

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
Frances Raskin, Due Process Hearing Officer
1150 – 5th Street, S.E.; Room 3
Washington, D.C. 20003
(202) 698-3819
Facsimile: (202) 698-3825

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STUDENT HEARING OFFICE
2009 APR 28 AM 8:26

Confidential

STUDENT, through the legal guardian¹)
)
 Petitioner,)
)
 v.)
)
 THE DISTRICT OF COLUMBIA)
 PUBLIC SCHOOLS,)
)
 Respondent.)
)

Hearing Date: April 17, 2009

HEARING OFFICER DETERMINATION

Counsel for Petitioner: Chike Ijeabuonwu, Esquire
6945 New Hampshire Avenue, Suite 211
Hyattsville, MD 20783-3245
(301) 270-9170; Fax: (301) 270-9173

Counsel for DCPS: Kendra Berner, Attorney at Law
Candace Sandifer, Attorney at Law
Office of the Attorney General
825 North Capitol Street, N.E.; 9th Floor
Washington, D.C. 20002
(202) 562-4000; Fax: (202) 562-4097

¹ Personal identification information is provided in Attachment A.

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 (“IDEIA”), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia (“District” or “D.C.”) Municipal Regulations (“DCMR”), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. BACKGROUND

Petitioner is the parent of a .year-old, .grade student (“Student”) at a District of Columbia public high school (“School”).² The Student has a disability classification of learning disabled under the Individuals with Disabilities Education Improvement Act (“IDEIA”).³

On March 13, 2009, the Petitioner filed a Due Process Complaint Notice (“Complaint”) alleging that the District of Columbia Public Schools (“DCPS”) failed to:

- A. Provide special education and related services;
- B. Timely review and revise the Student’s individualized educational program (“IEP”);
- C. Develop an appropriate IEP for the Student; and
- D. Provide an appropriate educational placement to the Student.

Petitioner sought relief including an order finding that DCPS denied the Student a free, appropriate public education as a result of the failures outlined above, ordering DCPS to convene a meeting of the multidisciplinary team (MDT”) to review and revise the Student’s IEP, and placing the Student at a non-public school at DCPS expense.

On March 23, 2009, counsel for DCPS filed a Notice of Insufficiency and Response to Petitioner’s Due Process Complaint (“Response”).⁴ The Response asserted that the Student is receiving special education services in an inclusion setting; DCPS was continuing to attempt to schedule an MDT meeting to review and revise the Student’s IEP; the Student’s IEP is appropriate to meet the Student’s individual needs although the Student had not taken full

² Testimony of Petitioner, DCPS Special Education Coordinator.

³ Petitioner Exhibit 3.

⁴ This Response was faxed to the Student Hearing Office at 5:23 p.m. on March 23, 2009, as evidenced by the fax confirmation counsel for DCPS provided this Hearing Officer. However, the Student Hearing Office never provided the Response to the Hearing Officer and thus this Hearing Officer did not have an opportunity to rule on the Notice of Insufficiency. This Hearing Officer did not receive a copy of the Response until just before the start of the due process hearing when counsel for Respondent provided it. When this Hearing Officer reviewed the Response, it became evident that counsel for Respondent had placed the wrong case number, which was for the previous case for the Student, on the Response.

advantage of it because he is regularly absent from school; the Student's current school is able to implement the Student's IEP; and Petitioner was invited to the IEP meeting.

Counsel for Petitioner, counsel for DCPS, and this Hearing Officer participated in a prehearing conference on April 2, 2009.⁵ This Hearing Officer issued a prehearing order on April 17, 2009.

The due process hearing convened at 3 p.m. on April 17, 2009. Petitioner testified by phone and the Student was present at the hearing.

At the inception of the hearing, all of the parties' Five-Day Disclosures, as well as Petitioner's Supplemental Disclosure, were admitted into evidence, with the exception of DCPS Supplemental Disclosure. The DCPS Supplemental Disclosure was held in abeyance until it could be authenticated; DCPS did not call a witness to authenticate the document and thus it was not admitted.

III. RECORD

Due Process Complaint Notice, filed March 13, 2008;
DCPS Notice of Insufficiency and *Response to Petitioner's Administrative Due Process Complaint Notice*, filed March 23, 2009;
Petitioner Five-Day Disclosure, filed April 10, 2009 (Exhibits 1-4);
DCPS Five-Day Disclosure, filed April 10, 2009 (Exhibits 1-11);
Petitioner Supplemental Five-Day Disclosure, dated April 15, 2009 (Exhibit 5);
DCPS Supplemental Disclosure, not admitted;
Prehearing Order, issued April 17, 2009;
Attendance Sheet, dated April 17, 2009; and
Compact Disc of Hearing conducted April 17, 2009.

IV. ISSUES PRESENTED

1. Whether DCPS denied the Student FAPE by failing to provide special education and related services;
2. Whether DCPS denied the Student FAPE by failing to timely review and revise the Student's IEP;
3. Whether DCPS denied the Student FAPE by failing to develop an appropriate IEP for the Student because the Student's IEP did not include counseling; and
4. Whether DCPS denied the Student FAPE by failing to provide an appropriate educational placement to the Student.

⁵ This Hearing Officer did not have a copy of the DCPS Response at the time of the prehearing conference but assumed the Student Hearing Office would be providing it soon, as the Student Hearing Office at that time was experiencing significant delays in processing pleadings and disclosures.

V. FINDINGS OF FACT

1. The Student is -year-old, -grade, learning-disabled student who attends a District of Columbia senior high school ("School").⁶ The Student was enrolled in the School on or about August 2008.⁷

2. The Student's February 7, 2008, IEP required DCPS to provide the Student ten (10) hours of specialized instruction weekly.⁸ This IEP was developed when the Student was still in junior high school.⁹ At the time it was developed, the Student was performing significantly below grade level.¹⁰ The IEP specified that the areas the Student required specialized instruction were reading, mathematics, and written expression.¹¹ The IEP required DCPS to provide the specialized instruction in a combination general education and resource classroom, otherwise known as an "inclusion" setting.¹² It also required DCPS to provide classroom accommodations to the Student, including extended time, a setting that provided reduced/minimalized distractions, a presentation that included repeated reviews of the material and drills, and parallel instruction.¹³ The IEP has been implemented since the Student enrolled at the School.¹⁴

3. The February 7, 2008, IEP did not require DCPS to provide any related services.¹⁵ Petitioner attended the meeting where the 2007 IEP was developed and signed the IEP.¹⁶

4. The only subject in which the Student needs extra assistance is mathematics.¹⁷ There are two teachers, a general education teacher and a special education teacher, who teach the general education and special education students, respectively, in the Student's math classroom.¹⁸ There are about twenty-five students in the classroom.¹⁹

5. The Student's first class of his school day is English.²⁰ He is usually about fifteen minutes late for his English class because he sleeps in or is delayed by his long ride on the Metro, which requires him to transfer between trains to get from home to school.²¹ The Student is failing English, in part because he is often late for class.²²

⁶ Testimony of Petitioner, Petitioner Exhibit 3 (Feb. 7, 2008, IEP).

⁷ Testimony of Student.

⁸ Petitioner Exhibit 3.

⁹ Testimony of Parent.

¹⁰ Petitioner Exhibit 3.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Testimony of Special Education Coordinator ("SEC").

¹⁵ *Id.*

¹⁶ *Id.*; Testimony of Petitioner.

¹⁷ Testimony of Student.

¹⁸ Testimony of Student, SEC.

¹⁹ Testimony of Student.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

6. The Student is failing his world history/geography class and algebra.²³ In the first advisory of the 2008-2009 school year, the Student earned Ds in algebra, health and physical education, and computer applications, and a C in extended literacy and environmental science.²⁴ In the second advisory, the Student received Ds in environmental science, which is his favorite subject, and computer applications, a C in health and physical education, and a C- in extended literacy.²⁵

7. The Student's failing grades are due in part to his failure to arrive at class on time.²⁶ He does not fail to attend his classes but is often fifteen minutes late.²⁷ He is late because the breaks between classes are his free time and he spends it socializing with friends at school.²⁸ The Student is marked absent for each tardy after he is late three times in an advisory period.²⁹

8. The Student "has no problems" with his teachers at the School.³⁰ When he requests help in class, he receives it.³¹ The student needs more help than he is receiving to pass all of his classes and would like to be pulled out of class for individualized instruction.³² He does not believe he needs psychological counseling.³³

9. The Student received specialized instruction in junior high but, when he enrolled in the School at the beginning of the 2008-2009 school year, he did not tell School officials that he had an IEP and was supposed to receive specialized instruction.³⁴ He told the School officials that he wanted to be in general education classes, in part because he wanted to see how well he performed in those classes.³⁵ Later in the semester, he attempted to return to special education classes but was told it was too late.³⁶ Petitioner believes that the Student did not receive the services on his IEP until January 2009.³⁷

10. When the School placed the Student in a self-contained math class, he begged his math teacher to keep him in inclusion class.³⁸ The Student is not currently in the self-contained math class.³⁹

²³ Petitioner Exhibit 2.

²⁴ *Id.*

²⁵ *Id.*; testimony of Student.

²⁶ Testimony of Student.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Testimony of Petitioner.

³⁸ Testimony of SEC.

11. Petitioner has not had any meetings with the Student's teachers at the School.⁴⁰ None of the Student's teachers have contacted her.⁴¹ Petitioner has received calls from the School on her cell phone and home phone only when the Student is late for school.⁴²

12. Petitioner has never been contacted for an IEP meeting at the School.⁴³ The phone number on which the School personnel attempted to reach her to invite her to an IEP meeting was incorrect.⁴⁴

13. The School reviewed the Student's evaluations and updated the Student's IEP on April 17, 2009, the day of the due process hearing, without the participation of Petitioner.⁴⁵ Because Petitioner was absent, the team that developed the IEP was not a full IEP team. Before holding the meeting at which the IEP was updated, the School sent two invitations for the meeting to Petitioner's counsel.⁴⁶ This is standard procedure at the School when a parent is represented by counsel because counsel who represent parents in IDEIA due process hearings generally request that all hearings be scheduled through them.⁴⁷ The School never received a response from Petitioner's counsel or anyone from his office to the invitations.⁴⁸

14. The April 17, 2009, IEP requires DCPS to provide the Student ten hours of specialized instruction.⁴⁹ The IEP does not provide psychological counseling for the Student.⁵⁰ The IEP team changed the Student's goals on his IEP to reflect his problems getting to class.⁵¹ His math goals were lowered to 60 percent accuracy.⁵² His reading goal was increased.⁵³

15. The IEP team wanted to change the Student's classroom for math and English to a self-contained classroom, which would have fifteen students.⁵⁴ The Student also would like a tutor, a mentor, and special education classes to help ensure he graduates from high school.⁵⁵

³⁹ *Id.*

⁴⁰ Testimony of Petitioner.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Conceded by counsel for DCPS.

⁴⁵ Testimony of SEC.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

16. The Student visited a non-public school where he received a tour of and observed several classes.⁵⁶ He liked the non-public school and thinks he would be more successful there because the classes are smaller than at his present school.⁵⁷ The Student would be on time to the non-public school because it is only one Metro stop away from his home and he would not have to transfer between trains.⁵⁸ He was accepted for admission at the non-public school.⁵⁹

17. The non-public school offers small, structured classroom settings.⁶⁰ He would be in a class with nine other students, one teacher, and a teacher's aide who is not a certified teacher.⁶¹

18. Fifty percent of the students at the non-public school obtain diplomas, twenty percent enter post-secondary vocational schools, and twenty percent enter the workforce after leaving the school.⁶²

19. The non-public school would be able to implement the Student's IEP. The Student would be reviewed thirty days after his enrollment at the non-public school and his IEP would be changed from 10 hours to 27.5 hours of specialized instruction.⁶³ This change would be necessary because the non-public school services only students with full-time IEPs.⁶⁴ There are no general education students at the non-public school.⁶⁵

VI. CREDIBILITY DETERMINATIONS

This Hearing Officer found that all of the witnesses who testified at the hearing were credible. The witnesses, including the Student, all provided the same picture of the Student's performance and strengths and weaknesses. This Hearing Officer found the Special Education Coordinator ("SEC") more credible than Petitioner on the issue of whether the Student's IEP was implemented at the beginning of the school year because Petitioner admitted that she had not attended any meetings with the Student's special education teachers and thus had no opportunity to ask them whether the IEP was being implemented, while the SEC had secondhand knowledge, from reports by the teachers, that the IEP was being implemented.

⁵⁶ Testimony of Student.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Testimony of representative from non-public school ("Representative").

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.⁶⁶ Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.⁶⁷

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children. 20 U.S.C. § 1412(1). FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...⁶⁸

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."⁶⁹ FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."⁷⁰ DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."⁷¹

In matters alleging a procedural violation, a hearing officer may find that the 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.⁷² In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.⁷³

⁶⁶ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

⁶⁷ 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

⁶⁸ 20 U.S.C. § 1401(9), 34 C.F.R. § 300.17.

⁶⁹ 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

⁷⁰ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted).

⁷¹ 34 C.F.R. § 300.101.

⁷² 20 U.S.C. § 1415 (f)(3)(E)(ii)

⁷³ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Krivant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").

VII. DECISION

A. Petitioner Failed to Establish by a Preponderance of the Evidence that DCPS Failed to Provide the Student Specialized Instruction.

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.⁷⁴ Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁷⁵

The IEP is “the centerpiece of the statute’s education delivery system for disabled children.”⁷⁶ Each public agency must ensure that as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child’s IEP.⁷⁷ “Public agency” includes the State education agency, LEAs,⁷⁸ educational service agencies (“ESAs”), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of a State that are responsible for providing education to children with disabilities.⁷⁹

IDEIA “imposes no clear obligation upon the District of Columbia beyond the requirement that [disabled] children receive some form of specialized education.”⁸⁰ The District is required only to make available a “basic floor of opportunity” that is “reasonably calculated to enable the child to receive educational benefits . . . sufficient to confer some educational benefit upon the [disabled] child,” or a program “individually designed to provide educational benefit.”⁸¹

The testimony of both the Student and the SEC established that the Student was receiving special education services in an inclusion setting. Petitioner presented no other testimony about the implementation of the Student’s 2007-2008 IEP. Thus, Petitioner failed to prove that the Student was not receiving the services required by his IEP.

⁷⁴ 34 C.F.R. § 114 (a)(2)(i).

⁷⁵ *Id.* at 114 (a)(2)(ii).

⁷⁶ *Honig v. Doe*, 484 U.S. 305, 311 (1988).

⁷⁷ 34 C.F.R. § 300.323 (c) (2).

⁷⁸ An LEA is defined as a “public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State.” 34 C.F.R. § 300.28 (a).

⁷⁹ 34 C.F.R. § 300.33.

⁸⁰ *Kerkam v. McKenzie*, 882 F.2d 884, 886 (D.C. Cir. 1988) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 195 (1982)).

⁸¹ 882 F.2d at 886.

B. Petitioner Failed to Establish by a Preponderance of the Evidence that DCPS Failed to Timely Review and Revise the Student's IEP.

Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.⁸² If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.⁸³ A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision; in this case, the public agency must have a record of its attempt to ensure their involvement.⁸⁴

Procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a free and appropriate public education ("FAPE").⁸⁵ Before Petitioner filed the Complaint in this case, DCPS sent two letters of invitation to her counsel that proposed meeting dates and times.⁸⁶ Counsel for Petitioner never bothered to respond to the invitations. Worst of all, counsel never even informed his client of the proposed dates and times for the meeting or that DCPS was attempting to schedule a meeting to discuss her child's IEP.⁸⁷

The blame for DCPS' failure to convene a full team to develop the April 17, 2009, IEP must be laid solely at the feet of counsel for Petitioner. The Student's prior IEP expired on February 7, 2009. DCPS sent the first invitation to counsel for a meeting on February 11, 2009, for Petitioner on February 2, 2009.⁸⁸ A little over a month later, on the morning of the day Petitioner filed the Complaint, but before Petitioner filed the Complaint, DCPS sent another letter of invitation to Petitioner's counsel suggesting three dates and times for the MDT meeting. Counsel did not respond to either invitation.⁸⁹

Counsel should not expect to prevail when he intentionally slept on his client's rights, *i.e.*, the right to an annual meeting to review and revise the Student's IEP, and then turned around and filed a due process complaint on that very issue. Although DCPS reviewed the evaluations and developed the IEP without a full team, the testimony established that DCPS had made several attempts to involve Petitioner. Unfortunately, the SEC had an incorrect phone number for Petitioner, and counsel for Petitioner failed to inform Petitioner of the MDT meeting. It was not for lack of trying that DCPS failed to include Petitioner in the meeting; rather it was due to a failure to communicate by Petitioner's counsel.

⁸² 34 C.F.R. § 300.501 (c)(1).

⁸³ 34 C.F.R. § 300.501 (c)(3).

⁸⁴ 34 C.F.R. § 300.501 (c)(4).

⁸⁵ *See, e.g., W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

⁸⁶ DCPS Exhibits 10, 11.

⁸⁷ Testimony of Petitioner.

⁸⁸ DCPS Exhibit 11.

⁸⁹ Testimony of SEC.

Thus, Petitioner failed to establish that DCPS failed to timely review the Student's evaluations and review and revise the Student's IEP.

C. Petitioner Failed to Establish by a Preponderance of the Evidence that the Student's IEP was Inappropriate because it Failed to Include Counseling.

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.⁹⁰ The court should not "disturb an IEP simply because [it] disagree[s] with its content."⁹¹ The court is obliged to "defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides."⁹²

Petitioner signed the 2008 IEP after attending the meeting where it was developed.⁹³ By signing the IEP, Petitioner certified that she was aware of its contents and consented to it. Petitioner presented no testimony that she did not understand what she was signing, that she did not participate in the formulation of the IEP, or that she was prevented from participating in the development of the 2008 IEP.⁹⁴

The blame for DCPS' failure to convene a full team to develop the April 17, 2009, IEP must be laid solely at the feet of counsel for Petitioner, as explained above. This IEP is nearly identical to the 2008 IEP, except that the Student's goals and objectives are lower because the team believed this would give him a better chance for success in light of his excessive absences.⁹⁵ The IEP provides specialized instruction in math, the area where the Student needs the most assistance. Finally, it addressed the setting the team believed was the least restrictive environment for the Student: an inclusion setting.⁹⁶ Petitioner presented no testimony that this IEP fails to provide specialized instruction uniquely tailored to the Student's needs.⁹⁷

Thus, Petitioner presented no evidence to show that either the 2008 or the 2009 IEP is inappropriate, other than a bald assertion that the Student requires psychological counseling. The testimony of the Student and the SEC established that the Student neither desires nor requires psychological counseling.

Thus, Petitioner failed to prove that DCPS failed to timely develop an appropriate IEP for the Student.

⁹⁰ *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Testimony of Petitioner, Petitioner Exhibit 3.

⁹⁴ See 34 C.F.R. § 300.9.

⁹⁵ Testimony of SEC.

⁹⁶ *Id.*

⁹⁷ See 34 C.F.R. § 300.39 (b) (3); 34 C.F.R. § 300.320 (a) (2) (i) (A-B).

D. Petitioner Failed to Establish by a Preponderance of the Evidence that DCPS Denied the Student a FAPE By Failing to Provide an Appropriate Placement.

When an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP.⁹⁸ Placement decisions must be made in conformity with the child's IEP.⁹⁹ Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.¹⁰⁰

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.¹⁰¹ IDEA requires that 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.¹⁰² In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.¹⁰³

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.¹⁰⁴ Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.¹⁰⁵

In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEA:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.¹⁰⁶

In a perfect world, Petitioner would receive one-on-one instruction and a multitude of services to address his suspected disabilities. However, IDEA does not require DCPS to "maximize the potential" of this Student.¹⁰⁷ Rather, it only has to provide a "basic floor of

⁹⁸ 34 C.F.R. § 300.116 (b) (2).

⁹⁹ 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006).

¹⁰⁰ See *Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

¹⁰¹ 34 C.F.R. § 114 (a)(2)(i).

¹⁰² 34 C.F.R. § 300.116 (c).

¹⁰³ *Id.* at (d).

¹⁰⁴ *Id.* at (e).

¹⁰⁵ 34 C.F.R. § 300.114 (a)(2)(ii).

¹⁰⁶ D.C. Code § 38-2561.02.

¹⁰⁷ *McKenzie*, 882 F.2d at 886 (noting that the Supreme court stressed the lack of any such requirement four separate times in *Rowley*, 458 U.S. at 189, 197 n. 21, 198, 199).

opportunity.”¹⁰⁸

Petitioner failed to provide any evidence--other than her own unsubstantiated opinion--that placement at the School is inappropriate. Nor did she proffer a single evaluation or expert opinion to support her opinion.

There was ample evidence that the Student was absent from school for substantial periods of time, and the Student testified that his absences were voluntary. Plaintiff has not shown that the student's poor academic performance resulted from a lack of appropriate services, but rather only that they are due to the Student's own extended absences. Indeed, the only problem with the Student's placement is that the Student has refused to take advantage of the educational opportunities afforded him.¹⁰⁹

Finally, the proposed placement at the non-public school would be highly inappropriate. It would not be the least restrictive environment for this Student.¹¹⁰ Most egregiously, the non-public school would revise the Student's IEP to fit their curriculum not his individual needs, which is impermissible under IDEIA.

Thus, Petitioner failed to prevail on her claim that the Student's placement is inappropriate.

¹⁰⁸ 882 F.2d at 886.

¹⁰⁹ See *Hinson v. Merritt Educational Center*, 579 F. Supp. 2d 89 (D.D.C. 2008) (mem.).

¹¹⁰ See 34 C.F.R. § 300.114 (a) (2) (i).

ORDER

Upon consideration of Petitioner's requests for a due process hearing, the parties' Five-Day Disclosures, and the testimony at the hearing, it is this 27th day of April 2009 hereby:

ORDERED that the Complaint is **DISMISSED WITH PREJUDICE**.

By: _____ /s/
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

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).

Distributed to:

Chike Ijeabuwu, Attorney at Law
Kendra Berner, Attorney at Law
Candace Sandifer, Attorney at Law
Hearing Office