

<p>STUDENT<sup>1</sup>, by and through Parent          Petitioners,          v.          District of Columbia Public Schools          Respondent.</p>	<p><b>HEARING OFFICER'S DETERMINATION</b></p> <p>Date: June 7, 2009</p> <p><b><u>Hearing Officer: Wanda I. Resto, Esquire</u></b></p>
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 STUDENT HEARING OFFICE

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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. PROCEDURAL BACKGROUND

On April 20, 2009, parent's counsel filed a Request for a Due Process Complaint Hearing ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to provide an appropriate educational placement, failing to implement her individualized education plan ("IEP"), failing to provide an appropriate IEP for the past two years, failing to provide appropriate special education and related services, failing to evaluate the Student in all areas of suspected disability and failing to complete an appropriate clinical psychological. The Petitioner also alleged the Student was denied a FAPE when the Respondent failed to provide compensatory education services.

The Petitioner requested the Respondent fund a full time special education private placement of her choice, convene a multidisciplinary team ("MDT") meeting to complete an appropriate IEP for the Student and provide her with appropriate special education and related services. Additionally the Petitioner requests that the Respondent provide a compensatory education plan for the Student.

On April 23, 2009, the District of Columbia Public Schools filed a Motion pursuant to 34 C.F. R. §300.510 agreeing to waive the resolution session and requesting that the case proceed to a due process hearing on the merits.

A telephonic pre-hearing conference for the above reference matter was conducted **May 6, 2009 at 4:00 PM**. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The Respondent reasserted its position.

On May 8, 2009, the DCPS filed a Response to the Parent's Administrative Due Process Complaint. The Respondent asserted that Columbia Heights Educational Center is an appropriate placement for this Student and can fully implement the IEP within an inclusion-style program. The Respondent asserted further that it has timely evaluated this Student. The Respondent claimed there was no denial of FAPE and therefore compensatory education is not required for the Student.

On May 11, 2009 the Petitioner was ordered to demonstrate at the hearing on May 26, 2009 at 12:00 PM why her choice of educational placement is appropriate and why the Respondent's proposed placement is not. The Petitioner also has an obligation to demonstrate what is inappropriate about the Student's IEP, what services have not been provided, what the suspected disability is, and why a clinical psychological evaluation is necessary. The Petitioner must also demonstrate how the Student or Petitioner have been harmed. The Petitioner was reminded that to sustain the request for a compensatory education award the Petitioner must prove (1) that as a result of Respondent's violation of the IDEIA, Petitioner suffered an educational deficiency, (2) that but for the violation, the Student would have progressed to a certain academic level, and (3) that there exists a type and amount of compensatory education

services that could bring the Student to the level the Student would have been but for the Respondent's violation. The Petitioner has an obligation to establish the need and reasonableness of the amount of compensatory education requested and how the hours will be integrated into the Student's current educational program.

The Respondent was required to must demonstrate that the placement was appropriate and that the MDT acted appropriately when it decided to place the Student. The Respondent must also provide evidence that it has provided all the services and evaluations the Student is entitled to receive. The Respondent must show that the Student was provided a FAPE and not entitled to a compensatory award.

Upon an agreement between the parties the hearing was held on May 26, 2009. The Petitioner presented a disclosure letter dated May 19, 2009 to which twenty documents were attached, labeled P-1 through 20 and which listed nine witnesses. Four witnesses testified –the special education teacher, child advocate, psychologist, and the private school representative. The Respondent presented a disclosure letter dated May 13, 2009 identifying three witnesses and to which one document was attached, labeled DCPS. No witness testified. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP"). At the end of the hearing the Petitioner requested a continuance of the hearing to allow the presentation of her closing statement. The Petitioner waived her right to a decision within 45 days of filing the Complaint. The Respondent did not object and the continuance was granted allowing the Petitioner until May 29, 2009 for the filing of closing statements.

## **II. ISSUE(S)**

1. Whether the Respondent failed to implement an appropriate IEP, and to provide appropriate special education and related services for the past two years?
2. Has the Respondent failed to evaluate the Student in all areas of suspected disability including a clinical psychological?
3. Did the Respondent fail to provide an appropriate educational placement for the Student during the 2007-2008 and the 2008-2009 school years?
4. Is the Student entitled to receive compensatory education services?
5. Was the Student denied a FAPE?

## **III. FINDINGS OF FACT**

1. Both the parent and the Student reside within the District of Columbia. The Student is enrolled school year.<sup>2</sup>

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<sup>2</sup> P# 1 April 20, 2009, Complaint .

2. The Student is a student with disabilities under the IDEIA. The Student's most recent IEP is dated January 29, 2009 and provides 1650 minutes per week (27.5hours) of specialized instruction, and 60 minutes of behavioral support services weekly outside of the general education. According to the IEP the Student's disability classification is multiple disabilities. The Petitioner signed and agreed with the IEP.<sup>3</sup>
3. The January 2009 IEP indicates the Student requires specialized instruction outside the general education classroom in order to address her severe education and emotional needs.<sup>4</sup>
4. The Respondent agreed to authorize an independent clinical evaluation, convene a meeting within 20 business days of receipt of the clinical evaluation, to review the evaluations, update the IEP and the educational placement and discuss compensatory education services.
5. During an interview with the Student she was upset because people talked about her appearance and said she spent the day coloring. The Student has emotional problems and requires one-on-one instruction. The Student's teacher was under the impression the school was too distracting for the Student. The Student's academic skills at the first and second grade level, the goals on the IEP are out of sync with her capacity. The Student operates on a borderline status and has major disparities in math. She requires more time and on-on-one assistance to answer correctly. Her writing is below the fourth grade level, the majority of the words are not properly written and the spacing is offline. The short term objectives in the written expression VIII Section of the IEP is a goal beyond the Student current capacity she first requires simple sentence construction. The Math goals should be limited to whole numbers because she is functioning at a second grade level. The reading goals in the 2007-2008 IEP are proper because they provide more information and detail while the 2009 IEP is vague. It's her opinion that the IEP does not provide clear goals of what the Student can do; there are no strategies to address her comprehension skills. The goals in the IEP do not meet her needs. The teacher told her that the Students is most of time outside of the classroom with the one-on- one teacher because she has a behavior problem.<sup>5</sup>
6. The Student's 02/05/08 IEP and her 01/29/09 IEP show that the Student has not made academic progress based on her grade equivalences. She is functioning between the 1<sup>st</sup> and the 2<sup>nd</sup> grade level.<sup>6</sup>
7. The psychologist reviewed two IEP-the March 19, 2007, the MD T notes of March 19, 2007, an educational evaluation of March 19, 2008, and psychological evaluation of December 11, 2008. The summary score of the Woodcock Johnson assessment shows the Student is below grade level in all areas. The Student's Full Scale IQ is 71 which is within the borderline range and her processing speed is 65 which is within the Deficient range. He cannot indicate what educational setting would be proper for the Student because it is dependent on the IEP and her needs must be identifying first. It is the opinion of the

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<sup>3</sup>P2 January 29, 2009, IEP

<sup>4</sup> P2 January 29, 2009, IEP

<sup>5</sup> P 2 January 27, 2009, IEP; P3 February 2008 IEP and testimony of the education advocate.

<sup>6</sup> P 2and 3 page 2 of the two IEPs.

psychologist that the Student requires a therapeutic setting with support and individualized instruction. <sup>7</sup>

8. In various visits to the school the Student has been observed not wanting to do the work, being defiant, running in the hallways. The Student currently is working with a one-on-one teacher and she continues to be disruptive and she is not going to the counseling sessions. The Student was expelled from school because she bought a knife and for fighting with other students. The special education teacher agrees that \_\_\_\_\_ is not an appropriate placement for the Student. However a placement meeting was not requested. <sup>8</sup>
9. According to the 02/05/08 IEP, the Student was to receive 10 hours of special education services. However, her 03/19/07 IEP provided 20 hours of special education services. There is no record of any evaluations that recommended the reduction in service hours and the Respondent did not explain why the hours were reduced from 20 to 10 even though there was documentation of the Student's poor academics and behavior.<sup>9</sup>
10. On January 29, 2008, the MDT determined the Student needed a clinical evaluation to address her disruptive behavior and non performance in school. The Respondent completed the comprehensive re-evaluation a week before the anniversary of the MDT recommendation of the evaluation. The January 2009 Re-evaluation, recommended that the MDT review the information to determine if the Student is a student with Emotional Disturbance. <sup>10</sup> The Student's IEP reflected an LD classification in both, her IEP for the 2007-2008 SY and part of the 2008-2009 SY. The Student's current IEP classified her as MD but there is nowhere in the IEP is an explanation of the multiple disabilities. <sup>11</sup>
11. Based on the review of the Student's record she shows the typical behavior of emotionally disturbed students. She requires assistance with social skills, behavior management and counseling. \_\_\_\_\_ Academy is a private therapeutic day school in serving students who range in age from five to twenty-one. The school places a strong emphasis upon social-emotional development. The student-to-teacher ratio is small and intensive, affording students a great deal of individualized attention. There are seven behavior counselors, Language and Speech, Occupational Therapy, Physical Therapy and Psychological Counseling can be provided. The teachers are certified in the state of Virginia. The cost is approximately \_\_\_\_\_ a year without related services.
12. The Petitioner withdrew the request for compensatory education.
13. The Respondent did not call a witness.

#### IV. CONCLUSIONS OF LAW

##### **FAPE Determination**

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<sup>7</sup> Testimony of the psychologist-(the testimony was limited to the psychological aspects of educational programming) and P12 Student hand written note.

<sup>8</sup> Testimony of the youth advocate and P15 -February 6, 2009, Incident Report.

<sup>9</sup> P 3 February 2008 IEP and P4

<sup>10</sup> P 7- January 9, 2009 , Comprehensive Re-evaluation Report; and P 3-February 05, 2008, IEP.

<sup>11</sup> P 2 January 27, 2009, IEP; P3 February 2008 IEP

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as “special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP).”

### **Burden of Proof**

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that 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 FAPE.

The Respondent did not meet its legal obligation under the IDEIA. Here is why.

### **Evaluations**

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the Respondent 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 special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living. *See id.* § 1400(d)(1)(A).

In January 2008, the MDT indicated the Student she required a clinical evaluation to address her behavioral problems but did not complete the evaluation until about a year later. There is no explanation viable for a delay of one year for an evaluation, particularly when is in the present case a staff of the Respondent is the one that makes the recommendation and mentions a suspected disability as a reason for the evaluation.<sup>12</sup>

### **Individualized Education Program**

In accordance with 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb), Individualized Education Programs or IEP “means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
- bb. Meet each of the child’s other educational needs that results from the child’s disability.”

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<sup>12</sup> P 7 *Id.*, and *Reusch v. Fountain*, 872 F.Supp. 1421, 1426 (D.Md. 1994) (holding that “systematic or unreasonable delays in the implementation of IEPs violate [IDEA]”).

Pursuant to 34 C.F.R. § 300.324(b)(1), DCPS must ensure that...the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals...and in the general education curriculum, if appropriate; the results of any reevaluation conducted ...; information about the child provided to, or by, the parents...; the child's anticipated needs; or other matters.

The Student's recent psychological re-evaluation in its findings inter alia, included that the Student could be eligible for special education under the educational handicap condition of emotional disturbance. The Student's IEP reflected an LD classification in both, her IEP for the 2007-2008 SY and part of the 2008-2009 SY. The Student's current IEP classified her as MD but there is nowhere in the IEP is an explanation of the multiple disabilities.

The Respondent did not meet its statutory obligations. The Student's IEP fails to include any mention of the findings in the psychological assessment. The Respondent had an obligation to provide a detail explanation of its disability classification and discussing what was reflected in the psychological evaluation. There was no evidence that the IEP was drafted to address the unique needs of this Student, there was no mention of how to address her absences, behaviors, or reading and writing deficiencies.

The Student's IEP is not reasonably calculated to provide a free and appropriate public education.

### **Related services**

The Respondent shall implement an IEP for each student with a disability. See id. at § 614(d)(2). While pursuant to D.C. Mun. Regs. tit. 5, § 3010.2 (2003), DCPS "shall implement an IEP as soon as possible after the meeting where the IEP is developed..." Pursuant to 34 C.F.R. § 300.115(a), DCPS "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."

The Student's March 2007 IEP provided 20 hours of special education services, the February 2008 IEP, reduced special education services to 10 hours. There is no record of any evaluations that recommended the reduction in service hours and the Respondent did not explain why the hours were reduced from 20 to 10 even though there was documentation of the Student's poor academics and behavior. The Respondent failed to provide evidence on the reasoning for the reduction of the services. The Respondent did not provide the Student's IEP with all her services as prescribed in her IEPs.

### **Educational Placement**

The Petitioner alleged the School is a full inclusion program and as such cannot provide the Student with the resource programming that she required.

The IDEIA at 20 U.S.C. 1412(a)(5) the determination of the educational placement of a child with a disability should be done annually and must be based on a child's IEP. The IDEIA and its regulation at 34 C.F.R. § 300.17 requires the Respondent as the local state education agency, to make certain that the educational placement, for the child with a disability within its jurisdiction, is able to implement the student's individualized educational program.

An MDT Meeting was held for the Student on or about January 29, 2009, in which the IEP Team reviewed the Student's evaluations, and revised and updated the Student's IEP. The IEP team including the Petitioner agreed that the Student requires specialized instruction outside the general education classroom in order to address her severe education and emotional needs. The allegation was that \_\_\_\_\_ is a full inclusion program and as such could not provide the Student with the resource programming that she required.

According to the IDEIA at 20 U.S.C. 1412(a)(5) the determination of the educational placement of a child with a disability should be done annually and must be based on a child's IEP. The IDEIA and its regulation at 34 C.F.R. § 300.17 requires the Respondent as the local state education agency, to make certain that the educational placement, for the child with a disability within its jurisdiction, is able to implement the student's individualized educational program.

Similarly 5 D.C.M.R. § 3013.1(e), provides "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."

Additionally in an accordance with 34 C.F.R. § 300.116 of the IDEIA regulations when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

The uncontroverted evidence was that the Student currently is working with a one-on-one teacher and she continues to be disruptive and is not going to the counseling sessions. The special education teacher agrees that Lincoln is not an appropriate placement for the Student. The Respondent offered no explanation of the Student's program, services provided or evidence the current placement can provide the Student with a FAPE.

The placement must be based on the IEP, this Student's IEP must be revised using current evaluations and after that revision a placement decision must be made. This Student's current IEP was created on January 29, 2009, without clear goals to address her math, reading, written expression or emotional concerns that have been impacting her learning.

The Student's IEP reflected an LD classification in both, her IEP for the 2007-2008 and part of the 2008-2009 school year. The Student's current IEP classified her as MD but the IEP does not contain an explanation of the multiple disabilities. However, the Hearing Officer takes notice that the Petitioner signed and agreed with the IEPs. It was not explained why she signed the IEPs and is now challenging them.

It is imperative that the Respondent convene a MDT to review the clinical evaluation and to determine if the Student is a student with emotional disturbance, learning disability or if there is another disability which is impacting negatively on her educational benefit. Without essential information on the Student's disability classification or specific identification of related services required, the Hearing Officer cannot make a placement determination.

Moreover, the Petitioner choice for placement \_\_\_\_\_ Academy is a full time special education private school outside of the District of Columbia, with no opportunity for the Student to interact with disable peers. The request is contrary to the IDEIA 20 U.S.C. 1412(a)(5) and it's

regulation at Sections 300.114 through 300.118, consistent with implementing the Act's strong preference for educating children with disabilities in regular classes with appropriate aids and supports.

Specifically, Section 300.114, requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled.

Undoubtedly the LEA in this case the Respondent has a statutory obligation to implement the IEP through an appropriate placement. The Petitioner proved that the Student's current IEP which is the cornerstone of the Student's program was defective because services hours were reduced without an explanation, the goals were not designed to meet this Student's unique needs, consequently the Respondent failed to comply with the IDEIA.

### **Compensatory education services**

At the hearing the Petitioner withdrew the request for compensatory education.

### **SUMMARY OF DECISION**

The Respondent has a statutory obligation to implement the IEP through an appropriate placement. The Petitioner proved that the IEP was inappropriate and that the placement is flawed because the Student's continues to have behavior and academic problems and there was no evidence that this Student's unique needs were addressed in the current placement. The Respondent failed to comply with the IDEIA. However, because the placement decision must be based on the Student's IEP and the Petitioner failed to provide the Hearing Officer with a full and current picture of the Student's disabilities to order the requested private placement. The Respondent must reconvene the MDT to discuss and determine based on the Student's unique needs and the current evaluations an appropriate placement for the Student. The MDT meeting notes will reflect the discussion of the Student's IEP goals and objectives and how these will be addressed. At the MDT meeting the parent must be given an opportunity to present evidence towards the appropriateness of the placement she has chosen. The MDT will discuss the options in the DCPS system and non public options and will document the pros and cons for the Student of each placement discussed.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the DCPS has denied the Student a FAPE and issues the following:

### **VI. ORDER**

**ORDERED**, the Respondent will fund an independent clinical evaluation, the Petitioner has until July 31, 2009 to get the evaluation completed and will forward the results to the Respondent within 5 school days. The Respondent will convene a meeting by August 21, 2009 to review the clinical evaluation, discuss the Student's disability classification, update the IEP and make an educational placement decision for the 2009-2010 school year. At the MDT meeting, the parent must be given an opportunity to present evidence towards the appropriateness of the placement she has chosen. The MDT will discuss the options in the DCPS system and non public options and document the pros and cons for the Student of each placement discussed.

**IT IS FURTHER ORDERED**, in the event that the Respondent fails to convene a meeting by August 21, 2009 and make a placement determination based on the Student's current needs. The Respondent shall within 20 school days after that issue a prior notice of placement to the \_\_\_\_\_ Academy. The Respondent then shall fund the placement of the Student at the \_\_\_\_\_ Academy with transportation and related services for the 2009-2010 school year.

**IT IS FURTHER ORDERED**, upon the Student attending the School for 30 consecutive days a MDT will convene to review the Student's progress and make adjustments as necessary to the IEP.

**IT IS FURTHER ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. The Respondent shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

**IT IS FURTHER ORDERED**, if the Respondent fails to comply with the terms herein, and an issue arises out of the noncompliance with this Order, the Petitioner may file a request for a hearing and the hearing will be scheduled within 20 calendar days.

This order resolves all issues raised in the Petitioner's April 20, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

#### **NOTICE OF RIGHT TO APPEAL**

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)

**/s/WiRestorres**  
**Wanda Iris Resto - Hearing Officer**

**Date: June 7, 2009**