

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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OSSE
Student Hearing Office
October 22, 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>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: October 10, 2013</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 October 10, 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 in ninth grade and resides in the District of Columbia with his parent. The student is a child with a disability pursuant to IDEA with a classification of emotional disability (“ED”). The student’s current IEP prescribes all services outside general education. The student was attending a full-time out of general education program at a DCPS middle school (“School A”) during school year (“SY”) 2012-2013. Petitioner asserts that School A fully implemented the student’s IEP and Petitioner was satisfied it was an appropriate location of services for the student.

For SY 2013-2014 DCPS assigned the student to attend a program at a DCPS high school (“School B”). Petitioner asserts that the program at School B is not a comparable therapeutic program as the student attended at School A and the School B program cannot appropriately implement the student’s IEP. Petitioner believes there are no therapeutic services including behavioral techs at School B and the student is actually in a general education classroom at least some of the day.

Petitioner filed the due process complaint on August 7, 2013, challenging the appropriateness of the student’s assignment to School B. Petitioner seeks as relief public funding of a private full-time special education program and compensatory education for the period the student has allegedly been in an inappropriate placement/location of services.

DCPS filed a timely response to the complaint on August 12, 2013. DCPS asserted that the student’s placement at School B is appropriate and the program located there to which the student is assigned can implement his IEP with fidelity.

A resolution meeting was held in August 21, 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 September 7, 2013, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on October 21, 2013.

A pre-hearing conference was held on September 17, 2013, and a pre-hearing conference order was issued October 3, 2013, outlining, inter alia, the issue to be adjudicated.

THE ISSUE ADJUDICATED:²

Whether DCPS denied the student a free and appropriate public education (“FAPE”) by failing to provide him an appropriate location of services at School B that can implement his IEP for SY 2013-2014.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1-22 and Respondent’s Exhibits 1-5) that were admitted into the record and are listed in Appendix A. If any documents were not admitted into the record it is so noted in Exhibit A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:³

1. The student is in ninth grade and resides in the District of Columbia with his parent. The student is a child with a disability pursuant to IDEA with a classification of ED. The student’s current IEP dated November 16, 2012, prescribes all services outside general education: 26.5 hours of specialized instruction per week and 240 minutes of behavioral support services per month. The IEP states with regard to supplement supports: “[the student] requires small therapeutic setting in a self contained classroom at [School A] ED program.” (Parent’s testimony, Petitioner’s Exhibit 7-1, 7-10).
2. The student was attending a full-time out of general education program at School A during SY 2012-2013 that fully implemented his November 16, 2012, IEP and Petitioner was satisfied that it was appropriate location of services for the student. Before School A the student attended another DCPS middle school for SY 2011-2012 where his behaviors were often problematic. While attending School A during SY 2012-2013 the student was successful academically and behaviorally. On rare occasion the student’s parent got a telephone call from School B regarding the student’s behavior. (Parent’s testimony, Witness 4’s testimony)
3. DCPS assigned the student to attend a program at School B for SY 2012-2013. The student attends a special education program housed at School B and only special education students participate with the student in that program. The student’s classes are outside general education and taught by special education

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may 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 this was the issue(s) to be adjudicated.

³ 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.

teachers. Each class has one special education teacher, an instructional aide, 3 to 7 other students at any given time, and in most cases a behavioral technician. School B has a roving behavioral technician who spends time in all the program classrooms and is on call as needed. Behavior supports exist for the student both in and outside the classroom at School B. (Witness 4's testimony, Witness 5's testimony)

4. Students in the School B program are able to receive Carnegie units through a blended learning approach, where they are taught by special education certified teachers, and content certification is provided via the PLATO computer system. The classroom mixes individual instruction with computerized reinforcement. (Witness 4's testimony, Witness 5's testimony)
5. School B's current principal was the principal of School A during SY 2012-2013 when the student attended School A. The program the student attended at School A is comparable to the program the student attends at School B except School B has more staff equipped to deal with students with behavioral concerns. (Witness 4's testimony)
6. The student's progress thus far at School B illustrates that he is attending class consistently, that he has had no behavioral incidents in the classroom that were of any significance and his teachers report he is doing well in class. (Witness 5's testimony, Respondent's Exhibits 2, 3, 5)
7. Early after the student began attending School B there was one incident when the student ran out of school upset by another student's behavior. The incident was resolved. The parent met two of the student's teachers at School B the middle of September 2013. The teachers indicated the student was struggling at beginning of the school year but has begun to do better. The parent could not point to any on going academic or behavioral difficulties since the student has been attending School B. However, the parent is seeking better communication with the school regarding the student's progress. (Parent's testimony)
8. The student was admitted to attend Accotink Academy ("Accotink") and Petitioner seeks to have the student placed there with public funding. Accotink is a full time therapeutic day program for students of various disability classifications from 1st to 12th grade. Accotink currently has 104 students, 72 of whom are funded by the District of Columbia. Accotink holds an OSSE certificate of approval and can provide the student specialized instruction, behavioral supports and therapeutic services outlined in his current IEP. It has certified special education teachers and related service providers and its tuition and related services rates are consistent with OSSE guidelines. (Witness 1's testimony)
9. The parent's educational consultant proposed a compensatory education program to compensate the student for the alleged denials of FAPE that allegedly included

the student not being in an appropriate placement location of services for SY 2013-2014. (Witness' 2's testimony, Petitioner's Exhibit 22)

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 a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of a 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; (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.⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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 5-3030.34. 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) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

⁴ 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.

Issue: Whether DCPS denied the student a FAPE by failing to provide him an appropriate location of services at School B that can implement his IEP for SY 2013-2014.

Conclusion: The evidence does not support a finding that DCPS failed to provide the student an appropriate placement/location of services for SY 2013-2014 or that School B cannot implement the student's IEP. Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

Congress passed the IDEA 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." 20 U.S.C. §1400(d)(1)(A). The IDEA provides funding to assist states in implementing a "comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families." 20 U.S.C. §1400(d)(2).

Under the IDEA, all states, including the District of Columbia, receiving federal education assistance must establish policies and procedures to ensure that "[a] free appropriate public education [FAPE] is available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A).

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F.Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1.

"The IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

The placement and program for each disabled student must be reasonably calculated to confer educational benefit. See *Board of Education of the Hendrick Hudson Central School District Westchester County et al, v. Rowley*, 458 U.S. 276, 102 S.Ct. 3034(1982) Furthermore the parent is a necessary participant in the placement decision for a disabled student under the IDEA and courts have held that failing to include representatives from the proposed placement denied the parent s meaningful participation in the placement decision. See *Werner ex rel Werner v. Clarkstown Central School District*, 43 IDELR 59 (S.D.N.Y. 2005).

Petitioner did not provide sufficient evidence that countered the credible testimony of DCPS witnesses who testified that the School B program to which the student is assigned

can implement his IEP and is comparable to the program he attended at School A which Petitioner acknowledged was appropriate.

Petitioner failed to prove that the move from School A to School B was a change in educational placement. Petitioner's original contention in the complaint was that program at School B was fundamentally different from the full-time, self-contained program at School A because School B supposedly did not have behavioral technicians and because the student receives some of his classes in the general education setting. However, the evidence demonstrates that School B is a program that can implement the student's IEP and is comparable to the program the student attended at School A.

Petitioner's educational advocate challenged School B's appropriateness in his testimony, but his testimony was not credible in this instance on the appropriateness of School B. He had not attended any IEP meetings for the student at School B, had not observed the student in class at School B and has not spoken to any of his teachers at School B. He testified he has found nothing to indicate that the student is doing poorly during SY 2013-14.

The parent in her testimony could not definitely state that she had any clear evidence that the student was not doing well at School B. She has received no phone calls about any behavioral incidents in the classroom and that she has no reason to believe anything other than that the student is succeeding at School B.

The preponderance of evidence from this hearing demonstrates that there is no significant difference between the student's programs at School A and the School B and points to a student who was successful last school year and who had continued that success at School B in SY 2013-2014.

ORDER:

The claims raised in the due process complaint are hereby dismissed with prejudice and all requested relief is denied.

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: October 21, 2013