

DC Office of the State Superintendent of Education
Office of Compliance & Review

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

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STUDENT HEARING OFFICE
2009 APR 27 AM 9:08

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

CONFIDENTIAL

In Re the Matter of:

Parent on behalf of Student *

Petitioner,

vs.

The District of Columbia Public Schools

Respondent.

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CASE NO.

Complaint Date: 03/12/09

Hearing Date: 04/20/09

Hearing Site:

Van Ness Elementary School

1150 5th Street, S.E., 1st Floor

Washington, D.C. 20003

HEARING OFFICER DETERMINATION

Petitioner's Attorney:

Miguel Hull, Esq.
James E. Brown & Associates, PLLC
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Respondent's Attorney:

Laura George, Esq.
Assistant Attorney General
Office of the Attorney General as Counsel
for D.C. Public Schools
825 North Capitol Street, N.E., 9th Floor
Washington, D.C. 20002

*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

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JURISDICTION

The Due Process Hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations (D.C.M.R.).

INTRODUCTION

On March 12, 2009, a Due Process Complaint Notice ("Complaint") was filed by the great grandmother and legal guardian ("Parent" or "Petitioner") on behalf of the 10 year old student ("Student") alleging that the District of Columbia Public Schools ("DCPS") denied Student a Free Appropriate Public Education ("FAPE") in violation of IDEIA when DCPS failed to provide Student with an appropriate educational placement during the last quarter of the 2007-2008 school year while Student attended _____ and from August 2008 – January 2009 while Student attended _____. Petitioner further alleges that the inappropriate placement while Student attended _____ constitutes the denial of a FAPE and entitles Student to compensatory education.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

THE DUE PROCESS HEARING

The due process hearing convened on April 20, 2009 at the Van Ness Elementary School located at 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003.

Petitioner was represented by Miguel Hull, Esq. ("Petitioner's Attorney") and DCPS was represented by Laura George, Esq. ("DCPS' Attorney"). Petitioner participated in the due process hearing by telephone throughout Petitioner's case in chief, but was excused from further participation by Petitioner's Attorney due to pressing employment obligations.

The parties did not engage in settlement discussions.

Disclosures:

Petitioner's Five-Day Disclosure letter dated 04/13/09, containing Exhibits #1-17, was admitted into evidence without objection.

DCPS' Disclosure Statement dated 04/10/09, contained Exhibits #1-10. DCPS' Exhibits #1-9 were admitted into evidence without objection. DCPS' Exhibit #10 was admitted into evidence over objection.

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Witnesses:

Witnesses for Petitioner included: (1) Petitioner, and (2) Maria Consuelo Ortega, educational advocate.

Witnesses for DCPS included: (1) Special Education Coordinator ("SEC") at (via telephone).

Relief requested:

Petitioner's requested relief consists of (1) a finding of a denial of a FAPE, and (2) DCPS to provide funding for approximately 190 hours of one-on-one private tutoring as compensatory education for the time that Student was inappropriately placed at or DCPS to convene a Multidisciplinary Team ("MDT") meeting within 10 business days to review and revise Student's IEP, and determine appropriate compensatory education.

Stipulation #1 – Student is _____ years of age and currently attends _____ as of February 2009. Student attended _____ from September 2008 – January 2009.

Stipulation #2 – Student's current Individualized Education Program ("IEP") dated 04/09/08 indicates that Student has an Emotional Disturbance ("ED") and should receive 26.5 hours of specialized instruction per week and 1 hour of social work services per week, and Student should receive these services 85% out of the general education setting.

Stipulation #3 – On 04/09/08, the MDT met and recommended that Student attend _____ Center for the 2008-2009 school year.

Stipulation #4 – On 06/19/08, the MDT met and determined that Student would be placed at Thomas ES for the 2008-2009 school year, and a Prior Notice was issued on 06/19/08.

Stipulation #5 – On 01/13/09, the MDT met and determined that Student should be placed at JRC for the rest of the school year.

FINDINGS OF FACT

#1. Student's 06/13/07 IEP, developed while Student was in the 3rd grade at Terrell ES, classified Student as ED and prescribed 25.0 hours/week of specialized instruction, 1.0 hour/week of psychological services, and 1.0 hour/week of speech-language services, for a total of 27 hours/week of special education with services provided 84% in an out of general education setting. (*Petitioner's Exhibit #4, IEP dated 06/13/07*).

#2. An educational evaluation conducted in April 2008 revealed that Student's academic skills, Student's ability to apply those skills, and Student's fluency with

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academic tasks were within the average range; and Student's performance in broad reading, mathematics, math calculation skills, written language, and written expression were average when compared to others at Student's age level. (*Petitioner's Exhibit #10, Educational Evaluation dated 04/04/08*).

#3. In April 2008, while in the 4th grade at _____ Student's behavior was described as oppositional and defiant in class, and disruptive and belligerent to peers and staff. Student was also at times very attentive and able to perform assigned work independently. At other times, Student was disruptive and unwilling to attend to instruction and assigned tasks. (*Petitioner's Exhibit #2 and DCPS' Exhibit #8, MDT Meeting Notes dated 04/09/08*).

#4. Student's 04/09/08 IEP, developed while Student was in the 4th grade at _____ classified Student as ED and prescribed 26.5 hours/week of specialized instruction and 1.0 hour/week of social work services, for a total of 27.5 hours/week of special education, with services to be provided 85% in an out of general education setting. (*Petitioner's Exhibit #2, IEP dated 04/09/08; Stipulation #2*).

#5. On 06/19/08, the MDT at _____ met and determined that Student would be placed at _____ for the upcoming 2008-2009 school year, and a Prior Notice of placement to _____ was issued. (*DCPS' Exhibit #7, Prior to Action Notice dated 06/19/09; Stipulation #4*). Petitioner wanted another school placement for Student because Student was aging out of _____ (*Testimony of Petitioner*). Petitioner was comfortable with Student being placed in a self-contained ED program at _____ that enabled Student to interact with non-disabled peers, and Petitioner, as a member of the MDT, agreed with the placement. (*DCPS' Exhibit #6, IEP Meeting Notes dated 06/19/08*). The MDT agreed that an out of general education classroom would be appropriate to implement Student's IEP goals and objectives. (*DCPS' Exhibit #7, Prior to Action Notice dated 06/19/08*).

#6. In July 2008, Student received a Behavioral Observation by a DCPS certified school psychologist while Student attended summer school. Student demonstrated maladaptive behaviors throughout the observation consisting of inappropriate movement and placing Student's head on the desk, and appearing unfocused and inattentive. Verbal redirection was used to assist Student in attending to task and to reduce the frequency of Student placing Student's head on the desk, but the intervention was successful only for a short interval of time. (*Petitioner's Exhibit #6, DCPS Behavioral Observation dated 07/10/08*).

#7. A psychological evaluation conducted in June 2008 indicated that Student had a global intelligence within the average range, and behavioral testing indicated that Student had behavioral concerns and was at risk for impulsivity, hyperactivity, academic and occupational and social problems within the school setting. (*Petitioner's Exhibit #8, Comprehensive Psychological Report dated 07/08/08*).

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#8. Beginning in August 2008, Student attended a self-contained ED special education cluster program at _____ remaining in the same classroom with the same students and teacher all day. (*Testimony of _____ SEC at _____ Testimony of Petitioner*). The ED cluster class size was approximately 8 students, with 1 teacher and 2-3 aides. (*Testimony of Maria Consuelo Ortega, educational advocate*). The ED cluster students shared the lunchroom with the general education students, but sat at a separate table that was supervised by two staff members. At lunchtime, the ED students, by choice, did not interact with the general education students. (*Testimony of _____ SEC at _____*)

#9. Student's 04/09/08 IEP was in effect while Student attended _____ the 26.5 hours/week of specialized instruction were provided to Student in the self-contained ED cluster classroom, the 1.0 hour/week of counseling services was provided to Student in the classroom and during resource pullout, and Student received all of the services specified in the 04/09/08 IEP while Student attended _____ (*Testimony of _____ SEC at _____ Student made academic progress at _____ and _____ Petitioner was pleased with the program and Student's work at _____ (Testimony of _____ SEC at _____ Petitioner's Exhibit #5 and DCPS' Exhibit #2, IEP Meeting Notes dated 01/13/09; Testimony of Petitioner)*). Student's behavior slightly improved while at _____ (*Petitioner's Exhibit #5 and DCPS' Exhibit #2, IEP Meeting Notes dated 01/13/09*).

#10. In January 2009, while attending _____ Student exhibited classroom behaviors of inattentiveness, putting Student's head down on the desk, moving around the class, talking in a yelling voice, verbal confrontations with other students, running out of classroom and acting out; and this was considered Student's typical or usual behavior. (*Testimony of Maria Consuelo Ortega, educational advocate; Testimony of Petitioner*). Petitioner received many telephone calls from _____ regarding Student's behavior. (*Testimony of Petitioner*). Typical behaviors of ED students include non-compliance, oppositional and argumentative behavior, physical confrontation, frustration, crying, throwing chairs or objects, tantrums, and failure to adhere to authority; and it is typical of Thomas ES to call the parents of ED students four times per day to keep them abreast of their child's acting out behaviors. (*Testimony of _____ SEC at _____*)

#11. Student has been receiving community mental health services through Scruples Corporation since June 2008, and has an assigned case manager, psychologist, and psychiatrist. (*Petitioner's Exhibit #9, DCPS Social Work Evaluation and Report dated 06/27/08; Testimony of Petitioner*). Medication for Student's ADHD, consisting of 20 milligrams/daily of Aderal, is monitored by the Scruples Corporation psychiatrist. (*Petitioner's Exhibit #9, DCPS Social Work Evaluation and Report dated 06/27/08; Petitioner's Exhibit #5, IEP Meeting Notes dated 01/13/09*). Beginning in September 2008, Mr. Gunn, Student's mental health case manager from Scruples Corporation, began expressing dissatisfaction with Student's placement at _____. Eventually, in December 2008, Petitioner expressed similar dissatisfaction with the services being provided at _____ and as a result, a MDT convened on 01/13/09 to discuss placement. (*Testimony of _____ SEC at _____*)

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#12. On 01/13/09, the MDT met and determined that Student should be placed in an out of general education program at _____ for the rest of the school year, primarily because _____ was the educational program that Petitioner wanted for Student. The MDT was in agreement with _____ as an alternate placement because the services in Student's IEP could be implemented at _____. The MDT felt that _____ was an appropriate placement for Student, but due to concerns of Petitioner and Mr. Gunn, and because the MDT knew that _____ could provide the same special education services as _____ and was an appropriate program for Student, the MDT issued a Prior to Action Notice of placement to _____. (*Testimony of _____ SEC at _____ offered more wrap around services than _____ and was affiliated with the Center for Mental Health. (Stipulation #5; DCPS' Exhibit #2 and Petitioner's Exhibit #5, IEP Meeting Notes dated 01/13/09; DCPS' Exhibit #4, Prior to Action Notice dated 01/13/09; Testimony of _____ SEC at _____*

#13. _____ is a full time special education school for ED students which offers wrap around services, social skills training, an ongoing therapeutic setting, a school wide behavior plan, a behavior crisis room, parent sessions for medication, and collaboration with the Center for Mental Health (also referred to as the Department of Mental Health). There are 12 students per class, and no general education students at _____. (*DCPS' Exhibit #2 and Petitioner's Exhibit #5, IEP Meeting Notes dated 01/13/09; Testimony of _____ SEC at _____* Petitioner preferred _____ because _____ had a parent resource center, because Student had had recent hospitalizations, and because Petitioner considered _____ affiliation with the Center for Mental Health to be a plus factor. (*Testimony of _____ SEC at _____*

#14. Prior to attending _____ Student attended school at the Center for Mental Health. (*Petitioner's Exhibit #8, Comprehensive Psychological Report dated 07/08/08*).

#15. Stipulations #1-5 are incorporated herein by reference. (*Stipulations #1-5*).

DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof shall be the responsibility of the party seeking relief. Based solely upon 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 with a FAPE." *5 D.C.M.R. 3030.3*. "The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast, 44 IDELR 150 (2005)*.

Free appropriate public education or FAPE means special education and related services that (1) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

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(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324. 34 C.F.R. 300.17.

Issue #1 – Whether DCPS failed to provide Student with an appropriate placement, thereby denying Student a FAPE?

Petitioner alleges inappropriate program placement of Student at _____ from 04/09/08 until the end of the 2007-2008 school year and inappropriate program placement at _____ from August 2008 until January 2009.

Student's current Individualized Education Program ("IEP") dated 04/09/08, classifies Student as ED, and prescribes 26.5 hours/week of specialized instruction in a special education setting and 1.0 hour/week of social work services, with services to be provided 85% out of the general education setting. (*Finding of Fact #4, #15 (Stipulation #2)*). At the time the 04/09/08 IEP was developed, it was recommended by the MDT that Student attend _____ Center; however, a Notice of Placement was not issued to _____ Center. (*Finding of Fact #15 (Stipulation #3)*). On 04/09/08, it became necessary to identify a new educational placement for Student because Student was aging out of _____ (*Finding of Fact #5*). Until 04/09/08, Student's 06/13/07 IEP was in effect (*Finding of Fact #1*), and there is no allegation regarding the inappropriateness of the 06/13/07 IEP or DCPS' failure to implement the 06/13/07 IEP. The 04/09/08 IEP dropped the requirement for speech-language special education services, and boosted the hours of specialized instruction by 1.5 hours/week (*Finding of Fact #1, #4*), and there was no allegation that this change in services was inappropriate. There was no evidence in the record that _____ failed to implement Student's 04/09/08 IEP from 04/09/08 until the end of the 2007- 2008 school year or that Student failed to receive any educational benefit during this time. Therefore, Petitioner did not meet its burden of proof that _____ was an inappropriate placement and that Student was denied a FAPE from 04/09/08 until the end of the 2007-2008 school year.

The MDT met on 06/19/08 and issued a Notice of Placement to _____ (*Finding of Fact #15 (Stipulation #4); Finding of Fact #5*). Petitioner participated in the MDT meeting on 06/19/08, and agreed with Student's placement at _____ (*Finding of Fact #5*). There is no evidence in the record that _____ could not or did not provide the special education services prescribed in the 04/09/08 IEP, or that Student failed to receive educational benefit while attending _____ (*Finding of Fact #9*).

The fact that Student was eventually transferred to _____ in January 2009 (*Finding of Fact #14 (Stipulation #1 and 5)*) does not mean that Student's program placement at _____ was per se inappropriate. The record clearly demonstrated that Student's acting out and maladaptive behaviors existed while Student attended _____ and _____ during the summer of 2008 (prior to Student attending _____ (*Finding of Fact #3, #6*), and continued while Student attended _____ (*Finding of Fact #10*). The evidence further showed Student's acting out behaviors in school could be expected due to Student's disability (*Finding of Fact #7*), and were typical of behaviors exhibited by ED cluster program students at _____ (*Finding of Fact #10*). Furthermore, it was

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the norm rather than the exception for parents of ED students at [redacted] to be contacted four times per day regarding their child's maladaptive behaviors (*Finding of Fact #10*). Therefore, based on this record, the Hearing Officer cannot conclude that Student's acting out behaviors indicated that Student's placement at [redacted] was inappropriate. Additionally, there was no evidence in the record that Student's IEP was not implemented at [redacted] or that Student failed to make progress or receive educational benefit while at [redacted] (*Finding of Fact #9*). When Student was tested in April 2008, Student's academic skills and educational performance were average when compared to other students at Student's age level (*Finding of Fact #2*). When tested again in July 2008, Student's global intelligence was found to be in the average range, but it was Student's behavior that put Student at risk for maladaptive behaviors and social problems within the school setting (*Finding of Fact #7*). There was no evidence in the record that Student was not academically performing as well as the average student.

Consistent with the holding in *Rowley*, DCPS is only required to provide Student with an educational program that yields some educational benefit. DCPS is not required to maximize or provide the best program; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit the child to benefit from the instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

IDEIA's requirement of a "free appropriate public education" is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP. *Id.* The facts of this case demonstrate that DCPS provided Student with an adequate and appropriate educational program when it placed Student at [redacted]

The change of placement from [redacted] to [redacted] was at the behest of Petitioner and Student's case manager from Student's community mental health program, primarily because [redacted] offered advantages distinct from the provision of IEP prescribed special education services (*Finding of Fact #11, #12, #13*). The evidence clearly demonstrated that Student's IEP was being implemented at [redacted] and could be implemented at [redacted] as well (*Finding of Fact #12*). The advantage to the educational program at [redacted] from Petitioner's point of view was that it offered more wrap around services such as a parent resource center and an affiliation with the Center for Mental Health (*Finding of Fact #12, #13*). And, the Center for Mental Health was a program that Petitioner was familiar with because Student had attended the Center for Mental Health in the past. (*Finding of Fact #14*). The change of program placement from [redacted] to [redacted] was not out of necessity because [redacted] was an inappropriate program, but by choice by Petitioner (*Finding of Fact #12, #13*). Student was on medication prescribed by a psychiatrist (*Finding of Fact #11*), had had recent hospitalizations (*Finding of Fact #13*), and received ongoing community mental health services (*Finding of Fact #11*), and the wrap around services offered by [redacted] that could address these issues appealed to [redacted]

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Petitioner. Although [redacted] was technically a more restrictive placement than [redacted] in that [redacted] was attended only by special education students (*Finding of Fact #13*), the ED cluster program at [redacted] was materially the same as [redacted] in that [redacted] provided a self contained classroom and students in the ED cluster did not mix with the general education students at lunchtime (*Finding of Fact #8*).

34 C.F.R. 300.116 Comments, page 46588, Federal Register Rules and Regulations, elucidates that “placement” constitutes the points along the continuum of placement options available for a child with a disability, and “location” as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. The Comments further state that public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. There is no evidence in the record that the change of location from [redacted] to [redacted] where at both locations Student was placed at a school that Student would have attended if not disabled and where Student’s 04/09/08 IEP was implemented, constitutes a change of “placement” rather than a change in “location.” The Hearing Officer therefore concludes that the change in educational program from [redacted] to [redacted] represented a change in location and not a change in educational placement. As such, Petitioner’s allegation that [redacted] was an inappropriate placement for Student has no merit, and the Hearing Officer concludes that Student was not denied a FAPE while attending [redacted] from August 2008 – January 2009.

Petitioner failed to meet its burden of proof on Issue #1.

Issue #2 – Whether Student is entitled to compensatory education due to Student’s inappropriate placement at [redacted]

“When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.” *Reid v. District of Columbia*, 43 IDELR 32 (2005).

Petitioner failed to prove by a preponderance of the evidence that Student’s placement at [redacted] was an inappropriate program placement, and without a demonstrated denial of a FAPE, Student is not entitled to compensatory education.

Petitioner failed to meet its burden of proof on Issue #2.

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ORDER

WHEREFORE, this Complaint having been fully litigated and there being no basis in fact to support Petitioner's allegations that Student was denied a FAPE and is entitled to compensatory education, it is

ORDERED that this Complaint be and hereby is **DISMISSED** with prejudice.

IT IS SO ORDERED.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

Virginia A. Dietrich /s/

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

04/25/09

Date

Issued: April 25, 2009