

DC Office of the State Superintendent of Education
 Office of Review & Compliance
 Student Hearing Office
 1150 5th Street, S.E.
 Washington, D.C. 20003
 CONFIDENTIAL

<p>[Parents], on behalf of [Student],</p> <p style="text-align: center;">Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools,</p> <p style="text-align: center;">Respondent.</p>	<p>Case</p> <p style="text-align: center;">HEARING OFFICER'S DETERMINATION</p> <p>April 9, 2009</p> <p><u>Representatives:</u></p> <p>Paula Rosenstock, Petitioners</p> <p>Daniel McCall, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:30 a.m. on March 19, 2009. The hearing concluded on March 30, 2009, upon the filing of Petitioner's post-hearing brief¹. The due date for the Hearing Officer's Determination (HOD) is April 9, 2009, in accordance with the Blackman/Jones Consent Decree. This HOD is issued on April 9, 2009.

¹ The Respondent did not file a post-hearing brief.

The hearing in this matter was conducted and this decision is written pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

Present at the due process hearing were:

Petitioner's Counsel, Paula Rosenstock, Esq.

Respondent's Counsel, Daniel McCall, Esq.

Petitioner, Student's Mother

Petitioner, Student's Father

Clinical Director, School (in part)

Keisha McKitty, DCPS Placement Specialist (in part)

Five witnesses testified at the hearing. The Petitioner presented three witnesses and the Respondent presented two. The witnesses were:

Petitioner's witnesses:

Petitioner (Student's Mother) (P)

Clinical Director, School

Respondent's witnesses:

Dr. Wesley Campbell, Psychologist (W.C.)

Keisha McKitty, Placement Specialist (K.M.)

A prehearing conference was held on February 24, 2009, and a prehearing order was issued on that date. A combined Response, Notice of Insufficiency, and Motion to Dismiss was filed by the Respondent on February 19, 2009. The complaint was found

sufficient, pursuant to 34 C.F.R. § 300.508. The motion to dismiss the complaint was denied on March 12, 2009, on the basis of a clear dispute of fact between the parties.

30 documents were disclosed and filed by the Petitioner on March 12, 2009. An additional four documents were disclosed and filed by the Petitioner on March 13, 2009. Of these documents, eleven were admitted into evidence. The exhibits are as follows:

- P 1 - Due Process Complaint, February 9, 2009
- P 2 - Petitioners' Opposition to Respondent's Motion to Dismiss, February 25, 2009
- P 3 - Neuropsychological Evaluation, July, 2007
- P 4 - Letter to McKitty from Rosenstock, December 12, 2008
- P 5 - Wediko Residential Treatment Discharge Summary, December 21, 2007
- P 6 - IEP team meeting notes, January 17, 2008
- P 17 - IEP, November 17, 2008
- P 25 - Information
- P 29 - Resume of Clare Savage
- P 31 - Psychological Assessment, March 1, 2009
- P 32 - Resume of Mark Sweeney

Seven documents were disclosed and filed by the Respondent on March 12, 2009².

None of these documents were objected to by the Petitioner and were admitted into evidence as Respondent's Exhibits 1 through 7 (R 1 – R 7). The exhibits are as follows:

- R 1 - Prior to Action Notice, January 17, 2008
- R 2 - IEP team meeting notes, January 17, 2008
- R 3 - Receipt for Procedural Safeguards Notice, January 17, 2008
- R 4 - Frost School Educational Update, November 12, 2008
- R 5 - IEP, November 17, 2008
- R 6 - IEP team meeting notes, November 17, 2008
- R 7 - Frost School Progress Reports, 2008-2009 & 2007-2008

² An eighth document was listed but not disclosed or filed. The document was not admitted and is not included here.

II. ISSUES

1. Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to fund or provide wrap-around services for the Student from December 2007 to the present?³
2. Whether the Respondent failed to provide written notice of its refusal to provide and fund wrap-around services for the Student following a request for such services in December 2008?

III. FINDINGS OF FACT

1. The Student is a year old learner with a disability and is currently enrolled at the School, a private placement approved by the IEP team. P 1, P 6, R 1, R 2.
2. The Student has been at since January 3, 2008, after being in a residential program in New Hampshire for over 15 months. P 5, P 6, R 1, R 2, R 4, Testimony (T) of P.
2. The Student was determined by the Respondent to be eligible for special education and related services under the definition of emotional disturbance (ED). R 1, R 5, P 17. The Student presents symptoms “recognizable with a Bipolar Disorder and Asperger’s Syndrome/Disorder” such as “verbal and physical aggression, oppositional and defiant behaviors including conduct instability.” P 31. He misses social cues, needs redirection, and engages in some excessive talking. T of C.S. After discharge from the residential program, and before use of

³ It was clarified as a preliminary matter at hearing that the alleged start date for the services was in February 2008, not December 2007, as originally pled.

the wrap-around services, the Student destroyed property at home, including a car windshield, struck his mother, and had to be restrained by his father. P 31, T of P, T of T of These symptoms have improved over the course of the past year, since the wrap-around services were employed. P 31, T of T of

3. The Student was placed in the residential program in New Hampshire because his “emotional difficulties [had] a large impact on his cognitive functioning and ability to participate in his current academic program.” P 5.

... [Student] had difficulty following directions from adults in authority, conflict with father, made poor eye contact, misread social cues, and had difficulty taking responsibility for his behaviors. . . . Because of [Student’s] responsiveness to the structures and interventions at [summer treatment wilderness camp] and the ongoing conflict in [Student’s] relationships at home, he was referred to [the residential program in New Hampshire].

P 5. This evidence is supported by the testimony of the Student’s Mother.

T of P.

4. The determination to discharge the Student from the residential program in New Hampshire was made because the program staff believed the Student had obtained all he could get from the program and his program therapist was leaving, so it was an opportune time to transition to a new placement. T of P. The residential program recommended the Student be placed in an educational program with “some type of therapeutic component.” P 5, T of P. It is not clear who chose Frost school as the placement. However, the IEP team subsequently determined it was

the appropriate placement for the Student, although no IEP was created until more than ten months later⁴. P 6, R 2.

5. An IEP team meeting was held January 17, 2008, two weeks after the Student's enrollment at Frost. P 6, R 2, T of P. The team did not develop an IEP at that meeting, but rather determined to wait until early February to do so. Id., T of P. The team also determined "that after the IEP is developed the team will reconvene to review his progress after a 60 day period." Id. This never occurred and the IEP team did not meet again until November 17, 2008, and an IEP was developed at that time. R 6, R 5, P 17, T of P.

6. The Student began his time at anxious, defensive, and short with his peers. T of He now uses some of the approaches taught to him by his mentors and in family therapy to better handle himself at school. Id. His unsafe and destructive behavior at home, such as striking his parents and smashing property, required either placement in a residential facility, or the use of the intensive mentoring (a non-parent adult working with him) and family therapy. T of T of T of P. The Petitioners chose not to send the Student back to a residential program. T of P.

7. The intensive mentoring and family counseling are referred to as "Community Based Intervention Services" or "wrap-around" services. They have been

⁴ It is unknown why, despite having already been determined eligible for special education and related services, there was no IEP in place when the Student was discharged from the residential program.

provided independently of the Respondent by The

P 31, T of T of P. These wrap-around services are provided outside of the normal school day. P 31, T of T of P. These services began during the last week of February, 2008. P 31.

8. The Petitioners did not ask the Respondent to provide the wrap-around services prior to the initiation of the services. T of P. The Petitioners did not ask the Respondent to reconvene the IEP team following the January, 2008, IEP team meeting. T of P.
9. Academically, the Student is involved in and progressing in the general curriculum. R 4, R 5, R 7, P 17. Despite some behavior issues, the Student is currently functioning fairly well at also. R 4, P 31, T of
10. An IEP team meeting was convened on November 17, 2008, and the Petitioners requested the wrap-around services. R 6, P 17, T of P, T of T of P. They also requested reimbursement for the services they had allegedly paid for⁵. T of T of P. The requested services were not included in the proposed IEP. P 17, R 5. No written notice was provided to the Petitioners concerning the Respondent's refusal to provide the requested services. T of T of P. The Respondent's response to the due process complaint did not address the refusal. DCSP Response, February 19, 2009.

⁵ testified that no documentation of the services or bills for the services were shared at the IEP team meeting.

11. The Petitioners' subsequently sent a letter to the Respondent, through their counsel, requesting the wrap-around services including reimbursement for prior services. P 4. No written notice or IEP team meeting resulted from this request.⁶

IV. CONCLUSIONS OF LAW

1. The Federal Regulations at 34 C.F.R. § 300.17 state:

Free appropriate public education or FAPE means special education and related services that —

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

2. An IEP must include statements of:

the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section[.]

34 C.F.R. § 300.320(a)(4).

3. Related services are “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education” and include⁷:

⁶ testified that she did not receive the letter in question. However, this testimony lacks credibility because the Respondent did not raise this defense in its response to the complaint, which specifically referenced the letter in question.

- Counseling services:

Counseling services means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

- Parent counseling and training:

(i) *Parent counseling and training* means assisting parents in understanding the special needs of their child;
(ii) Providing parents with information about child development; and
(iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

- Psychological services:

Psychological services includes—
(i) Administering psychological and educational tests, and other assessment procedures;
(ii) Interpreting assessment results;
(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;
(iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;
(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and
(vi) Assisting in developing positive behavioral intervention strategies.

- Social work services:

Social work services in schools includes—
(i) Preparing a social or developmental history on a child with a disability;
(ii) Group and individual counseling with the child and family;
(iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;
(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and
(v) Assisting in developing positive behavioral intervention strategies.

34 C.F.R. § 300.34(a) and (c)(2), (8), (10), & (14).

4. A school district must provide written notice to a parent whenever it:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

⁷ The U.S. Department of Education notes: "the list of services in § 300.34 is not exhaustive and may include other developmental, corrective, or supportive services if they are required to assist a child with a disability to benefit from special education." 71 Fed. Reg. 46540, 46569 (August 14, 2006).

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child[.]

34 C.F.R. § 300.503.

5. The Student, in this case, did not have an IEP to implement before he was discharged from the residential program in New Hampshire. While it is not clear how the determination to place him at _____ was made, the Respondent, as the guarantor of FAPE, had the responsibility to facilitate the change through IEP planning. The Respondent attempted to do this, belatedly, by convening an IEP team meeting about two weeks *after* the Student was enrolled at _____. Then, it did not create an IEP, but rather deferred the development of a new IEP for ten months⁸. During that time, there was no individualized education program plan to follow or monitor. This is a denial of FAPE⁹. Because there was no public supervision (as evidenced by the failure to reconvene the IEP team meeting in

⁸ The notes from the meeting indicate intent to do so sooner, but this never happened.

⁹ When the Petitioner testified during the hearing that an IEP did not result in February, 2008, as R 2 and P 6 indicate would happen, and was not written until after the November 2008 IEP team meeting, the Respondent objected to this testimony. Respondent requested a continuance, which was denied on the record, arguing that there was no complaint that the Student did not have an IEP and that the Respondent did not have a chance to prepare. The IHO found this argument without merit. The Respondent surely must have known the Student did not have an IEP since the document is the cornerstone of special education programming for any child with a disability. Furthermore, the first issue in this matter is whether the Respondent failed to fund or provide wrap-around services for the Student from December 2007 to the present. This issue required an examination of the IEP for the Student. Upon finding the Student did not have an IEP, it is shocking the Respondent proceeded to hearing on this matter. While vigorous advocacy is admired, there is a point when it can become shameful. Attempting to argue that it was not prepared to deal with evidence that the Student had no IEP while at Frost, for over ten months, crossed the line.

February as planned) and because there was no IEP, the Respondent has substantively denied the Student a FAPE.

6. The evidence also demonstrates the wrap-around services the Petitioner's obtained for the Student were necessary to enable him to remain in the less restrictive setting at Frost (as opposed to another residential placement) and therefore benefit from the academic opportunities there. The services represent at least four different kinds of defined related services: counseling services, parent counseling and training, psychological services, and social work services. Even if the services did not fit squarely into any of these definitions, the wrap-around services would still be related services because they are necessary to enable the Student to benefit from the special education provided to him. Without them, the Student would more likely than not be back in a residential program, which is not the least restrictive environment.¹⁰ While there is merit to the notion that the Petitioners did not request the services from the Respondent before providing them and therefore should not be reimbursed, there are three points which defeat that position. First, as noted in conclusion 4 above, there was no public supervision occurring and no IEP in place. It is not the Petitioners' job to ensure these things, but rather the Respondent's. Second, when the Petitioners did ask for the services at the IEP team meeting in November, 2008, and with a subsequent letter requesting the services in December, 2008, the Respondent failed to provide the required due process, written notice, pursuant to 34 C.F.R. § 300.503. This is also a substantive violation. It is reasonable

¹⁰ See 34 C.F.R. § 300.114.

to conclude that had the Petitioners requested the services earlier in the year, the Respondent would have failed to provide due process then, too. Finally, the IDEA provides specific procedures and limits regarding reimbursement for unilateral placements. *See*, 34 C.F.R. § 300.148. No such procedures or limitations have been prescribed for unilateral provision of related services, and so it cannot be assumed such procedures and limitations were intended.

7. Even though they may be due reimbursement for any costs they may have incurred in providing these related services for the past year, the Petitioners failed to present any evidence of what those costs were. Without that evidence, there is no reimbursement to provide. This cannot be a guessing game when looking backward to what should be known facts.

V. DECISION

1. The Respondent denied the Student a free appropriate public education when it failed to provide the Student with an IEP, including appropriate related services in the form of counseling services, social work services, psychological services, and parent counseling services, referred to by the Petitioners as “wrap-around” services, for the Student from February 2008 to the present.
2. The Respondent failed to provide written notice of its refusal to provide and fund wrap-around services for the Student following requests for such services in November and December 2008.

VI. ORDER

1. The Respondent shall immediately assume the costs of the wrap-around services currently being provided to the Student. This will be accomplished by the Petitioner immediately informing the service provider that the District of Columbia Public Schools (DCPS) is now responsible for the cost of such services, and that billing for such services must be provided directly to DCPS. Any invoices for these services provided after April 9, 2009, that have been submitted to the Petitioners, may be provided by the Petitioners to DCPS for payment.
2. Because Petitioners have not provided any evidence of the costs they have incurred in providing the wrap-around services, no reimbursement can be awarded¹¹.
3. The Student's IEP must be revised to include correct documentation of the currently provided related services which have been enabling him to remain in his current placement and receive educational benefit. The IEP must be reviewed and revised by April 24, 2009. At least three alternative meeting times and locations must be provided to the Petitioners. If the Petitioners fail to select any of the presented meeting times, the Respondent shall inform the Petitioner of the date and time it will proceed with the meeting, and must proceed with the meeting with or without the Petitioner. A representative from Frost and at least one of the

¹¹ In their closing brief, the Petitioners note that "if the cost of the services is determinative to the Hearing Officer's ruling, the parents are prepared to provide additional evidence or testimony as to the amount, . . ." it is unclear why, when the Petitioner's primary relief sought was reimbursement for these services, this was not prepared and presented at the hearing. In fact, the IHO reminded the Petitioners at the start of the hearing that evidence of the amount to be reimbursed would be required. It is now late in the game to offer what should have been offered in the first instance or even in the complaint itself.

Student's current teachers from Frost must be invited to attend the meeting, in addition to other required participants. Nothing in this order is to preclude the addition of other meeting participants by either party.

4. The wrap-around services must be provided at least until April 9, 2010, unless the parties mutually agree to end the services. Nothing in this order shall be deemed to preclude or require the addition of other special education and related services, as the entire IEP must be based upon the needs of the Student. The April 9, 2010 date is not to be used as a reason for stopping the services at that time. Members of the IEP team may conclude they are still necessary at that time, and if there is a dispute, procedural safeguards are in place in order to resolve it, including a due process hearing.
5. The Respondent is required to adhere to all requirements of the Individuals with Disabilities Education Improvement Act (IDEA) and related local law in providing a free appropriate public education to the Student.

IT IS SO ORDERED.

Dated this 9th day of April, 2009.



Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).