DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003
Tel: 202-698-3819
Fax: 202-442-5556

2010 APR -2 PM 3:11
OSSE STUDENT HEARING OFFICE

Confidential

on behalf of the Student
Petitioner,

v

DCPS,

Date Issued: April 2, 2010

Wanda I. Resto Torres, Hearing Officer

Case No:

Hearing Date: March 25, 2010 Room 5a

HEARING OFFICER DECISION

BACKGROUND

The Student is a year-old girl enrolled at public school, . in the grade, has a primary disability classification of Emotionally Disturbed and is eligible for special education and related services. The Student's most recent Individualized Education Plan ("IEP") is dated October 27, 2009 and provides 5 hours of Specialized Instruction in a general education setting, 30 minutes of Occupational Therapy, and 30 minutes of Behavioral Support services weekly outside the general education population.

On February 4, 2010, parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE"). The Petitioner requested *the Respondent be deemed to have denied the Student a FAPE and* as a relief.[1] The undersigned was appointed as the hearing officer on February 6, 2010.

On February 17, 2010, the DCPS asserted that the student's IEP and placement are reasonably calculated to provide educational benefit. The Respondent claimed the student is often absent and

[1] 20 U.S.C. §1415(c)(2)(B)(i)(I)

attempts to contact the parent in this regard were not fruitful. The parent has also been unavailable to attend IEP meetings to address this student's needs. The Respondent asserted the current placement and setting are reasonably calculated to provide educational benefit if the student would avail herself of the services offered. The Respondent asserted the student was provided a FAPE.

On February 25, 2010, the Petitioner filed a motion for directed finding. Attached to that motion was a court-ordered Psychoeducational evaluation.

On February 26, 2010, the Respondent filed an Opposition to Petitioner's Motion for Directed Finding; arguing that its response was sufficient and that a summary judgment was not a form of relief available in the administrative forum.

On March 9, 2010, at 3:00 PM. a pre-hearing conference call was held by the Hearing Officer with both Counsels. During that conference call, the parties agreed the Psychoeducational evaluation was provided to the school on February 24, 2010, and a multidisciplinary team ("MDT") meeting was scheduled for March 11, 2010. Petitioner's request for a directed finding was denied; the Respondent presented sufficient defenses as to maintain a genuine controversy. [2]

On March 15, 2010, the Respondent presented a Motion for Summary Judgment and alleged there was no genuine controversy because the Petitioner filed her complaint on or about February 4, 2010, alleging that the student's IEPs and placement were inappropriate without providing the Respondent an opportunity to review an evaluation. The Respondent also filed a Motion to exclude the Psychoeducational evaluation; claiming the evaluation was not reviewed by a MDT. The Respondent argued the Petitioner should be precluded from relying on the evaluation to prove that the Student's current IEP and placement are inappropriate, because it was provided to DCPS a month after the Petitioner filed her Complaint.

On March 17, 2010, the Respondent presented a Motion to exclude the testimony of Dr. Donnelly claiming it was a result of the Psychoeducational evaluation.

On March 19, 2010, the Petitioner filed a Response and Motion for Directed Verdict. The Petitioner *inter alia* argued that the Student's 2008 IEP was inappropriate and the 2009 was a "cut and paste" from another student; and that the Student has not shown progress. The Petitioner argued that there were no other evaluations disclosed by Respondent to demonstrate what was used to draft the challenged IEPs; and the evaluation disclosed by the Petitioner was the only one available for review.

On March 19, 2010; at 3:00 PM a second pre-hearing conference call was held with both Counsels. Petitioner's Motion for Directed Verdict was denied and Respondent's Motion for Summary

[2] As result of the summary judgment request being denied the Hearing Officer does not address whether it is a vehicle available in this forum.

Judgment was denied. The Petitioner signed the 2008 IEP and there is a 2009 IEP although not signed by the Petitioner. Consequently, the following issues presented in the Complaint were dismissed:

a. Failure to have a current IEP.[3]

b. Failure to include the Petitioner in the development of the 2008 IEP.[4]

The Respondent's Motion to exclude the testimony of Dr. Donnelly was granted solely for purposes of prohibiting statements about the Psychoeducational evaluation. The Respondent claimed two additional evaluations were current for the Student; and was ordered to provide copies to the Hearing Officer and the Petitioner.

On March 24, 2010, a closed due process hearing was held. Counsel for the Petitioner's was Chesseley Robinson; and for the Respondent, Laura George. The Petitioner presented documents, labeled P-1 through 7 and offered six witnesses; the Petitioner, the Student and the Special Education Coordinator from the private school testified. The Respondent objected to Petitioner's documents one through two based on duplicity; the documents were previously filed and are part of the record; the objection was sustained the documents were excluded. Petitioner's document 4 was excluded during the prehearing conference. The Respondent identified five witnesses; none testified. The Respondent offered five documents, labeled DCPS 1 through 5. The Hearing Officer received from the Respondent an Educational Evaluation - 11/28/07, and a Comprehensive Evaluation - 08/28/08, the documents were marked Hearing Officer Exhibits 1 and 2.The documents were admitted without objections except Respondent's document five, as to which the hearing officer deferred a ruling until the end of the hearing.[5] After the presentation of the Petitioner's witnesses; Counsel for the Respondent-requested a directed decision which was not granted. The Hearing Officer requested information on the implementation of the IEP from the Respondent. Counsel for the Respondent stated that the burden of proof is of the Petitioner and chose not to put forth any evidence. The Petitioner requested to be allowed to submit a written closing statement and to send a copy to the Hearing Officer by 9:00 AM on March 25, 2010; Counsel for the Respondent agreed. Both attorneys submitted their closing statements in a timely manner. The hearing was conducted in accordance with the rights established under the IDEIA and the implementing federal and local regulations, and the SOP. [6]

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[3] DCPS 1-November 6, 2009.

[4] DCPS 3 IEP - November 7, 2008.

[5] DCPS 5 -10 day letter, admitted at the end of the hearing.

[6] IDEIA and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the

ISSUES

The issues to be determined are as follows:

1. Are the goals on the student's IEP reasonably calculated to meet her individual needs?
2. Are the specialized instruction hours on the Student's IEP sufficient?
3. Was the parent denied an opportunity to participate in the IEP development process?
4. Did the Respondent provide an appropriate educational placement for the student for the 2009 2010 school year?
5. Can the Respondent provide an appropriate educational placement for the student for the 2009 2010 school year?
6. Was the Student denied a FAPE?
7. Can the school chosen by the Petitioner provide the student educational benefit?

FINDINGS OF FACT

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

a. The parties stipulated that there was an IEP dated 11/7/08 (the parent signed in participation and all team members signed) and an IEP dated 10/27/09 (signed by all team members except the parent). The MDT meeting scheduled for March 11, 2010 did not take place because of DCAS –testing.

b. The Petitioner spoke with the special education coordinator, last school year and this year, at least once a week, and IEP expiration date was mentioned but no date was set. She did not receive an invitation to an IEP meeting in October of 2009. The first time she saw the IEP document was the day before a meeting in February when the Student brought the document home. [7] The Student is in a classroom with approximately 30 other students and one teacher; she finds the class size to distracting. She receives counseling approximately once a week. She receives no help and when she asks for help she is told "...just a minute..." but that no one ever helps her. She leaves her class or does not go to

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Board of Education of the District of Columbia; 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

[7] Testimony of the Petitioner.

class because she doesn't learn anything in the classes. The Student did not receive the 5 hours of specialized instruction prescribed in her IEP.[8]

c. The Petitioner did not receive an invitation to an October 27, 2009 meeting.[9]

d. Prior to an evaluation being conducted, the Student was seen talking to herself, hearing voices, and acting out in a manner that led a clinical psychologist to refer her to the Psychiatric Institute of Washington on December 7th, 2009.[10]

e. The parent and student both testified that she is learning nothing in the classroom and since the IEP from 2008 provides no means for measuring progress on its face and the document alleged to be an IEP from 2009 is a Carbon copy of the IEP from 2008, there is no possible way to find any benefit for the student, particularly where DCPS presented no evidence otherwise.

f. The Petitioner failed to put on any evidence concerning the allegation that the student failed to make progress. The evidence showed, the student failed to attend school regularly this year and was reported to CFSA for some reason linked to this *concern*.[11] There was no credible evidence on appropriate amount of instruction hours for the Student.

g. is a full time program that provides a ratio of 8-10 students to 2 teachers. The Student would be in a class of no more than 8 students and that the age range of students would be between 12 and 15.

CONCLUSIONS OF LAW

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

The IDEIA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). [12] A free appropriate program (FAPE) means special education and related services that are provided at public expense, under public supervision, and without charge; meets the standards of the SEA, include an appropriate school; and are provide in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324. Furthermore, a free

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[8] Testimony of both the Petitioner and the Student.

[9] Testimony of the Petitioner and DCPS # 1, a letter of invitation, was accompanied by no proof of delivery and no testimony to discuss proof of delivery.

[10] Testimony of Dr. Donnelly.

[11] DCPS # 4 -Attendance record ending on March 15, 2010.

[12] *20 U.S.C. §1401(9), 34 C.F.R. §300.17, and 30 DCMR §3001.1.*

appropriate public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Bd. Of Education v. Rowley, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S.Ct.3034 (1982)*.

Burden of Proof

The burden of proof is the responsibility of the party seeking relief, in this case the parent. It requires that 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 a FAPE.[13]

The Respondent not met its legal obligation under the IDEIA. Here is why.

Individualized Education program.

The Petitioner claimed the goals on the Student's IEP were not reasonably calculated to meet her individual needs; the IEP from 2008 provides no means for measuring progress on its face and the document alleged to be an IEP from 2009 is a Carbon copy of the IEP from 2008; and she did not participate in its drafting.

The IDEIA[14] requires the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.

The Respondent as the local and state education agencies must make certain that the Student's IEP contain a statement of the student's present level of academic achievement and functional performance, 1) a statement of the student's measurable annual goals, 2) a description of how the student's progress toward meeting the annual goals will be measured, and 3) any statement of the special education needs and related services and supplementary aids for a student to advance properly toward attaining the annual goals.[15]

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[13] 5 D.C.M.R. § 3030.3.

[14] 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006).

[15] 20 U.S.C 1412 (a)(1), 1412 (a)(12)(A)(i), 1414(d)(3), (4)(B) and (7) and 1414(e).

A review of the IEP does reveal a strikingly bare document and the Respondent did not provide an explanation. The Petitioner however did not point to what the goals and objectives should have included. Counsel for the Petitioner did mention the failures during the written closing statement; however during the hearing there was no evidence provided to address the specific inappropriateness of the IEP. The Hearing Officer finds that the Petitioner proved that the IEP must be reviewed and explained in detailed inclosing measurable goals.

Parent participation in the placement decision

The Petitioner claims she was not invited to participate in the meeting to create the Student's IEP.

The IDEIA demands that each public agency must provide notice to ensure that parents of children with disabilities have the opportunity to participate in meetings. It also provides that a placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. [16] The information provided to parents must indicate the purpose, time, and location of the meeting and who will be in attendance.

The uncontroverted testimony was that the Petitioner did not receive an invitation for a meeting to discuss the Student's the 2009 IEP; the Petitioner became aware of the document when the Student brought home the document for the signature of the Petitioner. There was no evidence the Respondent invited the Petitioner to an IEP meeting in October or that it was unable to convince the guardian that she should attend an IEP meeting. In which case, the public agency must have kept a record of its attempts to arrange a mutually agreed on time and place; and the Respondent in this case did not.[17]

The LEA is required to "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate." *N.G.*, 556 F. Supp. 2d at 17; *Scorah v. District of Columbia*, 322 F. Supp. 2d 12, 14 (D.D.C. 2004)*18*

Specialized Instruction

The Petitioner alleged the Student does not receive specialized instruction. The uncontroverted testimony was the Student has one teacher and she asks for help and does not obtain any; and the only

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[16] 20 U.S.C. 1415(a)§§ 1414(e),1415(b)(1)), and 34 C.F.R. §§300.322(a)(1) and (b)(1), and 501.
[17] 34 C.F.R. §§ 300.322, and 328 (d).
[18] 20 U.S.C. §§1414(f), 1415(b)(1)). 34 C.F.R. § 300.322.

other services she receives is 30 minutes weekly of counseling. The Respondents have pointed to no evidence in the record contradicting the Petitioner's and the Student's testimonies.

Special education is defined as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. The FAPE requirement is satisfied when the State provides personalized instruction that is rational calculated to permit the child to benefit educationally. [19] To comply with the statute, DCPS must provide reasonable accommodations for the Student. These accommodations can include an adjusted workload, simplified instructions, modified testing procedures, and extended time. In the present case there was no evidence that any accommodation was made. The evidence was the Student is not receiving the five hours of specialized instruction as prescribed on her IEP.

Educational Placement

The IDEIA requires the Respondent once a student is eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.[20]

When determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. It also states that the determination of the educational placement of a child with a disability should be done annually and must be based on a child's IEP.[21]

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education and related services.[22]

The uncontroverted testimony was that the Petitioner did not receive an invitation for a meeting to discuss the Student's the 2009 program or the goals; the Student is in a classroom with approximately 30 other students, has one teacher and no evidence that her unique needs are being addressed. That

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[19] 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, and 30 DCMR § 3001.1.
[20] 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006).
[21] 20 U.S.C. 1412(a)(5), and 34 C.F.R.§ 300.116.
[22] 34 C.F.R. 300.320(a)(1), 34 C.F.R. 300.3209(a)(2), and 34 C.F.R. 300.320(a)(4).

evidence however failed to show that the Student requires a full time placement or that the Respondent cannot provide an appropriate educational placement for the Student for the 2009 2010 school year.

The Petitioner failed to provide evidence on what an appropriate placement for the Student. It is premature to allow the placement chosen by the Petitioner - – which is not the least restrictive environment for this Student and there was no evidence that it can provide the Student an educational benefit.

Furthermore, the Petitioner did not provide the Respondent an opportunity to review current evaluation so that the MDT could identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education and related services prior to claiming the Student's current placement is inappropriate.

The Respondent has denied the Student a FAPE, it will convene a MDT to review the IEP, discuss and describe how the specialized instruction will be integrated into the Student's placement.

ORDER

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

ORDERED, DCPS shall convene a MDT/IEP by April 20, 2010 with the appropriate personnel to review the Psychoeducational evaluation; review the IEP and discuss placement, **it is further**

ORDERED, at the MDT/IEP meeting, the performance measures with respect to each goal and objective must be discussed. The Respondent shall provide the Petitioner an explanation for the specialized instruction hours and placement it proposes, and the reasons for the proposal shall be provided in the Meeting Notes. The Respondent shall have five school days to issue a prior notice of placement to a DCPS school, and 20 school days to issue a prior notice of placement to a non public or private school, **it is further;**

ORDERED, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. The Respondent shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives, **it is further;**

This order resolves all matters presented in the Petitioner's February 4, 2010 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).

Dated: April 2, 2010

Hearing Officer