

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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Confidential

STUDENT, through the legal guardians¹)
)
 Petitioner,)
)
 v.)
)
 THE DISTRICT OF COLUMBIA)
 PUBLIC SCHOOLS,)
)
 Respondent.)
)

Hearing Date:
December 18, 2008

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STUDENT HEARING OFFICE
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REVISED HEARING OFFICER'S DECISION

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¹ Personal identification information is provided in Attachment A.

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. BACKGROUND

The Student is a -year-old, special education student who recently attended a non-public pre-school ("School"). On June 24, 2009, the Student's Parents ("Petitioners") filed a Due Process Complaint Notice ("Complaint"). The Complaint alleged that DCPS failed to:

- A. Timely and fully evaluate the Student in all areas of his disability;
- B. Timely review the Student's evaluations;
- C. Appropriately identify and address all areas of the Student's disability;
- D. Develop an appropriate IEP for the Student for the 2008-2009 and 2009-2010 school years;
- E. Implement the Student's IEP and provide the Student appropriate specialized instruction and related services;
- F. Provide the Student with an appropriate educational placement for the 2008-2009 and 2009-2010 school years; and
- G. Ensure the Student made academic and emotional progress in his educational placement.

The Complaint requested relief in the form of an order placing the Student at a non-public day school at DCPS expense and awarding the Student compensatory education for the failure of DCPS to provide the Student a free, appropriate, public education ("FAPE") during the 2008-2009 school year.

On July 10, 2009, counsel for DCPS filed a Response to Petitioner's (sic) Administrative Due Process Complaint ("Response"). Counsel for DCPS filed the Response six days after it was due and only after repeated requests by this Hearing Officer. The Response contained no specific assertions of fact or law and failed to address the claims in the Complaint.

In the prehearing conference, this Hearing Officer stated that DCPS would have the burden of production due to DCPS counsel's failure to file a proper response. This Hearing Officer also advised that Petitioners would bear the burden of proof in the due process hearing.

The due process hearing convened at 9 a.m. on August 10, 2009. At the outset of the

hearing, counsel for Petitioners moved for this Hearing Officer to bar several of the witnesses for DCPS from testifying on the grounds that counsel for DCPS failed to include addresses, phone numbers, and descriptions of the witnesses' testimony as required by this Hearing Officer in the prehearing order. This Hearing Officer barred the testimony of six of ten DCPS witnesses because counsel for DCPS failed to comply with the prehearing order.² Counsel for DCPS responded that this ruling left her with no witnesses to call that day because she had instructed the remaining witnesses to be available only for the second day of hearing. This Hearing Officer called a brief recess in the hearing to allow counsel for DCPS to locate witnesses who were available to testify. When the due process hearing reconvened, counsel for DCPS stated that DCPS would not be presenting any testimony.

With the consent of counsel for DCPS, the DCPS disclosures were not entered into evidence. All of Petitioners' five-day disclosures were entered into evidence, except for exhibit 5, to which counsel for DCPS objected. Counsel for Petitioners then stated that she would call only three of the witnesses listed in her five-day disclosure. These witnesses included Petitioner, the Director of the Student's School, and the Director of Special Education Programming of Petitioners' proposed non-public placement for the Student.

After the testimony of Petitioners' witnesses, the parties agreed to develop a list of joint stipulations of fact and submit written closing arguments. This Hearing Officer ordered the parties to file the stipulations of fact and closing arguments, with a copy to this Hearing Officer, before midnight on August 12, 2009.

III. RECORD

Due Process Complaint Notice, filed June 24, 2009;
DCPS Response to Due Process Complaint, filed July 10, 2009;
Prehearing Order, issued July 20, 2009;
Petitioners Five-Day Disclosures, filed August 3, 2009;
DCPS Five-Day Disclosures, filed August 3, 2009;
DCPS Supplemental Five-Day Disclosures, filed August 3, 2009;
Joint Stipulations of Fact, filed August 11, 2009;
Petitioners Closing Argument, submitted to Hearing Officer on August 11, 2009; and
DCPS Closing Argument, filed August 13, 2009.

² During the prehearing conference, this Hearing Officer discussed at length the requirement that counsel include a brief description of anticipated testimony of all witnesses listed on each party's five-day disclosure. This Hearing Officer explained that the requirement that the parties provide a brief description of anticipated testimony is to provide proper notice of each witness to the opposing party, and that the name, phone number and address of a witness is insufficient information to allow a party to prepare its case. This Hearing Officer's interpretation of the five-day disclosure rule, 34 C.F.R. § 300.512 is supported by the U.S. Department of Education, Office of Special Education Programs, the agency that drafted IDEIA's implementing regulations. See 211 IDELR 166, 211 LRP 6735 (stating that five-day disclosures should provide the names of witnesses to be called as well as the general thrust of each witness's testimony).

IV. ISSUES PRESENTED

A. Whether DCPS denied Petitioner a free appropriate public education (“FAPE”) by failing to timely evaluate the Student in all areas of disability;

B. Whether DCPS denied Petitioner a FAPE by failing to develop an appropriate IEP for the Student; and

C. Whether DCPS denied Petitioner a FAPE by failing to provide the Student with an appropriate educational placement for the 2008-2009 and 2009-2010 school years.

V. FINDINGS OF FACT

a. The Student was born at 36 weeks and hospitalized at four months of age because he failed to thrive.³ The Student had severe gastroesophageal reflux and was hospitalized at four months due to his failure to thrive.⁴ By the time the Student was six months old, his development was delayed.⁵ At that time, Petitioners contacted The District of Columbia government’s Early Intervention Program (“Early Intervention”) for assistance.⁶

b. Early Intervention referred the Student to _____ for speech, occupational, and physical therapy.⁷ At age two, the Student graduated from his program at _____.⁸ Between ages two and three, the Student attended two programs that provided speech and language and occupational therapy.⁹ Early Intervention evaluated the Student for speech-language, occupational therapy and other special education services when he was six months old.¹⁰ Early Intervention monitored the provision of these services until the Student was three years old.¹¹

c. At age three, the Student enrolled in the School.¹² The Student remained in the School for two years.¹³ During that time, the Student exhibited great visual skills but was very

³ Testimony of Student’s mother (“Petitioner”), Petitioners Exhibit 21 (Psycho-Educational Evaluation). The Student’s father did not attend the due process hearing; thus all references to Petitioner herein are to the Student’s mother.

⁴ *Id.*

⁵ *Id.*

⁶ Testimony of Petitioner.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* The programs are identified in Attachment A.

¹⁰ Joint Statement of Facts Not in Dispute.

¹¹ *Id.*

¹² Testimony of Petitioner

¹³ Testimony of Director of the School.

challenged in expressing himself and withstanding the normal hubbub of a classroom setting.¹⁴ At times, he looked like he would say something but was unable to speak.¹⁵ On other days, he would run up to his teacher, show her something, but would be unable to sustain the conversation.¹⁶ He also exhibited problems with attention and required a lot of prompting and support.¹⁷ The Student was diagnosed with attention deficit hyperactivity disorder (“ADHD”) in November 2007.¹⁸

d. At the School, the Student was friendly and sought out interactions with his peers.¹⁹ He wanted to be friends with his classmates but his inability to use language was an obstacle to his interactions.²⁰ Nonetheless, he models his behaviors on the typically developing children at the School and interacts well with them.

e. Early Intervention provided the Student no related services at the School, although other students received related services from Early Intervention.²¹ A private speech-language therapist regularly worked with the Student at the School.²²

f. The Student has difficulty understanding language and is very literal.²³ For example, he cannot comprehend that a question asking if he is five and asking if he is age 5 is the same question, and to the former he will answer that he is only one (person).²⁴

g. The Student is bright and has exceptional visual abilities.²⁵ He is able to complete a 200-piece puzzle in less than 5 minutes without looking at the box.²⁶ Although only five years old, he can read three letter words.²⁷ At the School, the Student knew every child’s name and the exact location of each child’s assigned seat.²⁸ He was very aware of the other kids.²⁹

h. On September 24, 2008, a DCPS multidisciplinary team (“MDT”), which included the Student’s mother, developed an evaluation plan for the Student.³⁰ The MDT decided that the Student would be fully evaluated for special education.³¹ The team agreed that

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Testimony of Petitioner.

¹⁹ Testimony of Director of the School.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Testimony of Petitioner.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Petitioners Exhibit 7.

³¹ *Id.*

DCPS would conduct occupational therapy and speech-language evaluations, and evaluate the Student for “attentional deficits.”³² At the MDT meeting, the Student’s mother provided written consent for the Student to be evaluated by DCPS and indicated that she agreed with the evaluation plan.³³

i. DCPS never conducted the Student’s evaluations.³⁴ In January 2009, Petitioners obtained an independent neuropsychological evaluation of the Student at their own expense.³⁵

j. The Student’s major disabilities are auditory processing and sensory integration disorders as well as ADHD.³⁶ He also was diagnosed with developmental coordination disorder due to his delayed fine motor skills.³⁷ He did not exhibit sufficient symptoms of autism to be diagnosed as autistic.³⁸

k. The Student’s IEP should be guided by the educational classifications of speech and language impairment and other health impaired (ADHD). He requires placement in a full-time, special education setting for students with learning disabilities.³⁹ He must receive twice-weekly speech-language therapy, regular occupational therapy to address his fine motor and sensory processing delays, and support for the development of his auditory processing and sensory processing delays.⁴⁰

l. On February 26, 2009, DCPS convened a meeting to develop the Student’s individualized educational program (“IEP”). The team, which included Petitioner, developed an IEP that provided that the Student would receive 26 hours of specialized instruction outside of the special education setting and 1.5 hours of speech-language therapy.⁴¹ Petitioner objected to this disability classification as it was counter to the Student’s psycho-educational evaluation.⁴² The IEP team completed an autism eligibility determination form, which indicated that the Student does not meet the criteria for autism.⁴³ Nonetheless, the team indicated on the IEP that the Student’s primary disability classification is DD, the abbreviation for autism.⁴⁴

m. The secondary disability classification on the Student’s IEP is OHI.⁴⁵ The IEP indicates that the Student’s educational setting is to be a DCPS elementary school.⁴⁶

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*; Petitioners Exhibit 21.

³⁷ Petitioners Exhibit 21.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Petitioners Exhibit 11.

⁴² Testimony of Petitioner.

⁴³ Petitioners Exhibit 13.

⁴⁴ Petitioners Exhibit 11; Testimony of Petitioner.

⁴⁵ Petitioners Exhibit 11.

n. On May 6, 2009, the MDT determined that the Student requires 1 hour and thirty minutes of occupational therapy services per week, and added them to the Student's IEP.⁴⁷

o. Petitioner's proposed non-public placement is an appropriate educational setting for the Student and is able to implement the Student's IEP.⁴⁸

VI. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children.⁴⁹ A free, appropriate public education "consists of educational instruction specially 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 instruction." *Bd. of Ed. v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

A. DCPS Denied the Student a FAPE when It Failed to Evaluate the Student.

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children. 20 U.S.C. § 1412(1). A free, appropriate public education "consists of educational instruction specially 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 instruction." *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted).

Among the specific conditions a state must satisfy is the requirement that it demonstrate that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated." 20 U.S.C. § 1412(2)(C). *See also* 20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. §§ 300.128(a)(1) and note 1, 300.220 and note, 300.300 note 3. This is known as the "child find" duty.

Although DCPS satisfied the first prong of its child find duties in that it located the Student, Petitioners established that DCPS failed to evaluate the Student, despite having developed an evaluation plan. Petitioner provided consent to evaluate yet DCPS made no effort to evaluate the Student. Finally, Petitioners had to obtain an independent evaluation at their own expense.

⁴⁶ *Id.*

⁴⁷ Petitioner Exhibit 18.

⁴⁸ Testimony of Director of Special Education Programming at non-public placement.

⁴⁹ 20 U.S.C. § 1412(1).

The Complaint does not seek reimbursement for the Student's independent evaluations and counsel for Petitioners presented no evidence of the cost of these evaluations. Thus, this Hearing Officer cannot reimburse Petitioners for the independent psycho-educational evaluation.¹ 34 C.F.R. § 300.324.

B. DCPS Failed to Develop an Appropriate IEP for the Student.

Congress enacted the IDEA to "ensure that children with disabilities have access to a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. §1400(d)(1)(A)(2005); *Cedar Rapids v. Garret F.*, 526 U.S. 66, 74 (1999). A free appropriate public education, or FAPE, is delivered through the implementation of an Individualized Education Program, or "IEP." *Burlington v. Dept. of Ed.*, 471 U.S. 359, 368 (1985)(describing the IEP as the "modus operandi" of special education). The IEP is developed by a team of professionals, including the child's parents, "as well as a representative of the local educational agency with knowledge about the school's resources and curriculum" *Branham v. District of Columbia*, 427 F.3d 7, 8 (D.C. Cir. 2005). "The IEP must, at a minimum, "provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid*, 401 F.3d at 519; see also *Branham*, 427 F.3d at 9.

In *Rowley*, the Supreme Court emphasized that "the benefits obtainable by children at one end of the [disability] spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." 458 U.S. at 202. To inform this individualized assessment, "courts fashioning discretionary equitable relief under IDEA must consider all relevant factors." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 16, (1993); *Reid*, 401 F.3d at 523-24.

In the development of the IEP, the IEP team must consider:

- A. The strengths of the child;
- B. The concerns of the parent for enhancing the education of their child;
- C. The results of the initial or most recent evaluation of the child; and
- C. The academic, developmental and functional needs of the child.⁵⁰

In conducting evaluations, an LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child to determine whether the child is a child with a disability and to determine the content of the child's IEP. 34 C.F.R. § 300.304. No single measure or assessment shall be the sole criterion for determining an appropriate IEP for the child. *Id.*

Here, DCPS failed to develop and IEP for the Student until his fifth year. As a result, Petitioner's had to place the Student at a non-public school at their own expense. Petitioners are entitled to reimbursement for tuition at the School.⁵¹

⁵⁰ 34 C.F.R. § 300.324.

Moreover, the IEP DCPS eventually developed was inappropriate because it incorrectly classifies the Student as autistic. The Student's psycho-educational evaluation established that the Student does not exhibit the symptoms of autism. The DCPS form completed by the IEP team also showed that the Student does not have autism. Nonetheless, DCPS developed an IEP that provides that the Student's primary disability is autism. Thus, Petitioners established that the IEP developed by DCPS was not reasonably calculated to enable the Student to receive educational benefits.⁵² DCPS denied the Student a FAPE when it failed to develop and appropriate IEP for the Student.

C. DCPS Failed to Provide an Appropriate Placement for the Student.

An IEP cannot be implemented without first identifying a placement for the provision of the IEP services, which must be based upon the child's IEP, with consideration given to the quality of services that the child needs. 34 C.F.R. 300.116(b). A placement may be considered to have been based on the child's IEP only when the individual characteristics, including demonstrated response to particular types of educational programs, are taken into account." *Deal v. Hamilton County*, 392 F.3d 840, 859 (6th Cir. 2004); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171, 177-178 (3rd Cir. 1988).

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.⁵³ Special 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.⁵⁴

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. *Branham*, 427 F.3d at 11-12 (citing, e.g., *Rowley*, 458 U.S. at 202 (noting that "sufficient educational benefit" will vary from child to child)); *McKenzie v. Smith*, 771 F.2d 1527, 1531 (D.C. Cir. 1985) (affirming district court's placement decision that took into consideration student's "individual needs").

In *Gellert v. District of Columbia*, the district court held that the student's IEP and public placement were inappropriate because the IEP team failed to take into account the student's need for a small class size and a quiet, controlled learning environment. 435 F. Supp. 2d 18, 26-27 (D.D.C. 2006). In this case, the Student's IEP was inappropriate. Thus, the DCPS public elementary school would have been inappropriate. Additionally, the psycho-educational

⁵¹ Counsel for Petitioners presented no evidence of the cost of the School or the therapy the Student received at Petitioners' expense.

⁵² See *Rowley*, 458 U.S. at 188-89.

⁵³ 34 C.F.R. § 114 (a)(2)(i).

⁵⁴ *Id.* at § 114 (a)(2)(ii).

evaluation established that the Student requires placement in a full-time, special education setting for students with learning disabilities.

C. Petitioners Properly Placed the Student in a Non-Public School and Are Entitled to Tuition Reimbursement.

Where the public school agency has failed to provide the child with a FAPE, hearing officers and courts are empowered to provide the equitable relief of tuition reimbursement and prospective placement in an appropriate private school. *Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C. Cir. 2005). See also *Burlington*, 471 U.S. at 370 (where that a private placement desired by the parents was proper under IDEA. . . . appropriate relief would include directing school officials to develop and implement an IEP placing the child in a private school, at public expense).

When, as in this case, a public school system has failed to provide an appropriate education, a private school placement is "proper under the Act" if the education provided by the private school meets the Act's educational goals. *Carter v. Florence County*, 950 F.2d 156, 163 (4th Cir. 1991) *aff'd* 510 U.S. 7 (1993); *Burlington*, 471 U.S. at 370; *Wirta v. District of Columbia*, 859 F. Supp. 1,5 (D.D.C. 1994).⁵⁵

Here, it is uncontroverted that the School met the Student's educational goals. Thus, Petitioners are entitled to reimbursement from DCPS for the costs they incurred in unilaterally placing the Student at the School. See *Bd. of Ed. of Murphysboro v. Illinois*, 41 F.3d 1162, 1168 (7th Cir. 1994)(in the absence of an appropriate school system proposal the only question for the court to decide was whether the parent's choice of placement would confer educational benefits).

VII. DECISION

Upon consideration of Petitioner's Complaint, Petitioners' Five-Day Disclosures, and the testimony at the hearing, it is this 22nd day of August 2009 hereby:

ORDERED that, within ten (10) days of this Order, DCPS shall fund all costs incurred in the Student's placement at Petitioners' proposed non-public day school;

IT IS FURTHER ORDERED that DCPS shall provide transportation for the Student to attend the non-public day school, if necessary;

IT IS FURTHER ORDERED that DCPS shall reimburse Petitioners for all costs already incurred in unilaterally placing the Student at the School; and

IT IS FURTHER ORDERED that this Order is effective immediately.

⁵⁵ DCPS may not "now propose an alternative placement where its failure to do so in the first instance violated the requirements of the Act." *Wirta*, 859 F. Supp. at 5.

/s/

Frances Raskin
Hearing Officer

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision 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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

Copies to:

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