

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

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

[STUDENT],¹
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 2/10/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 2/2/11 Room: 2009

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

On December 2, 2010 counsel for the petitioner filed a due process complaint alleging that DCPS denied a Free Appropriate Public Education (FAPE) to the student by failing to develop an appropriate IEP for the 2010-2011 School Year because the IEP did not require a full-time program, but instead provided for twenty (20) hours of specialized instruction with seven (7) hours outside of general education and thirteen (13) hours in general education. The complaint also alleged that DCPS denied a FAPE to the student by failing to provide an appropriate placement for the student at _____ (hereinafter

The complaint also alleged that the MDT composition was improper because the regular education teacher was not present at a November 9, 2010 MDT/IEP meeting and that independent evaluations were not properly reviewed at the November 9th MDT meeting. The

¹ Personal identification information is provided in Appendix A.

student is a _____ year old male student who has been found eligible for special education services as a student with the disability classification of a specific learning disability on his April 30, 2010 IEP. On December 15, 2010 counsel for the respondent DCPS filed a response denying the allegations and asserting that _____ is an appropriate placement that can implement the student's IEP. On December 29, 2010 a resolution meeting was convened and no agreement was reached. The forty-five day timeline began to run on December 30, 2010 and the HOD is due on February 12, 2011. On January 5, 2011, a pre-hearing conference was held with counsel for the petitioner Darnell Henderson and counsel for the respondent DCPS, Blair Matsumoto. On January 7, 2011 the Pre-Hearing Order was issued. The Order states that an MDT/IEP meeting scheduled for January 19, 2011 may resolve some or all the issues in this case and that counsel for petitioner is to report back to this Hearing Officer on the outcome of the January 19th meeting no later than the close of business on January 20, 2011. As a result of the January 19th meeting, the issues of the composition of the MDT and review of evaluations were resolved. The remaining issues for the hearing are 1.) Whether DCPS denied a FAPE to the student by failing to develop an appropriate IEP because the IEP developed did not require a full-time out of general education program and 2.) Whether the student's current placement at _____ is an appropriate placement. The relief requested by counsel for petitioner is placement at the non-public special education program The _____ and compensatory education.

The due process hearing convened at 9 a.m. on February 2, 2011 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Darnell Henderson represented the petitioner and Blair Matsumoto represented the respondent DCPS at the hearing. The hearing was closed. At the outset of hearing, Petitioner's Documents P-1-P-25 and

Respondent's Documents DCPS-1-DCPS-18 were admitted into evidence without objection. All witnesses were sworn in under oath prior to testifying. Counsel for petitioner called the following witnesses: the educational advocate Ms. Yojinde Paxton, an independent psychologist, Dr. Natasha Nelson, the principal of the _____ and educational advocate, _____ testified in person and Dr. Nelson, _____ and _____ testified by telephone. Counsel for respondent called as witnesses: a special education teacher and special education coordinator at _____ and a DCPS compliance case manager who all testified by telephone.

JURISDICTION

The hearing was convened on February 2, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code Of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

The student is a _____-year-old male who has been found eligible for special education services since the _____ grade. The student had a disability classification of Specific Learning Disability until a January 19, 2011 MDT/IEP meeting reclassified the student as Intellectually Deficient (ID-formerly Mental Retardation). He has for the last three years attended _____

in a full-inclusion program in the general education setting. The student has very low cognitive ability and severe deficits in all academic areas. He received failing grades in most of his classes. The student also has attendance issues. Petitioner has filed this due process complaint alleging that the student's than current IEP of October 1, 2009 was not appropriate in not providing a full-time IEP out of general education and only providing for seven hours of

specialized instruction outside of general education and thirteen hours of specialized instruction in general education. Petitioner also alleged that the student's current placement at is inappropriate. Petitioner requested as relief placement in a full-time non-public day special education program and compensatory education.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Whether DCPS denied a FAPE to the student by failing to develop an appropriate IEP because the IEP developed did not require a full-time out of general education program?
2. Whether the student's current placement at is an appropriate placement?

The relief requested by counsel for petitioner is placement at The and compensatory education.

FINDINGS OF FACT

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

1. The student is a -year old male who has been found eligible for special education services. (P-8, P-10, DCPS-3 and 4)
2. The student has had the disability classification of Specific Learning Disability and has been eligible for special education since he was years old and in the grade. (DCPS-16) The student's current IEP developed on January 19, 2011 changed

his disability classification to Intellectual Disability (also known as Mental Retardation). (DCPS-4)

3. The student is attending his neighborhood high school Ballou S.H.S. and that has been his placement since the 2008-2009 School Year. (DCPS-15)
4. The student's IEP of October 1, 2009 and signed by the parent calls for 7 hours a week of specialized instruction outside of general education and 13 hours a week of specialized instruction in general education. (P-8)
5. Until the January 19, 2011 IEP, the student spent according to the Ballou school psychologist's data evaluation review "100% of his time in the general education curriculum with general education peers and is supported with inclusion special education services during that time." (DCPS-16) The special education coordinator conceded in her testimony that the student did not receive 7 hours a week of specialized instruction outside of general education as required by his IEP.
(Testimony of special education coordinator)
6. A comprehensive psychological evaluation was conducted with the student by independent clinical school psychologist Dr. Natasha Nelson on September 11, 2010 and the report written on September 14, 2010. Dr. Nelson administered the Woodcock Johnson III Tests of Cognitive Abilities as a measure of his intelligence and the student received a General Intellectual Ability (GIA) score of 45 (or full-scale IQ score) which is in the Very Low range when compared to others in his age range (P-13 at p.4) The student's Verbal Ability standard score was 53, his Thinking Ability score was 57 and his Cognitive Efficiency score was 37. All these scores are in the Very Low range. (P-13 at p.5) Dr. Nelson's report stated: "Overall, his scores

suggest that he will evidence great difficulty in keeping up with his same aged peers on a wide variety of non-verbal and verbal reasoning tasks.” (P-13 at p.12) The Woodcock Johnson III Tests of Achievement were administered to measure the student’s academic skills. His scores were as follows: Broad Reading=23 (grade equivalent=1.6); Broad Mathematics=33 (grade equivalent=2.0); Broad Written Language=29 (grade equivalent=1.7); Oral Language=67(grade equivalent=2.5) (P-13 at p.12) These scores show severe deficiencies in reading, mathematics, written language and oral language. The special education coordinator at [redacted] agreed with the above test results from Dr. Nelson’s report. (Testimony of special education coordinator)

7. On September 11, 2010, the DCPS school psychologist at [redacted] did an evaluation of the student and wrote her report on November 9, 2010. She concluded in her report that the student “showed significant decline in the areas of reading and math from 2001 to 2010. Because of the significant decline in the areas reading and math; and the continued deficiency in written expression, [student] does need changes to his IEP which may include a more restrictive environment. Full inclusion does not seem appropriate based on the results of this review.” (DCPS-16 at p.4)
8. On November 22 and 23, 2010, the school psychologist at [redacted] administered the Wechsler Abbreviated Scale Intelligence (WASI) to determine the student’s current cognitive abilities. Any score below 69 is considered to be within the intellectually deficient range. The student’s full scale IQ score on the WASI was 55. The report of the school psychologist of January 18, 2011 stated: “His Full Scale IQ of 55 falls in the Intellectually Deficient range and is commensurate with his previous

scores, the last of which was a 45 on the Woodcock Johnson Tests of Cognitive Ability in September of 2010.” (P-14 at p.2)

9. The student’s year-end final report card at _____ for the 2008-09 School Year when he was in the _____ grade showed two Fs in Algebra 1A and 1B and a D in English, a D in Extended Literacy and a D in Environmental Science. (P-15, DCPS-14) The student repeated the _____ grade at _____ in the 2009-2010 School Year. The student’s report card dated March 26, 2010 showed an F in Algebra, an F in English II an F in Art and Culture and a D in French and a D in another Art and Culture class. (P-16) For the 2010-2011 School Year the student is in the tenth grade at _____. The October 28, 2010 report card shows the student in the first advisory period received an F in Geometry, an F in English II and an F in World History. (P-17)
10. The _____ attendance record for the student for the 2009-2010 School Year stated the student was present 126.5 days out of 176 school days including being suspended for ten days from May 4-17, 2010. (DCPS-18)
11. On January 19, 2011, an MDT meeting convened for the purpose of reviewing evaluations including the evaluation by the DCPS psychologist, to review and revise the student’s IEP, and discuss compensatory education. Based on the evaluation of the DCPS psychologist that the student’s IQ was 55 which is in the intellectual deficient range, the MDT changed the student’s disability classification from Specific Learning Disability to Intellectual Disability (ID) (formerly Mental Retardation). The MDT changed the student’s IEP on the amount of specialized instruction and where it would be provided. The new IEP provides for twenty-one (21) hours out of general

education for specialized instruction and seven (7) hours will be in an elective class of his choice. The new IEP also provides for one hour a week of behavioral support service. (DCPS-4 and DCPS-6) At the MDT meeting, DCPS offered the parent sixty-four (64) hours of independent tutoring as compensatory education and both the parent and her educational advocate agreed to that amount for compensatory education. (DCPS-6, Testimony of DCPS Compliance Case Manager, P-11) A compensatory education authorization letter for the above amount was hand delivered to the parent on January 19, 2011. (DCPS-10)

12. The student is currently in the ID/MR self-contained program at _____ for three of his four classes with students who also have an ID/MR disability classification. The adult to student ratio is 2:12 with one special education teacher and one other adult. He goes to a different class for each subject. He has four classes per day each eighty to ninety minutes long. (Testimony of special education coordinator)
13. The student has been accepted at the _____ Upper School at its South East campus in Washington, D.C. (P-22, Testimony of Principal at _____ The _____ is a non-public full-time day special education program. The _____ serves students with severe cognitive disabilities who have been classified as Intellectually Disabled (ID) as well as students with Emotional Disturbance (ED) and Other Health Impaired (OHI). The student would be on a certificate track program. He would participate in a life skills program. A vocational coordinator assists students find job placements. The program is small with a small class environment. All the students have full-time IEPs and _____ can implement a full-time IEP for the student. (Testimony of Principal,

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194 (3rd Cir. 2004) This hearing officer finds the testimony of the parent's expert witness, Dr. Natasha Nelson, very credible based on her comprehensive detailed psychological evaluation of the student, the many valid techniques and testing instruments administered (P-13) and the agreement of DCPS's school psychologist and the special education coordinator at _____ with her testing results. I also found her knowledgeable testimony consistent with her thorough evaluation. I therefore give great weight to her evaluation recommendation and expert opinion testimony that because of the severity of the student's cognitive ability as well as academic weaknesses, that the large high school environment at _____ is overwhelming to the student and he needs a full-time special education school that provides a small setting to receive educational benefits.

This hearing officer also finds the testimony of the compliance case manager on the agreement of the parties on compensatory education credible and there was no evidence presented to dispute her testimony.

CONCLUSIONS OF LAW/DISCUSSION

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

The first issue to be addressed is whether DCPS denied a FAPE to the student by failing to develop an appropriate IEP because the IEP developed did not require a full-time out of general education program.

In determining if an IEP meets the substantive requirements of the IDEA, which is the issue raised here by petitioner, The United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) held that courts must determine “is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” *Rowley*, 458 U.S. at 206-07. In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989), The Third Circuit held that appropriateness under *Rowley* as applied to a student with severe disabilities means more than trivial educational benefit. The Court held in *Polk* that “...using *Rowley*’s own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit.” *Polk* at p.184 Other Circuits have endorsed the *Polk* court’s interpretation of educational benefit in *Doe v. Smith*, 441 IDELR 544 (6th Cir. 1989); *Fort Zumwalt School District v. Clynes*, 26 IDELR 172 (8th Cir. 1991); *Roland M. v. Concord School Comm’n*, 16 IDELR 1129 (1st Cir. 1991) and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4th Cir. 1985) In *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41,44 (3d Cir. 1999) and *T.R. v. Kingwood Township Board of Education*, 32 IDELR 30 (3d Cir. 2000) the Third Circuit held that an IEP must provide significant learning and “meaningful benefit.” *See also A.I. Iapalucci v. D.C.*, 402 F. Supp. 2d 152 (D.D.C. 2005) (“...the appropriate focus of the court’s review should be on whether DCPS is providing A.I. with an IEP that is reasonably calculated to provide meaningful educational benefit.” *Id.* at p.167)

When the due process complaint was filed on December 2, 2010, the complaint alleged that the then current October 1, 2009 IEP calling for thirteen hours a week of specialized instruction in general education and seven hours a week outside of general education was inappropriate and the student needed a full-time out of general education IEP. DCPS admits

through the testimony of the special education coordinator at _____ and the report of the school psychologist of January 18, 2011 (P-14) that the student did not receive any of the 7 hours or specialized instruction outside of general education as his IEP required and that 100% of his specialized instruction was in the general education setting. (See Findings of Fact #5) Both the parent's expert witness Dr. Nelson and the DCPS school psychologist have found in their evaluations that the student functions at a very low cognitive level. As found in Findings of Fact #6, Dr. Nelson administered the Woodcock Johnson III Tests of Cognitive Abilities as a measure of his intelligence and the student received a General Intellectual Ability (GIA) score of 45 (or full-scale IQ score) which is in the Very Low range when compared to others in his age range (P-13 at p.4) At Findings of Fact #8 , the DCPS school psychologist's review of testing and her own evaluation concurred with Dr. Nelson's finding of the student's very low IQ. This hearing officer finds very significant Findings of Fact #7 that found DCPS's own school psychologist at

_____ had recommended in her report: that the student "showed significant decline in the areas of reading and math from 2001 to 2010. Because of the significant decline in the areas reading and math; and the continued deficiency in written expression, [student] does need changes to his IEP which may include a more restrictive environment. Full inclusion does not seem appropriate based on the results of this review." (DCPS-16 at p.4) As Findings of Fact #9 points out the student has been receiving failing grades under the October 2009 IEP. As Finding of Fact #6 shows, on The Woodcock Johnson III Tests of Achievement administered in September 2010, his scores were as follows: Broad Reading=23 (grade equivalent=1.6); Broad Mathematics=33 (grade equivalent=2.0); Broad Written Language=29 (grade equivalent=1.7); Oral Language=67 (grade equivalent=2.5) (P-13 at p.12) These scores show severe deficiencies in reading, mathematics, written language and oral language. This hearing officer concludes that

the student's October 2009 IEP that was in effect until January 19, 2011 was not reasonably calculated to provide educational benefit and did not provide meaningful educational benefit as Findings of Fact #6, #7 and #9 demonstrate.

At the January 19, 2011 MDT meeting, the student's IEP was reviewed and revised to provide for 21 hours of specialized instruction outside of general education and one hour of behavioral support services. DCPS determined that the IEP could be implemented in the ID self-contained program at [redacted]. As the above Findings of Fact show, this student has very low cognitive ability and severe deficits in all academic areas. The January 19, 2011 IEP is an improvement on the previous IEP, but still falls far short of meeting the special needs of this student who now needs a full-time IEP to address his significant deficits in all areas as recommended by Dr. Nelson in her evaluation and testimony. This hearing officer concludes that DCPS denied a FAPE to the student by failing to develop an appropriate IEP because the IEP developed did not require a full-time out of general education program.

The second issue raised by counsel for petitioner is whether the student's current placement at [redacted] is an appropriate placement.

A guiding principle in determining whether a placement is appropriate is provided in the U.S. Department of Education interpretative guidelines to the 1999 Regulations that : "educational placements under Part B must be individually determined in light of each child's unique abilities and needs, to reasonably promote the child's educational success." *Appendix A to 34 C.F.R. Part 300 Question 1* For the last three years this student has attended his neighborhood high school, [redacted] in a full inclusion program. He has made no educational progress at [redacted] repeating the ninth grade and then somehow being promoted to [redacted] grade even though he had failing grades in his classes. The [redacted] school psychologist has stated in her report that

the student has shown significant declines in his reading and math. This hearing officer gives great weight to the expert opinion of Dr. Nelson who found that the large high school environment at _____ is overwhelming to the student and he needs a full-time special education school that provides a small setting to receive educational benefits.

The petitioner has met the first prong of the *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) test that DCPS has not provided a FAPE to the student by maintaining _____ as the student's placement for the current school year. Once a court or hearing officer finds that the public school district has failed to offer a FAPE, the court or hearing officer is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. Section 1415 (i)(2)(C)(iii). "Under this provision equitable considerations are relevant in fashioning relief, and the Court enjoys broad discretion in so doing." *Carter*, 510 U.S. at 16

The petitioner has requested as relief placement of the student at the

The second prong of the *Burlington* and *Carter* test and the *IDEA Regulation at 34 C.F.R. 300.148 (c)* is that the private placement must be appropriate. Based on the description of the program by the principal of the _____ Upper School at the hearing, it is the conclusion of this hearing officer that the _____ Upper School is an appropriate placement for the student that will meet his unique needs and provide educational benefit. (See Findings of Fact #13). _____ program focuses on students with severe cognitive deficits such as this student. _____ offers a full-time special education program in a small setting which this student needs. _____ can address his severe deficits and provide him finally with an opportunity for educational success.

The petitioner in the December 10, 2010 due process complaint also requested as relief compensatory education. At the January 19, 2011 MDT meeting, DCPS offered the parent sixty-four (64) hours of independent tutoring as compensatory education and both the parent and her educational advocate agreed to that amount for compensatory education. (DCPS-6, Testimony of DCPS Compliance Case Manager, P-11) A compensatory education authorization letter for the above amount was hand delivered to the parent on January 19, 2011. (DCPS-10) (See Findings of Fact #11) There was no evidence presented to dispute this agreement. (See Credibility Finding)

ORDER

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

DCPS shall fund and place the student at the Upper School Program at the South East Campus located at including transportation services within ten business days of the issuance of this Hearing Officer's Determination for the 2010-2011 School Year with "stay put" protections.

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 USC §1415(i).

Date: 2/10/11

Seymour DuBow /s/
Hearing Officer