

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street NE, STE 2  
Washington, DC 20002

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[Parent], on behalf of  
[Student],<sup>1</sup>

Date Issued: September 9, 2011

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

A complaint concerning the Student and the Respondent was filed and a hearing held (Case resulting in a Hearing Officer Determination (HOD) on April 9, 2011, concerning an alleged failure to implement the February 23, 2010, individualized education program (IEP), the appropriateness of the August 25, 2010, IEP, and a failure to hold a timely IEP team meeting. The Petitioner's requests for relief were denied and the complaint dismissed.

The complaint in this matter was filed by the Petitioner on July 15, 2011. The Petitioner is represented by Roberta Gambale, Esq., and the Respondent is represented by Daniel McCall, Esq., and Victoria Healy, Esq.

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<sup>1</sup> Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

A resolution meeting was held July 28, 2011. The parties did not reach a settlement. They did agree no settlement could be reached and that the 45 day hearing timeline should begin. A response to the complaint was untimely filed on August 1, 2011. A prehearing conference was also held on August 1, 2011, and a prehearing order issued on that date.

A motion to dismiss was filed by the Respondent on August 10, 2011; a reply to the motion was filed by the Petitioner on August 12, 2011; and an order denying the motion was issued on August 22, 2011.

The hearing was convened and held on August 30, 2011, in room 2004 at 810 First Street NE, Washington, D.C. The due date for this HOD is September 11, 2011. This HOD is issued on September 9, 2011.

## **II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

## **III. ISSUES, RELIEF SOUGHT, and DETERMINATION**

The issues to be determined by the independent hearing officer (IHO) are:

- 1) Whether the Respondent failed to place the Student in the least restrictive environment (LRE) based on the Student's IEP when it did not place the Student in a full-time special education school for children with disabilities as determined necessary by the IEP team on January 26, 2011?
- 2) Whether the Respondent failed to convene the IEP team to determine whether the Student required extended school year (ESY) services for the summer of 2011?

- 3) Whether the Respondent failed to offer or provide an IEP reasonably calculated to provide educational benefit for the Student when the Student's IEP lacks ESY services for the summer of 2011?

The substantive requested relief at the time of hearing included:

- (1) Placement at the \_\_\_\_\_ School; and
- (2) Compensatory education consisting of one to one tutoring and counseling for missed ESY services.

The Respondent failed to place the Student in the LRE based on the Student's IEP when it did not place the Student in a specialized school for children with disabilities as determined necessary by the IEP team on January 26, 2011.

The Respondent failed to annually determine whether the Student required ESY services when it did not convene the IEP team to make the determination about ESY services following the January 26, 2011, IEP team meeting where the question was deferred.

The Respondent did not fail to offer or provide an IEP reasonably calculated to provide educational benefit when the IEP did not include ESY services for the summer of 2011.

#### **IV. EVIDENCE**

Four witnesses testified at the hearing, three for the Petitioner and one for the Respondent.

The witnesses for the Petitioner were:

- 1) The Petitioner (P)
- 2) Carolyn Miskel, Educational Advocate (EA)
- 3) \_\_\_\_\_ Admissions Coordinator, the

The witness for the Respondent was Cattima Millsap, Compliance Case Manager (CCM)

18 documents were disclosed by the Petitioner and 14 were admitted into evidence.<sup>2</sup> The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	January 26, 2011	IEP
P 2	January 26, 2011	Advocate's Notes
P 3	January 26, 2011	SEC's Notes
P 4	June 20, 2010	Confidential Comprehensive Psychological Evaluation
P 5	August 25, 2010	IEP
P 6	August 25, 2010	Advocate's Notes
P 7	February 23, 2010	IEP
P 11	April 9, 2011	HOD (Case No. Bruce Ryan, IHO)
P 12	August 22, 2011	Compensatory Education Proposal
P 13	February 2011	[Newlen Educational Services Progress Report]
P 14	January 2011	[Newlen Educational Services Progress Report]
P 15	December 2010	[Newlen Educational Services Progress Report]
P 16	August 17, 2011	Letter to Gambale from Roy
P 18	June 17, 2011	Email chain ending from Dabney to Miskel

Six documents were disclosed by the Respondent and five were admitted into evidence.<sup>3</sup> The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	January 21, 2011	Report to Parents on Student Progress
R 2	January 26, 2011	[Handwritten notes substantially similar to P 3]
R 3	January 26, 2011	IEP [Different number of pages than P 1]
R 5	July 28, 2011	Prior Written Notice
R 6	June 20, 2011	Report to Parents on Student Progress

## **V. 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:

<sup>2</sup> P 8, P 9, P 10, and P 17 were not admitted.

<sup>3</sup> R 4 was not admitted as it was duplicative of P 11.

1. Student is a     year old learner who was enrolled in     grade at a middle school in the District last year.<sup>4</sup> She is eligible for special education and related services under the definition of emotional disturbance.<sup>5</sup>
2. The Petitioner is the Student's aunt and guardian.<sup>6</sup>
3. An IEP team meeting was held on January 26, 2011, concerning the Student.<sup>7</sup> At the team meeting the IEP was revised and the IEP team determined the Student required special education and related services provided in a self contained classroom in a specialized school due to her behaviors and need for a more structured environment.<sup>8</sup> The specialized school was not immediately identified and the Petitioner agreed to an interim placement at her then current school.<sup>9</sup>
4. The specialized instruction for the Student was increased from 15 hours per week to 25 hours per week.<sup>10</sup>
5. The IEP team also agreed to postpone a determination of whether the Student required ESY services until "after the new services have been put in place."<sup>11</sup> The IEP was never subsequently revised reflecting a team determination of whether the Student required ESY services for the summer of 2011.<sup>12</sup>

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<sup>4</sup> Testimony (T) of P, R 3/P 1.

<sup>5</sup> R 3/P 1.

<sup>6</sup> T of P. The status of the Petitioner is not in question and so is not otherwise addressed in this HOD. It is noted that a guardian or individual acting in place of a biological parent meets the definition of parent under 34 C.F.R. § 300.30 and so the term "parent" is used in this HOD to refer, at times, to the Petitioner.

<sup>7</sup> T of P, T of EA, R 3/P 1, P 2, P 3, P 11.

<sup>8</sup> T of P, T of EA, R 3/P 1, P 2, P 3, P 11.

<sup>9</sup> T of P, T of EA, R 3/P 1, P 2, P 3, P 11.

<sup>10</sup> R 3/P 1, P 2, P 3, P 11.

<sup>11</sup> R 3/P 1, T of EA.

<sup>12</sup> R 3/P 1 (This is the most recent IEP revision provided by the parties, from January 26, 2011.)



emotional disturbance.<sup>22</sup> The clinical and academic needs of students can be met at the school.<sup>23</sup> All students get individual and group counseling and participate in a behavior management system.<sup>24</sup> A psychiatrist is on staff and related services such as speech and language and occupational therapy services are provided.<sup>25</sup> Credit towards District of Columbia graduation is earned at the school.<sup>26</sup>

12. The Student has been conditionally accepted at the \_\_\_\_\_ School for the 2011-2012 school year, pending a “funding letter,” a final report card for the 2010-2011 school year, and immunization record.<sup>27</sup>

#### **VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. 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 meet their burden. D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, 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); 34 C.F.R. § 300.516(c)(3).

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<sup>27</sup> P 16.

2. Placement determinations must be based, in part, on a child's IEP and, unless the IEP requires some other arrangement, a child with a disability is to be educated in the school she would attend if not disabled. *See* 34 C.F.R. § 300.116 (b) & (c).
3. The Student's IEP required that the Student be educated in a "specialized school." The Student was not placed in a specialized school but rather the school she would have attended if she was not disabled. This directly contradicted the IEP team's determination. The Respondent provided no substantive explanation for the placement, merely stating "Student's current IEP and educational needs can be serviced at neighborhood school  
  
This is not an explanation, particularly in light of the IEP team's determination that a specialized school was necessary.
4. Extended school year services are special education and related services that:
  - (1) Are provided to a child with a disability—
    - (i) Beyond the normal school year of the public agency;
    - (ii) In accordance with the child's IEP; and
    - (iii) At no cost to the parents of the child; and
  - (2) Meet the standards of the SEA.

34 C.F.R. § 300.106(b). "Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child." 34 C.F.R. § 300.106(a)(2).

5. The IEP team must meet to revise the IEP, as appropriate, to address in part the child's anticipated needs or other matters. *See* 34 C.F.R. § 300.324(b)(1)(ii)(D) & (E).
6. When the Student's IEP team met in January 2011 they clearly indicated their intent to revisit the question of whether the Student required ESY services for the summer of 2011 by documenting it on the IEP form: "The team will re-examine [ESY] after the new services have been put in place." This was a reasonable approach and left the Parent with the

expectation that the Student's "anticipated need" for ESY would at least be addressed at a subsequent IEP team meeting. The Respondent failed to ensure the team met to address whether ESY was needed to ensure the provision of FAPE for the Student.

7. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined 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 SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17.

8. Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. "[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 Fed. Reg. 46662 (2006).
9. The Supreme Court, in Board of Educ. v. Rowley, 458 U.S. 176 (1982), provided an analysis to examine the "basic floor of opportunity" or education benefit for children with disabilities who are mainstreamed. *Id.* at 201-205. However, according to the Court in Rowley:

It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable at the other end, with infinite variations in between. . . . We do not attempt today to establish one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

*Id.* at 202. Thus, Rowley does not provide the basis for the analysis in this case where the Student is to receive 25 hours per week of specialized instruction in a self-contained classroom in a specialized school, and she is still catching up to grade level and making

substantial progress in doing so. The analysis is thus based solely upon the requirements stated in the IDEA.

10. The Petitioner challenges the lack of ESY services in the IEP. Her challenge is based on the fact that the Student was provided ESY services over the summer in the past to address regression of skills learned during the regular school year. This is not sufficient cause to provide ESY services in the present because the Student's progress may be such that the services are no longer required to ensure the provision of a FAPE. Without evidence more substantial than showing she received ESY in the past, the Petitioner has not met her burden of persuading the IHO that ESY services were necessary to ensure the provision of FAPE. The Student is behind but progressing to meet grade level standards and her other special education services have been significantly increased. As a result, the failure to convene the IEP team to determine whether ESY services were necessary for the provision of FAPE during the summer of 2011 was a procedural error that did not impede the Student's right to a FAPE; did not *significantly* impede the Parent's opportunity to participate in the decision-making process regarding the provision of FAPE, and did not cause a deprivation of educational benefit.
11. When there has been a denial of FAPE on substantive grounds (34 C.F.R. § 300.513(a)(1)) the independent hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). The Petitioner has shown by a preponderance of the evidence that the Student's placement was not in conformity with the IEP. She has placed the Student at the Foundation School and seeks to preserve the Student's placement there, at public expense, for the remainder of the year. Because the Respondent failed to identify a

placement that complied with the IEP, and because the School has accepted the Student and can meet the Student's needs, the Respondent is responsible for the cost of the placement at the School for the remainder of the 2011-2012 school year or for as long as the Student remains at the Foundation School, which ever is shorter.

### **VII. DECISION**

The Petitioner prevails on Issue #1 because the Respondent failed to place the Student based on her IEP when it placed her at School.

The Petitioner prevails on Issue #2 because the Respondent did not convene the IEP team to determine whether the Student required ESY services for the summer of 2011. This was a procedural error that did not result in a denial of FAPE.

The Respondent prevails on Issue #3 because it did not fail to provide an IEP reasonably calculated to provide educational benefit when the IEP did not include ESY services for the summer of 2011.

### **VIII. ORDER**

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

1. The Respondent will fund the Student's placement at the School for the 2011-2012 school year with transportation. If the School cannot or will not maintain the Student's enrollment or the Petitioner seeks to remove the Student from the School, the Respondent will change the Student's location of services to a substantively comparable public or private school.

2. This order does not limit or prohibit the team from including or addressing any other needs of the Student (excluding placement for the 2011-2012 school year), and the services necessary to meet those needs, as determined by the IEP team.

**IT IS SO ORDERED.**

Date: September 9, 2011



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Independent Hearing Officer

**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).