

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE



<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>August 28, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Chike Ijeabunwu, Esq./Will Purcell, Esq.</p> <p>Counsel for DCPS: Kendra Berner, Esq./Tonya Chor, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

II. PROCEDURAL BACKGROUND

On June 22, 2009, Petitioner filed an Administrative Due Process Complaint Notice (“Complaint”) against the District of Columbia Public Schools (“DCPS”), asserting the following claims against DCPS: 1) failure to provide special education and related services as called for in the IEP, 2) inappropriate IEP, 3) failure to perform evaluation despite recommended [sic], 4) failure to evaluate in all areas of suspected disability, 5) timeline to evaluate, 6) failure to convene an MDT/IEP meeting to review evaluation reports, 7) failure to convene an MDT/IEP meeting with all relevant and necessary team members, 8) failure to provide ESY services, 9) failure to provide transportation services, 10) failure to provide compensatory education for the past and continuing violations, and 11) failure to invite parent and child to meeting.

On June 30, 2009, DCPS issued a letter waiving a resolution session meeting for this case. Therefore, the case was placed on a 45-day timeline and the due process hearing was scheduled for August 3, 2009 at 9:00 a.m.

On July 13, 2009, DCPS filed District of Columbia Public Schools’ Notice of Insufficiency and Response to Petitioner’s Due Process Complaint. DCPS’s Notice of Insufficiency (“NOI”) was based on Parent’s failure to sign the Complaint. DCPS asserted in its Response as follows: 1) the services on the IEP were provided, 2) the IEP is reasonably calculated to provide educational benefit, 3 - 6) the audiological evaluation allegedly requested in 2006 is barred by IDEIA’s statute of limitations, 7) a special education teacher, a general education teacher, and the school psychologist participated in the IEP meeting, 8) the team does not believe ESY is required, 9) Student has been receiving transportation services, 10) the claim for an alleged failure by DCPS to provide compensatory agreed to in 2006 is time barred, and 11) DCPS has always invited Parent to Student’s meetings.

The hearing officer attempted to schedule a prehearing conference for Student; however, substitute counsel was not available for any of the suggested days and times. Despite a series of emails back and forth, no conference was scheduled and none was held.

By their respective disclosure statements dated July 27, 2009, DCPS disclosed nine potential witnesses and five documents labeled DCPS-01 through DCPS-05, and Petitioner disclosed three potential witnesses and thirteen documents (hereinafter Petitioner’s Exhibits 1 – 13). By a supplemental disclosure statement dated July 28, 2009, DCPS added an additional document labeled DCPS-06 to its disclosures.

The hearing officer convened the due process hearing on August 3, 2009, as scheduled, and determined that the following 8 allegations needed to be addressed: 1) failure to implement the

IEP; 2) inappropriate reduction of IEP hours; 3) failure to review Student's psychological evaluation at the March 19, 2009 MDT meeting; 4) failure to convene a full IEP team on March 19, 2009; 5) failure to provide ESY; 6) failure to provide transportation; 7) failure to conduct an auditory evaluation pursuant to an October 2006 MDT recommendation; and 8) failure to provide agreed upon compensatory education hours. After preliminary discussions, substitute counsel for Petitioner requested a recess to speak with counsel for DCPS. At the conclusion of the recess, Petitioner requested a continuance so that an MDT meeting could be held, and DCPS represented that it did not oppose the continuance request. The parties agreed to conduct the MDT meeting on August 10, 2009 at 11:00 a.m. The hearing officer granted the requested continuance and rescheduled the hearing for August 17, 2009 at 9:00 a.m.

By a supplemental disclosure letter submitted to the SHO on August 11, 2009, Petitioner disclosed one additional witness and two additional documents (hereinafter Petitioner's Exhibits 14 and 15).

Based on emails from the parties indicating that the MDT meeting did not go forward on August 10, 2009 because DCPS was unable to secure the presence of all team members, the hearing officer reconvened the due process hearing on August 17, 2009. The hearing began late because Petitioner's counsel was waiting for Parent, who thought the hearing was scheduled for 11:00 a.m. instead of 9:00 a.m. Also, DCPS was represented by substitute counsel due to the illness of the original counsel for DCPS.

Once the hearing started, DCPS's disclosed documents were admitted into the record without objection. The hearing officer admitted Petitioner's documents into the record over DCPS's objection that the documents had not been authenticated, on the ground that authentication of each disclosed document is not required in administrative due process hearings. Thereafter, the hearing officer received limited testimony from Parent concerning Petitioner's compensatory education and audiological evaluation claims in an attempt to determine whether the claims were time barred. When DCPS subsequently made a motion to bifurcate, the hearing officer deferred ruling on the motion but stated that if the evidence on the two claims at issue proved to be inextricably intertwined with the other evidence, then the hearing officer would deny the motion and rule on the claims after receiving Petitioner's written post-hearing brief on the statute of limitations issue. On the other hand, if the two claims could be easily segregated from the rest of the case, then the hearing officer would grant DCPS's motion to bifurcate. The hearing officer then received the testimony of Parent and DCPS cross-examined the Parent. With no time remaining, all parties agreed to continue the hearing to the next day.

The hearing officer reconvened the hearing on August 18, 2009. DCPS was represented by its original counsel, who made a motion for a directed finding. However, due to her absence at the hearing the previous day, counsel was unable to support the motion by providing detailed argument and pointing to gaps in Petitioner's evidence. As a result, the hearing officer denied the motion. Thereafter, Petitioner sought to reopen its case to provide testimony from a previously disclosed representative of a private special education school. The hearing officer granted Petitioner's request because (1) it seemed that Petitioner had rushed to present its case the day before due to the time crunch, and (2) it seemed that admission of the evidence was necessary so that the hearing officer would be able to award the necessary relief upon the

conclusion of the case. After receiving Petitioners' additional evidence, the hearing officer received DCPS's evidence and closing arguments. Based upon the testimonial and documentary evidence, the hearing officer determined that it would be necessary to issue an Interim Order placing Student at a private special education school on a temporary basis. The hearing officer issued said Interim Order Regarding Placement on August 19, 2009.

III. ISSUE(S)

1. Did DCPS fail to implement Student's IEP?
2. Did DCPS inappropriately reduce Student's IEP hours?
3. Did DCPS fail to review Student's psychological evaluation at his March 19, 2009 MDT meeting?
4. Did DCPS fail to convene a full IEP team on March 19, 2009?
5. Did DCPS inappropriately fail to provide ESY?
6. Did DCPS fail to provide transportation?
7. If not bifurcated, did DCPS fail to conduct an auditory evaluation pursuant to an October 2006 MDT recommendation?
8. If not bifurcated, did DCPS fail to provide agreed upon compensatory education?

IV. FINDINGS OF FACT

1. Student is years old, and he attended grade at a DCPS elementary school during the 2008/09 school year. Student's report card for his grade school year reveals that he received the grade of "1" for all four advisories in all academic areas, where 1 means the student does not meet the standard and is performing at the "below basic" level.²
2. Student's April 15, 2008 IEP indicates that his disability classification was mentally retarded ("MR"), and that he was entitled to receive a total of 27.5 hours per week of special education and related services, which included 25 hours of specialized instruction, .5 hour of speech-language services, 1 hour of occupational therapy, and 1 hour of psychological services. The IEP included transportation services for Student on the ground that he was unable to function independently due to the severity of his disability, and the IEP indicates that Student was to receive ESY services during Summer 08 pursuant to the MDT/IEP team's recommendation.³

² See Petitioner's Exhibits 3, 5.

³ Petitioner's Exhibit 9.

3. The Meeting Notes from Student's April 15, 2008 IEP meeting reveal that the MDT determined that Student continued to be eligible for special education services as a mentally retarded student and that he required an out of general education placement. Student's special education teacher reported that he made consistent efforts to read and participate in class but required a reader to understand directions and one-to-one assistance to ensure he completed his work. Although Student's speech-language provider recommended decreasing his services to 30 minutes weekly, Student's social worker reported that he required continued counseling services to help him with behavioral concerns and frustration levels, and his occupational therapist reported continued services in the amount of 1 hour per week.⁴
4. When Student first began attending the elementary school he attended during SY 2008/09, he was placed in a cluster program for emotionally disturbed ("ED") students. After two to three years, the school determined that Student was not displaying emotional problems, so during SY 2008/09, with Parent's consent, the school transitioned Student into a non-categorical combination setting. Student had a regular education homeroom class and he attended music, art and other specials with general education students. Student received specialized instruction in the areas of reading, writing and math in a special education class that served a total of 10 students. In the special education coordinator's ("SEC") opinion, Student made a lot of social progress during SY 2008/09. However, the SEC cannot speak to whether Student made any academic progress during the school year.⁵
5. DCPS convened an IEP meeting for Student on March 9, 2009, but Parents asked for reevaluations. DCPS agreed to conduct the requested reevaluations and reconvene Student's MDT meeting after completion of the evaluations.⁶
6. On March 13, 2009, DCPS conducted an occupational therapy evaluation to Student. Based on Student's performance on the assessments administered, the evaluator determined that Student performed below average in visual motor, visual motor integration, fine motor coordination, and scissor skills. Student also displayed poor handwriting skills. The evaluator concluded that Student is a candidate for continuation of occupational therapy services.⁷
7. Also on March 13, 2009, DCPS conducted a psychological evaluation to Student. The evaluator administered the Wechsler Intelligence Scale for Children-Fourth Edition ("WISC-IV") and the Test of Nonverbal Intelligence-Third Edition ("TONI-3"), in addition to conducting a clinical observation and a record review. Student's performance on the WISC-IV resulted in scores in the low average range for general cognitive ability (FSIQ=62), verbal comprehension (VCI=59), and perceptual reasoning abilities

⁴ Petitioner's Exhibit 9.

⁵ Testimony of SEC.

⁶ Testimony of SEC.

⁷ Petitioner's Exhibit 7; DCPS-3.

(PRI=59). Student's performance on the TONI-3 resulted in a score in the Low Average range.

The evaluator concluded that Student's performance on the evaluation was consistent with his classroom performance, and that Student requires immediate intervention to address his limited academic skills. Moreover, the evaluator recommended an adaptive behavior assessment to determine the appropriate educational setting for Student.⁸

8. On March 17, 2009, DCPS conducted an educational evaluation of Student. Student's performance on the Woodcock-Johnson-III assessment administered resulted in scores in the low to low average range in math, in the low range in reading, in the very low to low range in the area of written language, and in the very low range in the area of written expression. Student's scores in each area resulted in grade equivalencies that were primarily at the second grade level. Based on Student's performance, the evaluator concluded that his "academic skills are very limited. Specifically, his math calculation skill[s] and spelling are limited. His sight reading ability is negligible . . . His fluency with reading and writing tasks is very limited . . . His passage comprehension ability and quantitative reasoning are very limited."⁹
9. DCPS reconvened Student's IEP meeting on March 19, 2009. Student's evaluations were reviewed, and DCPS developed a new IEP for Student. The team decided to retain Student's MR classification but reduced his IEP hours to provide him with 15 hours per week of specialized instruction, 30 minutes per week of behavioral support services, 30 minutes per week of speech-language pathology, and 30 minutes of occupational therapy. The new IEP also states that Student does not require ESY and that he does not require special transportation services.¹⁰
10. Student has problems remembering things. If he is told to do three things, he does one thing and cannot remember the other two. Student also has problems with reading, writing, social skills, and emotional skills.¹¹
11. Student is unable to cross streets on his own because he has a problem determining when to actually cross the street. Student and his parents live on main roads that have lots of steady traffic. Parent has practiced crossing the street with Student, but even when no cars are coming Student keeps looking back and forth for traffic and never actually crosses the street.
To get to the middle school DCPS has assigned Student for the 2009/10 academic year, Student will have to cross at least two major streets, and the walk will take Student at least 15 to 30 minutes.¹²

⁸ Petitioner's Exhibit 6; DCPS-4.

⁹ DCPS-2.

¹⁰ Petitioner's Exhibit 5; DCPS-5; Testimony of SEC.

¹¹ Testimony of Parent.

¹² Testimony of Parent.

12. On August 5, 2009, Student and Parent visited a full-time private special education school, where they toured the school and met with the staff members who were present. Parent spoke with the Director of Admissions about the difficulties Student had experienced in school in the past. Based on his review of Student's records and the interview, the Director determined that the school can implement Student's IEP.

The school services MR students and LD students with academic deficiencies. There would be 4 to 6 students in each classroom with 2 adults – a certified special education teacher and the teacher's assistant, in each class. All of the teacher's are certified in special education, and all related service providers have Master's degrees in their respective fields. The school offers a 100 percent out of general education setting, and it has been educating MR students for approximately 10 years. By letter dated August 5, 2009, the private school advised Petitioners' counsel that the school can adequately address Student's educational and related service needs. This school can provide Student with educational benefit.¹³

13. On August 3, 2009, the hearing officer continued the due process hearing in this case to permit the parties to participate in an MDT/Placement meeting on August 10, 2009, at which DCPS would have the opportunity to discuss and determine an appropriate placement for Student. Although Parent and advocate were present for the meeting, DCPS was unable to secure the attendance of any of the DCPS team members besides the SEC. As a result, the meeting did not go forward.¹⁴

14. On August 19, 2009, the hearing officer issued an Interim Order Regarding Placement that requires DCPS to **temporarily** fund Student's placement at the private special education school he visited with Parent, and to provide Student with transportation to and from said school, **but only until** such time as DCPS revises Student's IEP to properly reflect his recent reevaluations, which indicate that he is a low-functioning MR student, and provides Student with an appropriate placement that can address his academic deficiencies.¹⁵

V. CONCLUSIONS OF LAW

There are eight issues to be determined in this case. As the party seeking relief in this action, Petitioner bears the burden of proof. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

1. Implementation of IEP

Although Petitioner failed to present any evidence on this issue at the due process hearing, DCPS's witness testified that Student received specialized instruction in a special education classroom in the areas of reading, writing and math during SY 2008/09. Under these

¹³ Testimony of Admissions Director; Petitioner's Exhibit 15.

¹⁴ Testimony of Parent; Petitioner's Exhibit 14.

¹⁵ Emphasis was included in original Order.

circumstances, the hearing officer concludes that Petitioner failed to meet its burden of proof on this issue.

2. Inappropriate Reduction of IEP hours

Under IDEIA, revisions to a child's IEP are to be based on, *inter alia*, the results of any reevaluations conducted. *See* 34 C.F.R. § 300.324(b)(1)(ii)(B). The evidence in this case shows that Student performance on his March 13, 2009 psychological reevaluation led the evaluator to conclude that he required immediate intervention to address his limited academic skills, as well as an adaptive behavior assessment to determine the appropriate educational setting for him. Similarly, the evaluator who administered Student's March 17, 2009 educational evaluation concluded that Student's academic skills are very limited. Nevertheless, at Student's March 19, 2009 IEP meeting, the IEP team decided to reduce from 25 hours per week to 15 hours per week the amount of specialized instruction he would receive. There are no IEP Meeting Notes explaining why the team decided to reduce Student's IEP hours. However, Student's report card for SY 2008/09 reveals that he received "below basic" grades for all four advisories in all academic areas. Based on this evidence, the hearing officer concludes that DCPS inappropriately reduced Student's IEP hours when his evaluations and academic performance during SY 2008/09 indicated that he needs continued intervention to address his limited academic skills. As a result, the hearing officer concludes that Petitioner met its burden of proof on this claim.

3. Review of Psychological Evaluation

The documentary and testimonial evidence in this case reveal that Student's IEP team reviewed his March 2009 psychological evaluation report at his March 2009 MDT meeting. Hence, the hearing officer concludes that Petitioner failed to meet its burden of proof on this claim.

4. Alleged Failure to Convene Full MDT on March 19, 2009

Petitioner's evidence on this claim was so confusing and conflicting that the hearing officer was unable to make any findings of fact relevant to this claim. As a result, the hearing officer concludes that Petitioner failed to meet its burden of proof on this claim.

5. ESY

Petitioner has alleged that DCPS inappropriately failed to include ESY on Student's March 19, 2009 IEP. At the due process hearing, however, Petitioner's evidence concerning ESY was limited to whether DCPS provided Student with ESY during the summers of 2008 and 2009. As Petitioner failed to assert a claim concerning the summers of 2008 and 2009 in its Complaint, it would be inappropriate for the hearing officer to address it here. *See* 300.511(d). As Petitioner failed to present any evidence in support of its claim that Student's current IEP should include ESY, the hearing officer declines to address the claim here. However, in light of the fact that Student's April 15, 2008 IEP includes ESY services, the hearing officer encourages DCPS to revisit its decision to remove the services from Student's current IEP.

6. Transportation

IDEIA provides that “[r]elated services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34. In this case, the evidence reveals that Student’s April 15, 2009 IEP provided him with transportation services because the severity of his disability prevented him from functioning independently. The evidence also reveals that Student is presently unable to cross streets on his own because he has a problem deciding when to cross the street, with the result that he simply keeps looking back and forth for traffic and never actually crosses the street. Nevertheless, Student’s current IEP, dated March 19, 2009, does not include transportation services and states that he does not require special transportation services. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of proving that DCPS improperly failed to include transportation services on Student’s March 19, 2009 IEP.

7. Bifurcation

The hearing officer notes that Petitioner failed to present any evidence whatsoever regarding its claims that DCPS failed to conduct an auditory evaluation and failed to provide agreed upon compensatory education. As a result, it is clear that those two claims were not inextricably intertwined with the other claims asserted in this case, and the hearing officer concludes that bifurcation of the claims is appropriate.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proving that DCPS inappropriately reduced Student’s IEP hours and improperly failed to include transportation services on Student’s March 19, 2009 IEP. The hearing officer also determined that Petitioner’s claims that DCPS failed to conduct an auditory evaluation and failed to provide agreed upon compensatory services should be bifurcated from the other claims in this case. With respect to all remaining claims asserted, the hearing officer determined that Petitioner failed to meet its burden of proof.

VII. ORDER

1. As Petitioner has prevailed on its claims that DCPS inappropriately reduced Student’s IEP hours and improperly failed to include transportation services on Student’s March 19, 2009 IEP, the hearing officer’s August 19, 2009 Interim Order Regarding Placement, which requires DCPS to temporarily fund Student’s placement at a specific private special education school and to provide Student with transportation to and from the school, shall remain in effect until DCPS revises Student’s IEP to properly reflect his recent reevaluations, which indicate that he is a low-functioning MR student, and provides Student with an appropriate placement that can address his academic deficiencies.

2. DCPS's Motion to Bifurcate is hereby **GRANTED**, with the result that Petitioner's claims that DCPS failed to conduct an audiological evaluation and failed to provide agreed upon compensatory education, which claims DCPS asserts are time barred, are bifurcated so that Petitioner can pursue them in a separate action.
3. All remaining claims on Petitioner's June 22, 2009 are hereby **DISMISSED**, and Petitioner's requests for relief on those claims are hereby **DENIED**.

/s/ *Kimm H. Massey*

Kimm H. Massey, Esq.

Impartial Due Process Hearing Officer

Dated this 28th day of August, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).