

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
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OSSE
Student Hearing Office
July 02, 2013

Confidential

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| <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>Case #</p> | <p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: June 18, 2013</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Carolyn Houck, Esq. Connecticut Avenue, N.W. Suite 163 Washington, D.C. 20015</p> <p>Counsel for DCPS: District of Columbia Assistant Attorney General Justin Douds, Esq. 1200 First Street, NW Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p> |
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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* (“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 June 18, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ and has been determined eligible for special education with disability classification of multiple disabilities including emotional disability and other health impairment. The student is currently placed at a residential treatment center (“School A”) outside the District of Columbia. The student has been at School A since October 26, 2011.

The student’s current individualized educational program (“IEP”), was last reviewed and updated on August 16, 2012, and prescribes all services be provided in a residential setting due to her extreme behaviors and her need for counseling.

On March 27, 2013, DCPS convened a multi-disciplinary team (“MDT”)/IEP meeting with purpose of addressing the student’s parent traveling to School A to participate in regular family therapy with the student and School A staff. Petitioner alleges that although a DCPS representative attended the meeting that person was filling in for someone else and stated she did not have authority to make the anticipated amendment to the student’s IEP to include family therapy which would have provided for the parent to travel out of state to School A once per month.

On April 17, 2013, Petitioner filed this due process complaint alleging DCPS failed to convene a valid MDT/IEP meeting on March 27, 2013, with necessary personnel and failed to develop an appropriate IEP with the necessary family therapy added to the IEP.

Petitioner seeks as relief an order directing DCPS to amend the student’s IEP to include monthly family therapy once in person and once via video-conference, and funding of the parent’s transportation to School A for monthly therapy and the facilities/equipment for monthly video conferencing.

On April 25, 2013, DCPS filed a timely response to the complaint and denied all alleged denials of a FAPE to the student and specifically stated that there was agreement for an initial parental visit but no agreement by DCPS or an IEP team to monthly parental visits. DCPS stated that it was willing to convene a MDT/IEP meeting to address the request for family therapy to be added to the student’s IEP.

A resolution meeting was convened on May 2, 2013. The resolution meeting was not successful in resolving the disputes. The parties did not agree to waive the remainder of the resolution period. Thus, the 45-day timeline began to run on May 17, 2013, and ends, and the Hearing Officer's Determination ("HOD") is due, on July 1, 2013. A pre-hearing conference was held on May 30, 2013, and a pre-hearing conference order was issued June 4, 2013, outlining, inter alia, the issue to be adjudicated.

ISSUE: ²

The issue adjudicated is:

Whether DCPS denied the student a free and appropriate public education ("FAPE") by (1) failing to convene a valid MDT/IEP meeting on March 27, 2013, with the proper DCPS personnel authorized to amend the student's IEP to include monthly family therapy and/or by (2) not amending the student's IEP on that date to include the family therapy.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-15 and DCPS Exhibit 1-7) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: ³

1. The student is age _____ and has been determined eligible for special education with disability classification of multiple disabilities including emotional disability and other health impairment. The student is currently placed at School A, a residential treatment center outside the District of Columbia. The student has been at School A since October 26, 2011. (Petitioner's Exhibits 4-1, 5-1)
2. The student's current IEP was last reviewed and updated on August 16, 2012, and prescribes all services be provided in a residential setting due the level of her behavior and her need for counseling. (Petitioner's Exhibit 5-8)

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) in the pre-hearing conference order at the outset of the hearing and the parties agreed that these were 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.

3. The student has a history of violent and abusive behaviors at school and home and as result was placed in residential psychiatric treatment. Prior to her placement at School A, the student was placed in another residential placement for seventh months and it was determined that the placement was not appropriate for her. (Parent's testimony)
4. The parent now talks with the student at School A by telephone twice per week and the last time the student was able to visit home was July 2012. School A has not approved the student to come home since then. (Parent's testimony)
5. In July 2012 School A drafted a letter that recommended that that student not be discharged from School A as she was not yet meeting her treatment goals. The letter noted that family therapy had been limited due to the student's refusal to participate. "[the student] stated that she does not want to return home and that she would rather go to a step down facility or a group home... [the student's] mother has stated that ... she too was concerned about [the student] returning home because she continues to display the problematic behaviors and threats while at the facility. Mom would like to have additional training to know how to handle these behaviors and what to do it they would occur once she came home." (Petitioner's Exhibit 4-1)
6. The July 2012 School A letter states that its treatment plan for the student is focused on decreasing three targeted behaviors: aggressive behaviors, self-injurious behaviors and oppositional defiant behaviors. The letter goes on to state that when the student meets her goals of displaying a significant decrease in these targeted behaviors as well as a substantial increase in her appropriate replacement behaviors and meets her therapeutic goals of interacting more and discussing issues in her past it is the recommendation of School A that the student be discharged "to a step down facility closer to home so she can continue to take her medication as prescribed as well and continue to work with a Board Certified Behavior Analyst to generalize and master her replacement behaviors in multiple settings and with multiple people including in her home during home visits. In addition, we recommend that she work with a licensed mental health counselor in individual and family therapy sessions so she can continue to explore various feeling as well as make a healthier transition for final reunification with her mother." (Petitioner's Exhibit 4-1, 4-2)
7. The parent visited the student at School A in December 2013. The parent did not consider it a successful visit because the student wanted to spend time with people at School A and not the parent. (Parent's testimony)
8. The student's therapist at School A who worked with the student from the start of SY 2012-2013 until April or May 2013, recommended monthly family therapy once by video conference and once in person to successfully transition the student from School A back home to reunite with her parent. The student's School A team agreed with the recommendation and it has been discussed during some monthly treatment plan meetings. (Parent's testimony)

9. The DCPS program monitor assigned to School A and to the student's case has been monitoring the student at School A for about a year and has participated in some of the School A monthly treatment team meetings for the student. These monthly meetings are not IEP meetings but meetings of the student's School A team to discuss the student's progress. (Witness 2's testimony)
10. On February 19, 2013, School A conducted a monthly treatment team meeting for the student. Along with School A staff, the parent and her attorney and the DCPS placement monitor assigned to School A (Witness 2) participated in the meeting by telephone. This was the first time since DCPS took responsibility for the student's placement at School A that family therapy was proposed and it was done so by the parent's attorney near the end of the meeting. (Parent's testimony)
11. Following the February 2013 meeting there was a request from the parent's attorney to DCPS to have the family therapy services placed on the student's IEP. There were emails back and forth between the attorney and the placement monitor about scheduling a meeting. The placement monitor discussed the request before hand with the School A director and as a result she was prepared to authorize one parent visit to gather data and determine what would be accomplished with the family therapy and parental visits. (Witness 2's testimony)
12. DCPS scheduled a MDT/IEP meeting for March 27, 2013, for the School A staff, the parent and her attorney to discuss the request for parent travel for family therapy. The day of the meeting the placement monitor had an emergency and could not attend the scheduled meeting and requested that a colleague attend in her stead and informed the parent's attorney by email. (Witness 2's testimony)
13. The March 27, 2013, email to the parent's attorney on the day of the scheduled meeting stated: "On March 20th the [School A] team agreed to make themselves available to participate in the MDT meeting at 12:45 today. Here is the conference line number that was provided:[xxxxxxx]. Please call into this number to participate. Unfortunately, I will not be present, however, my colleague [Witness 1] will be participating on my behalf. As a reminder and for clarity, this meeting is to have a more in depth discussion about your request for travel after which DCPS will provide a response to the request. You can follow up with me directly at a later time if necessary. (Respondent's Exhibit 3-2)
14. Prior to the March 27, 2013, meeting, the assigned progress monitor informed her colleague who was going to attend the meeting in her stead (Witness 1) that the meeting was for the purpose of discussing and approving travel for the parent to School A. (Witness 1's testimony)
15. Another DCPS program monitor, (Witness 1), participated in the March 27, 2013, MDT meeting on DCPS' behalf. She is also a program monitor in DCPS' non-public unit on the residential placement team. Her general responsibilities include participating in IEP meetings and she is usually the only DCPS representative in the IEP/MDT meetings for

her assigned students and in those meetings she has authority to revise students' IEPs. (Witness 1's testimony)

16. The parent's attorney stated at the beginning of the March 27, 2013, meeting that the meeting was an IEP meeting. However, the placement monitor explained that family therapy and parental travel were not going to be added to the IEP but she would approve a visit for family therapy to acquire data to determine if therapy would be added. Once the visit was made another meeting would be convened. She did not say that DCPS would not add the therapy to the IEP. She was clear during the March 27, 2013, meeting that the initial visit should include family therapy while the parent was at School A. The placement monitor did not say during the meeting that she did not have authority to approve the therapy on the IEP. (Witness 1's testimony)
17. During the meeting the student's School A therapist stated that family therapy needed to occur and stated that the therapy needed to go on the IEP that day. The only recommendation came from the therapist. One other School A staff person concurred, but no-one else spoke. The School A team did not indicate that it was a unanimous decision of the School A staff for the IEP to be amended. (Witness 1's testimony)
18. The placement monitor informed the parent during the meeting to that the DCPS travel coordinator would be contacting her. The parent was a little unsure and asked about the duration of the initial visit. The placement monitor told her she would hear from the DCPS travel coordinator and the details of the trip would be made then, but she was not sure at that time whether the trip would be for a single day or more. (Witness 1's testimony)
19. When the parent has traveled to School A in the past the flight takes two and half hours. The parent does not believe that the family therapy and parent training can be accomplished on a single day of travel to and from School A, as School A is a 45 minute ride from the airport once she arrives at School A's local airport. (Parent's testimony)
20. The parent believed the March 27, 2013, MDT meeting was to be an IEP meeting for DCPS to put the parent visits and teleconferencing on the student's IEP. Once the meeting started the placement monitor told her that this was not an IEP meeting but she came with authorization for DCPS to agree to a parent visit to first determine that the therapy was necessary. Since the March 27, 2013, meeting the student has continually been asking the parent when is she coming but no visit has yet been confirmed. (Parent's testimony)
21. Since the March 27, 2013, meeting no one from DCPS has communicated with the parent about agreeing to the ongoing family therapy only about the one time visit to School A. The parent does not believe that another visit to School A without therapy would be productive and in her opinion any visit should include the family therapy. (Parent's testimony)

22. The student's parent believes the ultimate goal of the student returning home and functioning in a regular school and home environment is not possible until there is parent training and parent visits and sufficient preparation for the student to return home. (Parent's testimony)

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. 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). 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) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a free and appropriate public education ("FAPE") by (1) failing to convene a valid MDT/IEP meeting on March 27, 2013, with the proper DCPS personnel authorized to amend the student's IEP to include monthly family therapy and/or by (2) not amending the student's IEP on that date to include the family therapy.

Conclusion: Petitioner did not sustain the burden or proof by a preponderance of the evidence that DCPS failed to convene a valid MDT/IEP meeting with the necessary personnel or that the

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.

student's IEP is inappropriate because DCPS did not add family therapy to the student's IEP at the March 27, 2013, meeting.

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

Schaefer v. Weast, 554 F.3d 470 (U.S. App. 2009)

“The court is required to focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

Blackmon v Springfield R-XII Sch. Dist., 198 F.3d 648, at 653 (8th Cir. 1999)

Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit.

Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’ ” *Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207); see also *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (IEP viewed “as a snapshot, not a retrospective”).

34 C.F.R. §300.321 (a) in pertinent parent states:

The public agency must ensure that the IEP Team for each child with a disability includes--

- (1) The parents of the child;
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who--
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (ii) Is knowledgeable about the general education curriculum; and
 - (iii) Is knowledgeable about the availability of resources of the public agency.

As to the validity of the IEP team, Petitioner failed to present sufficient evidence that the DCPS representative did have authority on behalf of the LEA to commit its resources. The placement

monitor who attended the meeting clearly had DCPS authority offered the one time parental travel so as to gauge the success and to discuss amendment of the IEP at a subsequent meeting after the parent visit and therapy had occurred.⁵ The fact that she did comply with the parent's request or her attorney's request is insufficient proof that her participation in meeting rather than the usual School A placement monitor rendered the IEP/MDT meeting invalid.

The Hearing Officer found Witness 1 and Witness 2 credible. They were forthright, unhesitant and consistent in their testimony. Consequently, the Hearing Officer concludes that Petitioner failed to meet the burden of proof on this aspect of the issue.

The evidence⁶ in this case demonstrates that the parent and her attorney as well as the student's School A therapist expected that DCPS would at the March 27, 2013, meeting approve a change in the student's IEP to add family therapy and regular parental travel. However, the evidence also clearly indicates that it was not DCPS' intention that at the March 27, 2013, meeting the therapy would be finalized and the IEP be so amended. The email sent prior to the meeting by the placement monitor indicated that and the placement monitor who participated in the meeting, who has authority to amend DCPS students' IEPs, was prepared to only offer a single visit and did so at the meeting.⁷ This offers was quite reasonable given the evidence in the notes that the family therapy had limited effect in the past.⁸ It was more than reasonable for DCPS to agree to a single visit to gauge the success of any therapy and to outline goals for a future meeting before the IEP was amended.

Petitioner presented insufficient evidence that the student's current IEP without the family therapy is inappropriate. The treatment letter indicated that the reunification with the parent is a goal⁹ and the parent testified¹⁰ that the School A team believes that the family therapy should resume. However, there is a huge difference between a stated recommendation by members of a team for a service to be included in an IEP and the presentation of sufficient evidence and proof that the IEP, without the recommended service is inappropriate. The parent was Petitioner's sole witness and her testimony although heartfelt was insufficient to demonstrate that the student's IEP as it exists without the therapy is inappropriate and not reasonably calculated to enable the student to receive educational benefit. Petitioner did not present a witness to attest to the inappropriateness of the IEP and failed to meet the burden of persuasion as to the both aspects of the issue adjudicated

⁵ FOF #s 15, 16, 17, 18

⁶ Finding of Fact ("FOF") # 20

⁷ FOF #s 13, 14, 15, 16

⁸ FOF #s 5, 7

⁹ FOF # 6

¹⁰ FOF # 8

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: July 1, 2013