

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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Confidential

OSSE
STUDENT HEARING OFFICE
2009 SEP -4 PM 2: 10

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>September 4, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Donovan Anderson, Esq.</p> <p>Counsel for DCPS: Laura George, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

II. PROCEDURAL BACKGROUND

On July 9, 2009, Petitioner filed an Administrative Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS"), asserting the following claims against DCPS: 1) inappropriate school program/placement, 2) failure to conduct the mandatory reevaluation pursuant to 34 C.F.R. § 300.303, 3) failure to develop an IEP for Student, and 4) failure to provide any special education services to Student over the last two school years.

On July 15, 2009, DCPS issued a letter waiving a resolution session meeting for this case. Therefore, the case was placed on a 45-day timeline and the due process hearing was rescheduled accordingly. Due to one or more subsequent requests for a continuance by the parties, however, the due process hearing ultimately was scheduled for August 26, 2009 at 9:00 a.m.

On July 24, 2009, DCPS filed DCPS' Response to Parent's Administrative Due Process Complaint, in which DCPS asserted that Student's poor attendance prevented DCPS from conducting assessments. DCPS further asserted that it had convened an eligibility meeting for Student by phone based on her 2006 assessments, that Parent participated in the meeting by phone, that the team developed an IEP providing 16.5 hours of services to Student, and that Student failed to avail herself of the services offered.

By their respective disclosure statements dated August 19, 2009, DCPS disclosed four potential witnesses and seven documents (hereinafter DCPS-1 through DCPS-7), and Petitioner disclosed three potential witnesses and five documents (hereinafter Petitioner's Exhibits 1 - 5).

The hearing officer convened the due process hearing on August 26, 2009, as scheduled, and Petitioner's documents, as well as DCPS-01, were admitted into the record without objection. However, Petitioner objected to the admission of DCPS-02 through DCPS-07, on the ground that they were unsigned. The hearing officer excluded DCPS-02 through DCPS-05 due to the lack of signatures on the documents and the lack of any indication that the documents had been sent to or received by anyone. The hearing officer conditionally admitted DCPS-06 and DCPS-07, upon the condition that testimony was introduced to justify the hearing officer taking the documents into account in deciding the case.

Thereafter, Petitioner made an opening statement, but DCPS reserved its opening statement and indicated that it would not be presenting testimonial evidence because the witnesses listed on its disclosure statement were not available. After Petitioner presented its case, the hearing officer received closing statements and concluded the hearing.

III. ISSUE(S)

1. Did DCPS provide an inappropriate school program/placement?
2. Did DCPS fail to conduct a mandatory reevaluation of Student?
3. Did DCPS fail to develop an IEP for Student?
4. Did DCPS fail to provide special education services to Student during school years 2007/08 and 2008/09?

IV. FINDINGS OF FACT

1. Student is 17 years old, and she has attended four different schools during the past three school years.²
2. During SY 2008/09, in or about November of 2008, Parent enrolled Student at the local high school and gave the enrollment clerk Student's educational documents. Those documents included Student's IEP, her most recent psychiatric evaluation, and her report cards.³
3. Student's most recent IEP is dated March 26, 2007. The IEP classifies Student as having multiple disabilities, and it prescribes 16.5 hours per week of special education and related services for Student, including 15 hours of specialized instruction, 1 hour of psychological services, and 1 hour of speech/language services.⁴
4. Student's most recent psychiatric evaluation report is dated July 28, 2007. The report notes Student's prior diagnoses of Attention Deficit/Hyperactivity Disorder, Combined Type, Oppositional Defiant Order, Mathematics Disorder, Mixed Receptive-Expressive Language Disorder, Stuttering, and Mild Mental Retardation. The report also notes Student's history of behavior problems and extremely low cognitive functioning with deficits across all areas. The evaluator recommended Student receive a full-time placement in a small therapeutic setting with a low teacher to student ratio, individual therapy twice per week, group therapy, and remedial assistance with reading, math and writing.⁵
5. Student's most recent speech/language evaluation report is dated March 15, 2006. Based on Student's performance on the tests administered, the evaluator concluded that Student presented with a moderately severe receptive language deficit, was experiencing significant difficulty with retaining information presented orally, and also stuttered,

² See Complaint; Testimony of Student.

³ Testimony of Parent; testimony of Student.

⁴ Petitioner's Exhibit 2.

⁵ Petitioner's Exhibit 5.

especially when she perceived a task as being difficult or frustrating.⁶

6. Although Parent gave Student's IEP to the local high school when she registered Student, the staff at the school indicated that they were not aware that Student had an IEP on the occasions when Parent went up to the school to check on Student.⁷
7. Although Student attended a special education school prior to being placed in the local high school, the local high school placed Student in the following classes: Pre-Algebra, Science, Physical Education, American History, and English 1. There were approximately 20 students in each class with 1 teacher, and none of the teachers ever pulled Student aside to work with her individually.⁸
8. Student went to the school building at the local high school, but she did not go to class. At the due process hearing, Student stated, "I don't know," when asked why she did not attend class. Parent believes Student did not attend class because the school did not offer her the setting she needs.⁹
9. The Admissions Director of a local, full-time, private special education school interviewed Student and Parent in July 2009 and accepted Student into the school's program because she felt the school could meet Student's academic and behavior needs. The school serves emotionally disturbed student with opposition/conduct disorder. It offers a behavior modification system with 5 tiers that involves monitoring the students' behavior in 30-minute increments. It also has a system for dealing with truancy, which involves telephone calls and letters to parents. If Student attends the school in SY 2009/10, she will be in the 10th grade in a class with a maximum of twelve students, a certified special education teacher and a full-time aide.¹⁰

V. CONCLUSIONS OF LAW

Petitioner has asserted four claims against DCPS in this action. As the party seeking relief, Petitioner bears the burden of proof. *See* 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

1. Inappropriate School Program/Placement

Under IDEIA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. §§ 300.114-300.120. More specifically, pursuant to 34 C.F.R. § 300.116, a child's educational placement must, *inter alia*, be based on the child's IEP. The uncontradicted evidence

⁶ Petitioner's Exhibit 3.

⁷ Testimony of Parent.

⁸ Testimony of Student.

⁹ Testimony of Parent and Student.

¹⁰ Testimony of private school Admissions Director.

in this case demonstrates that Parent enrolled Student at her neighborhood high school and gave the school a copy of Student's IEP, but the school thereafter failed to provide Student with the special education and related services required by her IEP. Indeed, the school placed Student in all regular education classes without any regard for her IEP.

At the due process hearing in this case, DCPS argued that Petitioner failed to prove that the local high school cannot implement Student's IEP and/or does not have the specialized instruction and related service providers Student requires. While that may be true, it is also true that Petitioner proved that the school is Student's neighborhood school, that the school was given a copy of Student's IEP at the time of enrollment, and that the school thereafter failed to provide Student with the specialized instruction and services called for by her IEP. Based on this evidence, the hearing officer concludes that whether or not the local high school was technically capable of implementing Student's IEP, Petitioner met its burden of proving that DCPS failed to provide Student with an appropriate school program at her local high school during SY 2008/09.

2. Alleged Failure to Conduct Mandatory Reevaluation

The implementing regulations for IDEIA provide that each child with a disability must be reevaluated at least once every 3 years, unless the parent and the public agency agree otherwise. 34 C.F.R. § 300.303(b)(2).

At the due process hearing in this case, DCPS pointed out that Student's psychiatric evaluation report is current because it was issued on July 28, 2007, which is less than three years ago. However, DCPS conceded that Student requires updated psychoeducational and speech/language evaluations, and agreed that it would be more expeditious to allow Parent to obtain independent evaluations. Based on these concessions, the hearing officer will award Petitioner independent psychoeducational and speech/language reevaluations.

3. Alleged Failure to Develop IEP

IDEIA requires each public agency to ensure a child's IEP is reviewed periodically, but not less than annually. 34 C.F.R. § 300.324(b). Moreover, each public agency must have an IEP in effect at the beginning of each school year for each child with a disability within its jurisdiction. 34 C.F.R. § 300.323(a).

The evidence in this case reveals that Student's most recent IEP is dated March 26, 2007. Moreover, there is no evidence that the IEP has been revised or updated since it was issued.¹¹ Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving that DCPS failed to develop a current IEP for Student.

¹¹ DCPS attempted to introduce into the record an unsigned "Eligibility Meeting Report" and an unsigned IEP, both dated April 22, 2009. However, the hearing officer admitted those documents on a conditional basis only, and DCPS failed to fulfill the condition of introducing testimony that justified the hearing officer taking those documents into account in deciding this case. Hence, the documents are not a part of the administrative record, and the hearing officer has not taken them into account in deciding this case.

4. Alleged Failure to Provide Special Education Services During 08/09 and 09/10

IDEIA defines a free appropriate public education (“FAPE”) to mean special education and related services that are, *inter alia*, provided in conformity with a Student’s IEP. See 34 C.F.R. § 300.17. Hence, the United States Supreme Court has held that a State satisfies its requirement to provide a handicapped child with a FAPE by providing the child with specialized instruction and sufficient support services to permit the child to benefit educationally from that instruction. See *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982).

The uncontradicted evidence in this case demonstrates that Student’s most recent IEP requires her to receive 16.5 hours per week of specialized instruction and related services, but DCPS provided her with a full course load of regular education classes at her local high school during SY 2008/09 and failed to provide her with any related services at all. On the other hand, the evidence proved that Student was not enrolled at the local high school until about November of 2008, and there was no evidence at all concerning whether Student’s IEP was implemented at the schools she attended prior to being enrolled in the local high school. Under these circumstances, the hearing officer concludes that Petitioner met its burden of proving only a portion of this claim by proving that from November 2008 through the end of SY 2008/09, DCPS failed to provide Student with any special education services.

5. Relief to be Awarded

At the due process hearing in this case, Petitioner requested that the Student be placed in the local, full-time private special education school referenced in Finding of Fact 9, *supra*, on an **interim basis** until DCPS reviews her evaluations, develops an appropriate IEP, and issues a Prior Notice of Placement. DCPS asserted that it would make more sense to order DCPS to implement Student’s IEP at the local high school and have a meeting with Parent. Unfortunately for DCPS, however, DCPS failed to present any evidence tending to prove that the local high school can implement Student’s IEP, and the only evidence of record proves that the local high school wholly failed to implement Student’s IEP during SY 2008/09. DCPS also failed to offer any evidence tending to prove that it can offer some other school to implement Student’s current IEP until her evaluations have been completed and her IEP is revised. Under these circumstances, the hearing officer will award Petitioner the requested private placement on an **interim basis** until Student’s independent reevaluations are completed and DCPS reviews those reevaluations, revises her IEP and assigns her to an appropriate site to implement the IEP.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proving its first three claims and a portion of its fourth claim.

VII. ORDER

1. Petitioner is hereby awarded authority to obtain, at DCPS's expense, an independent psychoeducational reevaluation and an independent speech/language reevaluation. Petitioner shall obtain these reevaluations and submit the reevaluation reports to DCPS no later than 45 days after the issuance of this HOD and Order.
2. DCPS shall temporarily fund Student's placement at the local, full-time special education school that recently accepted her. This **interim placement** shall remain in effect until DCPS reviews Student's independent reevaluation reports, revises and updates her IEP to reflect those reevaluations, and assigns Student to a school site that can implement the updated IEP.

/s/ Kimm H. Massey

Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 4th day of September, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).