

<p>STUDENT¹, by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Dates of Hearing: August 27, 2009, September 2, 2009, September 4, 2009</p> <p>Date of Complaint: June 26, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Donovan Anderson, Esq. 2041 Martin Luther King, Jr. Avenue, SE Suite 240 Washington, DC 2020</p> <p>Counsel for DCPS: Kendra Berner, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened August 27, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was continued to September 2, 2009, and concluded on September 4, 2009. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on June 26, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-9 and DCPS Exhibits 1-8) which were admitted into the record.

ISSUE(S):²

1. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate IEP? Petitioner alleges the student is need of an IEP that prescribes a full time special education program.
2. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate placement? Petitioner alleges the student's current program at School A is inappropriate because it only provides special education in an inclusion setting and because it is a language emersion program.

FINDINGS OF FACT³:

1. The student is _____ years old, resides in the District of Columbia with his parent(s) and currently attends School A, his DCPS neighborhood school. The student has been

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party's Exhibit.

determined to be eligible for special education services. (Parent's testimony, DCPS Exhibit 2)

2. When the parent enrolled the student at School A in November 2009 she provided the school staff a copy of the student's Individualized Educational Program ("IEP"). The IEP stated that the student had a disability classification of Multiply Disabled ("MD") including the Learning Disability ("LD") and Attention Deficit Hyperactivity Disorder ("ADHD").⁴ The IEP dated June 11, 2008, when the student was six years old and in the 1st grade prescribed the following weekly services: 7.5 hours of specialized instruction in a general education setting and 2.5 hours in a special education setting; 30 minutes of occupational therapy and 1 hour of speech language services. (Parent's testimony, Petitioner's Exhibit 9)
3. School A is a language emersion program in which all students are taught content curriculum in both English and Spanish. During the 2008-09 School Year ("SY") the student's classroom had 27 students. The full class would have instruction together for a short period at the start of the day. The class was generally subdivided into two groups of 13 or 14 each. Each group was taught half the day in Spanish and half the day in English. The groups were then subdivided into three work groups generally by academic ability and the teachers would generally have the groups work on different activities simultaneously. There was also a teacher's aide in the classroom. The teacher who taught in Spanish was also the special education teacher; thus the student's special education instruction was in Spanish and was not provided to him one to one. However, the special education teacher would confer with the general education English speaking teacher about the student's special education needs. There were approximately seven other special education students in the classroom but not all the seven had specialized instruction in their IEPs. ([REDACTED] testimony, [REDACTED] testimony)
4. When the student arrived at School A this was his first exposure to Spanish language. He had difficulty adjusting to the classroom environment for about the first month. He routinely had behavior difficulties. In the second and third advisories the student had fewer behavior problems and began to make some academic progress. However, the student is significantly below grade level and entered School A (in the second grade) with academic skills at the pre-K level. By the end of the third advisory the student had progressed to about the beginning kindergarten level. In the fourth advisory the student again began to display behavior difficulties and required more attention from staff such that he made little if any academic progress. The student's teachers believe the behavior difficulties were related to the student's reaction to a new born sibling. The student continues to demonstrate attention difficulties and often requires redirection. When he is required to work independently he does not stay on task. ([REDACTED] testimony, [REDACTED] testimony, DCPS Exhibit 3)
5. An independent psycho-educational evaluation was conducted of the student in July 2009. The evaluation determined based on a comparison of a 2007 evaluation that the

⁴ The Hearing Officer notes this is not a named classification under IDEIA but usually within the classification of Other Health Impaired ("OHI").

students cognitive skills "are not developing as was first predicted and he is not keeping up with those of his peers." The evaluation also concluded the student's academic skills are at the late kindergarten level although he is currently starting the third grade. The evaluator recommended the student receive special education instruction in a self-contained classroom where he can get more one-on-one assistance. (Petitioner's Exhibits 3 & 4 [redacted] testimony⁵)

6. On June 9, 2009, DCPS convened an IEP meeting at School A.⁶ The IEP was amended to prescribe the following weekly services: 15 hours of specialized instruction in a general education setting, 1 hour of speech and language services and 30 minutes of occupational therapy.⁷ The parent participated in the IEP meeting. However, the parent disagreed with the 15 hours per week of specialized instruction and related services recommended. (Parent's testimony, DCPS Exhibit 4)
7. The student has been accepted by [redacted] is full time special education program that can provide the student specialized instruction and related services by certified professionals in a self contained classroom with low student to teacher ratio. Although the student does not currently have a full time IEP his academic levels indicate that he would benefit from being in a setting such as [redacted] offers. (Ms. [redacted])

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a 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.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁸ In this case the student/parent is seeking relief and has the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

⁵ The witness was qualified as an expert in educational psychology.

⁶ DCPS convened a prior IEP meeting at School A in March 2009 and conducted an annual IEP update. (DCPS Exhibit 1 & 2)

⁷ The IEP was also amended to include ESY services of 20 hours of specialized instruction outside a general education setting. The IEP states that the related services are to be provided outside of general education but the IEP does not otherwise clearly state the student's LRE.

⁸ 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

1. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate IEP? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

The evidence demonstrates that the student's most recent psycho-educational evaluation states that the student is not progressing as "first predicted and he is not keeping up with those of his peers." The evaluation and the credible testimony of the student's teachers demonstrate that he is significantly behind grade level academically. The evaluation recommends the student receive specialized education instruction in self-contained classroom where he can get more one-on-one assistance. It is clear from the evidence the student is making marginal progress in his current program and classroom with his instruction being provided by a Spanish speaking teacher in a language immersion program.

The student's prior IEP required some of his instruction in a special education setting. Because the student has not made significant progress in the inclusion setting there is not a substantiated basis for the IEP being amended to make all the instruction in a general education setting. However, it is not absolutely clear from the evidence that the student should have a full time special education IEP. As the July 2009 evaluation has not yet been reviewed by an IEP team, the Hearing Officer concludes that the IEP is inappropriate based on the specialized instruction hours being only in a general education setting. It should be determined by the IEP team whether the student is in need of a full time IEP.

2. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate placement? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

DCPS is required to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). In general, an LEA is required to provide for each qualified child with a disability sufficient support and services to enable him to obtain educational benefits. Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 203-4. And, each LEA must ensure that the parents of a child with a disability are members of any group that makes decisions on the educational placement of their child. 20 U.S.C. §1414(e).

34 CFR § 300.116 provides:

In 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; and (2) Is made in conformity with the LRE provisions of this subpart, including Sec. 300.114 through 300.118; (b) The child's placement-- (1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; (d) In selecting the LRE, consideration is given to any potential

inadequate or adequate to provide the student with FAPE.

harmful effect on the child or on the quality of services that he or she needs; and (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (Authority: 20 U.S.C. 1412(a)(5))

The evidence clearing demonstrates the student is operating significantly below grade level and made nominal progress during the 2008-09 School Year ("SY"). The student's teachers in his current program indicate the student has attention deficits and frequently requires redirection. The student is being required in the current program to learn content in both English and Spanish in a third grade classroom when his academic functioning is at the beginning kindergarten level. The Hearing Officer concludes based on the evidence that the student's current placement at School A is inappropriate.

Although the student's current IEP prescribes a less than a full time program, the evidence sufficiently demonstrates that the placement proposed by the parent can provide educational services that will benefit the student at least on an interim basis until DCPS has convened a meeting to review the student's most recent evaluation and his IEP and placement for SY 2008-09 is reviewed and determined. Consequently, this Hearing Officer has determined the student should be placed at the placement proposed by the parent on an interim basis until DCPS convenes a placement meeting.

ORDER:

1. DCPS shall immediately, as of the date of this Order, place and fund the student at the Kingsbury Day School on an interim basis and provide transportation services.
2. DCPS shall within fifteen (15) business days of the issuance of this Order, convene a multidisciplinary team multidisciplinary team ("MDT") meeting to review the student's recent evaluations, review and revise the student's IEP as appropriate and determine an appropriate placement for SY 2009-10.
3. The MDT meeting shall be scheduled through counsel for the student and parent.
4. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer

Date: September 11, 2009