

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

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STUDENT HEARING OFFICE

HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)	
)	
DOB)	DATE OF HEARING
)	March 20, 2009
Student I.D. #)	
Petitioner)	DATE OF COMPLAINT
)	February 18, 2009
V.)	
)	
The District of Columbia)	ATTENDING SCHOOL:
Public Schools,)	
Respondent)	

COUNSEL FOR PARENT/STUDENT: **Donovan Anderson**
2041 Martin Luther King Jr. Avenue SE
Ste 240
Washington, DC 20020

COUNSEL FOR DCPS: **Tanya Chor**
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

March 30, 2009

Representatives:

Petitioner – Donovan Anderson
DCPS – Tanya Chor

Hearing Officer:

Jane Dolkart

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

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student presently in the second grade at and eligible for special education under the classification of learning disabled (LD). The student was found eligible for special education on December 30, 2008, and an initial IEP was developed on that date. The student's most recent IEP, dated March 9, 2009, provides for 5 hours of specialized instruction, 1 hour of occupational therapy (OT), and 30 minutes of behavioral support services per week. is a Schoolwide Application Model (SAM) School. As a result, the student and all other students in the school receive various supports in the classroom. Based on the fact that the student receives the special services provided to all students by the SAM program, DCPS deemed the student's IEP to be appropriate for his needs.

This due process complaint was filed on February 18, 2009, alleging that the student's IEP was inappropriate because it did not contain sufficient specialized instruction and related services to meet his needs, and because it did not list a disability classification. The complaint also alleged an inappropriate placement. Subsequent to the filing of the complaint an MDT/IEP meeting was held on March 9, 2009, and a new IEP was developed. Petitioner has withdrawn the allegation concerning the classification on the IEP because the March 2009 IEP contains the classification of LD. Petitioner further withdrew the allegation of inappropriate placement. At the hearing, Petitioner clarified that the issue to be addressed was that the student's IEP does not accurately reflect the specialized instruction and related services that he needs, and that he is, in fact, receiving under the SAM program.

The student's mother is quite ill, and the student lives with his stepmother during the week. It is his stepmother who attended the March 9, 2009 MDT/IEP meeting and signed the IEP for the mother. Both the mother and the stepmother appeared in person for this hearing.

A pre-hearing conference in this matter was held on March 5, 2009, and a pre-hearing order was issued on March 10, 2009.

A Notice of Insufficiency for failure of the complaint to contain the parent's signature was filed by DCPS on March 3, 2009, and an Order denying the motion to dismiss for insufficiency was issued on March 5, 2009.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶

1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by failing to provide the student with an appropriate IEP that accurately reflects the amount of specialized instruction and related services needed by the student?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated March 11, 2009, containing a list of witnesses with attachments P 1-3. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's mother, the student's stepmother, and the student's educational advocate.

DCPS submitted a five day disclosure letter dated March 12, 2009, containing a list of witnesses with attachments DCPS 1-5. The disclosure was admitted in its entirety. DCPS called as a witness the student's special education teacher.

V. FINDINGS OF FACT

1. This is a _____ year old student presently in the _____ grade at _____ and eligible for special education under the classification of learning disabled (LD). The student was found eligible for special education on December 30, 2008, and an initial IEP was developed on that date. The student's most recent IEP, dated March 9, 2009, provides for 5 hours of specialized instruction, 1 hour of occupational therapy (OT), and 30 minutes of behavioral support services. (DCPS 3,4,5, P 3).

2. A comprehensive psychological evaluation report for the student was completed on December 30, 2008. The evaluation was conducted by Meiko Mori, a DCPS School Psychologist. The report noted that the student's school records extensively document the student's academic struggles and disruptive behaviors. The student was administered the Kaufman Assessment Battery for children – Second Edition (KABC-II), the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III-ACH), the Beery-Buktenika Test of Visual-Motor Integration (VMI), the Behavior Assessment System for Children – Second Edition (BASC-2) including the parent rating scale and the teacher rating scale, the Behavior Rating Inventory for Executive Functions (BRIEF), the Gilliam Autism Rating Scale – Second Edition (GARS-2), the Adaptive Behavior Assessment System – Second Edition (ABAS-II), and House-Tree Person (HTP). The examiner also observed the student in class, interviewed the student, the general education teacher, the mother, the step-mother and a behavioral specialist at Stanton ES. (P 2).

3. On the KABC-II, a test of cognitive functioning, the student obtained an MPI Full Scale IQ of 65, in the deficient range. On the four sub-tests of the KABC-II, the student was in the deficient range on the Planning Index and the Simultaneous Processing Index,

in the below average range on the Sequential Processing Index, and in the average range on the Learning Index

On the VMI-5 which assesses integration of visual and motor abilities, the student's abilities were found to be similar to those of children of 4-1, supporting a possible presence of visual-spatial difficulty.

The BRIEF rating scales in executive functions indicated that the student has difficulty in planning, impulse control, and inhibition, and indicated that the student would learn better in a well-structured educational environment with smaller classroom size, closer supervision, and minimized distractions.

Using the BASC-2, ABAS-II, HTP, and a clinical interview, the report concluded that the student's behavioral problems are believed to be due to high levels of frustration and confusion caused by difficulty with selective attention. No emotional disturbance was revealed.

Academically, the WJ-III indicated that the student was learning at the kindergarten (k) level in reading, on or below the 1st grade level in math, and below k in writing. The student's weakness in selective attention skills and visual spatial difficulties adversely impact his academic performance in reading, writing, and math.

(P 2).

4. The student's special education teacher, _____ testified about the school-wide program at the student's school. _____ has been a special education teacher in DCPS schools for 25 years. This is her first year at _____ and also the first year of the new program. _____ is a Schoolwide Application Model (SAM) School. SAM is a new program being carried out in a small group of selected DCPS schools. As a result, the student and all other students in the school receive various supports in the general education classroom. Under the SAM program, all students are integrated full-time into a general education classroom and services come to them. The student is provided services in a small group within the general education classroom and the general education teacher is his primary teacher. The special education teacher collaborates with the general education teacher to modify the curriculum so that the student can participate. The student receives extended time, small group instruction, repeated directions and his work is marked correct but not marked incorrect when it is wrong. Ms. Butler was found to be somewhat defensive but her testimony was by in large credible.

The student receives at least 5 hours a week of direct instruction from a special education teacher. In addition to several special education teachers who work with the student, the school provides social workers, behavioral specialists, SAM coaches, literacy coaches, a math professional developer, counselors, peer teaching, and city years volunteer mentors. All of these services are available to all students. (Testimony of Special Education Teacher).

5. The special education teacher testified that without the extra support in the unique SAM program, the 5 hours of specialized instruction in the student's present IEP would not be sufficient. (Testimony of Special Education Teacher).

6. Wayne Holmes was retained by Petitioner as an educational advocate for the student. Mr. Holmes has a BA in secondary education and is presently working towards a masters in divinity. He was a teacher for 3 years in DC public schools and for 2 years in PG County public schools. Mr. Holmes worked as an Educational Specialist at the National Center for Children and Families, working with children with special education needs. Until recently he was a Compliance Case Manager in the Office of the Chancellor, Office of Special Education, DCPS. In that capacity Mr. Holmes reviewed IEPs and evaluations, and Hearing Officer Decisions. He helped develop IEPs, attended MDT meetings, observed students in class, and spoke with classroom teachers, special education teachers, and SECs. Mr. Holmes presently runs his own educational consulting business. Mr. Holmes was found to be a credible witness.

Mr. Holmes observed the student in his classroom on March 18, 2009 for approximately 1 hour. He also spoke with the student's general education teacher, one of his special education teachers, and the SEC. Mr. Holmes observed that the student was receiving instruction in a small group of 5 students with a special education teacher during the entire time he was in the classroom. He observed that other support personnel came into the classroom to assist with the students. Mr. Holmes testified that the general education teacher informed him that the student receives instruction from a special education teacher a substantial part of the day, that he needs to be instructed in a small group with intensive instruction. He spoke with the SEC who agreed that for students who need extra help and support, the school has it available. Mr. Holmes spoke with the special education teacher in the classroom at the time and she indicated that even within a small group, she must have the student seated next to her to keep him on task.

(Testimony of Wayne Holmes).

7. The student's March 9, 2009 IEP indicates that the student is unable to perform basic addition and subtraction calculations, is unable to identify sight words, is unable to write sight words and complete sentences, and is unable to self regulate, organize and plan in his classroom environment. (P 3, DCPS 4).

8. The student presently receives more than 5 hours of specialized instruction per week.

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees "all children with disabilities" "a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. ¶ 1400 (d)(1)(A). Central to

the IDEA's guarantee of FAPE "is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The IDEA does not require that the services provided maximize each child's potential. *Id.* at 198. However, the IEP must be reasonably calculated to produce meaningful educational benefit. *Id.* at 199, *Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C. 2005).

Pursuant to IDEA § 1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

I. Is the Student's IEP Appropriate?

A. The SAM Program

The facts surrounding this case are somewhat unusual. Petitioner is not claiming that the actual specialized instruction and related services being provided to the student are deficient. Rather, Petitioner argues that the student's IEP does not reflect the extent of the services being provided to him. The student attends one of eight K-8 grade schools which have adopted the School Wide Application Model, or SAM. This is a model which substantially shifts the paradigm for the provision of special education services to children so as to successfully provide for full inclusion of special education students in the general education classroom.

The guiding principles of SAM are first, that all instruction is guided by general education, that is all students are considered to be general education students and all students are instructed in accordance with the general education curriculum with supports as needed. Second, all school resources are configured to benefit all students. Third, positive behavioral support is incorporated for all students at the individual, group and schoolwide levels. Fourth, the school employs a collaborative decision-making team organization. Fifth, the school has a working partnership with families of students who attend the school and with its community businesses and service providers.²

² Wayne Sailor and Blair Roger, *The School Wide Application Model*, www.forumoneducation.org/downloads/schoolwide_application_model.pdf; Statement of Rachel Burton, The Arc of the District of Columbia, before the Committee of the Whole, DC Council, December 12, 2008, www.arcdc.net.

As described by _____ and Mr. Holmes, the student is provided services in a small group within the general education classroom and the general education teacher is his primary teacher. The special education teacher collaborates with the general education teacher to modify the curriculum so that the student can participate. The student receives extended time, small group instruction, repeated directions and his work is marked correct but not marked incorrect when it is wrong. In addition to several special education teachers who work with the student, the school provides social workers, behavioral specialists, SAM coaches, literacy coaches, a math professional developer, counselors, peer teaching, and city years volunteer mentors. All of these services are available to all students. Mr. Holmes observed that the student was receiving instruction in a small group of 5 students with a special education teacher during the entire time he was in the classroom. He observed that other support personnel came into the classroom to assist with the students. Mr. Homes testified that the general education teacher informed him that the student receives instruction from a special education teacher a substantial part of the day, and that he needs to be instructed in a small group with intensive instruction. Mr. Holmes spoke with the SEC who agreed that for students who need extra help and support, the school has it available.

It is clear that the student receives more than 5 hours per week of specialized instruction and additional hours of related services. The results of the student's comprehensive psychological evaluation and the comments on his two IEPs indicate that the student has significant academic deficits in all areas and behavioral problems related to those deficits. The seriousness of the deficits supports the need for more than 5 hours of specialized instruction. Indeed, _____ testified that if the student was in a more traditional DCPS general education setting, 5 hours of specialized instruction would be inadequate to meet his needs.

The student is, in fact, receiving substantially more than 5 hours of specialized instruction. His IEP fails to reflect the extent of the specialized instruction and related services that the student receives. Petitioner argues that the IEP is supposed to drive placement and that the student's IEP fails to reflect his educational needs. Further, Petitioner is concerned that if the student were to transfer to a different school either in or out of DC, his IEP would fail to reflect the level of services he needs and he would receive only 5 hours of specialized instruction until the new school developed its own IEP. Thus, the student's IEP is inappropriate. However, the student is in actuality receiving special education and related services sufficient to provide him with educational benefit.

It is likely that the IEPs of all special education students in the SAM program are similarly non-reflective of the actual level of specialized instruction and related services being provided to the students. Arguably the present IEP structure is ill-suited to this new and radically reconceived concept of special education delivery. The question is whether DCPS has an obligation pursuant to the IDEA to provide an IEP that better reflects the level of services received, and if so, how to go about describing or determining the actual level of services.

B. Relevant Statutory and Case Law

As a condition of receiving funds under the Act, the IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include “a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, a statement of the special education and related services [and] the anticipated frequency, location and duration of those services... to be provided to the child...” 20 U.S.C. ¶ 1414(d)(1)(A). The adequacy of the student’s IEP is determined by whether the student has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 201 (1982). The IDEA does not require that the services provided maximize each child’s potential. *Id.* at 198. Thus, the question is whether the IEP is reasonably calculated to produce meaningful educational benefit. *Id.* at 199, *Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C. 2005).

In developing an IEP, 34 C.F.R. 300.324 requires the IEP Team to consider (i) the strengths of the child; (ii) concerns of the parents for enhancing the education of the child; (iii) the results of the initial or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child. Additionally, 30 DCMR § 3002.1(f) requires that, “the services provided to the child must address all of the child’s identified special education and related services and must be based on the child’s unique needs and not on the child’s disability.” (Emphasis added). Thus, the IEP is developed to reflect the student’s unique needs separate and distinct from any particular education program. “The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. *School Committee of the Town of Burlington v. Department of Education of the Commonwealth of Massachusetts et al.*, 105 S.Ct. 1996, 2002 (1985).

The IDEA also guarantees parents of disabled children the opportunity to participate in the evaluation and placement process. *See* 20 U.S.C. § 1414(f), 1415(b). One of the important policies underlying the need for an accurate written IEP is “to serve a parent’s interest in receiving full appraisal of the educational plan for her child, allowing a parent both to monitor her child’s progress and determine if any change to the program is necessary. *Alfano et al. v. District of Columbia*, 442 F.Supp.2d 1, 6 (DDC 2006) (citing *Mewborn v. Gov’t of Dist. Of Columbia*, 360 F.Supp.2d 138, 143 (DDC 2005).

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child’s needs as set out in the IEP. Placement decisions must be made in conformity with the child’s IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines

whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (DDC 2006).

C. Is the Failure to Include in the Student's IEP the Actual Specialized Instruction and Related Services Being Provided a Violation of the IDEA?

A violation of the IDEA must be based on either procedural or substantive inadequacies. A Hearing Officer may find a procedural violation only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. In this case the student was not denied FAPE, nor was he deprived of educational benefits. However, the failure of the IEP to reflect the services needed by the student did significantly impede the parent's opportunity to participate in the decision-making process regarding provision of FAPE. As discussed above, a parent has a right to receive a full appraisal of the educational plan for her child, allowing a parent both to monitor her child's progress and determine if any change to the program is necessary. The student's present IEP does not provide an appraisal of the actual education plan for the student since it does not reflect the actual services received by the student. Insufficient information is provided concerning the child's actual education program making it difficult for the parent to meaningful participate in the monitoring of the student's progress and his needed services.

The student's IEP is also substantively deficient since it does not reflect his actual special education needs. However, the student was receiving meaningful educational benefit despite the substantive deficiencies in the IEP. In that sense the substantive violation is *de minimus*. However, the student is harmed because the IEP as written is inappropriate and in an educational setting that does not employ the SAM program would constitute a denial of FAPE. The IEP should reflect the services the student requires across school settings, since it is meant to be developed prior to determining school placement.

Thus the student has been denied FAPE on both procedural and substantive grounds.

II. Is There an Appropriate Remedy for the Violation of FAPE?

The Hearing Officer recognizes that developing an accurate IEP within the SAM program and within the present framework of the IEP document is a complicated process. Because all students receive whatever services they require, the amount of specialized instruction and related services is hard to predict. DCPS would rightfully be concerned about developing an IEP that commits itself to providing a level of services the student may not require pursuant to the IDEA, but which is made available because of the SAM concept. Nevertheless, the student's IEP should reflect the minimum services the student would require if placed in a non-SAM school. The Hearing Officer is loath to provide a solution to the institutional and structural problem of IEP development in a SAM program, beyond indicating that a student's IEP must reflect the actual services he requires regardless of whether he will be placed in a SAM school. DCPS could revise the IEP form used in a SAM school to better reflect the array of services received by the student

or could revise the student's IEP to reflect the services he needs decoupled from the SAM program. That will be left up to DCPS.

VII. SUMMARY OF RULING

DCPS has denied the student FAPE on both procedural and substantive grounds. However, the violation is *de minimus* since the student is receiving sufficient educational benefits in his present program.

VIII. ORDER

It is hereby **ORDERED** that DCPS shall convene an MDT/IEP meeting within 21 days from the issuance of this HOD in order to revise the student's IEP to reflect the level of specialized instruction and related services he actually requires to receive educational benefit in a general education classroom, or to reflect all the services he actually receives in the SAM program.

Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

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.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: March 30, 2009