

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

CONFIDENTIAL

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STUDENT HEARING OFFICE
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HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)

DOB)

DATE OF HEARING

August 6, 2009

Student I.D.)

Petitioner)

DATE OF COMPLAINT

June 24, 2009

V.)

The District of Columbia)

Public Schools,)

Respondent)

ATTENDING SCHOOL:

COUNSEL FOR PARENT/STUDENT:

**Miguel Hull
James E. Brown & Assoc.
1220 L Street, N.W.
Ste. 700
Washington, D.C. 20005**

COUNSEL FOR DCPS:

**Candace Sandifer
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232**

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

August 16, 2009

Representatives:

Petitioner – Miguel Hull
DCPS – Candace Sanifer

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 is an _____ year old student who has completed the _____ grade at _____ and qualifies for special education under the classification of Other Health Impaired (OHI), in this case ADHD. On February 5, 2008, Petitioner requested in writing that the student be evaluated for special education. On July 17, 2008, Petitioner filed a due process complaint alleging failure by DCPS to complete the evaluations within the mandated 120-day timeline. On July 23, 2008, DCPS authorized independent evaluations, and on August 15, 2008, an HOD was issued finding that DCPS had denied the student FAPE by failing to complete the evaluations.

All independent evaluations were completed by the end of September 2008. An initial eligibility meeting was held on December 10, 2008. At the meeting it was determined that a psycho-educational evaluation was needed.² On January 30, 2009, the eligibility meeting was reconvened and the MDT Team determined to put in place certain interventions to help the student and reconvene in 60 days to review the student's progress. On April 8, 2009, an MDT meeting was convened, the student was found eligible for special education and an IEP was developed. The IEP provides for 12 hours of specialized instruction and 1 hour of counseling per week. This due process complaint was filed on June 24, 2009, alleging that DCPS had denied the student FAPE by developing an inappropriate IEP and by placing the student in an inappropriate placement.

A pre-hearing conference was held on July 15, 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 to provide an appropriate IEP in that the April 8, 2009 IEP contains an insufficient number of hours of specialized instruction?

² It was subsequently determined that an educational evaluation of the student had been completed on April 14, 2008.

2. Failing to provide an appropriate placement because the student requires a full time out of general education placement in a small classroom?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated July 30, 2009, containing a list of witnesses with attachments P 1-22. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's mother, the student's educational advocate, a psychologist, and the Assistant Educational Director at Accotink Academy.

DCPS submitted a five day disclosure letter dated July 30, 2009, containing a list of witnesses with attachments DCPS 1-3. The disclosure was admitted in its entirety. DCPS did not call any witnesses.

V. FINDINGS OF FACT

1. This is an year old student who has completed the grade at and qualifies for special education under the classification of Other Health Impaired (OHI), in this case ADHD. On February 5, 2008, Petitioner requested in writing that the student be evaluated for special education. On July 17, 2008, Petitioner filed a due process complaint alleging failure by DCPS to complete the evaluations within the mandated 120-day timeline. On July 23, 2008, DCPS authorized independent evaluations, and on August 15, 2008, an HOD was issued finding that DCPS had denied the student FAPE by failing to complete the evaluations. (P 2, 4, 16).

2. All independent evaluations were completed by the end of September 2008. An initial eligibility meeting was held on December 10, 2008. At the meeting it was determined that a psycho-educational evaluation was needed.³ On January 30, 2009, the eligibility meeting was reconvened and the MDT Team determined to put in place certain interventions to help the student and reconvene in 60 days to review the student's progress. On April 8, 2009, an MDT meeting was convened, the student was found eligible for special education and an IEP was developed. The IEP provides for 12 hours of specialized instruction and 1 hour of counseling per week.(P 3, 4, 5, 7, 8, 9, 10, 11, 12, 13)

3. The student has exhibited behavioral difficulties in school since first grade. He does not stay in his seat, leaves the classroom without permission, does not complete classroom assignments, remains off task, and cannot remain still. The student began grade at and was asked to leave in December 2007, because of his behavior. The student completed grade at On May 9, 2008, DCPS issued a notice of proposed expulsion of the student for having his hands around a male classmate's neck and causing a teacher who attempted to intervene to fall down the common area steps. (P 3, 12, 19, Testimony of mother)

³ It was subsequently determined that an educational evaluation of the student had been completed on April 14, 2008.

4. The student was diagnosed with ADHD in 2007. (P 3)

5. A clinical evaluation of the student was completed on September 26, 2008. The evaluation was conducted by a psychology PhD candidate under the supervision of Dr. James Ballard, Chief of Psychological Services at Interdynamics, Inc. The evaluator conducted interviews with the student, the student's mother, and the student's math teacher. A four hour classroom observation was conducted and the student was administered the Connor's Continuous Performance Test (CPT-II), the Human Figure Drawings, the Child Depression Inventory (CDI), the Roberts Apperception Test for Children (RAT), the Behavior Assessment System for Children (BASC-2) parent form and children self report, the Sentences Completion Test, and the Three Wishes Test. The testing was professionally administered, the student cooperated in the testing process and the testing is found to represent an accurate picture of the student's behavioral/emotional problems.

The clinical evaluation concluded that the testing and interviews support the diagnosis of ADHD, which is mainly manifested in a short attention span and hyperactivity. The student's problems revolve around his academic failures, frustration from schoolwork, negative attitudes to teachers and school, and personal conflicts with peers. The student's disruptive classroom behaviors are triggered by his ADHD.

The report notes that the student appears to concentrate better when he is on medication. However the student is not presently taking any medication.

In terms of academic instruction, the report recommends that the student would benefit from a small classroom setting that can address his short attention span and short frustration tolerance for academic work.

(P 3, 7, Testimony of Dr. Ballard)

6. The student was observed in the classroom on September 30, 2008, as part of the Clinical Evaluation as well as for a Functional Behavioral Assessment completed by the same persons who conducted the clinical. The student was observed through three academic periods. Interviews were conducted with two of the student's regular teachers. There was a substitute teacher in the student's World History class and observations in that class cannot be considered typical. Nevertheless, in all the student's classes he was unable to remain in his seat, was off task most of the time, did not complete any classroom assignments, talked to peers, laughed and screamed during academic periods, roamed the classroom, left the classroom without permission, ran in the hallways, and raised his voice at the teacher. The report noted that the student's behavior escalates during independent and unstructured time. The assessment recommended that a Behavioral Intervention Plan (BIP) be developed for the student, and that he be placed in a small classroom setting. (P 7)

7. The student was administered a comprehensive psychological evaluation by DCPS. The report is dated August 12, 2008. The clinical psychological section of the report is consistent with the findings of the September 26, 2008 clinical evaluation, and endorses a finding of ADHD. The report indicates that the student may have difficulty with organizing material, sustaining attention, maintaining effort, utilizing working memory, and monitoring. The student has difficulty with short-term working memory. The report recommends that the student requires behavioral supports within the school setting, should be given redirection for attention and focus, and that information should be divided into small segments to improve his auditory short-term memory. (P 12)

8. The comprehensive psychological evaluation also tested the student's cognitive abilities. The student was administered the Reynolds Intellectual Assessment Scales (RIAS). The RIAS is comprised of 4 indexes – Verbal Index, Nonverbal Index, Composite Intelligence Index, and Composite Memory Index. The student's verbal index was moderately below average. His nonverbal index was average. There was a 28 point difference between the verbal and nonverbal indexes. The difference was significant at the .01 level, and it is considered a rare occurrence. Thus, the composite intelligence index which was below average may be an underestimate of the student's cognitive abilities. This difference appears to suggest a possible learning disability but the report makes no mention of this and there was no testimony concerning the report. Additionally, the student's composite memory index was moderately below average, indicating below average working memory.

The student was also administered the Beery-VMI measure of visual motor integration. The results show that the student is functioning at the high range, indicating that his ability to integrate visual information is high.

(P 12)

9. On April 14, 2008, when the student was years, 5 months, he was administered the Woodcock Johnson III (WJ III) Tests of Achievement. As with the student's cognitive testing, the student exhibited advanced achievement in some types of tasks and limited achievement in others, although his composite scores in broad reading, math written language, math calculation and written expression were all at approximately his grade equivalent. Again, no explanation was provided for this discrepancy. The student's performance was advanced on tasks requiring the ability to convey ideas in writing, but limited on tasks requiring the ability to write rapidly with ease which requires minimal analytic attention. Likewise, the student performed in the advanced range on tasks requiring the production and organization of ideas in writing, but in the limited range on tasks requiring the ability to write rapidly with ease. Also, the student's performance was advanced on tasks requiring reading decoding and the ability to identify words, but limited on tasks requiring the ability to use syntactic and semantic cues in comprehending written discourse as it is being read. Lastly, the student performed in the average range on math tasks requiring speed and accuracy when performing basic arithmetic, but in the limited range on tasks requiring the ability to analyze and solve applied mathematics problems.

The student's academic fluency and academic applications were particularly poor, falling at the 4.6 and 4.2 grade levels respectively.

(P 13)

10. At the December 10, 2008 eligibility meeting at _____ the school psychologist questioned the need for special education services because the student had never been retained nor had any serious academic problems through his history. He recommended Section 504 accommodations but the team rejected this recommendation. (P 10)

11. At the January 30, 2009 eligibility meeting at _____ following the discovery of the cognitive and achievement testing that was administered while the student was at _____ the psychologist prevailed on the mother to allow the school to attempt interventions short of eligibility for special education. These interventions were to include counseling and a BIP. The BIP was completed. The student never received the counseling or any other interventions. (P 5, 11)

12. An eligibility meeting was again convened on April 8, 2009. It was determined that none of the interventions promised in January 2009 had been completed, and that the student's grades were still sliding. The student was found eligible for special education as OHI and was provided with 12 hours of specialized instruction and 1 hour of counseling. Petitioner disagreed with the IEP and believed the student needed a small therapeutic environment and a full time IEP. The 12 hours of specialized instruction in a small classroom setting was implemented after the April 8, 2009 meeting.

The student was provided with compensatory education in the form of 30 hours of independent counseling and 120 hours of independent tutoring.

(P 5, Testimony of mother)

13. As a result of the compensatory education awarded the student, during May and June 2009, the student began receiving independent tutoring for 3 hours on Saturday, and began receiving independent counseling. This occurred at the same time that began implementing the student's IEP. (Testimony of mother)

14. The student's behavior and grades improved somewhat during the 4th advisory. The mother attributes this to the tutoring and counseling. It is impossible to know the extent to which the improvement was the result of the IEP or the result of the outside compensatory education services. (Testimony of mother)

15. During the 1st advisory the student's grades included 2 F's and 2 D's. The 2nd advisory grades were 3 F's and 1 D. The 3rd advisory grades were 3 F's, 1 C, and 1 C-. The 4th advisory grades were 1 F, 2 D's, 1 C-, and 1 C. (DCPS 3)

16. The student has been accepted at _____ is a full time therapeutic special education private school in Springfield Virginia. The student would be in a self-contained classroom with a 1:3 ratio of students to adults. The classroom would have up to 9 students, 1 special education teacher, and 2 assistants. All students would be in the 7th grade. The curriculum meets the standards set by DCPS. The school has a very strong behavioral management program. No student is allowed out of the classroom without an adult and there are 7 full time behavioral counselors. The middle school has approximately 54 students. The other students in the classroom identified for the student have average cognition but are below grade level in functioning. _____ is an appropriate placement for the student. (Testimony of _____)

17. _____ has been identified as a failing school. As a result it is being taken over by an outside educational non-profit and will have a new administration and a substantially new staff and program. (Representation of DCPS attorney, knowledge of the hearing officer)

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. Appropriateness of the IEP

Although the IDEA does not require that the public school provide the best education possible, "Congress did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985). There is no bright line test for determining what constitutes *sufficient special education* or *meaningful progress*. The IDEA requires an IEP to confer a "meaningful educational benefit" gauged in relation to the potential of the child at issue. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) (citing *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999)). The educational benefit must be more than *de minimis* or trivial educational benefit. *Deal*, 392 F.3d at 862 (citing *Polk*, 853 F.2d at 179-82 when stating, "Congress must have contemplated 'significant learning' in special education classrooms."). The determination of "meaningful benefit" requires "a student-by-student analysis that carefully considers the student's individual abilities." *Ridgewood*, 172 F.3d at 248. A court must "analyze the type and amount of learning of which a student is capable in order to determine how much of an educational benefit must be provided." *Kingwood*, 205 F.3d at 577-78 (quoting *Ridgewood*, 172 F.3d at 248). "Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement. In conducting this inquiry, courts should heed the congressional admonishment not to set unduly low expectations for disabled children." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004).

There is no question that DCPS dragged its feet in determining that the student was eligible for special education and in developing an IEP and commencing the provision of specialized instruction and related services. The student is receiving compensatory education in the form of tutoring and counseling to make up for this delay. The question now is whether the amount of specialized instruction being provided to the student is sufficient. This inquiry must focus on whether the student is receiving sufficient educational benefit from the services provided. The problem in this case is that the

services have only been in effect for less than 3 months, and they were begun at the same time as the student began tutoring and counseling outside of school. The only testimony presented concerning the student's progress and behavior since April 2009 was provided by the mother. She testified that the student's behavior had improved somewhat, and that his grades had also improved. This is evidenced by the student's report card. The mother attributes this improvement to the tutoring and counseling, but it may also be as a result of the implementation of the student's IEP. The student's grades are still poor, but he only received specialized instruction for a few months.

Petitioner has failed to meet her burden of proof that the present IEP is inadequate and that the student has not received a meaningful educational benefit. The IEP needs to be given a sufficient chance before a determination can be made that it is inadequate. This is especially true given the substantial changes that will be occurring at this coming school year. A full evaluation of the student's progress should be made in early December to determine if the IEP is adequate. If the student is not making adequate educational progress, he should be placed in a full time setting with small class size.

Further, DCPS must follow up on the huge discrepancies in the student's verbal and nonverbal cognitive abilities and in various of his achievement tests. A neuropsychological evaluation should be conducted to aid in explaining these discrepancies, determine the extent to which they are related to the student's ADHD, and make recommendations concerning the student's specialized instruction.

B. Placement

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. 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).

If there is an appropriate public placement available that is "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*, 458 U.S. 176, 207 (1982). However, "[i]f no suitable public school is available [DCPS] must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote*, 935, F.2d 303, 305 (D.C. Cir. 1991). *See also, Burlington School Committee v. Mass. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

In this instance, Petitioner has failed to meet her burden of proof that the student requires a full time out of general education placement. Therefore a private placement is not warranted. DCPS can meet the student's educational needs for a part time special education placement and Petitioner has not proved that Hart MS is unable to provide for the student's educational needs.

VII. SUMMARY OF RULING

DCPS has not denied the student FAPE

VIII. ORDER

It is hereby **ORDERED** that this case be 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.

/s/ Jane Dolkart

Impartial Hearing Officer

Date Filed: August 16, 2009