

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
810 First Street, N.E., Suite 2001
Washington, DC 20002

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Office of Dispute Resolution
January 9, 2015

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Date Issued: January 9, 2015</p> <p>Impartial Hearing Officer: Charles M. Carron</p>
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The Student is female, Current Age, and attends a public school (the “Attending School”). The Student has been determined to be eligible for special education and related services as a child with a disability, initially Intellectual Disability (“ID”) and subsequently Emotional Disturbance (“ED”), under the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

In the instant case, Petitioner, the Student's Parent, claimed that Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to conduct timely and thorough evaluations of her disabilities, by failing timely to identify her as having ED as well as ID, by failing to place her in a so-called full time therapeutic setting, and by failing to include in her Individualized Education Program ("IEP") goals and sufficient services to address her attendance issues and short term goals for her transition to work or independent living after high school, as described in more detail in Section IV *infra*.

Respondent, District of Columbia Public Schools ("DCPS") asserted that the Student's evaluations and IEPs, including placement, were appropriate, that the Student was responsible for any delays, and that the Student was not harmed by any delays.

II. SUBJECT MATTER JURISDICTION

This is a Due Process Complaint ("DPC") proceeding pursuant to the IDEA.

The Due Process Hearing ("DPH") was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029 and E3030. This decision constitutes the Hearing Officer Determination ("HOD") pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Office of Dispute Resolution Due Process Hearing Standard Operating Procedures*.

III. PROCEDURAL HISTORY

On February 25, 2013, Petitioner filed a DPC against Respondent. Hearing Officer Kimm Massey was appointed to adjudicate the DPC, which was assigned Case Number 2013-0104.

Petitioner's DPC in Case No. 2013-0104 asserted that Respondent (a) failed to identify the Student as a child with ED, (b) failed to provide the Student with sufficient

behavioral supports and/or a functional behavioral assessment (“FBA”) and behavior intervention plan (“BIP”), (c) failed to conduct a comprehensive reevaluation of the Student in December 2012, (d) failed to hold a Manifestation Determination Review and/or conduct an updated FBA and BIP following the Student’s long-term suspension on or about February 17, 2012, (e) failed to provide the Student with an appropriate IEP and/or placement on or about December 5, 2012, and (f) failed to provide Petitioner access to all of the Student’s records.

On May 12, 2013, Hearing Officer Massey issued her HOD in Case No. 2013-0104, ordering Respondent, *inter alia*, (a) to convene an IEP meeting within ten school days of issuance of the Order, to revise the Student’s IEP to include 25 hours per week of specialized instruction; (b) to conduct a clinical assessment of the Student within 15 school days of issuance of the Order, sufficient to determine whether the Student should be classified as ED, and if so, what services and supports she required to address her social/emotional needs; and (c) within 15 school days of receipt of the Student’s clinical assessment report, to convene a Multidisciplinary Team meeting to review the report and if appropriate, to revise the Student’s IEP and discuss and determine placement.

Hearing Officer Massey’s May 12, 2013 HOD denied Petitioner’s request for compensatory education as premature.

On August 19, 2013, Petitioner filed another DPC against Respondent. Hearing Officer Melanie Byrd Chisholm was appointed to adjudicate that DPC, which was assigned Case Number 2013-0474.

The issues in the August 19, 2013 DPC were as follows:

Parent contends that the student has been denied a FAPE as a result of the following:

1. District of Columbia Public Schools (“DCPS”) failed to authorize an independent evaluation as requested by the parent.

2. District of Columbia Public Schools (“DCPS”) failed to comply with the May 12, 2013 Hearing Officer Determination (HOD) issued on behalf of this student by failing to timely complete evaluations and reconvene the MDT.

With regard to the first issue, the DPC in Case No. 2013-0474 (at 3, para. 6) challenged the psychological evaluation of the Student that had been conducted on June 17, 2013 on the following grounds:

The parent disagreed with the psychological evaluation conducted by DCPS in that the information was not coherent, there were numerous inconsistencies and inaccuracies through-out the report and the evaluation doesn’t clearly answer the [Impartial Hearing Officer’s] questions about the student’s emotional issues.

On September 26, 2013, Petitioner filed a Motion for Leave to Withdraw Without Prejudice the DPC in Case No. 2013-0474.

On October 7, 2013, Hearing Officer Chisholm issued her Order of Withdrawal, stating, in relevant part, as follows:

The Hearing Officer concludes that it is equitable to dismiss the issues in the Complaint with prejudice however reserve any claim for compensatory education.

Therefore, it is hereby ORDERED:

1. The matter is dismissed **with** prejudice.
2. Any claim to compensatory education related to the delay caused by the issues in the matter are dismissed **without** prejudice.

On October 31, 2014, Petitioner filed the DPC against Respondent in the instant case.

On November 4, 2014, the undersigned was appointed as the Impartial Hearing Officer.

A Resolution Meeting was held on November 6, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on November 30, 2014.

The 45-day timeline for this HOD started to run on December 1, 2014 and will conclude on January 14, 2015.

On November 10, 2014 Respondent filed its timely Response, stating, *inter alia*, that Respondent has not denied the Student a FAPE.

The undersigned held a Prehearing Conference (“PHC”) by telephone on November 19, 2014, at which the parties discussed and clarified the issues and the requested relief.

At the PHC, the undersigned struck from the DPC Petitioner’s challenge to the content of the Student’s June 17, 2013 psychological evaluation because that matter had been dismissed with prejudice by Hearing Officer Chisholm in Case No. 2013-0474.

At the PHC, the parties agreed that five-day disclosures would be filed by December 31, 2014 and that the DPH would be held on January 8 and 9, 2015. Petitioner elected for the hearing to be closed.

The undersigned issued a Prehearing Conference Summary and Order (“PHO”) on November 20, 2014.

On November 21, 2014, Petitioner filed a motion to reinstate a requested remedy that the undersigned had struck at the PHC. The undersigned granted the motion by Order issued December 1, 2014.

On December 20, 2014, the undersigned issued an Amendment to Prehearing Conference Summary and Order.

On December 22, 2014 Petitioner filed his five-day disclosures, comprising a cover letter with lists of witnesses and documents, and 41 proposed exhibits numbered P-1 through P-41.

On December 29, 2014, Respondent filed its five-day disclosures, comprising a cover letter with lists of witnesses and documents, and 20 proposed exhibits numbered R-1 through R-20.

No other pre-hearing motions were filed by either party.

IV. ISSUES

As confirmed at the PHC and in the PHO, the following issues were presented for determination at the DPH:

(a) Did Respondent deny the Student a FAPE because the Student's IEP developed on or about December 5, 2012 failed to place her in a full-time therapeutic setting for children with ED and ID?

(b) Did Respondent deny the Student a FAPE because the psychological evaluation conducted pursuant to the HOD in Case No. 2013-0104 was not conducted until a month after that HOD, and was not provided to Petitioner's counsel until more than a month after it was conducted?

(c) Did Respondent deny the Student a FAPE because the Student's IEP Team was not convened to discuss the June 17, 2013 psychological evaluation until September 27, 2013?

(d) Did Respondent deny the student a FAPE because the Student's IEP developed on or about December 2, 2013 lacked goals to address her attendance issues and/or because it failed to place her in a full-time therapeutic setting for children with ED and ID?

(e) Since September 5, 2014, has Respondent denied the student a FAPE by failing to evaluate her in all areas of suspected disability, specifically by failing to respond to Petitioner's request for an Occupational Therapy ("OT") evaluation and/or by failing to conduct an OT evaluation?

(f) Did Respondent deny the student a FAPE because the Student's IEP developed on or about October 7, 2014 (i) does not identify the Student as

Multiple Disability (“MD”) based upon ED and ID, (ii) does not include placement in a full time special education day school that can address both her ED and ID, (iii) lacks short term transition goals, (iv) provides insufficient hours of service for transition, and/or (v) does not give the Student the opportunity to earn a high school diploma?

V. RELIEF REQUESTED

Petitioner requested the following relief:²

- (a) a finding that Respondent denied the Student a FAPE;
- (b) an Order that Respondent revise the Student’s IEP to update her transition plan, include goals relating to attendance issues, and place her in a full time special education day school for children with both ID and ED;
- (c) an Order that, within thirty days of the issuance of the HOD, Respondent conduct an OT evaluation and reconvene the Student’s IEP Team or Multidisciplinary Team (“MDT”) ³ to review the results;
- (e) compensatory education in the form of 152 hours of academic tutoring, 52 hours of mentorship, and a Vocational Level II assessment; and
- (f) an Order that Respondent place and fund the Student’s attendance at Non-Public School, with transportation.

² In the DPC, Petitioner also requested attorney’s fees and costs, which the undersigned struck because only a court can award such relief.

³ Typically, a Student’s evaluation for special education eligibility is determined by an MDT, and the Student’s IEP is developed or revised by an IEP Team. In practice, the parties often use the terms interchangeably.

VI. THE DUE PROCESS HEARING

At the scheduled 9:30 a.m. starting time of the DPH on January 8, 2015, Petitioner was not present at the hearing location, Office of Dispute Resolution, 810 First Street, NE, Room 2006, Washington, DC 20002.

The undersigned convened the DPH at 10:05 a.m.

Respondent's counsel made an oral motion for dismissal based upon Petitioner's failure to prosecute.

Petitioner's counsel recited her efforts to contact Petitioner and noted that public transportation was disrupted due to extreme weather.

The undersigned recessed the DPH until 10:30 a.m. to allow Petitioner's counsel additional opportunity to contact Petitioner, and additional time for Petitioner to appear.

On the record, Petitioner's counsel related that she had learned that Petitioner had not returned home last evening, and that an emergency situation may have occurred.

Petitioner's counsel made an oral motion for a continuance.

The undersigned noted on the record that it was then 10:40 a.m., and even if an emergency had occurred, Petitioner had sufficient time to get word to his counsel.

In view of the fact that Respondent's counsel were present for the DPH, the witnesses were prepared and scheduled, and the reason for Petitioner's failure to appear was not known (and therefore no good cause for a last minute continuance was shown), the undersigned denied the motion for continuance.

Petitioner sought dismissal without prejudice; Respondent sought dismissal with prejudice.

The DPH was adjourned at 10:45 a.m.

VII. DISCUSSION

Four of the issues in the instant case (*see*, Section IV (a), (c), (d) and (e), *supra*) had not been raised in a prior DPC. Accordingly, those issues will be dismissed without prejudice. Thus, regardless of the reason for Petitioner's failure to appear at the DPH on January 8, 2015, Petitioner may file a new DPC reasserting those four issues.

The remaining two issues in the instant case (*see*, Section IV (b) and (c), *supra*) had been raised and dismissed, albeit without prejudice, in Case No. 2013-0474. Those two issues will be dismissed with prejudice because it would be unfair for Respondent to have to defend those issues a third time.

Pursuant to the doctrine of *functus officio*, upon issuance of this HOD, the undersigned no longer has jurisdiction over this matter. The undersigned cannot entertain a motion for reconsideration. Accordingly, if it should turn out that Petitioner had an emergency that not only prevented his presence at the DPH, but prevented him from contacting his counsel or having someone do that on his behalf, Petitioner's recourse to reassert the issues dismissed with prejudice herein will be to appeal this HOD to a court of competent jurisdiction.

VIII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. The following issues⁴ in Petitioner's DPC dated October 31, 2014 are *dismissed with prejudice*:

⁴ The original lettering of the issues is used to avoid confusion.

(b) Did Respondent deny the Student a FAPE because the psychological evaluation conducted pursuant to the HOD in Case No. 2013-0104 was not conducted until a month after that HOD, and was not provided to Petitioner's counsel until more than a month after it was conducted?

(c) Did Respondent deny the Student a FAPE because the Student's IEP Team was not convened to discuss the June 17, 2013 psychological evaluation until September 27, 2013?

2. The following issues in Petitioner's DPC dated October 31, 2014 are *dismissed without prejudice*:

(a) Did Respondent deny the Student a FAPE because the Student's IEP developed on or about December 5, 2012 failed to place her in a full-time therapeutic setting for children with ED and ID?

(d) Did Respondent deny the student a FAPE because the Student's IEP developed on or about December 2, 2013 lacked goals to address her attendance issues and/or because it failed to place her in a full-time therapeutic setting for children with ED and ID?

(e) Since September 5, 2014, has Respondent denied the student a FAPE by failing to evaluate her in all areas of suspected disability, specifically by failing to respond to Petitioner's request for an Occupational Therapy ("OT") evaluation and/or by failing to conduct an OT evaluation?

(f) Did Respondent deny the student a FAPE because the Student's IEP developed on or about October 7, 2014 (i) does not identify the Student as

Multiple Disability (“MD”) based upon ED and ID, (ii) does not include placement in a full time special education day school that can address both her ED and ID, (iii) lacks short term transition goals, (iv) provides insufficient hours of service for transition, and/or (v) does not give the Student the opportunity to earn a high school diploma?

IT IS SO ORDERED.

Dated this ninth day of January, 2015.



Charles M. Carron
Impartial Hearing Officer

IX. NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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).