

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

---

STUDENT,<sup>1</sup> by and through his Parent,

Petitioners,

Case No.

Bruce Ryan, Hearing Officer

v.

Hearing: August 17 and 18, 2009

Decided: August 28, 2009

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

---

OSSE  
STUDENT HEARING OFFICE  
2009 AUG 28 PM 3:40

## HEARING OFFICER DECISION

### I. PROCEDURAL BACKGROUND

The due process complaint in this matter was filed July 8, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint concerns a -year old student who currently attends as District of Columbia public school.

The complaint alleges that Respondent District of Columbia Public School ("DCSP") denied the student a free appropriate public education ("FAPE") by (a) failing to develop an appropriate individualized education program ("IEP"); (b) failing to comply with a June 3, 2009 Hearing Officer Determination ("6/3/09 HOD") in that DCPS failed to review and revise the IEP goals; and (c) failing to provide an appropriate placement for the Student.<sup>2</sup>

On July 15, 2009, DCPS agreed to waive the resolution session and requested that this case proceed to a due process hearing on the merits. DCPS then filed a response to the complaint on July 16, 2009, which asserts that DCPS did not deny the Student a FAPE and objects to any and all relief requested. Specifically, DCPS' response asserts that (a) Petitioner signed and accepted the 6/19/09 IEP which did not include speech/language services, (b) DCPS complied with the 6/3/09 HOD by conducting an annual review of the Student's IEP, and (c) the placement

---

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

<sup>2</sup> In addition, the complaint alleged that DCPS failed to provide the Student with certain related services, thereby entitling the Student to compensatory education. *See Prehearing Order*, July 28, 2009, ¶ 5(d). Petitioner withdrew this claim on the record prior to commencement of the due process hearing.

and/or location of services is reasonably calculated to provide educational benefit, and can and will implement the IEP.<sup>3</sup>

A Prehearing Conference ("PHC") was held on July 27, 2009, and a Prehearing Order was issued July 28, 2009. The parent elected for the hearing to be closed. Five-day disclosures were filed by both parties as directed, on or about August 10, 2009.

The Due Process Hearing was held in two sessions, on August 17 and 18, 2009. At the hearing, 26 documentary exhibits submitted by Petitioner (identified as "P-1" through "P-26") and six documentary exhibits submitted by DCPS (identified as "DCPS-01" through "DCPS-06") were admitted into evidence.<sup>4</sup> Testifying at the hearing on behalf of Petitioner were: (1) the Student's Educational Advocate ("EA"); and (2) \_\_\_\_\_ of the DCPS presented no witnesses, electing to rest on the record after the close of Petitioner's case.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

## **II. ISSUES AND REQUESTED RELIEF**

A discussion at the PHC of the issues and requested relief raised by Petitioner, along with the pleadings filed by both parties, has resulted in the following issues being presented for determination at hearing:

- a. Whether DCPS has denied the Student a FAPE by failing to develop an appropriate IEP;***
- b. Whether DCPS has failed to comply with the June 3, 2009 HOD; and***
- c. Whether DCPS has denied the Student a FAPE by failing to provide an appropriate placement.***

The relief sought by Petitioner under the issues stated above includes: (1) findings of FAPE denial and failure to comply with the 6/3/09 HOD; (2) a new speech and language assessment; (3) convening an MDT/IEP meeting to discuss and review evaluations and review/revise the IEP as appropriate; and (4) notice of placement to a program of parent's choice, with funding and transportation.

At the due process hearing, DCPS counsel stipulated and agreed to obtain an independent speech and language evaluation of the Student, and then to convene an MDT/IEP team meeting to review the results (items 2 and 3 of the requested relief).

---

<sup>3</sup> With respect to the subsequently withdrawn compounded claim, DCPS asserted that the Student's absences from school precluded award of the equitable remedy of compensatory education.

<sup>4</sup> It was stipulated at hearing that documentary exhibits predating the 6/3/09 HOD would be admitted for background information only, and not for the purpose of re-litigating any previously stipulated or adjudicated facts underlying the 6/3/09 HOD.

### III. FINDINGS OF FACT

1. The Student is a        year old resident of the District of Columbia who is currently enrolled at  
*See P-1; EA Testimony.*
2. The Student has been determined to be eligible for special education as a child with Multiple Disabilities under the IDEA.<sup>5</sup> The Student's initial date of eligibility was March 7, 2008. *See P-1; P-6.*
3. The Student's March 13, 2009 IEP provided 20 hours per week of specialized instruction (outside general education) and one hour per week of counseling/behavioral support services (outside general education). *See P-26.* Prior to that date, she had also received speech and language services, but those services were discontinued 3/13/09 "due to poor school, class and therapy attendance." *P-21, p. 5.*
4. On June 3, 2009, a Hearing Officer Decision (the "6/3/09 HOD") was issued based on joint stipulations of facts entered by Petitioner and DCPS. *See P-19.* Specifically, the parties stipulated that the Student's March 2009 IEP had been reviewed by the IEP team without the parent, and that the Student's independent evaluations had not been reviewed by the IEP team. *P-19, p. 5, Part VIII.* The parties also agreed to convene an MDT/IEP team meeting on June 12, 2009, with parent or parent's representative, to conduct an annual review of the Student's IEP; review the Student's independent evaluations; and update the Student's IEP, as appropriate. *Id.*
5. Based on the joint stipulation of the parties, the 6/3/09 HOD found that "DCPS failed to conduct an annual review of the student's [IEP]; and convene an IEP team meeting to review the student's independent evaluations, and update the IEP, as appropriate; in violation of the [IDEA]." *P-19, p. 6, Part IX.*
6. As a result, the 6/3/09 HOD ordered as follows: "that on June 12, 2009, DCPS shall convene a Multidisciplinary Development Team (MDT)/Individualized Education Program (IEP) team meeting, to conduct an annual review of the student's IEP; review the student's independent evaluations; and update the student's IEP, as appropriate...." *P-19, p. 6, Part X.*
7. On or about June 9, 2009, the Student was accepted at the  
a private day school located in the District of Columbia. *P-20.*
8. On June 11, 2009, DCPS convened an IEP team meeting without the parent. DCPS agreed to increase the Student's specialized instruction to 27.5 hours per week and to place her in the MR cluster program at        *P-1; P-21.* DCPS also reviewed the June 2008 clinical psychological assessment, and it noted that the Student's speech and language services were discontinued due to poor attendance. *P-21.* The psychological report recommended (*inter alia*) that the MDT should consider the appropriateness of the Student's current educational environment, and that it "may be appropriate to consider placement in a smaller sized, more structured environment due to the combination of learning issues, behavioral difficulties, and emotional problems she presents with." *P-9, p. 8.*

---

<sup>5</sup> The Student currently has a Multiple Disabilities (MD) classification for OHI/ADHD, ED, and MR. *See P-21 (6/11/09 MDT meeting notes), p. 5.* Her general cognitive ability is within the Extremely Low Range, with a Full Scale IQ score of 65. *See P-10, p. 3.*

9. On June 12, 2009, Petitioner arrived at \_\_\_\_\_ for the scheduled MDT/IEP team meeting pursuant to the 6/3/09 HOD. DCPS agreed to reschedule the meeting for June 19, 2009. *See P-1; P-22; EA Testimony.*

10. On June 19, 2009, the MDT/IEP team convened with the parent. P-23 (MDT Meeting Notes and New Addendum Meeting Page). The team revised the Student's IEP to include 27.5 hours of specialized instruction and one hour of counseling per week. The team determined that the Student "can benefit from a full-time MR cluster program in the LRE setting." *Id.*, p. 1. However, speech and language services were not included, based on the speech pathologist's report that the Student had failed to attend scheduled speech/language therapy sessions during the 2008-2009 school year. *See P-1; P-23; EA Testimony.*

11. At the 6/19/09 meeting, the Case Manager reported that the Student has a "poor attendance" record, due in part to "socializing in hallways with her friends." P-23, p. 3; *see also DCPS-02*. The meeting notes indicate that "her hours were changed to challenge her and keep her out of the hallways." P-23, p. 3.

12. At the 6/19/09 meeting, the MDT/IEP team also determined that the Student would remain at \_\_\_\_\_. The Prior Notice issued by DCPS states that \_\_\_\_\_ is an appropriate placement and that the IEP can be met at \_\_\_\_\_ within the MR cluster. P-23, p. 5. It further explains that the Student "continues to require a highly structured, low student-teacher ratio MR program," and that her needs could be met in this least restrictive environment. *Id.*; *see also P-21* (6/11/09 meeting notes), p. 6 ("MDT team agreed that \_\_\_\_\_ continues to be an appropriate placement with the changing of [the Student's] schedule, increasing her hours to a FT for the MR cluster, and placing her FT in \_\_\_\_\_ MR cluster program").

13. The parent disagreed with placement at \_\_\_\_\_ and requested placement at a private day school in D.C. *See P-1; P-23; EA 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. *See 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 provide an appropriate IEP and/or 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 standard generally is preponderance of the evidence. *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 discussed below, the Hearing Officer concludes that Petitioner has carried her burden of proof, in part, with respect to Issues (a) and (b), but that Petitioner has failed to carry her burden of proof on Issue (c).

***Whether DCPS has failed to develop an appropriate IEP***

4. Under IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit."). The issue of whether an IEP is appropriate is a question of fact. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003). Whether an IEP is appropriate "can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F. 2d 1031, 1040 (3d Cir. 1993).

5. In this case, Petitioners challenges two aspects of the Student's IEP as inappropriate: (a) the removal of speech and language services originally included in the March 2008 IEP; and (b) the failure to consider or provide extended school year ("ESY") services. See *P-1*, pp. 5-6; *Prehearing Order*.

6. With respect to speech and language services, the Hearing Officer agrees with Petitioner that it was unreasonable for DCPS to eliminate these services from the IEP without conducting any assessments to determine the Student's continuing speech and language needs, and based simply on the Student's failure to attend prior therapy sessions during the 2008-2009 school year. The failure of a student with a disability to cooperate with the school in trying to meet objectives in the IEP does not relieve DCPS of its obligation to provide FAPE to that student. See, e.g., *Letter to Borucki*, 16 IDELR 884 (OSEP 1990). To the contrary, "the student's failure to cooperate with school staff may be an indication of the need for a reevaluation, a revision in the child's IEP, or a change in the child's educational placement." *Id.* See also 34 C.F.R. 300.305(e) (agency "must evaluate a child with a disability ... before determining that the child is no longer a child with a disability").

7. In any event, as noted above, DCPS has now stipulated and agreed to an independent speech and language evaluation of the Student. DCPS also stipulated and agreed that, in the interim, it would reinstate the speech and language services that had been removed from the IEP at the 6/19/09 meeting. Accordingly, appropriate relief on this issue will be included in the order below.

8. With respect to ESY, the Hearing Officer concludes that Petitioner has *not* met her burden of proof. As Petitioner notes, ESY services "must be provided only if a child's IEP Team determines, on an individual basis... that the services are necessary for the provision of FAPE to the child." 34 CFR 300.106(a)(2); see also DCMR 5-3017.2; 71 Fed. Reg. 46,582 (Aug. 14, 2006) ("The inclusion of the word 'only' is intended to be limiting."); *id.* (States "have

considerable flexibility in determining eligibility for ESY services”). Here, there was no showing that ESY services should have been provided to the Student pursuant to judicially recognized concepts of “recoupment” and “likelihood of regression or retention” or that ESY was otherwise necessary to provide FAPE in this particular case. Moreover, Petitioner conceded that she did not even request ESY services at the June 2009 meetings. *See EA Testimony* (cross examination).

#### ***Whether DCPS has failed to comply with the June 3, 2009 HOD***

9. Petitioner next claims that DCPS failed to comply with the June 3, 2009 HOD because the HOD directed DCPS to convene an MDT meeting “to conduct an annual review” and DCPS allegedly did not conduct an appropriate annual review under IDEA. According to Petitioner, “[w]hen the IEP team convened on June 19, 2009, the team *failed to review and revise the student’s goals.*” *P-1*, p. 7 (emphasis added); *see also P-24*.<sup>6</sup> Petitioner appears to bring this claim as an HOD violation in order to assert a presumption of FAPE denial under the *Blackman/Jones* Consent Decree. *See P-1*, p. 7. In truth, however, the requirements that Petitioner alleges DCPS violated are set forth in the IDEA, not the terms of an HOD.

10. Under the IDEA, 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...” 34 C.F.R. 300.324(b)(1); *see also* DCMR 5-3008.1. Here, DCPS counsel argues that DCPS effectively did so when it increased the hours in the IEP, which addressed the “hallway” issue and added services. DCPS counsel further contends that if a student does not master existing goals, then the goals should basically “stay the same.” However, such a static approach does not appear to conform with the requirements of 300.324(b)(1) and DCMR 5-3008, as it does nothing to “address any lack of expected progress toward the annual goals” through appropriate IEP revisions. Moreover, the evidence suggests that inclusion of more clearly “measureable” annual goals, consistent with 34 CFR 300.320(a)(2), would facilitate the Student’s annual review process. *See EA Testimony*.

11. In matters alleging a procedural violation like this, a hearing officer may find that a child did not receive a FAPE in such cases “only if the procedural inadequacies ...significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child.” 34 CFR 300.513(a)(2)(ii); *see P-1*, p. 7. In this case, the Hearing Officer concludes that they did not. The evidence indicates that the parent and advocate attended the 6/19/09 meeting, but did not propose any specific goals or objectives to be added to the IEP. *See EA Testimony* (cross examination). Moreover, having withdrawn her claim for compensatory education, the relief Petitioner now seeks on this issue is simply a further MDT meeting to conduct a more complete annual review. DCPS counsel stated in closing argument that DCPS is willing to review the IEP again when it reviews the independent speech and language evaluation. This will be included in the order.

---

<sup>6</sup> Petitioner alleges that “[t]here is nothing in the record that indicates the IEP team reviewed and revised the goals in the student’s IEP since March 7, 2008.” *P-1*, p. 7 (emphasis added). As discussed at the PHC, however, the 6/3/09 HOD already adjudicated this claim with respect to any DCPS actions (or inactions) prior to June 2009; it is only DCPS’ actions since the 6/3/09 HOD that can be subjected to challenge in this case. *See P-19*, p. 6, Part IX.

***Whether DCPS has failed to provide an appropriate placement***

12. Finally, Petitioner claims that DCPS has failed to provide a FAPE by failing to provide an appropriate placement for the Student. Petitioner alleges that \_\_\_\_\_ does not provide the Student with the “smaller-sized, more structured environment” to address her unique needs. *P-1*, p. 7. The Hearing Officer concludes that Petitioner has **not** carried her burden of proof on this issue at the present time. Petitioner did not prove that the Student’s current placement (as modified at the 6/19/09 IEP team meeting) is inappropriate, that her services cannot be implemented at her current placement, or that the alternative non-public placement proposed by Petitioner is warranted for the Student.

13. Based on the record as a whole, the Hearing Officer concludes that the team’s 6/19/09 placement determination was proper under the IDEA and 34 CFR 300.116. By placing the Student in the MR cluster full-time, DCPS increases the intensity of the program, ensures that the Student is within a small structured setting throughout the entire school day, and enables the Student to benefit from more teacher attention. DCPS is also attempting to do so in a less restrictive environment (special class) than Petitioner’s proposed placement (special school), and as close as possible to the child’s home, consistent with IDEA and DC law requirements. *See* 34 CFR 300.115-300.116; DCMR 5-3011. *See also* DC Code 38-2561.02 (appropriate DCPS public school placements given priority over non-public facilities in D.C.). In short, Petitioners have failed to demonstrate a valid basis for overturning the team’s current placement decision for the Student.

**C. Appropriate Relief**

14. 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).

15. The Hearing Officer has exercised his discretion to fashion appropriate equitable relief, based on the record developed in this proceeding and the particular violation(s) adjudicated herein. As primarily stipulated and agreed by the parties, the relief consists of (a) restoring speech and language services to the IEP, (b) ordering an independent speech and language evaluation of the Student, and (c) ordering a further MDT/IEP team meeting to review the independent evaluation and otherwise to complete the required annual IEP review process, as described herein.

**V. ORDER**

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

1. An independent speech and language evaluation of the Student shall be completed at DCPS expense, and Petitioner shall submit a written report of the evaluation to DCPS, as soon as practicable, preferably by **October 12, 2009** (*i.e.*, 45 days from the date of this Order). Pending completion of this evaluation, DCPS shall immediately

- restore the speech and language therapy services that were included in the Student's individualized education program ("IEP") prior to March 2009.
2. Within **10 school days** of receiving the report of the independent speech and language evaluation, DCPS shall convene a meeting of the Student's MDT/IEP team. At this meeting, the MDT/IEP team shall: (a) review the report of independent speech and language evaluation; (b) review the IEP to determine whether the annual goals for the Student are being achieved and to address any lack of expected progress toward the annual goals; and (c) otherwise review and revise the IEP as appropriate.
  3. Petitioner's other requests for relief are hereby **DENIED**.
  4. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, John Straus, Esq., via facsimile (202-742-2098), or via email ([jstraus@jeblaw.biz](mailto:jstraus@jeblaw.biz)).
  5. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
  5. This case shall be, and hereby is, **CLOSED**.

Dated: August 28, 2009



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 District of Columbia 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).