

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

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STUDENT HEARING OFFICE
2009 AUG 31 AM 10: 17

HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)	
)	
DOB)	DATE OF HEARING
)	August 18, 2009, Room 5A
Student I.D.)	
Petitioner)	DATE OF COMPLAINT
)	July 14, 2009
V.)	
)	
The District of Columbia)	ATTENDING SCHOOL:
Public Schools,)	
Respondent)	

COUNSEL FOR PARENT/STUDENT: Zachary Nahass
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COUNSEL FOR DCPS: Kendra Berner
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Washington, D.C. 20002-4232

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

August 28, 2009

Representatives:

Petitioner – Zachary Nahass
DCPS – Kendra Berner

Hearing Officer:

Jane Dolkart

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

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student who has been found eligible for special education under the classification of Mental Retardation (MR). The student's most recent IEP completed on April 22, 2009, provides for 30.6 hours of specialized instruction and .75 hours of behavioral support services per week in an outside general education classroom. The student is in a self-contained MR classroom at a high school she is presently attending for the 4th year.

This due process complaint was filed on July 14, 2009, alleging that DCPS had failed to conduct necessary evaluations (adaptive skills assessment, age-appropriate transition assessment, educational evaluation), failed to provide an appropriate IEP, failed to implement the student's 2008-2009 IEP, and failed to provide an appropriate placement.

A pre-hearing conference was held on July 27, 2009, and a pre-hearing order was issued on August 4, 2009.

Following the pre-hearing conference, DCPS agreed to conduct a comprehensive psychological evaluation, including an adaptive skills assessment (Vineland). The evaluation was completed on August 5, 2009 and is part of the record in this case.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by

1. Failing to conduct an age-appropriate transition assessment?
2. Failing to provide an appropriate IEP for the 2009-2010sy because the student's IEP lacks specific data indicating her academic levels, how it arrived at her goals, or student progress reports or portfolios?
3. Failing to implement the student's 2008-2009 IEP because the IEP calls for full time out of general education, but the student was placed in a general education computer class with no special education support?

4. Failing to provide an appropriate placement because the student has failed to make progress during her 4 years at _____ and because the school cannot provide a program focused on vocational training, daily living skills, and intensive reading instruction?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated August 11, 2009, containing a list of witnesses with attachments P 1-12. The disclosure was admitted in its entirety. Petitioner also submitted a supplemental disclosure dated August 13, 2009, containing attachment P 13. The disclosure was admitted. Petitioner called as witnesses the student's grandmother and guardian, the student's educational advocate, and the Director of Special Education at _____

DCPS submitted a five day disclosure letter dated August 11, 2008, containing a list of witnesses with attachments DCPS 1-6. The disclosure was admitted in its entirety. DCPS called as a witness the SEC at _____

V. FINDINGS OF FACT

1. This is a _____ year old student who has been found eligible for special education under the classification of Mental Retardation (MR). The student's most recent IEP completed on April 22, 2009, provides for 30.6 hours of specialized instruction and .75 hours of behavioral support services per week in an outside general education classroom. The student is in a self-contained MR classroom at a high school she is presently attending for the 4th year. (P 3, Testimony of grandmother).

2. On November 9, 2004, the student was administered a psycho-educational evaluation. The student's cognitive functioning was assessed in the extremely low range of intelligence on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), with a FSIQ of 40 and a Verbal Comprehension Index of 47. Her academic achievement was measured using the Woodcock-Johnson III-Tests of Achievement (WJ-III-Ach). The student demonstrated an extremely low level of functioning in academic skills, ranging from a pre-K to 1.2 grade level. The student was found to be achieving at a level consistent with that predicted by her intellectual ability. (P 8)

3. The student was administered a psycho-educational evaluation on May 17, 2007. The student's cognitive functioning was assessed in the intellectually deficient range on the Wechsler Abbreviated Scale of Intelligence (WASI), with a FSIQ of 53, and a Verbal Performance Index of 55. The student was found to be functioning on the same academic level as her November 9, 2009 evaluation, ranging from pre-K to 1.6 grade level. The student was found to be achieving at a level commensurate with her intellectual functioning. (P 10)

The report noted that the student should continue with vocational training at the local school level to promote life skills, and that a job analysis should be done to identify _____

essential work tasks for the student to learn on the job. The report also noted that the student would need the services of MMRI once she ages out of special education. (P 10)

4. On July 29, 2009, the student was administered a psycho-educational evaluation. The student's cognitive functioning was assessed in the extremely low range of intelligence on the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III), with a FSIQ of 48, a Verbal IQ of 53, and a Verbal Comprehension Index of 52. Her academic achievement was measured using the Wechsler Individual Achievement Test-Second Edition (WIAT-II). The student performed in the extremely low range in all academic skills, at the same percentile ranking of <0.1 as on the previous tests of academic achievement. No grade level equivalents were provided. The evaluator found a statistically significant difference between the student's achievement scores in reading, math, oral language, and written language than expected for an individual with her general cognitive abilities (based on the student's Verbal IQ of 53). (P 13)

A Vineland Adaptive Behavior Scale was also administered. Her general adaptive functioning was found to be low, ranging from that of a child of age 1.10 to 9.8. (P 13)

5. The student has not had a vocational assessment and the transition plan in her April 22, 2009 IEP is virtually useless. (P 3) The student does not have specific functional goals.

6. The present levels of educational performance in the student's April 22, 2009 IEP derive from the May 17, 2007 psycho-educational evaluation. The evaluation was conducted two years earlier and was current under the IDEA. (P 3, 10)

7. The student's special education teacher attended the student's IEP meeting and provided information concerning the student's progress. A student progress report covering the first three advisory periods was provided to the parent. (P 3, 4, 12)

8. The student was placed in a general education computer class at the request of her grandmother. (Testimony of grandmother, SEC)

9. The parent's educational advocate did not request a change in any of the student's IEP goals. The SEC offered to reconvene the meeting but the educational advocate did not ask to reconvene. The educational advocate did not request that a transition assessment be completed, although she did request an adaptive skills assessment. (P 3, Testimony of educational advocate).

No evidence was presented at the hearing concerning changes to the student's IEP goals.

10. At the IEP meeting for the 2009-2010 IEP the student's grandmother indicated that she wanted the student to obtain a high school diploma and that she wanted the student in a program that could provide support for the student to get a high school diploma.

The grandmother indicated that she expects the student to live independently with a job.

The educational advocate supported the grandmother in these desires.

(P 4)

11. The student has made progress in her emotional, social, and behavioral development. She has improved her ability to identify and verbalize her emotions to others, has improved her accurate perception of social interactions with others, is more assertive, and has better interactions with her peers. (P 3, 4)

12. The student is in a class with 9 other MR students, one special education teacher, an aide, and several dedicated aides assigned to other students. She attends a job program at Good Will Industries for at least ½ day a week. The student's teacher and the classroom aides go with the students to the program. She receives instruction in functional life skills oriented reading, math, and written and oral expression. The student also attends a Special Olympics program one day a week. When the educational advocate went to observe the student in class, the class was working on filling out a job application to Burger King. (Testimony of SEC, grandmother, educational advocate).

13. The student has been accepted at _____, a therapeutic special education private school for students with MR, ED and LD that provides both High School diplomas and certificates. Julia Warden, the Director of Special Education testified concerning the program at Accotink. Ms. Warden has a Masters degree in special education and has 30 years of experience in the field. She is responsible for the day to day operations at the school, overseeing instructional support, curriculum development, and admissions. The school has 160 students, ages 5-21, 25 special education teachers, 75 aides, and 13 clinical psychologists. The school provides transition services and has a vocational department with 7 job counselors. The school has programs in nursing assistance and hospitality. She indicated that the student required a functional life skills class with intensive reading instruction, vocational training, and functional skills.

The school has partnerships with 40 vocational sites and sends job coaches to the job sites with the students. It has a school store where students learn to make change and go shopping. It has group counseling for social skills training. There would be 6 other students in the class, all with MR, plus a teacher, a co-teacher and an assistant. The other students have somewhat higher IQ's and function at a little higher level. She would be the lowest functioning student, at the K-1 grade level. Ms. Warden believes the student is functioning at a level consistent with her IQ.

Ms. Warden does not believe Accotink could increase the student's reading ability very much but would focus on survival reading such as words for housekeeping, recognizing a hospital sign, etc.

(Testimony of Warden)

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 *et seq.*, guarantees “all children with disabilities” “a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. § 1400 (d)(1)(A). The IDEA defines FAPE as

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 State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEA’s guarantee of FAPE “is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a “basic floor of opportunity” for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. § 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. § 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include “a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child...” 20 U.S.C. § 1414(d)(1)(A).

Pursuant to IDEA § 1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

A. Failure to conduct a transition assessment

The IDEA and its implementing regulations state that "Beginning not later than the first IEP to be in effect when the child turns 16..., and updated annually, thereafter, the IEP must include

1. Appropriate measurable post secondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills.
2. The transition services...needed to assist the child in reaching those goals. 34 CFR § 300.320 (b)(1, 2).

The IDEA and its regulations do not further define what an age appropriate transition assessment should include. However, one definition of transition assessment is an "...ongoing process of collecting data on the individual's needs, preferences, and interests as they relate to the demands of current and future working, education, living, and personal and social environments. Assessment data ... form the basis for defining goals and services to be included in the Individual Education Program (IEP)". Sitlington, Neubert, & Leconte, "Transition Assessment: The position of the Division on Career Development and Transition", 1997, p. 70-71. This definition has been approved by the OSEP, US Department of Education.

In conducting age appropriate assessments, DCPS uses three levels of transition assessment. Level 1 is a general assessment, level 2 is a more detailed assessment, and level 3 is an assessment done at the right time for students who are more significantly disabled. This level is conducted by a vocational assessment specialist. This student is 19 years old and has less than three years of special education eligibility remaining. There is no indication in the record that the student has ever received a level 3 transition assessment and her present transition plan is totally inadequate. There is substantial agreement that the student's educational program should be focusing on life skills and job preparedness. This cannot be done effectively without a transition assessment, including a determination as to whether ½ day a week at Good Will is sufficient on the job training, and what specific functional skills the student will need. DCPS has denied the student FAPE by failing to conduct a transition assessment both because the IDEA requires that such an assessment be conducted and because the assessment is essential for developing appropriate specific goals for the student.

Once a transition assessment is conducted, it is clear that the student's IEP will need to be revised to reflect specific transition goals.

B. Implementation of the student's 2008-2009sy IEP

Petitioner argues that DCPS failed to implement the student's 2008-2009 IEP because the IEP required that the student be placed in a 100% out of general education setting. In this case it was not the choice of the school to place the student in the general education computer class. Rather, the placement was made at the request of the grandmother. DCPS cannot be held to have violated the student's IEP.

C. Inappropriateness of the student's 2009-2010 IEP

Petitioner alleges that the student's 2009-2010 IEP is inappropriate for several reasons. First, Petitioner argues that the IEP lacks specific data on the student's current levels of performance. Pursuant to the IDEA, each child's IEP must contain present levels of academic achievement and functional performance. 34 CFR 300.320 (a) (1). The student's April 22, 2009 IEP contains the student's present level of performance in math, reading, written expression, communications and speech, and emotional, social, and behavioral development. The math, reading, and written expression performance levels were obtained from the student's 2007 psycho-educational evaluation. This evaluation was current as it had occurred within the three year period mandated for reevaluations. 34 CFR 300.303 (b) (2). The remaining levels were provided by the student's S/L teacher and the student's counselor based on performance over the past year. Further, Petitioner was provided with the student's quarterly progress report. Also, the student's teacher, S/L therapist and counselor were at the meeting and addressed the student's level of performance. The IEP contained adequate present levels of academic achievement.

Second, Petitioner argues that no information was provided concerning how the student's goals were arrived at. The IDEA requires that a student's IEP contain a statement of measurable annual goals, and a description of how the child's progress toward meeting the annual goals will be measured. 34 CFR 300.320 (a) (2) & (3). Petitioner failed to meet her burden of proof that no information was provided concerning the student's annual goals, or that the goals themselves were inappropriate. Petitioner did not suggest any changes to the goals at the IEP meeting. The SEC indicated that she would reconvene the meeting if Petitioner wished to further explore the student's goals. Petitioner made no request to reconvene the meeting. Additionally, Petitioner failed to provide any evidence at the hearing concerning proposed changes to the student's IEP. It is the obligation of the Hearing Officer to make changes to the student's IEP if the present IEP is inappropriate. The Hearing Officer is powerless to make such changes if no evidence is presented concerning requested revisions. Vague allegations that the student's goals are inadequate do not meet the burden of proof.

D. Appropriateness of the Student's Placement

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (DDC 2006).

The educational agency must provide a "basic floor of opportunity" for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3rd Cir. 1988). If there is an appropriate public placement available

that is "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*, 458 U.S. 176, 207 (1982).

Petitioner argues that the student has attended _____ for over three years and has not made any educational progress. The student is moderately mentally retarded with a FSIQ in the forties or low 50's. She has limited cognitive abilities and limited abilities to achieve academically. Psycho-educational evaluations were conducted in 2004 and 2007. There was little academic gain between the two evaluations. Both evaluators determined that the student's academic achievement was consistent with her cognitive abilities and that her lack of significant progress was the result of her limited cognition. Julia Warden, the Director of Special Education at _____ and an educator with over 30 years of experience in special education, also testified that the student was not likely to improve much in her reading and that her academic achievement was consistent with her cognitive abilities.

The psycho-educational evaluation conducted in August 2009, reached the same result concerning the student's cognitive abilities. A different achievement test was used and no grade level equivalents or other explanation of the scores achieved was provided. The evaluator determined that there was a statistically significant scoring discrepancy between the student's academic achievement and her expected academic achievement. The evaluator did not testify at the hearing and was not available for questioning concerning his conclusions. The student's achievement appeared to be consistent with the results of her two previous achievement tests. The evaluator provided no recommendations concerning goals, objectives or educational services that should be provided for the student. The Hearing Officer cannot credit the conclusion reached that the student's achievement is below expectation.

The student's grandmother wants the best for the student which is to her credit. She has taken an active role in attempting to ensure that the student reaches her potential. Unfortunately her testimony and the meeting notes of the May 6, 2009 IEP meeting reflect that the grandmother has unrealistic expectations for the student. Despite all evidence to the contrary, the grandmother was still talking about the student receiving her high school diploma even though her present academic level is in the K-1st grade range. The grandmother testified that the student has made no educational progress at Wilson SHS. However, because the grandmother's expectations for the student are so at odds with the reality of her abilities, her testimony cannot be credited in determining if the student's progress has been adequate.

The great weight of testimony and documents supports a finding that the student's progress needs to be measured in very small increments, and needs to focus on basic life skills and vocational skills. The fact that the student's math and reading skills have not improved very much is not the primary determination of progress. No evidence was presented concerning the student's lack of progress in life skills or vocational skills. The student has clearly made progress in her emotional and social skills. The student is in a

full time self contained class for student's with MR. She is receiving vocational training and life skills training. On the day the educational advocate observed the student, the class was learning how to fill out a job application.

It is quite possible that _____ would provide the student with some benefits her present placement cannot provide. However, the IDEA and case law are clear that the student is not entitled to the best education possible, only an adequate education. Petitioner has failed to prove that the student is not receiving an adequate education in her present placement.

VII. SUMMARY OF RULING

DCPS has denied the student FAPE in its failure to conduct an age appropriate transition assessment for the student.

DCPS has not provided an inappropriate IEP or placement, and has not failed to implement the student's 2008-2009 IEP.

VIII. ORDER

It is hereby **ORDERED** that

1. DCPS shall fund an independent age appropriate Level III vocational assessment and shall hold an MDT meeting within 15 days of receipt of the assessment in order to review the assessment and revise the student's IEP.
2. 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, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: August 28, 2009