

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

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

[STUDENT],¹
through the Parent/Guardian,*

Petitioner,

v.

DCPS,

Respondent.

Date Issued: 9/20/11

Hearing Officer: Seymour DuBow

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STUDENT HEARING OFFICE
2011 SEP 20 AM 10:03

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

A due process complaint was filed by counsel for petitioner on July 12, 2011. He alleges that DCPS denied a FAPE to the student by failing to implement the student's IEP, developing an inappropriate IEP because it did not contain sufficient hours of specialized instruction outside of general education and failing to provide an appropriate placement at

School. Counsel for respondent filed her response on August 5, 2011 denying the above allegations. On August 2, 2011 a resolution meeting was held and the parties failed to reach an agreement. A pre-hearing conference was held on August 11, 2011 with counsel for petitioner

and counsel for respondent

The pre-hearing Order was issued on August 12, 2011. Counsel for petitioner agreed to let the thirty day resolution period run until August 11, 2011 and the HOD is due September 25, 2011. The pre-hearing Order stated that the

¹ Personal identification information is provided in Appendix A.

issues to be decided at the hearing are: 1. Did DCPS fail to implement the student's current IEP of April 28, 2011 calling for 15 hours a week of specialized instruction outside of general education? 2. Is the student's IEP inappropriate for failing to contain sufficient hours of specialized instruction? 3. Is the student's placement at _____ School inappropriate for not providing educational benefits to the student? The relief requested is placement at _____ Academy in Prince George's County, Maryland and compensatory education for the time the student's IEP was not implemented.

The due process hearing convened at 9 a.m. on September 2, 2011 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Miguel Hull represented the petitioner and Tanya Chor represented the respondent DCPS. The hearing was closed. At the outset of the hearing, petitioner's documents P-1-P-7 and respondent's documents R-1-R-10 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses: the educational advocate Juan Fernandez, the mother, and the student who testified in person and _____ who testified by telephone. Counsel for respondent DCPS called as witnesses: the special education teacher of the student at _____ and the DCPS compliance case manager, Brandy Carter.

JURISDICTION

The hearing was convened on September 2, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

Counsel for petitioner alleges that DCPS failed to implement the student's IEP of April 28, 2011 at _____ that calls for fifteen hours of specialized instruction a week outside of general education. Counsel also argues that the IEP does not contain sufficient hours to meet the student's needs and that the placement at _____ cannot implement the student's IEP and is therefore an inappropriate placement. DCPS witnesses concede that the student's IEP cannot be implemented at _____ because all special education is provided in the general education setting. The student failed almost all his subjects last school year at _____. At the April 28, 2011 MDT meeting, DCPS agreed to find another placement for the student. DCPS has not provided another placement option to this date. The student has been accepted at the _____ Academy in Lanham, Maryland, a full-time non-public day special education program.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did DCPS fail to implement the student's current IEP of April 28, 2011 calling for 15 hours of specialized instruction outside of general education?
2. Is the student's current IEP inappropriate for failing to contain sufficient hours of specialized instruction?
3. Is the student's placement at _____ School inappropriate for not providing educational benefits to the student?

The relief requested is placement at a non-public day special education program at
of Prince George's County, Maryland and compensatory education for the time the
student's IEP was not implemented.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing
Officer's Findings of Fact on issue one –the failure to implement the IEP- are as follows:

I.

1. The student's current IEP of April 28, 2011 calls for fifteen (15) hours of specialized
instruction per week outside of general education and ten (10) hours of specialized
instruction per week in general education and one hour a week of speech-language
pathology outside of general education. (P-4)

2. The student's report card of July 13, 2011 shows the student is in general education
classes all day except for one class, with the special education teacher,

The report card shows that the special education teacher co-teaches in two
general education classes- English I and Earth Science. (P-7)

3. The special education teacher does not provide special education outside of general
education. The special education teacher co-taught with the regular education teacher
in English I and Earth Science with this student. (Testimony of student, special
education teacher)

After considering all the evidence, as well as the arguments of both counsel, this Hearing
Officer's Findings of Fact on issue two –the failure of the IEP to contain sufficient hours of
specialized instruction- are as follows:

II.

1. The student's report card of July 13, 2011 shows the student received failing grades in all his subjects except Algebra concepts. (P-7)
2. The student has been classified with the disability of Intellectual Disability (also know as Mental Retardation) (P-4)
3. An educational evaluation was conducted on the student on June 2, 2010. The evaluator administered the Woodcock-Johnson III Tests of Achievement. (P-6) The test scores showed that when compared to others at his grade level, this student's overall level of achievement is low with very low in broad reading, reading comprehension, math reasoning, written language and written expression. At the time of the evaluation, the student was _____ and seven months old attending the end of the _____ grade at _____ School. The WJ-III test results were as follows: on Broad Reading is had a standard score of 64 with a 1 percentile rank , a 2.9 grade equivalent and 8-2 age equivalent, on Broad Math he had a standard score of 74 with a 4 percentile rank, a 4.6 grade equivalent and a 10-2 age equivalent, on Broad Written Language he had a standard score of 63 with a 1 percentile rank, a 3.0 grade equivalent and a 8-3 age equivalent, on reading comprehension he had a standard score of 59 with a .3 percentile rank, a 2.2 grade equivalent and a 7-8 age equivalent, on math calculation skills he had a standard score of 82 with an 11 percentile rank, a 5.7 grade equivalent and a 11-2 age equivalent, on math reasoning he had a standard score of 65 with a 1 percentile rank, a 3.1 grade equivalent and a 8-7 age equivalent and on written expression he had a standard score of 68 with a 2 percentile rank, a 3.1 grade equivalent and 8-6 age equivalent. (P-6 at p.3)

4. An educational evaluation was conducted on the student on April 11, 2011 when the student was years 5 months old in the grade at (R-3)
The evaluator administered the Woodcock-Johnson III Tests of Achievement. The test scores showed that when compared to others at his age level, the student's performance is low in math calculation skills, written language, and written expression; and very low in broad reading, reading comprehension, and mathematics. The WJ-III test results were as follows: on Broad Reading he had a standard score of 66 which is the 1 percentile ranking, a 3.0 grade equivalent and a 8-3 age equivalent, on Broad Math he had a standard score of 67 which is the 1 percentile ranking, a 3.8 grade equivalent and a 9-4 age equivalent, on Broad Written Language he had a standard score of 70 which is the 2 percentile ranking, a 3.7 grade equivalent and 8-11 age equivalent, on reading comprehension he had a standard score of 61 which is 0.4 percentile ranking, a 2.4 grade equivalent and a 7-10 age equivalent, on math calculation skills a standard score of 75 which is 5 percentile ranking, a 5.1 grade equivalent and a 10-7 age equivalent, on written expression he had a standard score of 73 which is 4 percentile ranking, a 4.1 grade equivalent and a 9-7 age equivalent. (R-3 at p.2)
5. A comparison of the above Woodcock-Johnson III Achievement Tests in 2010 and 2011 shows that the student went down in his scores in Broad Math and math calculation, stayed at the same level in Broad Reading and reading comprehension and made slight gains in written language and written expression. The student is according to the 2011 WJ-III Achievement Test scoring six grade levels below his

peers in reading, five grade levels below is peers in math and written language. (See Findings of Fact #3 & #4)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue three –that _____ is an inappropriate placement instruction- are as follows:

III.

1. The student is attending _____ School which he began attending last school year in the _____ grade.
2. _____ provides special education in a full-inclusion model where all specialized instruction is provided in the general education setting. (Testimony of special education teacher)
3. The student is not receiving any specialized instruction outside of the general education setting. (Testimony of student, special education teacher, 2011 report card-P-7)
4. At the MDT meeting on April 28, 2011, the MDT determined that _____ cannot implement the student's IEP calling for fifteen hours of specialized instruction per week outside of general education and it is not an appropriate placement for the student. (Testimony of special education teacher, _____ The MDT Notes state that "Site location pending DCPS determination". (R-4 at p.3) The DCPS Compliance Case Manager participated in the meeting via telephone. (R-4 at p.1)
5. To the date of the due process hearing, DCPS has not proposed any different program for the student and he is still attending _____ (Testimony of _____)

6. The student has been accepted at Academy of Prince George's County, Maryland. (Testimony of Academy is a full-time non-public ten month special education day program. The student would be placed in a ninth grade class with 7 to 8 students of which two are classified with an Intellectual Disability or Mental Retardation. The class is taught by a certified special education teacher who is also certified in content area and a teaching assistant. There is a full-time speech and language therapist on staff. Academy is accredited by the state of Maryland and the District of Columbia. Academy follows the State of Maryland curriculum and the District of Columbia curriculum. The student will have the opportunity to earn credits. There are 70 students ages 8-18 attending the program with the disabilities of Specific Learning Disabilities, Other Health Impaired, Emotional Disturbance and Mental Retardation. There are several D.C. students in the program and DCPS approves the tuition. (Testimony of

Academy can provide educational benefits to the student and is an appropriate placement to meet the student's needs.

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2003) This hearing officer observed the demeanor of the mother and student who testified in person and found their answers straightforward and honest. This hearing officer found their testimony to be credible.

DISCUSSION/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 on issue one- failure to implement the student's IEP- are as follows:

The legal standard that applies to whether an implementation failure amounts to a denial of a FAPE, as recently stated in *Wilson v. D.C.* (Civil Action 09-02424 March 18, 2011) by Judge Henry Kennedy, is whether the aspects of the IEP not followed were "substantial or significant" or whether the deviations from the IEP's stated requirements were "material". Judge Kennedy relied on the above quoted language in the Fifth Circuit decision of *Houston Independent School District v. Bobby R.*, 200 F. 3d 341 at 349 (5th Cir. 2007). The Ninth Circuit Court of Appeals in *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5 J*, 502 F. 3d 811 at 822 ((9th Cir. 2007) stated: "[A] material failure to implement an IEP violates IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."; accord *S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008), *Catalan v. D.C.*, 478 F. Supp. 2d 73 (D.D.C. 2007). The student's educational progress, or lack of it, may be probative of whether there has been a significant shortfall. In *Catalan*, the district court found that missing a few speech and language sessions was not enough to constitute a substantial deviation from the IEP and a denial of a FAPE. In *Wilson*, the same federal judge who decided *Catalan*, held that the District's delay in arranging transportation services caused a nine-year-old boy to miss three weeks of his four week ESY program amounted to a material implementation failure resulting in a denial of a FAPE. The student's IEP requires fifteen (15) hours of specialized instruction a week outside of general education and ten hours a week of specialized instruction in general

education. The special education teacher testified that _____ is a full-inclusion model and all special education services are provided in the general education setting. The student's report card also shows that all his specialized instruction was in the general education setting. The student's report card shows him failing in almost all his subjects. A comparison of the WJ-III Achievement Test scores for 2010 and 2011 shows a decline in the student's achievement scores in Broad Math and math calculation and no gains in Broad Reading and reading comprehension. Both the report card and WJ-III test scores show a lack of educational progress that indicates a significant shortfall. (See Findings of Fact II. #1, #3-#5) The student's and special education teacher's testimony and the student's report card show that DCPS significantly failed in a material way to implement the student's IEP (See Findings of Fact I. #2 & #3)

This hearing officer finds that DCPS's failure to implement the student's IEP of April 28, 2011 resulted in a denial of a FAPE. Compensatory education is an equitable remedy for the denial of a FAPE. In *Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005), this Circuit set out the standards for an award of compensatory education. "Under the theory of 'compensatory education,' courts and hearing officers may award educational services...to be provided prospectively to compensate for a past deficient program. *Id.* at 522 Designing a compensatory education remedy requires "a fact-specific exercise of discretion by either the district court or a hearing officer." *Id.* at 524 To assist the court or hearing officer's fact specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's]specific education deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526 DCPS may be required to "offer proof that the placement compensated for prior FAPE denials in addition to providing

some benefit going forward.” *Id.* at 525. “[T]he inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005)

In this case, counsel for petitioner did not present a plan for compensatory education on the failure to implement the student’s IEP. The parent has the burden of “propos[ing] a well-articulated plan that reflects [the student’s] current education abilities and needs and is supported by the record.” *Phillips v. District of Columbia*, 2010 WL 3563068, at *6, 55 IDELR 101 (D.D.C. Sept. 13, 2010) Neither party has requested an extension of time beyond the 45-day timeline to supplement the record. The hearing officer cannot unilaterally extend the 45-day timeline. *34 C.F.R. Section 300.515 (c)*. “Choosing instead to award [the parent] nothing does not represent the ‘qualitative focus’ on [the child’s] ‘individual needs’ that Reid requires.” *Phillips* at *6 quoting *Nesbitt I*, 532 F. Supp. 2d at 125. The hearing officer can determine the amount of compensatory education that a student requires if the record provides him with sufficient “insight about the precise types of education services [the student] needs to progress.” *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 130 (D.D.C. 2008) Findings to assist the hearing officer to tailor the compensatory education award to the student’s unique needs should include the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services requested and the student’s current educational abilities. *Branham v. District of Columbia*, 427 F. 3d 7 (D.C. Cir. 2005) In this case, counsel for petitioner is seeking compensatory education from the April 28, 2011 IEP. The student’s IEP called for 15 hours of specialized instruction per week

outside of general education and ten hours of specialized instruction per week in general education. Because counsel presented no evidence on compensatory education and no compensatory education plan and because this hearing officer is going to grant the relief of a full-time non-public day special education program, this hearing officer concludes that the relief granted will ensure that the student receives the services he should have received in the first place for the seven week period where services were not provided outside of general education

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 on issue two- that the IEP is inappropriate for failure to contain sufficient hours of specialized instruction- are as follows:

In determining if an IEP meets the substantive requirements of the IDEA, The United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) held that courts must determine "is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07. In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989), The Third Circuit held that appropriateness under *Rowley* as applied to a student with severe disabilities means more than trivial educational benefit. The Court held in *Polk* that "...using *Rowley*'s own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit." *Polk* at p.184 Other Circuits have endorsed the *Polk* court's interpretation of educational benefit in *Doe v. Smith*, 441 IDELR 544 (6th Cir. 1989); *Fort Zumwalt School District v. Clynes*, 26 IDELR 172 (8th Cir. 1991); *Roland M. v. Concord School Comm'n*, 16 IDELR 1129 (1st Cir. 1991) and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4th

Cir. 1985) In *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41,44 (3d Cir. 1999) and *T.R. v. Kingwood Township Board of Education*, 32 IDELR 30 (3d Cir. 2000) the Third Circuit held that an IEP must provide "meaningful benefit." See also *A.I. Iapalucci v. D.C.*, 402 F. Supp. 2d 152 (D.D.C. 2005) ("...the appropriate focus of the court's review should be on whether DCPS is providing A.I. with an IEP that is reasonably calculated to provide meaningful educational benefit." *Id.* at p.167)

The Woodcock-Johnson Achievement Test results do indicate that the student is performing at a very low level in all academic areas and is regressing in Broad Math and math calculation. While the student was attending the ninth grade last school year at _____ in general education classes, his W-J III scores showed he was at 3.0 grade equivalent in Broad Reading, 3.8 grade equivalent in Broad Math, 3.7 in Written Language, 2.4 grade equivalent in reading comprehension, 5.1 grade equivalent in math calculation and 4.1 grade equivalent in written expression (See Findings of Fact II. #3-#5) The student's report card shows the student is failing in a full-inclusion model at _____ (See Findings of Fact II. #1) In light of the student's disability and very low achievement levels placing him five to six grade levels below his peers, this hearing officer concludes that counsel for petitioner has met his burden of proof that the current IEP is inappropriate for not containing sufficient hours of specialized instruction. The student needs an IEP that provides for specialized instruction outside of general education for all his academic classes in order to receive meaningful educational benefits.

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 on issue three- that the placement at _____ is inappropriate- are as follows:

The legal standard for educational placements was stated in the U.S. Department of Education interpretative guidelines that “educational placements under Part B must be individually determined in light of each child’s unique abilities and needs, to reasonably promote the child’s educational success.” *Appendix A to 34 C.F.R. Part 300 Question 1*. Following the development of an IEP, the public school system is required to provide an appropriate educational placement that meets the needs set forth in the IEP and allows for its implementation. *See Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004) (citing *Petties v. District of Columbia*, 238 F. Supp. 2d 114, 116 (D.D.C. 2002) and *34 CFR 300.116* Both DCPS witnesses conceded that _____ could not implement the student’s IEP and was not an appropriate placement for the student. (See Findings of Fact III. #2-#4) The student’s report card showed he was failing most of his classes at _____ (See Findings of Fact II. #1) The placement at _____ does not “reasonably promote the child’s educational success”. At the April 28, 2011 MDT meeting, it was agreed that DCPS would find another placement that could implement the student’s IEP. Almost five months have past since that meeting and DCPS has taken no action to find an appropriate placement for the student. (See Findings of Fact III. #4 & #5) This hearing officer finds that DCPS denied a FAPE to the student in not providing an appropriate placement to implement the student’s IEP. *See Parker v. District of Columbia Board of Education*, 555:268 EHLR (1979) (U.S. District Judge Penn ordered reimbursement when school failed to have appropriate placement at the start of the school year.) *See also Gerstmyer v. Howard County Public Schools*, 850 F. Supp. 361 (D.Md. 1994) (U.S. District Judge Motz found four month delay by school district in doing evaluations entitled parents to reimbursement at private placement). Once a court or hearing officer finds that the public school district has failed to offer a FAPE, the court or hearing officer is authorized to

“grant such relief as the court determines is appropriate.” 20 U.S.C. Section 1415(i)(2) (C) (iii).

“Under this provision, equitable considerations are relevant in fashioning relief, and the Court enjoys broad discretion in so doing.” *Florence County School District Four v. Carter*, 510 U.S. 7

at 16 (1993) Counsel for the petitioner is requesting for relief placement of the student at the

of Prince George’s County, in Lanham, Maryland. Such relief can be

granted under the Supreme Court decisions in *Burlington School Committee v. Massachusetts*

Department of Education, 471 U.S. 359 (1985) and *Carter* if the public school system failed to

provide a FAPE and the private placement is appropriate. *See also IDEA 2004* and its 2006

Regulation at 20 U.S.C. 1412 (a)(10)(C)(ii) and 34 CFR 300.148 (c). Both of these prongs of

the above test have been met in this case. Findings of Fact III. # 6 shows that the

is an appropriate private placement that can provide educational benefits.

ORDER

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

DCPS shall fund and place the student at Academy in Lanham, Maryland including transportation for the 2011-2012 School Year within seven school days of issuance of this Hearing Officer’s Determination.

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: 9/20/11

Seymour DuBow /s/
Hearing Officer