

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
November 12, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: November 12, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by the failure of Respondent District of Columbia Public Schools (DCPS) to ensure that PUBLIC CHARTER SCHOOL 1 (PCS-1) developed an Individualized Education Plan (IEP) for Student for the 2013-2014 school year, by

¹ Personal identification information is provided in Appendix A.

the failure of PCS-1 to include Mother in an IEP meeting in January 2014 and by the failure of PCS-1 to afford Mother access to Student's education records.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on September 4, 2014, named DCPS as Respondent. The parties met for a resolution session on September 18, 2014 and did not reach an agreement. On September 30, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on October 5, 2014.

The due process hearing was held before this Impartial Hearing Officer on October 29, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Petitioner testified and called as witnesses, Student, EDUCATIONAL ADVOCATE 1, EDUCATIONAL ADVOCATE 2 and LEGAL ASSISTANT. DCPS called as witnesses CASE MANAGER and SPECIAL EDUCATION COORDINATOR. Petitioner's Exhibits P-3 through P-22 were admitted into evidence, including Exhibits P-5, P-8 through P-12 and P-22, which were admitted over DCPS' objections. Exhibit P-1 and P-2 were not offered. Respondent's Exhibits R-1 through R-9 were admitted into evidence without objection. Counsel for both parties made closing arguments. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the September 30, 2014

Prehearing Order:

- Whether DCPS has denied Student a FAPE by failing to afford the parent access to Student’s education records for the 2012-2013 and 2013-2014 school years;
- Whether DCPS denied Student a FAPE by failing to convene and/or failing to include the parent in an IEP annual review meeting for Student in the 2013-2014 school year;
- Whether DCPS denied Student a FAPE by failing to develop and implement an appropriate IEP for him during the 2013-2014 school year.²

For relief, Petitioner seeks an order requiring DCPS to provide the parent and her attorney with copies of the entirety of Student’s education records including MDT meeting notes, IEPs, disciplinary records, attendance records, assessments, DC CAS reports, IEP service logs and IEP goals/progress reports and transcripts for the 2012-2013 and 2013-2014 school years. Petitioner also seeks an award of compensatory education for the denials of FAPE alleged in the complaint.

² At the time the due process complaint was filed, Petitioner believed, erroneously, that PCS-1 had not developed an IEP for Student during the 2013-2014 school year. PCS-1 did, in fact, develop a revised IEP for Student at a January 30, 2014 IEP annual review meeting. Subsequent to filing her due process complaint on September 4, 2014, Petitioner became aware that Student’s IEP team had developed the January 30, 2014 IEP. However, Petitioner did not seek to amend her complaint to allege that the January 30, 2014 IEP was deficient. Therefore, at the due process hearing on October 29, 2014, I sustained DCPS’ objection to Petitioner’s offering evidence on whether the January 30, 2014 IEP was inappropriate for Student.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE youth, resides with Mother in the District of Columbia. Testimony of Mother. Student is a "child with a disability" as defined by the IDEA and is eligible for special education and related services under the primary disability classification Emotional Disturbance (ED). Exhibit P-5.
2. Student is currently enrolled in GRADE at PUBLIC CHARTER SCHOOL 2 (PCS-2). For the 2012-2013 and 2013-2014 school years, Student was enrolled in PCS-1. Testimony of Mother. PCS-1 is a District of Columbia Public Charter School and DCPS serves as its local education agency (LEA). See 5E DCMR § 923.3. Hearing Officer Notice.
3. Student's IEP team at PCS-1 developed a revised IEP for Student on February 6, 2013. Mother attended the February 6, 2013 IEP meeting. The February 6, 2013 IEP provided Student 10 hours per week of Specialized Instruction outside general education, two hours per month of Occupational Therapy and one hour per week of Behavioral Support Services. Exhibit P-7.
4. Student's final grades for the 2012-2013 school year were 1 A-, 1 B+, 2 B's, 3 B-'s, and 2 C+'s. His final GPA was 2.84. Exhibit P-20.
5. In October 2013, Mother first received notice of a January 2014 IEP annual review meeting for Student. Testimony of Mother. On January 28, 2014, PCS-1 sent Mother a Letter of Invitation (LOI) for an IEP annual review meeting on January 30, 2014. Exhibit R-3. Mother responded that she would attend by telephone and provided her office telephone number as the contact number. Testimony of Mother. At

the beginning of the IEP meeting on January 30, 2014, the IEP team made a couple of attempts to reach Mother by telephone, but Mother did not answer. Testimony of Case Manager. At the time, Mother was at her desk and waiting for the call. Testimony of Mother. When the IEP team was unable to reach Mother, the team went ahead with the IEP meeting without Mother or any other parent representative. Testimony of Case Manager. Student attended the beginning of the meeting to discuss his post-secondary transition goals. He was excused from the meeting after discussing his transition interests. Testimony of Student. The PCS-1 IEP team completed Student's revised IEP at the January 30, 2014 meeting. Case Manager mailed a copy of the revised IEP to Mother. Case Manager never confirmed that Mother received the IEP. Testimony of Case Manager.

6. The January 30, 2014 IEP continued, without change, the Special Education and Related Services provided in Student's prior February 6, 2013 IEP. Exhibit P-6.

7. Mother did not receive the January 30, 2014 IEP. Mother did not contact PCS-1 to request a copy of the IEP or to ask for the IEP meeting to be reconvened, although she knew that Student had attended the beginning of the IEP meeting. Testimony of Mother.

8. Late in the 2013-2014 school year, PCS-1 instituted an electronic record system to enable parents to access their child's grades and teachers' comments in "real time" via the internet. Testimony of Special Education Coordinator. Despite repeated efforts, Mother was never successful in accessing the electronic records system. The email address registered for Student's electronic records was Student's email address, not the email address used by Mother. Testimony of Mother. Mother did not

participate in parent-teacher meetings during the 2013-2014 school year. She did not receive Student's report cards during the school year. She did not go to the school to meet with staff or teachers about Student. Testimony of Mother.

9. After the end of the 2013-2014 school year, Mother decided to move Student to PCS-2. Beginning in July 2014, she sent several communications to PCS-1 requesting PCS-1 to forward Student's education file to PCS-2. On August 1, 2014, Mother went to PCS-1 to retrieve Student's records, but was not provided the records. In September 2014, PCS-2 advised Mother that it had received Student's education records. Testimony of Mother, Exhibits P-13, P-14, P-15, P-16.

10. On October 16 and 22, 2014, DCPS provided to Petitioner's Counsel a complete set of Student's education records. No education records sought by the parent have not been provided. Stipulation of Counsel.

11. Student's final grades for the 2013-2014 school year at PCS-1 were Biology - D+, English - C+, Film- C+, Geometry - F, Government - D+, Journalism - D+, Latin D+, and Performance - C-. His final Grade Point Average declined from 2.84 for the 2012-2013 school year to 1.19 for the 2013-2014 school year. Exhibit P-20.

12. Student enrolled in PCS-2 at the beginning of the 2014-2015 school year. PCS-2 convened an IEP team meeting on October 3, 2014 to update his present levels of performance, needs, impact on student, annual goals, baseline, anticipated date of achievement, evaluation procedures and areas of concern, to increase his specialized instruction hours and to revise his transition plan. Exhibit P-5. Student's Specialized Instruction was increased from 10 hours per week outside general education (January 30, 2014 IEP) to 16 hours per week outside general education (October 3, 2014 IEP). Exhibits P-5, P-6.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and the argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

1. – Did DCPS deny Student a FAPE by failing to convene, and/or by failing to include the parent in, an IEP annual review meeting for Student in the 2013-2014 school year?
 - Did DCPS deny Student a FAPE by failing to develop and implement an appropriate IEP for him during the 2013-2014 school year?

The first issues raised by Petitioner in her due process complaint, concerning whether PCS-1 failed to review and revise Student's IEP during the 2013-2014 school year, arise from the parent's mistaken belief that PCS-1 did not hold an annual IEP review meeting that school year. The IEP meeting was held, and Student's IEP was revised, on January 30, 2014. However PCS-1 held the meeting without the parent's being present. Mother had notified PCS-1 that she would attend the meeting by telephone. When the PCS-1 staff was unable to reach the parent by telephone, the IEP team held the meeting without her. Petitioner contends that proceeding with the IEP meeting, without the parent in attendance, denied Student a FAPE. Based upon the facts in this case, I disagree.

For all IEP team meetings, the IDEA expressly requires that the local education agency (LEA) take steps to ensure that the parent is present or is afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

34 CFR § 300.322(a). However, an IEP meeting may be held without the parent present if the public agency is unable to convince the parent to attend and if the agency kept a record of its attempts to arrange and agree on a mutually convenient time and place.

See Jalloh v. District of Columbia, 968 F.Supp.2d 203, 211 (D.D.C.2013) (*Jalloh 2*).

Here, PCS-1 and Mother agreed that the IEP meeting would be held on January 30, 2014 and Mother affirmed that she would attend by telephone. Therefore, I find that DCPS has shown that PCS-1 scheduled the IEP meeting at a mutually agreed on time and place.

Mother testified that on the day of the meeting, she was at her telephone and no call from the IEP team came through. However, the IEP team did try to reach the parent by telephone at the work number she had provided. For unexplained reasons, Mother did not receive the call. Whatever the cause for the telephone communication failure, Mother has not shown that PCS-1 was at fault for her not attending the meeting. Moreover, Mother knew that the IEP meeting had been held without her because Student told her that he had attended the first part of the meeting to discuss his post-secondary transition goals. Still, the parent never contacted PCS-1 to ask that the meeting be reconvened or to obtain a copy of the revised IEP.

Assuming, without finding, that PCS-1 violated the IDEA by proceeding with the

IEP team meeting when it was unable to reach Mother by telephone, this would have been a procedural violation of the Act. *See Jalloh 2, supra*. “[A procedural violation] only results in a denial of FAPE if the procedural inadequacies in question “(I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.” *Jalloh 2, supra*, citing 20 U.S.C. § 1415(f)(3)(E)(ii).

For the preceding 2012-2013 school year at PCS-1, under his February 6, 2013 IEP, Student had passed all of his courses with a C+ or higher grade. At the January 30, 2014 IEP review meeting, the IEP team maintained the same level of special education and related services from Student’s prior IEP, that is, the IEP team continued the services than had proved successful for Student in the past. *Cf. K.S. v. District of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP.) Petitioner did not allege in her complaint in this case that the January 30, 2014 IEP was substantively inappropriate. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 204, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). (“[IEP] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”) I conclude, therefore, that even if PCS-1 had violated the IEP by going forward with the January 30, 2014 IEP meeting without the parent’s being present, such procedural violation did not result in a denial of FAPE to Student. *See Jalloh 2, supra* at 212 (Upholding hearing officer’s conclusion that, given that the amount and quality of special education services did not change and the parents failed to raise any substantive concerns about the IEP, DCPS offered the student a FAPE and did not substantively

violate the IDEA.)

2. Did DCPS deny Student a FAPE by failing to afford the parent access to Student's education records for the 2012-2013 and 2013-2014 school years?

Petitioner also alleges that DCPS denied Student a FAPE by not providing the parent access to Student's education records for the school years that he attended PCS-1. Mother alleges that her right to examine Student's education records from PCS-1 was infringed upon in two respects. First she was never able to successfully access PCS-1's on-line "real time" student grades web site and, second, PCS-1 took over a month to provide copies of Student's academic records to PCS-2.

An LEA must permit parents to inspect and review any education records, that are collected, maintained, or used by the agency, with respect to the identification, evaluation, and educational placement of their child, and the provision of a FAPE to the child. *See* 34 CFR §§ 300.501 (a), 300.613(a). *See, also, Jalloh ex rel. R.H. v. District of Columbia*, 535 F.Supp.2d 13, 21 (D.D.C.2008) (*Jalloh 1*) (Parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records.) The LEA must comply with a parent's request to inspect education records without unnecessary delay and in no case more than 45 days after the request has been made. *See* 34 CFR § 300.613(a).

With respect to not being able to access PCS-1's internet site to view Student grades and teacher comments, Mother has not shown an IDEA violation. PCS-1's on-line system is a school-provided service which is not mandated by the IDEA. The school's failure to ensure that Mother was able to access the on-line service did not violate the IDEA's requirement that the LEA afford parents an opportunity to inspect and review all education records.

Nor is it clear that Mother ever made a request to “inspect and review” Student’s education records. Beginning in July 2014, after she enrolled Student in PCS-2, Mother, by letter and in person, repeatedly requested PCS-1 to provide Student’s education records to his new school. On August 1, 2014, Mother went to PCS-1 to “dis-enroll” Student. At that time, she requested copies of Student’s records to take to PCS-2. PCS-2 received the education records in September 2014. Assuming that Mother’s August 1, 2014 request for copies of the records constituted a request to inspect and review Student’s education records, the evidence does not establish that PCS-1 did not comply with the requirement of 34 CFR § 300.613(a) to provide the records within 45 days after the request had been made.

Further, failure to timely provide copies of the Student’s education records would be a procedural violation of the IDEA. As stated above, procedural violations of the IDEA do not, in themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir. 2006), citing *C.M. v. Bd. of Educ.*, 128 Fed.Appx. 876, 881 (3d Cir.2005) (*per curiam*). Petitioner made no showing that PCS-1's alleged failure to timely provide copies of Student’s education records to PCS-2, impeded Student’s right to a FAPE, significantly impeded Mother’s opportunity to participate in the decision making process, or caused a deprivation of educational benefits. *See Jalloh 2, supra*; 20 U.S.C. § 1415(f)(3)(E)(ii).³ I find, therefore, that

³ The parties stipulated at the due process hearing that in October 2014, DCPS provided a complete copy of Student’s education records to Petitioner’s Counsel.

Petitioner has not established that DCPS denied Student a FAPE by failing to ensure that the parent was afforded the opportunity to inspect and review Student's education records.

ORDER

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

All relief requested by the Petitioner herein is denied.

Date: November 12, 2014

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).