

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
March 13, 2013

[Parent], on behalf of
[Student],¹

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: March 13, 2013

Hearing Officer: Jim Mortenson

Case No: 2013-0066

HEARING OFFICER DETERMINATION

CONSENT ORDER AND DISMISSAL ORDER

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

Two prior complaints had been filed with the Respondent by the Petitioner concerning the Student in the last year.² (Cases No. 2012-0364 and 2012-0583.) Case No. 2012-0364 resulted in a Hearing Officer Determination (HOD). The issue determined in the HOD for Case No. 2012-0364 was “Is the Student entitled to an award of compensatory education due to DCPS’s failure to provide a new location of services prior to summer of 2012?” The determination was that the Student was not denied a free appropriate public education (FAPE) because the Respondent had

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

² These are not the only complaints filed against the Respondent by the Petitioner.

put in place measures to address the Student's behavior at the school he arrived at in 2012, which were initially successful. When those measures were no longer successful the Respondent agreed to send the Student to a full-time private special education day school "where he will have an opportunity to receive the academic and behavioral support he needs to thrive." Because there was no denial of FAPE, no compensatory education was awarded and the case dismissed with prejudice. Case No. 2012-0583 resulted in a settlement agreement.

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) on February 7, 2013. The Respondent filed a motion to dismiss on February 14, 2013. A prehearing conference was held on February 22, 2013 and a Prehearing Order was issued on that date. The prehearing on February 22, 2013, resulted in a denial of the Respondent's motion to dismiss. The Respondent's argument for dismissal was based on the settlement agreement between the parties which, according to the Respondent, deprived the Undersigned of jurisdiction over the complaint. Because the settlement agreement was a contract between the parties and no authority to enforce a contract between the parties has been provided to special education hearing officers under District of Columbia law, the Parties were advised the settlement agreement would not be enforced in this tribunal, for either side. *See, e.g. Letter to Shaw*, 50 IDELR 78 (OSEP 2007).

Even though the parties had a settlement agreement (that was not enforceable by this tribunal) one of the two issues arose after the settlement and was not affected by it. The issue was identified for hearing as: "Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose or provide the Student an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the IEP, revised January 25, 2013, lacks appropriate measurable post-secondary goals based on age-appropriate transition assessments?"

A second issue could not be clarified by the IHO and the Petitioner was granted leave to amend the complaint. The Petitioner's stated issue was: "DCPS Failed to Issue an Appropriate IEP/Placement/Site Location/Setting School during the 2011-2012 school year and for the 2012-2013 school year, which created a right to compensatory education from the time of the HOD dated 7/26/2012 until the student started at _____ and a new IEP was created on 1/25/2013." This issue, as stated, was not consistent with the facts alleged in the complaint. For example, the facts alleged the Student was most recently placed at _____ not

Furthermore, it was not clear whether the issue had already been litigated and determined. It also was not clear whether the Petitioner's problem was with the Student's IEP, placement, site/location, setting school, and what those terms meant to the Petitioner. Because the matter was not clarified, despite discussion at the February 22, 2013, prehearing conference, the Petitioner was granted leave to amend the complaint. Specifically, the Petitioner was ordered to "clearly describe the problem that either denied the Student a FAPE or why his placement was not appropriate (as the alleged case may be)."

The amended complaint was filed on February 28, 2013, another response and motion to dismiss was filed on March 5, 2013 (effectively identical to the prior response and motion), and an opposition to the motion was filed on March 8, 2013.³ The issue was stated in the amended complaint as: "DCPS Failed to Issue an Appropriate IEP or Placement from May 14, 2012 until January 25, 2013, which created a right to compensatory education from the time of the May 14, 2012 complaint until the student started at Foundations Academy, on October 9, 2012 and a new IEP was created on January 15, 2013." Some alleged facts were added to the complaint, but there was not clarification of what the problem was that either denied the Student a FAPE or why his placement was not appropriate.

³ The certificate of service states the opposition was filed on February 19, 2013. This is not accurate.

Another prehearing was held on March 12, 2013. The Undersigned expressed concern that it was still not clear what the Petitioner believed denied her child a FAPE or what the disagreement with placement was, given that she agreed to placement at _____ and was not seeking to change that and wanted only compensatory education, which had already been denied by another IHO. Petitioner argued that because the Student was placed at Foundations, his placement prior to that was not appropriate, and that because his IEP had been revised in January 2013, the IEP prior to that revision was not appropriate, and therefore the Student was entitled to compensatory education. The Respondent continued to argue the matter was resolved in the September 28, 2012, settlement agreement (which it was, but the Undersigned had already informed the parties that I did not have authority to enforce that contract).

The parties then reached an agreement to resolve Issue #1, and the Undersigned advised the parties that Issue #2 would be dismissed.

This HOD is based on the consent of the parties and the pleadings, motions, and HOD in case #2012-0364.

ISSUE #1

Consent Order

The parties entered into an agreement on the first issue: Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to proposed or provide the Student an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the IEP, revised January 25, 2013, lacks appropriate measurable post-secondary goals based on age-appropriate transition assessments? The agreement is as follows:

1. The Respondent will, within 30 school days, convene an IEP team meeting to discuss the Petitioner's concerns regarding the IEP and vocational level 1 and 2 transition assessments that the Petitioner claims should ensue.
2. The Petitioner agrees the issue will be dismissed with prejudice.
3. The IHO will issue a consent decree memorializing the agreement of the parties.

Because the parties reached agreement on the resolution of the issue, including requesting the agreement be memorialized in a consent decree, the issue is resolved and dismissed with prejudice. The specific, enforceable order appears near the end of this document.

ISSUE #2

Dismissed

The issue about placement and request for compensatory education has already been litigated and cannot proceed. The legal theory of issue preclusion (collateral estoppel) provides that when the following three elements are met an issue is precluded from being re-litigated in the same forum: 1) identity of issue in a prior case; 2) full litigation of issue in a prior case; and 3) necessity of resolution of the issue to the decision in the prior case. *United States v. Andrews*, 479 F.3d 894, 900 (D.C.Cir. 2007).

The Petitioner's issue here is that the Student is entitled to compensatory education because her placement or IEP (prior to January 2013) was not appropriate.⁴ (It is still not clear how the placement or IEP were not appropriate.) She claims the issue is different from the prior case because it involves a different period of time. This is not the case. The Petitioner had argued in the previous hearing (Case No. 2012-0364) that compensatory education was warranted "on the

⁴ "[P]lacement' refers to the provision of special education services, rather than a specific place, such as a specific classroom or specific school." 71 Fed. Reg. 46630 (August 14, 2006). The IEP lists the special education services to be provided to a student with a disability. 34 C.F.R. § 300.320.

ground that DCPS denied Student a FAPE by providing him with an inappropriate placement/location of services (“school”) from the time of his March 29, 2012 MDT meeting forward, because at the time of the meeting it was apparent that Student required a more structured and therapeutic school.”⁵ The HOD of July 26, 2012, stated that there was no denial of FAPE because the Respondent had determined to send the Student to a full-time special education day school (which the Petitioner wanted and agreed to) where the Student would have the opportunity to thrive.⁶ (There were some subsequent problems with implementing the agreement, which resulted in another complaint and a settlement on September 28, 2012, Case No. 2012-0583.)⁷ The subsequent IEP to complain about, according to the complaint and prior HOD, was the IEP revised on January 15, 2013.⁸ (The issue concerning this IEP was permitted to proceed, and the parties settled it, as stated herein.) The prior HOD dealt with the March 29, 2012 IEP and the period of time which included the end of the 2011-2012 school year (see FF # 10 & #11) and specifically addressed the Student’s placement for the current school year.⁹ It had been agreed that the Student would be placed at a full-time special education day school for the current school year.¹⁰ The Student was placed at Foundations, based on a subsequently mutually agreed upon settlement (Case No. 2012-0583), and the IEP had been revised in January 2013.¹¹ Because the Respondent made FAPE available, including its proposal to send the Student to the private school, no compensatory education was warranted.¹²

The same issue of placement and/or the IEP (it was the same IEP) that was the issue in Case 2012-0364 was raised in the present case. That issue had been fully litigated and it was

⁵ #2012-0364 HOD.

⁶ #2012-0364 HOD.

⁷ Complaint, February 7, 2013, Response and Motion to Dismiss, February 22, 2013.

⁸ #2012-0364 HOD, Complaint, February 7, 2013 & Amended February 28, 2013.

⁹ #2012-0364 HOD.

¹⁰ #2012-0364 HOD.

¹¹ #2012-0364 HOD, Complaint, February 7, 2013 & Amended February 28, 2013, Response and Motion to Dismiss, February 22, 2013, amended Response and Motion to Dismiss, March 5, 2013.

¹² #2012-0364 HOD.

determined that FAPE had not been denied the Student, and no remedy was warranted, specifically no compensatory education, because the Respondent had resolved the problem by agreeing to place the Student in a full-time special education day school, where the Student is currently. To permit the Petitioner to proceed to hearing on the issue of compensatory education for the same IEP and period litigated and determined in the prior HOD is unwarranted under the theory of issue preclusion.

ORDER

- 1) Issue #1, concerning the IEP revised in January 2013, is resolved by the consent of the parties as follows:
 - a. The Respondent will, within 30 school days of the date of this order, convene the Student's IEP team to discuss the Petitioner's concerns regarding the IEP and vocational level 1 and 2 transition assessments that the Petitioner claims should ensue.
 - b. The complaint issue is dismissed with prejudice and will not proceed to hearing.
- 2) Issue #2, concerning the claim for compensatory education, is dismissed with prejudice, as it has already been litigated and determined.

IT IS SO ORDERED.

Date: March 13, 2013



Jim Mortenson, Independent Hearing Officer

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 USC §1415(i).