

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

on behalf of,

Student,
(DOB STARS
Petitioner,
v.
DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,
Respondent.

Case No.
Bruce Ryan, Hearing Officer
Hearing: April 17, 2009
Decided: April 27, 2009

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STUDENT HEARING OFFICE
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HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on March 13, 2009, on behalf of a -year old student (the "Student") who resides in the District of Columbia and attends School . The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations. Petitioner is represented by Roberta L. Gambale, Esq., of James E. Brown & Associates, PLLC, and Respondent District of Columbia Public Schools ("DCPS") is represented by Kendra Berner, Esq., Assistant Attorney General for the District of Columbia.

The complaint alleges that DCPS (1) failed to develop an appropriate individualized education program ("IEP") for the Student on or about 2/13/09, in that the IEP fails to address social-emotional concerns and/or does not provide the levels of service or the setting he requires, and (2) has failed to implement the 2/13/09 IEP as written. Petitioner claims that DCPS has thereby denied the Student a free appropriate public education ("FAPE").

DCPS filed a timely response on March 19, 2009, which asserts that the Student's IEP is appropriate and is calculated to provide him educational benefit. DCPS further states that "[t]he team will reconvene to review the speech and language evaluation as well as the independent psychological evaluation, and will review and revise the IEP as necessary at the time." (DCPS Response, at p. 2) In addition, DCPS states: "Because is an inclusion high school, the team will reconvene to discuss placement and locate a school that can fully implement the student's IEP." *Id.*

A Prehearing Conference ("PHC") was held on March 31, 2009, and a Prehearing Order was issued April 3, 2009, clarifying the issues and requested relief. *See Prehearing Order*, dated

4/3/09, ¶ 5. Five-day disclosures were filed by both parties as required, and a supplemental disclosure statement was filed by DCPS on April 15, 2009.

The Due Process Hearing convened on April 17, 2009. At the hearing, 41 documentary exhibits submitted by Petitioner (identified as -1" through 41") and two documentary exhibits submitted by DCPS (identified as "DCPS-1" and "DCPS-2") were admitted into evidence. Petitioner presented two witnesses – parent (Petitioner) and the Student's Educational Advocate ("EA"). DCPS presented one witness – the Special Education Coordinator ("SEC") at Phelps.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUE(S) AND REQUESTED RELIEF

As indicated in the Prehearing Order, and as discussed further at the outset of the Due Process Hearing, the following issues were presented for determination:

- a. *Whether DCPS has failed to develop an appropriate IEP for the Student in that the IEP fails adequately to address social-emotional concerns and/or does not provide the Student with the levels of service or setting that he requires;*
- b. *Whether DCPS has failed to implement the Student's IEP by failing to provide the full extent of instructional services and/or setting specified by the IEP; and*
- c. *Whether either of the above failures constitutes a denial of FAPE or otherwise constitutes substantive grounds for relief?*

The complaint requests the following relief: (1) a finding that DCPS denied the Student a FAPE, (2) amendment of the IEP to provide (*inter alia*) counseling goals and specialized instruction in all academic subjects, (3) a suitable alternate placement if the current school is unable to fully implement the IEP, and (4) compensatory education services as appropriate.

At the Due Process Hearing, the parties agreed that the current placement at _____ was not appropriate, that speech and language services should be added to the IEP, and that an independent psychological evaluation should be completed. However, the parties continued to disagree as to the need for counseling services and the need for increased hours of specialized instruction, thus necessitating completion of the hearing.

III. FINDINGS OF FACT

1. The Student is a _____ year old resident of the District of Columbia whose date of birth is _____. The Student resides with his mother, the Petitioner. *See* _____-2; Parent Testimony.

2. The Student currently attends _____ School _____ where he is in the _____ grade. *See* _____-2; Parent Testimony. He has attended _____ since the beginning of the 2008-2009 school year. Parent Testimony.

3. The Student has been determined to be eligible for special education and related services as a child with a disability, classified as having a Specific Learning Disability ("SLD").

19. He has a current Individualized Education Program ("IEP") dated February 6, 2009, which calls for 900 minutes (15 hours) per week of specialized instruction outside the general education setting. *Id.* His prior IEPs, in effect during the 2008-2009 school year, similarly called for services to be provided outside the general education setting. *See* -23 (11/4/08 IEP); -25 (11/06/07 IEP).

4. During the current school year, Petitioner has expressed concerns about the Student's behavior to the principal and teachers at Petitioner has indicated that the Student "acts out" when he does not understand the school work, and she believes his behavior would improve with more academic support. *See* Parent Testimony. The Student has received approximately four (4) suspensions this school year for fighting and other conduct violations. *Id.* However, his behavior has improved during the most recent advisory period. SEC Testimony.

5. At the February 2009 meeting of the Student's Multi-disciplinary Team ("MDT"), Petitioner expressed concerns that the Student may have an emotional disturbance and/or other health impairment in addition to SLD. Petitioner felt that counseling services were needed, but the team did not add them to the Student's IEP. -2; -19; Parent Testimony; EA Testimony. Apparently, the team wanted to see how the Student performed under its behavior intervention plan (BIP) before deciding whether to add counseling services to the IEP. *See* EA Testimony. However, the SEC agreed at hearing that counseling is a "possibility" that "should be explored." SEC Testimony.

6. At the February 2009 MDT meeting, Petitioner expressed concerns that the Student was failing or struggling in core academic subjects including Algebra. The general education teacher also indicated that she had "not seen much improvement academic wise." 21 (MDT Meeting Notes, at 1). The team nevertheless determined not to increase the number of hours of specialized instruction contained in his IEP. -2; -19; Parent Testimony. However, Petitioner was in agreement with maintaining the number of hours at that time, as long as the services were provided outside the general education setting. EA Testimony.

7. On February 13, 2009, Petitioner signed a Parent/Guardian Consent to Evaluate authorizing an evaluation of the Student in the area of Communications/Speech and Language. -19, p. 1. A speech and language evaluation report was completed February 26, 2009. 16.

8. On or about March 3, 2009, Petitioner received notice from DCPS that the Student was failing one or more academic courses and was in danger of being retained in the 9th grade. -39. The Report to Parents on Student Progress for the 2d advisory ending January 16, 2009, showed F's in Algebra, English and Music. -36. The progress report for the 3d advisory ending March 20, 2009, reported some improvements including a D in Algebra and a C- in English. DCPS-1. *See also* SEC Testimony (noting improved grades compared with 1st and 2d advisories).

9. On or about March 18, 2009, after the filing of the complaint, DCPS authorized Petitioner to obtain an independent comprehensive psychological evaluation of the Student at DCPS expense. -5.

10. The MDT/IEP team "will reconvene to review the speech and language evaluation, as well as the independent psychological evaluation." DCPS' Response, dated

March 19, 2009, at 2. The team also “will review and revise the IEP as necessary at that time.” *Id.* See also SEC Testimony.

11. During the current school year, the Student has not received the full extent of specialized instruction services contained in his IEP. DCPS has generally provided him not more than approximately ten (10) hours per week, rather than the 15 hours weekly specified in the IEP. See -2; Parent Testimony; see also SEC Testimony.

12. During the current school year, the Student has received most of his services on an “inclusionary” basis within the general education classroom setting, rather than in an “out of general education setting” as specified in his IEP. 2; 19; see Parent Testimony; EA Testimony. The SEC has only pulled the Student out of his general education class for individual instruction “when his schedule permits,” on average about twice per week. SEC Testimony. When they occur, the sessions last for approximately 40 minutes. *Id.* (cross examination).

13. According to the SEC, the Student generally performs better in pull-out sessions because he responds better to one-on-one intervention. SEC Testimony (cross examination).

14. It is undisputed that cannot provide “pull-out” services to the Student as required under his current IEP, and that the SEC at also presently serves as the only special education teacher at See SEC Testimony; EA Testimony.

15. “Because is an inclusion high school, the team will reconvene to discuss placement and locate a school that can fully implement the Student’s IEP.” DCPS’ Response, dated March 19, 2009, at 2.

16. The Student has significant academic deficits in the areas of reading comprehension and vocabulary, which impact his progress in many academic courses including Language Arts, Science, Social Studies, and Math (word problems), as well as his ability to follow directions in any class. See EA Testimony.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; see also *Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to develop an appropriate IEP.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.3. The standard generally is preponderance of the evidence. See, e.g., *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

B. Issues/Alleged Violations by DCPS

- (1) *Whether DCPS has failed to develop an appropriate IEP for the Student in that the IEP fails adequately to address social-emotional concerns and/or does not provide the Student with the levels of service or setting that he requires.***

3. With respect to the claim of an inappropriate IEP, the Hearing Officer concludes that Petitioner has **not** carried her burden of proving this claim by a preponderance of the evidence.

4. FAPE is not defined as a potential maximizing education. Generally speaking, a school has met its obligation to provide a FAPE if the IEP is reasonably calculated to enable the child to receive some meaningful educational benefit. *See Board of Education v. Rowley*, 102 S. Ct. 3034 (1982); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The MDT is the right entity to make this determination, not a hearing officer, unless a complainant proves that the team got it wrong.

5. In this case, Petitioner has failed to show by a preponderance of the evidence that the Student's current IEP is not reasonably calculated to enable the Student to receive meaningful educational benefit. Petitioner has proffered some evidence, mainly in the form of testimony by the parent and the EA, that (a) counseling services and (b) increased hours of specialized instruction might provide additional benefits to the Student. However, the MDT's judgment as to the level and type of services appropriate for the Student's current disability classification and circumstances has not been shown to be unreasonable, based on the information available to the MDT as of February 2009.

6. When the MDT next meets, it will need to review the further evaluations (including the comprehensive psychological) and assess whether additional or increased levels of services are necessary to meet the unique educational needs that result from the Student's disability.

- (2) *Whether DCPS has failed to implement the Student's IEP by failing to provide the full extent of instructional services and/or setting specified by the IEP.***

7. With respect to this IEP implementation claim, the Hearing Officer concludes that Petitioner has carried her burden of proving this claim by a preponderance of the evidence.

8. DCPS agreed at hearing that _____ is not an appropriate location/placement in which to implement the Student's IEP because it is an "inclusion" high school that generally cannot provide the pull-out individual instruction required under the IEP. Thus, the record is clear that DCPS is failing to provide the "out of general education" setting called for in the IEP.

9. In addition, the evidence demonstrates that DCPS has not provided the full extent of instructional services (15 hours per week) required under the IEP. According to the SEC's own testimony, he provides an average of less than two hours of pull-out specialized instruction weekly. Beyond that, the record is unclear as to how much, if any, specialized instruction is provided within the general education classroom. The quantity of services appears to fall far short of the required 15 hours per week, even in a general education setting, and certainly

constitutes a material failure to implement the IEP. See, e.g., *Van Duyn v. Baker School District*, 502 F.3d 811 (9th Cir. 2007); *Catalan v. District of Columbia*, 47 IDELR 223 (D.D.C. 2007).

(3) ***Whether either of the above failures constitutes a denial of FAPE or otherwise constitutes substantive grounds for relief.***

10. DCPS also agreed at hearing that the current placement constitutes a denial of FAPE. As FAPE is defined under IDEA to mean special education and related services that (*inter alia*) are “provided in conformity with an individualized education program (IEP) that meets the requirements of [the Act],” 34 C.F.R. §300.17, the denial of FAPE seems clear from the record. Moreover, the current placement at Phelps does not provide educational benefits to the Student. The only question debated by counsel in closing argument was what relief is or is not appropriate at this point.

C. Relief

11. The IDEA authorizes district courts and hearing officers to fashion “appropriate” relief, e.g., 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). As reflected in the Order below, the Hearing Officer has exercised his discretion to fashion appropriate equitable relief, based on the record developed in this proceeding and the particular violation(s) adjudicated herein.

12. At hearing, Petitioner did not seek an immediate alternative placement, but indicated instead its intention to work with DCPS in the context of the further MDT/IEP team meetings to determine an appropriate placement. “IDEA continues to obligate DCPS to come forward with a plan that meets [the Student’s] needs” through the MDT/IEP process. *Branham v. District of Columbia*, 427 F.3d 7, 13 (D.C. Cir. 2005); see 20 U.S.C. §1412(a)(1)(A). Petitioner will retain the right to file a further due process complaint in the event she is dissatisfied with any revised IEP and/or placement determination.

13. Petitioner also sought at the close of hearing an order requiring “tutoring as an immediate remedy” (though not as compensatory education) – essentially to take the place of the specialized instruction services that DCPS is not currently providing under the IEP, perhaps on an interim basis until the MDT can meet to determine an appropriate placement going forward. However, Petitioner was unable to demonstrate adequate factual or legal support for such relief, which strikes the Hearing Officer as unusual and also was not set forth in her complaint -2) or discussed at prehearing conference 3).

14. Finally, with respect to compensatory education for the adjudicated FAPE denial, Petitioner suggests that this issue be deferred pending completion of the independent psychological evaluation, further MDT/IEP meeting and placement decision, so that it can be based on up-to-date information. Petitioner asserts that consideration of compensatory education would be premature now because, *inter alia*: (a) the continuing harm from the inappropriate placement makes it difficult to calculate at this time; and (b) the pending comprehensive psychological evaluation is a necessary aid in developing the precise amount and form of compensatory education. DCPS objects to reserving compensatory education. The Hearing Officer agrees with Petitioner, and concludes that the present record is inadequate at this time to

conduct the fact-specific inquiry necessary to craft the "specific compensatory measures needed to best correct" (*Reid, supra*) the educational deficits resulting from his loss of services. *See, e.g., Friendship Edison Public Charter School v. Nesbitt*, 583 F. Supp. 2d 169 (D.D.C. 2008) (ordering updated psychological and vocational evaluations to permit an adequate compensatory education plan to be developed).

V. **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered:

1. Within **10 school days** after receipt of the results of the independent comprehensive psychological evaluation of the Student authorized by DCPS on 3/18/09, DCPS shall convene a meeting of the Student's MDT/IEP team for the purpose of: (a) reviewing the psychological and speech/language evaluations; (b) reviewing and revising, as appropriate, the Student's IEP, including but not limited to incorporating speech and language services and addressing social/emotional goals if warranted by the evaluations; and (c) determining an appropriate placement to take the place of his current school, _____ School.
2. Within **five (5) school days** of the above-referenced meeting, DCPS shall issue a Prior Notice of Placement that provides a suitable alternate public placement and/or funds a private placement selected by the parent.
3. The MDT/IEP team also may discuss and determine whether to include additional special education or related services within the IEP, to the extent it finds them appropriate to compensate for and/or meet the unique needs of the Student in light of DCPS' prior failure to provide services during the 2008-2009 school year found herein. Otherwise, Petitioner will retain the right to bring a further due process complaint seeking a compensatory education remedy for the denial of FAPE adjudicated in this decision, based on updated evaluations and further information.
4. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Roberta Gambale, Esq., via facsimile (202-742-2098), or via email (rgambale@jebllaw.biz).
5. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
6. This case shall be, and hereby is, **CLOSED**.

Dated: April 27, 2009

/s/



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any State court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).