

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

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STUDENT HEARING OFFICE
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PETITIONER, on behalf of
[STUDENT],¹

Date Issued: February 14, 2011

Petitioner,

Hearing Officer: Peter B. Vaden

v

Case No:

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: February 4, 2011

Respondent.

Student Hearing Office, Room 2003
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PETITIONER (the "Petitioner"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, the Petitioner alleges that District of Columbia Public Schools ("DCPS") breached a May 24, 2010 Settlement Agreement to consider the appropriateness of compensatory education. Petitioner

¹ Personal identification information is provided in Appendix A.

also contends that Student's current IEP is inappropriate and that DCPS has failed to develop a Behavior Intervention Plan ("BIP") for Student. Petitioner seeks an order for DCPS to fund Student's placement at PRIVATE SCHOOL ("PS").

The Student, an AGE adolescent, is a resident of the District of Columbia and is eligible for special education services under the primary disability, Other Health Impairment ("OHI"). The Petitioner's Due Process Complaint, filed on November 30, 2010, named DCPS as respondent. The undersigned Hearing Officer was appointed on December 1, 2010. The parties met for a resolution session on December 21, 2010. No agreement was reached and the parties decided that the case should proceed to a due process hearing. A prehearing telephone conference was held with the Hearing Officer and counsel on December 20, 2010 to set the hearing date, and to discuss issues to be determined and other matters.

The due process hearing was originally scheduled for January 27, 2011. Due to winter weather conditions, District of Columbia government offices were closed on that date and the hearing had to be rescheduled. On a joint motion of the parties, the Hearing Officer granted a 10 day continuance. After the continuance, the due date for issuing the Hearing Officer Determination in this case was deferred to February 14, 2011.

The due process hearing was held before the undersigned Impartial Hearing Officer on February 4, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared by telephone and was represented by counsel. Respondent DCPS was represented by counsel. The Petitioner testified and called as witnesses FIRST EDUCATIONAL ADVOCATE, PS ADMISSIONS DIRECTOR, PSYCHOLOGIST, and SECOND EDUCATIONAL ADVOCATE. DCPS called as witnesses COMPLIANCE CASE MANAGER, ELEMENTARY

SCHOOL (“ES”) SPED COORDINATOR, MIDDLE SCHOOL (“MS”) SPED COORDINATOR and MS SPECIAL EDUCATION TEACHER. Petitioner Exhibits P-1 through P-12 and DCPS Exhibits R-1 through R-9 were admitted into evidence without objection.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

1. Whether DCPS breached its undertaking in a May 24, 2010 settlement agreement to discuss and determine compensatory education for Student;
2. Whether the August 27, 2010 Individualized Education Program (“IEP”) denies Student a FAPE because it (i) contains inadequate goals and objectives, (ii) provides insufficient hours of specialized services, and (iii) omits transportation as a related service; and
3. Whether Student requires a BIP.²

Petitioner seeks an order for DCPS to fund Student’s placement at PS, to provide transportation services, and to develop and implement a BIP for Student.

FINDINGS OF FACT

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

1. Student is a AGE resident of the District of Columbia. He attends MS. Exhibit R-5
2. Student was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) when he was 6 or 7 years old. Exhibit P-4

² At the due process hearing, Petitioner withdrew a fourth issue, whether DCPS failed to convene a 30 day review meeting after Student was enrolled at MS.

3. Parent elected to send Student "out of boundary" to MS under school choice. MS is not the neighborhood school for Student's residence address. Parent requested that Student be transferred from his neighborhood school because of her concerns about Student's being bullied.

Testimony of Parent

4. The special education services specified in Student's IEP could have been provided at Student's neighborhood school, for which transportation would not have been provided. Testimony of ES SPED Coordinator

5. In a May 18, 2010 Settlement Agreement between Petitioner and DCPS, DCPS agreed, *inter alia*, to convene a Multidisciplinary Team ("MDT") meeting to review independent evaluations, determine Student's special education eligibility and discuss and determine compensatory education, if warranted. Exhibit P-1

6. DCPS convened an MDT meeting at ES on August 27, 2010. Parent and First Educational Advocate attended. At the meeting, Student was found eligible for special education services under the disability classification, OHI. An IEP was developed for Student at the meeting which provided, *inter alia*, that Student would receive special education services, including 2.5 hours per week in reading, 5 hours per week in mathematics and 5 hours per week in written expression. In addition the IEP provided that Student would receive 30 minutes per week of Behavioral Support Services. All of the special education and related services would be furnished outside the general education setting. Exhibits R-4, R-5

7. At the August 27, 2010 MDT meeting, the team determined that compensatory education was not warranted. Exhibits R-4, R-5, Testimony of Compliance Case Manager, ES SPED Coordinator Neither Parent nor First Educational Advocate raised compensatory education as an issue at the MDT meeting. Testimony of First Educational Advocate

8. At the August 27, 2010 MDT meeting, transportation to school for Student was discussed. The team determined that Student was not eligible based upon his OHI (“ADHD”) classification for transportation as a related service and that the fact that Parent had opted for Student to attend an out of boundary school did not make him eligible for transportation services.

9. Parent signed the IEP on August 27, 2010 to affirm that she agreed with its content. Exhibit R-5 Neither Parent nor First Educational Advocate objected to the level of special education services provided in the IEP or to the placement at MS. Testimony of ES SPED Coordinator

10. Student has been accepted for admission at PS. Exhibit P-8 All students at PS receive full time special education services. There are no nondisabled students attending PS. Testimony of PS Admissions Director

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

DISCUSSION

The burden of proof in a due process hearing is the responsibility of the party seeking relief, in this case, the Parent. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005) (Burden of proof in an administrative hearing challenging an IEP placed upon the party seeking relief); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

1. DID DCPS BREACH ITS UNDERTAKING IN THE MAY 24, 2010 SETTLEMENT AGREEMENT TO DISCUSS AND DETERMINE COMPENSATORY EDUCATION FOR STUDENT?

In the May 24, 2010 settlement agreement between the Petitioner and DCPS, DCPS agreed to convene an MDT team meeting to review independent evaluations, determine Student's special education eligibility and discuss and determine compensatory education, if warranted. In her due process complaint the Parent alleges that at the August 27, 2010 MDT/IEP team meeting, DCPS did not discuss or determine compensatory education. I find that the evidence establishes, to the contrary, that the MDT team did discuss compensatory education and determined it was not warranted.

Compliance Case Manager testified that there was an in-depth discussion of compensatory education and the IEP team determined it was not warranted, after looking at Student's poor attendance and missed work during the 2009-2010 school year. (Compliance Case Manager testified that Student has missed more than 40 days of school.) In her MDT Meeting Notes, Compliance Case Manger recorded that "The team determined that compensatory education was not warranted." Exhibit R-4 ES SPED Coordinator testified that the IEP team discussed compensatory education at the August 27, 2010 team meeting and determined that Student did not qualify because he had not missed any special education services. The August 27, 2010 IEP, signed by the Parent, is ambiguous. The check box for whether Compensatory Education was discussed at the meeting is marked "No," but in the following comments, the IEP states, "The IEP Team determines that [Student] does not qualify for Compensatory Education Services." Parent's First Educational Advocate, who attended the IEP meeting, testified that compensatory education was not discussed, but stated that she did not ask to talk about this service. She added that if she had felt like it was needed, she would have

raised compensatory education as an issue. First Educational Advocate's notes from the meeting do not reflect any discussion of compensatory education. Exhibit 2

Whether compensatory education was, or was not, discussed at the IEP meeting, the Parent, counseled by her educational advocate, had the opportunity to raise the issue. Furthermore, she signed the IEP, which stated that Student did not qualify for compensatory education, affirming that she agreed with the IEP's contents. Based upon the preponderance of the evidence, I find that Parent has failed to establish that compensatory education was not discussed or determined at the August 27, 2010 IEP meeting. DCPS prevails on this issue.³

2. IS THE AUGUST 27, 2010 IEP INADEQUATE BECAUSE IT (i) CONTAINS INADEQUATE GOALS AND OBJECTIVES, (ii) PROVIDES INSUFFICIENT HOURS OF SPECIALIZED SERVICES, AND (iii) OMITTS TRANSPORTATION AS A RELATED SERVICE?

Under the U.S. Supreme Court's decision in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Hearing Officer must address two questions that are aimed at DCPS's paralleling responsibilities to comply with the procedural and substantive requirements of the IDEA: First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Rowley*, 458 U.S. at 206-07, 102 S.Ct. 3034. In this case, Parent does not allege any procedural deficiencies. Accordingly, my inquiry must be whether the IEP was reasonably calculated for Student to receive sufficient educational benefits to meet the

³ The basis for Petitioner's claim for compensatory education appears to be premised on an alleged need to "remediate the years in which the student failed to received specialized instruction" before the May 18, 2010 settlement agreement. See Exhibit P-10 (Compensatory Education Plan). Whether Student received FAPE, before the August 27, 2010 IEP was developed, is not an issue before this Hearing Officer.

requirements of a FAPE. *See, e.g., N.S. v. Dist. of Columbia*, 709 F. Supp. 2d 57, 60, 54 IDELR 188 (D.D.C. 2010).

As a preliminary to discussion of the adequacy of the August 27, 2010 IEP, I note that in this case, both the Parent and her educational advocate (an employee of Parent's attorneys) fully participated in the development of Student's August 27, 2010 IEP, and Parent signed the IEP indicating her agreement with its content. That is not to say that Parent is now barred from challenging the IEP which she and her advocate helped to craft. However under the IDEA, the IEP team model brings together the parents and teachers of the disabled student, as well as other educational specialists, to determine in a collaborative process how best to accommodate the needs of the student and provide a FAPE. *See, e.g., Parents v. Dist. Of D.C.*, 709 F.Supp.2d 57, 60 (D.D.C., 2010). In this case the failure of Parent and her educational advocate to make her concerns known at the IEP meeting deprived the rest of the IEP team of the opportunity to consider those concerns and make appropriate adjustments to the IEP.

The IDEA requires that every IEP contain a statement of measurable annual goals, including academic and functional goals designed to—

- (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- (B) Meet each of the child's other educational needs that result from the child's disability.

34 C.F.R. § 300.320(a)(2).

Student's IEP contains the following academic goals:

Mathematics:

By August 26, 2011, Student will demonstrate concrete visual organizers for multiplying and dividing to solve grade level problems in Number Sense and Operations by scoring 90% accuracy on 5 Work Samples, consisting of ten math problems;

By August, 26, 2011, Student will identify keys words or signs to determine the correct operation to use to obtain the answer to a math problem. This will be measured on 8 out of 10 trials with 90% accuracy, over ten consecutive days, as measured by student work samples, or teacher made assessments. Problems will be taken from the math textbook; Given math problems, Student will add and subtract mixed fractions with another fraction having like denominators on four out of five trials; with 90% accuracy;

By August 26, 2011, Student will demonstrate finding measurement. Performance Quality by August 26, 2011, on review of Student's Numeracy (Mathematics) Work Sampling Portfolio, there is five work samples scored at 90% to measure competency. Two work samples will measure two-dimensional shapes and three work samples will measure three-dimensional shapes.

Reading:

Given informational text and literary text, Student can demonstrate comprehension with grade level literary forms by using enabling strategies to respond to questions at the analysis reasoning level on 10 work samples scored at 90% to measure competency.

Written Expression:

Given prompts for written expression, Student can demonstrate skill by writing a beginning, middle and end for a variety of expository text read. On review of Student's Written Expression Work Sampling Portfolio, there is 5-Work Samples scored within the Proficiency range using the DCPS Writing Rubric to score competency;

By August 26, 2011, given strategies (i.e. teach the student to know text organization - compare/contrast, cause/effect, sequence/chronological order and main idea/ideas - for written expression, Student will demonstrate grade level writing as measured by four work samples of a paragraph within the proficiency range (level 3) on the DCPS Rubric used to measure proficiency.

Exhibit R-5

Parent's Second Educational Advocate, a law firm colleague of the education advocate who helped to craft the IEP, opined that while parts of the goals were very good, she generally faulted the IEP goals for failure to specify on what grade levels the Student is performing. This criticism lacks merit. In the Present Levels of Educational Performance ("PLOP") sections of the IEP, Student's achievement levels are specified for mathematics (5.0 grade equivalent) and for reading (Basic). In Written Expression, annual goals are directed at the proficiency range

(level 3) on the District of Columbia Comprehensive Assessment System (“CAS”) Writing Rubric. Second Educational Advocate also opined that Student’s reading goal should include several comprehension goals, identifying fact, opinion and plot, and that writing goals should work on sentences and paragraphs. As with other aspects of the IEP, the Annual Goals must be considered sufficient if they were reasonably calculated to enable the Student to receive educational benefits. *See Rowley, supra.* I find that Second Educational Advocate’s opinions, if correct, show only that the IEP goals could be improved. They do not demonstrate that the goals were not reasonably calculated to enable Student to receive educational benefit. DCPS prevails on this issue.

Parent also contends that the August 27, 2010 IEP provides insufficient hours of specialized services. Under the IEP, Student was to receive 12.5 hours per week of Special Education academic services and 30 minutes per week of behavioral support services. In her independent Clinical Evaluation dated July 1, 2010 (before Student was found eligible for special education services), Psychologist recommended that due to Student’s learning problems and emotional difficulties, that he be placed in a full-time, private, therapeutic school. In her testimony at the hearing, Psychologist explained that she had recommended a full-time setting because Student’s learning difficulties and depression were impacting his academics and behavior in school. Second Educational Advocate also opined that Student required a full-time therapeutic special education program.

MS Special Education teacher testified that under the IEP, Student is making progress toward his IEP goals. and, specifically in reading, English and language arts, is not doing badly. She reports that his in-class behavior has also improved. The MS SPED Coordinator testified that Student’s teachers report that he is doing “Okay” but not as well as they think he is capable

of doing. On the progress report for October 28, 2010, Student received D's in Math and Science, a C in Language Arts and an A in Health and Physical Education.

Unfortunately, the evidentiary record in this case is thin both as to the amount of special education services this student may require and as to his progress or lack of progress under his current IEP. I find Psychologist's recommendation that Student be placed in a full-time, private, therapeutic setting unpersuasive because (1) she is not an educator, (2) she has not observed Student in school, (3) her recommendation does not address the "basic floor of opportunity" that the IDEA seeks to guarantee each handicapped child. *See Blackman v. District of Columbia*, 374 F.Supp.2d 168, 172 (D.D.C. 2005), *citing Rowley, supra*, 458 U.S. at 201. Second Educational Advocate's opinion is also unpersuasive because her opinion was addressed to remediating DCPS's alleged failure to provide an appropriate education to student in past school years – an issue neither alleged nor proven in this case. *See* "Compensatory Education Plan for [Student]" at Exhibit P-10 (The 12.5 hours of specialized instruction outside general education, and only 30 minutes of behavioral support services, cannot remediate the years in which student failed to receive specialized instruction.) DCPS's evidence on the appropriateness of the services provided in Student's IEP, and on the educational benefit he is receiving, was also less than comprehensive. Nonetheless, the burden of proof in this hearing was on the Parent, as the party challenging the IEP. *See, Schaffer, supra*, 546 U.S. 49 at 62. I find that Parent has not met her burden to establish that the special education services provided in Student's August 27, 2010 IEP were not reasonably calculated to provide educational benefits. DCPS prevails on this issue.

Finally with regard to alleged deficiencies with the IEP, Parent contends that DCPS should have provided transportation to and from school as a related service. The IEP Team is responsible for determining if transportation is required to assist a child with a disability to benefit from special education and related services, and how the transportation services should

be implemented. See 34 CFR § 300.320(a)(4); U.S. Department of Education, Office of Special Education Programs, *Questions and Answers on Serving Children with Disabilities Eligible for Transportation* (November 2009). The evidence in this case does not establish that transportation was required to assist Student to benefit from his special education services. The special education services specified in Student's IEP could have been provided at Student's neighborhood school, for which transportation would not have been provided. Parent requested that Student be transferred from the neighborhood school because of her concerns about Student's being bullied. Enrolling Student in an out-of-boundary school may have been the best choice for Student, but the evidence does not establish it was necessary to assist Student to benefit from special education. Therefore, transportation is not a required related service under 34 CFR § 300.320(a)(4). DCPS prevails on this issue.

3. IS DCPS REQUIRED TO DEVELOP A BIP FOR STUDENT?

The IDEA requires, in the case of a child whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. See 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). Many students with ADHD need BIPs to help with impulsive and off task behavior. Testimony of Second Educational Advocate Psychologist concluded in her July 6, 2010 FBA that the results suggested the need for a BIP to address attentiveness, active participation in class activities, redirection toward tasks at hand and comprehension of course material. Exhibit P-5, p. 7 This conclusion is fully supported by the July 1, 2010 in-school observation of Student by DOCTORAL STUDENT. DCPS must develop and implement a BIP directed at producing positive changes in Student's behavior. The Petitioner prevails on this issue.

ORDER

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

Within 10 school days of this Order, DCPS shall convene Student's MDT team to develop and implement an appropriate BIP for Student. All other relief requested by the Petitioner in her Complaint for Due Process is denied.

Date: February 14, 2011

s/ Peter B. Vaden
Peter B. Vaden, 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 U.S.C. §1415(I).