

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

STUDENT,¹ by and through his Parent,

Petitioners,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Case No.

Bruce Ryan, Hearing Officer

Hearing: August 21, 2009

Decided: August 31, 2009

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HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

The due process complaint in this matter was filed July 13, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint concerns a now -year old student who currently attends , located in the District of Columbia. Respondent District of Columbia Public School ("DCPS") serves as the LEA for

The complaint alleges that DCPS denied the student a free appropriate public education ("FAPE") by (a) failing to provide an individualized education program ("IEP") that is reasonably calculated to benefit the child educationally, and (b) failing to provide an appropriate placement. Petitioners allege (*inter alia*) that the Student needs a full-time dedicated aide to assist him throughout the school day, and that the current placement at is not appropriate because the school cannot provide the Student with his needed American Sign Language ("ASL") instruction. The parent has requested that DCPS fund the Student's placement at the School, a private school located in Baltimore County, Maryland.

On July 20, 2009, DCPS agreed to waive the resolution session and requested that this case proceed to a due process hearing on the merits. DCPS then filed a response to the complaint on July 21, 2009, which asserts: (a) the Student's IEP, which includes a part-time dedicated aide, is appropriate; and (b) the full-time special education placement at is appropriate, as the school is implementing the IEP, and the Student is making progress including instruction in ASL and Picture Exchange Communications System ("PECS"). DCPS thus opposes the relief requested by Petitioners.

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

A Prehearing Conference ("PHC") was held on July 27, 2009, and a Prehearing Order was issued July 28, 2009. Petitioners elected for the hearing to be closed. Five-day disclosures were filed by both parties as directed, on or about August 14, 2009.

The Due Process Hearing was held on August 21, 2009. At the hearing, a total of 18 documentary exhibits submitted by Petitioners (identified as -6" through "-23")² and nine documentary exhibits submitted by DCPS (identified as "DCPS-01" through "DCPS-09") were admitted into evidence without objection.³ Testifying at the hearing on behalf of Petitioners were: (1) the Parent-Petitioner; (2) the Student's Educational Advocate ("EA"); and (3) Dr. Jennifer Reesman, a Clinical Psychologist at Children's National Medical Center. Testifying on behalf of DCPS were: (1) Special Education Teacher; (2) Christine Raymond, Speech-Language Pathologist; and (3) Assistant Principal.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioners, along with the pleadings filed by both parties, has resulted in the following issues being presented for determination at hearing:

- a. *Whether DCPS has denied the Student a FAPE by failing to develop an appropriate IEP; and*
- b. *Whether DCPS has denied the Student a FAPE by failing to provide an appropriate placement.*

The relief sought by Petitioners includes: (1) findings of FAPE denial; (2) DCPS' placement of the Student at the School, including transportation services and funding of audiological services and a full-time dedicated aide who can provide ASL services; (3) a follow-up MDT/IEP team meeting; and (4) compensatory education.

III. FINDINGS OF FACT

1. The Student is a -year old resident of the District of Columbia who is currently enrolled at See Parent Testimony; EA Testimony; -8.
2. The Student has been determined to be eligible for special education as a child with Multiple Disabilities as a result of his being deaf and autistic. The Student's initial date of eligibility was September 7, 2007. See -6; -9.
3. The Student began attending on or about January 26, 2009. Prior to that, he attended An HOD issued January 9, 2009, found that the

² Petitioners withdrew Exhibits -1 through 5 following DCPS' objection because they related to a prior due process complaint which had been voluntarily withdrawn without prejudice.

³ In addition, the 7/13/09 Due Process Complaint and the 7/21/09 DCPS Response were admitted without objection as Hearing Officer Exhibits "HO-1" and "HO-2," respectively.

placement at _____ was inappropriate, as it was unable to meet the Student's unique special education needs and implement the Student's IEP; and that the inappropriate placement had caused a deprivation of educational benefit and constituted a denial of FAPE to the Student. See _____ 6.

4. The Student's current IEP, dated April 23, 2009, provides 20.75 hours per week of specialized instruction, one hour per week of speech/language therapy, 45 minutes per week of occupational therapy, 30 minutes per week of speech/language therapy consult, 30 minutes monthly of audiological services, and 15 hours per week of a dedicated one-on-one aide. See _____ 9; *DCPS-01*.

5. At the 4/23/09 MDT/IEP team meeting, the parent and educational advocate requested that the dedicated aide be provided on a full-time basis. See _____ -10. However, DCPS determined that the aide should be provided only on a part-time (15 hours weekly) basis, at least initially. See _____ -8; *DCPS-02*. DCPS determined that this issue could be revisited in six months to see if a full-time aide was needed based on the Student's progress. _____ -10 Meeting Notes, p. 20); *DCPS-02*; *Spec. Ed. Teacher Testimony*.

6. The Student's MDT/IEP team next convened on or about June 5, 2009. The purpose of the meeting was to review the appropriateness of the Student's placement and to review a recently completed social work assessment. At this meeting, the parent requested an independent social work assessment as she disagreed with the assessment completed by DCPS. The parent also repeated her request to provide the Student with a full-time dedicated aide who was familiar with ASL. See _____ 11; *DCPS-03*.

7. At the 6/5/09 meeting, the MDT/IEP team agreed that DCPS would fund an independent social work assessment. See _____ 12 (Student Evaluation Plan); *DCPS-05* (IEE letter). However, DCPS again declined to provide a full-time dedicated aide with ASL abilities. _____ 11; *EA Testimony*. DCPS also determined that the Student would remain at _____

8. The parent disagreed with the contents of the IEP and the Student's continued placement at _____ The parent requested that DCPS fund the Student's placement at the _____ School, and further requested that DCPS fund audiological services at the school, as well as a dedicated aide trained in ASL. See _____ -11; *Parent Testimony*; *EA Testimony*.

9. The teachers and dedicated aide currently communicate with the Student through a combination of PECS and very basic, functional-level ASL throughout the school day including academic lessons. See, e.g., *DCPS Testimony (Spec. Ed. Teacher, Speech/Language Pathologist, Assistant Principal)*; *EA Testimony*. While DCPS believes that this is all the Student is capable of performing at present, the evidence indicates that he may be able to perform at a higher level if he is provided access to a broader, more consistent program of ASL instruction. See *Parent Testimony*; *EA Testimony*; *Psychologist Testimony*.

10. In addition to the regular communication and speech/language therapy, DCPS also currently provides the Student with approximately three, 10-minute ASL instructional sessions per school day, although these services are not specifically set forth in the IEP. The special education teacher began to implement this further direct ASL instruction, through aide or teacher assistant, after meeting with the parent on 6/5/09 and being provided a list of words the Student knows expressively and receptively. See *Spec. Ed. Teacher Testimony*; *DCPS-07*.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. *See Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See DCMR 5-3030.3*. The standard generally applied is preponderance of the evidence. *E.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); *see also* 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Denials of FAPE

3. For the reasons discussed below, the Hearing Officer concludes that Petitioners have carried their burden of proof, in part, with respect to *Issue (a) (inappropriate IEP)*; but Petitioners have failed to carry their burden of proof on *Issue (b) (inappropriate placement)*.

Issue (a): Whether DCPS has failed to develop an appropriate IEP

4. Under IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982).⁴ The issue of whether an IEP is appropriate is a question of fact. *See, e.g., S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

5. In this case, Petitioners argue that the Student is in need of a full-time, dedicated aide trained in ASL, who can assist him throughout the school day, as part of his IEP. DCPS contends that its provision of a part-time aide shared with another student is adequate to address the Student's needs at present. DCPS further asserts that the Student currently receives sufficient instruction in ASL, which together with PECS adequately addresses his unique communications needs and goals.

6. Petitioners have not shown on this record that a full-time dedicated aide is necessary to provide meaningful educational benefit under the current IEP. However, since the 4/23/09 MDT/IEP team determined that it would review progress and revisit this issue after six months (*i.e.*, 10/23/09), it would be appropriate for DCPS to conduct such review and redetermination at least by the end of the Fall 2009 semester. Accordingly, the Order will specify a deadline of December 15, 2009. Petitioners should present to the team all relevant information

⁴ *See also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit.").

relating to the Student's need for dedicated-aide assistance, and the team should schedule a meeting with the parent and advocate to address this issue, in advance of that deadline.

7. In the meantime, regardless whether a part-time or full-time aide is provided, it is essential that the Student be provided with sufficient instruction (and communication) in ASL as part of his educational program. The parent is concerned that the Student is regressing in his expressive and receptive language skills, and that PECS cannot serve as an adequate long-term substitute for ASL. *See Parent Testimony*. The 4/23/09 IEP summarizes his current performance level in the communication (speech & language) area as follows:

“[The Student] has not demonstrated expressive use of any signs and requires full hand over hand assistance to form signs. He needs to develop a functional communication system to make his wants and needs known to staff and caregivers. Receptively, he responds to a very limited set of single-sign commands.”

AD-9, p. 2 (Section VII). *See also Spec. Ed. Teacher Testimony; Findings* ¶ 9. Moreover, Petitioners' expert psychologist (a post-doctoral fellow in pediatric neuropsychology at Children's Medical Center) testified that she was particularly concerned about the Student's language and communication, and that the “window is closing” on his ability to learn fluent ASL. *See Psychologist Testimony*.

8. In recognition of the Student's need for improved communication skills, DCPS witnesses testified that the school currently provides the Student with approximately three, 10-minute ASL instructional sessions per school day. *See Spec. Ed. Teacher Testimony*. However, these services are not specifically set forth in the IEP. The Hearing Officer agrees with Petitioners that individual ASL instruction should be included within the IEP as part of the Student's written program of specialized instruction and related services. Otherwise it would not constitute an enforceable FAPE obligation. *See 34 CFR 300.17*. Accordingly, a directive to this effect will be included in the Order.

Issue (b): Whether DCPS has failed to provide an appropriate placement

9. Placement determinations should be based on a complete, up-to-date record of the student's evaluations and assessments, and “must be tailored to meet the child's specific needs.” *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005). The relevant considerations in determining whether a particular placement is appropriate for a particular student include the following:

“the nature and severity of the student's disability, the student's specialized educational needs, the link between these needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment.”

Branham, 427 F.3d at 12, citing *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982).

10. In this case, Petitioners claim that the Student's current placement at is not appropriate primarily because the school cannot provide the Student with his needed ASL instruction. However, the evidence shows that there are five to six staff at with

some capability in ASL; that _____ is capable of providing more ASL instruction if needed; and that it can provide all other services listed in the IEP. *See Assistant Principal Testimony; Spec. Ed. Teacher Testimony.* Approximately one-half of _____ students are autistic, and five other students are completely deaf. *See Assistant Principal Testimony.*

11. Petitioners conceded that their proposed placement at Trellis School would similarly require DCPS to fund a full-time dedicated aide as well as audiological and ASL services. Thus, it appears that the real issue is what the IEP provides, not the nature of the school placement or location. Moreover, no one from _____ School was presented to testify regarding their proposed educational program for the Student.

12. Additionally, _____ School is a non-public school, outside the District of Columbia, and is located near Baltimore, Maryland, approximately a 45-minute drive from Petitioners' home in D.C. Petitioners did not demonstrate how this proposed placement, rather than _____ would comport with the placement priorities of the IDEA (*see* 34 CFR 300.116(b)(3) (child's placement should be "as close as possible to the child's home"), DCMR 5-3013.1(f) (same), and/or DC Code 38-2561.02(c). *See, e.g., Roark v. District of Columbia*, 460 F. Supp. 2d 32, n. 11 (D.D.C. 2006).

13. Accordingly, the Hearing Officer concludes that the evidence does not support a finding that the current placement at _____ is inappropriate. Nor does the record developed at hearing support "an informed and reasonable exercise of discretion" regarding the requested placement at _____ School at this time. *Branham*, 427 F.3d at 12; *Reid v. District of Columbia*, 401 F.3d 516, 527 (D.C. Cir. 2005).

C. Appropriate Relief

14. The IDEA authorizes district courts and hearing officers to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

15. In this case, the Hearing Officer has exercised his discretion to fashion appropriate equitable relief, based on the record developed in this proceeding and the particular violation(s) adjudicated herein. The appropriate relief is set forth in the Order below.⁵

⁵ Petitioners failed to present evidence at hearing to support an award of compensatory education under *Reid*, beyond any compensatory educational plan previously agreed by the team for prior denials of FAPE (*see AD-17*).

V. **ORDER**

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

1. Within **10 school days** of this Order (*i.e.*, by **September 15, 2009**), DCPS shall convene a meeting of the Student's MDT/IEP team to review and update the Student's IEP in accordance with this HOD. At this meeting, the MDT/IEP team shall revise the IEP to include **specialized instruction in the American Sign Language ("ASL") communication program to the Student on an individual basis in the amount of at least ninety (90) minutes per week**. The MDT/IEP team shall also make any appropriate, corresponding revisions to the goals and objectives sections of the IEP. This program of specialized ASL instruction shall be designed and coordinated in consultation with the Student's parent and educational advocate.
2. By **December 15, 2009**, DCPS shall convene a further meeting of the MDT/IEP team to review the Student's progress with the assistance of a part-time dedicated aide, together with any other relevant information provided by the parent and advocate relating to the Student's need for one-on-one, dedicated-aide assistance. The team shall consider and determine at that time **whether the level of dedicated aide services should be adjusted to meet the unique needs of the Student, including but not limited to (a) increasing to full-time dedicated aide services, and/or (b) requiring the assistance of an aide with greater ASL capabilities**. If the team determines to adjust the dedicated-aide services, it will review and revise the IEP as appropriate.
3. Petitioner's other requests for relief are hereby **DENIED**.
4. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Domiento Hill, Esq., via facsimile (202-742-2098), or via email (dhill@jebllaw.biz).
5. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
5. This case shall be, and hereby is, **CLOSED**.

Dated: August 31, 2009



Impartial Hearing Officer