

<p>STUDENT<sup>1</sup>, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS")</p> <p>Respondent.</p> <p>Case # 2009-0811</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: September 28, 2009, &amp; October 1, 2009</p> <p>Date of Complaint: May 29, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: John Straus, Esq. 1220 L Street, N.W. Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Nia Fripp, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* ("IDEA"), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

## **PROCEDURAL BACKGROUND:**

A Due Process Hearing was convened September 28, 2009, at the Van Ness School, 1150 5<sup>th</sup> Street, SE, Washington, DC 20003, and concluded on October 1, 2009. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on May 29, 2009, alleging the issues outlined below.

## **RELEVANT EVIDENCE CONSIDERED:**

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1- 22 and DCPS Exhibits 1-10) which were admitted into the record.<sup>2</sup>

## **ISSUE(S):<sup>3</sup>**

Did DCPS deny the student a free and appropriate public education by failing to provide an appropriate program/placement? Petitioner specifically alleges that because the student has never attended school and is significantly behind academically from his same age peers, he is need of a program that will gradually integrate him into a school environment so that he is not thrust into a setting that would exacerbate his emotional condition.

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<sup>2</sup> DCPS objected the admission of several documents disclosed by Petitioner on the basis of irrelevance and being more than 2 years old (outside the IDEA statute of limitation period). The Hearing Officer concluded these documents would be admitted based on timely disclosure and relevance as to background on what has occurred regarding the special education services to the student prior to the complaint being filed.

<sup>3</sup> The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn. When Petitioner filed the complaint it alleged the parent was not provided meaningful participation in the May 2009 MDT meeting. In light of the MDT meeting held August 26, 2009, Petitioner withdrew the claim of alleged failure to provide the parent meaningfully participation.

#### FINDINGS OF FACT <sup>4</sup>:

1. The student is [REDACTED] old and resides in the District of Columbia with his parent(s). The student has been determined eligible as a child with a disability under IDEA with a disability classification of Multiple Disabilities (“MD”) including emotional disturbance (“ED”) and Other Health Impaired (“OHI”) for the condition of neurological impairment.<sup>5</sup> (Petitioner’s Exhibit 15)
2. On May 25, 2004, the student received a speech and language evaluation. The evaluator recommended the student receive speech and language therapy two times per week for one hour sessions. There has been no subsequent speech language evaluation of the student. (Petitioner’s Exhibit 3, [REDACTED] testimony)
3. The student was first found eligible for special education services in August 2008. (Petitioner’s Exhibit 9)
4. The student has been a homebound student and has never attended regular school. DCPS was to provide the student visiting home instruction and related services at home. During School Year (“SY”) 2008-09 the student was provided the related services of speech and language therapy and counseling in his home by the firm “Seeds of Tomorrow.” (Dr. Holman’s testimony, Ms. [REDACTED] testimony)
5. In April 2009 the student’s physician completed a “Physician’s Certificate of Pupil’s Inability to Attend School” stating that the student could not attend school due to “developmental delay and seizure disorder.” The duration for which the student could not attend student was “to be determined.” (Petitioner’s Exhibit 13)
6. On May 5, 2009, DCPS School Placement Physician, Dr. [REDACTED], prepared an addendum to a previous medical review of records. Dr. [REDACTED] recommended that the student be in a therapeutic classroom placement with small student to teacher ratio, with a child specific aide to provide one to one assistance in managing anxiety and focusing on tasks. She also recommended a “process for transitioning from home to classroom as the student does not like crowds and needs guidance in developing social and coping skills.” (Petitioner’s Exhibit 14)
7. On May 18, 2009, DCPS convened a multidisciplinary team (“MDT”) meeting to update the student’s individualized educational program (“IEP”). The student’s IEP from that date prescribes the following weekly services: 10 hours of specialized instruction 1 hour of speech-language services and 1 hour of behavioral support services. The DCPS

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<sup>4</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party’s Exhibit.

<sup>5</sup> The student has also been diagnosed with ADHD; however, the student’s IEP and MDT notes indicate that the OHI designation is related to a neurological disorder.

members determined the student would attend his neighborhood school, School A, and the IEP would be implemented there. (Dr. ██████ testimony, Petitioner's Exhibit 15)

8. On May 29, 2009, Petitioner filed the due process complaint challenging the decision regarding the student's educational placement made at the May 18, 2009, MDT meeting. (Petitioner's Exhibit 1).
9. On July 18, 2009, a psychological evaluation was conducted of the student.<sup>6</sup> The evaluation determined the student is of low average cognitive abilities. The results of the adaptive behavior assessment determined the student's overall functioning fell at the moderately low level. The evaluator determined the student has problem modulating his emotions and controlling his impulses. The student experiences problems with initiating, organizing and sustaining working memory and self monitoring. He experiences significant problems with conduct, aggression, and hyperactivity. The student has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). The academic achievement assessments revealed that the student is operating at the pre-kindergarten level at 0.1 percentile and an age equivalency of under five years old. (Petitioner's Exhibit 20)
10. On August 26, 2009, DCPS convened a MDT meeting to review a recent psychological evaluation conducted of the student and to review the proposed placement of the student. The DCPS members of the MDT determined the student's IEP would be implemented at School A. The MDT discussed the student having a one-to-one aide if he attended School A; however, the body of the IEP was not amended to include the aide. (Dr. ██████ testimony, Petitioner's Exhibits 22)
11. The student is provided private therapy services once a week by Dr. ██████. In addition to providing the student therapy, ██████ supervised the student's July 18, 2009, psychological evaluation. Based on ██████ knowledge of the student's academic abilities and psychological and emotional condition, ██████ is of the opinion that the student could attend a regular education setting such as School A where he can be provided general and special education services. However, Dr. Scott believes because the student has never been in such an educational setting and because he is so far behind academically from his same age peers that he would be harmed emotionally if he were to attend School A or any regular elementary school without first being provided intense academic tutoring to raise his academic abilities so that he could adequately perform in a regular education setting. ██████ has concluded the student needs "intense catch-up in reading, writing and math." "The student is currently operating at pre-kindergarten level not because he doesn't have the ability but because he has not been exposed." Based on the July 2009 psychological evaluation, ██████ considers the student to have low

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<sup>6</sup> The evaluation included the following assessments: Wechsler Intelligence Scales for Children Fourth Edition (WISC-IV) Wechsler Individual Achievement Test, Second Edition (WIAT-II), Beery-Buktenica Development of Visuomotor Integration (VMI), Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) Behavior Rating Inventory of Executive function, Parent Form, Behavior Assessment System for Children, Second Edition (BASC-2), Parent Rating Scales, Structured Developmental History.

average cognitive abilities and the ability to function on grade level if he is provided intense catch-up services on a short term basis. [REDACTED] testimony) <sup>7</sup>

12. [REDACTED] of the opinion that a six to twelve week program of intense tutoring in a program such a Lindamood Bell would be appropriate for this student to quickly raise his academic abilities to then transition into a regular education setting. [REDACTED]s of the opinion that with educational assessments following such an intense program and an updated speech and language evaluation a MDT could then adequately determine the student's educational and related service needs and determine an appropriate educational placement. [REDACTED] testimony)
  
13. The student was provided in-home counseling services during SY 2008-09. The counselor who provided the counseling services assisted the student in addressing his apprehension and interaction with others. The student often exhibited behavior of fleeing from social settings where he felt uncomfortable. The counselor observed the student often did not want to leave his home or even his bedroom. On several occasions, as a form of therapy, the counselor walked with the student in around his neighborhood. The student exhibited anxiety when the counselor attempted to take the student to School A, on a non school day, in an attempt to acclimate the student to the school building. The student was physically resisted going anywhere near the school building. (Mr. [REDACTED] testimony)
  
14. The student did not begin attending School A at the start of SY 2009-10 as the School A staff expected. Since the start of the school year there has been a dedicated aide assigned to student. The aide has shown up daily at School A awaiting the student's arrival. The School has been using the aide's services to assist in other students until the student begins attending. School A staff has a special education teacher available to provide the student specialized instruction. The School can fashion a transition program for the student to allow him to come to the School A part of the day until he fills comfortable attending and participating in a regular classroom. (Ms. [REDACTED] testimony)
  
15. Lindamood Bell provides intense customized educational remedial services to students. The customized programs are developed based on an initial diagnostic assessment of the student. The typical programs include instruction for approximately four hours per day for approximately twelve weeks. The diagnostic evaluation is \$645. The hourly instruction cost is \$102. The diagnostic assessment and 120 hours for a six week four hour per week program would cost approximately \$12,845. Although the Lindamood Bell staff has reviewed the student's educational records there has been no diagnostic assessment of the student conducted and no recommendation as to what services would be proposed for the student. (Ms. [REDACTED] testimony)

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<sup>7</sup> This witness was designated as an expert in pediatric psychologist.

## CONCLUSIONS OF LAW:

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

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

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.<sup>8</sup> In this case the student/parent is seeking relief and has the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Did DCPS deny the student a free and appropriate public education by failing to provide an appropriate placement? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

34 CFR § 300.116 provides:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that-- (a) The placement decision-- (1) Is 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 (2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118; (b) The child's placement-- (1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (Authority: 20 U.S.C. 1412(a)(5))

Although the complaint challenged the student's placement and program as inappropriate, the complaint did not specifically challenge the student's IEP. The student's IEP prescribes that he be placed in a combination setting with general education and special education services provided at his neighborhood school. The MDT at the May 2009 and August 2009 determined that the student could be educated in his neighborhood school.

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<sup>8</sup> Based solely upon the 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 FAPE.

34 CFR § 300.116 requires that a child be educated in the least restrictive environment preferably in his neighborhood school. However, this provision also states that in selecting a student's least restrict environment consideration should be given to any potential harmful effect on the child or on the quality of services that he or she needs.

██████████ credibly testified and the student's most recent psychological evaluation reveal that the student is significantly behind academically and operating on a pre-kindergarten level although his chronological age would make him a second or third grader. In addition, ██████████ and ██████████ credibly testified as to the student's emotional impairments and anxiety that would be exacerbated if he were immediately thrust into a regular school setting without some intense remediation and transition planning.

██████████ the DCPS physician, recommended a process for transitioning from home to classroom be developed for the student who "does not like crowds and appears to need guidance in developing social skills and coping skills." ██████████ recommended the student be placed in a therapeutic classroom with a small student teacher ratio and that a child specific aide should be assigned to him to provide one to one assistance in managing anxiety and focusing on tasks. The student's IEP does not appear to make any provisions for such a transition or for a dedicated aide.

Although ██████████ testified that DCPS has a dedicated aide assigned and available for the student, the student's IEP does not specifically prescribe the dedicated aide. And although ██████████ testified that School A is willing to develop a transition plan to accommodate the student including allowing him to attend school part of the day, the student's IEP and formal program does not include such accommodations. The Hearing Officer does not doubt Ms. Fox's sincerity and intention; however, without such services specifically prescribed in the student's IEP there is no guarantee DCPS will provide the needed services.

The Hearing Officer concludes based on the evidence presented that the student's placement at his neighborhood school without the student's IEP containing the specific requirement of a dedicated aide and specifics of a transition that would allow the student needed remediation and gradual integration into a school setting, the student's current program and placement is inappropriate. As there has not yet been an assessment conducted by the placement option proposed by the parent the Hearing Officer cannot award any services at the Lindamood Bell program. However, the Hearing Officer will authorize that DCPS fund a diagnostic assessment.

In addition, ██████████ credibly testified that the student's speech language skills need to be reassessed to accurately address the student's current needs. It appears that the student's most recent evaluation is more than three years old. Consequently, the Hearing Officer is requiring DCPS to provide an updated speech and language evaluation by a date certain.

**ORDER:**

1. DCPS shall fund and the parent shall obtain a diagnostic assessment of the student's academic abilities from Lindamood Bell at a cost not to exceed \$645.
2. DCPS shall, within ten (10) calendar days of the issuance of this Order, provide Petitioner a copy of an up to date speech/language evaluation if one has been conducted. If the evaluation is not provided within that time frame Petitioner is authorized by this Order to obtain an independent speech/language evaluation at DCPS approved rate(s).
3. DCPS shall within fifteen (15) school days of the issuance of this Order, convene a multidisciplinary team (MDT) meeting to review the Lindamood Bell diagnostic assessment if available, review the student's recent speech and language evaluation if available, review and revise the student's IEP to include a dedicated aide and a transition plan for gradual integration of the student into the general/special education setting; and to review any outstanding home instruction or related services or compensatory education issues that are outstanding.<sup>9</sup>
4. The MDT meeting shall be scheduled through counsel for the student and parent.
5. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



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**Coles B. Ruff, Esq.**

**Hearing Officer**

**Date: October 11, 2009**

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<sup>9</sup> The Hearing Officer did not conclude in this HOD that the student was due any compensatory education services. However during the hearing there was discussion between the parties regarding settlement of outstanding compensatory education services from prior HOD(s) and/or MDT/IEP meeting(s).