

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
July 01, 2013

PETITIONER,
on behalf of STUDENT,¹

Date Issued: June 30, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the “Petitioner” or “MOTHER”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“DCMR”). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools’ (“DCPS”) March 20, 2013 Individualized Education Program (“IEP”) denies Student a Free Appropriate Public Education (“FAPE”) because it does not meet the child’s alleged need for full-time special education programming.

¹ Personal identification information is provided in Appendix A.

Student, an AGE boy, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on May 2, 2013, named DCPS as respondent. The parties met for a resolution session on May 21, 2013 and were unable to reach an agreement. On May 30, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

On May 29, 2013, DCPS filed a motion to dismiss on the grounds that Petitioner's claims are partially barred by the doctrines of *res judicata* and collateral estoppel due to settlement agreements between the parties on May 9, 2012 and September 19, 2012. By order of June 17, 2013, I denied the motion.

The due process hearing was reconvened before the undersigned Impartial Hearing Officer on June 25, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS COUNSEL.

Petitioner testified and called as witnesses, EDUCATIONAL ADVOCATE, PRIVATE SCHOOL EDUCATION DIRECTOR and CLINICAL PSYCHOLOGIST. DCPS called as witnesses SPECIAL EDUCATION COORDINATOR ("SEC") and PROJECT COORDINATOR. Petitioner's Exhibits P-1 through P-19 were admitted into evidence without objection, with the exception of Exhibits P-11 and P-12 which were admitted over DCPS' objections and P-13, which was withdrawn. DCPS' Exhibits R-1 through R-9 were admitted without objection. Exhibit R-10 was admitted over Petitioner's objection. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

This issues to be determined in this case are:

- Whether DCPS’ March 20, 2013 denies Student a FAPE because it does not provide appropriate services to target Student’s educational and behavioral issues and because it does not meet Student’s need for full-time special education services in an outside of general education setting; and
- Whether DCPS has violated the Parent’s IDEA right to inspect and review Student’s education records, specifically a DCPS’ LRE review.

For relief, Petitioner seeks an order for DCPS to convene Student’s IEP team to revise his IEP, an order for DCPS to fund Student’s full-time placement at Private School and to provide school transportation and an order that DCPS provide Parent full access to Student’s education records.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student, an AGE boy, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification, Intellectual Disability (“ID”). Exhibit P-7. Prior to December 2012, Student’s primary disability classification was Specific Learning Disability (“SLD”). Exhibit P-15.

3. For the 2012-2013 school year, Student was enrolled in GRADE at CITY

ELEMENTARY SCHOOL. Exhibit R-3. Student has attended City Elementary School since the 2011-2012 school year. Testimony of Mother. Prior to enrolling in City Elementary School, Student attended PRIOR ELEMENTARY SCHOOL. Exhibit P-16, Testimony of Mother.

4. In a November 16, 2010 DCPS psychological evaluation report, the DCPS evaluator recommended, *inter alia*, that given Student's academic, social/emotional and adaptive/daily living deficits, special teaching methods might be considered, including special class placement for severe deficits in general intellectual development. She recommended that teachers be encouraged to limit instruction to Student primarily to one-to-one or small-group settings, reserving large-group settings for maintenance activities of learned skills and other activities. Exhibit P-17.

5. Student's March 16, 2012 City Elementary School IEP identified his primary disability as SLD. The IEP provided Student 12 hours per week of Specialized Instruction in the General Education setting, 2 hours per month of Occupational Therapy ("OT") outside General Education and 2 hours per month of Speech-Language Pathology ("S/L") in General Education. Exhibit R-1.

6. In June 2012, Student was referred to LICENSED PSYCHOLOGIST for an independent a psychoeducational evaluation. Licensed Psychologist and/or her clinical extern reviewed existing data and administered a battery of cognitive and academic achievement tests to Student. Licensed Psychologist was unable to determine a Full Scale IQ score for Student due to his inability to respond meaningfully to several questions. Using Matrix Reasoning performance results, Licensed Psychologist concluded that Student's cognitive abilities fell in the Extremely Low range. Student's performance on the Visual Motor Integration (VMI) assessment also fell in the Very Low range for motor skills and visual skills. Standardized tests

of academic achievement indicated that Student's academic performance fell in the Very Low range in all areas, including reading, math, spelling and written expression. Exhibit P-14.

7. Licensed Psychologist's diagnostic impressions for Student were Attention Deficit Hyperactivity Disorder ("ADHD"), Not Otherwise Specified (by history), Oppositional Defiant Disorder (by history) and Mild Mental Retardation. Exhibit P-14.

8. Licensed Psychologist recommended, *inter alia*, that Student's Multidisciplinary Team ("MDT") consider providing Student with special education services as a student with Intellectual Disability, which accounts for his cognitive, academic and adaptive functioning delays. She stated that Student will require a small, 1:5 maximum teacher/student ratio, supportive and structured classroom environment, where teachers are experienced in working with students with academic disabilities and where Student can have access to behavior and therapeutic staff to assist him when he is demonstrating behavioral and/or emotional challenges. Exhibit P-14.

9. Student's MDT team at City Elementary School reviewed the June 30, 2012 Comprehensive Psychological Evaluation report on November 13, 2012. Testimony of Educational Advocate.²

10. Student's MDT/IEP team met at City Middle School on December 17, 2012. At that meeting, Mother requested a full-time special education placement for Student. The DCPS compliance team member stated that before making a full-time placement, DCPS would need to conduct a Least Restrictive Environment ("LRE") review. Exhibit P-12; Testimony of Educational Advocate. By email of December 17, 2012 to SEC and another DCPS employee, Educational Advocate confirmed Mother's request that Student be placed in a full-time, small-

² At the due process hearing, Counsel for Petitioner withdrew Exhibit P-13, which included Educational Advocate's meeting notes and a November 2, 2012 Review of Independent Educational Evaluation Report by a DCPS school psychologist.

structured and therapeutic setting. Educational Advocate attached to the email a November 8, 2012 letter from a District of Columbia non-public school stating that Student was an appropriate candidate for that school's Learning Disabled ("LD") program. Exhibit P-11. At the November 13, 2012 meeting or at the December 12, 2012 meeting, Student's disability classification was changed to ID. Exhibit R-3.

11. Beginning December 12, 2012, Educational Advocate made repeated requests to SEC to provide access to Student's educational records including, specifically, "LRE Review Documents." Exhibits P-5, P-6. Mother telephoned SEC and instructed her to send Student's educational records to her and to stop sending them to the attorney (Educational Advocate's employer). SEC then put Educational Advocate's record requests "on hold." Testimony of SEC. SEC did not receive an LRE review document for Student following the December 12, 2012 IEP/MDT meeting. *Id.*

12. Student's City Elementary School IEP team convened on March 20, 2013 for Student's annual IEP review. Mother and Educational Advocate attended the IEP meeting. At this IEP meeting, the team increased Student's Specialized Instruction to 15 hours per week, in the General Education setting. The IEP also provides 2 hours per month of OT services outside General Education, 2 hours per month of S/L Pathology in General Education and 120 minutes per month of Behavioral Support Services in General Education. (The IEP states, presumably a typographical error, "120 hr. per mon.") The IEP provides for Extended School Year ("ESY") services. Exhibit R-3. In a May 31, 2013 IEP review, the IEP team added 60 minutes per month of Physical Therapy ("PT"), outside General Education, to Student's IEP. Exhibit R-4.

13. SEC has seen amazing progress by Student since the last school year. She observed that Student had done well with phonetics skills, which has helped his reading and was

improving with sequencing. Student knows his letters. Student feels comfortable at City Elementary School and receives a lot of personal attention there. For several weeks prior to the March 20, 2013 IEP meeting, Student had in-class behavior issues, but until then, had been showing improvement in his behavior. Testimony of SEC. Mother acknowledged that Student had made a little bit of progress in the last school year until the behavior issues that arose in March. Testimony of Mother.

14. On Student's April 18, 2013 IEP Progress Report, recorded by SPECIAL EDUCATION TEACHER and the related services providers, Student was reported as "Progressing" on each of his IEP goals, except independently writing numbers and letters without a visual model, which had just been introduced. Student was reported to have "Mastered" naming and categorizing basic items/form sentences given target words with 70% accuracy, and independently writing numbers and letters with a visual model on 4/5 opportunities. Exhibit R-6.

15. On Student's June 17, 2013 IEP Progress Report, recorded by Special Education Teacher and the related services providers, Student was reported as "Progressing" on each of his IEP goals, except for PT goals which has just been introduced. Student was reported to have "Mastered" naming and categorizing basic items/form sentences given target words with 70% accuracy, and independently writing numbers and letters with a visual model on 4/5 opportunities. Exhibit R-10.

16. Service Trackers for S/L services provided to Student beginning March 7, 2013 show Student was generally progressing on expressive and receptive language skills. Exhibit R-7.

17. Service Trackers for OT services provided to Student beginning March 28, 2013 show Student was generally progressing on his IEP visual perceptual motor integration goal.

Exhibit R-8.

18. Service Trackers for psycho-social counseling services provided to Student beginning March 15, 2013 show Student was generally maintaining or progressing on his IEP social-emotional goals. Exhibit R-9.

19. Private School is a private, separate day school in suburban Maryland. It enrolls children with disabilities, aged 3 through adult, in elementary, middle and high school programs. Its students have disability classifications including Emotional Disturbance (“ED”), Learning Disability (“LD”), ID, Speech or Language Impairment as well as multiple disabilities. A large majority of the students are classified as ED. The students at Private School have a variety of behavioral and social-emotional difficulties. They do not have interaction at school with non-disabled peers. Testimony of Education Director.

20. The Private School elementary program has self-contained classrooms, grouped by age, grade or ability level. The class size is 9 students, taught by a teacher, certified in special education, and a staff assistant. Testimony of Education Director.

21. Private School provides a therapeutic counseling and behavior program for all students. Testimony of Education Director.

22. The tuition fee at Private School is approximately \$35,000 per year, with additional charges for related services. The school has a current certificate of approval issued by the D.C. Office of the State Superintendent of Education (“OSSE”). Testimony of Education Director.

23. Student and Mother visited Private School and were interviewed there by school staff. Private School has accepted Student for admission. Education Director testified that the school would be able to serve Student's educational and IEP needs. Testimony of Education Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 95 (D.D.C.2008) (Plaintiff, as the party challenging the IEP, had the burden of proof to show that the plan was inappropriate, citing *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).)

Analysis

1. DOES DCPS' MARCH 20, 2013 DENY STUDENT A FAPE BECAUSE IT DOES NOT PROVIDE APPROPRIATE SERVICES TO TARGET STUDENT'S EDUCATIONAL AND BEHAVIORAL ISSUES AND BECAUSE IT DOES NOT MEET STUDENT'S NEED FOR FULL-TIME SPECIAL EDUCATION SERVICES IN AN OUTSIDE OF GENERAL EDUCATION SETTING?

Petitioner asserts that DCPS' March 20, 2013 IEP denies Student a FAPE because it does not provide appropriate services or provide Student a full-time, outside of general education, placement. "The question of whether a public school placement is appropriate rests on '(1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide . . . some educational benefit to [the student.]'" *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010), quoting *Schoenbach v. District of*

Columbia, 309 F.Supp.2d 71, 80 (D.D.C.2004). In this case, Petitioner has not raised a procedural issue with the development of the March 20, 2013 IEP. Therefore, I move directly to the second prong of the inquiry.

The IDEA's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).) The minimum standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Petitioner's expert, Clinical Psychologist, testified that Student has developed behavior problems that are a manifestation of his ID and ADHD disorders. She opined that the "optimal" classroom setting for Student would be a small class with a 1:5 teacher-to-student ratio and that a general education classroom of 26 students was not the optimal setting for educating Student. I accord little weight to Clinical Psychologist's testimony because her opinion was based, solely,

on her review of the parties' prehearing disclosure documents. She did not evaluate Student or observe him in the school setting. In fact, she has never met Student or the Petitioner. Neither did she interview Student's teachers, school staff or other service providers. Moreover, in her testimony, Clinical Psychologist addressed the optimal setting for Student rather than "basic floor of opportunity" standard set forth by the Supreme Court in *Rowley, supra. Compare A.M. v. District of Columbia*, 2013 WL 1248999, 10 (D.D.C. Mar. 28, 2013) ("Plaintiffs considered Kingsbury to be the optimal placement, and it may well have been. But that does not obligate the District to pay for it if the placement it offered was sufficient to meet the educational needs of the student." *Id.*)

I accord much more weight to the recommendations contained in the independent June 2012 comprehensive psychological evaluation report on Student. Licensed Psychologist and/or her clinical extern conducted cognitive and educational testing of Student and interviewed his Mother and teachers. In their June 30, 2012 report, they stated that Student requires a small, 1:5 maximum teacher/student ratio, supportive and structured classroom environment, where teachers are experienced in working with students with academic disabilities and where Student can have access to behavior and therapeutic staff to assist him when he is demonstrating behavioral and/or emotional challenges. However, Licensed Psychologist did not testify at the due process hearing and the comprehensive psychological evaluation was conducted at the end of the 2011-2012 school year, over 12 months before the hearing in the present case.

Supporting the appropriateness of DCPS' March 20, 2013 IEP is the evidence of the progress Student has made over the last school year under his March 16, 2012 IEP. Like the current IEP, the 2012 IEP placed Student with non-disabled peers in the general education classroom. SEC testified, without rebuttal, that Student has made "amaz[ing]" progress over the

2012-2013 school year. She testified to Student's growth at City Elementary School, and, except for a period of behavior problems for a couple of weeks before the March 20, 2013 IEP meeting, that Student's behavior had improved over the school year. SEC identified, specifically, phonetics skills, which has helped Student's reading, and sequencing as areas of Student's progress. I found SEC to be a credible witness and her testimony was supported by Student's IEP progress reports, which show sustained and specific progress on all of his IEP goals, except for PT goals which were introduced later in the school year. I find that DCPS' March 16, 2012 IEP clearly conferred some educational benefit upon Student. Service Trackers for S/L, OT and psycho-social counseling services provided to Student from March 2013 through the end of the school year also reported Student's progress in these areas, generally, as Progressing or Maintaining.

Academic progress is one of the "yardsticks" used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012); *Hunter v. District of Columbia*, 2008 WL 4307492, 10 (D.D.C. Sept. 17, 2008), citing *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir.1998) ("An appropriate public education under IDEA is one that is likely to produce progress, not regression.") (citations omitted); *Danielle G. v. N.Y. City Dept. of Educ.*, 2008 WL 3286579, at *7 (E.D.N.Y. Aug. 7, 2008) ("A school district will fulfill its substantive obligations under the IDEA if the student is likely to make progress, not regress, under his IEP, and if the IEP affords the student with an opportunity greater than mere trivial advancement.") (citations omitted); *P.K. v. Bedford Cent. Sch. Dist.*, 569 F.Supp.2d 371, 385 (S.D.N.Y. 2008) ("[I]n determining whether a school district has met its obligations under the IDEA, a court must look for objective evidence in the record indicating whether the student would likely have progressed or regressed under the challenged

IEP.”) DCPS’ March 20, 2013 IEP continues and augments both the Specialized Instruction and Related Services provided to Student in the prior year IEP under which Student did make progress.

Another consideration supporting the appropriateness of Student’s placement in the March 20, 2013 IEP is the opportunity at City Elementary School for Student to interact with non-disabled peers. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012) (IDEA requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate.) SEC testified that at City Elementary School, Student benefits from being with his grade-level peers while still receiving a lot of individualized support. At the Private School placement sought by Petitioner, Student would be segregated from his non-disabled peers.

The recommendation in the June 2012 comprehensive psychological, that Student needed a small, structured classroom environment, notwithstanding, the evidence at the due process hearing established that Student is receiving more than *de minimis* benefit from his current placement in the general education setting at City Elementary School. I conclude, therefore, that DCPS’ March 20, 2013 IEP was reasonably calculated to provide Student educational benefits and that Petitioner has not met her burden of proof was to show that the IEP was inappropriate. DCPS prevails on this issue.

2. DID DCPS VIOLATE THE PARENT’S IDEA RIGHT TO INSPECT AND REVIEW STUDENT’S EDUCATION RECORDS, SPECIFICALLY DCPS’ LRE REVIEW?

Under the IDEA, DCPS must provide parents an opportunity to inspect and review their child’s educational records. *See* 34 CFR § 300.501(a); *Friendship Edison Public Charter*

School Collegiate Campus v. Murphy 2006 WL 2711524, 4 (D.D.C.2006). Educational Advocate, an employee of Petitioner’s Counsel, testified that he did not receive responses from DCPS to his repeated requests, beginning December 2012, for copies of Student’s educational records. However, SEC testified, without rebuttal, that Mother telephoned her and instructed her not to send records to Petitioner’s attorney. SEC therefore “put on hold” Educational Advocate’s record request. The right to have a representative inspect and review a child’s educational records belongs to the parent – not her attorney. *See* 34 CFR § 300.613(b)(3). I find, therefore, that the evidence does not establish that DCPS’ failure, in this case, to provide copies of Student’s records to Educational Advocate violated Mother’s right to access to Student’s records.³

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

All relief requested by the Petitioner in this matter is denied.

Date: June 30, 2013

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination 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 from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

³ The specific record, which Petitioner’s Counsel complains was not provided, was a Least Restrictive Environment (“LRE”) review for Student. SEC testified that she did not receive an LRE review following the December 17, 2012 MDT/IEP team meeting.