

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

| | | |
|--|---|------------------------------|
| STUDENT, ¹ |) | |
| through the Parents, |) | |
| |) | Date Issued: May 10, 2015 |
| Petitioners, |) | |
| |) | Hearing Officer: John Straus |
| v. |) | |
| |) | |
| District of Columbia Public Schools (“DCPS”) |) | |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

HEARING OFFICER DETERMINATION

Background

The Petitioners, who are the parents of the Student, filed a due process complaint notice on January 7, 2015, alleging that the student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioners alleged DCPS denied the Student a FAPE by failing to timely evaluate the student within 120 days of the Petitioner’s November 8, 2013 request for evaluations to determine whether the student is a student with a disability under the IDEA; failing to timely develop an IEP within 30 days from the IEP team’s April 11, 2014 determination that the Student is a student with Multiple Disabilities (“MD”) under the IDEA; failing to develop an IEP on May 30, 2014 that is reasonably calculated to provide educational benefit; specifically, the IEP does not have speech and language goals and services outside the general education setting and does not provide enough hours of specialized instruction per week outside of the general education setting; failing to provide an appropriate placement for the 2013-2014 and 2014-2015 school year; and erring in determining the Student is a student with MD under IDEA, rather than a student with a Specific Learning Disability and an Other Health Impairment under the IDEA. The Petitioner requested the Hearing Officer order DCPS to reimburse the Petitioner for tuition, related services and costs at the Nonpublic School from March 8, 2014 to the end of the 2013-2014 school year and fund the student’s placement and transportation to the Nonpublic School for the 2014-2015 school year.

Hearing Officer Determination

DCPS asserted that the parent made a referral for special education eligibility on November 8, 2013 and the eligibility meeting was scheduled for March 17, 2014, but due to the closure of DCPS on that day the meeting had to be rescheduled. The first date available due to spring break and the schedules of the parties was April 11, 2014. DCPS asserted the student was determined eligible, and on May 30, 2014 DCPS proposed an IEP and placement. DCPS states it has proposed an appropriate IEP and placement for the student and it has made a FAPE available to the Petitioner and that the Nonpublic school is not proper or appropriate for the student. Finally, DCPS states the Student was not denied a FAPE by the disability category.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on January 7, 2015. This Hearing Officer was assigned to the case on January 12, 2015. Neither the Petitioners nor the Respondent waived the resolution meeting. The resolution meeting took place on January 21, 2015. At the resolution meeting, parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on February 6, 2015, the 45-day timeline to issue a final decision began on February 7, 2015.

The undersigned Impartial Hearing Officer held a Prehearing Conference on January 23, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by February 27, 2015 and that the Due Process Hearing would be held on March 6, 9, and 12, 2015. The PHC was summarized in the Pre-Hearing Order issued January 23, 2015.

The hearing was initially scheduled over three days on March 6, 9, and 12, 2015 and then consolidated to two days (March 6 and 9, 2015). On March 6, 2015, the District of Columbia government offices were opened on a two hour delay due to a snow emergency. Due to the inclement weather and resulting travel difficulties for the parties, the first day of the hearing, March 6, 2015, was cancelled at the request of Petitioner. The parties did not agree to proceed on March 9, 2015 because the Petitioner’s witnesses were not available and DCPS did not agree to proceed before the Petitioners presented their case in chief. The hearing was rescheduled for April 24 and 30, 2015 which were the next available dates for the parties and their witnesses.

On April 24, 2015, the Petitioner presented five witnesses; Psychologist, Registered Occupational Therapist (“OTR”), Nonpublic School High School Administrator (“HS Administrator”), Nonpublic School Junior High School Administrator (“JHS Administrator”) and the Father. On April 30, 2015, the Petitioner presented one witness; Speech Language

Hearing Officer Determination

Pathologist (“SLP”) and the Respondent presented two witnesses; Middle School Assistant Principal (“MS AP”) and High School Assistant Principal (“HS AP”).

Neither party objected to the testimony of witnesses by telephone. The Petitioners participated in person throughout the hearing.

The Petitioner’s disclosures dated February 27 and April 17, 2015, containing a witness list and Exhibits P-1 through P-34 were timely filed and admitted into evidence. DCPS’ disclosures dated February 27, 2015, containing a witness list and Exhibits R-1 through R-16, were timely filed and admitted into evidence. At the conclusion of Petitioner’s case-in-chief, DCPS’ Counsel made an oral motion for a partial directed finding, which the IHO denied. Counsel for both parties made closing arguments. Neither party requested leave to file post-hearing written argument.

As discussed at the Prehearing Conference, the issues² to be determined in this Hearing Officer Determination are as follows:

1. Whether Respondent denied Student a FAPE by failing to timely evaluate the student within 120 days of the Petitioner’s November 8, 2013 request for evaluations to determine whether the student is a student with a disability under the IDEA.
2. Whether Respondent denied Student a FAPE by failing to timely develop an IEP within 30 days from the IEP team’s April 11, 2014 determination that the Student is a student with Multiple Disabilities (“MD”) under the IDEA.
3. Whether DCPS denied the Student a FAPE by failing to develop an IEP on May 30, 2014 that is reasonably calculated to provide educational benefit; specifically, the IEP does not have speech and language goals and services outside the general education setting and does not provide enough hours of specialized instruction per week outside of the general education setting.
4. Whether DCPS denied the Student a FAPE by failing to provide an appropriate placement for the 2013-2014 and 2014-2015 school year.

A fifth issue, whether DCPS denied the Student a FAPE by erring in determining the Student is a student with MD under IDEA, rather than a student with a Specific Learning Disability and an Other Health Impairment under the IDEA, was withdrawn by the Petitioner after the Petitioner presented its case in chief. DCPS did not object to the withdrawal.

For relief, Petitioner requested the Hearing Officer to order DCPS to reimburse the Petitioner tuition and other educational expenses at Nonpublic School for the 2014-2015 school year and for the Hearing Officer to order DCPS to fund the Student’s placement at Nonpublic School for the remainder of the 2014-2015 school year.

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

Findings of Fact³

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

1. The Student is _____ lives with his parents in the District of Columbia. He attends Nonpublic School.⁴
2. The Student attended Private School from the 2006-2007 school year to the 2012-2013 school year. He enrolled in Private School in the _____ grade and remained until _____ grade. The Student was not able to read by second grade and he was enrolled in a tutoring program in second grade for four hours per day concurrently with his enrollment at Private School. Since he received tutoring, the Student made progress. During his tenure at Private School, the Student was not identified as a student with a disability under the IDEA.⁵
3. On May 9, 14 and 23, 2013, the Student received a psychological assessment from the Psychologist. The cognitive batteries indicated the Student's perception and reasoning, ability to manipulate symbolic information, and complete simple paper and pencil tasks in a timely fashion are less developed than his verbal intellectual functioning. The assessment included academic achievement tests that yielded low average basic reading skills, variable reading comprehension skills and weak reading fluency. In Mathematics, the Student was well below average in his understanding of math concepts and calculation procedure and made errors or skipped all items involving division, fractions, negative numbers, basic algebra and geometry. The Student's written language skills were borderline low overall evidencing a weakness for phonology and orthography. The Psychologist noted the Student has a long standing history of Attention Deficit Hyperactivity Disorder ("ADHD"). The Psychologist stated the Student continues to be a student with ADHD. Additionally, the Student has a Learning Disability, a Reading Disorder, a Mathematics Disorder, a Disorder of Written Expression and an Adjustment Disorder with mixed disturbance of emotional and conduct. The Psychologist recommended the Student be placed in an academic setting that is capable of addressing the Student's need for skill remediation as well as appropriate accommodations. The Psychologist further recommends the Student be placed in a small school setting, meaning a small building.⁶

³ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁴ Father

⁵ P-2, P-14, R-3, Father

⁶ P-2, P-14, R-11, Psychologist

Hearing Officer Determination

4. The Student enrolled in Nonpublic School on October 24, 2013, two weeks after the start of the 2013-2014 school year. The Petitioners have paid the Student's tuition at Nonpublic School since the Student's enrollment at Nonpublic School.⁷
5. On November 1, 2013, the Nonpublic School developed an education plan for the Student. The plan does not include goals for the Student; however, the plan states the student would receive 35 hours of specialized instruction per week to be provided by an academic instruction team, integrated speech and language services to be provided by a speech and language therapist and integrated occupational therapy to be provided by an occupational therapist.⁸
6. On November 8, 2013, the Petitioner's, through counsel, made a referral for special education services to the DCPS, Private and Religious School Office. The referral included proof of enrollment at Nonpublic School, proof of residency in the District of Columbia, school records from Private School, Stanford 10 reports, parent interview forms, the psychological assessment report conducted on May 9, 14 and 23, 2013 and the education plan from Nonpublic School.⁹
7. On November 21 and December 17, 2013, the Student received a Speech and Language ("SL") assessment. The evaluator administered formal batteries to the Student in oral and written language that yielded average scores, below average scores and poor scores. The SLP stated the Student's linguistic weaknesses are marked and could pervade every area of his school performance. The evaluator recommended the Student receive direct speech and language intervention on a twice weekly basis for 45 minutes each. The evaluator recommended the SL services address improving verbal reasoning, receptive language and oral language formulation skills; introduce and practice strategies for auditory memory; increase sound-symbol knowledge; and focus on reading fluency, written language organization, spelling, capitalization and punctuation. The evaluator further recommended that the Student be placed in a full-time programs for students with learning disabilities. Specific strategies to develop SL skills both in the classroom and in therapy sessions were provided.¹⁰
8. On December 7 and 13, 2013, the Student received an Occupational Therapy ("OT") assessment from the OTR. The OTR stated the Student's difficulties in ocular motor, visual motor integration, finger strength, fine motor control and precision and executive functioning skills directly impact upon the Student's ability to participate in necessary tasks at school and at home. The OTR recommended the Student receive 45 minutes of school based OT services per week and integrated into the total school program.¹¹
9. On April 11, 2014, the DCPS IEP team reviewed the OT assessment, SL assessment and psychological assessment and determined the Student is a student with Multiple

⁷ P-2, R-4, MS Administrator, Father

⁸ P-2, R-5, OTR, MS Administrator

⁹ Stipulated, P-2, R-6

¹⁰ P-4, SLP

¹¹ P-7, OTR

Hearing Officer Determination

Disabilities, with a primary disability of Specific Learning Disability and an Other Health Impairment under the IDEA which cause severe educational needs. The team further determined the Student requires special education services and OT services; however, the team determined the Student does not qualify for SL services. The Petitioner was told that it was DCPS' policy that reading comprehension, decoding, spelling, reading fluency and written expression can be addressed with specialized instruction rather than a Speech-Language Pathologist. The team stated an IEP would be written in 30 days by Middle School. At that time, the Petitioner will be able to review the IEP and decide whether or not they would like to enroll the Student in a DCPS school or stay at Nonpublic School.¹²

10. On May 12, 2014, the Nonpublic School developed another education plan for the Student. The plan included goals for the Student. The plan states the Student would receive 33.5 hours of special education per week to be provided by a special education team, 45 minutes of integrated speech and language services to be provided by a speech and language specialist, integrated occupational therapy services to be provided by an occupational therapist, 45 minutes of individual occupational therapy per week to be provided by an occupational therapist and 45 minutes of speech and language therapy services per week to be provided by a speech and language therapist.¹³
11. On May 30, 2014, the IEP team at Middle School developed an IEP for the Student. The team developed goals and there was no disagreement regarding the goals. The goals are based on common core standards for students in the sixth, seventh and eighth grades. The team determined the Student required two hours of Reading per week outside the general education setting, three hours of Written Expression per week outside the general education setting, five hours of Mathematics per week outside the general education setting and 120 minutes of Occupational Therapy per month outside the general education setting. DCPS maintained that the Student does not require speech and language services because his needs can be met through the specialized instruction in Reading. The Petitioner and the staff at Nonpublic School disagreed with the amount of services offered by DCPS because it was less services than what was offered at Nonpublic School. The MS AP testified the hours are aligned to the goals in the IEP.¹⁴
12. On June 16, 2014, DCPS informed the Petitioners that the Student would be placed at Middle School for the 2013-2014 school year. The Petitioners were under the impression that the Student would be held back by placing the Student at Middle School.¹⁵
13. On August 11, 2014, the Petitioners notified that the Student would attend Nonpublic School for the 2014-2015 school year. The Petitioners further requested that DCPS place and fund the Student's program at Nonpublic School.¹⁶

¹² P-16, R-9, R-10, MS AP

¹³ P-17, OTR

¹⁴ P-18, R-13, Father, MS AP

¹⁵ P-20, Father

¹⁶ P-21

Hearing Officer Determination

14. On August 20, 2014, DCPS informed the parents that DCPS would not pay the Student's tuition at Nonpublic School. DCPS further stated that the Student may enroll at High School. The first day of the 2014-2105 school year was Monday, August 25, 2015. The Petitioner stated he did not have time to observe the program at High School prior to the beginning of the 2014-2015 school year. However, he did observe the program after the start of the 2014-2015 school year.¹⁷
15. The Student is currently receiving SL services at Nonpublic School from the SLP. The SLP recommends the Student receive individual SL services twice per week in order to increase functional communication skills as well as to access the curriculum.¹⁸
16. On April 17, 2015, the Nonpublic School developed another education plan for the Student. The plan states the Student would receive 32.75 hours of special education per week to be provided by a special education team, integrated speech and language services to be provided by a speech and language specialist, integrated occupational therapy services to be provided by an occupational therapist, 45 minutes of individual occupational therapy per week to be provided by an occupational therapist and 90 minutes of speech and language therapy services per week to be provided by a speech and language therapist.¹⁹
17. The Student has made progress at Nonpublic School.²⁰
18. Eighteen hundred students attend High School. High School has self-contained classrooms with certified teachers teaching all classes and fifteen students per class. The students attending these have a variety of disabilities and have the same curriculum as student in the general education population. However, the curriculum is presented to the students via different modalities.²¹

Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

¹⁷ P-22, P-23, R-15, Father

¹⁸ P-31, SLP

¹⁹ P-34

²⁰ P-19, P-24, Father, SLP, OTR

²¹ HS AP

Hearing Officer Determination

DCPS did not deny the Student a FAPE by failing to timely evaluate the student within 120 days of the Petitioner's November 8, 2013 request for evaluations to determine whether the student is a student with a disability under the IDEA.

The Individuals with Disabilities Education Improvement Act of 2004, 34 C.F.R. § 300.111(a), requires DCPS, as the State Education Agency to ensure that:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the District and children with disabilities attending private school, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

D.C. Mun. Regs. tit. 5, § 3002.1(d) (2003) requires that the local education authority ensure procedures are implemented to identify, locate, and evaluate children with disabilities residing in the District of Columbia. Pursuant to 34 C.F.R. § 300.301(b), either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. In this case, the Petitioners made a referral for special education on November 8, 2013. The referral placed DCPS on notice that the Student may be a student with a disability under the IDEA.

Additionally, pursuant to D.C. Mun. Regs. tit. 5, § 3005.1 (2003), DCPS “shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services in order to determine if the child is a ‘child with a disability’...; and the educational needs of the child.” Further, pursuant to D.C. Mun. Regs. tit. 5, § 3005.2 (2003), “the IEP team shall conduct an initial evaluation of a child within a reasonable time of receiving a written referral and parental consent to proceed and within timelines consistent with Federal law and D.C. Code § 38-2501(a).” Under the D.C. Code, DCPS and “shall assess or evaluate a student, who may have a disability and who may require special education services, within 120 days from the date that the student was referred for an evaluation or assessment.” (D.C. Code § 38-2501(a)). The Petitioner requested the Student be evaluated for special education services on November 8, 2013. DCPS did not complete the evaluation until April 11, 2014. DCPS was required to complete its evaluation and determine the Student’s eligibility for special education services no later than March 8, 2015. Therefore, DCPS is in violation of its procedural obligations to determine the Student’s eligibility for special education.

Pursuant to 34 C.F.R. § 300.513(a)(2), in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies, impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or caused a deprivation of educational benefit. The Student was able to receive a FAPE and received educational benefit at nonpublic school from March 8, 2014 to April 11, 2014. Therefore, the Student was not denied a FAPE as a result of DCPS’ failure to evaluate the Student in a timely manner. The Petitioner failed to meet their burden of proof.

DCPS did not deny the Student a FAPE by failing to timely develop an IEP within 30 days from the IEP team's April 11, 2014 determination that the Student is a student with MD under the IDEA.

Pursuant to 34 C.F.R. § 300.323(c)(1), DCPS must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services. On May 30, 2014, the IEP team developed an IEP for the Student. The IEP was developed 19 days after the statutory deadline to develop an IEP.

A school district's failure to develop an IEP within 30 days of an eligibility determination amounts to a denial of FAPE where it causes substantive harm to the student. *See, e.g., Gerstmyer v. Howard County Pub. Schs.*, 20 IDELR 1327 (D. Md. 1994) (finding that a district denied a child FAPE when it failed to develop an IEP for him for more than six months after it became aware that he needed an evaluation); and *Salley v. St. Tammany Parish Sch. Bd.*, 22 IDELR 878 (5th Cir. 1995) (holding that a district's failure to hold an IEP meeting for a fourth-grade transfer student with learning disabilities within 30 days of her May enrollment did not violate the IDEA because the child was not denied educational benefit). The Student was not substantively harmed by DCPS' failure to develop an IEP for the Student in a timely manner. *See Supra*. The Student was not denied a FAPE; therefore, the Petitioner did not prevail on this issue.

DCPS denied the Student a FAPE by failing to develop an IEP on May 30, 2014 that is reasonably calculated to provide educational benefit; specifically, the IEP does not have speech and language goals and services outside the general education setting and does not provide enough hours of specialized instruction per week outside of the general education setting.

FAPE is broadly defined as special education and related services that are provided at public expense and are provided in conformity with IEP. 34 C.F.R. § 300.17. The leading standard of FAPE under the IDEA came from the U.S. Supreme Court case, *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (1982). *Rowley* established an oft-cited two-part test that a court should undertake to determine whether a district has complied with the IDEA. The contours of an appropriate education must be decided on a case-by-case basis, in light of an individualized consideration of the unique needs of each eligible student. *See Rowley*, 553 IDELR 656 (U.S. 1982). In *Rowley*, the Supreme Court established the following two-part test that courts should use to decide the appropriateness of a student's education:

1. Has the state complied with the procedures set forth in the IDEA?
2. Is the IEP, developed through the IDEA's procedures, reasonably calculated to enable the child to receive educational benefits?

Rowley, 553 IDELR 656 (U.S. 1982). The Supreme Court held that when this two-part test is satisfied, the state has complied with the obligation imposed by Congress, and the courts can require no more.

Hearing Officer Determination

In *Rowley*, the Supreme Court made it clear that the IDEA does not require districts to provide students with disabilities with the best possible education.²² A "reasonableness" standard governs the provision of special education to eligible students with disabilities. *Rowley*, 553 IDELR 656 (U.S. 1982). The High Court said that districts "need not provide the optimal level of services," or even a level that would confirm additional benefits. *See also Z.W. v. Smith*, 47 IDELR 4 (4th Cir. 2006, *unpublished*) (holding that districts have no obligation to ensure that students with disabilities receive the best education available) and *Klein Indep. Sch. Dist. v. Hovem*, 59 IDELR 121 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600, 113 LRP 10911 (2013) ("Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting the child's disability.") Referring to the minimal level of benefits that an appropriate educational program must confer, the Supreme Court termed the state's obligation as being the provision of a "basic floor of opportunity." *Rowley*, 553 IDELR 656 (1982). *See also Coleman v. Pottstown Sch. Dist.*, 64 IDELR 33 (3d Cir. 2014, *unpublished*); and *Barron v. South Dakota Bd. of Regents*, 57 IDELR 122 (8th Cir. 2011).

The use of language is pervasive in our everyday lives. The Speech and Language assessment indicates the Student's linguistic weaknesses are marked and could pervade every area of his school performance. The evaluator recommended the Student receive direct speech and language intervention on a twice weekly basis for 45 minutes each. The Nonpublic school initially provided speech and language services integrated in his specialized instruction for 45 minutes per week and in separate speech and language services for 45 minute per week. The speech and language therapist found that the Student required all of his speech and language services in one to one sessions with the Speech and Language therapist. DCPS denied the Student speech and language services because they determined that his speech and language needs could be met through specialized instruction. In doing so, DCPS did not consider the recommendations in the speech and language assessment or the recommendations by his current speech and language therapist. The Hearing Officer finds that DCPS' failure to provide speech and language services in the Student's IEP is a denial of FAPE.

The IEP developed by DCPS provides 10 hours per week of specialized instruction outside the general education setting and roughly 30 minute per week of occupational therapy services. The psychological assessment indicates the Student is performing well below his peer in all academic areas of functioning, especially in Mathematics. The IEP goals developed for the Student were for students in the sixth through eighth grade. Given the Student's past performance, his struggle to learning to read in second grade and the most current measure of his academic achievement, the Student requires intensive instruction in order to be able to perform academically commensurate with his age level peers. Given the Student's age, he should be performing academically at the tenth grade. Unfortunately, he is far below his peers. The IEP developed by DCPS does not provide the Student with adequate hours of specialized instruction to allow the Student to receive educational benefit. The Student requires much more than 10 hours per week of specialized instruction. Therefore, the Hearing Officer finds that DCPS denied the Student a FAPE by failing to provide adequate special education services.

²² According to an analogy from the 6th U.S. Circuit Court of Appeals, FAPE does not require a "Cadillac." Rather, it requires a "Chevrolet." *Doe v. Board of Educ. of Tullahoma City Sch.*, 20 IDELR 617 (6th Cir. 1993), *cert. denied*, 111 LRP 3215, 511 U.S. 1108 (1994).

Hearing Officer Determination

DCPS denied the Student a FAPE by failing to provide an appropriate placement for the 2013-2014 and 2014-2015 school year.

Once an IEP or the contents of the student's educational program are determined, the next step is to locate an appropriate placement so that the IEP can be implemented. *See* 34 C.F.R. § 300.116. This step is known as a placement decision. What is pertinent in making the placement decision will vary, at least to some extent, based upon the child's unique and individual needs. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994).

The Student's unique needs were described in the psychological assessment and speech and language assessment reports. The psychologist recommended the Student be placed in a small school building in order for him to be able to focus better on his school work. No testimony or documents dispute the psychologist's recommendations other than the testimony that DCPS could implement the IEP at High School.

School districts must offer a continuum of alternative placements for students who require special education and related services. The continuum should provide the range of potential placements in which a district can implement a student's IEP. It begins with the regular classroom and continues to get more restrictive at each placement on the continuum. 34 C.F.R. § 300.115 (a).²³ The speech and language assessment report recommends that the Student be placed in a full-time programs for students with learning disabilities. The Student requires a placement in a separate day school program. DCPS offered to place the Student in special classes in a regular education school. The student would not receive educational benefit in such a setting. Therefore, the Hearing Officer finds that DCPS denied the Student a FAPE.

Courts may still require a district to provide tuition reimbursement even if the student never received public education. The receipt of special education and related services through the public school system is not a prerequisite for reimbursement. As such, the mere failure to make FAPE available to a student with a disability can expose a district to a claim for tuition

²³ 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 comments to the regulations clarify that

The Act does not require that every child with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every child with a disability is reflected in the requirement that LEAs make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of children with disabilities. This requirement for the continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each child with a disability. The options on this continuum must include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). These options must be available to the extent necessary to implement the IEP of each child with a disability.

See 71 Fed. Reg. 46,587 (2006). As stated above, the continuum, in general, ranges from the least restrictive to the most restrictive: instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1) and *H.H. v. Indiana Bd. of Special Educ. Appeals*, 50 IDELR 131 (N.D. Ind. 2008).

Hearing Officer Determination

reimbursement. However, reimbursement also will depend on whether the private placement is appropriate, and whether there are any equitable considerations, such as a lack of proper notice, that would bar reimbursement. *Forest Grove Sch. Dist. v. T.A.*, 52 IDELR 151 (U.S. 2009); and 71 Fed. Reg. 46,599 (2006). The Petitioners have paid the Student's tuition at Nonpublic School out of pocket and the Student has made progress at the Nonpublic School and is appropriate for the Student. The record reflects that the Petitioner provide proper notice to DCPS of their intent to place the Student at the Nonpublic School pursuant to 34 C.F.R. § 300.148. Therefore, the Hearing Officer will order DCPS to reimburse the Petitioner for tuition paid at the nonpublic school.

ORDER

- (1) DCPS shall reimburse the Petitioner for tuition paid at Nonpublic School for the Student's education since March 8, 2014;
- (2) DCPS shall place the student in Nonpublic School for the 2014-2015 school year, including transportation, as necessary;
- (3) DCPS shall convene an IEP team meeting at Nonpublic School within 10 school days to review and revise the student's IEP;
- (4) For every day of delay by the Petitioner, DCPS shall have one day to convene the meeting; and
- (5) No further relief is granted.

SO ORDERED.

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).

Date: May 10, 2015

/s/ John Straus
Hearing Officer