

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

on behalf of,

Student,

(DOB STARS

Petitioner,

Case No.

Bruce Ryan, Hearing Officer

v.

Hearing: May 13, 2009

Decided: May 23, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was brought on behalf of a _____ year old student (the "Student") who resides in the District of Columbia and currently attends _____ School.

The complaint was filed March 27, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§ 1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations. Petitioners are represented by Donovan Anderson, Esq., and Respondent District of Columbia Public Schools ("DCPS") is represented by Daniel McCall, Esq., Assistant Attorney General for the District of Columbia.

Petitioner alleges that on or about March 3, 2009, DCPS determined that _____ was not an appropriate school program for the Student, and thus that the Student was in need of a change in school placement. Petitioner claims that more than a reasonable period of time has expired since the Multi-disciplinary Team ("MDT") met on March 3, and that DCPS has still failed to identify an appropriate school program for the Student. Petitioner therefore requests that DCPS place and fund the Student in a private school that can implement his individualized educational program ("IEP"), which Petitioner has identified as _____ of Laurel, Maryland.

A Prehearing Conference ("PHC") was scheduled for, and convened on, April 22, 2009. However, since DCPS had not yet filed any response, it was difficult for the Hearing Officer and parties to discuss and/or clarify the issues and requested relief to be presented at the due process hearing.

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STUDENT HEARING OFFICE

The Due Process Hearing was originally scheduled for May 1, 2009, but Petitioner moved to continue the hearing to May 13, 2009, due to her unavailability on May 1. The continuance was granted.

On or about May 4, 2009, DCPS finally filed a Response, Notice of Insufficiency ("NOI"), and Motion to Dismiss against the complaint. The NOI was untimely under the IDEA, and the Hearing Officer therefore had no discretion to consider it.¹ The Response was nearly a month late under the rules. In its response and motion to dismiss, DCPS asserted that (1) the Student's IEP was reasonably calculated to provide the Student with meaningful educational benefit, and (2) DCPS was prohibited by law from changing the Student's placement without completing a new evaluation.

The Due Process Hearing convened on May 13, 2009. At the hearing, Petitioner offered seven (7) documentary exhibits that were contained in its April 22, 2009 five-day disclosure, and each was admitted into evidence. Testifying for Petitioner were (1) the parent-Petitioner; and (2) (Admissions Director, DCPS presented no witnesses or documentary evidence and elected to rest following Petitioner's case.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and SOP Section 1003.

II. ISSUE(S) AND REQUESTED RELIEF

As discussed at the outset of the Due Process Hearing the following issue(s) and requested relief were presented for determination:

- a. Whether DCPS has denied the Student a free appropriate public education ("FAPE") by failing to provide an appropriate school program that could implement the Student's IEP; and*
- b. Whether DCPS should be required to place and fund the Student in a private school program chosen by Petitioner that can implement his IEP.*

III. FINDINGS OF FACT

1. The Student is a year old resident of the District of Columbia whose date of birth is . He currently attends School his neighborhood school, where he is in the grade. 1; -7; Parent Testimony.

2. The Student has been determined to be eligible for special education and related services as a child with a disability, with a disability classification of Mental Retardation ("MR"). -1; .5.

3. The Student's IEP dated March 3, 2008 provides for 27 hours per week of specialized instruction and 0.50 hours per week of psychological services/counseling in a special education setting outside the general education classroom. 5, 3/3/08 IEP, pp. 1, 4.

¹ Pursuant to 34 C.F.R. Section 300.508(d)(1), the complaint "*must* be deemed sufficient" since DCPS did not file its notice within 15 days of receipt of the complaint (*emphasis added*).

4. At the March 3, 2008 MDT meeting, the team acknowledged that the Student had shown "limited progress" and "made few gains since arriving at [redacted] -5, 3/3/08 MDT meeting notes.

5. In September 2008, Petitioner filed a due process complaint alleging (*inter alia*) that [redacted] did not have an appropriate program to implement the Student's IEP. A Hearing Officer Determination ("HOD") was issued November 7, 2008, concluding that Petitioner had failed to meet her burden of showing a denial of FAPE to the Student at that time. *See HOD*, 11/7/08, Case No. [redacted]. As a result, the Student continued at [redacted].

6. On February 19, 2009, [redacted] the Special Education Coordinator ("SEC") at [redacted] wrote Petitioner's counsel stating: "We need to schedule a *placement meeting* as soon as possible." [redacted] 2 (emphasis added). Following a further exchange of email correspondence, a placement meeting was scheduled for March 3, 2009. *See DT-3*.

7. On March 3, 2009, DCPS convened a meeting of the Student's MDT. *DT-5*. At the meeting, the team determined that [redacted] was not an appropriate school location at which to implement the Student's IEP. *See Parent Testimony; DT-1*, p. 3. Accordingly, the team "agreed that [the Student] will be placed in a more proper setting to meet his educational goals." [redacted] 5. The team also "agreed to receive [new] IEP once [redacted] review[s] it." *Id.*

8. Petitioner testified that she discussed the fact that [redacted] was not an appropriate school location for the Student with both the SEC [redacted] and the principal [redacted] prior to the March 3, 2009 MDT meeting. She testified that the SEC told her that [redacted] did not fit the Student's needs and that a new school placement had to be found. *See Parent Testimony*. DCPS did not contradict that testimony.

9. Petitioner further testified that she believes [redacted] does not meet the Student's needs; that it includes "open space" areas that are "not good" for the Student; that he has engaged in a lot of fights at [redacted] that he did not get along with his teachers or the principal at [redacted] that the school staff has repeatedly complained about his bad behavior; and that he was not deriving meaningful educational benefit from the program at [redacted]. *See Parent Testimony; DT-1*. DCPS did not contradict that testimony.

10. On March 4, 2009, Petitioner's counsel wrote to the SEC to confirm his "understanding that the team believes that [redacted] is not appropriate and that the Student is in need of a new school placement." [redacted] -4. Petitioner's counsel stated that the "parent and I are in agreement." *Id.*

11. In the same March 4, 2009 communication, Petitioner's counsel indicated that he was "questioning the student's diagnosis of MR," and thus "parent is requesting that DCPS completes a psychological evaluation and an educational evaluation" since the Student "was last evaluated in 2007." [redacted] -4; *see also DT-6*.

12. Petitioner's counsel stated in his March 4, 2009 email to the SEC that "[i]t is our view that we should not have to wait for the evaluations to be completed to make a placement decision." [redacted] -4. However, on cross examination, Petitioner agreed that she was requesting new evaluations of the Student in part to determine an appropriate school to fit his needs. *Parent Testimony*.

13. As of the date of the hearing, DCPS had not completed any new evaluations of the Student. There is nothing in the record to indicate the status of any pending evaluations of the Student or when any such evaluations will be completed.

14. As of the date of the hearing, DCPS had not identified an appropriate school program for the Student.

15. is a full-time special education school of approximately 120 students, and is licensed by Maryland and the District of Columbia. The school generally provides classes of no more than nine (9) students, with two teachers or other staff. It provides a full-time program including academics, a therapeutic environment, and vocational training. All of its teachers are fully certified special education teachers. The school currently includes approximately 42 students placed and funded by DCPS. Approximately 40% of its students are classified as MR, with most of the remainder classified as ED. *See Testimony.*

16. Admissions Director generally testified that he believed the school would be appropriate for the Student and could serve the Student's needs, as specified in the IEP. *See Norris Testimony.* However, the Admissions Director did not recall interviewing the Student, did not speak with any DCPS staff or observe the Student in a classroom environment, and did not have a copy of his current IEP.² also was not aware of the pending evaluations or that Petitioner was questioning his MR disability classification, and the school has not conducted its own evaluations of the Student. *Id.* (cross examination).

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing generally is on the party seeking relief, *i.e.*, Petitioner. DCMR 5-3030.3; *see also West v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006).

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

B. Issues/Alleged Violations by DCPS

(1) ***Whether DCPS has denied the Student a FAPE by failing to provide an appropriate school program that could implement the Student's IEP.***

3. The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

² reviewed a copy of the Student's February 20, 2007 IEP, which he testified provided for the same 27.5 hours of specialized instruction and related services in a setting outside the general education classroom. *See Testimony.*

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...*include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...*" (emphasis added).

20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; 30 DCMR Sec. § 3001.1.

4. In this case, DCPS did not seriously contest the allegation that it has failed to provide an appropriate school program that can successfully implement the Student's IEP at since at least March 3, 2009. DCPS argued in closing only that the MDT's agreement to place the Student in a "more proper setting" was not equivalent to a determination that is "inappropriate"; and that the problems experienced by the Student at (about which the parent testified) did not show that DCPS failed to carry out the requirements of the IEP.

5. However, a fair reading of the evidence indicates that DCPS officials had in fact determined — and communicated to Petitioner, both prior to and at the 3/3/09 MDT meeting — that could *not* provide the Student an appropriate school program in conformity with his IEP. DCPS offered no evidence to contradict Petitioner's testimony on this point or to contradict the documentary evidence reflecting Petitioner's understanding (with which DCPS did not appear to disagree at the time) that DCPS had made this determination.³

6. Accordingly, the Hearing Officer concludes that Petitioner has carried her burden of proving that DCPS has failed to provide an appropriate school program to implement the IEP, and that DCPS has thereby denied a FAPE to the Student, since at least March 3, 2009, while he has been attending

(2) *Whether DCPS should be required to place and fund the Student in a private school program chosen by Petitioner that can implement his IEP.*

7. As the U.S. Court of Appeals for the D.C. Circuit has explained, "an award of private-school placement is not...retroactive relief designed to compensate for *yesterday's* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA." *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005). Thus, placement awards "must be tailored to meet the child's specific needs" through a fact-intensive inquiry. *Id.* at 11-12. "To inform this individualized assessment, '[c]ourts fashioning [such] discretionary equitable relief under IDEA must consider all relevant factors.'" *Id.* at 12, quoting *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993); see also *Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

8. The relevant considerations in determining whether a particular placement is appropriate for a particular student include the following:

³ In fact, Petitioner attempted to call the SEC at _____ as a witness for its own case, but DCPS counsel first objected, and then the SEC was unavailable to provide testimony.

“the nature and severity of the student’s disability, the student’s specialized educational needs, the link between these needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment.”

Branham, 427 F.3d at 12, citing *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982). In order to be tailored to the child’s specific needs and properly consider the nature and severity of the student’s disability, the placement determination should ordinarily be based on a complete, up-to-date record of the student’s evaluations and assessments. See generally *Branham*, 427 F.3d at 11-12; *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006).

9. In this case, the evidentiary record does not appear to support “an informed and reasonable exercise of discretion” (*Reid*, 401 F.3d at 527) as to the requested placement order, at least at this time. See *Branham*, 427 F.3d at 12. As noted in the *Findings* above, the parent has requested updated evaluations that may affect the Student’s disability classification and/or educational program provided in his IEP, and it would be preferable for both the student’s MDT and the school identified by Petitioner to have the opportunity to consider that information in deciding on a particular program going forward. In addition, the Hearing Officer has taken into account the fact that the current school year is almost at an end, and transitioning to a new school environment for only a few weeks may be very disruptive to the Student’s education.

10. However, DCPS cannot simply stand by while the Student fails to receive a FAPE.⁴ Because DCPS has agreed that _____ cannot provide an appropriate educational program for the Student, “IDEA continues to obligate DCPS to come forward with a plan that meets [the student’s] needs.” *Branham*, 427 F.3d at 13; see 20 U.S.C. §1412(a)(1)(A). This plan is overdue, as nearly three months have now passed since the 3/3/09 MDT meeting without identification of an appropriate school placement. The 3/3/08 IEP is now out of date, and the updated evaluations found warranted by the MDT have not yet been completed. DCPS must act promptly to complete this process before the end of the current school year. If DCPS defaults in that obligation, then the only alternative will be to place and fund the Student at the parent’s choice of schools, Youth in Transition, without further delay.⁵

C. Appropriate Relief

11. The IDEA authorizes district courts and hearing officers to fashion “appropriate” relief, e.g., 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid*, 401 F.3d at 521-23. See also 34 C.F.R. § 300.513 (a) (3) (“Nothing in

⁴ DCPS argues that it is legally prohibited from changing the Student’s placement without first conducting a “preplacement evaluation” pursuant to 34 C.F.R. §104.35. However, this provision (which is contained in the regulations implementing the non-discrimination provisions of Section 504 of the Rehabilitation Act, over which the Hearing Officer lacks jurisdiction) does not by its terms apply to IDEA’s statutory FAPE requirement (which differs from Section 504) or govern IDEA’s placement determinations. Thus, the Hearing Officer concludes that it cannot modify or eliminate an LEA’s obligation to ensure a timely and appropriate placement under IDEA or its implementing federal and state regulations (see, e.g., 34 C.F.R. §300.116; DCMR 5-3013).

⁵ See *Blackman v. District of Columbia*, 185 FRD 4, 7 (D.D.C. 1999) (“a few months can make a world of difference in harm to a child’s educational development”).

[Section 300.513(a)] shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§ 300.500 through 300.536.”).

12. Based on the record developed in this proceeding and the FAPE denial adjudicated herein, and in exercise of his discretion, the Hearing Officer finds that the equitable relief set forth in the Order below is necessary and appropriate.

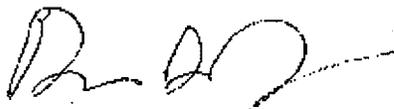
V. ORDER

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

1. Within **10 school days** of the date of this Order (*i.e.*, by **June 8, 2009**), DCPS shall convene an MDT meeting for the following purposes:
 - (a) to review all completed evaluations of the Student, including the updated psychological and educational evaluations requested in connection with the March 3, 2009 MDT meeting;
 - (b) to review and determine the appropriate disability classification or classifications for the Student;
 - (c) to review and revise, as appropriate, the Student's March 3, 2008 IEP; and
 - (d) to discuss and determine an appropriate educational placement and school location in which to implement the Student's IEP, consistent with the unique needs of the Student and including consideration of any school proposed by Petitioner.
2. Within **30 calendar days** of the date of this Order (*i.e.*, by **June 22, 2009**), DCPS shall issue a Prior Notice of Placement (“PNOP”) identifying the educational placement and school location for the Student for the 2009-2010 school year.
3. Should DCPS fail to convene the required MDT meeting and/or fail to take the other actions specified in paragraphs 1 and 2 of this Order in a timely manner, DCPS shall immediately issue a PNOP by which DCPS shall fund the private placement of the Student at the _____ facility in Laurel, Maryland, with appropriate transportation and related services. DCPS shall then develop and implement an IEP appropriate to that placement for the 2009-2010 school year.
4. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Donovan Anderson, Esq., via facsimile (202-610-1881), or via email (Donovan.Anderson@donovananderson.com).
5. DCPS' motion to dismiss shall be, and hereby is, **DENIED**.
6. This case shall be, and hereby is, **CLOSED**.

Dated: May 23, 2009

/s/



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to 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 U.S.C. §1415(i)(2).