DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

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Parent or Guardian, on behalf of
Student, [1]

Petitioner,

v

The District of Columbia
Public Schools

Respondent.

Date Issued: July 2, 2010

Hearing Officer: Jane Dolkart

Case No:

Hearing Date: June 23, 2010
Room: 7a

HEARING OFFICER DECISION

Counsel for Petitioner:

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[1] Personal identification information is provided in Appendix A.

HEARING OFFICER DECISION AND ORDER

I. INTRODUCTION

This is a year old student presently in the grade at a DCPS elementary school. The student has repeated both and grade and will be socially promoted to the third grade for the 2010-2011 sy. The student is presently eligible for special education with a disability classification of Specific Learning Disability (Dyslexia). The student's most recent IEP completed on August 12, 2009, calls for him to receive 10 hours per week of specialized instruction in an out of general education setting, 10 hours per week of specialized instruction in a general education setting, 1 hour per week of speech and language (s/l) services and one hour per week of occupational therapy (OT) services.[2]

Petitioner filed a Due Process Complaint on November 19, 2009, alleging many of the same issues as alleged in the present complaint, to wit, the appropriateness of the student's IEP and placement and the failure to hold a meeting following evaluations as required in an April 30, 2009, HOD. On December 10, 2009, a settlement agreement was reached which stated that it was in full satisfaction and settled all claims in the pending complaint. Petitioner failed to include this information in the present complaint, thus providing the Hearing Officer with misleading information concerning the scope of the issues raised. The December 10, 2009, settlement agreement required that DCPS fund an independent neuropsychological evaluation and convene an IEP meeting to review the evaluation, revise the IEP if warranted, and discuss placement. An IEP meeting was held on April 10, 2010, at which the evaluation was reviewed and a new IEP was developed.

The present due process complaint was filed on April 21, 2010, and a Response was timely filed on May 3, 2010.

A resolution meeting was held on May 18, 2010. No resolution was reached and Petitioner signed a Complaint Disposition Form on the same day. The forty-five day timeline commenced on May 19, 2010, the hearing was held on June 23, 2010, and the HOD is due on July 2, 2010.

A pre-hearing conference in the case was held on June 1, 2010, and a pre-hearing order was issued on June 5, 2010. The complaint filed in this case is nothing short of a mess. It is an incomprehensible, all over the place, kitchen sink of allegations and requests for remedy. The pre-hearing conference was necessary simply to understand what the real issues in the complaint were. Respondent did not file a notice of insufficiency in this matter, but might well have.

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[2] The August 12, 2009, IEP is P 10 in the record. Page 6 of the IEP lists the student's specialized education and related services. It incorrectly lists all of the services as occurring in the general education setting. Testimony from the educational advocate and SEC make clear that this is an error and the services are being provided as listed above. Additionally, there is a draft updated IEP dated April 12, 2010, which would continue the same level of services.

The complaint alleges that the student has an inappropriate IEP. In light of the December 10, 2009, settlement, Petitioner can only challenge the subsequent IEP developed on April 10, 2010, and not yet finalized. Petitioner has stated that he will not pursue the allegation that the student's IEP is inappropriate. The complaint also alleged the failure by DCPS to hold a timely IEP meeting as required by an April 13, 2009, HOD. This issue is precluded by the December 10, 2009 settlement as it was an issue raised in the November 19, 2009, complaint.

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 to properly implement the student's August 12, 2009, IEP in that the student's 10 hours of special education delivered in a general education setting is being delivered by an unqualified teaching assistant?

2. Failing to provide the student with an appropriate placement because the student is in need of a full-time out of general education setting?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated June 16, 2010, containing a list of witnesses with attachments P 1-18. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's mother, the student, the student's educational advocate.

DCPS submitted a five day disclosure letter dated June 17, 2010, containing a list of witnesses with attachments R 1-10. The disclosure was one day late because the DCPS computer system was not working and DCPS counsel could not access the documents to provide the disclosure. Counsel contacted the Hearing Officer who agreed to give her until the next morning to submit the disclosure. The disclosure was admitted in its entirety. DCPS called as a witness the SEC at

V. FINDINGS OF FACT

1. This is a year old student presently in the grade at a DCPS elementary school. The student has repeated both and grade and will be socially promoted to the grade for the 2010-2011 sy. The student is presently eligible for special education with a disability classification of Specific Learning Disability (Dyslexia). The student's most recent IEP completed on August 12, 2009, calls for him to receive 10 hours per

week of specialized instruction in an out of general education setting, 10 hours per week of specialized instruction in a general education setting, 1 hour per week of speech and language (s/l) services and one hour per week of occupational therapy (OT) services. (Testimony of mother, SEC, educational advocate, P 6, 8, 10)

2. The student receives 10 hours of specialized instruction in a resource setting. The class has 4 other students and is taught by a certified special education teacher. (P 6, 10, testimony of SEC)

3. The student receives 10 hours of specialized instruction in the general education classroom. The special education teacher collaborates with the student's general education teacher to determine each day's curriculum and how it will be delivered. The special education teacher is not in the general education classroom when the specialized instruction is delivered to the student, although he may drop in for short periods of time. The student's general education teacher is in the classroom with a class size of approximately 15-21 other students. An educational assistant works with the student to provide the 10 hours of specialized instruction in the general education setting. (Testimony of SEC, educational advocate, mother)

4. The student's general education teacher is not a certified special education teacher. She is certified in curriculum development. The teacher did not testify and it is not clear if she has had any special training in teaching learning disabled students. (Testimony of SEC)

5. The educational assistant is not a teacher. She has a two year degree from a community college and is certified as an educational assistant. Her role is to offer support to special education students, not to teach them. (Testimony of SEC)

6. The educational assistant is with the student during his 10 hours of specialized instruction in the general education classroom and is the primary person delivering the actual instruction. (Testimony of SEC, mother, student, P 18, R 5)

7. The school has adapted a particular model of education called the School Wide Applications Model (SAM), which is a form of response to intervention teaching theory. The SAM model is based on the premise that all students can be taught in an inclusion setting and that each child should receive the interventions s/he needs regardless of whether they are labeled special education students or not. The SEC at the school testified that the special education teacher (SET) and the general education teacher (GE) collaborate and co-plan and determine the student's curriculum and the SET delivers instructions to the GE on delivery of specialized instruction. The SET testified that this collaboration qualifies the GE teacher to teach special education students. (Testimony of SEC, P 18, R 5)

8. The record contains Collaborative Lesson Planning/Inclusion Service Delivery Forms for September through December and February through March. There are no forms for January or after March 15, 2010. The record does not contain an explanation for the lack of forms during those periods. The forms are signed for the most part by the SET and the

GE teacher. They contain a particular reading or math assignment, the IEP goals addressed by the assignment and the strategies to be used in delivery of services. Three forms dated September 21, 23, and 25 list as the teachers to deliver the services the GE teacher and the educational assistant. (P 18, R 5)

9. The record does not contain any evidence of the student's academic progress or lack of progress for the 2009-2010sy. The record contains an IEP Progress Report covering the reporting period from 1/27/2010-4/12/2010. The student is reported as progressing in reading, math, and writing. There is space for comments concerning each specific goal in the student's IEP. They are all blank. No further information is supplied. (R 4)

VI. DISCUSSION AND CONCLUSIONS OF LAW

A. Legal Standard

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 IDEAs 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).

The Hearing Officer's inquiry in this case is twofold. First, has DCPS complied with the procedures set forth in the Act? *Rowley*, 458 U.S. at 206. Second, is the individualized education program developed through the Act's procedures being delivered so as to be reasonably calculated to enable the child to receive educational benefits? *Id.* at 207-08.

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.

B. Discussion

The burden of proof in an IDEA case is placed on the Petitioner. *Schaffer et al. v. Weast,* 546 U.S. 49 (2005). A Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 20 U.S.C. § 1415 (i) (2) (c)

1. Is the Student's Placement Appropriate?

Petitioner alleges that the student's placement is inappropriate and that the student should be placed in a full-time out of general education placement. However, the student does not have a full-time IEP and Petitioner has not alleged that the IEP is inappropriate. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia,* 460 F.Supp.2d 32, 44 (DDC 2006). Therefore, the student is not eligible to be placed in a full time special education program. This is the only allegation concerning the inappropriateness of the placement made by Petitioner. At the commencement of the hearing, the Hearing Officer dismissed this claim.

2. Is the student's IEP being properly implemented?

The sole allegation concerning whether the student's IEP is being properly is that the 10 hours of instruction in a general education setting is not being properly delivered.

The IDEA mandates that the State Education Agency (SEA) establish and maintain qualifications for personnel who provide services to children with disabilities under the Act. 34 CFR § 300.156. These qualifications must ensure that personnel, including paraprofessionals, are appropriately adequately prepared and trained and have the skills to serve children with disabilities. *See* 34 CFR § 300.156; U.S. Department of Education comments at 71 Fed. Reg. 46611. To prevail on his claim that the student's services are being provided by an unqualified educational assistant supervised by a general education teacher, Petitioner must demonstrate the specific training and qualifications mandated by the IDEA and the Office of the State Superintendent of Education (the SEA in the District of Columbia). Petitioner also must establish the roles that general education teachers and educational assistants may perform in the delivery of services to special education students and that either the educational assistant or the general education teacher exceeded their training and skills. Petitioner has failed to introduce any of this evidence.

In particular, 34 CFR § 300.156 (b) (2) (iii) specifically allows paraprofessionals who are properly trained and supervised, in accordance with state law, to assist in providing special education to children with disabilities. However, 34 CFR § 300.156 (b) (2) (iii), and the U.S. Department of Education comments at 71 Fed. Reg. 46612, are clear that

this does not permit the use of paraprofessionals as the replacement for teachers who meet State qualification standards. Paraprofessionals in public schools are not directly responsible for the provision of special education and related services. They may provide such services only under the supervision of special education personnel. 71 Fed Reg 46612, *Cavanagh v. Grasmick,* 75 F. Supp. 2d 446, 464 (D. Md. 1999) (distinguishing between IDEA personnel standards for special education teachers and paraprofessionals, and stating that paraprofessionals simply assist with the provision of special education under a teacher's supervision). No effort was made to introduce evidence elucidating the line between assisting in the provision of services and providing those services. This is a difficult case in that regard because the educational assistant is not supervised directly by the special education teacher, but by a general education teacher who collaborates with the special education teacher.

Regardless, the Hearing Officer does not need to determine if the delivery of special education services by the educational assistant falls outside the line of what is permissible under the IDEA and SEA standards. Even if Petitioner proved that the delivery of services did not meet the requirements of the IDEA, this would not automatically equate to a denial of FAPE. To prevail in this case, Petitioner is required to prove that the failure of DCPS to provide qualified personnel to delivery the student's specialized instruction is a substantive violation that denies the student FAPE.

Petitioner has failed to present any testimony or other evidence on any aspect of the student's educational performance during the 2009-2010sy. Petitioner also failed to present any evidence concerning the student's progress, or lack thereof, as a result of his work with the educational assistant. Thus, Petitioner has failed to introduce any evidence to show the student was denied FAPE.

Petitioner has failed to meet his burden of proof that the student was denied FAPE.

VII. SUMMARY OF RULING

Petitioner has failed to meet his burden of proof that the student was denied FAPE

VIII. ORDER

Upon consideration of the testimony and exhibits admitted at the hearing, it is hereby

ORDERED that Petitioner's complaint is **DISMISSED WITH PREJUDICE**

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.

By: s/s Jane Dolkart
Hearing Officer

Dated: July 2, 2010