District of Columbia

Office of the State Superintendent of Education

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OSSE
STUDENT HEARING OFFICE
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Confidential

PARENT OF STUDENT[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent. Case # 2012-0472	HEARING OFFICER'S DETERMINATION Hearing Date: September 5, 2012 Representatives: Counsel for Petitioner: Donovan Anderson, Esq. 2041 Martin Luther King, Jr. Avenue, S.E. Washington, D.C. 20020 Counsel for DCPS: William Jaffe, Esq. Assistant Attorney General 1200 First Street, NW Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

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 on September 5, 2012, at the OSSE Student Hearing Office, 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in grade attending a District of Columbia Public Schools ("DCPS") middle school, hereinafter referred to as "School A." The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of other health impairment. ("OHI") based on her condition of Attention Deficit Hyperactivity Disorder ("ADHD").

During the 2011-2012 school year ("SY") the student attended another DCPS middle school, hereinafter referred to as "School B." The student was attending a full time special education program at School B principally for students with the disability classification of emotional disturbance ("ED").

In March 2012 DCPS conducted a comprehensive psychological evaluation that DCPS reviewed at an individualized educational program ("IEP") meeting on May 10, 2012. At the IEP meeting DCPS staff agreed that based on the evaluation School B was not an appropriate educational placement for the student and determined she should attend her neighborhood DCPS middle school, School A, for SY 2012-2013. The student's IEP was not changed at the May 10, 2012, meeting. The student's IEP prescribes that she be provided 31 hours of specialized instruction per week out of general education and one hour per week of behavioral support services also out of general education.

The student's parent disagreed with the student's placement at School A and on July 3, 2012, through counsel filed a due process complaint alleging DCPS failed to propose an appropriate educational placement that could implement the student's IEP to wit provide 31 hours of specialized instruction per week outside general education. Petitioner seeks as relief that the Hearing Officer order DCPS to fund the student's attendance at a private special education day school, for SY 2012-2013.

DCPS filed a response to the complaint on July 12, 2012, asserting School A is able to implement the student's IEP and is an appropriate educational placement.

The parties held a resolution meeting on July 25, 2012. The meeting was unsuccessful in resolving the issues. The parties expressed a desire to allow the full 30-day resolution period to expire before the 45-day timeline began. Thus, the 45-day period began on August 3, 2012, and ends (and the HOD is due) on September 16, 2012.

A pre-hearing conference was conducted on August 15, 2012, at which the issues to be adjudicated were discussed and determined. On August 20, 2012, the Hearing Officer issued a pre-hearing order outlining the issues to be adjudicated. The pre-hearing order states and the parties stipulated that the IEP was not at issue and not being challenged.[2]

ISSUES: [3]

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational placement/location of services at School A for SY 2012-2013 because School A cannot implement full time (31 hours per week) special education services in an out of general education setting.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-5 and DCPS Exhibit 1-5) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:

1. The student is age in grade attending a DCPS middle school, School A. The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of OHI based on her condition of ADHD. (Petitioner's Exhibits 1-1, 1-10, 2-2)

2. During SY 2011-2012 the student attended a different DCPS middle school, School B. The student was attending a full time special education program at School B principally for students with the disability classification of ED. (Petitioner's Exhibit 1-1)

3. In March 2012 DCPS conducted a comprehensive psychological evaluation of the student as a result of a parental request. The student's cognitive abilities were measured to be average with a full-scale IQ score of 100. On academic achievement assessments the student scored in the low average range in reading with a composite score of 88 and

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[2]At the hearing DCPS counsel attempted to raise an additional defense that DCPS erred by not reducing the number of hours of specialized instruction from 31 per week to 27.5 to match the number of hours that can be provided at School A and that the difference in hours between 31 and 27.5 was deminimus. DCPS counsel had ample time when it drafted its response and at the pre-hearing conference to assert such a defense and that defense was not asserted at either stage. Consequently, the Hearing Officer stated that it would be unfair surprise to allow this defense to be raised at such a late stage.

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

average in math with a composite score of 92. Her writing composite score was in the low range at 75. Based upon review of the student's school records, psychological assessments, teacher interviews and classroom observations, the evaluator concluded the student did not meet the criteria of emotional disturbance. The evaluator, however, stated that the student's continued eligibility under the OHI classification needed to be considered by an IEP team. (Parent's testimony, Petitioner's Exhibit 2-1, 2-9, 2-10, 2-11, 2-12, 2-17)

4. At an IEP meeting on May 10, 2012, DCPS reviewed the March 2012 comprehensive psychological evaluation. At the IEP meeting DCPS staff agreed that based on the evaluation the student continued to be eligible and remained in need of specialized instruction in the areas of reading, math and written expression. The DCPS psychologist and other DCPS personnel expressed the opinion that the student should not be in an ED program. The team concluded School B was not an appropriate educational placement for the student. The DCPS members of the team determined the student should attend her neighborhood DCPS middle school, School A, for SY 2012-2013. The parent disagreed with the student's placement at School A and filed the current due process complaint on July 3, 2012. (Petitioner's Exhibit 1-8, 1-10, 1-11)

5. The student's IEP was not changed at the May 10, 2012, meeting. The IEP team did not amend the student's IEP or reduce the number of hours of special education services. The student's IEP prescribes that she be provided 31 hours of specialized instruction per week out of general education and 1 hour per week of behavioral support services also out of general education. (Respondent's Exhibit 1-6, 1-7, Petitioner's Exhibit 1-10, 1-11)

6. The student displayed behavioral difficulties both at school and at home during SY 2011-2012. However, the student's parent believes the student is functioning on grade level academically but her behavior has interfered with her academic performance. At the May 10, 2012, IEP meeting the School B special education coordinator informed the parent that the hours in the student's IEP did not need to be changed. Although the student's parent disagreed with the student's placement at School A she enrolled her at School A. The student's parent talked with the special education coordinator at School A and was told that School A could not provide 31 hours of specialized instruction but could only implement 27.5 hours per week out of general education. She was also told by the coordinator the student would be in a classroom with students of various ages and various disability classifications including specific learning disability ("SLD"), intellectually deficient ("ID") and ED. (Parent's testimony)

7. On August 27, 2012, School A's principal responded by email to the parent's attorney's email in which the principal described the program(s) and services that are available at School A. The principal stated in the email the following about School A: "We have a self-contained non-categorical group that has not reached capacity, for which full-time IEPs can be serviced. Additionally, we have a social worker who can provide the stated behavioral support of 60 minutes per week. The concern with the student's IEP is the number of hours she is supposed to receive, 31 hrs a week. Because the school day is from 8:45 – 3:15, we cannot provide 31 hours/week when the school day only permits

27.5 hrs/week." At the hearing School A principal stated that when she sent the email to the parent's attorney she calculated the number of hours that can be delivered based on the general education schedule and did not know how many hours the self contained programs could implement until after she talked to School A's special education coordinator. testimony, Petitioner's Exhibit 4)

8. The student's parent and her attorney met with the School A special education coordinator prior to the student enrolling at School A and she told them that School A does not have a classroom that can provide 31 hours of specialized instruction per week but School A could provide 27.5 hours of specialized instruction and behavioral support services. testimony)

9. School A's special education coordinator interprets the student's current IEP as requiring the student be in a separate program with no interaction with non-disabled peers. There are three such separate programs at school A for Autism, ID classifications. Those programs could implement the hours in the student's IEP because students are in school 32.5 hours per week. All educational services are provided in a special education classroom. The students in these programs do not associate with the non-disabled peers; they eat lunch and have recess separately from any other students in the school building. The coordinator stated that she was not aware that the student had been assigned any School A programs or classroom. School A's special education coordinator stated that the student would be placed in the ID classroom until School A can review the student's IEP and educational placement within 30 days of her enrollment. testimony)

10. Upon being told the student's most recent academic functioning scores the coordinator expressed the opinion that the student should not be in School A's ID program, but she stated that she would defer to an IEP team to make that final determination. There are 18 students currently in School A's ID program and most of them are functioning 3 to 5 years below grade level. testimony)

11. If School A staff determines the student functions at a significantly higher level than other students in the ID program the team would review the hours in her IEP and determine whether she would be provided inclusion services with general education students or remain in a separate program. The school psychologist and social worker would first need to observe the student in the classroom. If School A cannot implement the IEP an IEP meeting would be held to make that determination and then a recommendation would be made by DCPS for another placement. (Ms. Lawrence's testimony, testimony)

12. The student started attending School A on August 30, 2012. Based upon what the student has told the parent, the parent believes the student sits in the same classroom all day and is with ID students the entire day. The parent is concerned that the student has been placed in a classroom with other students who are operating at significantly lower cognitive and/or academic levels than the student. (Parent's testimony)

13. School A's principal stated during the hearing that the student is currently in the "non-categorical" self -contained classroom. The classroom has one certified teacher and an educational aide. School A's principal acknowledged that students in the non-categorical classroom are at a lower academic functioning level than the student but the principal was not sure how much lower. School A can provide the student differentiated instruction to match her academic level if prior to a 30 day review it is found that she is functioning at a higher level that other students in the classroom. However, the principal asserted that School A can provide the 31 hours of specialized instruction in the student's IEP and the school has an on-site social worker to provide the one hour of behavioral support services. testimony)

14. The student has been accepted at is a private full time special education day school located in Prince George's County, Maryland. provides services only to special education students with various disability classifications. High Road has 68 students enrolled including 35 DCPS students. Every student is working toward a high school diploma. has certified special education teachers and certified related services providers. School staff also includes licensed clinical social workers. is on OSSE's list of approved schools. annual tuition cost is Related services are billed at per hour. testimony, Petitioner's Exhibit 12)

15. The admissions director interviewed the student and met with the student's parent. The admissions director reviewed the student's evaluations and IEP and has determined the school can implement the student's IEP and provide her appropriate services. has concluded the student is functioning at an average level in reading and math and writing is her lowest area. The school will develop an individual program for her for that level. The classroom that has been identified for the student currently has five students with one teacher and one assistant. The students in the class are on similar functioning cognitive and academic functioning levels as the student. Students arrive at for six hours and 40 minutes each day for a total of approximately 33 hours and 33 minutes per week. Students arrive at 8:00 am and are in school until 2:40 p.m. Students are in instructional classes the entire school day including lunch. school can provide the student 31 hours of specialized instruction per week. (Ms. Mercer's testimony, Petitioner's Exhibit 12)

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.

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.

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

To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

Issue: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational placement/location of services at School A for SY 2012-2013 because School A cannot implement full time (31 hours per week) special education services in an out of general education setting.

Conclusion: The evidence demonstrates that DCPS can provide the student 31 hours of special education services (specialized instruction) in an out of general education setting at School A. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also *Scott v. District of Columbia*, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

20 U.S.C. 1414(a)(i) defines IEP as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes

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[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.

measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

A student's placement is to be in the least restrictive environment and ***in a school that is capable of meeting the student's special education needs***. See Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C.§ 1402 (9) (D) ("FREE APPROPRIATE PUBLIC EDUCATION- The term 'free appropriate public education' means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved" [and] "are provided in conformity with the individualized education program"); § 1401 (29) (D) ("The term 'special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .]."); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student's IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5E § 3013.1-7 (LEA to ensure that child's placement is based on the IEP); and D.C. Mun. Regs. Tit. 5E § 3000.

A school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley, 458 U.S. at 198-99.* Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley, 458 U.S. at 203.*

Pursuant to D.C. Code § 38-2561.02 (c)

> Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:
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> (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
> (2) Private or residential District of Columbia facilities; and
> (3) Facilities outside of the District of Columbia.

Although the District must pay for private school placement "[i]f no suitable public school is available[,] ... if there is an appropriate public school program available ... the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (citations and quotations omitted).

The sole issue in this case is whether School A can implement 31 hours per week of specialized instruction in an out of general education setting. It is clear from the evidence that prior to the hearing School A's special education coordinator and principal communicated to the parent and her attorney that School A could only provide 27.5 hours per week of specialized instruction. That position changed as of the due process hearing.

The Hearing Officer considers it odd that School A's principal and special education coordinator expressed that School A could only provide 27.5 hours of specialized instruction because of the length of the school day. The school day is 32.5 hours week (8:45 am to 3:15 pm five days per week) and the student's IEP services amount to 32 total hours. It is possible, although perhaps not probable given some time is used for lunch and recess, that the IEP services could be delivered to the student within this time frame.

However, testimony during the hearing about the number of hours that can be provided in the School A self-contained programs was credible. Her testimony was forthright and without hesitation. credibility that the program can provide these hours was bolstered by her testimony that her interpretation of the student's IEP requires the student to be in a self-contained program where the student has no interaction with non-disabled peers. She testified that School A has three such programs or classrooms. Albeit she opined that based on the student's recent academic scores none of the programs would be appropriate.

The evidence demonstrates from both the parent's testimony and that of the special education coordinator that student may be in a program with other students who are significantly lower in academic functioning than the student. Although, the DCPS witnesses stated that the student's placement would be reviewed within 30 days, there is no guarantee that this will occur. Thus, the Hearing Officer concludes that the student's placement in the School A program should be conducted immediately. The Hearing Officer points out that the May 10, 2012, IEP team determined the student was in an inappropriate educational placement at School B and the reason she was moved to School A.

Given Ms. Lawrence's testimony that with the student's current academic functioning she would not recommend the student be placed in any of the self-contained programs at School A, the Hearing Officer concludes that it will be detrimental to the student to remain in that placement without an immediate review of its appropriateness for SY 2012-2013.

Exactly how the 31 hours of specialized instruction will be provided at School A was unclear. For instance there was no testimony that school day would be lengthened to accommodate the student's current IEP. However, it seems possible that rather than lengthen the student's school day School A staff might merely amend the student's IEP to reduce the hours to meet the 27.5 hours as was intimated by DCPS' counsel's attempted but late defense that the difference in hours between 31 and 27.5 is deminimus and/or there was an error by DCPS in not reducing the hours. It would certainly be inequitable for DCPS to simply be allowed to change the student's IEP at this juncture and in response to this litigation. Therefore, the Hearing Officer will direct that in the IEP meeting that is being ordered below DCPS is restricted from reducing the hours of specialized instruction in the student's IEP from 31 hours.

ORDER:

1. DCPS shall within ten (10) school days of the issuance of this Order convene an IEP/placement meeting for the student and review the student's current evaluative data, including social and emotional and academic functioning and performance, and determine the appropriateness of the student's current placement at School A and whether that program can effectively implement the student's current IEP and provide appropriate programming and services.

2. DCPS is restricted in the IEP/placement review that is ordered by this HOD from reducing the hours of specialized instruction in the student's IEP from 31 hours.

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 16, 2012