

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

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STUDENT HEARING OFFICE
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<p>STUDENT¹, by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date: March 4, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Joy Freeman-Coulbary</p> <p>Counsel for Respondent: Nia Fripp</p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On January 23, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") alleging the DCPS denied the Student a Free Appropriate Public Education ("FAPE") by failing to evaluate and/or reevaluate the Student for special education eligibility, failing to provide the Student an appropriate Individualized Education Plan ("IEP"), failing to implement the Student's current IEP, and failing to provide an appropriate placement. The Petitioner requests the Respondent be deemed to have denied the Student a FAPE and as a relief ordered to fund independent evaluations for the Student inclusive of a comprehensive psychological, social history and speech/language evaluation. The Petitioner requests that within five days of receipt of the reports of the evaluations, to convene a meeting to review the Student's evaluations and revise the IEP accordingly. Further, the Petitioner requests the Respondent to immediately implement the Student's IEP, and fund a full-time private placement. The Petitioner also requests that the Respondent fund a compensatory education plan.

The Hearing Officer attempted in various occasions to coordinate a pre-hearing conference call with Counsel for both parties. However, Counsel for the Petitioner was not available. As a result the hearing was limited to the 4 hours scheduled with no opportunity for a continuance.

The DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed on February 9, 2009. The Respondent alleges that it made two unsuccessful attempts to convene a meeting with Petitioner to discuss her concerns. It was not until the third attempt that the Petitioner agreed to attend a February 5, 2009 MDT meeting. At the afore-mentioned meeting the Respondent agreed to conduct evaluations requested and obtained consent from the Petitioner. It is the Respondent's assertion that the parties agreed to reconvene the MDT meeting to discuss the results of the evaluation. The Respondent asserts that the Student's IEP is being implemented and that various interventions have been put in place to address the Student's behavior. The Respondent further asserts that because there are pending evaluations it is premature to determine whether the Student requires a full time special education program. The Respondent asserts that the Student's IEP can and is being implemented at the current placement.

A Due Process Hearing ("hearing") was held on February 24, 2009. The Petitioner presented a disclosure letter dated February 17, 2009 to which nineteen documents were attached, labeled P-1 through 19 and which listed six witnesses. Three witnesses testified –the Mother, Grandmother and a Counselor. The Respondent presented a disclosure letter dated February 17, 2009 identifying seven witnesses and to which five documents were attached, labeled DCPS 1 through 5. One witness testified – the Special Education Coordinator ("SEC"). The documents were admitted without objections.

The Petitioner chose for the hearing to be held in a closed session and reiterated the issues as plead. The Petitioner claimed the Student disability designation of Other Health Impairment ("OHI") is not included in his IEP. The Student requires increased hours. It further claims that the Student has not received all his required hours specialized instruction hours and related services.

The Petitioner asserted that the Student's escalating pattern of antisocial behavior should have provided the Respondent notice of the Student's need for further evaluations.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

1. Did the Respondent fail to evaluate and/or reevaluate the Student for special education eligibility?
2. Has the Respondent failed to provide the Student an appropriate IEP?
3. Did the Respondent fail to implement the Student's current IEP?
4. Did the Respondent deny the Student a FAPE through an inappropriate placement?
5. Was the Student denied a FAPE, did the Petitioner prove the Student's request for compensatory education?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student is enrolled at School for the 2008/2009 school year.²
2. The mother participated in an October 10, 2008 MDT meeting to develop an IEP and signed in agreement. The MDT meeting recommended that the Student continue receiving specialized instruction as a Learning Disabled ("LD") student with psychological counseling, speech therapy, and occupational therapy.³ At the meeting the special education teacher indicated that the Student is to receive special education services for 10 hours a week to be distributed in math, reading and written language. However, the IEP created that day provides the Student 480 minutes per week of specialized instruction out of the general education classroom setting.⁴
3. The IEP indicates that the nature of the Student disability is one than can only make progress on IEP goals and objectives by being removed from the general education classroom to receive the services. According to the IEP the Student needs to develop his motor skills in order to improve his classroom performance and it provides the Student with 30 minutes per week of Occupational Therapy. It also indicates the Student needs to use proper vocabulary and language in school and is to receive 60 minutes per week of Speech-Language Therapy. It further indicates the Student needs minimize behavioral distractions in order to improve his academic skills and is to be provided 30 minutes a week of Psychological counseling. The IEP also indicates that the Student requires specialized instruction with individualized intervention to meet his educational goals.⁵
4. The MDT requested that the parent obtain medical information on the Student regarding his Attention Deficit Hyperactivity Deficiency ("ADHD") diagnosis and shared it with the school. The

² P#2 Due Process Complaint dated 1/23/09

³ P#17 IEP dated 10/10/08

⁴ P#17 MDT notes dated 10/10/08

⁵ P#17 IEP dated 10/10/08

team agreed to reconvene once it received the information from the parent to consider the OHI diagnosis. ⁶

5. The Student is usually not in his classroom; he roams around school, and sits in the sixth grade classroom of a cousin. The Student is reading at a kindergarten level, he has difficulty with his classroom teacher because she said in front of the class that the Student could not read. The teacher has said she does not want the Student in the classroom. There was a February 5, 2009 meeting to discuss the Student's behavior a Behavior Intervention Plan ("BIP") was developed and then an IEP meeting was to take place. At the MDT meeting the parent was asked if she had another public school choice for the Student, the parent did not investigate any public school alternative. The Student has been accepted into Primary School and the mother shared the acceptance letter with the Respondent at a February 5, 2009 meeting. The BIP is not effective because the Student continues to roam in the hallways of the school. ⁷
6. The Student is in an open space classroom setting. The classroom has too much stimulus which distracts the Student and he loses focus on his classes. The Student can barely read which leads to a lot of frustration, he does not receive all his related services, and he's been suspended various times. The Student lacks faith in the school staff.⁸
7. The Student's classroom has no walls, which makes it very easy for the Student to get up and leave the room. The Student cannot focus for long periods of time. The Student's Reading Report reflects that he is reading at a kindergarten level and he's a poor reader and writer.⁹
8. On various occasions the grandmother has had to go to the school to pick up the Student because the School calls her since they cannot control his behavior.¹⁰
9. The Student did not receive Occupational Therapy ("OT") services from September through December 2008. The Respondent has completed all the evaluations requested, however the only report available is the social history. There are times when the Student refuses to go in his class, he is impulsive and runs away. The Student needs a closed environment with doors. At the current placement it is easy for the Student to run away from the classroom. The Student may be able to benefit from a full-time program. ¹¹
10. The Student's IEP was changed from 480 minutes per week, the SEC made a mistake of writing the amount of time for services in minutes instead of writing in hours. Therefore in November he corrected the IEP to reflect 10 hours of specialized instruction.¹²

⁶ P#17 MDT notes dated 10/10/08

⁷ Testimony of the mother and P#19 MD T notes dated 2/05/09.

⁸ Testimony of the Community Connection Counselor.

⁹ Testimony of the Educational Advocate

¹⁰ Testimony of the Grandmother.

¹¹ Testimony of the Special Education Coordinator

¹² Testimony of the Special Education Coordinator

11. A MDT meeting was held on November 20, 2008, the team reviewed medical information, recommended a change of disability classification from learning disabled to other health impaired ("OHI"), added 2 hours of specialized instructions to the Student's IEP for a total of 10 hours, plus 2 hours in related services and a behavior intervention plan ("BIP") was developed. The team discussed the missing OT services and the special education coordinator was to investigate the status of the services.
12. The Respondent agreed to conduct a Comprehensive psychological evaluation, speech/language evaluation, and a social history. The school requested reports on evaluations from Hillcrest Center conducted on the Student in 2008. The team agreed to meet again on 12/18/08.¹³

IV. CONCLUSIONS OF LAW

FAPE Determination

The DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living. *See id.* § 1400(d)(1)(A). The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the 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 a FAPE.

The DCPS has not met its legal obligation under the IDEA. Here is why.

Evaluation/eligibility

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.1 (2003) requires DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible,

¹³ P#18 Addendum to IEP meeting page dated 11/20/08.

provide special education and related services through an appropriate Individualized Education Program ("IEP") and Placement.

The Respondent has completed all the evaluations requested, however the only report available is the social history. The Respondent has an obligation to prepare the reports of evaluations in a diligent manner. The Respondent has failed to provide the Petitioner with the reports of the evaluations completed.

Individualized Education Program

Pursuant to 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb), Individualized Education Programs or IEP "means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- bb. Meet each of the child's other educational needs that results from the child's disability."

Related services

The IDEA 20 U.S.C. § 1401 (9) (D); its regulations at 34 C.F.R. § 300.17; and 30 D.C.M.R. § 3001.1 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)." Transportation is a related service if necessary for student to access education. See: 20 U.S.C. § 1401 (26); 34 C.F.R. § 300.34 and D.C. M. R. 5 § 3001.1

The Respondent did not comply with these cited IDEA obligations. The Respondent did not meet its obligations in a number of ways. The Respondent failed to specifically indicate on the Student's IEP the correct amount of time out of general education that the Student should receive. According to the Student's most current IEP he needs to develop his motor skills in order to improve his classroom performance and it provides the Student with 30 minutes per week of OT services. The Student did not receive OT services from September through December 2008, the MDT discussed the missing OT services however there was no evidence that any action was taken. The Respondent failed to address how the related services missed would be provided. Additionally the MDT in November, 2008, recommended a change of disability classification from learning disabled to other health impaired and added 2 hours of specialized instructions to the Student's IEP. However, there is no current IEP to show those changes have been included in the document and there was no testimony to establish that the services are being provided.

It is undisputed that the Respondent failed to provide the Student with an IEP designed to meet his unique needs. During the hearing, DCPS alleged that the IEP was appropriate but failed to indicate what measures were put in place to address specific concerns about the Student's OHI classification and the behavior problems that were identified in evaluations, by the parent and the SEC. The Student's current IEP is inappropriate.

Placement

Under the IDEA, all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs. 20 USC section 1400 (a)(1)(A)

34 C.F.R. § 300.116 of the IDEA regulations requires that when determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. It also states that the determination of the educational placement of a child with a disability must be based on a child's IEP. 20 U.S.C. 1412(a)(5).

Once developed, the IEP is then implemented through appropriate placement in an educational setting suited to the student's needs. *See Roark ex rel. Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006). The placement decision, in addition to conforming to a student's IEP, should also consider the least restrictive environment and a setting closest to the student's home. 34 C.F.R. §300.116(a), (b).

The Student is eight years of age; he roams the school halls, and the building. The Student's escalating behavior substantially interferes with his academic program at the current placement, and though he is a young child, the current placement is unable to control him behaviorally. The SEC acknowledged that the Student is distracted in the open space classroom and could benefit from a full time placement. All the evidence pointed to the Student requiring another setting than the current placement.

The placement at _____ is not appropriate based on the testimony of the all the witnesses and the documentary evidence. Unfortunately the Petitioner failed to present any evidence of an alternative placement that can meet the Student's unique needs.

Compensatory Education Plan

The Petitioner did meet her burden in providing that the Student is entitled to compensatory education award for the lack of occupational therapy service that were not provided and the Respondent's failure to provide an appropriate IEP and placement. The Petitioner claims that because there was denial of FAPE the Student is entitled to a compensatory education award.

This jurisdiction requires a compensatory award that would place the student in the same position he/she would have occupied but for the LEA's violation of the IDEA. *Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005) "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id.* at 524. Compensatory education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student" *Id.*

The Reid Court held that, once a finding has been made that a student has been denied FAPE, the student is entitled to compensatory education services.

The Reid decision demands substantial evidence of a link between the compensatory education sought and the expected educational benefit. The student "is not entitled, however, to an amount of such instruction predetermined by a cookie-cutter formula, But rather to an informed and reasonable exercise of discretion regarding what services he needs to elevate him to the position he would have occupied absent the school district's failures." Id.

The Petitioner had the burden of showing (1) that as a result of Respondent's violation of IDEA, Petitioner suffered an educational deficiency, (2) that but for the violation, Petitioner would have progressed to a certain academic level, and (3) that there exists a type and amount of compensatory education services that would bring Petitioner to the level Petitioner would have been but for the Respondent's violation. The Petitioner has an obligation to establish the need and reasonableness of the amount of compensatory education requested and how the hours would be integrated into the Student's current educational program. The Student did not provide evidence to meet the qualitative standard imposed by the Reid case.

It is the Hearing Officer's determination that the Petitioner failed to provide any evidence towards establishing the need and reasonableness of the amount of compensatory education requested and how the hours would be integrated into the Student's current educational program. The Petitioner attempted to address the evidentiary requirement for compensatory education award through the closing statement of her attorney. Counsel for the Petitioner was reminded that the evidence had to be provided during the presentation of evidence either with documents or a witness; the Hearing Officer cannot rely on her statements that the Student requires a determinate number of hours of compensatory education to establish an award.

V. SUMMARY OF DECISION

Based on the aforementioned, it is the Hearing Officer's determination that: 1) the Respondent failed to provide the Student the required hours of specialized instruction, failed to include the correct disability classification on the Student's IEP and failed to provide the required occupational therapy. The Petitioner failed to prove that there are evaluations missing. The Petitioner failed to present evidence on an alternative educational placement for the Student. The Petitioner failed to present evidence for purposes of establishing whether compensatory education is warranted, and if so, what type and amount of compensatory education is most appropriate.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, the Respondent will within 3 school days provide the Petitioner and Counsel with a copy of all the currently conducted evaluations.

IT IS FURTHER ORDERED that the Respondent will convene a MDT/IEP meeting within 15 school days of receipt of the reports of the evaluations, convene a meeting to review the Student's

evaluations and revise the IEP accordingly, the MDT will discuss and make a determination on a new placement for the Student.

IT IS FURTHER ORDERED, that Respondent shall afford Petitioner an opportunity to participate in any meeting in which the Student's placement is discussed or determined. The Respondent's placement representative shall advise Petitioner's parent of the advantages and disadvantages for Petitioner with respect to each school that is discussed, including any schools proposed by the parent. The Respondent shall provide Petitioner's parent an explanation for the placement the Respondent proposes, and the reasons for the proposal shall be provided in the MDT meeting Notes. The Respondent shall issue a Prior Notice within seven days school days if Petitioner is placed in a public facility or within 20 school days if the Petitioner is placed in a private facility.

IT IS FURTHER ORDERED, that 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, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

This order resolves all issues raised in the Petitioner's January 23, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. Final decisions of special education Hearing Officer may be appealed to a state or federal district court of competent jurisdiction. (20 U.S.C. §1415(i)(2) and 34 C.F.R. §300.516)



Wanda I. Resto - Hearing Officer

Date: March, 2009