



## **I. Case Background and Procedural Information**

### **A. JURISDICTION**

This Decision and Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, codified at 20 U.S.C. §§ 1400 -1482, 118 Stat. 2647; and its implementing regulations codified at 34 C.F.R. §§ 300.01 – 300.818; 5 D.C.M.R. §§ 3000 - 3033; and Section 327 of the D.C. Appropriations Act.

### **B. DUE PROCESS RIGHTS**

Before the hearing the parent had been advised of their due process rights.

### **C. FIVE-DAY DISCLOSURES**

Petitioner: Admitted, without objection, a disclosure letter filed on 02/27/09 that list four (4)-witnesses and attached five exhibits sequentially labeled Parent-01 through Parent-05. Two witnesses were present and called to testify: (1) the student; and (2) the student's mother.

Respondent: DCPS did not submit a five day disclosure. No documents were offered into evidence. No witnesses were present or called to testify.

### **D. STATEMENT OF THE CASE**

The student, born \_\_\_\_\_ age \_\_\_\_\_-years 5-months, is a student with a disability who is to receive special education and related services, according to his Prince George's County Public Schools' expired 11/16/06 IEP, as an \_\_\_\_\_ grade, at least 21% of the school day outside of a general education classroom as a Specific Learning Disabled ("SLD") student now attending \_\_\_\_\_ located in Washington D.C. (R. at Parent-01, 03.)

Since his enrollment at \_\_\_\_\_ for the 2008-09 school year his IEP has not been implemented.

Consequently, on 02/03/09 parent's counsel filed the student's 02/03/09 Due Process Complaint ("DPC") alleging that DCPS as the LEA violated the IDEA and denied the student a Free Appropriate Public Education ("FAPE") by doing one thing: (1) failing to implement the student's expired 11/16/06 IEP during the 2008-09 school year until a new IEP could be developed. (R. at Parent-01.)

As relief, the student and parent want the expired IEP implemented until a new IEP can be developed. (R. at Parent-01.)

DCPS' 02/20/09 Response to the student's DPC was that "DCPS was not aware that the student possessed an IEP or required specialized instruction until his [02/03/09] Complaint was filed." (R. at 02/20/09 DCPS' Response to DPC.)

The OSSE Student Hearing Office ("SHO") continued, at parent counsel's request, the due process hearing scheduled for 03/06/09 until 11:00 a.m. on Thursday, March 26, 2009. The continued hearing was held at Van Ness Elementary School, 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003. The parties' waved participation in a Resolution Session. And parent's counsel selected to have a closed due process hearing that convened, as scheduled, 51-days after the 02/03/09 DPC was filed.

Assistant Attorney General Laura George appeared in-person representing DCPS. Attorney Donovan Anderson appeared in-person representing the student who was present; and the student's mother who also was present.

## **II. Issue**

Did DCPS, as the LEA, violate the IDEA and deny the student a FAPE by failing to implement his IEP according to 34 C.F.R. § 300.323 (f) during the 2008-09 school year?

### **Brief Answer**

Yes. DCPS said it had a copy of the student's expired IEP when he enrolled at the start of the 2008-09 school year but did not implement that IEP as had been requested by the parent and the adult (year old) student.

## **III. FINDINGS OF FACT**

1. The student, born \_\_\_\_\_ age \_\_\_\_\_-years 5-months, is a student with a disability who was to receive special education and related services, according to his Prince George's County Public Schools' expired 11/16/06 IEP, as an \_\_\_\_\_ grade, at least 21% of the school day outside of a general education classroom as a Specific Learning Disabled ("SLD") student now attending \_\_\_\_\_ School located in Washington D.C. (R. at Parent-01, 03.)
2. According to the student's 11/16/06 IEP developed by the Prince George's County Public Schools ("PGCPS") that expired on 11/16/07 while the student was enrolled in a PGC public school, he was to

receive these special education services in an intensive academic program as an SLD student:

- a. Specialized Instruction—15.0 hours/week in a Special Education Classroom. (R. at Parent-03.)
3. When the student transferred from a Military School in Maryland to enroll in \_\_\_\_\_ in September 2009 the student's mother provided \_\_\_\_\_ a copy of her son's expired 11/16/06 PGCPS IEP for implementation. And to date that IEP has not been implemented at or revised by \_\_\_\_\_ (R. at mother's testimony.)
4. That 11/16/09 IEP had not been updated by the PGCPS while the student was in enrolled in a PGC public school between November 16, 2007 when the IEP expired and September 2009 when he student transferred from the PGCPS to \_\_\_\_\_ (R. at mother's testimony.)
5. The 11/16/06 IEP states that student's reevaluation date is 11/16/09—nine (9)-months from the date the student's 02/03/09 DPC was filed. (R. at Parent 01, 03.)
6. According to the student's 10/24/06 Educational Report, the following areas or skills were found relatively weak: Calculation; Math Fluency; Spelling; and [Word] Passage Comprehension. ... The evaluator recommended that the student "continue to receive modifications and accommodations available through Special Education." (R. at Parent-02.)
7. DCPS offered no evidence whatsoever to contradict the parent's averments and documents. Nor did DCPS offer any explanation about why it had not implemented the student's IEP or revised it.
8. There was no evidence presented regarding the student's grades, but his December 2, 2008 Report to Parent's on Student Progress stated that he was "failing World Geography." No grades are noted on the Report. (R. at Parent-04.)
9. So based on these findings, the student's 11/16/06 expired IEP was not implemented as requested by the student's mother at \_\_\_\_\_ and no effort has been made to revise the expired IEP.

#### **IV. DISCUSSION and CONCLUSIONS OF LAW:**

**An LEA is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.**

The IDEA codified at 20 U.S.C. §§ 1400 - 1482. and 5 D.C.M.R. § 3000.1 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, provide them with special education and related services through an appropriate IEP and educational placement.

DCPS did not meet its legal obligation under the IDEA. Here is why.

1. "If a child's initial evaluation suggests [s/he] is entitled to a FAPE, IDEA then requires the school district to create and implement an IEP, which is the 'primary vehicle' for implementing the Act." Hoing v. Doe, 485 U.S. 305, 311 (1988).
2. Pursuant to 5 D.C.M.R. § 3002.1, LEA Responsibility, "[t]he services provided to the child must address all of the child's identified special education and related services needs and must be based on the child's unique needs and not on the child's disability."
3. Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."
4. Pursuant to 5 D.C.M.R. § 3025, Procedural Safeguards—Prior Written Notice, DCPS shall provide written notice to the parent of a child with a disability before it proposes...an educational placement of the child.
5. Pursuant to the IDEIA at 20 U.S.C. § 1414 (d) (A), (B); 34 C.F.R. § 300.323 (a) Requirement that Program be in Effect—

At the beginning of each school year, each local educational agency ... shall have in effect for each child with a disability in the agency's jurisdiction an IEP.

6. Pursuant to Initial Evaluations at 34 C.F.R. § 300.301 (a): "Each public agency shall conduct a full and individual initial evaluation in accordance with § 300.305 and § 300.306 before the initial provisions of special education and related services [are provided] to a child with a disability under this part [Part B of the IDEA]."
7. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(4): "Each public agency must ensure that ... (4) "the child is assessed in all areas related to the suspected disability, including, if appropriate ... [their] social and emotional status."
8. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(6): "Each public agency must ensure that ... (6) "in evaluating each child with a disability

under §§ 300.304 - 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."

9. Pursuant to 20 U.S.C. § 1414 (c)(1), "initial evaluation shall consist of procedures to determine whether a child is a child with a disability ... within 60-days of receiving parental consent for the evaluation, or if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe."
10. To ensure that each eligible student receives a FAPE, the IDEA requires that an IEP be developed to provide each disabled student with a plan for educational services tailored to that student's unique needs. See 20 U.S.C. § 1414 (d)(3).
11. Pursuant to 34 C.F.R. § 300.321 (a)(5), IEP Team, "[t]he public agency must ensure that the IEP Team for each child with a disability includes—an individual who can interpret the instructional implications of evaluation results."
12. Pursuant to the IDEA at 20 U.S.C. § 1414 (a)(2)(A), Reevaluations, "A local educational agency [LEA] shall ensure that a reevaluation of each child with a disability is conducted ... if the [LEA] determines that the educational or related services needs ... warrants a reevaluation or if the child's parents or teacher requests a reevaluation."
13. Pursuant to the IDEA at 34 C.F.R. § 300.303, reevaluations must occur at least once every three years but the law does not specify a time period for the LEA to complete the parties' agreed to reevaluation process.
14. Pursuant to the IDEA at 20 U.S.C. § 1414 (c)(3), Parental Consent, "Each local educational agency [LEA] shall obtain informed consent ... prior to conducting a reevaluation of a child with a disability."
15. Pursuant to the IDEA federal regulations at 34 C.F.R. § 300.09 consent means that the parent has been fully informed of all information relevant to the activity for which consent is sought ... and the parent understands and agrees in writing to carry out the activity.
16. Pursuant to the IDEA federal regulations at 34 C.F.R. § 300.300, parental consent is required to conduct an initial evaluation or reevaluation consisting of more than a review of existing information.
17. Pursuant to the IDEA at 34 C.F.R. § 300.323 (f), "if a child with a disability (who had an IEP that was in effect in a previous public agency in another

State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child FAPE (including services comparable to those described in the child's IEP from the previous agency) until the new public agency—

- a. Conducts an evaluation... if determined to be necessary by the new public agency; and
- b. Develops, adopts, and implements a new IEP....”

18. DCPS as an LEA did not comply with the IDEA. Albeit there was no evidence that the student had a current IEP in effect when he transferred from a PGC public school in the State of Maryland to a D.C. public school in September 2009, the student's mother testified that she gave the new public school an expired IEP from the transfer State and asked that it be implemented. (R. at Parent-03, mother's testimony.)
19. DCPS provided no evidence whatsoever to contradict the mother's testimony. Absent such testimony, the hearing officer finds the mother's testimony credible.
20. And since DCPS was given a copy of the student's last IEP developed in his transfer state, DCPS was required to implement that IEP since the parent requested that it be implemented. To date, that IEP has not been implemented.
21. And based on the student's still current 10/24/06 Education Evaluation Report, the evaluator found the following areas or skills relatively weak: Calculation; Math Fluency; Spelling; and [Word] Passage Comprehension. ... The evaluator recommended that the student “continue to receive modifications and accommodations available through Special Education.” (R. at Parent-02.)
22. There was no evidence presented regarding the student's grades, but his December 2, 2008 Report to Parent's on Student Progress stated that he was “failing World Geography.” No grades, however, are noted on the Report. (R. at Parent-04.)
23. Therefore, since the student had been found eligible for special education services in another State; had an IEP from that State; and provided DCPS with a copy of that expired IEP for implementation until a new IEP was developed, without a reason to do otherwise that IEP, should have been implemented and was not.

24. Consequently, DCPS' failure to implement the IEP it was given or to develop a new IEP for out-of-state transfer student places DCPS in default of its IDEA obligations.
25. That is because the IDEA was enacted to "ensure that children with disabilities have access to a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education, or FAPE, is delivered through the implementation of an Individualized Education Program, or "IEP." See Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985) (*describing* the IEP as the "modus operandi" of special education).
26. The IEP is developed by a team of professionals, including the child's parents, "as well as a representative of the local educational agency with knowledge about the school's resources and curriculum." Branham v. District of Columbia, 427 F.3d 7, 8 (D.C. Cir. 2005). An appropriate IEP, at a minimum, "must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Educ. v. Rowley, 458 U.S. 176, 204 (1982).
27. So without an IEP, albeit the student is eligible for special education services, DCPS is unable to provide the personalized instruction with sufficient support services to permit him to benefit educationally from that instruction as required by Rowley. See Board of Educ. v. Rowley, 458 U.S. 176, 204 (1982).
28. Therefore, pursuant to 5 D.C.M.R. § 3030.3, "The burden of proof shall be the responsibility of the party seeking relief; either the parent/guardian of the child or the LEA. 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 Free Appropriate Public Education (FAPE)."
29. The parent and student, who filed the hearing request, had and met their burden of proof in this case because the parent and student:
  - a. Proved that DCPS failed to implement the student's transfer IEP or develop a new IEP.

So in consideration of the hearing record, the hearing officer finds that DCPS denied the student a FAPE and the hearing officer issues this:

# ORDER

DCPS shall .....

1. Convene the student's BLMDT/IEP Meeting on or before April 21, 2009, for this purpose:
  - a. To review all of the student's existing assessment reports to determine his continued eligibility for special education services;
  - b. To determine if additional assessments are warranted, and if so, either perform them or fund independent assessment (s);
  - c. To review and revise his 11/16/06 IEP based on the review of his existing evaluation reports;
  - d. To discuss and decide placement; and issue his Prior Written Notice of Change in Placement (PWNOP) for the remainder of the 2008-09 and the 2009-10 school years at the conclusion of the meeting or as follows:
    - (i) Issue the PWNOP within 5-calendar days after the BLMDT/IEPT Meeting if the educational placement is to a public school; or
    - (ii) Issue the PWNOP within 30-calendar days after the BLMDT/IEPT Meeting if the educational placement is to a non-public school.
2. Continue to implement the student's 11/16/06 IEP as written, along with any amendments or modifications to that IEP agreed to by the parent and DCPS before the new IEP is developed as authorized by the IDEA at 34 C.F.R. § 300.324(6), Amendments [to the IEP].
3. Schedule all meetings at a mutually agreeable time through the parent and parent's counsel. And provide counsel written notice of all meetings by facsimile at (202) 610-1881
4. Day-for-Day Caveat: Any scheduling, evaluation or meeting delay due to acts of the parent, student, student-advocate, student's attorney, or because of an unscheduled school closing shall extend DCPS' performance timelines established in this Order by one day for each day of delay.
5. This Order resolved all issues raised in the student's 02/03/09 Due Process Hearing Request that is dismissed with prejudice.

6. And the hearing officer made no additional findings.

**This is the final ADMINISTRATIVE DECISION. An appeal can be made to a court of competent jurisdiction within ninety (90)-days from the date of this Decision and Order pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B); 34 C.F.R. § 300.516 (b).**

*/s/ Frederick E. Woods*  
**Frederick E. Woods**  
**Hearing Officer**

**April 5, 2009**  
**Date**