



Office of Review & Compliance

Student Hearing Office
Van Ness Elementary School
1150 5th Street, S.E., 1st Floor
Washington, D.C. 20003
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Confidential

The Student Through their)

Parents,*)

Case No.: 2009-1127)

Petitioner;)

vs.)

The District of Columbia Public Schools,)

Home School: [REDACTED])

Attending: [REDACTED])

Respondent.)

IMPARTIAL

DUE PROCESS HEARING

DECISION & ORDER

) Due Process Compl. Filed: July 31, 2009
) **Scheduled Hr'g Dates: Oct. 9 & 14, 2009**

) Held at: Van Ness Elementary School
1150 5th Street, S.E., 1st Floor
Washington, D.C. 20003

) **Pre-Hearing Conference Held By-Phone**
) **Friday, Oct. 2, 2009 at 4:00 p.m.**

Counsel for the Parent/Student:

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District of Columbia Public Schools:

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Independent Hearing Officer:

Frederick E. Woods

- Party identification information is stated in Appendix A of this order and Appendix A shall be removed from this order before public dissemination.

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OSSE
STUDENT HEARING OFFICE

I. Case Background and Procedural Information

A. JURISDICTION

This Decision and Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, codified at 20 U.S.C. §§ 1400 -1482, 118 Stat. 2647; and its implementing regulations codified at 34 C.F.R. §§ 300.01 – 300.818; 5 D.C.M.R. §§ 3000 - 3033.

B. DUE PROCESS RIGHTS

Before the hearing the parent had been advised of their due process rights.

C. FIVE-DAY DISCLOSURES

Petitioner: Admitted, without objection, a disclosure letter filed with the SHO on 09/30/09 that list nine (9)-witnesses and attached nine exhibits sequentially labeled and tabbed Parent-01 through Parent-09. Three witnesses were called to testify: (1) the legal guardian aunt; (2) a private psychologist; and (3) the [REDACTED] Academy associate director of admission.

Respondent: Admitted, without objection, disclosure letters file d on 10/06/09 and 10/05/09 that together lists ten (10)-witnesses and attached four exhibits sequentially labeled DCPS-01 through DCPS-04. Two witnesses were called to testify: (1) a DCPS school psychologist; and (2) the student's special education teacher.

D. STATEMENT OF THE CASE

The student, born 02/03/00, age 9-years 8-months, is a student with a disability receiving special education and related services, according to his 01/08/09 initial IEP, as a 4th grade, Specific Learning Disabled ("SLD") student attending [REDACTED] Elementary School (" [REDACTED] ES") in Washington D.C. (R. at Parent-09.)

The student's aunt/guardian believes that based on the student's behavior problems and poor academic performance in school the student did not receive all of his specialized instruction called for in his 01/08/09 initial IEP during the 2008-09 school year; and that the student needs a full time therapeutic educational setting to implement his IEP. And the guardian wrote under her signature on the student's 01/08/09 IEP "I disagree." (R. at Parent-09.) The student's other MDT members, however, disagreed with the guardian and developed a part time 13.5 hour IEP and placed him at [REDACTED] ES for the educational setting to implement his IEP. (R. at Parent-09.)

Consequently, on 07/31/09 the parent filed the student's Due Process Complaint ("DPC") alleging that DCPS as the LEA violated the IDEA and denied the student a Free Appropriate Public Education ("FAPE") by doing two things: (1) failing to provide the student with all of his IEP called for specialized instruction during the 2008-09 school year; and (2) failing to provide the student with a full time special education setting to implement his IEP. (R. at Parent-03.)

As relief, the parent wants the student's IEP services hours increased to a full time IEP; and wants DCPS to place and fund the student at public expense at [REDACTED] for the 2009-10 school year. (R. at Parent-03.)

The DCPS 08/18/09 written Response to the guardian's DPC and its oral updated response to the DPC provided at the due process hearing denied the guardian's claims for these reasons: (1) the student's 01/08/09 IEP is appropriate; (2) the student received all of his IEP called for specialized instruction in an inclusion model classroom; and (3) [REDACTED] ES is an appropriate educational setting to implement the student's IEP. (R. at DCPS' 08/18/09 Resp. to DPC.)

The OSSE Student Hearing Office ("SHO") scheduled the due process hearing for 1:00 p.m. on Friday, October 9, 2009 that convened, testimony taken, and was continued until 1:00 p.m. October 14, 2009 to complete the testimony. The hearings were held at Van Ness Elementary School, 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003. The parent selected to have closed due process hearings that convened, as continued.

Assistant Attorney General Kendra Berner appeared in-person representing DCPS. Attorney Chesseley A. Robinson appeared in-person representing the student who was present; and the student's aunt/guardian who also was present.

II. Issue

Did DCPS, as the LEA, violate the IDEA and deny the student a FAPE during the 2008-09 school year by doing two things: (1) failing to provide the student with all of his IEP called for specialized instruction; and (2) failing to provide the student with a full time special education setting to implement his IEP?

Brief Answer

(1) Yes. DCPS did not provide the student with all of his IEP called for specialized instructions during the 2008-09 school year. (2) But no, the student did not need a full time special education setting because [REDACTED] ES, the education placement setting to implement that IEP, is appropriate.

III. FINDINGS OF FACT

1. The student, born 02/03/00, age 9-years 8-months, is a student with a disability receiving special education and related services, according to his 01/08/09 initial IEP, as a 4th grade, Specific Learning Disabled (“SLD”) student attending [REDACTED] Elementary School (“[REDACTED] ES”) in Washington D.C. (R. at Parent-09.)
2. According to the student’s 01/08/09 initial IEP developed by DCPS along with the guardian, the student was to receive these special education services in an inclusion model classroom:
 - a. Specialized Instruction—12.0-hours/week in a General Education setting;
 - b. Behavioral Support Services—.5-hour/week outside the General Education setting; and
 - c. Speech-Language Pathology—1.0-hour/week outside the General Education setting. (R at Parent-09.)
3. The student’s aunt/guardian disagreed with that IEP because the IEP was to be implemented in an inclusion model classroom at [REDACTED] ES. She testified that (1) the student cannot read at his age level 9-years 8-months and at his grade level 4th grade because he does not know and does not understand the words he is supposed to be reading. (2) During, the 2007-08 school year, when the student was in the third grade his teachers’ assigned course materials that were on a second grade level and he struggled with those materials. (3) So he acted out in class because he cannot read and therefore could not perform his assigned school work which also impacted his self esteem. And (4) she received several phone calls from the school staff about him not staying in his seat and about him doing “strange things.” (R. at aunt/guardian’s testimony.)
4. Functioning below grade level is also supported by the student’s independent 12/10/08 Comprehensive Psychological Assessment Report and the independent evaluator’s testimony about the student’s intellectual and academic functioning which are as follows:
 - i. Based on the student’s test results from the Wechsler Intelligence Scale for Children, fourth edition (“WISC-IV”), he has a Full Scale Intelligence Quotient (“FSIQ”) of 63—placing his intelligence in the 1st percentile when compared with other children his age. That score places him in the WISC-IV 90% Confidence Interval of a FSIQ between 59-69—extremely low. That classifies him in the borderline range of intelligence

meaning that his overall performance exceeds about 1% of his age related peers.

- ii. His academic achievement, based on his subtest scores from the Woodcock-Johnson Test of Achievement, third edition (“WJ-III”), places him between 2.4-2.8 grade levels below his current 4th grade equivalency (“G.E.”) level in all subjects tested, among them—
 - a.) Broad Reading, 1.6 G.E.;
 - b.) Letter Word Identification, 1.5 G.E.;
 - c.) Reading Fluency, 1.5 G.E.;
 - d.) Spelling, 1.2 G.E.;
 - e.) Math Calculation Skills, 1.2 G.E.; and
 - f.) Academic Skills, 1.3 G.E.
 - iii. His emotional/personality functioning diagnostically shows “that he does not suffer from emotional and behavioral problems that warrant immediate treatment and his functioning in these domains fall in the Average range when compared to peers his age. . . There were problems identified in the domains of the student’s attention, social skills, leadership, and adaptive skills.”
 - iv. His diagnoses on Axis I is as follows: (1) Adjustment Disorder and (2) Learning Disorder NOS [not otherwise specified].
 - v. And based on the student’s test results and diagnoses his evaluator recommended, among other things, the following—
 - a.) “Due to the student’s limited cognitive functioning and his specific academic problems, he should be placed in a small classroom where one to one services can be available to him.
 - b.) Academically, he needs specialized instruction especially in the area of language”
(R. at Parent-08; private psychologist’s testimony.)
5. According to the testimony of the DCPS school psychologist who evaluated the student, reviewed the independent Psychological Assessment, and worked with the student in the 2008-09 school year, she said that (1) the student’s Reading and Math skills are low. (2) The student needs a part time IEP to focus on his foundational Reading skills to include phonetics, syllabication, and reading comprehension. (3) The student does not have behavior concerns he just needs for his

home life to settle because of having been recently removed [by the court] from living with his mother; he is now living in a new home with his aunt; and he attended three different schools within the last three years. And (4) the student can be successful in an inclusion model classroom and does not need a full time private special education school. (R. at DCPS school psychologist's testimony.)

6. According to the student's 09/16/08 Social History Report "the student is having problems dealing with his emotions as it relates to his mother being separated from his family." (R. at Parent-04.)
7. According to the student's special education teacher since 08/26/09 to the present, she testified that (1) she did not teach the student in the 2008-09 school year. (2) The student is presently in the fourth grade and reads at a solid second grade level. (3) [REDACTED] ES is a School wide Application Model School ("SAM") meaning it provides special education students their specialized instruction in an inclusion model classroom where she co-teaches along with a general education teacher in a general education classroom. (4) She is physically present to co-teach in the student's general education classroom to provide the special education students in the classroom with one to one assistance as follows: Mondays 9:00 - 9:30 a.m.; Tuesdays 9:30 - 11:00 a.m.; and Fridays 1:00 - 2:00 p.m. for a total of three-hours per week. (5) She provides the student's specialized instruction in Reading in a small group setting where the student reads out loud story books on the second grade level. And (6) on Thursdays, the student is pulled out of the general education classroom to receive his IEP called for related services. (R. at student's special education teacher's testimony.)
8. There was no testimony or evaluator report presented to support the guardian's claim that the student needed full time special education services. And the student's 06/15/09 Special Education Student Progress Report for Periods 3 & 4, shows the student was making progress on all of his IEP goals except for the goals that had not been introduced during those grading periods. (R. at DCPS-02.)
9. And none of the student's evaluation reports nor did any of the student's evaluators recommend that the student receive full time special education services or recommend that the student receive his special education services in a full time special education setting away from his non disabled peers. (R. at Parent-04, 05, 07, 08; DCPS-02; DCPS school psychologist's and the private psychologist's testimony.)
10. Based on these findings there is no probative evidence that the student needs a full time IEP. And since he does not need a full time IEP the student does not need a full time educational setting to implement a

13.5-hour IEP. However, there was evidence that DCPS did not provide the student with all 12-hours of specialized instruction hours called for in his initial IEP. (R. at Parent-09.) That is because the student's special education teacher testified that she provided the student with three hours of specialized instruction each week as his support teacher in his inclusion model general education classroom. (R. at special education teacher's testimony.)

11. Therefore, DCPS denied the student a FAPE when it failed to provide the student with all of his IEP called for specialized instruction.

IV. DISCUSSION and CONCLUSIONS OF LAW:

I

DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEA codified at 20 U.S.C. §§ 1400 - 1482. and 5 D.C.M.R. § 3000.1 requires DCPS 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 them with special education and related services through an appropriate IEP and placement.

DCPS met some but not all of its legal obligation under the IDEA. Here is why.

1. "If a child's initial evaluation suggests [s/he] is entitled to a FAPE, IDEA then requires the school district to create and implement an IEP, which is the 'primary vehicle' for implementing the Act." Hoing v. Doe, 485 U.S. 305, 311 (1988).
2. According to the IDEA at 34 C.F.R. § 300.306 (a)(1)-(b)(2), Determination of Eligibility, "Upon completion of the administration of assessments and other evaluation measures—(1) a group of qualified professional and the parent of the child determine whether the child is a child with a disability ... in accordance with paragraph (b) of this section and the educational needs of the child. ... (b) A child must not be determined to be a child with a disability if ... the child does not otherwise meet the eligibility criteria under § 300.8, [Child with a Disability]."
3. Pursuant to 5 D.C.M.R. § 3002.1, LEA Responsibility, "[t]he services provided to the child must address all of the child's identified special education and related services needs and must be based on the child's unique needs and not on the child's disability."
4. Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."

5. To ensure that each eligible student receives a FAPE, the IDEA requires that an IEP be developed to provide each disabled student with a plan for educational services tailored to that student's unique needs. See 20 U.S.C. § 1414 (d)(3).
6. Pursuant to 34 C.F.R. § 300.321 (a)(5), IEP Team, "[t]he public agency must ensure that the IEP Team for each child with a disability includes—an individual who can interpret the instructional implications of evaluation results."
7. Pursuant to 34 C.F.R. § 300.116 (a)(1), Placements, "[i]n determining the educational placement of a child with a disability, each public agency shall ensure the placement decision is made by a group of persons, including the parent, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options."
8. Pursuant to 34 C.F.R. § 300.501(c), Parental Involvement in Placement Decisions, "[e]ach public agency shall ensure the parents of each child with a disability are members of any group that makes decisions on the education placement of their child."
9. Pursuant to 5 D.C.M.R. § 3025, Procedural Safeguards—Prior Written Notice, DCPS shall provide written notice to the parent of a child with a disability before it proposes...an educational placement of the child.
10. Pursuant to 34 C.F.R. §§ 300.323(a), (c)(2), IEP Must be in Effect, each public agency must provide special education and related services to a child with a disability in accordance with the child's IEP.
11. And the U.S. Supreme Court held that a state or district fulfills its obligation to provide a free appropriate public education ("FAPE") to a student with a disability "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Bd. of Educ. Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 203 (1982). "Implicit in the congressional purpose of providing access to a FAPE under the IDEA is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped student." Rowley, 458 U.S. at 200. Further, the Court held that "the basic floor of opportunity' provided by the Act [IDEA] consists of access to a specialized instruction and related service which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201.
12. In this case, DCPS complied with those cited IDEA requirements and provided the student with the basic floor of opportunity designed to provide him educational benefit when the student's 01/08/09 MDT/IEP Team that

included his guardian as a team members did these things: (1) reviewed and interpreted the student's assessment reports; (2) based on that review they found the student was eligible for special education services with a SLD disability classification; (3) developed the student's 01/08/09 13.5 hours per week part time IEP; and (4) on 01/08/09 issued the student's Prior Notice of Placement to his neighborhood school— [REDACTED] ES. (R. at Parent-04, 05, 07, 08, DCPS-01, 03, 04; guardian's and [REDACTED] ES special education teacher's testimony.)

13. And albeit the guardian wants a full time IEP and a full time private school placement to implement that IEP, there was no persuasive evidence presented that the student required a full time IEP and placement. In fact the credible evidence is to the contrary. Here is why.
14. The guardian testified that the student needed a full time IEP to address his behavior problems in school and poor academic performance. And the behavior problems amounted to the student acting out in class because he is unable to do his assigned class work. The guardian did not, however, specify what additional type of special educational services should be provided to the student and the amount of hours needed for those additional services. Nor did any witness called by the guardian specify what additional type of special education services should be provided to the student and the amount of hours needed for those additional services. (R. at guardian's and private psychologist's testimony.)
15. However, based on the student's unique needs at this time, the student's behavior problem is being addressed in the student's 01/08/09 IEP via Emotional, Social, and Behavior Development Goals. And there was no evidence presented that the student needed more social emotional goals, more related service hours, or any additional related services. (R. at Parent-09.)
16. Moreover, there was no evidence presented about why the student would need more than his IEP called for 12-hours per week of specialized instruction. Simply saying, as the guardian testified, that the student needs more help with his work without more information is not a sufficient reason to increase the student's specialized instruction hours in their IEP. Particularly since the 06/15/09 Special Education Student Progress Report for Periods 3 & 4, shows the student was making progress on all of his IEP goals except for the goals that had not been introduced during those grading periods. And there was no nexus made between increasing the student's special education service hours and remediation of the student's behavior problems or academic performance. (R. at Parent-09; DCPS-02; guardian's testimony.)
17. So based on this hearing record, there does not exist evidence supporting the guardian's claim that the student was denied a FAPE because he needed but did not have a full time IEP and full time special education setting.

18. But there was sufficient evidence to support a finding that DCPS did not provide the student with all of his IEP called for 12-hours per week of specialized instruction as recommended by his IEP team; and that DCPS did not provide the student's specialized instruction in a small classroom setting as recommended by his private psychologist. (R. at Parent-08, 09; private psychologist's and special education teacher's testimony.)
19. And "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than *de minimis* failure to implement all elements of that IEP, and, instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. ... 'Failure to implement all services outlined in an IEP does not constitute a *per se* violation of the IDEA.'" Catalan v. District of Columbia, 478 F. Supp. 2d 73, 75-76 (D.D.C. 2007) (*holding* that a failure to provide all of a student's weekly speech-language therapy outlined in their IEP did not constitute a FAPE deprivation).
20. In this case the parent showed more than a than *de minimis* failure to implement all elements of that IEP, and, instead demonstrated that DCPS failed to implement substantial or significant provisions of the IEP. Catalan, 478 F. Supp. at 75-76. Here is why.
21. The student's 01/08/09 initial IEP calls for him to receive 12-hours per week of specialized instruction. And as recommended by the student's private psychologist, that instruction should be given in a small classroom setting due to his education deficits.(R. at Parent-08, 09, private psychologist's testimony.)
22. Those deficits showing the student is functioning below grade level are documented in the student's independent 12/10/08 Comprehensive Psychological Assessment Report and the independent evaluator's testimony about the student's intellectual and academic functioning which are as follows:
 - i. Based on the student's test results from the Wechsler Intelligence Scale for Children, fourth edition ("WISC-IV"), he has a Full Scale Intelligence Quotient ("FSIQ") of 63—placing his intelligence in the 1st percentile when compared with other children his age. That score places him in the WISC-IV 90% Confidence Interval of a FSIQ between 59-69—extremely low. That classifies him in the borderline range of intelligence meaning that his overall performance exceeds about 1% of his age related peers.
 - ii. His academic achievement, based on his subtest scores from the Woodcock-Johnson Test of Achievement, third edition

("WJ-III"), places him between 2.4-2.8 grade levels below his current 4th grade equivalency ("G.E.") level in all subjects tested, among them—

- a.) Broad Reading, 1.6 G.E.;
 - b.) Letter Word Identification, 1.5 G.E.;
 - c.) Reading Fluency, 1.5 G.E.;
 - d.) Spelling, 1.2 G.E.;
 - e.) Math Calculation Skills, 1.2 G.E.; and
 - f.) Academic Skills, 1.3 G.E.
- (R. at Parent-08.)

23. Yet despite his Reading deficits, according to the student's special education teacher, [REDACTED] ES is a School wide Application Model School ("SAM") meaning it provides the student's specialized instruction in an inclusion model where she co-teaches along with a general education teacher in a general education classroom. However, she is only physically present to co-teach in the student's general education classroom to provide the special education students in the classroom with one to one assistance as follows: Mondays 9:00 - 9:30 a.m.; Tuesdays 9:30 - 11:00 a.m.; and Fridays 1:00 - 2:00 p.m. for a total of three-hours per week. (R. at special education teacher's testimony.)
24. Consequently the student is receiving only $\frac{1}{4}$ of his IEP called specialized instruction each week albeit the student is a fourth grader reading at the second grade level. Since the student cannot read at his present 4th grade level that means he has not learned to read at his age and grade equivalency. And he must first learn to read in order to be able to read to learn.
25. So while the student does not need more hours of specialized instruction or a full time private special education school program, he does need all of his IEP called for 12-hours of specialized instruction per week, not just 3-hours of specialized instruction each week. And that instruction should be provided to him in a small group setting with an emphasis on an intensive reading program to help the student with these things: oral and written language; and foundational Reading skills to include phonetics, syllabication, reading fluency, spelling, and reading comprehension.
26. Pursuant to 5 D.C.M.R. § 3030.3, "The burden of proof shall be the responsibility of the party seeking relief; either the parent/guardian of the child or the LEA. 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 Free Appropriate Public Education (FAPE)."

27. The guardian, who filed the Due Process Complaint, had and did not meet their burden of proof in this case on one issue because the guardian:
- a. Failed to prove that DCPS denied the student a FAPE by not providing him a full time IEP; and
 - b. Failed to prove the student required a full time educational setting to implement his 13.5-hour part time IEP.
28. But the guardian, who filed the Due Process Complaint, had and met their burden of proof in this case on one issue because the guardian:
- a. Proved that DCPS did not provide the student with all of his IEP called for specialized instruction.

So in consideration of the hearing record, there is no finding that the student was denied a FAPE on the issue that the student needed a full time IEP and full time private school placement because the guardian did not meet their burden of proof under the IDEA by proving those alleged violations of the IDEA. But the guardian did prove that DCPS failed to provide the student with all of his IEP called for specialized instruction. Ergo based on the evidence and governing law the hearing officer issues this—

ORDER

DCPS shall ...

1. Provide the student with all of his IEP called for 12-hours per week of specialized instruction in a small group setting with one to one assistance from his special education teacher.
2. As part of the student's 12-hours of specialized instruction, provide the student with an intensive reading program to help the student with his oral and written language; and foundational Reading skills to include phonetics, syllabication, reading fluency, spelling, and reading comprehension in a small group setting.
3. Provide the student with another educational setting to implement his 01/08/09 IEP by November 16, 2009 if [REDACTED] ES can not provide the student with the services called for in paragraphs one and two of this order.
4. The guardian's 07/31/09, Due Process Complaint ("DPC") in Case No.: 2009-1127 is dismissed, with prejudice—meaning that the issues that were or could have been raised in the 07/31/09 DPC based on the same facts against the same parties or privies that arise from the same time period that formed the basis for the 07/31/09 DPC that is resolved herein by a final judgment on the

merits cannot be relitigated. See Apotex, Inc. v. FDA, 393 F.3d 210, 217 (D.C. Cir. 2004).

5. The 45-day time limit, from filing the Due Process Hearing Request to its Disposition after the expiration of the 30-day period under § 300.510 (b) — receipt of the final Hearing Officer’s Decision (HOD) pursuant to 34 C.F.R. § 300.515 (a) (1)—was extended by the parent for good cause; and the time for disposition was extended, in accord with this Order, to accommodate the parent’s requested and jointly agreed to continuances.

Furthermore, pursuant to SOP § 402 (B)(2) Continuances, states that “in general the parties’ agreement to a continuance constitutes ‘good cause’ to reschedule the hearing to another date and to extend the deadline for issuance of a final determination.”

6. This Order resolved all issues raised in the student’s 07/31/09 Due Process Complaint in Case Number 2009-1127 that is dismissed with prejudice.
7. And the hearing officer made no additional findings.

This is the final ADMINISTRATIVE DECISION. An appeal can be made to a court of competent jurisdiction within ninety (90)-days from the date of this Decision and Order pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B); 34 C.F.R. § 300.516 (b).

1st Frederick E. Woods
Frederick E. Woods
Hearing Officer

October 24, 2009
Date