

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. DCPS Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Dates: May 14, 2009 May 18, 2009 <u>Representatives:</u> Counsel for Petitioners: Miguel Hull, Esq. 1220 L Street NW Suite 700 Washington, DC 20005 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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STUDENT HEARING OFFICE
2009 MAY 29 AM 9:00

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 May 14, 2009, and concluded on May 18, 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 March 20, 2009, alleging the issues outlined below.

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- 22 and DCPS Exhibits 1- 2 which were admitted into the record.

ISSUE(S):²

1. Did DCPS deny the student a free and appropriate public education by failing to develop an appropriate IEP for the student?
2. Did DCPS deny the student a free and appropriate public education by failing to find an appropriate placement for the student?

Petitioner alleges the student should be in a full time program but with although he is currently in a special education classroom all day it is a resource rather than a full time special education program in a "self contained" setting.

FINDINGS OF FACT³:

1. The student is _____ years old, currently attends School A and resides in the District of Columbia with his legal guardian. Prior to attending School A the student attended School B during the 2007-2008 school year. (Parent's testimony)

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.

2. The student has been determined eligible to receive special education and its related services. According to the student's Individualized Educational Program (IEP) dated October 21, 2008, the student was classified as Learning Disabled (LD). (Petitioner's Exhibit 3)
3. The student's October 21, 2008, IEP prescribed the following weekly services: 15 hours of specialized instruction, 60 minutes of speech language and 60 minutes of behavioral support. (Petitioner's Exhibit 3)
4. On September 29, 2008, a Hearing Officer's Determination was issued which authorized the parent to obtain an independent clinical psychological evaluation. Pursuant to the HOD Petitioner obtained an independent comprehensive psychological evaluation which was provided to DCPS on December 18, 2009. (9/29/08 HOD, Petitioner's Exhibit 7, DCPS 2 – 12/23/08 Letter from Principal to Mr. Hull)
5. The comprehensive psychological evaluation demonstrated the student was operating the extremely low range in reading. (Petitioner's Exhibit 7)
6. On January 16, 2009, DCPS convened a multidisciplinary team (MDT) meeting at which the independent comprehensive psychological evaluation was reviewed. Neither the parent nor his representative was present at the MDT meeting. As a result of the independent evaluation, the MDT changed the student's disability classification from LD to Emotional Disturbance (ED). The services and their levels remained the same as in the October 2008 IEP. The MDT determined the student would remain at School A and found the School A was an appropriate placement. (Petitioner's Exhibit 4, DCPS Exhibit 1).
7. The student's educational advocate conducted a classroom observation on February 13, 2009. At the time of the observation the student was first in a general education classroom with one classroom teacher and approximately twenty students. The teacher in the classroom was directing an activity with some of the students. The student was not participating with the group but was working alone on a computer. The student remained in this classroom for approximately an hour and then proceeded to his special education classroom. The general education teacher indicated to the educational advocate that the student stayed with her longer than usual during the observation because the special education teacher had another appointment. (Ms. Ortega's testimony)
8. The educational advocate observed the student in the special education classroom for approximately ninety minutes. During the observation of the student's special education classroom the student was with approximately nine students. The students were separated in groups of three. The teacher worked with the student's group for approximately thirty minutes. The special education teacher worked with the student to demonstrate to the educational advocate the student's academic deficiencies. The student was not able to read words with more than three letters. The special education teacher shared that the student has attention and behavior problems and the student is

typically with her the full school day. However, on a subsequent visit to the school the educational advocate was told by the special education teacher the student was only with her part of the school day. (Ms. Ortega's testimony)

9. The special education teacher expressed to the educational advocate concern about the student stating that she believes that he needs to be placed in different setting where he can be provided more focused attention. The special education teacher stated to the educational advocate that she has 9 to 11 students every day from different grades, levels and disabilities and that as a result she is not able to assist the student sufficiently adequately. (Ms. Ortega's testimony)
10. The parent has had continual complaints from the principal and student's classroom teacher about the student behavior difficulties. The parent has been called to pick the student up from school because of his behavior. The student displays behavior difficulties at home as well. (Parent's testimony)
11. The student had had behavior difficulties which have resulted in the student being sent home from school. The student's in school behavior has resulted on a couple of occasions in intervention by police officer(s) assigned to the school. (School A's principal's testimony)
12. The student has been interviewed by and accepted to _____ is a full time special education school that predominately serves students with ED classification. _____ has certified special education teachers and related services providers who can provide the special education services in the student's current IEP. _____ 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.

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.

1. Did DCPS deny the student a free and appropriate public education by failing to develop an appropriate IEP for the student? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

A free appropriate public education ("FAPE") consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs. 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

The term "special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .]." 20 U.S.C. § 1401 (29); 34 C.F.R. § 300.39; and D.C. Mun. Regs. tit. 5 § 3000.1.

The student's comprehensive psychological evaluation demonstrates the student is operating at an extremely low academic level and has demonstrated behavior difficulties which have resulted in the student's disability classification being changed to ED. The Hearing Officer credits Ms. Ortega's testimony that the student's special education teacher has stated the student requires more attention than the student can currently receive under his IEP and in his current special education classroom. The Hearing Officer concludes the student's IEP does not prescribe sufficient specialized instruction to address his academic deficiencies.

2. Did DCPS deny the student a free and appropriate public education by failing to find an appropriate placement for the student? Conclusion: Petitioner counsel sustained the burden of proof by a preponderance of the evidence.

According to the applicable statutes and regulations, a placement is to be in an appropriate school. 20 U.S.C. § 1402 (9) (D) ("FREE APPROPRIATE PUBLIC EDUCATION - The term 'free appropriate public education' means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved." 34 C.F.R. § 300.17 (c); § 1401 (29) (D) ("The term 'special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .]."); § 1414 (e) (public agency to ensure that parents are involved in the placement decision); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student's IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5 § 3013.1-7 (LEA to ensure that child's placement is based on the IEP); and D.C. Mun. Regs. Tit. 5 § 3000.

There was sufficient evidence presented that the student is not in an appropriate placement as he is functioning at extremely low academic levels. In addition, the parent credibly testified the student's behavior difficulties have resulted in the student being repeatedly sent home from school. The Hearing Officer credits Ms. Ortega's testimony that the special education teacher

told the educational advocate that the student should be placed in a different school because he requires more one-on-one attention that cannot be met in the special education classroom at School A. In addition, the Hearing Officer credits the parent's testimony that the student's in school behavior has result in the student being sent home repeatedly. The Hearing Officer concludes School A is an inappropriate placement for the student.

In addition, at the student's most recent MDT meeting the student's most recent evaluation was reviewed and the student's eligibility classification was changed. The parent was not present at the meeting nor represented.

Petitioner requested the student be placed at _____ However, the Hearing Officer was not convinced by _____ testimony as to a basis for the student being in a full time special education placement such as _____ and that the student's least restrictive environment (LRE) is something less than a full time special education placement. Therefore, the Hearing Officer concludes that the new and appropriate should be determined by a MDT that includes the parent and/or his representative.

In addition, the Hearing Officer was not convinced that the student was due any compensatory education and did not find the testimony of the student's educational advocate to be based on sufficiently objective data to convincingly the Hearing Officer of the services that would make up for any loss of services the student experienced. Therefore, the Hearing Officer concludes no compensatory education award is warranted based on the evidence presented.

ORDER:

1. DCPS shall, within fifteen (15) business days of the issuance of this Order, convene a multidisciplinary team (MDT) meeting to amend the student's IEP to provide for additional specialized instruction, to determine based on the student's behavior and academic deficiencies whether the student is in need of a full time special education placement or a full time therapeutic placement and discuss and determine an appropriate placement for the student and issue a Prior Notice. The MDT shall consider any placement(s) proposed by the parent.
2. The MDT meeting shall be scheduled through counsel for the student and parent.
3. 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).

A handwritten signature in cursive script, appearing to read "Coles B. Ruff".

Coles B. Ruff, Esq.
Hearing Officer
Date: May 28, 2009