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

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Confidential

STUDENT, through the legal guardian[1]	)	Complaint Filed: October 5, 2009
	)	
Petitioner,	)	Prehearing Order: October 26, 2009
	)	
v.	)	Hearing Date: November 13, 2009
	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Docket Nos.
	)	
Respondent.	)	
	)	
Student Attending:	)	
	)	

HEARING OFFICER'S DECISION

Counsel for Petitioner:	Douglas Tyrka, Esquire 2807 – 27th Street, N.W. Washington, D.C. 20008 (202) 332-0038; Fax: (202) 332-0039
Counsel for DCPS:	Daniel McCall, Esquire Laura George, Esquire Office of the General Counsel, DCPS 825 North Capitol Street, N.E.; 9th Floor Washington, D.C. 20002

[1] Personal identification information is provided in Appendix A.

Jurisdiction

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Background

Petitioner is a year-old student attending
On October 5, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) develop an appropriate Individualized Education Program ("IEP"), and (2) provide an appropriate placement. In a Prehearing Order on October 26, 2009, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure to develop an appropriate IEP

  Petitioner alleges that DCPS has failed to develop an appropriate IEP in over a year. Petitioner concedes that DCPS developed an IEP on January 9, 2009. However, Petitioner alleges that the January IEP was the product of an incomplete IEP team and that the IEP suffers from the following deficiencies: (1) the goals and objectives are more advanced than Petitioner is reasonably capable of attaining; (2) no counseling is prescribed despite recommendations in evaluations; (3) no life-skills, pre-vocational training was prescribed despite recommendations in evaluations; (4) no extended year services ("ESY") were prescribed despite the need for the same being documented in a psychological evaluation.

  DCPS asserts that it made several efforts to secure the parent's presence at IEP meetings and finally completed an IEP on January 29, 2009.

- DCPS' alleged failure to provide an appropriate placement

  Petitioner alleges that his unilateral placement at for the current school year is appropriate due to DCPS' failure to determine a placement for the 2009-2010 school year and its failure to issue a notice of placement. DCPS asserts that Petitioner received notice of placement at but failed to enroll or appear. He was given a unilateral transfer to for gang-related safety concerns, but he did not attend DCPS further asserts that it determined the placement when it developed his IEP and determined the appropriate educational setting.

Neither party requested a modification of the Prehearing Order. The due process hearing was convened on November 13, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated October 5, 2009
District of Columbia Public School's Response, Notice of Insufficiency, and Motion to Dismiss Petitioner's Due Process Complaint Notice dated October 21, 2009
Prehearing Order dated October 26, 2009
Parent's Response to Notice of Insufficiency dated October 27, 2009
District of Columbia Public School's Supplemental Response and Motion to Dismiss Petitioner's Due Process Complaint Notice dated November 10, 2009
Petitioner's Five-Day Disclosure dated November 5, 2009 (Exhibit Nos. 1-7)
DCPS' Five-Day Disclosure dated November 4, 2009 (Exhibit Nos. 1-2)
Attendance Sheet for hearing conducted on November 13, 2009

Witnesses for Petitioner

Petitioner's Mother
Educational Advocate
Admissions Officer,
Special Education Coordinator,

Witnesses for DCPS

None

Findings of Fact

1. Petitioner is a year-old student attending During the 2008-2009 school year, Petitioner attended

2. On May 3, 2007, Ms. Jennifer Penn completed a Cognitive Psychological Re-Evaluation of Petitioner. Ms. Penn's findings and recommendations, *inter alia*, include the following:

> [Petitioner] is a child of uneven cognitive functioning, as assessed by the KBIT. There is a significant difference between the ways he processes information verbally vs. nonverbally, in favor of the latter. He has

[2] Testimony of Petitioner's mother.

> significant deficits in his verbal processing skills, with average nonverbal skills. His full scale IQ score of 77 places his overall cognitive functioning in the Well Below Average range. He has significant social and behavioral problems in the school. He has a negative attitude when asked to comply with requests from authority. [Petitioner] is recommended to continue to receive special education services for children with Learning Disabilities, as well as psychological support services in the school. Life skills and pre-vocational training is recommended to assist him in his adjustment to high school and pre-career skills.[3]

3. DCPS convened a Multidisciplinary Team ("MDT") meeting on January 29, 2009 and developed an IEP.[4] Petitioner's mother did not attend the meeting.[5] The MDT prescribed 26 hours per week of specialized instruction and one hour per week of behavior support services, out of general education.[6] The IEP included goals and objectives in mathematics, reading, written expression, and emotional, social, and behavioral development.[7] The MDT did not issue a Prior Notice.

4. In June 2009, Petitioner's mother was notified that Petitioner would be retained in the grade. Petitioner's mother attempted to reenroll Petitioner at for the 2009-2010 school year on August 17, 2009, but did not provide proof that Petitioner had received necessary vaccinations. When Petitioner's mother returned with the documentation, she was told that Petitioner had been transferred to Petitioner's mother expressed concern about to Assistant Principal, directed her to take Petitioner home and that a meeting would be scheduled to discuss placement. A meeting was convened during the second week of the school year.[8] Due to gang-related safety concerns, DCPS transferred Petitioner to Petitioner's mother elected not to enroll Petitioner at and enrolled him at near the end of September.[10]

5. Neither nor was capable of providing full-time specialized instruction in an out of general education environment.[11]

6. is a private school offering full-time specialized instruction. At Petitioner is in a class of four boys and two girls in a self-contained class. All of his teachers are certified in special education. All of the students in Petitioner's class are governed by behavior modification plans that reward students for appropriate behaviors.

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[3] Petitioner's Exhibit ("P.Exh.") No. 3 at 4-5.
[4] P.Exh. No. 1 at 1.
[5] *Id.* at 2.
[6] DCPS Exh. No. 1 at 4.
[7] *Id.* at 2-3.
[8] Testimony of Petitioner's mother.
[9] DCPS No. 2.
[10] Testimony of Petitioner's mother.
[11] Testimony of

There are ten psychological counselors on the staff, including psychologists and licensed social workers.[12]

Conclusions of Law

Failure to Develop an Appropriate IEP

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[13] the Supreme Court set forth the requirements for IEPs:

> The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). § 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document containing
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> "(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." § 1401(19).
>
> Local or regional educational agencies must review, and where appropriate revise, each child's IEP at least annually. § 1414(a)(5). See also § 1413(a)(11).[14]

The IEP team must include the parents of the child, at least one regular education teacher of the child, at least one special education teacher of the child, a representative of the public agency who is qualified to provide or supervise special education services, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the public agency, and an individual who can interpret the instructional implications of evaluation results.[15] MDT meetings held in the absence of a parent are inherently suspect. The LEA has a heavy burden to ensure the presence of the child's parent at each IEP meeting.[16] If neither parent can attend, the LEA should facilitate

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[12] Testimony of
[13] 458 U.S. 176 (1982).
[14] *Id.* at 181-82.
[15] 34 C.F.R. §300.321(a).
[16] 34 C.F.R. §300.322(a).

parental participation by phone.[17] In the case of a parent who is difficult to reach, or who persistently fails to attend meetings, LEA should maintain detailed records of its attempts to encourage a parent to attend a meeting. The regulations suggest that, in the event a school decides to proceed with an IEP meeting without a parent, it should have records of telephone calls made or attempted to the parent, copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits.[18]

An LEA should not take lightly its obligation to ensure the availability of the required team members. The Ninth Circuit has held that the failure to convene an appropriate team constitutes a substantive violation of IDEA, and is a denial of FAPE.

> The failure to include at least one regular education teacher on the IEP team deprived the team of "important expertise regarding the general curriculum and the general educational environment." The IEP team did not include individuals Congress concluded were most knowledgeable about a disabled student's special educational needs. As a result, we have no way of determining whether the IEP team would have developed a different program after considering the views of a regular education teacher. The failure to include at least one regular education teacher on the IEP team was a structural defect in the constitution of the IEP team.[19]

In this case, it is uncontroverted that the parent did not attend the January 29, 2009 MDT meeting at which Petitioner's latest IEP was developed. DCPS offered no testimony as to its decision to proceed with the meeting in the parent's absence. Therefore, the Hearing Officer concludes that Petitioner has met his burden of proving that DCPS failed to develop an appropriate IEP.

Failure to Determine and Provide an Annual Placement

Placements must be reviewed annually, must be based on the child's unique needs identified in the IEP,[20] and must be made by a properly constituted IEP team.[21] In *Deal v. Hamilton County Board of Education*,[22] the court held that "A placement decision may only be considered to have been based on the child's IEP when the child's individual characteristics, including demonstrated response to particular types of educational

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[17] 34 C.F.R. §300.322(c).
[18] 34 C.F.R. §300.322(d).
[19] *M.L. v. Federal Way School District*, 394 F.3d 634, 646 (9th Cir. 2004), citation omitted. *See also, Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1076-77 (9th Cir. 2003)(the failure to include a representative from the private school that the child was currently attending on the IEP team violated the procedural requirements of the IDEA). *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1484-5 (9th Cir. 1992)(the school district violated the procedures mandated by Congress in the IDEA by failing to secure the participation of the disabled student's regular education teacher, or any representative of the private school he attended after the school district refused to identify him as disabled.)
[20] 34 C.F.R. §300.116(b) and §300.324(b).
[21] 34 C.F.R. §300.321(a) and §300.308(b).
[22] 392 F.3d 840 (6th Cir. 2004).

programs, are taken into account."[23] All other factors being equal, the student should be placed in a school as close as possible to his or her home and, preferably, at the child's neighborhood school.[24]

District regulations sets forth the following criteria for determining an appropriate placement; the decision must be

(a) Made by a group of persons, including the parents and other persons, knowledgeable about the child, the meaning of the evaluation data, and the placement options;
(b) Made in conformity with the Least Restrictive Environment (LRE) provision of the Act and § 3011 of this Chapter;
(c) Made within timelines consistent with applicable local and Federal law;
(d) Determined at least annually after his or her initial placement;
(e) Based on the child's IEP; and
(f) Is as close as possible to the child's home.[25]

The placement determination must be made "by a group of persons, *including the parents*, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and … is based on the child's IEP." [26] Thus, a placement determination made by a DCPS official or a DCPS entity that does not include the parents, that is reached without consideration of the capability of the proposed placement to meet the needs identified in the IEP, and that is made by a group that otherwise fails to meet the requirements of an appropriate IEP team, is invalid.

In this case, DCPS conducted an invalid MDT on January 29, 2009. There is no evidence that it determined an annual placement at that meeting. No additional MDT meetings were held for Petitioner before the beginning of the 2009-2010 school year. When Petitioner's mother attempted to re-enroll him at for the 2009-2010 school year, she was told that Petitioner had been transferred to There is no evidence that this placement determination was based on Petitioner's educational needs as established in his IEP. After the MDT met in early September to address the parent's concerns about DCPS transferred Petitioner to Again, there is no evidence that the placement determination was based on Petitioner's educational needs as established in his IEP. Moreover, offered uncontroverted testimony that Roosevelt and were incapable of providing the services prescribed in Petitioner's IEP.

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[23] *Id.*, 392 F.3d at 858-59, citations omitted. *See also, Spielberg ex rel. Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258-59 (4th Cir. 1988)(placement must be based on the IEP, and parents' after the fact involvement in the decision does not satisfy the obligation to provide a meaningful opportunity to participate in the decision).

[24] 34 C.F.R. §300.116(b)(3) and (c).

[25] 5 D.C.M.R. §3013.1. *See also* 34 C.F.R. §300.116.

[26] 34 C.F.R. §300.116(a)(1), emphasis added. Each public agency must ensure that a parent of a child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. 34 C.F.R. §300.501(c)(1).

Counsel for DCPS argued that DCPS fulfilled its annual placement obligation when it determined the appropriate educational setting for Petitioner in his January 2009 IEP. Thereafter, DCPS had the sole authority to determine the location where that program would be implemented. Under DCPS' theory, there is no distinction between "educational setting" and "placement."

First, the Hearing Officer has already determined that the IEP is flawed, because the parent did not participate in its development. Second, DCPS' theory is inconsistent with the plain wording of the applicable regulations. Federal and local regulations mandate the placement "as close as possible to the child's home."[27] Thus, under prevailing regulations, placement includes a consideration of the school's location. 5 D.C.M.R. Section 3013.1(e) and 34 C.F.R. Section 116(b)(2) compel the MDT to consider the capability of the school at a particular location to meet the child's needs as those needs are described in the IEP. Thus, the coincidental requirements of parental participation in the placement decision, and the consideration of the capabilities of a proposed school to meet the child's needs, imposes an obligation on the local education agency ("LEA") representative at the MDT meeting to reveal to the parent the proposed location and to afford the parent the opportunity to discuss the capability of that particular school to meet the child's needs. Once the parent has had the opportunity to participate meaningfully in that discussion, the LEA has the unilateral right to make the placement determination, subject to the parent's right to challenge that determination through a due process proceeding.

Here, DCPS never provided the parent the opportunity to participate in the placement determination. DCPS' unilateral decision to place Petitioner at was not the product of an MDT meeting in which the parent participated. As for the placement at was not discussed with the parent at the meeting in September, and there is no evidence the placement determination was based on capability to meet Petitioner's educational needs as established in his IEP. Therefore, the Hearing Officer concludes that Petitioner has met his burden of proving that DCPS failed to provide an appropriate placement.

Reimbursement

It is settled law that parents who doubt the appropriateness of an IEP or a placement may remove their child to a private school and, if due process proceedings result in a determination that they were correct, the parents would be entitled to reimbursement for the costs of the private education.[28] In this case, Petitioner seeks reimbursement for expenses incurred as a result of his unilateral placement at has a certificate of approval from OSSE. At Petitioner is in a class of four boys and two girls in a self-contained class. All of his teachers are certified in special education. All of the students in Petitioner's class are governed by behavior modification plans that reward students for appropriate behaviors. There are ten psychological counselors on the

[27] 5 D.C.M.R. §3013.1. See also 34 C.F.R. §300.116.

[28] *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts,* 471 U.S. 359, 369 (1985).

staff, including psychologists and licensed social workers. The Hearing Officer concludes that is likely to confer educational benefit to Petitioner.

Compensatory Education

In *Reid v. District of Columbia*,[29] the D. C. Circuit held that in determining awards of compensatory education services, Hearing Officers could no longer simply award services on an hour-for- hour basis, or by use of a standard formula.

> We reject... appellants'... mechanical hour-per-hour calculation and instead adopt a qualitative standard: compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.[30]

Thus, Petitioner had the burden of showing that (1) as a result of DCPS' failure to provide services, he suffered an educational deficiency, (2) but for the violation, he would have either maintained his current level of academic performance or progressed to a higher level, and (3) that there exists a type and amount of compensatory education services that would bring him to the level he would have been but for DCPS' violation.

offered testimony that Petitioner was entitled to compensatory education services as a result of services DCPS failed to provide during the 2008-2009 school year. First, the *Complaint* included no allegation that DCPS failed to provide services during the 2008-2009 school year. Second, the Hearing Officer did not include the failure to implement a previous IEP as an issue to be adjudicated in the Prehearing Order, and Petitioner's counsel failed to avail himself of the opportunity provided in the Order to suggest modifications to the Order.

Third, even if the issue of deprivation of services was at issue, failed to offer evidence of the academic level Petitioner would have been but for failure to provide ESY. Therefore, Petitioner has failed to meet his burden of proving his entitlement to compensatory education services. Hearing Officers may not award compensatory education services based solely on the amount of services a local education agency ("LEA") failed to provide.

> [W]e part company with the Reids regarding how such awards are calculated. They urge us to adopt a presumption that each hour without FAPE entitles the student to one hour of compensatory instruction, a standard apparently embraced by several courts... In our view, this cookie-cutter approach runs counter to both the "broad discretion" afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce.

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[29] *Reid v. District of Columbia,* 401 F.3d 516 (D.C. Cir. 2005).
[30] *Id.* at 18

> More specifically, as the Fourth Circuit has explained, "compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a give period of time to provide a FAPE to a student... Overlooking this equitable focus, the Reids' hour-for-hour formula in effect treats compensatory education as a form of damages – a charge on school districts equal to expenditures they should have made previously. Yet "the essence of equity jurisdiction" is "to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it..." In keeping with that principle of case-specific flexibility, we agree with the Ninth Circuit that "there is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of IDEA..."[31]

Petitioner has the burden of establishing the type and amount of compensatory services that will compensate the student for the services that were denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

> Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.[32]

Thus, in a claim for compensatory education services, the Hearing Officer must determine (1) the educational deficit Petitioner suffered as a consequence of DCPS' failure to provide services, and (2) the type and amount of services that would adequately compensate him for this deficit. pro posed a compensatory education plan including individual tutoring for three hours per week for two years, ninety minutes of counseling per week for two years, and one hour per week of "life skills" wrap-around services for two years. However, none of Petitioner's witnesses offered any evidence that Petitioner suffered a measurable educational deficit as a result of DCPS' alleged violation. In the absence of any evidence that Petitioner suffered a measurable deficit, the Hearing Officer is incapable of determining the likelihood that these proposals would be likely to address that deficit.

In sum, neither nor any other witness offered evidence that Petitioner suffered any educational deficit as a result of DCPS' alleged violation. Thus, there could be no showing of the level of proficiency Petitioner would have reached but for DCPS' violation, or the type and amount of services that would allow him to reach that level of

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[31] *Id.*, 401 F.3d at 523-24, citations omitted.
[32] *Id.*, 401 F.3d at 524.

proficiency. Therefore, Petitioner failed to meet the standard of proof set forth in *Reid* to justify an award of compensatory education services.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented during the hearing, and the representations of the parties' counsel at the hearing, this 19th day of November 2009, it is hereby

ORDERED, that DCPS shall immediately issue a Prior Notice placing Petitioner at for the remainder of the 2009-2010 school year, including transportation and all other appropriate related services.

IT IS FURTHER ORDERED, that upon the submission to DCPS of receipts, invoices, cancelled checks, or other documentation of payment, DCPS shall reimburse Petitioner's parents or for tuition and transportation expenses related to Petitioner's enrollment at for the 2009-2010 school year.

IT IS FURTHER ORDERED, that on or before December 23, 2009, DCPS shall convene an MDT meeting to review all current evaluations and update Petitioner's IEP. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel, Douglas Tyrka, Esquire.

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

IT IS FURTHER ORDERED, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's counsel will contact the Special Education Coordinator at the appropriate DCPS Placement Specialist, and the DCPS OSE Resolution Team to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply. [33]

IT IS FURTHER ORDERED, that this Order is effective immediately.

[33] If DCPS fails to contact Petitioner's counsel to coordinate scheduling the MDT meeting by a date that would make compliance with this Order feasible, Petitioner's counsel shall initiate telephone calls and electronic correspondence to attempt to effect compliance within the timelines set out herein.

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) days of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

/s/
Terry Michael Banks
Hearing Officer

Date: November 19, 2009