

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

2011 DEC -6 AM 9:41
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a _____ year-old female, who currently attends a private special education school located in the District of Columbia as a result of Parent's unilateral placement of Student.

On September 21, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to evaluate in all areas of suspected disability, failed to develop an appropriate IEP that contains appropriate goals and sufficient specialized instruction hours that will advance Student's basic skills, and failed to place Student in an appropriate program to enable her to receive meaningful benefit during SYs 2010/11 and 2011/12. As relief for these alleged denials of FAPE, Petitioner requested funding of Student's unilateral placement retroactive to August 29, 2011, funding for independent audiological processing and vocational evaluations at market rates, an MDT meeting to review all evaluations and review and revise the IEP as necessary, and funding of a compensatory education plan developed by Parent.

The parties concluded the Resolution Meeting process by failing to reach agreement on October 4, 2011, but the parties did not elect to shorten the 30-day resolution session. Hence, the 45-day timeline for this case started on October 21, 2011 and will end on December 5, 2011, which is the HOD due date.

On October 11, 2011, DCPS filed its Response to the Complaint, asserting therein that DCPS had already authorized the requested independent audiological and vocational assessments, that Student previously received independent comprehensive psychological and speech/language

evaluations, that Student received 78 hours of compensatory education at a June 2, 2011 meeting, which resolved all compensatory education issues pursuant to the authorization, that the 6/2/11 IEP is appropriate and based on the most current data for Student, and that there was no denial of FAPE.

On October 27, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer issued the Prehearing Order on October 28, 2011.

By their respective disclosure letters provided on November 8 and November 9, 2011, respectively, Petitioner disclosed thirty-one documents (Petitioner's Exhibits 1 – 31) and DCPS disclosed 13 documents (Respondent's Exhibits 1 - 13).

The hearing officer convened the due process hearings on November 16 and 21, 2011, as scheduled.¹ At the November 16th hearing, Petitioner's Exhibits 1-2, 8, and 10-31 were admitted without objection, Petitioner's Exhibits 3-4 and 24 were admitted over objection, Petitioner's Exhibits 5-7 were conditionally excluded with a requirement that Petitioner link the documents to the time period under consideration, and Petitioner's Exhibit 9 was excluded over objection. DCPS's documents were admitted without objection. Petitioner withdrew its evaluation claim in light of its agreement with DCPS to have the desired evaluations conducted. DCPS objected to a portion of Petitioner's claim regarding the appropriateness of the program on the ground that it was precluded by the parties' March 8, 2011 Settlement Agreement. The hearing officer sustained the objection and limited consideration of said claim to the period beginning on March 9, 2011. Thereafter, opening statements were received, Petitioner presented its testimonial evidence, Petitioner advised of its decision not to pursue its request for compensatory education, and the hearing officer adjourned the hearing.

At the November 21st hearing, DCPS presented its testimonial evidence and the hearing officer granted Petitioner's request that the parties be allowed to submit written closing statements. With the parties' agreement, the hearing officer established the following schedule: 12:00 noon as the deadline for receipt of Petitioner's written closing and 12:00 midnight on November 25th as the deadline for DCPS's written closing, with the administrative record to close at 12:05 am on November 26th.² Thereafter, the hearing officer concluded the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

² Petitioner submitted its written closing by the deadline, but DCPS failed to submit a written closing statement.

1. Did DCPS fail to develop an appropriate IEP that contains appropriate goals and sufficient specialized instruction hours that will advance Student's basic skills because Student requires a full-time out of general education IEP?
2. Did DCPS fail to place Student in an appropriate program to enable her to receive meaningful academic benefit for SY 2010/11 from March 9, 2011 through the end of the year and for SY 2011/12, because Student requires a location of services that offers full-time out of general education services?

FINDINGS OF FACT³

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is years old, and she is in grade at a private full-time special education school, located in the District of Columbia, where she was parentally placed. Last year, Student attended grade at a DCPS public charter school.⁴
2. Student has a severe language impairment in the areas of receptive and expressive language, with difficulty in the areas of sentence assembly, semantic relations, recalling sentences, understanding spoken paragraphs, and word classes - receptive and expressive. These deficits can translate to difficulty interpreting information and classroom language tasks.⁵
3. Student's Full Scale IQ score is 62, which is in the Lower Extreme range and at the 1st percentile. Student's reading skills range from Borderline to Low Average, primarily at the 2nd and 3rd percentile, although Student performed at the 11th percentile (Low Average) in the area of reading speed. Student's math skills are in the Borderline range at the 2nd to 3rd percentile. Student's spelling skills are in the Lower Extreme range at the 1st percentile. Student's writing skills are at the Low Average to Low Extreme range, with writing fluency at the 16th percentile and writing samples at the .2 percentile.⁶
4. With Student's very low academic skills, she would not be able to keep up in a general education 9th grade class.⁷
5. Student has received the following DSM-IV-TR diagnoses: reading disorder; mathematics disorder; disorder of written expression; borderline intellectual functioning, provisional; and educational problems.⁸

³ To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved..

⁴ See Complaint; testimony of Parent.

⁵ Petitioner's Exhibit 11 at 7.

⁶ Petitioner's Exhibit 12.

⁷ Testimony of educational consultant.

6. Student's cognitive and academic skills have decreased over time. Hence, her Full Scale IQ dropped from 76 in 2005, to 71 in 2008, to 62 in 2011. Her broad reading percentile scores dropped from the 16th percentile in 2008 to the 5th percentile in 2011; her broad math scores dropped from the 13th percentile in 2008 to the 1st percentile in 2011; and her broad writing scores dropped the 7th percentile in 2008 to the 3rd percentile in 2011.⁹
7. Student's current IEP is dated June 2, 2011. It identifies Student's primary disability as Specific Learning Disability ("SLD"), and it requires Student to receive 20 hours per week of specialized instruction in general education and 1 hour per week of speech-language services outside general education. The IEP indicates that Student did not require ESY services for summer 2011.

In the academic area of mathematics, the IEP indicates that Student performs math at a 3rd grade level, struggles with math automaticity, and demonstrates significantly underdeveloped math calculation skills and procedural knowledge. There are three annual math goals, which require Student to simplify algebraic expressions using combining like terms and the distributive property, solve 1 and 2 step equations and translate verbal sentences into 1-step equations, and select, create and interpret an appropriate graphical representation for a set of data and compare two or more sets of data.

In the academic area of reading, the IEP indicates that Student reads at a 5th grade level and demonstrates basic decoding skills, but has difficulty accessing age-appropriate reading based curriculum because her foundational reading skills, reading fluency, and comprehension skills are well below age expectations and require remediation. There are four annual reading goals, which require Student, when given text at instructional level, to demonstrate comprehension of a passage by using and mastering basic literacy skills, understand the relationship between cause and effect, distinguish between fact and opinion, and identify the sequence of events.

In the academic area of written expression, the IEP indicates that Student can compose simple sentences and paragraphs, but struggle with conveying messages in writing, needs improvement in grammar, syntax and punctuation, spells below age expectations, and experiences difficulty constructing complete sentences that include required details. There are three annual written expression goals, which require Student to identify and correct grammatical errors, use sentence variety, and practice varying paragraph lengths; use the following figurative language terms property – alliteration, metaphor, personification, simile, symbol, idiom and paradox; and with the use of graphical organizers, produce functional texts that address audience needs, state purpose and context, and utilize correct format.

The Post-Secondary Transition Plan included in the IEP identifies the following long-range goals for Student: in the area of post-secondary education and training – to attend a 4-year institution of higher education in the DC metropolitan area; in the area of employment, to become either a social worker or a surgeon; and in the area of independent living, to live independently but near her family. The annual measurable post-secondary transition goals require Student to begin to prepare for the SAT college

⁸ Petitioner's Exhibit 12 at 10.

⁹ Petitioner's Exhibit 24.

entrance exam by focusing on SAT words of the day, identify 5-10 universities in the DC metropolitan area that she would like to attend, interview current professional in the fields of social work and surgery and create a log of the questions and responses, research the costs associated with living independently and create a monthly expenditure spreadsheet. For the courses of study to support Student's post-secondary goals, the transition plan lists all of the classes Student took at the DCPS public charter school she attended during SY 2010/11.¹⁰

8. Student's previous IEP, which was dated January 20, 2011, is essentially the same as Student's current IEP, with almost exactly the same goals in each academic area and the same post-secondary transition plan, but it provided for Student to receive only 10 hours per week of specialized instruction in general education and 1 hour per week of speech-language pathology outside general education.¹¹
9. Student's current IEP is inappropriate for failure to include goals that address Student's needs for basic foundational skills in math, reading and written expression. Moreover, 20 hours per week of specialized instruction in a general education setting are insufficient for a disabled child like Student, who's functioning at such a low academic level that she cannot keep up in a 9th grade general education class.¹²
10. Student's current IEP is inappropriate for failure to include ESY, because Student needs the repetition and rehearsal she would have received during ESY to retain the skills she learned during the regular school year. Hence, Student's April 21, 2011 comprehensive psychoeducational and clinical evaluation report recommends, *inter alia*, frequent repetition and review of classroom material, and frequent drill and repetition.¹³
11. Student's current IEP is inappropriate for failure to include an appropriate post-secondary transition plan, because the annual education and training goal focusing on SAT preparation is a wholly inappropriate goal given Student's very low level of academic functioning, Student needs more than one annual goal each in the areas of employment and independent living, and the courses of study merely repeat Student's general education schedule during SY 2010/11 instead of listing what will be done to prepare Student to meet her post-secondary goals.¹⁴
12. Student would not benefit from a general education setting. Instead, Student needs a small, highly structured, out of general education setting that can expose her to the general education curriculum while teaching her the fundamental skills she needs. Hence, Student's April 21, 2011 comprehensive psychoeducational and clinical evaluation report recommends, *inter alia*, placement in a small and highly structured full time special education program that can provide her with the intensive, specific, and appropriate academic and support to remediate her very severe learning disabilities in all academic

¹⁰ Petitioner's Exhibit 14; see Petitioners Exhibit 7.

¹¹ See Petitioners Exhibit 8.

¹² Testimony of educational consultant.

¹³ Testimony of educational consultant; Petitioner's Exhibit 12 at 10-11.

¹⁴ Testimony of educational consultant.

areas, and a low student to teacher ratio and frequent 1:1 contact to provide the intensive structure and support and individual attention that she requires to engage in the classroom.¹⁵

13. The DCPS charter school Student attended for SY 2010/11 provides special education services in co-taught classes with a general education and a special education teacher because it is a full inclusion program. All instruction at the school is within the general education setting.¹⁶
14. Student's final report card for SY 2010/11 reveals that Student received a final grade of "F" in all of her classes, except "Capstone," in which she received an A. More specifically, Student received final grades of "F" in English I, Algebra 1, Earth Science, Language and Composition 1, Algebra Concepts 1, Music, and World History during SY 2010/11. Hence, Student did not earn any Carnegie units/credits toward graduation during SY 2010/11.¹⁷
15. Student's behavior is not an issue in school or in connection with her academics. She is a very hardworking student. She is also remarkably upbeat and happy, despite the long history of academic failure she has experienced. Student's April 21, 2011 comprehensive psychoeducational and clinical evaluation revealed no evidence of mood, anxiety or emotional concerns. However, Student is at risk for emotional difficulties, such as learned helplessness, inadequacy and hopelessness, if she doesn't start seeing some academic success.¹⁸
16. Student is very motivated in school. During SY 2010/11, when she attended the DCPS charter school, Student went to school, went to after-school tutoring and Saturday school, and did not display any significant behavior issues. Student's teachers consistently report that she tries hard and does her best but is not mastering the material. The teachers asked Student to participate in the after-school tutoring and the Saturday Academy during SY 2010/11 because her grades were low regardless of how hard she tried.¹⁹
17. During SY 2010/11, Student was very frustrated that she did not seem to be progressing no matter how hard she tried. When her parents helped her with her homework, she would cry and want to give up. Student often came home crying after school and did not want to go back, but Parent kept encouraging Student not to give up. Now that Student is attending the full-time special education unilateral placement, she is much happier and can do her own homework without help.²⁰
18. The private full-time special education school Student is now attending as a result of Parent's unilateral placement services students with the disabilities of SLD, ADHD, other

¹⁵ Testimony of educational consultant; Petitioner's Exhibit 12 at 10.

¹⁶ Testimony of special education teacher.

¹⁷ Petitioner's Exhibit 16; testimony of Parent; testimony of educational consultant.

¹⁸ Testimony of psychologist; testimony of special education teacher; testimony of educational consultant.

¹⁹ Testimony of Parent; testimony of educational consultant; testimony of advocate.

²⁰ Testimony of Parent.

health impairment, and multiple disabilities. The school has a Certificate of Approval from the District of Columbia to service students with these disabilities. There are 37 students at the school, ranging from grades 7 through 12. Ninety percent of the students at the school are SLD, and most of the students are high school students in grades 9 through 12. All of the students at the school are pursuing a high school diploma, and the school provides intensive assistance and support to help its graduates transition to post-secondary academic and/or vocational programs. The school offers an 11-month program, and the annual tuition is not including related services. The cost for related services is per hour for counseling, and from to per hour for speech/language pathology services. These fees have been approved by the District of Columbia state educational agency.²¹

19. Student has been attending the non-public unilateral placement since the start of SY 2011/12 in September. Student fits in well at the school with respect to her academic needs and socially, and she has adjusted well. She has made friends, is passing her classes, does her classwork and homework, and goes to school on time every day. There are 6 periods per day at the school, and Student is taking World History, Writing Resource, Math, Physical Education, English, and Health. There are approximately 3 to 5 students in the content area classes, but electives can have up to 7 students. Although the average student to teacher ratio is 5 to 1, Student has a paraprofessional in her English and Math classes so the ratio in those classes is 4 to 2 or 5 to 2. The accommodations Student is receiving at the school include the following: extended time; chunking of reading; and math warm-ups geared toward areas of weakness. One-to-one pullout is also available if Student needs it, although she hasn't needed it so far.²²
20. Student is earning better grades at the non-public unilateral placement. The work is at her pace because it's not too fast or slow. Student is learning how to read better now. She is able to grasp the entire concept in her current math class, goes up and does work on the board, and helps others in math, whereas last school year, she could not grasp the full concepts in her math class.²³
21. The non-public unilateral placement Student is currently attending is an appropriate and proper school for Student.

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:

²¹ Testimony of Founding Director of private school.

²² Testimony of Founding Director of private school.

²³ Testimony of student.

1. Alleged Failure to Provide an Appropriate IEP

The free appropriate public education required by IDEA is tailored to the unique needs of the handicapped child by means of an IEP. The requirement to provide a FAPE is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Hence, the IEP, and therefore the personalized instruction, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982)

In the instant case, Petitioner has asserted that DCPS failed to develop an appropriate IEP that contains appropriate goals and sufficient specialized instruction hours that will advance Student's basic skills, because Student requires a full-time out of general education IEP. The evidence in this case supports Petitioner's position, as it proves that Student's current IEP is inappropriate because it fails to include goals that address Student's needs for basic foundational skills in math, reading and written expression; the 20 hours per week of specialized instruction in a general education setting the IEP provides constitutes an insufficient number of hours in an inappropriate setting because Student requires a full-time out of general education setting; the IEP fails to provide the ESY Student needs to retain the skills she learns during the regular school year; and the IEP fails to include an appropriate post-secondary transition plan. Hence, the IEP is not reasonably calculated to enable Student to achieve passing marks and advance from grade to grade, which is foreshadowed by the straight Fs Student received under her previous IEP, which, other than providing for 50% fewer hours of specialized instruction in the same general education environment, is essentially the same as the current IEP. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proof on this claim, and the hearing officer will order DCPS to reconvene Student's MDT meeting to rectify the deficiencies in the current IEP that have been identified herein.

2. Alleged Failure to Provide an Appropriate School Program

Under IDEIA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. Hence, IDEA provides that a FAPE consists of special education and related services that, *inter alia*, are provided at an appropriate preschool, elementary or secondary school. *See* 34 C.F.R. § 300.17.

In the instant case, Petitioner has asserted that DCPS failed to place Student in an appropriate program to enable her to receive meaningful academic benefit for SY 2010/11 from March 9, 2011 through the end of the year and for SY 2011/12, because Student requires a location of services that offers full-time out of general education services. Once again, the evidence of record supports Petitioner's position. Here, the evidence demonstrates that from March 9, 2011 forward, the only program DCPS offered for Student was a full inclusion program that provides all specialized instruction in co-taught classes in a general education setting, whereas Student requires a small, highly structured, out of general education setting on a full-time basis to receive meaningful educational benefit. As a result, the hearing officer concludes that Petitioner has met its burden of proof on this claim as well. *See Rowley, supra* (a State satisfies its obligation to

provide a FAPE by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction).

“Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). “Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

In the instant case, the evidence proves that Student's non-public unilateral placement is both proper and appropriate because it provides the full-time out of general education setting Student requires to receive meaningful educational benefit, and it offers the small setting, low student-to-teacher ratio, and intensive academic support and instruction required to remediate Student's severe learning disabilities in all core academic areas. As a result, the hearing officer will order DCPS to fund for SY 2011/12, retroactive to August 29, 2011, Student's attendance at the private full-time special education school she is currently attending.

ORDER

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

1. DCPS shall provide funding in the amount of _____ plus the costs of related services for SY 2011/12, retroactive to August 29, 2011, for Student's attendance at the private full-time special education school she is currently attending.
2. Within ten school days of the issuance of this Order, DCPS shall reconvene Student's MDT meeting and revise Student's IEP to (a) include goals that address Student's needs for basic foundational skills in math, reading and written expression, (b) provide for full-time specialized instruction outside of the general education setting, (c) provide ESY for Student, and (d) include an appropriate post-secondary transition plan that includes appropriate annual education and training goals, more than one goal each in the areas of employment and independent living, and a course of study designed to enable Student to meet the goals.
3. In scheduling the meeting ordered in Paragraph 2 above, DCPS shall ensure that invitations are issued to relevant team members at Student's current non-public unilateral placement, in addition to including Parent and her representative(s) in the meeting. Parent and her representative(s) shall cooperate with DCPS's efforts to schedule the

meeting, and in the event the meeting is delayed as a result of the unavailability or lack of cooperation of Parent and her representative(s), the deadline established herein for the meeting shall be delayed by one day for each day of delay caused by Parent and her representative(s).

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 U.S.C. § 1415(i).

Date: 12/5/2011

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer