

**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: 4/21/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 4/13/11 Room:2003

2011 APR 21 PM 12:16
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

The student is an _____-year-old _____ who is currently not attending school. She last attended the _____ a private school until she was removed at the end of January 2011. The student has been found eligible for special education and related services with the disability classification of Specific Learning Disability and Other Health Impaired. (P-22) On February 23, 2011 counsel for petitioner filed a due process complaint alleging the following issues: 1. Failure to comply with the September 3, 2010 Settlement Agreement; 2. Failure to have an appropriate IEP team at December 17th and 23rd MDT meetings; 3. Failure to have an appropriate IEP in not including occupational therapy (OT) services and a Behavior Intervention Plan (BIP); 4. Failure to provide an appropriate placement; 5. Failure to have proper procedures in determining student's placement; 6. Failure to issue an appropriate Prior to Action Notice. On

¹ Personal identification information is provided in Appendix A.

February 28, 2011 a Notice of Pre-Hearing Conference was sent to counsel setting March 23, 2011 for an agreed on date for the pre-hearing conference. The Notice in bold letters in the first paragraph stated "Counsel shall provide to this hearing officer the date of the resolution meeting as soon as known and a copy of the disposition form the day after the resolution meeting."

Counsel never responded to this hearing officer on the date of the resolution meeting until the pre-hearing conference on March 23, 2011. On March 4, 2011 counsel for respondent DCPS filed a Response denying the allegations. On March 7, 2011 the parties concluded a Resolution Meeting and failed to reach an agreement. The forty-five day time line began to run on March 8, 2011 and the HOD is due April 21, 2011. On March 23, 2011 a pre-hearing conference was held by telephone with counsel for petitioner Domiento Hill and counsel for respondent Victoria Fetterman. A pre-hearing Order was issued on March 25, 2011. The Order stated that the issues to be addressed at the hearing are 1. Is the current IEP inappropriate for failing to include OT services for thirty minutes a week and not including a Behavior Intervention Plan? 2. Is the DCPS proposed placement of _____ inappropriate because it cannot implement the student's IEP? 3. Did DCPS deny a FAPE by failing to issue an appropriate Prior to Action Notice because it did not include options considered, and was incomplete? 4. Did DCPS deny a FAPE by failing to involve the parent in the placement decision process?

The due process hearing convened at 9 a.m. on April 13, 2011 in Room 2003 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Domiento Hill represented the petitioner and Victoria Fetterman represented the respondent DCPS at the hearing. The hearing was closed. At the outset of the hearing, both the petitioner's documents P-1-P-44 and respondent's documents R-1-R-9 were admitted into evidence without objection. Counsel for petitioner also at the outset of the hearing withdrew the issues of the failure to

provide BIP on the IEP and failure to have an appropriate IEP team at the MDT meetings. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses Kevin Carter, the educational advocate, and the mother who testified in person and

Associate Director of _____ and _____ occupational therapist who testified by telephone. Counsel for respondent DCPS did not call any witnesses and rested on her documents.

JURISDICTION

The hearing was convened on April 13, 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 an _____-year-old _____ who is currently not attending school. She last attended the _____ a private school, until she was removed at the end of January 2011. The student has been found eligible for special education and related services with the disability classification of Specific Learning Disability and Other Health Impaired. (P-22) On February 23, 2011 counsel for petitioner filed a due process complaint. Counsel for petitioner argues that DCPS denied a FAPE in not including 30 minutes a week of OT services on the student's IEP as recommended from an independent OT evaluation. Counsel also argues that DCPS's proposed placement of _____ is inappropriate because it cannot implement the student's IEP calling for 25.5 hours of specialized instruction a week outside of general education and one hour a week of speech and language services and one hour a week of

counseling services. Counsel further argues that a PNOP to did not include legally required information and that the parent was not involved in the placement decision. Counsel for the respondent DCPS denies these allegations. Counsel for the respondent DCPS also argues that the petitioner is barred from seeking compensatory education because of a previous settlement agreement on this issue.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did DCPS deny a FAPE to the student by failing to include occupational therapy services on the student's IEP?
2. Did DCPS deny a FAPE to the student by failing to propose an appropriate placement at
3. Did DCPS deny a FAPE by failing to issue an appropriate Prior to Action Notice to
4. Did DCPS deny a FAPE by failing to involve the parent in the placement decision?

Counsel for petitioner is requesting the relief of placement of the student at in Beltsville, Maryland 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 on issue one failure of the IEP to include OT services are as follows:

I.

1. An independent Occupational Therapy Evaluation was conducted by Rochelle Bell an occupational therapist on November 17, 2010. The evaluator used the

Beery-Buktenica Developmental Test of Visual Motor Integration to assess the student's visual motor integration skills. The student received a standard score of 79 in her visual motor integration which places her in below average range indicating a deficit. In the area of visual perceptual skills, the Motor Free Test of Visual Perceptual (non-motor) was used to assess her abilities. The student obtained a standard score of 81 with a percentile rank of 10% which indicates below average abilities. The student demonstrated adequate performance in her handwriting skills. (P-14 at p.4) The report noted that the student was not wearing her glasses during the evaluation and the student stated she thinks she needs them. (P-14 at p.2) The evaluator recommended 30 minutes a week of school based OT services due to the student's below average ability on visual motor integration and visual perceptual skills. (P-14 at p.4, Testimony of Ms. Bell)

2. An MDT meeting was held at _____ on December 17, 2010. An occupational therapist, Ms. Cindy Palmer, reviewed the independent OT evaluation and did not recommend that the student receive 30 minutes a week of OT services. Ms. Palmer found the independent evaluation inadequate because the independent evaluator did not do a classroom observation or interview the student's teachers. The MDT Notes state: "Therapy should not be warranted simply based on the tests conducted. There is no educational relevance and functional loss to the student." (P-26 at p.2) The MDT Notes also point out in the review of the OT evaluation that "the student stated that she believes she needs glasses." (P-26 at p.1) The MDT team agreed that the independent OT evaluation did not warrant revising the student's IEP. (P-26 at p.2)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issues two the failure of DCPS to propose an appropriate placement at are as follows:

II.

1. The student's IEPs of March 8, 2010 (P-19) and June 21, 2010 (P-22) both provide for 25.5 hours of specialized instruction a week outside of general education taught by a special educator, one hour a week of speech and language therapy and one hour a week of counseling services for eleven months. The IEPs also provide for ESY services. The IEPs were developed at the with a DCPS compliance case manager in attendance. (P-19 at p.1 & P-22 at p.1) The March 8, 2010 MDT Meeting Notes states: "The team agreed that [student] should be in an out of general education placement based upon her being in the other settings and not being successful in those settings. [Student] should be in a small therapeutic school setting based upon her severe auditory concerns, past behavioral concerns resulting from a large school setting..." (P-20 at p.4)
2. At the December 17, 2010 MDT meeting, with the DCPS Compliance Manager in attendance, the team agreed that the March 8, 2010 is still appropriate. (P-26 at p.2) The lawyer for petitioner and the educational advocate were invited to attend on that date and confirmed via e-mail (R-4), but the educational advocate did not appear because of attendance at a hearing. (Testimony of
3. The December 23, 2010 MDT meeting was convened to review the student's IEP and discuss placement. The parent and educational advocate were in attendance in person and the DCPS compliance case manager, participated by

phone. The MDT written Meeting Notes state: "The [redacted] is in agreement that [student] needs a more therapeutic placement. [redacted] agreed to allow [student] to stay at [redacted] school until the end of January, and at that time she will be asked to be removed from the [redacted]. The student was being removed from [redacted] for behavior concerns. The school psychologist Dr. Moss noted in the MDT Notes "hostile behaviors, impulsivity, poor attendance, disruptive behaviors, does not complete assignments, poor attitude, verbal aggression consequences/results: student receives time-outs, multiple suspensions." (P-27 at p.2) The MDT Notes indicate that Ms. Hannah stated that "DCPS's stance is that [student] is to return to her neighborhood school because she is unilaterally placed at The [redacted] and DCPS will not fund her placement at The [redacted] (P-27 at p.3) The typed MDT Notes conform to the written notes. (P-28) The typed notes also indicate on the site location discussion that "DCPS' stance is that the student is placed at the [redacted] unilaterally and student should return to her neighborhood school for the remainder of the 2010-2011 SY. PNOP was issued and sent to the attorney for the student to attend her neighborhood school. [redacted] team feels that the student needs a more therapeutic placement and that they cannot service her there and she needs a different site location and that the student be removed immediately... The [redacted] team has stated that they would allow [student] remain at the [redacted] until the end of January 2011, but after that they will ask her to leave." (P-28 at p.2)

4. No representative of _____ was present at the December 23, 2010 MDT meeting to discuss their program. At the MDT meeting, the DCPS representative _____ did not discuss how the _____ program could implement the student's IEP. _____ is a large neighborhood high school that offers combination classes of special education classes and inclusion classes, but does not have a full-time out of general education program and does not have an eleven month program. (Testimony of _____)
5. The student has been accepted at The _____ in Beltsville, Maryland. (P-36) The _____ is a private special education program for students ages 13-21 serving ED, LD and some MR students. The school year is 180 days with an ESY program which altogether is a ten month program. There are 71 students in the Upper School program with 39 students from DCPS. _____ has a certificate of approval from OSSE. There are nine teachers on staff with six certified in special education and three teachers certified only in content areas. There are five licensed social workers on staff to provide counseling services. _____ has a behavior modification program including a point rewards system. _____ also offers a transition program to work including a beauty shop. There are seven to eight students in a class with one teacher and one teacher's assistant. The student would be placed in a homeroom class taught by a special education teacher with eight students- three females and five males. All the students in this class are diploma track. The student would be taught math by the homeroom special education teacher, but go to other teachers for other classes. The majority of students are ED throughout the school. The

is an appropriate placement that can meet the student's

needs. (Testimony of

This hearing officer's Findings of Fact as to the third issue that the PNOP is insufficient are as follows:

III.

1. On December 23, 2010, DCPS issued a Prior to Action Notice stating that the student's placement from The _____ is being changed to _____. The description and explanation of agency action proposed is "Student was unilaterally placed at The _____ DCPS has stated that the student should return to her neighborhood school, _____ (R-7) The Description of Other Options Considered section and the line on other relevant factors to the decision were left blank. (R-7)

This hearing officer's Findings of Fact as to the fourth issue of failing to involve the parent in the placement decision are as follows:

IV.

1. The parent along with her educational advocate participated in the December 23, 2010 MDT meeting. At that meeting, placement was discussed. The representative from DCPS stated that the student's placement would be changed to her neighborhood school. _____ and a Prior to Action Notice was issued at that time. The parent and her educational advocate stated their objection to placement at the DCPS proposed placement of _____. The educational advocate stated in the MDT Notes his objections to the placement of the student at her neighborhood school because of her previous history of unsuccessful academic and behavioral services. (P-27 at p.3, Testimony of Mr. Carter)

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 educational advocate Mr. Carter very credible. This hearing officer finds that he has extensive experience as an educational advocate and has observed and visited several DCPS programs including Mr. Carter testified in person This hearing officer after observing Mr. Carter's demeanor and answers to questions from both counsel, found him to be forthcoming and knowledgeable.

DISCUSSION/CONCLUSIONS OF LAW

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 counsel for petitioner raises is that DCPS denied a FAPE in not including in the student's IEP the 30 minutes a week of OT services recommended in the independent OT evaluation. The 2006 Regulation at 34 CFR 300.502(c)(1) provides that if parents initiate an independent educational evaluation, the results of that evaluation must be "considered" by the district in any decision made with respect to the provision of FAPE to the student. In the case of *T.S. ex rel. S.S. v. Board of Education of the Town of Ridgefield*, 20 IDELR 889 (2^d Cir.1993), the 2nd Circuit held that, in the absence of a statutory or regulatory definition, the plain meaning of "considered" –to reflect on or think about with some degree of care or caution–seemed appropriate. Using that standard, the court found that the district had properly considered the independent evaluation because the minutes of the meeting reflect some discussion of the issues raised in the IEE. In this case, the MDT team reviewed the independent OT evaluation and the school's occupational therapist reviewing the evaluation for the MDT team found that it had

several problems including that the independent evaluator did not do an observation of the student at school and there was no interview of the teacher. The Notes also reflect that the MDT team was aware that the IEE was conducted on visual motor integration and visual perceptual abilities without the student's glasses and the student told the independent evaluator she needs her glasses. The MDT team found that the evaluation was not related to how the student was functioning at school. The MDT Notes indicate the MDT did consider the IEE, but for the above stated reasons did not agree with its recommendation for 30 minutes a week of OT services. (See Findings of Fact I. #2). The district's obligation to consider an independent evaluation does not mean DCPS has an obligation to accept its recommendations. Counsel for petitioner has failed to meet his burden of proof on issue one.

The second issue raised by counsel for petitioner is that DCPS's proposed placement of the neighborhood school . is inappropriate because it cannot implement the student's IEP. 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 Following the development of an IEP, the public school system is required to provide a appropriate educational placement that meets the needs set forth in the IEP. *See Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004) (*citing Petties v. District of Columbia*, 238 F. Supp. 2d 114, 116 (D.D.C. 2002)).

The student's IEP calls for 25.5 hours a week of specialized instruction outside of general education, one hour a week of speech and language services and one hour a week of counseling services. The IEP also calls for ESY services. (See Findings of Fact II. #1) The MDT team

including the parent that agreed to the March 8, 2010 IEP stated in the MDT Meeting Notes:

“The team agreed that [student] should be in an out of general education placement based upon her being in the other settings and not being successful in those settings. [Student] should be in a small therapeutic school setting based upon her severe auditory concerns, past behavioral concerns resulting from a large school setting...” (P-20 at p.4) (See Findings of Fact II. #1) At the December 23, 2010 MDT Meeting, the MDT Notes stated: team feels that the student needs a more therapeutic placement”. (See Findings of Fact II. #3) This hearing officer finds significant that the educational staff at who worked on a daily basis with the student recommended a small therapeutic school setting for the student to be educationally successful.

The only evidence in the record about program came from the educational advocate. He testified he has visited on several occasions on behalf of other students that he represents as an educational advocate. He has found that is a large neighborhood high school that offers combination classes i.e. some special education classes outside of general education and inclusion classes, but does not offer a full-time outside of general education program. He testified cannot implement this student’s IEP calling for 25.5 hours of specialized instruction a week outside of general education and two hours a week of related services in an eleven month program. (See Findings of Fact II. #5) This hearing officer has found the testimony of the educational advocate credible. (See Credibility Findings) There is no evidence in the record that DCPS’s proposed placement to can implement the student’s IEP.

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 offering _____ 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 _____ in Beltsville, Maryland. 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 associate director of the _____ at the hearing, it is the conclusion of this hearing officer that the _____ is an appropriate placement for the student that will meet her unique needs and provide educational benefit. (See Findings of Fact II.#5). The student who has a learning disability in math would be taught math by a special education teacher in a small class of nine students including her. There are licensed social workers on staff to provide the behavior interventions the student needs. _____ also offers a transition program to prepare the student who is almost nineteen years old for transition to work after school. _____ offers the small school setting with therapeutic interventions recommended by The _____ MDT members for the student to be educationally successful.

The third issue raised by counsel for petitioner is that the Prior to Action Notice is insufficient. On December 23, 2010, DCPS issued a Prior to Action Notice stating that the student's placement from The _____ is being changed to _____ The description and explanation of agency action proposed is "Student was unilaterally placed at The _____

DCPS has stated that the student should return to her neighborhood school,

(R-7) The Description of Other Options Considered section and other relevant factors to the decision were left blank. (R-7) (See Findings of Fact III.#1) The statute and regulations require the LEA to provide written notice to parents before they initiate or refuse a change in student's identification, evaluation, or educational placement. *20 U.S.C. Section 1415 (b)(3); 34 C.F.R. Section 300.503(a)*. Specifically, the written notice must contain: (A) a description of the action proposed or refused by the agency; (B) an explanation of why the agency proposed or refuses to take action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter; (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency's proposal or refusal. *20 U.S.C. Section 1415 (c)(1); 34 C.F.R. Section 300.503 (b)*. In this case, counsel for petitioner is asserting that the above Section E describing other options considered and Section F on other relevant factors were not included in the Prior to Action Notice. Counsel for petitioner is correct that Sections E and F were left blank in the PNOP. These procedural failings, however, do not necessarily mean there is a denial of a FAPE. Counsel for petitioner must show that the procedural violations affected the student's substantive rights. *See Lesesne v. District of Columbia*, 447 F. 3d 828, 834 (D.C. Cir. 2006) Counsel for petitioner has failed to meet his burden of proof that these procedural failings affected the student's substantive rights. Both the

educational advocate and parent participated in the MDT meeting where placement was discussed. They both understood DCPS's position that the neighborhood school,

was the option DCPS considered and the parent and educational advocate objected to that option and requested a stay put so they could find an alternative placement. *See T.T. v. District of Columbia*, 2007 U.S. Dist. LEXIS 52547 (D.D.C. 2007)

The fourth issue raised by counsel for petitioner is whether DCPS denied a FAPE by failing to include the parent in the placement decision through failure to consider other options than _____ and failing to provide information about _____. The regulations require that "the parents of a child with a disability, be afforded an opportunity to participate in meetings with respect to ... [the] educational placement of the child. *34 C.F.R. Section 300.501 (b)(1)*; see also *20 U.S.C. Section 1414 (e)*. Counsel for the petitioner's argument that the parent was not included in the placement decision is not supported by the record. The parent and her educational advocate participated in the December 23, 2010 MDT meeting that discussed placement. The representative from DCPS stated that the student's placement would be changed to her neighborhood school _____ and a Prior to Action Notice was issued at that time. The parent and her educational advocate stated their objection to placement at the DCPS proposed placement of _____. The educational advocate stated in the MDT Notes his objections to the placement of the student at her neighborhood school because of her previous history of unsuccessful academic and behavioral services. (See Findings of Fact III. #1., P-27 at p.3, Testimony of Mr. Carter) In *T.T. v. District of Columbia*, 2007 U.S. Dist. LEXIS 52547 at p.7 (2007), the Court held under similar circumstances that a review of the record "confirms that defendants did not prevent plaintiffs from participating meaningfully in the placement decision

of T.T.” This hearing officer concludes that the petitioner has not met her burden of proof on this issue.

Finally, counsel for petitioner is seeking compensatory education for a denial of a FAPE when the student was at _____ Counsel for respondent DCPS argues that counsel for petitioner is barred from making this claim because of a previous settlement agreement. Counsel for respondent points out that counsel for petitioner had filed a previous due process complaint on August 20, 2010 requesting the exact same relief for compensatory education that he is requesting in this complaint. (R-1 at p.13 of August 20th due process complaint, P-2 at p.23 of February 23, 2011 due process complaint) On September 3, 2010 the parties entered a settlement agreement that stated at paragraph 10:“This Settlement Agreement is in full satisfaction and settlement of all the claims contained in the pending complaint, including those claims under IDEA and Section 504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement.” Paragraph 11 of the Settlement Agreement stated: “Parent is unaware of any other issues that DCPS could immediately address for the benefit of the child including, but not limited to compensatory education.” (R-1 at p.3) *In D.R. v. East Brunswick Bd. of Educ.*, 109 F. 3d 896 (3rd Cir. 1997) , the Third Circuit examined a settlement agreement reached by the parties which limited the school district’s funding obligations regarding the student’s residential placement and concluded it was a binding and enforceable contract, voluntarily entered into by the parties. The Third Circuit held the district court improperly voided that settlement agreement. A review of the September 3, 2010 settlement agreement also shows it was voluntarily entered into by the parties and is a binding contract between the parties. This hearing officer therefore concludes

that the settlement agreement is controlling and agrees with the argument of counsel for respondent DCPS on the compensatory education claim.

ORDER

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

ORDERED:

DCPS shall fund and place the student at _____ in Beltsville, Maryland including transportation costs within ten business days of the issuance of this Hearing Officer's Determination for the remainder of the 2010-2011 School Year.

It is further ORDERED that:

Issue one on the IEP not including OT services is DISMISSED; Issue three on the PNOP being defective and denying FAPE is DISMISSED; Issue four on the parent not being involved in the placement decision is DISMISSED.

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: 4/21/11

Seymour DuBow /S/

Hearing Officer