

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

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

[Parent], on behalf of,
[Student],¹

Petitioner,

v

District of Columbia Public Schools (DPCS),
on behalf of

Respondent.

Date Issued: May 24, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: May 18, 2010 Room: 1

HEARING OFFICER DETERMINATION

I. BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on May 18, 2010, in hearing room 1, and concluded on that date. The due date for the Hearing Officer's Determination (HOD) is May 28, 2010, pursuant to Standard Operating Procedure (SOP) § 1003. This HOD is issued on May 24, 2010.

The hearing in this matter was conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30. The hearing was closed to the public.

Present at the due process hearing were:

Zachary Nahass, Esq., Petitioner's Counsel

Daniel Kim, Esq., Respondent's Counsel

¹ Personal identification information is provided in Appendix A.

Petitioner, Student's Mother

Special Education Coordinator/Teacher

One witness testified at the hearing:

Assistant Educational Director,

The complaint in this matter was filed on March 24, 2010. The complaint named the Respondent and a public charter school (PCS) the Student attended during the 2008-2009 school year. The PCS filed a response to the complaint on March 31, 2010. A prehearing conference was held on April 2, 2010, and a prehearing order issued on April 3, 2010. Significant items ordered as a result of the prehearing, in addition to clarification of the issues for hearing, including a determination that the Student was not entitled to an expedited hearing, and that the PCS was not a proper party to the hearing.² The Respondent filed an untimely response on April 21, 2010. A resolution meeting was held, untimely, on April 30, 2010, and no resolution was reached.³ The Petitioner is seeking reimbursement for a unilateral private placement of the Student.⁴

18 documents were disclosed and filed by the Petitioner on May 11, 2010. (P 1 – P 18) The IHO rejected P 1 and P 2, as duplicative of documents already in the record (The due process complaint and the prehearing order) without objection of Counsel. Petitioner's Counsel chose not

² Please refer to the April 3, 2010, prehearing order for details.

³ 34 C.F.R. § 300.510 requires the local education agency (LEA) to convene a resolution meeting within 15 days of the receiving notice of a due process complaint. The petitioner must participate in the resolution meeting and if not, the LEA may request the IHO to dismiss the complaint at the conclusion of the 30 day resolution period. Likewise, if the resolution meeting is not convened within 15 days of the LEA receipt of the complaint, the petitioner may request the IHO to begin the 45 day hearing timeline. Parties may agree, in writing, to waive the resolution meeting.

⁴ At the prehearing conference, Petitioner's Counsel advised that the Petitioner was seeking, among other things, placement at a full-time therapeutic special education school, specifically [redacted]. The facts at hearing show the Student had been accepted at [redacted] on March 25, 2010, and that the Respondent was notified of the Petitioner's intent to unilaterally place the Student there on that date. The facts also show the Student began attending at [redacted] on April 6, 2010, following the prehearing conference. Thus, the IHO was not made aware of this nuanced change in relief being sought by the Petitioner until the hearing. Unfortunately, the Petitioner did not present any evidence as to the amount of reimbursement she is seeking.

to introduce P 18, a curriculum vitae, as the testimony of that potential witness was not going to be used. The remaining documents, P 3 – P 17, were entered into the record without objection.

Petitioner's exhibits are:

- P 3 - Individualized education program (IEP), August 8, 2008
- P 4 - IEP, April 30, 2009 (See R 2)
- P 5 - Unsigned IEP team meeting notes, March 22, 2010 (Compare with R 4)
- P 6 - Advocate's IEP team meeting notes, March 22, 2010
- P 7 - Unsigned incident notes, December 17, 2009
- P 8 - Email from Gunasinghe to Petitioner, January 4, 2010
- P 9 - Notice of Termination, March 12, 2010
- P 10 - Psychoeducational Evaluation, March 24, 2010 (See R 3)
- P 11 - Psychoeducational Evaluation, March 19, 2009
- P 12 - Clinical Psychological Evaluation, January 15, 2009
- P 13 - Psychiatric Evaluation, January 15, 2009
- P 14 - Social History Report, January 30, 2009
- P 15 - Career/Vocational Evaluation, October 27, 2007
- P 16 - Letter from Nahass to Murray, March 25, 2010
- P 17 - Letter from Corley to Petitioner, March 25, 2010

Nine documents were disclosed and filed by the Respondent on May 11, 2010. (R 1 – R 9)

Counsel did not offer R 1 (prehearing order) nor R 5 and R 6 (not necessary). The remaining documents, R 2 – R 4 and R 7 – R 9, were entered into the record without objection.

Respondent's exhibits are:

- R 2 - IEP, April 30, 2009 (See P 4)
- R 3 - Psychoeducational Evaluation, March 24, 2010 (See P 10)
- R 4 - IEP Meeting Notes, March 22, 2010 (Compare with P 5)
- R 7 - Attendance Records by Student, August 19, 2009 to June 14, 2010
- R 8 - Current Year's Student Schedule, March 15, 2010
- R 9 - Email chain ending from Nahass to Murray, April 9, 2010, 8:43 AM

II. ISSUES⁵

- 1) Whether the Respondent failed to develop an IEP reasonably calculated to provide educational benefit to the Student?
- 2) Whether the Respondent failed to provide the Student with an appropriate educational placement in terms of location for his special education services?

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 was enrolled at PCS and DCPS is the LEA for special education purposes.⁶ The Student is eligible for special education and related services under the categories of emotional disturbance and learning disabilities.⁷
2. PCS cannot implement the Student's IEP.⁸ The Student requires a "full-time" IEP.⁹ PCS began to look for another placement for the Student as early as January 4, 2010.¹⁰ On April 9, 2010, prior to finding another location for services, the Respondent sought to observe the Student at PCS as part of its process for placement.¹¹ As of May 18, 2010, the Respondent had not identified a location to implement the Student's proposed "full-time" IEP.¹²

⁵ The second issue listed in the prehearing order, "Whether the Respondent failed to provide the Student with special education and related services in conformity with his individualized education program (IEP)?" was withdrawn at the start of the hearing due to stipulations of the parties.

⁶ Stipulated fact.

⁷ P 4, R 2.

⁸ Stipulated fact. *See also*, R 4 and P 8.

⁹ Stipulated fact. A "full-time" IEP is a term of art that refers to an IEP that requires placement in a fully segregated special education setting.

¹⁰ P 8.

¹¹ R 9. The Respondent's Program Manager, in the exhibit cited, refers to making an observation that "will allow DCPS to follow the OSSE's Policy and Procedures for Placement that we are mandated to follow." D.C. Mun. Regs.

3. The Petitioner, through Counsel, notified the Respondent of her intent to enroll the Student at a non-public school at the Respondent's expense on March 25, 2010.¹³ The Petitioner unilaterally placed the Student at _____ who had been admitted on March 25, 2010, and he began attending on April 6, 2010.¹⁴ The Student was admitted by _____ based on staff review of his education records, including assessment reports, and an interview of the Student.¹⁵
4. The Student had tardiness and truancy issues prior to arriving at _____¹⁶ PCS sent the Petitioner a notice that the Student had been expelled as a result of truancy on March 12, 2010.¹⁷ _____ PCS later reversed this decision.¹⁸
5. _____ is a private therapeutic day program in Springfield, Virginia.¹⁹ It serves Students with disabilities aged five to 21 years.²⁰ _____ provides a wide range of related services including, but not limited to, clinical psychologists, behavior management, occupational therapy, social workers, etc.²¹ _____ follows the educational curriculum of the State a Student is from (e.g. District of Columbia students are educated based on the D.C. curriculum.)²² _____ also utilizes the IEPs the students bring from their States and does not develop its own.²³ All students at _____ have

tit. 5, Chap. 30, §3013 is the local regulation on placement and includes no reference to a required observation prior to changing a student's placement.

¹² Stipulated fact.

¹³ P 16.

¹⁴ Testimony (T) of _____ P 16, P 17, R 9.

¹⁵ T of _____

¹⁶ T of _____ R 4, R 7,

¹⁷ P 9.

¹⁸ P 6, R 4.

¹⁹ T of _____

²⁰ T of _____

²¹ T of _____

²² T of _____

²³ T of _____

“full-time” IEPs.²⁴ The student-teacher ratio at _____ is two to three adults for every 10 students.²⁵

6. The Student is taking classes at _____ in science, English, algebra, social studies (history and geography), a military cadet course, and a technology course (small engines).²⁶ He is receiving clinical psychological counseling in a small group.²⁷ He has not had any attendance or other significant behavior issues since he arrived at _____.

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:

1. Federal regulations at 34 C.F.R. § 300.148(b) provide that:

Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

2. This complaint is based on a disagreement between the parties regarding the availability of a program appropriate for the Student, and the reimbursement of costs incurred by the Petitioner thus far for a unilateral private placement and continued placement at _____ Academy. As such, it is a complaint under the authority of this IHO.
3. Reimbursement for a unilateral private placement may be ordered by an IHO if the IHO “finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34 C.F.R. § 300.148(c).

²⁴ T of

²⁵ T of

²⁶ T of

²⁷ T of

²⁸ T of

Whether the placement is “appropriate” does not depend on whether the placement meets “State standards that apply to education provided by the SEA and LEAs.” Id.

4. 34 C.F.R. § 300.17 provides:

Free appropriate public education or FAPE means special education and related services that —

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

5. Because the Respondent could not implement the IEP at PCS, and because it failed to timely locate an educational placement for the Student, he was not receiving an appropriate education in the District of Columbia. Thus, he was denied a FAPE.
6. The Petitioner unilaterally placed the Student at a private therapeutic day program. Based on the program and services provided at and the Student’s relative success thus far (just over a month), the placement is appropriate for the Student.
7. The Petitioner has not provided any evidence of expenditure on the placement. However, given that the parties agree the Student requires a placement like (a “full-time” IEP not at PCS), and that the Respondent has not proposed an alternative to PCS, and because serves students coming from DCPS, the Petitioner may be reimbursed for any costs she has incurred for the placement, including transportation, consistent with the Order below.²⁹

²⁹ Respondent’s Counsel, on cross examination, asked what the tuition at is. Petitioner’s Counsel objected and this objection was upheld by the IHO on the basis that cost is not relevant to whether the placement was proper. I note that cost is relevant when “equitable considerations” are being made about the amount of reimbursement. See Florence County School District Four v. Carter, 510 U.S. 7, 16 (1993). Despite the Respondent’s query of cost on cross-examination, it made no argument about the cost and presented none of its own evidence (indeed, the Respondent did not put on a case in terms of an opening statement, witnesses, or closing statement – only its six exhibits) concerning cost or the appropriateness of or even whether the Petitioner’s reimbursement should be reduced or denied (see 34 C.F.R. § 300.148(d)). Thus, there are no equitable considerations in play in this case, and the determination about reimbursement is made solely on the two primary factors (whether FAPE was denied and whether the placement was appropriate).

ORDER

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

1. The Petitioner shall be reimbursed within 30 days of showing Respondent proof of tuition payments to _____ for the 2009-2010 school year, if she provides proof to the Respondent within 30 days of the date of this HOD. Proof shall consist of receipts from _____ showing payment, affidavits from both Petitioner and _____ canceled checks from Petitioner to _____ or Petitioner's credit card statements showing payment made to _____.
2. The Respondent shall keep the Student at _____ for the 2010-2011 school year and shall treat the 2010-2011 school year as an LEA placement, pursuant to this HOD.
3. The Petitioner must request _____ Academy to develop an IEP, substantially consistent with 34 C.F.R. § 300.320, for the 2010-2011 school year. The Respondent shall be responsible only for the cost of the placement, including the education program, related services, and transportation. If _____ declines to develop an IEP for the Student, substantially consistent with 34 C.F.R. § 300.320, the Petitioner shall so inform the Respondent. This shall not impact the Respondent's requirement to maintain the Student at _____ for the 2010-2011 school year pursuant to this HOD, or a similar non-public school if _____ expels the Student.
4. The Respondent must monitor the Student's educational performance while at _____ and the Petitioner must authorize the full disclosure of education records between _____ and the Respondent. If the Petitioner fails to provide such authorization by June 15, 2010, the Respondent shall not be responsible for the cost of

the unilateral placement for the 2010-2011 school year. In this event the Respondent must place the Student at a school similar to _____ prior to the start of the 2010-2011 school year.

5. The Respondent shall convene the IEP team, including representatives from the attending school, to review the Student's educational progress and other data and develop an IEP for the 2011-2012 school year, no sooner than April 1, 2011, and not later than May 1, 2011. Following the revision of the IEP, the IEP team must make a placement determination. Any disagreement about the proposed IEP or placement at that time may be subject to appropriate dispute resolution. Nothing in this HOD is intended to require the Respondent to continue to place the Student at _____ beyond the 2010-2011 school year unless the IEP team determines it is the least restrictive environment for the Student (i.e. a less segregated setting will not be appropriate given the Student's IEP). The parties may agree to change the Student's placement prior to the conclusion of the 2010-2011 school year and they may agree to keep his placement at _____ Academy beyond the 2010-2011 school year at the Respondent's expense.

IT IS SO ORDERED.

Date: May 24, 2010



Independent 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 USC §1415(i).