

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

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

RECEIVED

2012

PETITIONER,
on behalf of STUDENT,¹

Date Issued: February 24, 2012

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 “Parent”), 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 (“D.C. Regs.”). In her Due Process Complaint, Petitioner alleges that DCPS is denying Student a free appropriate public education (“FAPE”) because his Individualized Education Program (“IEP”) does not provide for full-time specialized instruction outside of the general education setting.

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 November 18, 2011, named DCPS as respondent. The case was originally assigned to Hearing Officer Virginia A. Dietrich and set for hearing on January 23, 2012. Due to Parent's unexpected unavailability on the hearing date, the hearing had to be continued and the case was reassigned to the undersigned Hearing Officer on January 26, 2012. The parties met for a resolution session on December 1, 2011, but did not come to an agreement. On December 12, 2011, Hearing Officer Dietrich convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day timeline for issuance of this HOD began on December 19, 2011. On January 26, 2012, upon the unopposed motion of Petitioner, the Chief Hearing Officer granted a 30-day continuance to hold the due process hearing and for issuance of this decision. The due process hearing was held before the undersigned Impartial Hearing Officer on February 21, 2012 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. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called as witnesses, DIRECTOR from NONPUBLIC SCHOOL, and EDUCATIONAL ADVOCATE. DCPS called, as witness SOCIAL WORKER from CITY MIDDLE SCHOOL. Petitioner's Exhibits P-1 through P-25, and DCPS' Exhibits R-1 through R-9, were admitted into evidence without objection. Counsel for both parties made oral closing arguments. Neither party requested leave to file a post-hearing brief.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

– WHETHER DCPS HAS DENIED STUDENT A FAPE IN THE 2011-2012 SCHOOL YEAR BY, REDUCING, IN HIS APRIL 5, 2011 IEP, SPECIALIZED INSTRUCTION SERVICES TO EIGHT HOURS PER WEEK OF SPECIALIZED INSTRUCTION, ALL IN THE GENERAL EDUCATION SETTING.

For relief, Petitioner seeks an order for DCPS to convene Student's IEP team to revise his IEP to provide for full-time specialized instruction services, in a therapeutic setting outside of general education, and for DCPS to fund Student's prospective enrollment at Nonpublic School.²

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 is an AGE resident of the District of Columbia, where he resides with his mother. Testimony of Petitioner.

2. Student is enrolled in the GRADE at City Middle School ("CMS"). Testimony of Petitioner.

3. In December 2004, Student was found eligible for special education and related services under the disability classification Emotional Disturbance ("ED"). Exhibit P-17.

4. In a May 12, 2009 psychological evaluation, the evaluator reported her impression that Student's test performance revealed solidly average intellectual abilities and overall achievement commensurate with his cognitive abilities. She further reported that test data indicate that Student often experiences perceptual disturbances that have the power to interfere with his functioning in daily life, including in school. She made a diagnosis of Psychotic Disorder Not Otherwise Specified. Exhibit P-19.

² At the beginning of the due process hearing on February 21, 2012, Counsel for Petitioner withdrew the remaining issues identified in the December 13, 2012 Prehearing Order.

5. In a July 3, 2009 Psychiatric Addendum, PRIVATE PSYCHIATRIST opined that Student did not meet the criteria for a diagnosis of Psychotic Disorder. He recommended that Student's classroom should be small and structured throughout the day, because a disorderly class may often result in disorderly behaviors which take on unusual presentations with creative unsupervised minds. Exhibit P-20.

6. In a March 31, 2010 Psychiatric Evaluation Report, CHILD AND ADOLESCENT PSYCHIATRIST reported that Student had no bizarre behaviors during his assessment or other indications of psychotic process. This psychiatrist concluded that Student's immature regressive behavior was most likely precipitated by his hyperactivity and inattentiveness, difficulties with family dynamics and ongoing sibling rivalry. The Psychiatrist diagnosed Student with Attention Deficit Hyperactivity Disorder – Combined Type and Sibling Relational Problems. The psychiatrist recommended, *inter alia*, continued IEP and individual counseling services for Student, small class settings, and a 1:1 help model of education. Exhibit P-14.

7. In a December 3, 2010 Psychological Re-Evaluation Report, DC SCHOOL PSYCHOLOGIST reported that in the period before her evaluation, Student had begun to demonstrate more frequent and more significant disruptive behaviors in the classroom, such as arguing, being defiant and name-calling. School Psychologist reported that testing did reveal significant difficulties with internalized and externalized behaviors in the educational environment. She recommended, *inter alia*, that Student should continue to be provided with a highly structured learning environment that will provide him with clear expectations, consequences, and swift feedback about his behavior and work performance, both positive and negative. Exhibit P-18.

8. For several years, Student received full-time special education services in self-contained classrooms in the District of Columbia public school system. Testimony of Petitioner, Exhibit P-9.

9. At the end of the 2009-2010 school year, Student's IEP team at DC ELEMENTARY SCHOOL ("DCES") decided that Student had made progress in the Emotional, Social and Behavioral Development Area of Concern and that he no longer required full-time placement in a self-contained classroom. In its June 17, 2010 IEP, the DCES team reduced Student's Specialized Instruction to 5 hours per week, outside general education, and 19 hours per week in the general education setting. The IEP team also provided 60 minutes per week of Behavioral Support Services. Petitioner attended the IEP meeting and signed the IEP. Exhibit P-7.

10. Petitioner decided to enroll Student at PUBLIC CHARTER SCHOOL ("PCS") for the 2010-2011 school year. Testimony of Petitioner. Initially at PCS, Student received 10 hours, 40 minutes per week of specialized instruction outside of general education. On October 21, 2010, at the 30 day IEP review meeting, Petitioner reported that there had been an improvement in Student's behavior at PCS. She requested that PCS continue the Specialized Instruction Services, 5 hours per week, outside general education, and 19 hours per week in the general education setting, provided in the June 17, 2010 IEP. Exhibits P-5, P-6.

11. The October 21, 2010 PCS IEP team revised Student's IEP to provide 9 hours per week of Specialized Instruction outside of general education, 8 hours per week in the general education classroom and 60 minutes per week of Behavioral Support Services. Parent's educational advocate, who attended the IEP meeting, stated that the total hours of special education services in the new IEP were not sufficient. Exhibit P-4, P-5, P-6.

12. In December 2010, Petitioner moved, with Student, to Prince George's County, Maryland for two to three months. When Petitioner moved back to the District, she was not able to re-enroll Student at PCS. In February 2011, Petitioner enrolled Student at CMS, where he is currently enrolled. Testimony of Petitioner.

13. On Student's April 2, 2011 IEP Progress Report at CMS, his teachers reported that Student scored very low on the DC Benchmark Assessment System (DC BAS) for mathematics, answering only six questions correctly; that he was reading at a level Q (approximately three years behind his grade level), and that his writing needs were significantly below grade level. Exhibit R-5. The school social worker reported that Student's learning disability and behaviors impact his overall global level of functioning and that his behavioral concerns are an impediment towards further growth, without the proper supports in place. Id.

14. Student's IEP team convened at CMS on April 5, 2011. The IEP team reported that in Mathematics, when Student is working in a small group, without any distractions, he is very capable of accessing the material in grade-level mathematics. Similarly, for Academic-Reading, the IEP team reported that Student works better in a small teacher-led group and in an environment where he is not distracted by his peers. He benefits from small group-guided reading with a text on his reading level. For Written Expression, the IEP team reported that Student's behavior during class impacts his ability to complete assignments. In the Emotional, Social and Behavioral Development Area of Concern, the IEP team reported that Student's off-task and non-compliant behaviors prevent him from progressing with academic achievement and functional performance. Exhibit P-3.

15. The April 5, 2011 CMS IEP team eliminated Student's Specialized Instruction services outside the general education setting and reduced his special education inclusion

services to 8 hours per week. Exhibit P-3. Petitioner, apparently, did not attend the IEP meeting, but she did later sign the IEP form indicating her agreement with the contents. Exhibit R-8.

16. At CMS, there are approximately 22 children in Student's regular education classroom and 7 children in the pull-out classroom. Testimony of School Social Worker.

17. At CMS, Student receives much more Specialized Instruction services than specified in his April 5, 2011 IEP. He receives 4 hours per week of pull-out services and 16 hours per week of inclusion services in the general education classroom. Testimony of School Social Worker.

18. Student definitely needs pull-out services for mathematics, because that subject is his weakness. Testimony of School Social Worker.

19. This year at CMS, Student's behaviors have been inconsistent. Early in the school year, he was fine. Then his behavior, primarily in the general education classroom, became bizarre, including making animal noises and angry drawings, and talking like he is a computer. His behavior improved again in the weeks just before the due process hearing. Testimony of School Social Worker. Parent still received telephone calls from the school regarding several in-school incidents in this time period. Testimony of Parent.

20. At the end of the first 2011-2012 reporting period, Student had mastered or was progressing in his IEP Mathematics goals, progressing in his IEP Reading goals, progressing in his Written Expression goals and showing no progress in his Emotional, Social and Behavioral Development goals. Exhibit R-4.

21. Nonpublic School has operated in Prince George's County, Maryland since 2004. Nonpublic School serves 67 students, including 16 in the middle school program. All students

at Nonpublic School receive special education services under the disability classifications ED, Other Health Impaired, and/or Multiple Disabilities. All students at Nonpublic School are on a high school diploma track, and students from the District of Columbia may earn credits leading to a regular D.C. high school diploma. Classroom size is small, with a 3.5:1 student/teacher ratio. Nonpublic School has, on staff, 3 full-time social workers and 4 social work interns. Nonpublic School is monitored by a DCPS progress monitor, who visits the school two days per week. Nonpublic School is an Office of the State Superintendent of Education (“OSSE”) approved nonpublic school. Testimony of Director.

22. Student has been accepted by Nonpublic School and could start immediately. He and Petitioner have toured the school and met with school administration. Testimony of Director, Testimony of Petitioner.

CONCLUSIONS OF LAW

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

DISCUSSION

In this case, Petitioner alleges that DCPS has denied Student a FAPE and violated the IDEA because Student’s April 5, 2011 IEP provides insufficient Specialized Instruction and no Specialized Instruction outside of the general education setting. The purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education (‘FAPE’) that emphasizes special education and related services designed to meet their unique needs. . . .” 20 U.S.C. § 1400(d)(1)(A). “Implicit” in the IDEA's guarantee of FAPE “is the requirement that the education to which access is provided be sufficient to confer some

educational benefit upon the handicapped child.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). As a condition of receiving funding under the IDEA, school districts are required to adopt procedures to ensure appropriate educational placement of disabled students. *See* 20 U.S.C. § 1413. A student’s eligibility for a FAPE is determined by the results of testing and evaluating the student, and the findings of a “multidisciplinary team” or IEP team. *Id.* § 1414. An IEP team consists of the parents and teachers of the disabled student, as well as other educational specialists, who meet and confer in a collaborative process to determine how best to accommodate the needs of the student and provide a FAPE. *See id.* § 1414(d)(1)(B).

An IEP is created to meet the special educational needs of each disabled student. *See id.* § 1414(d)(2)(A). The IEP must be formulated in accordance with the terms of the IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Rowley*, 458 U.S. at 204, 102 S.Ct. 3034. The IDEA requires IEPs to include statements of present functional performance, measurable annual goals, how the goals will be measured, and “the special education and related services and supplementary aids and services . . . to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child.” 20 U.S.C. § 1414(d)(1)(A)(I). “If no suitable public school is available, the school system must pay the costs of sending the child to an appropriate private school.” *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005) (citation and alterations omitted). *Holmes-Ramsey v. District of Columbia*, 747 F.Supp.2d 32, 35 (D.D.C. 2010).

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

DID DCPS DENY STUDENT A FAPE BY REDUCING HIS SPECIALIZED INSTRUCTION SERVICES IN HIS APRIL 5, 2011 IEP TO EIGHT HOURS PER WEEK, ALL IN THE GENERAL EDUCATION SETTING?

The Petitioner contends that DCPS denied Student a FAPE by continuously reducing the level of Specialized Instruction Services offered to Student from full time self-contained services in his 2009-2010 IEP, to 5 hours self-contained/19 hours general education in his June 17, 2010 IEP, to 9 hours self-contained/8 hours general education in his October 21, 2010 IEP, to, finally, no self-contained/8 hours general education in his April 5, 2011 IEP.³

A Hearing Officer must “afford some deference to the expertise of the . . . school officials responsible for the child's education” *JN v. District of Columbia*, 677 F. Supp.2d 314, 322 (D.D.C. 2010) (citations omitted). Unfortunately, none of the participants in the April 5, 2011 IEP meeting testified at the due process hearing and no minutes from that meeting were introduced. The school officials’ reasoning for the April 5, 2011 IEP team’s decision to further reduce special education services to Student, and to end all Specialized Instruction outside general education, is not in evidence. When the IEP team reviews a child’s IEP, the team must,

- (i) Determine whether the annual goals for the child are being achieved; and
- (ii) Revise the IEP, as appropriate, to address—

³ Although Petitioner complains of DCPS’s repeated reductions in Specialized Instruction services to Student, in this proceeding, she seeks relief only the alleged denial of FAPE associated with the April 5, 2011 IEP.

- (A) Any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation;
- (C) Information about the child provided to, or by, the parents;
- (D) The child's anticipated needs; or
- (E) Other matters

See 34 CFR § 300.324(b). The April 5, 2011 IEP team would be expected to have considered DCPS' most recent psychological reevaluation from December 10, 2010, which recommended that Student should continue to be provided with a highly structured learning environment that will provide him with clear expectations, consequences, and swift feedback about his behavior and work performance, both positive and negative. The IEP team also had before it Student's April 2, 2011 IEP Progress Report, which reported that Student had scored very low on the DC BAS for mathematics, answering only six questions correctly; that he was reading at a level approximately three years behind his grade level, and that his writing needs were significantly below grade level.

On the April 5, 2011 IEP, the team reported that, when Student is working in a small group in math, without any distractions, he was very capable of accessing grade-level material; that, for Academic-Reading, Student works better in a small teacher-led group and in an environment where he is not distracted by his peers; that, behaviorally, Student continued to show off-task and non-compliant behaviors which prevented him from progressing with academic achievement and functional performance. Assuming the IEP team based its consideration on the factors required by the IDEA, including the above cited information, the IEP team's decision to reduce the level of Specialized Instruction services to Student – especially to eliminate pull-out instruction – is incomprehensible. Subsequently, CMS elected to

provide Student much more special education services than specified in his IEP. However the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008).⁴ I find, therefore, that at the time that DCPS' April 5, 2011 IEP was offered to Student, the IEP was not reasonably calculated to provide educational benefits and that, consequently, DCPS denied Student a FAPE. Petitioner prevails on this issue.

Remedy

The IDEA affords the Hearing Officer "broad discretion in fashioning appropriate relief." *See Clay v. District of Columbia*, Civil Action No. 09-1612 (BAH) (DAR) (D.D.C. Dec. 14, 2011), citing 20 U.S.C. § 1415(i)(2)(C)(iii); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005) (noting that the Supreme Court has explained that courts' powers to fashion "appropriate relief" under IDEA entail "broad discretion" and implicate "equitable considerations.") (quoting *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16, (1993)). Here, for her proposed remedy for DCPS' denial of FAPE to Student, Petitioner seeks an award of private placement at Nonpublic School. An award of private-school placement is not retrospective relief designed to compensate for yesterday's IDEA violations, but rather prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA. *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005). Placement awards, like compensatory education awards, must be tailored to meet the child's specific needs. *Id.* at 12. Determining what constitutes a FAPE will always require a fact-intensive and child-specific

⁴ Although the measure and adequacy of an IEP is determined as of the time it is offered to the student, I find it significant that the CMS Social Worker, who also serves as Special Education Coordinator, testified that, as of the hearing date, Student definitely needs pull-out services for mathematics.

inquiry. To inform this individualized assessment, courts have identified a set of considerations “relevant” to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. *Id.*

As in the *Branham* case, the record in this case contains little of the information required to determine the appropriateness of Student’s proposed placement at Nonpublic School. Specifically, the evidence does not establish the extent of Student’s specialized educational needs, the link between those needs and the services offered by Nonpublic School, or Nonpublic School’s cost.⁵ I also find that the evidence does not establish that Nonpublic School, where Student would not have any in-school contact with nondisabled students, represents the least restrictive environment for the Student. *See, e.g., McCrary v. District of Columbia*, Civil Action No. 09-1784 (JEB) (D.D.C. Jun. 16, 2011). (The 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.) Accordingly, I deny Petitioner’s request for an award of private placement for Student.

As stated above, the Hearing Officer has broad discretion to order appropriate relief for denial of FAPE. In this case, Petitioner elected not to put on evidence for a compensatory education award, but seeks, instead, prospective relief, including restoration of full-time Specialized Instruction, outside of general education, as was provided in Student’s June 12, 2009 IEP. Student’s outside-of-general education instruction had been reduced from full time in June

⁵ When questioned on direct examination, the Director of Nonpublic School did not know the private school’s tuition costs.

2009 to 5 hours per week in June 2010; increased to 9 hours per week in October 2010; and was eliminated entirely in the April 5, 2011 IEP. I do not find that Petitioner's evidence establishes a requirement for Student to have a full-time out of general education placement. The evidence shows that Student made educational progress at PCS, where he was receiving 9-10 hours per week of pull-out services. However, because I have found that the April 5, 2011 IEP was not reasonably calculated to provided educational benefits, I find that it is appropriate, at a minimum, to restore the level of Student's special education and related services to the level preceding the April 5, 2011 IEP – namely, 9 hours per week of Specialized Instruction outside general education, 8 hours per week of Specialized Instruction in the inclusion setting, and 60 minutes per week of Behavioral Support Services outside general education. I will further order DCPS to convene Student's IEP team to review and revise Student's IEP following the requirements of 34 CFR § 300.324(b).

Summary

In summary, I have found that DCPS violated the IDEA and denied Student a FAPE by developing a revised IEP at the April 5, 2011 IEP meeting that was not reasonably calculated to provide educational benefits. Petitioner has not met her burden of proof, under the *Branham v. District of Columbia* guidelines, to establish the appropriateness of placing Student at Nonpublic School. I find that an appropriate remedy for DCPS' denial of FAPE to Student will be to order DCPS to provide Student the level of special education and related services specified in his October 21, 2010 IEP.

ORDER

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

1. Within 10 school days of entry of this order, DCPS shall convene Student's IEP team to review Student's IEP following the requirements of 34 CFR § 300.324(b). The revised IEP shall, for the remainder of the 2011-2012 school year, provide, at minimum, the level of Specialized Instruction and Related Services, in the respective settings (Outside General Education and General Education) specified in Student's October 21, 2010 IEP;
2. DCPS shall promptly obtain, subject to the Parent's consent, any reevaluations warranted by Student's educational or related services needs, including changes in Student's academic achievement and functional performance, required by Student's IEP team to consider the academic, developmental, and functional needs of the child. Notwithstanding, the provision of Student's special education and related services, as required in Paragraph 1 of this Order, shall not be delayed for the receipt of requested reevaluations; and
3. All other relief requested by Petitioner herein is denied.

Date: February 24, 2012

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).