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STUDENT HEARING OFFICE

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent on behalf of Student[1],

Petitioner,
v.

District of Columbia Public Schools,

Respondent.

Hearing Officer: Gary L. Lieber
Case No: 2012-0587

HEARING OFFICER'S DETERMINATION

Introduction and Procedural Background

This case was brought as a due process complaint pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §1400 *et. seq.* and Title 5-E, Chapter 5-E 30 of the District of Columbia Municipal Regulations. Petitioner is the mother of Student, [redacted]. Petitioner alleges that Student was denied a Free and Appropriate Public Education ("FAPE") by a failure to properly implement his Individualized Education Plan ("IEP") dated May 17, 2012, by maintaining his placement at _____ Senior High School ("Senior High School"). The parent requests a remedy that the Student be placed in a specific private school in the District of Columbia that specializes in the education of children with serious emotional disabilities ("Private School").

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[1] Personal identification information is provided in Appendix A and the Appendix must be removed prior to public distribution.

The Due Process Complaint was filed on [redacted] (Hearing Officer's Exhibit A).[2] Respondent District of Columbia Public Schools ("DCPS") filed a Response to the Due Process Complaint on [redacted], in which it denied that it had failed to provide FAPE to the student (H.O. Exh. C). On [redacted] the parties conducted a Resolution Meeting which did not result in an agreement that would dispense with the need for the Due Process Complaint Hearing (H.O. Exh. E). On [redacted] the undersigned conducted a prehearing conference and on [redacted] a Prehearing Order was issued which, *inter alia*, set the date for the Due Process Hearing as [redacted] (H.O. Exh. D & F). The five-day disclosures were timely filed on [redacted]

The Due Process Hearing was conducted on [redacted]. The hearing was open to the public and electronically recorded. Both parties were represented by counsel.[3]

The Record Evidence

The Petitioner called the following witnesses: the parent, educational advocate/attorney, special education consultant (qualified as an expert witness on the subject of special education instruction to children with disabilities) and the Admissions Director at the Private School.

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[2] The Hearing Officer's Exhibits shall be referred to as H.O. Exh. __; Petitioner's Exhibits as P. Exh. __; and Respondent's Exhibits as R. Exh. __.
[3] Petitioner was represented by Donovan Anderson, Esquire and Respondent was represented by E. Justin Douds, Assistant Attorney General for the District of Columbia.

DCPS called the following witnesses: Co-Locations Classroom Coordinator for Respondent DCPS.

The following exhibits were offered and admitted into evidence. Petitioner's 1 through 5 and Respondent's 1 through 5.

Stipulations

At the hearing, for the first time in the case, Respondent conceded that Respondent had failed to provide FAPE to Student since the initial date of the current IEP because the Senior High School could not implement that IEP. This admission was thus converted by the parties into a stipulation that FAPE had not been provided since May 17, 2012. As such, Respondent conceded the underlying issue of liability. The parties thus agreed that the sole issue to be resolved was one of remedy and that with the exception of the physical location of the school, the IEP was appropriate. Thus, as of the hearing, DCPS is now asserting that instead of Senior High School, the RISE Program, a special education program, located in several District of Columbia Public Schools was capable of meeting the Student's special education needs as otherwise defined in his IEP. Respondent seeks to have Student enrolled in the RISE Program at a specific public high school ("Public High School").

Jurisdiction

This Hearing Officer has jurisdiction pursuant to IDEA, 20 U.S.C. § 1415, the statute's implementing regulations at 34 C.F.R. §§ 300.511 and 300.513 and the District of Columbia Code of Municipal Regulations ("DCMR")

at 5-E § 3029 and 5-E § 3030. This decision constitutes the Hearing Officer's Determination, the authority for which is set forth in 20 U.S.C. §1415(f)(3)(E) and 34 C.F.R. § 300.513.

Issues and Requested Relief

As substantially narrowed at the outset of the hearing where the denial of FAPE was stipulated, the parties agreed that the issues were:

1. Could the Student's IEP be sufficiently implemented if the Student were enrolled at the RISE Program at Public High School. If the RISE Program does not serve to satisfy FAPE, should Respondent reimburse the Parent for the Student's enrollment at Private School as requested by Parent.

Findings of Fact

1. Student is 15 years old (R. Exh. 5, p. 1).

2. Student received special education services as a student with an ED (Emotionally Disturbed) Disability. He is also classified ASDH and takes medication for that condition. *Id.* He also suffers from a condition known as Oppositional Defiant Disorder which results in his demonstrating disruptive behavior in class and elsewhere (Testimony of Expert Witness).

3. During the 2010-2011 school year, Student attended ____ Academy ("Academy"), a public school with a small enrollment that was geared to providing education to disabled students. Both the parent and DCPS believed that the Student made progress at that school (Testimony of Parent).

4. Thereafter, for the 2011-2012 school year, DCPS decided to have Student enrolled at Senior High School at least in part due to the progress he had made at the Academy the year before (Testimony of Parent).

5. By all accounts, Student did not have a successful school year in 2011-2012. He failed the majority of his Ninth grade courses and by the end of the school year had earned only 3.5 of 24 credits that he would need to graduate (P. Exh. 4). His math skills are at a fourth and fifth grade level and his reading skills are between a third and fourth grade level. Furthermore, he is not regularly in class and when in class frequently walks out of class unabated and has either roamed the school grounds or hid in various areas of the school unconstrained by any supervision (Testimony of Expert; P. Exh. 1, p.4).

6. Student's May 17, 2012, IEP provided for 27.5 of specialized "pull out" instructions from his regular general education classes in the areas of math, reading and written expression; 120 minutes per week in individual and group counseling to address Student's behavioral problems; and 60 minutes per week of additional consultation with his teachers and support staff regarding those behavioral issues (P. Exh. 1, p. 7).

7. The likelihood of Student succeeding in school would be advanced if he were placed in an educational setting with classrooms with fewer students where more individual attention could be given to Student. This would benefit him from both the standpoint of better addressing his disabilities and giving

him the kind of specific attention to the actual content of the classes he is taking (Testimony of Parent; Testimony of Educational Advocate; Testimony of Expert). In this respect, Student's reading and math skills are far below his current ninth grade level and he would benefit substantially from a more intensive educational environment as well as a full-time therapeutic behavioral intervention support program (Testimony of Expert).

8. Student currently remains enrolled at Senior High School for the 2011-2012 school year (Testimony of Parent).

9. DCPS established the RISE Program in August 2012 to address the needs of IDEA eligible students with ED. The Program is located at four high schools in the District of Columbia. Each school has two RISE classrooms. RISE is the successor to the SPECTRUM Program which was discontinued after one year due to budget constraints. The main difference between the two, at least in a general sense, is that SPECTRUM was operated under a contract with a vendor while RISE is being run entirely by DCPS. The RISE classroom where DCPS wishes to place Student would be within the physical space of the High School building with the classroom being in one of the corner wings of the building with the RISE staff. The RISE students spend the entire day out of a general education setting in a single classroom. They eat lunch with the RISE staff. The program has a high school diploma track and the Student can receive Carnegie units towards graduation. Respondent's only witness conceded that controlling Student within a single classroom all day would be a "challenge" (Testimony of Co-Locations Classroom Coordinator).

10. If Student was enrolled in RISE, he would be the eleventh student in the class. There is one teacher, a special education teacher certified in English. The students spend approximately twenty-five percent of their time at an individual computer station receiving content in math, social studies, science and English subjects. The remainder of the time the student works on the content areas with the aid of the teacher. Additionally, the Student would receive Behavioral Support Services as required in the IEP through the assistance of a behavioral technician[4] and a half-time social worker. Each RISE class also has a teacher's aide (Testimony of Co-Locations Classroom Coordinator).

11. The RISE Program's teachers are only content certified in one subject area. Thus, the Co-Locations Classroom Coordinator stated that the "computer" qualifies as a "highly qualified special education teacher" under IDEA.[5] The Co-Locations Classroom Coordinator was Respondent's only witness. She is a manager of the RISE Program and not a teacher. She was unable to explain any details relating to the exact nature of this certification. She did explain in some detail the daily schedule of how the subject area classes are structured. That schedule amounted to twenty-five hours of weekly subject area class time. However, she was unable to identify how Student would receive the final 2.5 hours totaling 27.5 hours of pull out instruction

[4] There is one such behavioral technician for each class. They are trained in de-escalation techniques, safety care training and life crisis management. They have college degrees and were recruited from non-public schools (Testimony of Co-Locations Classroom Coordinator).
[5] See 34 C.F.R. § 300.18.

called for in the Student's IEP (P. Exh. 1, p. 7; Testimony of Co-Locations Classroom Coordinator).

12. Some time in mid to late September, Student was referred to RISE for possible placement. DCPS did not contact Parent about RISE at any time. Rather, the first contact was with Counsel for Petitioner on or about October 5, 2012, when Counsel briefly explained the Program and provided contact information so that the Parent or a representative could presumably learn more about the Program (Testimony of Co-Locations Coordinator). However, when Petitioner's expert thereafter sought to visit RISE at the Public High School, she was denied entry due to the policy of the school denying access to third parties not parents of students (Testimony of Expert).

13. Co-Locations Classroom Coordinator had very limited knowledge of Student's file and no evidence was presented as to the basis for the Student's referral to RISE (Testimony of Co-Locations Coordinator).

14. Private School is a school dedicated to students with disabilities, including ED. The school is certified for that purpose by DCPS and currently has DCPS referred and funded students attending the school. The hours of the school are 8:15 a.m. to 3:00 p.m. The students circulate among classrooms throughout the school day. Each subject area class is taught by a teacher that is certified as a special education teacher in that subject area. The maximum size of each class is ten except for math where the class size is in the 4-6 student range. The teachers are assisted by teacher's aides and specially

trained licensed social workers to deal with emotionally disturbed children. The school also has a speech pathologist. The tuition cost of one year for Student to be borne by Respondent would be in excess of thirty-nine thousand dollars (Testimony of Private School Admissions Director).

Analysis and Legal Conclusions

The Individuals with Disabilities Education Act provides that States and Territories, including the District of Columbia, that receive federal educational financial assistance must establish policies and procedures to ensure that they extend a "Free Appropriate Public Education" to children with disabilities. Free Appropriate Public Education or FAPE is defined as "special education and related services that have been provided at public expense, under public supervision and direction and without charge" 20 U.S.C §1401(9); *see also* 34 C.F.R. § 300.39 and DCMR Title 5-E § 3001.1. The term "child with a disability" is defined to mean a child with any one of a certain named type of condition or impairment "that by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a); see also, 20 U.S.C. §1401(3)(i) and (ii); D.C. Code § 38.2561.01(14) and DCMR Title 5-E § 3001. It is the duty of the State and its constituent local school authorities to identify and evaluate children with disabilities and then ultimately develop an education plan for such student which is called an Individualized Educational Plan or IEP. 20 U.S.C. §1414; 34 C.F.R. §§ 300.320 through 324. The Public Agency is required to review the child's progress periodically, but not less than annually

and to revise the IEP accordingly so as to meet the stated goals in concert with the child's progress under the IEP. 34 C.F.R. § 300.324(b)(1) through (b)(2).

It is further well-established that IDEA is satisfied when a child receives access to an education that is intended to "confer some educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 200 (1982). Stated otherwise, the statute does not impose upon the Public Agency a duty to provide the best possible education but rather the opportunity to succeed within the context of the child's disability and the educational setting that is available. Thus, the court in *Rowley* stated, "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit" to a child with a disability. *Id.* at 201.

The issue in this case is fairly narrow. The Respondent has conceded that FAPE was not provided since the date of the IEP in May 2012. Indeed, Counsel for Respondent candidly admitted that between the time period of May 17, 2012 until some time in mid-September, DCPS "dropped the ball" resulting in a clear deprivation of FAPE.

Petitioner seeks that Respondent be ordered to fund Student at Private School for the remainder of the 2011-2012 school year. It asserts that this is appropriate under IDEA as both an equitable remedy for the period of time since FAPE was denied (May 17, 2012) and separately because the IEP cannot be lawfully implemented as articulated in *Rowley* and its progeny.

Respondent, in turn, asserts that there is no fundamental difference between RISE and Private School and that RISE would provide an appropriate level of services in the least restrictive environment. Respondent also asserts that the Petitioner's claim that Private School reimbursement should be awarded as an equitable remedy should be rejected since what is essentially a two-month school time period (excluding the summer) is too short a time to warrant such a remedy.

In such a case as this, the standard is the same as when the parent had already placed the child in a private school and seeks reimbursement for the unilateral placement. Therefore, "[t]o order such payment, however, a court must first find that the private placement is appropriate under IDEA and that public placement would not be." *Stockton v. Barbour County Bd. of Educ.*, 1997 U.S. App. LEXIS 9877, at *9, 25 IDELR 1076, at slip op. 4-5 (4th Cir. May 5, 1997) citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985); *C.C., et al. v. Fairfax County Bd. of Educ.*, 2012 U.S. Dist. LEXIS 100773, at * 13, 59 IDELR 95, at slip op. 5 (E.D. Va. July 19, 2012).

The burden of proof under IDEA lies with the party seeking relief, namely the Petitioner. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *see also* DCMR Title 5-E § 3030.14. Accordingly, it is Petitioner's burden to demonstrate by a preponderance of the evidence[6] that RISE is an inadequate placement to meet the needs of Student's May 17, 2012 IEP. By a preponderance of the evidence

[6] See e.g., *Scott v. District of Columbia*, 2006 U.S. Dist. LEXIS 14600 (D.D.C. Mar. 31, 2006).

means that the Petitioner's burden is to prove that there is more evidence in substance supporting its position than that of the other party.

For several reasons, the undersigned concludes that the record evidence demonstrates that RISE is an inadequate placement to meet the standard articulated by the Supreme Court in *Rowley*. At the outset, it is important to emphasize that such a conclusion does not mean that the RISE program is an insufficient program to qualify for placement of any IDEA eligible student. First, as the cases make clear, it is not always the case that a change in location constitutes a change in "educational placement."[7] Second, as the Supreme Court in *Rowley* made clear the analysis in an individualized case by case approach wherein a "free appropriate public education consists of a program 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 program....The program must meet the needs of the individual child." *Yu v. Hillsborough City Elem. Sch. Dist.*, 2012 U.S. Dist. LEXIS 142023, at * 14, 112 LRP 48778 (N.D. Cal. Sept. 28, 2012) (citations omitted) citing *Rowley*, 458 U.S. at 188-189.

There are several reasons within the record that when treated in combination are persuasive that the RISE Program does not meet the minimal standards of *Rowley*. The most compelling is that the record evidence fails to provide any specifics relating to how <u>this</u> Student is to have the <u>opportunity</u> to

[7] Here, this is not an issue because the Act's "stay put" provisions are not implicated [20 U.S.C. §1415(i)] and neither side is asserting that the current placement at Senior High School is an appropriate placement.

achieve success in a program where much of the content in all subjects but English and Reading is supplied by a computer program.[8] The problem with this evidence is that it was much too generalized to be given any credence. Thus, no RISE teacher testified. Presumably, a teacher might have provided the detail necessary to explain (a) how the computer program obtained such certification; (b) what the certification consisted of; (c) how the teacher would supplement the computer program so that, as a matter of practical reality, the combination of the uncertified teacher in such subjects as math and social studies with the certified computer program could provide the necessary instructional educational environment to meet the requirements of FAPE. Indeed, Respondent failed to proffer even any documentary evidence as to how the RISE computer-based system operated or interacted with students. Similarly, no documents were proffered that the computer system was in any way "certified" in special education.

While the Co-Locations Classroom Coordinator was a credible witness, the substance of her testimony was short on substance in those areas and either omitted detail or, as just noted, was not supplemented by other witnesses who could have presented more specific evidence.

Furthermore, in keeping with the requirements that this analysis must be geared to the individual student in question, there is no basis to give DCPS

[8] The Co-Locations Classroom Coordinator testified that the specific teacher where Student would be placed was English/Reading certified in special education. In another RISE classroom, the teacher might be certified in math. It is undisputed that all RISE classes have one teacher certified in one subject area with the "computer" presumably holding the certification in all the required subject areas.

the benefit of any doubt. Indeed, this is particularly the case with this Student where a violation of FAPE has already been conceded and where the Student is four or five grade levels below where he might be expected to be. Beyond those factors, Respondent apparently considered Student an immediate candidate for RISE even though there is no evidence that the IEP Team evaluated RISE as a location after it mistakenly denoted Senior High School as a location going forward for the 2011-2012 school year --- a school to which the Respondent now concedes to be denial of FAPE. *See, e.g., A.K., a minor by his parents v. Alexandria City Sch. Bd.*, 484 F.3d 672, 681 (4th Cir. 2007). Compounding this clear shortcoming is the fact that, as she conceded during her testimony, the Co-Locations Classroom Coordinator – Respondent's only witness – had "limited" knowledge of Petitioner's file. The Co-Locations Classroom Coordinator also acknowledged that the all day one classroom in RISE would be a "challenge" to the behavioral technician and social worker with respect to controlling student. The problem is that the record was devoid of any evidence as to how such a "challenge" would be met or why with limited knowledge of "the file," Respondent was confident that RISE could provide an opportunity for this Student to succeed.

Thus, it is concluded that for this Student, RISE falls short of the minimum statutory requirements defined in *Rowley*. In contrast, Private School does clearly meet those requirements. Each student is taught by special education certified teachers in the respective subjects taught. Students circulate from class to class and are thus not required to remain in one

classroom all day. Testimony from Petitioner's expert indicated that such movement is at least helpful to managing emotionally disturbed students. In all, the testimony demonstrated that Private School has a well-rounded program aimed at educating children such as Student.[9] Accordingly, the undersigned shall order that Respondent amend Student's May 17, 2012 IEP by inserting Private School as the physical location and that it reimburse Petitioner for the cost of the expense of Student's attendance at that school for the 2011-2012 school year.

As an alternative ground, given the discretion afforded to the Impartial Hearing Officer to fashion an equitable remedy, the undersigned also concludes that reimbursement of the cost of attendance at Private School for the 2011-2012 year is appropriate as an equitable remedy in connection with DCPS' stipulated denial of FAPE from May 17, 2012 to the present. It is undisputed that Respondent "dropped the ball" in several ways. First, as already noted, DCPS did not address the inadequacy of the Student's current IEP until the 2011-2012 school year was well under way and, indeed, only after it had filed its Answer to the Due Process Complaint where it denied any violation. Indeed, attention to the Student's situation was not addressed by September 27, 2012, when the undersigned issued the Prehearing Order and where Respondent's position remained that there was no denial of FAPE. Second, and perhaps more importantly, at no time did Respondent involve the Parent in what is

[9] Respondent effectively conceded that Private School met FAPE standards but argued that RISE did as well. The latter contention has been rejected.

intended to be a "cooperative" process.[10] Surely, advising Parent's Counsel on the eve of the five-day disclosure requirement just in advance of the due process hearing does not satisfy the Public Agency's duty to involve parents in their children's placement. *See* 34 C.F.R. § 300.327 and 34 C.F.R. § 300.501(c). These are procedural requirements that go to the statute's fundamental purposes. *See also, Eley v. District of Columbia*, 2012 U.S. Dist. LEXIS 124767, at *20-21, 59 IDELR 189, at slip op. 8-9 (D.D.C. Aug. 24, 2012).

Based upon these undisputed facts, the undersigned alternatively holds that reimbursement for the full 2011-2012 school year is appropriate as an equitable remedy intended to restore the parties to the place they would have been but for the violation of FAPE. In this respect, the school year is already in full swing and it would be unfair under the circumstances outlined throughout this decision to provide reimbursement for any period less than the full academic year. Accordingly, based upon a balance of the equities, including consideration of cost to Respondent, the undersigned concludes that full year reimbursement of the cost of attendance at Private School is also alternatively appropriate as an equitable remedy to compensate Petitioner for Respondent's violations of FAPE.[11]

This Hearing Officer further concludes that Petitioner is the prevailing party.

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[10] *See A.K. v. Alexandria City Sch. Bd.*, 484 F.3d at 681.
[11] The undersigned is also including related transportation costs as a remedy adjunct to the primary remedy.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, the entire record herein including the testimony and exhibits and with due consideration to the arguments of Counsel, it is hereby ORDERED:

1. Within no longer than seven business days, Respondent shall modify the Student's current IEP to reflect the school location as Private School and shall contact Private School so as to arrange for Student's enrollment at Private School for the remainder of the 2011-2012 school year.

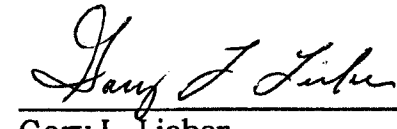
2. Respondent shall reimburse Petitioner for the cost of the 2011-2012 school year at Private School.

3. Respondent shall also provide reasonable expenses for the cost of transportation to and from Private School.

4. This case shall be, and is, hereby closed.

IT IS SO ORDERED

Date: 11-6-12



Gary L. Lieber
Impartial Hearing Officer

Copies to: All Counsel of Record
District of Columbia Public Schools
Student Hearing Office, OSSE

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 District of Columbia 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. §1451(i)(2)(B).