

Hearing Officer Determination & Order

JURISDICTION

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

INTRODUCTION

On 06/16/09, a Due Process Complaint Notice (“Complaint”) was filed by the parent (“Parent” or “Petitioner”) on behalf of the 8 year old student (“Student”), alleging that District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEIA”) when DCPS failed to provide Student with an appropriate Individualized Education Program (“IEP”) and when DCPS failed to provide Student with an appropriate placement; with each failure resulting in the denial of a FAPE. In the Complaint, Petitioner asserts that Student is entitled to compensatory education due to the denials of a FAPE.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

THE DUE PROCESS HEARING

The due process hearing convened on 07/28/09 at the Van Ness Elementary School located at 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003.

Petitioner was represented by Miguel Hull, Esq. (“Petitioner’s Attorney”) and DCPS was represented by Tanya Chor, Esq. (“DCPS’ Attorney”). Petitioner participated in the due process hearing in person until the beginning of closing arguments, at which time Petitioner left to attend to child care obligations.

DCPS elected not to engage in settlement discussions prior to the commencement of the due process hearing.

Disclosures:

Petitioner’s Five-Day Disclosure letter dated 07/21/09 contained Petitioner’s Exhibits #1-11. Petitioner’s Exhibits #1-7 and #9-11 were admitted into evidence without objection. Petitioner’s Exhibit #8 was admitted into evidence over objection.

DCPS’ Disclosure Statement dated 07/21/09 contained DCPS’ Exhibit #1; however, DCPS’ Exhibit #1 consisted of DCPS’ Response with attachments. For clarity, DCPS’ Exhibit #1 was re-labeled as follows: DCPS’ Exhibit #1(a) is DCPS’ Response dated 06/26/09; DCPS’ Exhibit #1(b) is Student’s Report of Progress dated 06/11/09;

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DCPS' Exhibit #1(c) is Student's IEP dated 05/20/09; and DCPS' Exhibit #1(d) is Student's Physical Therapy Re-Evaluation dated 04/07/09. DCPS' Exhibits #1(a) - #1(d) were admitted into evidence without objection.

Special Accommodations:

Beatriz Bass and Luis Alarez provided Spanish-English translation services to Petitioner while Petitioner participated in the due process hearing.

Witnesses:

Witnesses for Petitioner included: (1) Petitioner, and (2) Juan Fernandez, educational advocate.

DCPS presented no witnesses.

Issues Presented in the Complaint:

Issue #1 – Whether DCPS failed to provide Student with an appropriate IEP and placement, thereby denying Student a FAPE?

This issue remained active for litigation.

Issue #2 – Whether Student is entitled to compensatory education?

Petitioner withdrew this issue at the beginning of the due process hearing. The Hearing Officer allowed withdrawal of the issue without prejudice.

Relief requested by Petitioner:

- (1) A finding of a denial of a FAPE on Issue #1;
- (2) A determination that Student's 05/20/09 IEP is inappropriate and that Student requires a full time or close to full time IEP, and a determination that Student's placement at _____ is inappropriate;
- (3) A determination that Student should be classified as Emotionally Disturbed ("ED") as well as Specific Learning Disability ("SLD");
- (4) DCPS to convene a Multidisciplinary Team ("MDT") within 10 business days to review and revise the IEP in accordance with the hearing officer's determination regarding classification, level of services, and placement, and DCPS to determine appropriate placement with placement to be made within 5 days if to a public school or 30 days if to a non-public school; and

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(5) Any other relief deemed appropriate.

FINDINGS OF FACT

#1. On 05/29/07, Student was diagnosed with Nystagmus, a condition that consists of involuntary eye movements that limit vision and may be associated with other motor problems such as balance. This condition causes Student to have 20/40 vision even with glasses, and to compensate for this educationally, it was recommended by a medical doctor that Student sit in front of the class and have large print books. *(Petitioner's Exhibit #9, Psychological Evaluation dated 10/04/07).*

#2. Student has great difficulty seeing without glasses. Even with a current prescription of eyeglasses, Student's vision problems are particularly acute when Student has to view the printed word because it is difficult for Student to see small things. Sometimes Student vocalizes that the problem with homework is that the letters are too small. Student sits near the teacher in class. *(Testimony of Petitioner).*

#3. While Student was in the grade at Student received a psychological evaluation that indicated that Student's vision problems tended to slow down Student's performance, especially on timed and written tasks; and that Student needed to sit close to the teacher and work with large visual stimuli. The evaluation indicated that Student needs to learn mostly through verbal input with simple tasks that increase in complexity gradually over time, that Student's visual limitations also had an impact on Student's almost three year delay in visual motor coordination and integration and spatial organization, that these problems have a direct impact on writing and reading skills, and that Student needs to have visual stimuli presented with a high degree of structure and to face the blackboard directly and not from side angles. The evaluator also noted that it was remarkable that although Student had limited vision, Student was able to perform at Low Average levels or higher on some tasks that required visual abilities. *(Petitioner's Exhibit #9, Bilingual Psychological (Psycho-Educational) Re-Evaluation dated 10/04/07).*

#4. During the 2008-2009 school year, Student attended grade at which was Student's neighborhood school, and there Student received special education services as a student with a SLD. *(Petitioner's Exhibit #3, Prior Notice Letter; Petitioner's Exhibit #7, IEP dated 09/15/08).*

#5. Student's 09/15/08 IEP, in effect from 09/15/08 until 05/20/09, prescribed 6 hours/week of specialized instruction in a general education setting, 1 hour/week of specialized instruction outside a general education setting, 1 hour/week of occupational therapy ("OT") outside a general education setting, 1 hour/week of physical therapy ("PT") outside a general education setting, and .5 hours/week of speech-language pathology services outside a general education setting. Classroom accommodations specified in Student's 09/15/08 IEP to allow Student to advance toward attaining goals while participating in the general education setting included enlarged copies of handouts, assignments broken into segments, extra time for completion of tasks, breaks between

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work periods, preferential seating, small group testing, location with minimal distractions, repetition of directions, simplification of oral directions, reading of test questions (math only), assisted reading of entire comprehension test, calculators, graphic organizers, manipulatives, large print copy, breaks between subtests, and extended time on subtests. (*Petitioner's Exhibit #7, IEP dated 09/15/08*).

#6. Student's grade general education teacher reported the following odd behaviors of Student: Student does strange things, babbles to self, acts confused, picks at things like own hair, nails, or clothing, seems unaware of others, acts strangely, says things that make no sense, plays alone, and has trouble making friends. Additionally, the teacher reported that Student acts without thinking, and is easily distracted from class work. (*Petitioner's Exhibit #10, Psychological Triennial Assessment dated 04/29/09*). According to the teacher, Student struggled to work and read independently in the general education setting, with the biggest obstacle being Student's problem with reading comprehension; however, Student performed well in class with one to one assistance. (*Testimony of Juan Fernandez, educational advocate; Petitioner's Exhibit #6, advocate's notes dated 05/20/09*).

#7. Student's current learning problems are not due to any known hearing or motor disability, mental retardation, emotional disturbance, cultural factors, or environmental or economic disadvantage. Student has current vision problems that may impact Student's learning and performance. Student will benefit from spending time in the regular education environment with non-disabled peers in order to foster age appropriate social development. Student performs at grade level in math computation skills, but can be expected to have difficulty keeping up with same aged peers in reading and writing tasks. (*Petitioner's Exhibit #10, Psychological Triennial Assessment dated 04/29/09*).

#8. Student's current IEP dated 05/20/09, prescribes 10 hours/week of specialized instruction outside the general education setting, 1 hour/week of OT outside the general education setting, 1 hour/week of speech-language pathology services outside the general education setting, .5 hours/week of PT services outside the general education setting, and .5 hours/week of behavioral support services in the general education setting. Classroom accommodations specified in Student's 05/20/09 IEP to allow Student to advance toward attaining goals while participating in the general education setting include the following: assignments broken into segments, small group testing, location with minimal distractions, repetition of directions, extended time on subtests, reading of test questions (math only), assisted reading of entire comprehension test, and enlarged copies of handouts. The 05/20/09 IEP did not contain a description of any supplemental supports and services that were previously attempted in a general education setting. (*Petitioner's Exhibit #5, IEP dated 05/20/09*).

#9. 10 hours/week of specialized instruction outside of general education is prescribed by Student's 05/20/09 IEP to address weaknesses in the areas of math fluency, applied math problems, letter-word identification, passage comprehension, and written expression; all academic areas in which Student performed below grade level. The

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MDT's justification for removal from the general education population for these services was that Student required small group instruction in order to build academic skills. (*Petitioner's Exhibit #5, IEP dated 05/20/09*). At the 05/20/09 MDT/IEP team meeting, DCPS offered after school tutoring with the assistance of a special education teacher to help Student with homework. (*Petitioner's Exhibit #6, advocate's notes dated 05/20/09; Testimony of Juan Fernandez, educational advocate*).

#10. During the 4th report period of the 2008-2009 school year, Student made progress towards or mastered all of the goals identified for specialized instruction, occupational therapy, physical therapy, and speech-language pathology; with mastery of most goals in the areas of OT and PT, but with progression towards most goals in the areas of math, reading, and written expression. (*DCPS' Exhibit #1(b), Student Report of Progress dated 06/11/09*).

DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast, 44 IDELR 150 (2005)*. "Based solely upon 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 with a FAPE." *5 D.C.M.R. 3030.3*.

Issue #1 – Whether DCPS failed to provide Student with an appropriate IEP and placement, thereby denying Student a FAPE?

Petitioner specifically alleges that:

(a) Student's 05/20/09 IEP that classifies Student with a SLD and prescribes 10 hours/week of specialized instruction outside the general education setting, 1 hour/week of occupational therapy outside the general education setting, 30 minutes/week of physical therapy outside the general education setting, 30 minutes/week of speech and language pathology services outside the general education setting, and 30 minutes/week of behavioral support services in the general education setting, should contain full time or close to full time special education services and placement for an SLD and Emotionally Disturbed ("ED") student, based on Student's April 2009 psychological evaluation and behaviors observed by Student's classroom teacher; and

(b) Student should be classified as Emotionally Disturbed ("ED") pursuant to the definition found in 34 C.F.R. 300.8 (c)(4)(i), 5 D.C.M.R. 3001.1, based on the April 2009 and the October 2007 psychological assessments, and on teacher observations reported during the 05/20/09 MDT meeting.

The facts of this case reveal that Student's current IEP dated 05/20/09, prescribes 10 hours/week of specialized instruction outside the general education setting (*Finding of*

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Fact #8), and it is this amount of specialized instruction that Petitioner takes issue with. Petitioner ardently argues that 10 hours/week of specialized instruction is insufficient to provide Student with a FAPE and that this should be evident by the content of the 2007 psychological evaluation, the content of the 2009 psychological evaluation, and by the comments of Student's general education grade teacher at DCPS counters Petitioner's argument, stating that as of 06/11/09, Student had made progress towards or mastered all of the special education goals specified in Student's 05/20/09 IEP; therefore, DCPS has not denied Student a FAPE.

Student has a history of serious vision problems that directly impact academic performance. (*Finding of Fact #1, #2, #3*). The impact on academic performance is so severe that DCPS has delineated many special classroom accommodations in Student's 09/15/08 IEP and 05/20/09 IEP to help Student survive and thrive in the general and special education environments. These accommodations include large print text and handouts, extra time for completion of tasks, repetition of directions, and reading of test questions for math. (*Finding of Fact #5, #8*). Student has great difficulty with reading and writing, and cannot read or work independently in class. (*Finding of Fact #6, #7*). The Hearing Officer's conclusion that Student's academic problems are related to Student's vision problems and are not a result of Attention Deficit Hyperactivity Disorder or an emotional disturbance for which Student would need a different type of educational program, is supported by the evidence that (1) even with glasses on, Student's vision is only 20/40, (2) Student complains that the letters on the homework assignment are too small, (3) Student does well in class with one to one assistance, and (4) the 04/29/09 psychological evaluation ruled out a diagnosis of an emotional disturbance and ruled in the adverse impact of deficient vision on academic performance. (*Finding of Fact #1, #2, #6, #7*). It should be noted that math computation skills are on grade level (*Finding of Fact #7*), which is perhaps the only academic area Student can perform in that doesn't require reading per se. In the record is the fact that Student sits close to the teacher in class (*Finding of Fact #2*), but what is absent from the record is whether or not DCPS provides Student with text and materials that have enlarged print.

In the record is the fact that Student is removed from the general education setting each day for 2 hours for specialized instruction with a special education teacher to address weaknesses in the areas of math fluency, applied math problems, letter-word identification, passage comprehension, and written expression; all academic areas in which Student performs below grade level. (*Finding of Fact #9*). And, for the remainder of the day when Student is not receiving related services outside of general education, Student is being educated in the general education setting with limited vision and no one to verbally translate the written material so that Student can participate in and complete the assignments satisfactorily. It is only with the one to one assistance of the general education teacher that Student has been able to perform satisfactorily. Without one to one assistance, Student is easily distracted from class work and does not complete assignments. (*Finding of Fact #6*).

Pursuant to 5 D.C.M.R. 3011.1, "the local education agency shall ensure that: (a) to the maximum extent appropriate, children with disabilities, including children in

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public or private institutions or other care facilities, are educated with children who are not disabled; and (b) special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." This is considered the Least Restrictive Environment ("LRE").

And, pursuant to 5 D.C.M.R. 3013.2, "unless the IEP of a child requires some other arrangement, the child shall be educated in the school that the child would attend if not disabled." Furthermore, "a child with a disability shall not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum." 5 D.C.M.R. 3013.4.

The problem and the solution in this case is to provide Student with specialized instruction in the general education setting, along with specialized instruction outside the general education setting, to enable Student to be educated with non-disabled peers, in the least restrictive environment, in the neighborhood school, in accordance with the legal dictates of 5 D.C.M.R. 3011.1 and 5 D.C.M.R. 3013.

At the MDT/IEP team meeting on 05/20/09, DCPS offered Student after school tutoring with the services of a special education teacher. (*Finding of Fact #9*). This offer is a good offer, but it is not enough to provide a FAPE. It is very critical that Student be provided with all school materials, texts and handouts that have enlarged print. The 05/20/09 IEP did not describe any of the efforts that DCPS had made under the previous IEP to provide Student with these special classroom accommodations in the general education setting. (*Finding of Fact #8*). The Hearing Officer can only conclude that these efforts were not made, and that during the 2008-2009 school year, Student did not receive textbooks and handouts with enlarged print; the very things that were fundamental and critical to Student's success in school. Moreover, Student's comments about the small print on homework assignments (*Finding of Fact #2*) lends support to this conclusion.

The purpose of IDEIA is to (a) ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, (b) ensure that the rights of children with disabilities and their parents are protected; (c) assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and (d) assess and ensure the effectiveness of efforts to educate children with disabilities. 34 C.F.R. 300.1.

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. 34 C.F.R. 300.39(a). Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction (i) to address the unique needs of the child that result from the child's disability; and (ii) to ensure access

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of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39(b)(3).

Thus, the Hearing Officer concludes that 10 hours/week of specialized instruction outside the general education setting prescribed by Student's 05/20/09 IEP is insufficient specialized instruction to meet Student's unique needs and this amount of specialized instruction is insufficient for Student to meaningfully and successfully access the general curriculum. Although Student has mastered many goals in the IEP, the majority of the mastered goals were in the areas of related services, and not in the areas of reading, applied math, or written expression. (*Finding of Fact #10*). Moreover, there was no evidence regarding the amount of progress that Student had made over what period of time in progressing towards the goals, and whether the progress was achieved inside or outside the general education setting. Student presently requires one to one assistance in the general education setting so that Student's vision problems are not an impediment to learning. The preferred method of learning for Student is through verbal input with simple tasks that increase with complexity. (*Finding of Fact #3*). This can be achieved in the general education setting by providing Student with one to one assistance.

Student was denied a FAPE because the 05/20/09 IEP was insufficient to provide the type of educational supports that Student needed to be successful in the general education setting.

There was insufficient evidence in the record for the Hearing Officer to conclude that Student should have been classified as ED. A recent psychological evaluation dated 04/29/09 indicated that there was no evidence of an emotional disturbance. (*Finding of Fact #7*). That evaluation factored in an extensive list of behaviors relayed to the evaluator by Student's 3rd grade general education teacher, and included the list of behaviors that Petitioner relied upon to assert its position that Student required a disability classification of ED. Some of Student's behaviors seemed peculiar, such as, babbling to self, acting strangely, and picking at things like own hair, nails or clothing. (*Finding of Fact #6*). A psychiatric evaluation might shed some light on any developing personality disorders.

There was also insufficient evidence in the record for the Hearing Officer to conclude that _____ could not provide Student with 2-3 hours/day of specialized instruction in the general education setting in addition to 2 hours/day of specialized instruction outside of general education. Student's 09/15/08 IEP provided for 6 hours/day of specialized instruction in the general education setting (*Finding of Fact #5*), thus, it is possible for _____ to provide the lesser maximum amount of 3 hours/day of specialized instruction in the general education setting.

Petitioner met its burden of proof that DCPS failed to provide Student with an appropriate IEP. Petitioner also met its burden of proof that Student requires full time or close to full time special education services.

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Petitioner did not meet its burden of proof that _____ was an inappropriate placement for Student. Petitioner also did not meet its burden of proof that Student should be classified with a disability classification of ED.

ORDER

WHEREFORE, it is

ORDERED that

- (1) Within fifteen (15) business days, the MDT/IEP team shall reconvene to revise Student's IEP to reflect the provision of at least 2 hours/day, but no more than 3 hours/day, of one to one specialized instruction in the general education setting, in addition to 2 hours/day of specialized instruction outside the general education setting, with the IEP to reflect the same amount of related services as contained in the 05/20/09 IEP, and the MDT/IEP team shall discuss and determine placement and issue a Notice of Placement within 5 days if to a public school or 30 days if to a non-public school if the revised IEP cannot be implemented at _____ and _____
- (2) At the aforementioned MDT/IEP team meeting, Petitioner shall provide the MDT with the results of any vision testing conducted within the last calendar year, and the MDT shall review the results; and if Petitioner does not provide the MDT with vision test results within the past calendar year at the aforementioned MDT meeting, DCPS shall conduct its own vision testing of Student within 15 school days and ensure that Student's eyeglass prescription is up to date; and
- (3) From the beginning of the 2009-2010 school year and at all times thereafter, DCPS shall provide Student with all textbooks and academic materials that have enlarged print suitable for Student; and
- (4) DCPS shall conduct a psychiatric evaluation of Student no later than 30 calendar days after the beginning of the 2009-2010 school year, with particular attention to providing the input of Student's _____ grade teacher to the psychiatric evaluator; and
- (5) DCPS shall conduct a developmental optometrist evaluation no later than 30 calendar days after the beginning of the 2009-2010 school year, or provide authorization for funding of an independent evaluation by a developmental optometrist within 21 calendar days of the date of this Order, and
- (6) Within 15 school days of DCPS' receipt of either the psychiatric evaluation or the developmental optometrist evaluation, DCPS shall reconvene an MDT/IEP team to review the evaluation(s), and review and revise the IEP as necessary; and

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- (7) DCPS shall make available to Student after school tutoring with the one to one assistance of a special education teacher, at least one hour/day, three days per week, while school is in session.

IT IS SO ORDERED.

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. Section 1415(i)(2).

Virginia A. Dietrich /s/

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

07/31/09

Date

Issued: July 31, 2009