

DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

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Confidential

<p>STUDENT¹, by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date: May 6, 2009.</p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On March 19, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to convene an Individualized Education Program ("IEP") team meeting with the parent to review the Student's assessments; failing to review and revise the Student's IEP based on the findings and recommendations of the comprehensive psychological assessment; failing to develop an IEP that is reasonably calculated to provide a free and appropriate public education; failing to provide all necessary specialized instruction and related services; and failing to provide an appropriate placement.

The Petitioner requests the Respondent be found to have denied the Student a FAPE and ordered to immediately place and fund the Student at a full-time special education placement of the Petitioner's choosing, with transportation. The Petitioner further requests that within 30 days, the Respondent convene a multidisciplinary team ("MDT") meeting at the Student's new placement to review all current evaluations, and revise the Student's IEP as appropriate, at the ordered MDT meeting, to discuss and determine appropriate compensatory education to compensate the Student for the Respondent's failures as identified in the Complaint.

On April 6, 2009, the Respondent filed a Response to the Parent's Administrative Due Process Complaint and Motion to Dismiss. The Respondent asserted the allegations are inaccurate, the parent through Counsel requested from the Student's school, an MDT meeting for January 16, 2009 at 10:00 AM, the meeting convene the parent did not appear. The educational advocate did appear. The meeting went forward, and the Student's IEP was reviewed, revised and agreed to by the MDT. The Respondent alleged it has fulfilled its obligation by convening the meeting and is providing the Student FAPE.

The Respondent further asserted that the Complaint was insufficient because the allegations are unsupported by the facts and that the Complaint does not include the Complaint's signature, and documents to support the facts are also not included.

A telephonic pre-hearing conference for the above reference matter was conducted on April 17, 2009 at 3:00 PM. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The Respondent reiterated its position. The Respondent further asserts that it fulfilled its obligation by convening the IEP meeting and during that meeting no objection to the IEP was made and it contends it is providing the Student FAPE.

The Hearing Officer determined that the Petitioner may sign the Complaint on the date of the hearing. The parties stipulated that the Student is a resident of the District of Columbia, entitled to specialized instruction and there was a meeting on January 16, 2009 to discuss the Student's educational program. The Petitioner withdrew her request for a compensatory education award. The Respondent's Notice of insufficiency was discussed the Hearing Officer determined that the Respondent's claim of insufficiency is not warranted.

20 U.S.C.1415(b) (7)(A)(ii) does not require a due process complaint to reach the level of specificity and detail of a complaint in a court of law. The purpose of the sufficiency requirement is to ensure that the other party will have an awareness and understanding of the issues forming the basis for

the complaint. Due process complaints should be construed in light of Schaeffer v. Weast, 126St.Ct.528, 532 (2005) and Escambia County Board of Education v. Benton, 406 F. Supp. 2d 1248, 1259-1260 (2005). The standard set in Schaeffer and Escambia for reviewing the sufficiency of a due process request is a minimal pleading standard and is lower than the standard for reviewing complaints in court.

The Complaint filed by the Parent in this matter, contains all the relevant information along with a description of the failure to review the Student's IEP based on the findings and recommendations of the comprehensive psychological assessment; to develop an IEP that is reasonably calculated to provide a free and appropriate public education; to provide all necessary and prescribed specialized instruction and related services and to provide an appropriate placement. The Complaint also contains proposed resolutions by the Parent. Making the Complaint sufficient, and in conformity with the IDEA. See 20 U.S.C. 1415(b)(7) and its regulations at 34 C.F.R. 300. § 508(b).

An April 19, 2009 Order required the Petitioner at the hearing to present evidence to show why the findings and recommendations of the comprehensive psychological assessment must be followed; what specialized instruction and related services were not provided. Additionally, the Petitioner was to prove what aspect of the Student's placement is inappropriate and how her choice of placement is appropriate for the unique needs of the Student.

The Respondent was ordered to demonstrate that the Student's January 2009 IEP is appropriate. The Respondent was to explain how the IEP is sufficient as written and how it has been implemented. The Respondent was required to show that the Student was provided the services prescribed in the Student's IEP, and that the placement is appropriate.

A hearing was held on April 30, 2009. The Petitioner presented a disclosure letter dated April 23, 2009 to which eighteen documents were attached, labeled P-1 through 18 and which listed six witnesses. Three witnesses testified – the Mother, the Educational Advocate and the Psychologist. The Respondent presented a disclosure letter dated April 23, 2009 identifying four witnesses and to which twelve documents were attached, labeled DCPS 1 through 12. One witness testified – the Special Education Coordinator. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 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").

II. ISSUE(S)

1. Did the Respondent fail to convene an IEP team meeting with the parent to review the Student's assessments?
2. Did the Respondent fail to review and revise the Student's IEP based on the findings and recommendations of the comprehensive psychological assessment?
3. Did the Respondent fail to develop an IEP that is reasonably calculated to provide a free and appropriate public education?

4. Did the Respondent fail to provide all necessary specialized instruction and related services?
5. Has the Respondent failed to provide an appropriate placement for the Student?
6. Was the Student denied a FAPE?

III. FINDINGS OF FACT

1. Both parents and the Child are residents of the District of Columbia.
2. The Student is a student with disabilities under the Individuals with Disabilities Education Improvement Act ("IDEIA"). The Student's most recent IEP is dated January 16, 2009 and provides 10 hours of specialized instruction weekly, and 30 minutes a week of counseling services. The Student's disability classification is Other Health Impairment.
3. A March 2008 HOD ordered an independent psychological evaluation and a meeting to be convened within twenty days of the receipt of the evaluation. The order included caveat that any delay in the time frames caused by the Petitioner or representative shall result in an extension of one day for each day of delay.²
4. In November 2008 a comprehensive psychological assessment was performed on the Student.³ The assessment yielded a low range score in math calculation skills. The assessment states the Student is a student with post traumatic stress disorder, depressive disorder, attention deficit hyperactivity disorder and mathematics disorder. The assessment states in light of the Student's current difficulties attributable to her experience of multiple traumatic events at Patterson Elementary, it is clear that her current school placement is unsafe for her. Additionally, the Student expressed her desire to be removed from her current school to ensure her safety and well being. The Evaluator recommended that the Student's mother and educational advocate locate another school for the Student. According to the Evaluator the Student should be placed in a school where her emotional, behavioral, academic difficulties could be adequately addressed. Given her symptoms of ADHD, she would likely function best in a small student-to-teacher ratio classroom setting. The assessment report further stated the Student is in need of intensive support/tutoring to address her math difficulties and recommended an occupational therapy assessment.⁴ The Psychologist findings and recommendations, inter alia, include the following: The Student is eligible for special education under the educational handicap condition of multiple disabled to include emotionally disturbed and learning disabled. The evaluator stated that the Student is showing symptoms of depression and if she continues to be exposed to these factors in school and educational be impaired and her ability to function will also suffer.⁵

² P8- March 7, 2008, Hearing Officer Determination HOD

³ P 9-Confidential Comprehensive Psychological Evaluation, dated November 27, 2008. Reports on Axis I Posttraumatic Stress Disorder, Acute, Depressive Order Not Other Wise Specified, Attention Deficit Hyperactivity Disorder Predominantly Hyperactive-Impulsive Type, Mathematics Disorder; Axis II: None; Axis III Sticker Syndrome, eye problems; Axis IV- to the limited social support; abandonment by father; recent laws/murder of her uncle; academic/school problems and Axis V Global assessment functioning: current =60.

⁴P 9-Confidential Comprehensive Psychological Evaluation, dated November 27, 2008.

⁵ Testimony of the Psychologist.

5. On December 3, 2008, the Respondent requested a copy of the results of an independent comprehensive psychological evaluation. That same day, the evaluation was sent to the DCPS Office of Special Education Legal Unit and an IEP team meeting was requested.⁶
6. On December 5, 2008, the Respondent sent the Petitioner through Counsel a letter of invitation to an IEP team meeting and it proposed December 19, 2008 as the meeting date. On December 10, 2008, the parent, through counsel, offered January 15 or 16, 2009 as alternative meeting dates.⁷
7. On December 12, 2008, the Respondent sent the Petitioner through Counsel a letter of invitation to an IEP team meeting and it proposed January 8, 2008. On December 18, 2009, the parent, through counsel, made a request for dates in January for an IEP team meeting.⁸
8. On December 17, 2008, the Respondent sent the Petitioner through Counsel a letter of invitation to an IEP team meeting and it proposed December 19, 2008. On December 18, 2009, the parent, through counsel, made a request for dates in January for an IEP team meeting.⁹
9. On December 30, 2008, the parent, through counsel, made another request for an IEP team meeting, offering January 15th or 16th as alternative meeting dates.¹⁰
10. On January 16, 2009 at 10:00 AM, the meeting convened the Education Advocate ("EA") appeared, the Petitioner did not. The EA did not want to go forward with the meeting without the parent; he tried for approximately 35 minutes to contact the Petitioner via telephone to no avail. The meeting went forward, and the Student's IEP was reviewed, revised and agreed to by the MDT, without the parent.
11. The Student gets bullied at school and comes home crying. Her hair has been pulled, she has been punched in the face after having cataract surgery. The Petitioner removed the Student out of school for approximately two weeks fearing for her safety. The Student has no math skills and does not understand when her mother tries to help with assignments. The Student has retention problem in reading and has ADHD, she is withdrawn and depressed. The Petitioner did not attend a January 16, 2009 meeting because she had to attend a funeral. On various occasions the Respondent tried to set a meeting with the Petitioner, but her attorney told her not to meet without the assistance of a representative from his office. The mother has not asked someone at the school if the Student has received all her IEP services. The mother had not told anyone from the school that she wanted the Student transferred.¹¹

⁶ DCPS 10- December 3, 2008, Respondent's E-mail requesting results of evaluation and P10- December 3, 2008, Petitioner's Counsel Letter of notice of independent evaluations report.

⁷ DCPS 1- December 5, 2008, Respondent's letter of invitation to meeting and P11-Petitioner's Counsel Letter to the Respondent, dated December 10, 2008.

⁸ DCPS 2 - December 12, 2008, Respondent's letter of invitation to meeting and P12-Petitioner's Counsel Letter to the Respondent, dated December 18, 2008.

⁹ DCPS 3 - December 17, 2008, Respondent's letter of invitation to meeting and P12-Petitioner's Counsel Letter to the Respondent, dated December 18, 2008.

¹⁰ P13-Petitioner's Counsel Letter to the Respondent, dated December 30, 2008.

¹¹ Testimony of the mother

12. On March 5, 2009, the parent, through counsel, made another request for an IEP team.¹²
13. The Student for the period of September 5, 11, 18, and 25th of 2008 did not received behavioral support, she was absent three times and the provider was at an MDT meeting on the fourth occasion.¹³
14. The SEC attempted to schedule a meeting in December 2008 and January 8, 2008, a meeting date was confirmed for January 16, 2009 the team met. The purpose of the meeting was to comply with the March 8, 2008 HOD and update the Student's IEP. The EA was at the meeting, but left early because the parent wasn't present. The meeting went forward the independent evaluation was reviewed the team agreed that the Student is eligible for special education under Other Health Impaired. Later that day, the mother was at the school and said she had not attended the meeting because she was at a funeral. He thinks that the concern about safety was mentioned at a December meeting and that the Principal addressed the problem. During the IEP meeting in the Student the depression and anxiety were mentioned and to be addressed in counseling. At that meeting, and Student services were discussed, it was determined that the Student is reading above grade average and reading services were removed, and Math specialized instruction hours were increased there was no additional change to the IEP.¹⁴
15. The Foundation School is located at Largo, Maryland. The school serves students from first through eighth grade that have emotional disturbance, other health impairment or are learning disabled. There are twelve students to one teacher and a teacher aide per classroom. There is a licensed social work on staff and there is a speech/language therapist and occupational therapist on contract. The Student was interviewed on April 21, 2009, her IEP, psychological from November 2008 were reviewed and it was determine that the program is appropriate for the Student, although she doesn't have a full time IEP and would require one to be enrolled into a program. The Student was admitted based on the psychological evaluation. There is no designated classroom for the Student as of yet. The administrator did not know the costs for the program.

IV. CONCLUSIONS OF LAW

FAPE Determination

The DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the DCPS 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

¹² P14-Petitioner's Counsel Letter to the Respondent, dated March 5, 2009.

¹³ DCPS 7- January 29, 2009, Student Service Tracker Behavioral Support Services Report for the period of September 5th, 11th, 18th, and 25th, 2008.

¹⁴ Testimony of the Special Education Coordinator and DCPS 12- January 16, 2009 MDT meeting notes.

meet their unique needs and prepare them for further education, employment, and independent living.¹⁵ The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as “special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP).”

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be 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.

The Petitioner met her burden of proof of violation to the IDEIA. Here is why.

IEP team meeting Parent participation in the placement decision

The Petitioner alleged that on January 2009 the Student’s MDT/IEP meeting went forward, and the Student’s IEP was reviewed, revised and agreed to by the MDT, without the parent.

According to 34 C.F.R. § 300.116 of the IDEIA regulations 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. 20 U.S.C. 1412(a)(5).

Pursuant to 34 C.F.R. § 300.321(a)(1), DCPS “must ensure that the IEP Team for each child with a disability includes the parents of the child”

The assessments were done independently and they were sent to the Respondent in December 2008. There was communication between the special education coordinator and the education advocate to set a date for the IEP meeting. January 16, 2009 was the date confirmed. On that date, the entire MDT except the parent was present at the meeting. The EA spent 30 to 45 minutes trying to get in contact with the Petitioner.

The evidence was that the parties had agreed on an MDT meeting and chose a date as offered by the Petitioner. On various occasions the Respondent tried to set a meeting with her, but her attorney told her not to meet without the assistance of a representative from his office. At the meeting there was a representative from the attorney but not the Petitioner; her assertion that she had to attend a funeral is certainly understandable. However, what is not reasonable is failing to communicate with Counsel, the Education Advocate or someone at the School at least the day before the funeral, to request a change in date or time. The Respondent had the responsibility to comply with an HOD and convene a MDT. An MDT meeting requires that many people and time is invested to address the Student’s needs, the Respondent acted properly to move forward with the meeting.

¹⁵ 20 U.S.C. § 1400(d)(1)(A).
HOD

Individualized Education Program and recommendations of the comprehensive psychological assessment

In accordance with 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb), Individualized Education Programs or IEP “means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
- bb. Meet each of the child’s other educational needs that results from the child’s disability.”

Pursuant to 34 C.F.R. § 300.324(b)(1), DCPS must ensure that...the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals...and in the general education curriculum, if appropriate; the results of any reevaluation conducted ...; information about the child provided to, or by, the parents...; the child's anticipated needs; or other matters.

Pursuant to 34 C.F.R. § 300.305 “as part of...any reevaluation...the IEP Team and other qualified professionals, as appropriate, must review existing data on the child, including evaluations and information provided by the parents of the child...and on the basis of that review, and input from the child’s parents...determine...the educational needs of the child...”

The Student recently received a comprehensive psychological its findings inter alia, included that the Student could be eligible for special education under the educational handicap condition of multiple disable to include emotionally disturbed and learning disabled. The evaluator stated that the Student is showing symptoms of depression and fear in attending school.

The Respondent did not meet its statutory obligations. The Student’s IEP fails to include any mention to the findings in the comprehensive psychological assessment. The Respondent had an obligation to provide a detail explanation of its choice of programming versus what was reflected in the psychological evaluation. There was no evidence that the IEP was drafted to address the unique needs of this Student, there was no mention of how to address her absences, safety concerns, fears or Math deficiencies.

The Student’s IEP is not reasonably calculated to provide a free and appropriate public education.

Related services

The Respondent shall implement an IEP for each student with a disability. See *id.* at § 614(d)(2). Pursuant to D.C. Mun. Regs. tit. 5, § 3010.2 (2003), DCPS “shall implement an IEP as soon as possible after the meeting where the IEP is developed...” Pursuant to 34 C.F.R. § 300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.”

The Petitioner acknowledged she had not asked anyone at the school if the Student has received all her current IEP services. The Student three out of four times in September 2008 did not receive behavioral support, because she was absent three times and the provider was at an MDT meeting on the fourth occasion. The Respondent did not fail to provide the Student with related services.

Educational Placement

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) 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. See id. § 1400(d)(1)(A).

According to the IDEIA at 20 U.S.C. 1412(a)(5) 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. The IDEIA and its regulation at 34 C.F.R. § 300.17 requires the Respondent as the local state education agency, to make certain that the educational placement, for the child with a disability within its jurisdiction, is able to implement the student's individualized educational program.

The Petitioner alleged the School does not provide a small student-to-teacher ratio classroom setting. The only evidence that the Student may need a small student-to-teacher ratio classroom setting was a recommendation in the psychological report. The placement must be based on the IEP, this Student's IEP must be revised using all current evaluations and after that revision a placement decision must be made. Furthermore, the Petitioner did not inform anyone beyond her attorney that she wanted the Student transferred.

Moreover, the Petitioner choice for placement is a full time special education private school outside of the District of Columbia, with no opportunity for the Student to interact with disable peers. The request is contrary to the IDEA 20 U.S.C. 1412(a)(5) and it's regulation at Sections 300.114 through 300.118, consistent with implementing the Act's strong preference for educating children with disabilities in regular classes with appropriate aids and supports.

V. SUMMARY OF DECISION

The Petitioner demonstrated that the Student's IEP was inappropriately crafted, the findings and recommendations of the comprehensive psychological assessment were not discussed, and the Student's unique needs were not addressed. The Respondent failed to develop an IEP that is reasonably calculated to provide a free and appropriate public education. The Petitioner failed to prove that specialized instruction and related services were not provided. The Petitioner failed to prove that the parent was excluded from the MDT decision making process. The Petitioner failed to prove that the placement is inappropriate. The Respondent proved that the Petitioner's choice for placement is not appropriate for the Student. The Respondent must convene an MDT meeting to discuss the psychological evaluations recommendations and if an occupational therapy assessment is warranted. At the MDT meeting, the parent and the Student will be invited to discuss the needs of this Student, including how to address her absences, safety concerns, and Math deficiencies. The MDT will make a determination if extended services are warranted and will make a decision on placement for the 2009-2010 school year.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, The Respondent will reconvene the MDT by June 1, 2009 at that meeting the team must discuss and determine based on the Student's unique needs, the current evaluations and the January 16, 2009 IEP an appropriate program and placement. At the MDT meeting, the parties are to discuss the psychological evaluations recommendations and if an occupational therapy assessment is warranted. The parent and the Student will be invited to discuss the needs of this Student, including how to address her absences, safety concerns, and Math deficiencies. The MDT will make a determination if extended services are warranted and will make a decision on placement for the 2009-2010 school year

IT IS FURTHER ORDERED, in the event that the Respondent should fail to comply by June 1, 2009 and with the terms herein, and an issue arises out of the noncompliance the Petitioner may file a request for a hearing and the hearing will be scheduled within 20 calendar days.

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. Respondent shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

This order resolves all issues raised in the Petitioner's March 19, 2009, due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)

/s/WI Restorres
Wanda Iris Resto - Hearing Officer

Date: May 6, 2009