

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
May 27, 2014

PETITIONER,
on behalf of STUDENT,¹

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Hearing Date: May 22, 2014

Student Hearing Office,
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools' (DCPS) March 11, 2014 Individualized Education Program (IEP) and requests public funding for Student's prospective placement at NONPUBLIC SCHOOL.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on March 18, 2014, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 19, 2014. The parties met for a resolution session on April 17, 2014 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on April 18, 2014. On April 17, 2014, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on May 22, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witnesses, DCPS SCHOOL PSYCHOLOGIST and NONPUBLIC SCHOOL ADMINISTRATOR. DCPS called PROGRAM MANAGER as its only witness. Petitioner's Exhibits P-1 through P-7 were admitted into evidence without objection. DCPS' Exhibits R-3, R-4, R-6 and R-7 were admitted without objection. Exhibits R-1, R-2 and R-5 were admitted over Petitioner's objections. Exhibit R-8 was not offered. Counsel for the respective parties made opening and closing statements. Neither party requested leave to file post-hearing written argument.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUE AND RELIEF SOUGHT

- Whether DCPS' March 11, 2014 IEP is inappropriate for Student because it provides inadequate Specialized Instruction services.

For relief, Petitioner requests an order for DCPS to ensure that Student's IEP team develops an appropriate IEP for the student, and for DCPS to fund Student's placement, with transportation at Nonpublic School.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia, where he resides with Mother. Testimony of Mother.
2. Student currently attends CITY MIDDLE SCHOOL. Prior to the 2013-2014 school year, Student attended CITY ELEMENTARY SCHOOL. Testimony of Mother.
3. Student is eligible for special education and related services under the primary disability classification Multiple Disabilities, based upon the impairments Specific Learning Disability (SLD) and Other Health Impairment (OHI). Exhibit P-2. The OHI impairment is based on Student's Attention Deficit Hyperactivity Disorder (ADHD) diagnosis. Testimony of DCPS School Psychologist.
4. Student has had Individualized Education Programs (IEP) since he attended City Elementary School. His IEP team met at City Middle School on October 9, 2013 for an annual review of the IEP. The October 9, 2013 IEP identified Mathematics; Reading; Written Expression; Emotional, Social and Behavioral Development and Motor Skills/Physical Development as areas of concern for Student. The October 9,

2013 IEP provided Student 10 hours per week of Specialized Instruction outside of the General Education setting and 120 minutes per month, each, of Behavioral Support Services and Occupational Therapy related services. Exhibit P-2.

5. In January 2014, Student was referred for a comprehensive psychological reevaluation conducted by DCPS School Psychologist. Mother requested the reevaluation based on her concerns that Student had been suspended and in trouble with other Students and that he continued to have difficulties with reading, concentrating and sitting still. Exhibit P-5.

6. In her interviews with Student's reading resource teacher, DCPS School Psychologist was informed that Student struggled with identifying sight words, struggled with completing tasks and that in the area of reading, Student was performing at a Pre-Kindergarten level. The math resource teacher reported that Student was progressing in the area of being able to demonstrate geometric formulas and shapes. When School Psychologist observed Student in his math class, she noted that he had difficulty responding to one digit multiplication facts without the use of a calculator. Exhibit P-5.

7. Student's teachers did not report that Student exhibited any behavior concerns at all and DCPS School Psychologist was not made aware of any concerns regarding Student's interactions with his nondisabled peers. Testimony of DCPS School Psychologist.

8. On the Wechsler Intelligence Scale for Children- 4th Edition (WISC-IV), Student attained a Full Scale IQ score of 88, in the Low Average range of overall cognitive functioning, above 21% of his age group. There was a significant discrepancy between Student's Verbal Comprehension Index score and Perceptual Reasoning Index

score, which suggests that Student's nonverbal ability is more developed than his verbal ability. Exhibit P-5.

9. On the Kaufman Test of Educational Achievement-2nd Edition (K-TEA-II), in the area of overall reading ability, Student earned a reading composite score of 60 that is in the Lower Extreme range. In the area of overall math ability, he earned a math composite score of 65 that is in the Lower Extreme range. In the area of overall written ability, Student earned a written language composite score of 56 that is also in the Lower Extreme range. Exhibit P-5.

10. Attention Scales completed by Mother and Student's classroom teacher indicated Student has an Attention Deficit/Hyperactive Disorder, Combined Type. However this was not confirmed by the Student's self-report scale. Exhibit P-5.

11. School Psychologist found that Student had difficulty identifying basic one-syllable sight words, which children are taught in Kindergarten or 1st Grade. She also noted that Student had difficulty regrouping two-digit numbers, especially with subtraction. Testimony of DCPS School Psychologist.

12. DCPS School Psychologist concluded in her Comprehensive Psychological report that Student continues to meet IDEA criteria as a student having a Specific Learning Disability as well as an OHI (ADHD) disability. Exhibit P-5.

13. At the end of the second term of the 2013-2014 school year, Student earned, in his cores subjects, a D in Reading, C in Geography, F in Math, and D in Science. Exhibit P-6.

14. Student's IEP team at City Middle School convened on March 11, 2014² to

² The meeting date stated on the IEP is March 11, 2014. However, the IEP meeting notes indicate that the IEP team met on March 10, 2014. It appears that the meeting was held on March 11, 2014. See Exhibits P-3, P-4.

review the January 2014 Comprehensive Psychological Evaluation and an OT assessment, and to review and revise, as appropriate his IEP. Student's general education teacher (for science) reported that he remained stagnant in his academic progress, although his behavior had improved and he was getting along much better with his classmates. Student's resource teacher/case manager reported that as a result of his better attendance and timeliness, Student was making progress in math and English Language Arts (ELA). The IEP team decided to maintain Student's IEP Specialized Instruction Services at 10 hours per week and Related Services at 120 minutes per month, each, for OT and Behavioral Support. Mother and Petitioner's Counsel attended the IEP meeting and disagreed with the team's decision not to increase Student's Specialized Instruction services. Exhibits P-2, P-3.

15. DCPS School Psychologist attended the March 11, 2014 IEP meeting. She disagreed with the IEP team's decision not to increase Student's Specialized Instruction services because of his severe reading deficits. Testimony of DCPS School Psychologist.

16. Since the beginning of the current school year, DCPS has operated a middle school program (the LD PROGRAM) with self-contained classrooms for children with learning disabilities. The LD Program classes have a low student-to-teacher ratio and are staffed with a special education teacher and a paraprofessional. The classrooms are contained in a regular middle school. If determined appropriate by a student's IEP team, a student may attend some classes and other activities in the school with his non-disabled peers. DCPS would be able to assign Student to the LD Program. Testimony of Program Manager. There was no evidence that prior to the due process hearing, DCPS ever offered to place Student in this program.

17. Nonpublic School is a special education day school in the District for

children with SLD and attentional problems. It has an enrollment of 205 students in grades Pre-Kindergarten through 12th Grade, with 45 students in the middle school division. The middle school division offers self-contained classrooms taught by a special education teacher and an assistant teacher. The student to teacher ratio is 8 to 2. Nonpublic School follows District of Columbia common core academic standards. It offers students “scaffolded” access to grade level materials and could provide Student heavy remediation in all core reading deficits. Nonpublic School provides a 90 minute per day reading intervention program. Testimony of Administrator.

18. Nonpublic School holds a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education (OSSE). The tuition is approximately \$40,000 per year, plus additional charges for related services. Testimony of Administrator.

19. Student has participated in a two-day visit to Nonpublic School. Based upon the visit, his school records and special education evaluations and assessments, Student has been offered admission to the school. The school is able to provide OT and Behavioral Support Services as required by Student’s IEP. At Nonpublic School, Student would have no interaction with nondisabled peers. Testimony of Administrator.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

- Is DCPS' March 11, 2014 IEP inappropriate for Student because it provides inadequate Specialized Instruction services?

Petitioner contends that the March 11, 2014 IEP is inappropriate because it only provides Student ten hours per week of Specialized Instruction outside of the General Education setting. To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010). The FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually

designed to provide educational benefit to the handicapped child.” *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.) The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, “did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985). “If no suitable public school is available, the school system must pay the costs of sending the child to an appropriate private school.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005) (citation and alterations omitted).

In this case, the hearing evidence establishes that DCPS’ March 11, 2014 IEP, which maintained Student’s special education services from his October 9, 2013 IEP, does not meet Student’s current, established need for Specialized Instruction services. Prior to the IEP meeting, Student was failing or close to failing all of his core academic subjects. DCPS School Psychologist, who was called as a witness by the parent, testified that she disagreed with the IEP team’s decision not to increase Student’s Specialized Instruction services. When School Psychologist evaluated Student in January 2014, he tested in the Very Low-Severe Deficient range in the academic areas of reading, math and written language. School Psychologist was most concerned that Student had difficulty identifying basic one-syllable sight words, which children normally learn to do in Kindergarten or 1st grade and she opined that he needs more hours in the area of reading. Because of his difficulty identifying words, Student has difficulty

comprehending written text. School Psychologist testified that Student's math achievement scores were also in the very low, severe deficient range and that he has difficulty regrouping two-digit numbers, especially with subtraction. She opined that Student needs more than the 10 hours per week of Specialized Instruction provided in the March 11, 2014 IEP and that he requires all of his instruction in reading, math and written language outside of the General Education setting. DCPS School Psychologist was a credible witness and her testimony was not rebutted by DCPS. I find, therefore, that the Petitioner has established that the March 11, 2014 IEP, which provided only 10 hours per week of Specialized Instruction, was not reasonably calculated to enable Student to receive educational benefits and that Student has been denied a FAPE as a result.

Remedy

Having found Student has been denied a FAPE by DCPS' March 11, 2014 IEP, which was not reasonably calculated to provide educational benefits, I turn to Petitioner's requested remedy – DCPS funding for Student to attend Nonpublic School.

i. Private School Placement

“Where a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ if the education provided by said school is ‘reasonably calculated to enable the child to receive educational benefits.’”

Wirta v. District of Columbia, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is “prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA.” *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C.Cir.2005)

(citations omitted). Placement awards, must be tailored to meet the child's specific needs. *Id.* at 11-12. To inform this individualized assessment, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those 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. *Id.* at 12.

Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The evidence in this case establishes that Student has an SLD in reading, math and written language as well as an Other Health Impairment (ADHD) disability. He is functioning years below grade level and age expectations in reading and math. During the 2013-2014 school year, Student has received failing or of close to failing grades on his core content academic courses.

b. Student's Specialized Educational Needs

According to DCPS School Psychologist, who was called as the parent's witness, Student requires Specialized Instruction, outside of the General Education setting, in reading, math and written language. However, Student may be educated with his nondisabled peers in "Specials" courses, *e.g.*, music, art and physical education.

c. Link between Student's Needs and the Services Offered by Nonpublic School

Nonpublic School is a full-time special education day program. It serves students with various disabilities, including children with Student's disability classifications, SLD and OHI. Nonpublic School offers an intensive daily reading intervention program and

individualized remediation in all core course, which would undoubtedly benefit Student.

d. Cost of Placement at Nonpublic School

The cost of tuition at Nonpublic School is approximately \$40,000 per year, plus additional charges for related services such as OT and counseling. DCPS offered no evidence that the cost of placement at Nonpublic School would be higher than at other local private schools serving students with disabilities.

e. Least Restrictive Environment

At Nonpublic School, Student would be segregated from his non-disabled peers. Under the IDEA's Least Restrictive Environment (LRE) requirement, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled" and "[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2). See *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C.2006) (The IDEA requires school districts to place disabled children in the least restrictive environment possible.) "Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act." *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 324 (D.D.C.2010), quoting *DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir.1989).

DCPS School Psychologist, testified that Student only has academic concerns and that he does not have behavior problems at all. She opined that Student did not need to be separated from his nondisabled peers because he does not have difficulty interacting

with them. She testified that Student would be able to function in a regular education setting for music, art and physical education. School Psychologist was the Petitioner's witness and her testimony was credible.

Considering all of the above factors, I find that the proposed private placement is not proper because Petitioner has not established that the nature of Student's disability is such that his education in a regular school, with appropriate Specialized Instruction services, cannot be achieved satisfactorily. Notwithstanding that Student would likely benefit from the services offered by Nonpublic School, the private school does not represent the LRE for Student. I therefore conclude that Petitioner has not shown that Nonpublic School is an appropriate placement for Student.

ii. Other Equitable Relief

I have found in this decision that Student has been denied a FAPE by DCPS' March 11, 2014 IEP, which was not reasonably calculated to produce meaningful educational benefit. Special education hearing officers have broad discretion in ordering relief for a denial of FAPE. *See, e.g., G.G. ex rel. Gersten v. District of Columbia*, 2013 WL 620379, 8 (D.D.C. Feb. 20, 2013) (Once a court holds that the public placement violated the IDEA, the court enjoys broad discretion in granting such relief as it determines is appropriate); *S-1 by and through P-1 v. Spangler*, 650 F.Supp. 1427, 1431 (M.D.N.C.1986), *vacated as moot*, 832 F.2d 294 (4th Cir.1987) (Incongruous that Congress intended the reviewing court to maintain greater authority to order relief than the hearing officer.) Having found that the March 11, 2014 IEP was not reasonably calculated to produce meaningful educational benefit to Student, I will require DCPS to ensure that the IEP is revised to meet Student's need for Specialized Instruction outside of General Education in all core academic courses. In addition, Student requires

intensive remedial instruction in reading. Finally DCPS must ensure that Student has appropriate opportunities to interact at school with his nondisabled peers. As explained above in this determination, if there is no public school available which can meet these IEP requirements, DCPS must pay the costs of sending Student to an appropriate private school.³ Because there are only three weeks remaining in DCPS' current regular school year, I will order that the revised IEP be implemented by the beginning of 2014-2015 school year.

ORDER

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

ORDERED:

- i. Within 10 school days of entry of this order, DCPS shall convene Student's IEP team to revise his IEP in accordance with this decision. The revised IEP must provide that Student receives Specialized Instruction in all core academic subjects, except "Specials" such as art, music and physical education, in an outside of General Education setting. The revised IEP must also provide Student intensive, individualized, reading instruction to address his reading deficits. Student's IEP placement shall be at a location where Student will have appropriate opportunities to interact with his nondisabled peers;
- ii. DCPS must ensure that a suitable public or nonpublic location of services is promptly identified, which is capable of implementing Student's revised IEP, by the beginning of the 2014-2015 school year; and
- iii. All other relief requested by the Petitioner herein is denied.

Date: May 26, 2014

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

³ There was testimony at the due process hearing that DCPS offers such a program at LD Academy. The suitability of that program has not been considered by Student's IEP team and I make no finding as to its appropriateness for Student.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).