the last day of June 2013. Thus, the student missed no more than 4 weeks of services. The student's significant academic deficits is sufficient evidence that the student was harmed by missing IEP services from May 31, 2013, to the end of SY 2012-2013.

ISSUE 3: Whether DCPS denied the student a by failing to comply with 34 C.F.R. §300.325(a)(2) ⁸ by failing involve the staff representative of School B at the placement meeting to determine the selection of the student's placement/location of services at School B.

⁸ 34 C.F.R § 300.325: Private school placements by public agencies.

(a) Developing IEPs.

(1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child in accordance with Sec. Sec. 300.320 and 300.324.

(2) The agency must ensure that a representative of the private school or facility attends the meeting. If the

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Although the evidence indicates that no person from School B participated in the May 31, 2013, meeting to describe its program and whether it could implement the student's IEP, there was insufficient evidence of harm to the student from such a person not being present. There was evidence that the student did not receive services for a period after [redacted] left School A, which is addressed in the issue above; however, there was insufficient evidence that the student missed services because a staff member of School B did not participate in the May 31, 2013, meeting. Accordingly, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's *substantive* rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from [redacted] loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Although Petitioner has requested compensatory education for the student allegedly having been in an inappropriate setting the full summer of 2013, the evidence demonstrates the student missed no more than four weeks of services because [redacted] IEP did not prescribe ESY services. The proposed compensatory education plan overstates the services the student actually missed. Nonetheless, the Hearing Officer concludes based upon the evidence that the student is operating more than four grade levels behind and based on the evidence of the student's in-school behavioral issues just prior to the change in location that the student should be provided some compensatory services. Even though the proposed plan has overestimated the actual missed services, to provide the student nothing would be inequitable. Therefore, the Hearing Officer will provide what [redacted] considers to be nominal compensatory services.

representative cannot attend, the agency must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(b) Reviewing and revising IEPs.

(1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency must ensure that the parents and an agency representative--

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the IEP before those changes are implemented.

(c) Responsibility. Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

ORDER:⁹

1. DCPS shall within thirty (30) calendar days of the issuance of this Order, complete a comprehensive psychological evaluation (to include cognitive, academic and social/emotional components) and convene a multi-disciplinary team (“MDT”) meeting to review the comprehensive psychological evaluation and review and revise the student’s IEP as appropriate.
2. DCPS shall fund the following as compensatory education to the student for the missed services from May 31, 2013, until the end of SY 2012-2013: 15 hours of independent tutoring at the DCPS/OSSE approved rate.

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. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: September 23, 2013

⁹ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.