

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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Confidential

STUDENT ¹ , by and through his Parent Petitioners, v. District of Columbia Public Schools (DCPS) Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Dates: April 30, 2009 May 11, 2009 <u>Representatives:</u> Counsel for Petitioners: Michael J. Eig, Esq. 5454 Wisconsin Avenue Suite 760 Chevy Chase, MD 20815 Counsel for DCPS: Daniel McCall, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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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* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened April 29, 2009, and concluded on May 11, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on February 25, 2009, alleging the issue(s) outlined below. The student by and through his father.

Petitioner alleged DCPS denied the student a Free and Appropriate Public Education (FAPE) by failing to fund and monitor his placement at School B in both the 2006-07 and 2007-08 school years, after allegedly placing the student there on April 3, 2006, through a settlement agreement and subsequent Prior Notice. Petitioner also alleged DCPS denied the student a FAPE by failing to offer him any educational services for the 2008-09 school year. At the start of the 2008-09 school year the parent placed the student in his current school, School A, where he remains in attendance as of the date of the due process hearing.

At the April 1, 2009, pre-hearing telephone conference, the Hearing Officer requested briefing from the parties on the following legal issue: Under the settlement agreement and the IDEA, did DCPS have a duty to fund and monitor the student's placement at School B? If so, has DCPS breached that duty?

DCPS counsel filed a notice of insufficiency and alleged the complaint did not meet the requirements of 20 U.S.C. 1415(b)(7) and 34 C.F.R. 300.508 specifically it not provide a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem. The Hearing Officer concluded the complaint met the requirements of 34 C.F.R. 300.508 and the matter proceeded to hearing.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-42 and DCPS Witness List) which were admitted into the record unless noted in the attached Appendix A.

ISSUE(S): ²

Did DCPS deny the student a free and appropriate public education by failing to honor the settlement agreement governing the student's placement and reimburse for the student's educational placement in the 2006-07, 2007-08 and the 2008-09 school years?

FINDINGS OF FACT ³:

1. The student is a -year-old student who is currently attending School A, a private school located in Potomac Maryland, where the student has attended since the start of the 2008-09 school year. Prior to attending School A, the student attended the School B for three school years 2005-06, 2006-07 and 2008-09. (Parent's testimony)
2. Prior to attending School B the student attended School C, a private full time special education school located in the District of Columbia, where his tuition was funded by DCPS. The student first started attending School B when he was in the first grade and six years old. (Parent's testimony, Petitioner's Exhibit 2)
3. The student has been diagnosed with Asperger Syndrome and Developmental Delay and has been determined eligible to receive special education and related services under IDEA. (Parent's testimony, Petitioner's Exhibit 2 & 10)
4. The student had a DCPS individualized education program (IEP) while attending School C which prescribed specialized instruction and related services. (Parent's testimony, Petitioner's Exhibit 2)
5. On February 16, 2006, Petitioner filed a due process complaint against DCPS. DCPS entered into a settlement agreement (dated March 2, 2006) with the parent settling the due process complaint. Under the settlement agreement the parent agreed to withdraw the complaint and DCPS agreed to place and fund the student at School B for the 2005-06 school year, with all related services specified in the due process complaint. The settlement agreement was executed by Petitioner's counsel on March 6, 2006. (Petitioner's Exhibit 7)

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

6. On April 3, 2006, DCPS issued a Prior Notice documenting the student's change of placement from the student's DCPS home school (at the time) to School B. (Petitioner's Exhibit 8)
7. The settlement agreement also stated that the parent represented the student was "a resident of the District of Columbia, has established residency, and has been registered as attending or non-attending at his/her local school." (Petitioner's Exhibit 8)
8. On July 28, 2006, the parent completed a DCPS Residency Verification form and submitted it to DCPS. (Petitioner's Exhibit 9)
9. The parent had funded the student's tuition at School B for the 2005-06 school year and DCPS reimbursed the parent for the tuition payment. It was not until after the end of that school year that DCPS reimbursed the parent for tuition for the 2005-06 school year. (Parent's testimony, Petitioner's Exhibit 15)
10. The parent annually reconfirmed the student's status as a resident of the District of Columbia and reconfirmed the student's enrollment at the School B for the 2006-07 and 2007-08 school years at the top of the DCPS Residency Verification form. (Parent's testimony, Petitioner's Exhibits 12)
11. For the two subsequent school years, 2006-2007 and 2007-2008, the student continued in his placement at School B. The parent thought that he was doing what was required of him with respect to the student's special education placement and to obtain DCPS funding and/or reimbursement for the student's tuition at School B. (Parent's testimony)
12. During the time the student attended School B no one from DCPS ever met or observed the student at School B, nor did anyone contact the school to keep abreast of his progress. DCPS made no efforts to develop an IEP during his years at School B. There were no new evaluations and testing for the student. (Parent's testimony)
13. At the start of the 2008-09 school year the parent initiated the change of placement for the student from School B to School A. The parent completed and submitted the DCPS Residency Verification form on August 8, 2008, and indicated at the top of the form that the student was attending School A. (Parent's testimony, Petitioner's Exhibit 16)
14. Following the initial reimbursement of tuition for the 2005-06 school year at School B other than filing out the residency verification forms the parent did not request reimbursement for the student's tuition at School B until July 16, 2008, when the parent's counsel wrote DPCS requesting reimbursement for the student's tuition at School B for the 2006-07 and 2007-08 school years. (Petitioner's Exhibit 15)
15. DCPS did not provide the requested reimbursement and Petitioner filed the current due process complaint seeking reimbursement for the tuition for School B for the 2006-07 and 2007-08 school years and reimbursement for the tuition at School A for the 2008-09 school year. (Parent's testimony, Petitioner's Exhibit 1)

16. School A is not certified by the State of Maryland as a special education school but provides some degree of specialized instruction and currently has several funded students attending. (Ms. Ein's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §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 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁴ 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.

Did DCPS deny the student a free and appropriate public education by failing to honor the settlement agreement governing the student's placement and reimburse for the student's education placement in the 2006-07, 2007-08 and the 2008-09 school years? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the DCPS failed to fund (or reimburse the parent for) the student's tuition at School B for the 2006-07 and 2007-08 school years.

The parent had every reason to believe that School B was the ongoing placement and that DCPS understood that to be the case. DCPS itself formally placed the student at School B in its Prior Notice. Never having received notice that the DCPS designated placement was anything other than School B, the parent was legally and logically entitled to rely upon the Prior Notice in his understanding that School B continued to be the student's IDEA placement. There was no evidence of waiver of stay put protection, it was also reasonable for the parent to believe that, unless he heard otherwise from DCPS, School B would continue to be the designated funded placement.

Because DCPS did not reimburse the parent for tuition for the 2004-2005 and 2005-2006 school years until after the end of the 2005-2006 year, the parents had no reason to expect tuition reimbursement for the 2006-07 school year until after the end of that school year, which clearly falls inside the scope of the IDEA two-year statute of limitations. Consequently, DCPS is being ordered to reimburse Petitioner the student's tuition at School B for school years 2006-07 and 2007-08.

⁴ 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

However, the Hearing Officer concludes DCPS is not obligated to reimburse the parent for the student's tuition at School A as it is was a unilateral placement by the parent. The parent did not contact DCPS to seek the reimbursement apparently until reimbursement was sought through the filing of the due process complaint.

The United States Supreme Court has established the following two-part test to determine whether a state has met the requirements of IDEAL "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to received educational benefits?" *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176, 206-07 (1982). The Supreme Court has also determined that the school district is not required to maximize or provide the best program, rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit her to benefit from the instruction. *Id* at 188. The Petitioner in this matter has received the basic floor of opportunity guaranteed by the IDEIA, and all relief should be denied.

The unilateral placement of a student in a private placement is done at the parent's risk. The parent must prove that the IEP offered is not appropriate, and that the private placement requested is appropriate based upon the standard of "otherwise proper" which is a lesser standard than FAPE. *Florence County School District Four v. Shannon Carter b/n/f Emory D. Carter*, 510 U.S. 7, 15 (1993). ("Moreover, parents who, like Shannon's, "unilaterally change their child's placement during the pendency of review proceedings, without the consent of the state or local school officials, do so at their own financial risk.") *Burlington*, *supra*, at 373-374. They are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA, and that the private school placement was proper under the Act.")

ORDER:

1. DCPS shall reimburse the parent for the student's tuition at School B for the 2006-07 and 2007-08 school years after submission to DCPS of receipt(s) of payment.
2. DCPS shall, within fifteen (15) business days of the issuance of this Order, convene a multidisciplinary team (MDT) meeting to review the student's eligibility, individualized educational program and determine and offer the student an appropriate placement for the remainder of the 2008-09 school year and for the 2009-10 school year.
3. The MDT meeting shall be scheduled through counsel for the student and parent.
4. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

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. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: May 21, 2009