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

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STUDENT,[1]
through the Parent,

Petitioner,

v

DCPS

Respondent.

Date Issued: August 8, 2010

Hearing Officer: Wanda I. Resto

Case No:

Hearing Date: July 30, 2010 Room: 4a

HEARING OFFICER DETERMINATION

BACKGROUND

The student's is a year old boy in the grade at a private school funded by the DCPS, eligible for special education and related services under the disability category of mental retardation. The student's individualized education program (IEP) is dated December 10, 2009 and provides 27 hours per week of specialized instruction outside the general education, 1.5 hours per week of speech language pathology, 1 hour weekly of occupational therapy, and .5 hour per week of behavioral support services.[2]

On May 10, 2010, the Respondent held a multidisciplinary (MDT) team meeting without representatives from the student's current school or the parent present for the meeting. At that meeting, the DCPS team determined the current private placement is not the appropriate location for services for the student and issued a prior notice of placement to a DCPS.

On June 7, 2010, a Due Process Complaint was filed in which the Petitioner claimed the DCPS failed to provide timely notice of the MDT meeting; failed to allow parental participation in the MDT meeting, and did not provide an appropriate educational placement for the student for the 2010/2011 school year. As relief, the Petitioner requests, *inter alia*, a finding that DCPS denied the student access to free appropriate public education (FAPE) by failing to notify the parent of a MDT meeting and not having the proper team members present; a finding that, the current private placement, is the proper placement to implement the student's IEP; and for DCPS to convene a MDT meeting with all the relevant members.

The Respondent denies every allegation and claims that the Student has not been denied a FAPE. The Respondent argued the parent was invited to a May 3, 2010 meeting on April 29, 2010 to determine an appropriate location of services for the school year 2010-2011. The Petitioner requested for the

[1] Personal identification information is provided in Appendix A.
[2] DCPS #15, December 10, 2009, IEP.

meeting to be rescheduled; it was postponed to May 10, 2010 and the parent failed to attend. DCPS proceeded with the meeting and it was determined that the current school was not an appropriate location of services for the student. The student is functioning very low and is the only student at that school that did not qualify for the DC CAS alternative assessment. The Respondent objected to the relief requested.

On June 3, 2010 this Hearing Officer was appointed to hear the matter. On June 30, 2010, at 3:30 PM., a telephonic pre-hearing conference was held in the above matter. Participating in the conference were: Petitioner's counsel, Darnell Henderson; and Respondent's counsel, Tanya Chor. [3]

On July 30, 2010 at 9:30 a.m. a closed hearing was held the parties were represented by the above mentioned attorneys. The Petitioner presented documents labeled P-1 through 21, documents P, 6-9, 13-16 and 19 were admitted into evidence and four witnesses testified; the Petitioner, the Special Education Teacher, the Occupational Therapist, and the Clinical Psychologist. The Respondent presented documents labeled DCPS 1 through 23; documents DCPS all were admitted into evidence, with exception to document identified as #1 because it was already part of the record and three witness testified; the DCPS Past Special Education Coordinator, the DCPS Special Education Coordinator (current), and the DCPS School Psychologist. The hearing was conducted in accordance with the rights established under federal and local laws and the implementing regulations, and the SOP. [4] No written closing arguments or briefs were submitted.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to provide the Petitioner timely notice of a MDT/IEP meeting?
2. Did the DCPS fail to allow parental participation in MDT/IEP meeting?
3. Did the DCPS fail to determine an appropriate placement for the student for the 2010/2011 school year?
4. Was the student denied a FAPE?

FINDINGS OF FACT

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

1. The student's disability category is mental retardation. The student's December 10, 2009 IEP provides him 27 hours per week of specialized instruction outside the general education, 1.5 hours per week of speech language pathology, 1 hour weekly of occupational therapy, and .5 hour per week of behavioral support services.[5]

[3] The June 30, 2010, Prehearing Order required the Respondent to file by July 15, 2010 evidence of the participation of the representatives from the private school, and of the various alleged invitation to the parent to participate in a meeting. The Petitioner failed to comply with the Order; Ms. Chor- Counsel for the Respondent, persuaded the Hearing Officer that in this case, there was no harm to the parties. Counsel is reminded that timely response to an Order may avoid unnecessary hearings, and in the future the Hearing Officer expects timely compliance.
[4] IDEIA and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").
[5] DCPS #15, December 10, 2009, IEP.

2. During the end of the month of April of 2010, a DCPS Placement Specialist informed the Petitioner of their intention to change the student's location of services from the private school to a DCPS, and that she should visit the proposed school.[6]

3. On May 10, 2010, a MDT meeting was held, although invited the Petitioner did not attend; representatives from the student's current school went but, were instructed to leave by Petitioner's Counsel. At that meeting the DCPS team determined, the current private placement is not the appropriate location for services for the student. [7]

4. The student has received occupational therapy for one hour a week for a year with interventions and strategies integrated into the classroom. The student has improved in all motor sensory and processing skills. He has auditory sensitivity and visual motor deficits. The student communicates better and is more integrated with peers. The Occupational Therapist was notified of the May 2010 meeting to discuss location of services for the student and was advised by Counsel for the Petitioner not to participate.[8]

5. The student is "low functioning cognitively" when engaging with people, and needs to be comfortable before he is available for services. The student has shown improvement in his interaction with other peers and has appropriate social skills. The student "shuts down" and is hypersensitive to hearing the words, stupid and dumb; he has low expectations of himself. [9]

6. The student was observed at the current private school placement; he was doing his work but did not participate in the group lesson. The student's IEP goals and objectives can be met at the proposed DCPS in classes with of ratio of 7 students with a Special Education Teacher (SET) and a Teacher Assistant and the related services on his IEP can be provided The proposed DCPS has three Speech/Language Pathologist, an Occupational Therapist, a Psychologist, a Behavior Specialist, a Social Worker and twelve full-time Special Education Teachers; and there are approximately 86 other special education students in the school. The student's noise and light sensitivity can be address; currently similar accommodations are in place at the DCPS for other students.[10]

7. A review of the student's report cards, classroom observation and evaluations show; he has severe communication and auditory processing problems; and his visual, auditory and sensory deficits impact him academically. The student requires a variety of instructional approaches to process information; and a classroom where language support is used throughout the day. The student's poor social skills are typical for children with intellectual disabilities; and call for socialization skills in the instructional program. The proposed school is the District of Columbia's special education school focusing on students with intellectual disabilities. The proposed DCPS provides total communication classes; the language skills are integrated in each class and a Speech Pathologist is available for group or individual services as necessary. The class is less than 10 students with two adults. The student's noise buffer and lighting accommodations will be addressed with computers (and training to use), erasable pens and other

[6] DCPS #11, April 29, 2010, Meeting Notes; DCPS #5, May 7, 2010 and testimony of the Petitioner.
[7] DCPS #7, April 29, 2010, Confirmation of meeting Notice; DCPS #5, May 7, 2010, Letter; DCPS #6, April 29, 2010, Letter; and DCPS #7 Confirmation of Meeting Notice, April 29, 2010.
[8] Testimony of the Private School Occupational Therapist.
[9] Testimony of the Clinical Psychologist.
[10] Testimony of the DCPS Special Education Coordinator (current).

equipment adjustments. The teachers go to the classrooms; the students transfer for lunch, recess and other non-core academic classes. [11]

8. A analysis of the 2008 psychological evaluation that diagnosed the student as MR, teacher questionnaire 2010, and an observation of the student at the private placement; demonstrates the student's achievement is very low. The progress was sufficient low that he was the only student in the private school did not have to take the District of Columbia Alternate Assessment, used to measure progress between private and public educational placement. [12] At the May 10, 2010 meeting, the DCPS-LEA Placement Specialist, and the DCPS Psychologist determined that the student required a change in the location of services; because his behavior is not impairment, nor is emotional disturbance a concern. A Behavior Assessment System for Children of September 2009 justified psychological services for the student; however there was no clinical or emotional problem, the concerns were attention, withdrawal and functional communication deficits. The student because of his mental retardation has a low IQ and difficulties with daily skills. The private school is a therapeutic day program, which the student does not need. The student needs to learn hygienic skills, and how to cope with teasing and name calling. The student requires programming to focus on intellectual functioning instead of a behavior or emotional disturbed program as is the private school. [13]

9. Accotink Academy is a private therapeutic day school in Springfield, Virginia serving students who range in age from five to twenty-one years. The school places emphasis upon learning disabled, emotionally disturbed and a variety of other disabilities. The student has attended the school since December 2009 when he was placed and financed by DCPS. At the beginning he was having difficulties communicating and now he has improved to where he can provide more complex answers. The Student has a full time IEP, requires time to feel confident before he can reveal his learning style. The School and the Petitioner were informed on April 19, 2010 that DCPS was proposing a change in placement for the student. In late April an envelope with the private school letterhead was placed in the student's backpack by a DCPS representative, the envelope contained an invitation for a May 3, 2010 meeting to discuss the student's future educational placement. The Petitioner said she would reschedule the meeting in order to retain an attorney. The SET and other members of the private school were available for the meeting; but Petitioner's Counsel told them not to participate. [14]

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:

The IDEIA and the District of Columbia requires the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique

[11] Testimony of Expert, who was also the past SEC at the DCPS; DCPS 21-23, DCPS 9- 11and P 13 November 19. 2010, Psychological Evaluation, P-16 November 20, 2009 Speech Language Evaluation, P# 18, Quarterly Report Card, 2010, P#*19*, Quarterly Therapist Comments.

[12] DCPS#19, January 26, 2010, District of Columbia Alternate Assessment Participation Criteria Form; DCPS#3, May 10, 2010, IEP Meeting Notes,

[13] DCPS # 13 Quarterly Grade Report Card, P#14, Justification for Psychological Services, and testimony of the DCPS Psychologist

[14] Testimony of the Special Education teacher at the private school.

needs and prepare them for further education, employment, and independent living.[15] The applicable regulations define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)." [16]

Burden of Proof

The burden of proof is the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the Student a FAPE.[17]

FAPE Determination

In assessing whether a FAPE has been provided, a court must determine whether (1) the school complied with the IDEIA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the Student to receive educational benefits.[18] The Respondent met its legal obligation under the IDEIA, and below is why.

Parental Notice to participate in meeting

The Petitioner claimed she did not receive adequate notice of an MDT/IEP meeting.

The IDEIA demands that each public agency must provide notice to ensure that parents of children with disabilities have the opportunity to participate in meetings. The IDEIA requires that the notification to parents of the meeting is early enough to ensure that they will have an opportunity to attend; and that the scheduling of the meeting be at a mutually agreed on time and place. The IDEIA also provides that a placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. [19] In which case, the public agency must have a record of its attempt to ensure their involvement; here the DCPS did provide notice. It was demonstrated that the Petitioner was verbally informed on April 23, 2010; that a discussion of the student's 2010-2011 educational placement was to take place. The Petitioner asked and received a postponement of the meeting for May 10, 2010, and a written reminder was sent. On the day of the meeting the Petitioner did not appear and Petitioner's Counsel instructed potential MDT members from the private school not attend or to leave the meeting and not participate.

DCPS met its statutory obligations to provide adequate notice and made efforts to convince the parent to participate.

Multidisciplinary Team

The Petitioner alleged the May 10, 2010 MDT action was unlawful because the IEP team was not properly constituted; only DCPS representatives were present.

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[15] 20 U.S.C. § 1400(d)(1)(A). and 5 D.C.M.R. § 3000.1 (2007)
[16] 34 C.F.R. § 300.17
[17] 5 D.C.M.R. § 3030.3.
[18] *Bd. of Educ. v. Rowley,* 458 U.S. 176, 206-07 (1982); and *Jalloh v. District of Columbia,* 535 F. Supp. 2d 13, 16 (D.D.C. 2008).
[19] 20 U.S.C. 1415(a)§§ 1414(e),1415(b)(1)), and 34 C.F.R. §§300.322(a)(1) and (b)(1).

The IDEIA requires a MD/IEP Team must include the parents of the child, at least one regular education teacher of the child, at least one special education teacher of the child, a representative of the public agency who is qualified to provide or supervise special education services, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the public agency, and an individual who can interpret the instructional implications of evaluation results. [20]

In the instant matter, the Respondent rescheduled the MDT/IEP meeting according to the Petitioner's request, invited teachers, representative from the private school and other relevant MDT members. At the meeting there were people knowledgeable about the availability of resources of the public agency, another who could interpret the instructional implications of evaluation results; and the LEA representative with decision making authority; those not present were the Petitioner and representatives from the private. The lack of participation by relevant MDT members was not caused by the Respondent. In fact, all the evidence demonstrated that it was the intervention of Petitioner's Counsels which caused the absence of relevant MDT meeting participant. All the evidence demonstrated that the MDT, convened by Respondent on May 10, 2010 was appropriately assembled by DCPS. The Respondent responsibility to summon IEP/MDT members to discuss educational programming and placement cannot be undermined by delaying tactics from the Petitioner.

Educational Placement

The Petitioner claims that the DCPS is unable to provide the student with the special education and related services that he needs in order to benefit educationally.

In accordance with the IDEIA and its regulations when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. It also states that the determination of the educational placement of a child with a disability must be based on a child's IEP. [21]

The overwhelming evidence shows the private school the student currently is scheduled to attend for the 2010-2011 school year, does not provide appropriate programming for the student's intellectual deficits and functional skills needs. At the meeting to discuss the location of services the Petitioner chose not to attend and to disallow the participation of the private school representatives. The Petitioner's choice for the location of services is a private school outside the jurisdiction; which focuses its programming primarily to students with emotional disturbance and the learning disabled; the Petitioner did not provide evidence to show that her choice for the location of services can provide an educational benefit to the student.

The Respondent demonstrated that the student requires an educational program that places emphasis on the student's cognitive and communication deficits, and that the DCPS location offered to provide the services can implement the student's IEP and address his specific needs. Furthermore, the District of Columbia Code imposes a strict order of priority for special-education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia." [22] the private school is in the state of

[20] 20 U.S.C. 1414(d)(1)(B)–(d)(1)(D) , and 34 C.F.R. §300.321(a) .
[21] 20 U.S.C. 1412(a)(5), 34 C.F.R.§ 300.116.
[22] D.C. Code § 38-2561.02(c) (2007).

Virginia, and there was no explanation on why the Petitioner should be allowed to override the order of priority.

Although the IDEA guarantees a Free Appropriate Public Education, it does not, however, provide that this education will be designed according to the parent's desires. The primary responsibility for formulating the education to be accorded a [child with a disability] and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parent or guardian of the child. Thus proof alone that loving parents can draft a better program than a state offers does not, alone, entitle them to prevail under the Act." Shaw v. The District of Columbia, 238 F. Supp. 2d 127, 139 (D.D.C. 2002).

The decision to change the student's location for services from the private school to the program at DCPS was made calculated to provide the student educational benefit. The student has not been denied a FAPE.

ORDER

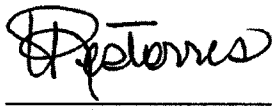
Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. **ORDERED,** the due process complaint filed on June 7, 2010 is **Dismissed.**

This order resolves all issues presented in the Petitioner's June 7, 2010 due process hearing complaint; and the Hearing Officer makes no additional findings

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 USC §1415(i).



Date: August 8, 2010

Wanda I. Resto Torres Hearing Officer