

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

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HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)

DOB)

Student I.D.
Petitioner)

V.)

**The District of Columbia
Public Schools,
Respondent**)

DATE OF HEARING
June 9, 2009

DATE OF COMPLAINT
May 5, 2009

ATTENDING SCHOOL:

**COUNSEL FOR PARENT/STUDENT: Elizabeth Jester
PO Box 1165
Great Falls, Virginia 22066**

**COUNSEL FOR DCPS: Daniel Kim
Office of the General Counsel
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Washington, D.C. 20002-4232**

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STUDENT HEARING OFFICE
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STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

June 19, 2009

Representatives:

Petitioner – Elizabeth Jester
DCPS – Daniel Kim

Hearing Officer:

Jane Dolkart

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This year old student has just completed the fourth grade at the PG County and is eligible for special education under the classification of Emotional Disturbance (ED) and Other Health Impaired (OHI). The student was placed at pursuant to a September 9, 2008 HOD. The student's present IEP, dated April 23, 2009 provides for 32.25 hours of specialized instruction per week and 40 hours of counseling per year. The IEP also provides a full time 1:1 dedicated aide and a Behavioral Intervention Plan (BIP) because of the student's intensive behavioral and clinical needs.

This due process complaint was filed on May 5, 2009, alleging that DCPS has denied the student FAPE by failing and refusing to include one-on-one home tutoring services as part of the student's April 23, 2009 IEP, and by deferring the decision refusing to provide the tutoring to a DCPS employee who was not part of the student's IEP team and who did not participate in the IEP meeting.

A pre-hearing conference was held on May 14, 2009, and a pre-hearing order was issued on May 14, 2009.

DCPS filed a waiver of resolution session on May 8, 2009.

The parties each submitted written closing arguments on June 13, 2009.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by

1. Failing and refusing to include one-on-one (1:1) tutoring services in the student's IEP?
2. Deferring the decision refusing to provide the tutoring to a DCPS employee who was not part of the student's IEP team and who did not participate in the student's IEP meeting?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated June 1, 2009, containing a list of witnesses with attachments P 1-11. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's aunt and the student's therapist.

DCPS submitted a five day disclosure letter dated June 1, 2009, containing a list of witnesses with attachments DCPS 1-2. The disclosure was admitted in its entirety. DCPS called as a witness the IEP Coordinator at

V. FINDINGS OF FACT

1. This year old student has just completed the grade at the of PG County and is eligible for special education under the classification of Emotional Disturbance (ED) and Other Health Impaired (OHI). The student was placed at pursuant to a September 9, 2008 HOD. The student's present IEP, dated April 23, 2009 provides for 32.25 hours of specialized instruction per week and 40 hours of counseling per year. The IEP also provides a full time 1:1 dedicated aide and a Behavioral Intervention Plan (BIP) because of the student's intensive behavioral and clinical needs. (P 2, 10).
2. The student was found eligible for special education on May 1, 2008. During the 2007-2008sy, the student was suspended several times and threatened with expulsion. The student was violent towards other children, used inappropriate language, was disruptive and disrespectful towards peers and adults, and did not complete assignments. She exhibited compulsive, hyperactive and uncontrolled behavior. As a result of these behaviors, the student was placed at the which is a full time therapeutic day school for children with ED. (September 11, 2008 HOD found at P 10).
3. The has a small student to staff ratio. The student is in weekly group and individual therapy. Therapeutic crisis intervention is available. The student is given special seating in the classroom and frequent breaks. The student has a BIP. (P 5, 7, 8).
4. On December 5, 2008, an MDT meeting was held to discuss the student's behavior. The Team agreed that the student was in need of a dedicated aide. wrote a justification for the need to obtain a dedicated aide as follows:

Since her admission to the program on 9/24/2008, [the student] has shown significant difficulty demonstrating safe and appropriate school behaviors. To date, her conduct has resulted in 19 critical incidents and 3 recent suspensions as a result of physical aggression (biting, hitting and kicking) towards staff....[O]ther behaviors of concern have included frequent displays of sexual gesturing & verbalizations, threats of harm to staff & peers, impulsivity, AWOLing, and blatant opposition. In addition [the student] is extremely provocative towards peers and often initiates conflict which creates ongoing crisis during instructional time....In addition to concerns for her physical safety, [the student's] ability to

respond to staff redirection negatively impacts her availability for learning. A great portion of her academic day is spent outside of the classroom as a result of crisis intervention, AWOLing and/or her refusal to commit to safety. (P 5).

5. On April 23, 2009, an MDT/IEP meeting was held at _____ to update the student's IEP. Present at the meeting were the aunt, the aunt's attorney, the IEP coordinator, the compliance specialist from DCPS, two special education teachers, two school therapists, the student's DMH therapist, the dedicated aide, and a person from CASA.

The IEP indicated that the student was administered the Woodcock Johnson Tests of Achievement on 4/15/2008. At that time the student's broad math score was at the 3.0 grade equivalent, her broad reading score was at the 4.1 grade level, and her broad written expression was at the 3.9 grade equivalent.

At the time the April 23, 2009 IEP was prepared, the student's level of performance in math was reported to be at the 3rd grade level when she did her math assignments. In reading she was able to read orally at the 5th grade level but she comprehended on the 3rd grade level. The student was able to write an 8 sentence paragraph but used punctuation and capitalization correctly only 30% of the time and completed very little work assigned to her in class.

The IEP notes that the student's emotional disturbance impacts on her academics because her behavioral problems cause her to spend time away from instruction. When in the classroom the student has difficulty focusing on the instructions and hurries through her work, refusing to correct mistakes. The work the student completed during the year was work done when a staff member was sitting with her, verbally prompting her to stay focused, and going through each step of the work.

(P 2).

6. The record contains the student's grades for the first and second of four quarters. At the end of the second quarter she had a D in math, a D in another course whose identity can not be ascertained from the document, a C in reading/language arts, a C in science, an F in social studies, and a U (unsatisfactory) in systematic reading instruction. (P 11).

Comments in the April 23, 2009 IEP indicate that in the third quarter the student's grades had declined as a result of multiple crisis situations and her opposition towards completing assignments. (P 2).

7. The student made little if any academic progress during the 2008-2009sy.

8. The student receives counseling from a counselor at the DC Department of Mental Health which is part of the Community Services Agency. The therapist has a BA in rehabilitation and psychology, and is an MS candidate in marriage counseling.

The therapist has been providing individual counseling and crisis management to the student since September 2007, when the student was removed from her mother and placed with her grandmother, and eventually with her aunt. She sees the student 1 time per week and was at the student's April 23, 2009 IEP meeting. The therapist was a credible witness concerning the student's emotional difficulties.

The student is emotionally unstable, hyperactive, and does not do well with change. When the student first came to the therapist, the student's mother was incarcerated and the student was living with her aunt, along with her twin sisters who are approximately 5 years old. This fall her mother was released from prison. Shortly before Thanksgiving, the student was reunited with her mother and thereafter the student's sisters were also sent back to their mother. On December 30, 2008, all three girls were again removed from their mother and sent back to their aunt. In approximately March 2009, the twins were sent back to their mother. The student's behavior deteriorated as all these changes were occurring. The student's behavior began deteriorating further in December 2008, and even further after her sisters were sent back to their mother in March. The student has shut down, has a poor attitude, poor concentration, will not remain in class, and refuses to follow directions. The student's medication was increased and her therapy has become more intensive.

At the April 2009 IEP meeting, it was the therapist, along with the aunt, and the aunt's legal counsel who first proposed tutoring for the student. The tutoring was suggested because of the student's limited access to her academics, the amount of time she spent out of class, and because the student was behind her peers. The student works best 1:1 and once she forges a relationship with a person she behaves much better. She also behaves better at home than at school. The therapist recommended 2-4 hours of tutoring per week at first. If the student forms a relationship with the tutor, the amount could be increased.

(Testimony of DMH therapist).

8. The IEP Team members from _____ agreed that the student would benefit from tutoring. The DCPS representative left the room to consult with her supervisor by phone and came back and indicated that DCPS would not fund tutoring. The reasons given were that the student was in ESY and that other community support was available for tutoring. (Testimony of DMH therapist, IEP coordinator, P 3).

The student's DMH therapist, the student's aunt, and the _____ IEP Coordinator all agreed that if tutoring was provided it would need to be provided by someone trained to deal with a student with severe behavioral issues. (Testimony of DMH therapist, aunt, IEP coordinator).

9. The IEP Coordinator at _____ testified on behalf of DCPS. She was a credible witness.

The IEP coordinator indicated that she is not in a position to determine if the student needs tutoring, has no knowledge concerning whether the student made educational

progress or not, and does not know if the dedicated aide has helped. She confirmed that the student misses a lot of class time because of her behavior, that the student's DMH therapist initiated the discussion of tutoring, and that the IEP team members believed that the student would benefit from tutoring. She also confirmed that the DCPS representative had left the IEP meeting to speak with her supervisor and returned saying DCPS would not agree to tutoring.

Tutoring is not listed on the student's IEP because DCPS refused to approve it. (Testimony of IEP coordinator).

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees "all children with disabilities" "a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

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 State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to 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. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a "basic floor of opportunity" for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include "a statement of the child's present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child...." 20 U.S.C. ¶ 1414(d)(1)(A).

Pursuant to IDEA § 1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEA § 1415 (f)(3)(E)(ii), 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.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

A. Did DCPS Deny the Student FAPE Because the DCPS Representative Left the April 23, 2009, IEP Meeting to Consult With Her Supervisor?

Petitioner claims a procedural violation of the IDEA because the DCPS representative left the IEP meeting to consult with her supervisor concerning whether DCPS would provide home tutoring for the student as part of her IEP.

The IEP Team for each child must include the parents of the child, at least one regular education teacher of the child, at least one special education teacher of the child, an individual who can interpret evaluation results, and others with knowledge or special expertise regarding the child. 34 CFR 300.321 (a). In addition, the IEP Team must include

(4) A representative of the public agency who – (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) Is knowledgeable about the general education curriculum; and (iii) Is knowledgeable about the availability of resources of the public agency. 34 CFR 300.321 (a)(4).

DCPS sent a Program Specialist who was able to participate in the development of the student's specialized instruction and related services, including approval of a full-time placement at the the provision of counseling services, and the provision of a dedicated aide, all at DCPS expense. The DCPS representative clearly met the requirements laid out for a representative of the public agency pursuant to the IDEA and its implementing regulations.

Home tutoring was not part of the initially drafted IEP and was not raised until the IEP meeting. It is not unreasonable that the agency representative would need to consult with her supervisor before committing additional unanticipated DCPS resources. It would have been preferable if the agency representative had called her supervisor and placed her on a conference call with the rest of the IEP Team, but there is nothing in the statute or its regulations that prevents a member of the IEP Team from consulting with a third party during the IEP meeting. Petitioner has not pointed to any case law or provision in any statute or regulation in support of her position. There was no procedural violation of the IDEA.

B. Did DCPS Deny the Student FAPE By Failing and Refusing to Include Home Tutoring in the Student's 2009-2010 IEP?

DCPS argues that tutoring is not a related service under the IDEA and that, therefore, Petitioner does not have a cognizable claim. DCPS applies the wrong analysis. Several DC court opinions have held that tutoring is specially designed instruction, not a related service, pursuant to 34 CFR 300.39 which states that

(a)(1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including –

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings....

See, Solomon-Lane v. District of Columbia, 2005 WL 736533 (unreported case), *Spilsbury v. District of Columbia*, 307 F. Supp.2d 22, 26 (DDC 2004), *Johnson v. District of Columbia*, 190 F. Supp.2d 34, 37 (DDC 2002).

Thus, if academic tutoring is necessary for the student to access her education, it is part of her academic program. The IDEA makes clear that such instruction can be conducted in the home.

The crux of the issue in this case is whether home tutoring is necessary for the student to access her education. As stated above, DCPS is not required to provide the best education available, but only that education which is sufficient to confer some educational benefit upon the handicapped child that is more than de minimus. *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. at 200, *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10. All the witnesses and the IEP Team agree that home tutoring could benefit the student. However, DCPS takes the position that it has provided a floor of education sufficient to confer some educational benefit to the student and thus to provide the student with FAPE.

There is no question but that DCPS has provided this student with substantial services which are meant to address the student's emotional problems sufficiently to allow her to access the curriculum. The student is in a full time private therapeutic placement at a school that specializes in teaching students with emotional problems. She has been provided with one hour a week of counseling, and with a full time dedicated aide. Petitioner does not question the suitability of the placement. It is evident that

has worked to address the student's disability. It is also evident that this student is severely emotionally disturbed and has experienced enormous instability and trauma over the past year. In spite of all the interventions, the student is substantially unable to access her education.

The evidence shows that the student spends a great portion of her academic day outside the classroom. It further shows that even when the student is in the classroom she has difficulty focusing on the instruction. The April 23, 2009 IEP indicates that the student

has completed little work this school year and that she is most successful when the teacher sits with her and provides 1:1 instruction.

The evidence concerning the student's academic progress is not as strong as it could be. For some reason the student's report card for only the first two quarters has been provided. None of the student's teachers were called to testify concerning the student's academic progress. However, there is sufficient information in the record to reach the conclusion that the student has made little if any academic progress. The student was administered the Woodcock-Johnson Tests of Achievement in April 2008, which provide a baseline of the student's progress as of that time. The student's April 23, 2009 IEP provides information concerning the student's level of performance as of April 2009. The student's math performance was at the third grade level on the W-J and remained at the third grade level in April 2009. The student's Broad Reading was at the 4.1 level on the W-J, and her comprehension was at the 3rd grade level in April 2009, with her reading fluency at the 5th grade level, exactly where it was in the W-J.

The student's grades for the 2nd quarter were two C's, two D's, and 2 F's or U's. The April 2009 IEP indicates that the student's grades went down during the 3rd quarter. The IEP as well as testimony from her outside therapist and mother all indicate that the student is behind her peers academically.

Petitioner has met her burden of proof that the student has not been able to access the curriculum or make more than minimal educational progress as a result of her severe emotional disability.

The question remains whether home tutoring will be any more successful than the specialized instruction already in place for the student. There is some evidence that tutoring might have some success. The student's April 2009 IEP notes that the student is most successful when she receives 1:1 instruction. The student's DMN therapist also testified that the student does better 1:1. She also indicated that the student's behavioral problems lessen when she is in her home environment. However, the therapist admitted that it might take time for the student to trust the tutor and it is not clear if the tutoring would be successful. Both the DMH therapist and the IEP Coordinator agreed that the student would need a tutor trained to deal with students with emotional problems and that community based volunteer tutors would not be appropriate or successful.

The student will be provided with three hours of tutoring a week for a period of four months. At the end of the four months, _____ is to convene an MDT meeting in order to assess whether the tutoring has been successful in aiding the student to make academic progress. If it has been successful, the MDT Team is to determine whether additional tutoring, up to five hours a week, is needed in order for the student to access her education, or if the student's behavior in the classroom has improved to the point that she is able to sufficiently access the curriculum at school.

VII. SUMMARY OF RULING

DCPS has not denied the student FAPE because the DCPS representative of the April 23, 2009 IEP Team left the meeting to consult with her supervisor.

DCPS has denied the student FAPE by refusing to provide the student with home tutoring on her April 23, 2009 IEP.

VIII. ORDER

It is hereby **ORDERED** that

1. DCPS shall provide the student with three hours per week of home tutoring at DCPS expense, to commence immediately. The parent (aunt) shall choose the tutor who shall be trained to tutor student's with emotional disturbances.

2. At the end of October 2009, _____ shall convene an MDT meeting and shall determine if the tutoring has been successful in aiding the student to access the curriculum and make academic progress. If the tutoring has not been successful, it shall be terminated immediately. If the tutoring has been successful, the MDT Team shall determine if additional tutoring, up to five hours per week, is necessary in order for the student to access her education. If the student's behavior has improved to the point that she is able to access her education at school, the tutoring shall be terminated immediately.

3. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart

Impartial Hearing Officer

Date Filed: June 19, 2009