

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF REVIEW AND COMPLIANCE
STUDENT HEARING OFFICE

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STUDENT ¹ , by and through Parent	HEARING OFFICER'S DETERMINATION
Petitioners,	Case No.
v.	<u>April 21</u> , 2009
DISTRICT OF COLUMBIA PUBIC SCHOOLS	<u>Representatives:</u>
Respondents.	Counsel for Petitioners: DOMIENTO HILL, ESQ.
	Counsel for DCPS: LINDA SMALLS, ESQ.
	<u>Hearing Officer:</u> CHERYLEN LONG

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STUDENT HEARING OFFICE

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Confidential

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

The Complaint in this matter was filed January 30, 2009. The hearing then set for March 5, 2009 to be held at 1150 5th Street, SE, Washington, D.C. Two Pre-Hearing Conferences were convened prior to the initial hearing and a Pre Hearing Order was issued. Evidence was presented, but there was insufficient time for parties to complete the presentation of their cases. Hence, the hearing was continued until April 31, 2009 at 9:00 am. Following the second all day hearing, additional time was needed to present DCPS' case. A continuance was Ordered, and the final hearing commenced on April 28, 2009. The hearings were conducted and this decision was written pursuant to the *Indiv. With Disab. Act* (IDEA) (P.L. 101-476), reauthorized as the *IDEA Improvement Act of 1997*(IDEIA) (P.L. 105-17) 20 U.S.C. 1400 Et. Seq.; and their current regulations, specifically the Code of Federal Regulations at 34 CFR Part 300; further reauthorized as the *IDEA Improvement Act of 2004* (P.L. 108-446) and Title 5 of the DCMR and section 145 of the D.C Appropriations Act, effective October 21, 1998.

Parties were represented by counsel. Petitioner timely filed and presented disclosures which included Exhibits 1-24, which were supplemented to include Exhibits 25-33 (hereinafter GB 1-33). Petitioner's exhibits were admitted, with the exception of GB 22, after authentication. DCPS also filed disclosures which included exhibits 1-20 (hereinafter DCPS 1-20). DCPS' exhibits were admitted without objection. Witnesses were sworn and testimony was received. A list of all participants is attached.

Preliminarily, DCPS moved to dismiss the Complaint. The basis of DCPS' Motion to Dismiss was the parents' refusal to sign their consent to the IEP. DCPS counsel argued that 34 CFR 300.300(A) requires that parental consent be provided before DCPS can provide special education services to Student. Further, counsel asserted that according to 34 CFR 300.300(b)(4), there is no FAPE denial when consent to services is refused. Counsel for Petitioner maintained that Parent is entitled to a Due Process Hearing on the adequacy of the IEP and their right to reimbursement. An agency that is responsible for making a free appropriate public education available to a child with a disability shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child. In the event that Parent refuses to consent to the initiation of services, DCPS is insulated from any liability for not providing FAPE. 34 CFR 300.300 (b)(4)(i). However, 34 CFR 300.300(d)(5) places a requirement of recordkeeping upon the LEA with respect to attempts to obtain parental consent to initiate services.

The record is noticeably void of any testimony that DCPS made efforts to obtain consent. There was no evidence that consent was sought or discussed. Counsel for DCPS argued that the Parent's refusal to sign the IEP constituted a refusal to give consent to service the student. The Parents here simply wrote "We disagree with the IEP and proposed placement" on the IEP itself. Undersigned does not find this statement, even in conjunction with their refusal to check the box at the bottom of the IEP stating: "I AGREE with the contents of the IEP....and consent to the implementation of services in the IEP" constitutes a refusal to consent as intended by the statute.

5. At the _____ Student received instruction in small classes (6-8 students), intensive instruction in reading, speech-language and occupational therapies, and social skills instruction in a group setting. [Testimony of Maguire; DCPS#1; #14; 16].
6. Student was diagnosed with Attention Deficit Disorder in February, 2004 and was subsequently treated with both medication and therapy. [DCPS#7].
7. In September, 2006, Student underwent a comprehensive psycho-educational evaluation.
8. By the end of the 2006-07 school year, the _____ family had informed the _____ School that they would be re-locating to Washington, DC. [Testimony of _____ of _____]
9. The _____ School provided a recommendation indicating that Student should continue to be placed in a small, structured classroom education setting. Student was not performing on level and was receiving intensive instruction, particularly in reading. [Testimony of Maguire Tr. 104; 14].
10. Student enrolled at the _____ for the start of the 2007-08 school year.
11. In early January, 2008, Student's parents contacted the CARE Center², to initiate

²C.A.R.E. is an acronym for Central Assessment Review and Evaluation. It was formerly a centralized office operated by the District of Columbia Public Schools to conduct Child Find activities. It has subsequently been disbanded and replaced in part by the PRO office ("Private

the Child Find process.

12. On January 24, 2008, Student's parents, and their educational consultant, Dr. Laura Solomon, attended a Mutlidisciplinary Team ("MDT") meeting at the CARE Center. The DCPS representatives were Ms. Gayle Hall and Ms. Nathalia Houston. Ms. Houston authored the notes of the meeting. [DCPS#2; Testimony of
13. Ms. Houston's official notes indicate that the Student's parents expressed their concerns about Student's academics. [DCPS#2].
14. The MDT developed a Student Evaluation Plan ("SEP"), which included receiving from the parents a series of 19 evaluations, progress reports, and IEPs, dating back to the 2001-02 school year. [DCPS#4; Testimony of Perkins].
15. Mr. Jermaine Perkins, a school psychologist with five year's experience, observed Student at the Mr. Perkins spent two hours watching Student in three different settings and then spoke with Student's classroom teacher. Mr. Perkins noted that Student had difficulty with verbal interaction with both peers and adults, had difficulty working independently, and had problems with higher-level thinking. [Testimony of Perkins; DCPS#9].
16. Ms. Hinton, a speech-language pathologist, also observed Student at Ms. Hinton's observation noted that Student's responses "were often limited and she did not usually provide an answer if less than three or four clues were given."

and Religious Office"). [Testimony of Solomon and DCPS website]

[DCPS#14].

17. On May 27, 2008, an MDT meeting was held at the CARE to discuss Student's eligibility for special education. Participants at the meeting included both of Student's parents, Dr. Solomon, Student's classroom teacher at the School the academic director of the School a speech-language pathologist who had evaluated Student, been reviewed by DCPS (DCPS#14). [Testimony of Solomon, DCPS#15].
18. The MDT found Student to be eligible for special education as a student with multiple disabilities, including Other Health Impaired due to her documented Attention Deficit Hyperactivity Disorder (ADHD), Specific Learning Disabilities in the areas of oral expression, written expression, and math calculation, and Speech-Language Impairment³. [DCPS#15].
19. Due to time constraints, the parties agreed to re-convene on June 11, 2008 to develop the IEP. Dr. Solomon was provided with a draft copy of the IEP, which she marked up and submitted to DCPS for consideration.⁴ [Testimony of Solomon; DCPS#17].
20. The IEP team re-convened as scheduled to develop the IEP and placement for Student. In attendance were both parents, and Ms. the

³Despite her deficits in phonological processing, weak decoding, and, comprehension, the MDT team did not find a Specific Learning Disability in reading.

⁴Dr. Solomon was unable to attend the June 11th meeting due to a prior personal commitment.

- Intermediate Coordinator at the [DCPS#16].
21. DCPS considered and accepted some of the changes to the draft IEP that had been provided by Dr. Solomon, and rejected others. Detailed meeting notes of the specific changes were taken by [DCPS#16].
 22. The IEP team proposed that Student be placed in a part-time, special education program at [DCPS#16; Testimony of]
 23. Student's parents rejected the proposed placement, believing that Student requires a full-time special education placement. [DCPS#16; Testimony of]
 24. DCPS noted the parents' rejection and the reasons for the rejection on the IEP team meeting notes. [DCPS#16].
 25. The IEP team rejected the parents' request that DCPS provide Extended School Year services, based upon a "lack of documentation to confirm that student would have sig. regression of problems w/recoupment." [DCPS#16]. The parents disagreed; their disagreement was noted in several places on the official IEP notes. [DCPS#16; 18].
 26. Throughout the Eligibility/IEP/Placement process, Student's parents were involved and cooperative participants, who voluntarily provided copies of all necessary evaluations, school and medical records to DCPS in a timely manner, consented to

⁵At the time, [redacted] was known as [redacted]

all requested DCPS observations and/or evaluations, and provided the input of their consultant, Dr. Solomon. [Testimony of

27. At the time that the placement at _____ was made, the DCPS IEP team had only limited knowledge of the details of the _____ placement, and could not provide a full description of the proposed program. [Testimony of DCPS#16].
28. No one from _____ participated at any of the meetings for Student. _____ special education coordinator, _____ was not made aware of the existence of Student until contacted by Dr. Solomon in November, 2008 [Testimony of Solomon;
29. Student's parents rejected the proposed IEP and placement because they felt the student would be overwhelmed. [Testimony of
30. The proposed IEP places Student in a general education classroom for the majority of her school day. Class size in the general education setting at _____ are in the 25-26 student range, with one teacher. [Testimony of Solomon].
31. General education classes at _____ are group by age level, not developmental level. [Testimony of Solomon]
32. Student's multiple disabilities impact her attention, organization, memory, and socialization. Student's multiple disabilities are pervasive and negatively impact her across all settings, both academic and non-academic. Student's multiple and pervasive learning disabilities cause her to function below grade level in reading decoding, comprehension and fluency, written expression, math calculation and

math reasoning. [Testimony of Maguire; Solomon; Perkins; DCPS#9 14;15;16].

33. Student's deficits in auditory memory cause her to have difficulty with multi-step directions. The more complex the directions get the more taxing the task becomes for Student. At the same time, Student does not always remember what she has learned, which creates additional challenges when asked to juggle multiple sources of information. Student is also reluctant to ask questions, even in a small group setting. [Testimony of Solomon; 17].
34. Student has poor organization and weak problem solving strategies. Student has very significant weaknesses in inferential comprehension. In a general education middle school environment, the curriculum-based expectations call for higher-order thinking. Student does not possess the age-appropriate problem solving ability and inferential comprehension to be successful in general education classes. [Testimony of Solomon; Perkins; DCPS#15].
35. Socially, Student wants to have friends, but is often unable to keep pace with the social language of her peers. [Testimony of In the more relaxed environment of a physical education class, Student is reluctant to participate (verbally), and is reduced to following the group rather than being engaged in the activity. [Testimony of Ross; Perkins; DCPS#9].
36. Student has difficulties with pragmatic language, particularly in distinguishing informal language and tone. Student uses sarcastic expressions that can be interpreted the wrong way by her peers. [Testimony of Ross; DCPS#9].

37. Student is presently a student at the #1; Testimony of Solomon;
38. The is a full-time, special education school located in the District of Columbia. The serves students with average to above-average cognitive abilities who have learning disabilities. [Testimony of
39. The serves over 100 students from DCPS, many of whom are placed at the directly by DCPS. [Testimony of
40. Student's program at the consists of reading instruction using the Wilson Reading program for decoding and the Read Naturally program for fluency and comprehension. Written language is supported by both the special education teacher and speech-language pathologist. Student receives social studies in an arts-based curriculum (i.e. "Knights and Ladies"). All of Student's teachers are certified, special education teachers. [Testimony of Ross; Solomon;
41. Student is making good and meaningful progress at the School. She is showing progress in reading decoding, following directions, being more verbal in social situations, math problem solving, and expanding upon responses. 10; Testimony of Ross;
42. Socially, Student is starting to form friendships and to gain social acceptance. Student is more comfortable and relaxed. She enjoys school is developing an improved self-esteem. [Testimony of

IV. CONCLUSIONS OF LAW

Petitioner asserts that DCPS ignored voluminous, multi-confirming data that was at the agency's disposal, along with the input of Parents, teachers, service providers, and an educational consultant, and thereby made an erroneous decision to place Student in a part-time program at _____ School. As a result of DCPS' failure to propose an IEP and placement that is reasonably calculated to meet the unique needs of the student, Petitioner argued, she was denied FAPE. DCPS took the position that the primary responsibility for formulating the education of a child with a disability, and for choosing the educational method most suitable to the child's needs is theirs. There was no dispute that an MDT meeting was held to determine the student's eligibility, and that she was found to be eligible for part time special education services, in a general education classroom setting. DCPS' eligibility determination process included a formal review of the evaluations that had been provided by the family, multiple classroom observations of Student at the _____ and discussions with Lab School staff. There is no dispute that Parents did not agree that a part time program, to include 12.5 hours per week of specialized instruction in a general education setting was sufficient to meet Student's needs.

Further, DCPS offered _____ School as a placement location for the student. However, according to DCPS witness testimony, it wasn't yet determined what the projected enrollment would be. Further, there had been no final determination as to who the teacher would be, or what the precise classroom ratio would be. It was known that a resource room would be available to implement services and that the goals and objectives on the child's IEP could be achieved at _____. Parents arranged for a visit to _____ to assess its appropriateness. Parents spent a couple of days there, and they brought in Dr. Solomon to assist. Ultimately, Parent testified that he felt the program was too mainstreamed, and without more individualized help Student would regress. He was also concerned that her socialization issues could result in her becoming a social outcast. Basically, Student needed help when she was in a class with 9 students and 3 teachers, progressing in small increments; so he was confident that she would have more difficulty keeping up in a general education setting.

There was a great deal of testimonial evidence presented by Petitioner that Student cannot thrive in anything less than a full time special education setting. Five witnesses (two of which were designated expert witnesses) were presented who had spent time with Student, assessed and/or observed the student and testified that the student's disabilities would prevent

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her from receiving the educational benefit of the services offered. None of the DCPS witnesses were qualified as experts or had any significant interaction with Student, who had not ever attended a DCPS school. However, DCPS presented three witnesses who testified about how their eligibility determination was made, and why is able to implement the IEP. DCPS' psychologist observed the student, and testified that in making his recommendation, he considered her social interaction issues and felt that in non academic classes she would benefit from general education interaction. He also testified that he has not reviewed any evaluation or spoken with any evaluator (on Parent's or DCPS side) who recommended that student needs anything less than FT placement. testified that there was an ongoing issue regarding S/L services because DCPS allows the special education teacher to provide the service as opposed to a S/L instructor. Further, she stated that DCPS felt there was no reason that Student could not interact with non disabled peers in the LRE.

When the student's disability adversely affects their educational performance and an MDT fails to gather all relevant functional, developmental and academic information that may assist in determining whether the child is a child with a disability, while failing to consider information provided by the parents, the decision of the MDT was in error. N.G. v. District of Columbia, 50 IDELR 7 (U.S. District Court, D.C. (2008)). The IEP is to be 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). An *appropriate* IEP, at a minimum, "must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Education v. Rowley, 458 U.S. 176, 204 (U.S. 1982). It is this prong of the well established two prong test in *Rowley*, which DCPS fails. Petitioner presented overwhelming evidence that Student showed weaknesses in auditory processing, phonological processing, and minimal verbal output. Additionally, she needs prompts to elaborate on verbal responses, and has difficulty with auditory memory (which impacts functioning in the classroom). There was significant expert testimony regarding the student's speech and language issues, and the many ways her learning is negatively impacted, as well as her academic performance. Her participation was noted by DCPS' speech and language pathologist to be limited and further noted that she does not offer verbal responses if verbal cues are not provided. The student's prior program included a "robust" speech and language program. However, the placement offered by DCPS would not include instruction by a pathologist, but a

special education classroom instructor.

Petitioner met the burden of proof establishing that the methods of instruction, student/teacher ratio, unavailability of a speech therapist, *inter alia*, Student's disabilities would not allow her to receive educational benefit in a part time, general education setting. No firm basis was given for DCPS' decision, which was contrary to the student's entire educational history, not to offer full time special education and related services to Student.

For the stated reasons, undersigned finds DCPS drafted an IEP for the student that was not reasonably calculated to enable the child to receive educational benefit, hence denying her FAPE. The IEP was inappropriate, and so it follows that the site location identified for the student was also inappropriate, as it was selected to provide part time services. Additionally, the Circuit Court of Appeals in Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005), listed a set of "relevant" factors to be considered in determining whether a particular placement is appropriate for the student, including (1) the nature and severity of the disability; (2) the specialized needs of the student; (3) the link between those needs and the services offered; (4) the placement's cost; (5) and the extent to which the placement is the least restrictive educational environment. Factors 1, 2, and 3, based on evidence presented, clearly prevent the recommended placement from being the able to meet the student's needs.

As relief, Petitioner requests that DCPS fund the student's placement at the and reimburse Parents for the expense they have incurred as a result of unilaterally placing Student privately. 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); Burlington, 471 U.S. at 370 ("In a case where a court determines that a private placement desired by the parents was proper under the Act...it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school."⁶ However, unilateral placement of a student at a private school, without the consent of the state or local school officials, is at their own financial risk.

⁶*Burlington* addressed the concept of tuition reimbursement for parents who have the resources to unilaterally place a child in a private school at their own expense during the pendency of a due process hearing. Over the years, courts have consistently applied the *Burlington* doctrine to situations where the parent can not afford to pay for placement, by awarding services, including placements, where the school system has been deficient under the IDEA. The DC Circuit adopted that expansion of *Burlington* in Reid v. D.C., 401 F.3d at 522-523.
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Burlington, supra, at 373.

34 CFR 300.148(c) states as follows:

If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

On this point, undersigned agrees with DCPS, that since the student has not ever been determined eligible to receive special education and related services under the authority of a public agency, Parents are not entitled to re-imbursement for their unilateral placement of Student.

Lastly, with regard to DCPS' denial of ESY services to Student, Extended school year (ESY) services are only necessary to a "free appropriate public education" (FAPE) when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq. In this case, Student has been attending the _____ since she moved to the District. The _____ is a full time program, comparable to the _____ she was attending prior to her move. Hence, Student's progress has not been interrupted. There was insufficient evidence that Student will regress during the summer months at the _____. Therefore, Petitioner's request for DCPS to fund ESY services at the _____ is denied.

V. SUMMARY OF DECISION

Undersigned finds that DCPS DENIED THE STUDENT FAPE by failing to provide her an appropriate IEP and placement. In light of this, undersigned issues the following Order:

VI. ORDER

It is hereby ORDERED:

That DCPS shall revisit the Student's IEP to reflect full time special education services, and will fund Student's attendance at the _____ immediately.

/s/ Cherylen Long, Esq.
Hearing Officer

Dated this 16 th day of APRIL, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.