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

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on behalf of,

Student,
(DOB STARS

Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Case No.
Bruce Ryan, Hearing Officer

Hearing: June 9, 2009
Decided: June 19, 2009

HEARING OFFICER DECISION

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I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on May 8, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.* The case concerns a year old student ' or the "Student") who resides in the District of Columbia and attends Petitioner is represented by Elizabeth Jester, Esq. of the Children's Law Center, 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 has denied the Student a free appropriate public education ("FAPE") by (a) failing to re-evaluate the Student in all areas of suspected disability, (b) failing to convene a placement meeting and offer placement in an appropriate special education program, (c) failing to provide the related services set forth in the Student's individualized educational program ("IEP"), (d) failing to develop an appropriate IEP, and (e) failing to make an appropriate determination that the Student's conduct was a manifestation of his disability.

On May 12, 2009, DCPS agreed to waive the resolution session and requested that this case proceed to a due process hearing on the merits. DCPS filed a late response on May 26, 2009, which asserted that (a) the relevant re-evaluations were conducted as required, (b) DCPS "is in the process of locating a school site where increased services can be provided," (c) DCPS has provided the Student with the related services on his IEP, (d) the present levels of performance and goals on the IEP are accurate and appropriate, and (e) the team properly determined that the Student's behavior was not a manifestation of his disability. DCPS also filed a Notice of Insufficiency with respect to the parent's failure to sign the complaint, but withdrew the Notice at the PHC based on Petitioner's representation that the parent will attend the hearing.

A Prehearing Conference ("PHC") was held on May 26, 2009, the same date the response was filed, in order to discuss and clarify the issues and address other pre-hearing procedural matters. Five-day disclosures were filed by both parties on or about June 2, 2009, and a Prehearing Order was issued June 8, 2009. The Due Process Hearing convened on June 9, 2009. The parent elected for the hearing to be closed.

At the Due Process Hearing, 46 documentary exhibits submitted by Petitioner (identified as 1" through 46") and four (4) documentary exhibits submitted by DCPS (identified as "DCPS-1" and "DCPS-4") were admitted into evidence without objection. Petitioner presented two witnesses: (parent-Petitioner); and (Admissions Director, DCPS presented two witnesses: (Special Education Coordinator, and (Special Education Teacher, Written Closing Statements were thereafter filed by both parties on or about June 15, 2009.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and *SOP* Section 1003.

II. ISSUE(S) AND REQUESTED RELIEF

As summarized in the Prehearing Order and at the outset of the Due Process Hearing, the following issues involving alleged denials of FAPE were presented for determination:

A. ***Failure to conduct reevaluations*** — Whether DCPS failed to re-evaluate the Student in all areas of suspected disability, including speech/language, cognitive testing, clinical psychological, functional behavioral assessment, and appropriate educational testing;

B. ***Failure to develop an appropriate IEP*** — Whether DCPS failed to develop an appropriate IEP that addressed the Student's special education needs;

C. ***Failure to provide related services*** — Whether DCPS failed to provide the related services set forth on the Student's IEP;

D. ***Failure to provide an appropriate placement*** — Whether DCPS failed to convene a placement meeting and offer placement in an appropriate program; and

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[1] DCPS also sought to present a third witness, the Special Education Coordinator at who was identified in DCPS' five-day disclosure. Petitioner objected to the proposed testimony of this witness as irrelevant and outside the scope of the designated hearing issues. The testimony proferred by DCPS concerned the nature and quality of the special education program at which DCPS asserted was relevant because it had recently identified that program as a proposed placement/location of services for the Student. The Hearing Officer sustained Petitioner's objection and excluded the proferred testimony as to special education program on the grounds that the testimony (1) was speculative and hypothetical and not relevant to any of the issues in this case because, as of the date of hearing, the MDT had made no placement determination for (2) was not relevant to the relief requested in that this case does not present a DC Code § 38-2561.03 issue involving uncertified private facilities; and (3) would impose unfair surprise and prejudice on Petitioner pursuant to 34 CFR 300.512 (b)(1) and SOP §§ 500 and 800.1, which expressly includes undisclosed "recommendations based upon the offering party's evaluations" within the category of impermissible "surprise evidence." Here, DCPS waited over four months to recommend or propose a new educational placement for the first time at the due process hearing, without prior disclosure to Petitioner and without following IDEA's required procedures governing placement decisions (*see, eg,* 34 CFR §§300.116, 300.322(a), 300.501(c)). *See* further discussion, *infra.*

E. ***Failure to make an appropriate manifestation determination*** — Whether DCPS failed to make an appropriate determination that the Student's conduct was a manifestation of his disability.

Petitioner requests the following relief: (1) immediate placement and funding for the Student to attend a school that can address all the Student's special education needs and provide educational benefit (*e.g.,* (2) an IEP meeting to review/revise the Student's IEP as necessary, within 30 days of enrollment; (3) funding of independent evaluations in clinical/psychological, psycho/educational, and speech/language; (4) a functional behavioral assessment; and (5) removal of the 4/28/09 suspension from the Student's records and one-on-one tutor to work with the Student on the school work he missed due to the allegedly unlawful suspension.

III. FINDINGS OF FACT

1. The Student is a -year old resident of the District of Columbia whose date of birth is The Student attends at where he is currently in the grade. *Parent Testimony; 25.*

2. The Student has been determined to be eligible for special education and related services, with a disability classification of Mentally Retarded ("MR"). *See -24, 25.*

3. The Student's current IEP, dated 2/17/09, provides 15 hours per week of specialized instruction, one hour per week of speech/language therapy , and one hour per week of behavioral support services (counseling), all in an "Outside General Education" setting. *25.* The IEP indicates that the Student's needs require removal from general education because (*inter alia*) the Student requires small group sessions and individualized instruction. *Id.*

4. On or about December 4, 2008, the Student's MDT/IEP team met "to discuss [his] recent behavior at school." *24.* At that meeting, the team determined that the Student "needs an alternative placement." *Id.* The team further determined that the Student needed a re-evaluation, as requested by the parent, and obtained the parent's signed consent for the re-evaluation. *Id.*

5. On or about December 15, 2008, DCPS conducted a social history with Petitioner.

6. On or about February 9, 2009, DCPS administered an evaluation to ascertain the current level of the Student's academic skills. Cognitive testing was not conducted. DCPS' speech pathologist determined that a re-evaluation in the speech/language area was not needed.

7. On or about February 17, 2009, a further MDT/IEP meeting was held for the purpose of conducting a re-evaluation. *26.* At the meeting, the team determined that the Student continued to be eligible for special education and related services as a student with Mental Retardation." *Id.,* p. 6. The team also again determined that the Student required a more restrictive placement than what could be offered at] *Id.,* p. 7 ("The MDT concurs that requires a more restrictive placement with students functioning at a level of mild mental retardation with significantly delayed academics.") The team stated that the IEP would "be modified if necessary for placement in a new and appropriate placement," and that "a packet will be submitted to Office of Special Education for placement consideration for [the Student]." *Id.,* pp. 6, 7. Theses facts are all undisputed. *See DCPS Response; DCPS Written Closing Argument.*

8. Following the February 2009 MDT meeting, Petitioner inquired numerous times about a new placement, but was told by the principal or other staff that no other placements were available. *See Parent Testimony.*

9. To date, the Student's IEP has not been revised to reflect the need for a more restrictive environment and/or full-time placement, no notice of proposed placement has been provided to the parent, and no MDT meeting has ever been held to address a change of placement. The Student has continued to remain at under an IEP and educational placement that DCPS acknowledges is not appropriate to meet his needs. *See DCPS Written Closing Argument,* p. 2.

10. By the time the complaint was filed, over five (5) months had elapsed since the MDT first determined that the Student needed a new placement and over three (3) months had elapsed since the MDT reiterated that determination and said it would revise the IEP and identify a new and appropriate placement. It is undisputed that this constitutes "undue delay" in implementing the necessary change in the Student's placement. *DCPS Written Closing Argument,* p. 3.

11. DCPS has failed to provide all related services required under the Student's current IEP. The evidence indicates that the Student missed approximately 15 speech therapy sessions and approximately 30 hours of counseling services during the current 2008-2009 school year. *See DCPS-1-- DCPS-3; Petitioner's Closing Argument,* pp. 2-3.

12. On or about April 28, 2009, the Student was suspended from for 11 days. DCPS determined that the conduct was a manifestation of his disability. *-41.* However, the parent testified that she was not invited to or informed of this meeting, which was held without her participation. *See Parent Testimony.* DCPS also did not take steps to conduct a functional behavioral assessment ("FBA").

13. On or about May 27, 2009, after the filing of the complaint, DCPS issued a letter authorizing Petitioner to obtain an independent comprehensive psychological evaluation (which included cognitive, educational, and clinical components as well as a social history) and a speech/language evaluation at the expense of DCPS ("IEE Letter"). *DCPS-4.*

14. Uncontroverted evidence shows that the Student needs full-time specialized instruction and related services outside the general education setting based on the evaluations completed to date, the teachers' reports, and his lack of academic and behavioral progress.

15. Uncontroverted evidence shows that cannot provide full-time special education and related services to meet the Student's unique needs and is not an appropriate educational placement. DCPS did not identify or offer any other placement option for the Student prior to the due process hearing.

16. Uncontroverted evidence shows that the program at can provide the Student with the individualized supports, special education and related services he needs, and that the program can thereby provide educational benefit to the Student. *See Stitt-Twine 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, develop an appropriate IEP, and/or provide an appropriate placement.

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 normal standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *see also* 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Denials of FAPE

3. For the reasons and to the extent set forth below, the Hearing Officer concludes that Petitioner has carried her burden of proof as to the denials of FAPE alleged in the complaint.

Re-evaluation

4. IDEA provides that an LEA "shall ensure that a reevaluation of each child is conducted ...at least once every 3 years, unless the parent and [LEA] agree that a reevaluation is unnecessary." 34 C.F.R. §300.303 (b)(2); *see, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). The reevaluation must be conducted "in accordance with §§ 300.304 through 300.311." 34 C.F.R. §300.303(a). This includes the requirement that the evaluation be "sufficiently comprehensive to identify all of the child's special education and related services needs...." *Id.* §300.304(c) (6); *see also Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation "must be a complete evaluation of the child in all areas of the child's suspected disability....").

5. Here, the parent requested a re-evaluation at the December 4, 2008 MDT meeting, and DCPS obtained written parental consent and "agreed to re-evaluate the Student." *DCPS Written Closing Argument; see -24.* DCPS conducted a new educational evaluation (*-38),* reviewed and updated the social history *37),* and reviewed the prior speech/language evaluation *-39).* Following the filing of the complaint, DCPS has also now agreed to fund an independent speech/language evaluation and independent clinical psychological evaluation. *DCPS-4.*

6. To the extent that the commitments expressed in the recent IEE letter partially resolves this issue of the complaint, they will be incorporated into the Hearing Officer's Order. *See Petitioner's Closing Statement,* p. 1. In addition, DCPS has not yet conducted an FBA, which it should have done as part of either the re-evaluation or manifestation review based on the Student's behavioral concerns. *See, e.g., Harris v. DC,* 561 F. Supp. 2d 63, 68 (D.D.C. 2008) ("FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral

role in the development of an IEP."); 34 CFR 300.530(f)(1). DCPS will be directed to complete an FBA within a reasonable period of time, *i.e.,* approximately 60 days, which will enable the team to have this information in hand before the beginning of the 2009-2010 school year.

Inappropriate IEP

7. The evidence presented by Petitioner, and not contradicted by DCPS, demonstrates that the current 2/17/09 IEP is inappropriate and not reasonably calculated to enable the Student to receive meaningful educational benefit. *See Board of Education v. Rowley*, 458 U.S. 176, 204 (1982); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). Indeed, the MDT made clear –and DCPS has acknowledged – that the Student's IEP must be revised to reflect the need for a more restrictive, full-time educational placement, including a small class setting and one-on-one instruction. However, the IEP has never been revised to reflect these needs. *See Parent Testimony; Pender Testimony.* The failure to provide an appropriate IEP is a denial of FAPE. [2]

Failure to Provide Related Services

8. As noted in the Findings above, DCPS has also failed to provide all related services required under the Student's current IEP. The evidence indicates that the Student missed approximately 15 speech therapy sessions and approximately 30 hours of counseling services during the current 2008-2009 school year. *See DCPS-1-- DCPS-3; Petitioner's Closing Argument,* pp. 2-3.

Inappropriate Placement

9. The uncontroverted evidence demonstrates that DCPS failed to provide an appropriate educational placement for the Student during the 2008-2009 school year, since at least December 2008. As described above, the MDT determined in December 2008, and again in February 2009, that was not an appropriate placement and did not provide an appropriate program capable of meeting the Student's needs. Despite that, DCPS has allowed the Student to remain there for several more months, essentially through the end of the current school year. As a result, DCPS has denied a FAPE to the Student.

10. DCPS does not dispute that the current placement is inappropriate, that the team made this determination over six months ago, that DCPS failed to take any formal action to propose a new appropriate placement prior to the due process hearing, and that this amounted to "undue delay" between the date of the team's decision and a change of the Student's placement. *See Pender Testimony* (noting "100% agreement" that is not an appropriate placement); *DCPS' Written Closing Argument*, pp. 1-3. DCPS argues that, notwithstanding all this, D.C. Code §38-2561.02 prohibits the award of private placement requested by Petitioner. The argument lacks merit.

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[2] Petitioner also argued that the IEP was inappropriate in that extended school year services were not discussed or included at the MDT's 2/17/09 meeting, despite the Student's previous eligibility for ESY services at Brookland. However, Petitioner has not carried her burden of showing that ESY services have been inappropriately denied.

11. In *Burlington v. Department of Education,* 471 U.S. 359 (1985), the Supreme Court held that the IDEA authorizes reimbursement of the educational and related expenses of a child covered by the Act where the school system failed to propose a placement in accordance with the Act's requirements. In doing so, the Court necessarily recognized the validity of a prospective placement remedy under similar circumstances: "In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school." *Burlington,* 471 U.S. at 369, 105 S. Ct. 1996, 2002-03. These principles apply equally to the authority of hearing officers to grant "appropriate" equitable relief under the IDEA.

12. Even assuming *arguendo* that D.C. Code §38-2561.02 applies to a proposed private placement as an equitable remedy ordered in due process hearing (as opposed to DCPS placement decisions), the placement priorities set forth in subsection 38-2561.02(c) would not constrain the private placement requested in this case. By its terms, subsection 38-2561.02(c) provides: "Special education placements shall be made in the following order or priority; *provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter...*" D.C. Code 38-2561.02(c) (emphasis added). That means DCPS was required to ensure that a formal "placement decision" was made by the team, including the parents (34 CFR 300.116, 300.501(c)(1)); and DCPS was required to use procedures consistent with those described in 300.322, which required notice to parents and scheduling of an IEP team to consider placement. *See also* DCMR 5-3013.1 (c) (requiring LEA to ensure that the educational placement decision for a child with a disability is "made within timelines consistent with applicable local and federal law)". In this case, DCPS did not provide notice to the parents, did not convene a placement meeting, did not make a placement determination, and did not offer any proposed placement to Petitioner (other than , which it found to be inappropriate). Thus, the only educational placement shown on this record that can meet the Student's needs is Petitioner's proposed placement, As a result, there is no occasion to refer to the placement priorities in 38-2561.02(c).

13. DCPS nevertheless argues that, because DCPS has finally made a "proffer that a DCPS placement exists" (after the Student has languished at Brookland for six more months), "Petitioner has not proved that DCPS is unable to meet the student's needs in *any of its programs*" and "private placement is therefore premature." *DCPS Opposition to Petitioner's Motion to Strike and Reply,* p. 1 (emphasis added). DCPS thus argues that hearing officers cannot order a private placement remedy in any case "in the absence of a *complete record regarding the DCPS programs available.*" *Id.* (emphasis added). This argument would erect an almost insurmountable barrier to due process hearing complainants, requiring them to rebut hypothetical placements under every conceivable public school program, whether or not the Student's IEP team ever considered or determined such program to be an appropriate placement. It also would effectively undermine the authority and "broad discretion" of courts and hearing officers to award "appropriate" equitable relief under 20 U.S.C. §1415(i)(2)(C)(iii), *see 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).

14. As the U.S. District Court for the District of Columbia recognized in *Wirta v. DC,* 859 F. Supp. 1, 5 (D.D.C. 1994), there is "no authority which permits a school system a second opportunity to conduct evaluations and propose an alternative placement where its failure to do so in the first instance violated the requirements of the Act." Here, as in *Wirta*, DCPS has unreasonably delayed in making available a FAPE and "failed to propose an appropriate special education program and placement" for the current school year. 859 F. Supp. at 4. Because DCPS has thereby "defaulted on its obligations under the IDEA," a private school placement that is "proper under the Act" is an appropriate remedy for the denial of FAPE. 859 F. Supp. at 5.

Failure to make an appropriate manifestation determination

15. Finally, as noted in the Findings, the Student was suspended from Brookland based on an incident found to be a manifestation of his disability. Under the IDEA, DCPS was then required to conduct an FBA and implement a behavioral intervention plan as part of the IEP. *See* 34 CFR 300.530(f)(1). This requirement applied even if "special circumstances" had permitted DCPS to remove the Student from his current placement. *Id.* §300.530(f)(2). Because DCPS did not conduct an FBA, it violated the requirements of Section 300.530(f). However, this issue has already been addressed under Issue 1 above and does not require any additional or separate relief.

C. <u>Appropriate Relief</u>

16. 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).

17. As noted above, Petitioner requests the following forms of relief: (1) immediate placement and funding for the Student to attend a school that can address all the Student's special education needs and provide educational benefit (*e.g.,* (2) an IEP meeting to review/revise the Student's IEP as necessary, within 30 days of enrollment; (3) funding of independent evaluations in clinical/psychological, psycho/educational, and speech/language; (4) a functional behavioral assessment; and (5) removal of the 4/28/09 suspension from the Student's records and one-on-one tutor to work with the Student on the school work he missed due to the allegedly unlawful suspension.

18. Petitioner's requests for relief shall be granted in part. Items (1)-(4) are included in the Order set forth below. The evidence shows that the proposed placement to High Road Academy is "proper under the Act" because the educational program provided by the school is "reasonably calculated to enable the child to receive educational benefits," *Board of Education v. Rowley,* 458 U.S. 176 (1982). The placement also appears to be appropriately "tailored to meet the child's specific needs." *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005); *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006). *See Stitt-Twine Testimony.*

19. Item (5) will not be granted because (a) the suspension itself has not been shown to be unlawful under IDEA, and (b) the request for one-to-one tutor and/or formula-based award, under a backwards-looking calculation of educational units or services denied to the Student, has not been shown to be the product of a "'qualitative, fact-intensive' inquiry ...tailored to the

unique needs of the disabled student," consistent with *Reid v. District of Columbia*, 401 F. 3d at 521. *E.g., Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008).

V. ORDER

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

1. DCPS shall issue a notice of immediate placement and provide funding for and transportation for the Student to the of Washington, DC. Notice of Placement shall be issued within ten (10) school days of this Order.
2. Within 30 calendar days of placement at the Student's MDT/IEP team shall meet to review and revise, as appropriate, the Student's IEP to govern the provision of specialized instruction and related services in the program in which he becomes enrolled.
3. DCPS shall provide funding for the independent comprehensive psychological evaluation and independent speech-language evaluation to be conducted by an evaluator of Petitioner's choosing, pursuant to DCPS' May 27, 2009 authorization letter.
4. DCPS shall conduct a functional behavioral assessment ("FBA") to be completed within 60 days of this Order, or no later than August 18, 2009.
5. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Elizabeth Jester, Esq , via facsimile (703-757-8378), or via email (ETJESQ@aol.com).
6. Any delay in meeting deadlines in this Order that are caused by Petitioner shall extend the deadlines by the number of days attributable to such delay.
7. This case shall be, and hereby is, **CLOSED.**

Dated: June 19, 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).