

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

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

OSSE
Student Hearing Office
June 2, 2014

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a _____ eligible _____ student with an Other Health Impairment.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on March 18, 2014 in regard to the Student. This Hearing Officer was appointed to preside over this case on March 19, 2014. A response was filed on March 24, 2014. A resolution meeting was held in this case on March 31, 2014. The resolution period expired on April 17, 2014.

On April 24, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on April 28, 2014 outlining the summarizing the rules to be applied in this hearing and identifying the issue in the case.

A hearing date followed on May 23, 2014. This was a closed proceeding.

Petitioner entered into evidence exhibits 1-10. Respondent entered into evidence exhibits 1-4. Petitioner presented as witnesses: Petitioner; Witness C, Educational Expert; Witness D, School B. Respondent presented: Witness A, a teacher; Witness B, an LEA representative.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

ISSUE

As identified in the Prehearing Conference Summary and Order and in the Second Due Process Complaint, the issue to be determined is as follows:

1. Did DCPS fail to appropriately provide the Student with an appropriate amount of special education services in the IEP dated February, 2014? If so, did DCPS deny the Student a FAPE?

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:

1. The Student is currently eligible for services as a student with an Other Health Impairment. (P-2)
2. Student is in the fifth grade at School A. (Testimony of Petitioner)

3. The Student has been at School A since first grade. (P-6-2)
4. The Student's IQ is in the average to superior range in non-verbal, composite intelligence and composite memory. In verbal intelligence, the Student was in the low average range. (P-6-6)
5. According to Woodcock Johnson III Tests of Achievement scores from May 3, 2012, the Student's broad reading was at the 2.2 grade level equivalent, his broad math was at the 1.5 grade level equivalent, and his broad written language was at a 2.0 grade level equivalent. The Student had particular weakness in math calculation (1.2 grade level equivalent) and math fluency (1.8 grade level equivalent). (P-4-6)
6. The Student scored below basic on the DC-CAS in third and fourth grade for reading and mathematics. (P-6-7)
7. The Student is currently reading on an upper second grade level. (Testimony of Witness A)
8. The Student is currently performing in math in on an upper first grade level. (Testimony of Witness A)
9. The Student's writing is currently on first to second grade level. (Testimony of Witness A)
10. The Student has difficulty with computation, practical applications, solving word problems, grasping higher order math concepts. (P-6-8)
11. In writing, the Student has difficulty with spelling, vocabulary, punctuation, and organizing sentences into meaningful paragraphs. (P-6-8)
- 12.. The Student has been having difficulty with his homework. He is not able to do his math homework. (Testimony of Petitioner)

13. The Student has attentional issues in the classroom and loses focus easily.
(Testimony of Witness A; P-6-3)
14. He needs significantly shorter comprehension passages in reading. (Testimony of Witness A)
15. The Student needs specialized instruction in a small group setting. (Testimony of Witness A)
16. The Student would benefit from reading instruction, writing instruction and math instruction presented at his grade level. (P-4-2-4)
17. The Student needs direct instruction in spelling and “explicit” instruction in writing. (P-4-4-5)
18. The Student would benefit from word recognition strategies, a word bank, repeated reading, incorporating self-monitoring strategies, using mnemonics, manipulatives, multi-sensory instruction. (P-4-2-4)
19. The Student spent the 2012-2013 school year, his fourth grade year, at School A.
(Testimony of Petitioner)
20. An IEP meeting was held on March 12, 2013. This IEP contained goals in math, reading, written expression, emotional, social and behavioral issues, and motor skills/physical development. The IEP recommends 5 hours per week of specialized instruction outside general education, and 5 hours per week of specialized instruction inside general education. Occupational therapy is recommended for 2 hours per month. Behavioral support services are recommended for 2 hours per month. (P-1)
21. The Student’s fourth grade report card was poor. The Student’s grades in math and ELA were “1,” or below basic. The Student was considered to be “beginning” work on

most skills in every area. The Student's reading level was a K on the TRC. The Student needed frequent prompting in completing class work on time, using time wisely, completing and returning homework, participation in group discussion. The Student received a I on all behavioral criteria. (P-9-1-3)

22. The Student has attended School A for the 2013-2014 school year. (Testimony of Petitioner)

23. The Student has made minimal progress in applied math problems. (Testimony of Witness A)

24. The Student has made minimal progress in reading comprehension. (Testimony of Witness A)

25. He has made some progress in writing in terms of capitalization and punctuation, but he continues to struggle with reversals. (Testimony of Witness A)

26. An IEP meeting was held for the Student on February 25, 2014. (P-2)

27. At the IEP meeting, the Student's general education teacher said that she does not "get anything from him." (Testimony of Petitioner)

28. The IEP team reduced his special education hours because they felt he needed more socialization. (Testimony of Witness A)

29. The parent did not attend the meeting. (Testimony of Witness B)

30. In the February 25, 2014 IEP, the Student was recommended for 4 hours per week of specialized instruction outside general education, 4 hours per week of specialized instruction inside general education, and occupational therapy for 30 minutes per month. The IEP recommended flexible scheduling and testing accommodations. (P-2-8-10)

31. This IEP does not contain behavioral support goals. It indicates that the Student no longer needs behavioral support. The IEP contains reading, math writing, and motor skills/physical development goals. (P-2-7)

32. In the Student's fifth grade report card, the Student continued to get 1 in reading, writing and language, speaking and listening, and math, though the Student did get a 2 in reading for the second term. A majority of skills were marked as B for beginning. The Student frequently needed prompts in following directions, completing work on time, using time wisely, returning completed homework, participating in class discussion, and making an effort. The Student's reading level was Q on the TRC. (P-10)

33. During 2013-2014, the Student did not progress overall in writing. (P-7-3)

34. After Spring break for the 2013-2014 school year, the Student stopped participating in class and has become withdrawn. (P-7-3)

35. I found all the witnesses credible in this proceeding.

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:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Schaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in

Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP decision must be determined as of the time it was offered to the student. Citing to Circuit court decisions, the Court found that an IEP should be judged prospectively to avoid “Monday morning quarterbacking.” See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

The record reveals that this is a fifth grader who has been functioning well below grade level for a number of years in all areas despite some average IQ scores. The Student remains in a general education environment with four hours a week of special education services pushed into the classroom. The Student is currently performing three to four years behind the other students in his class in writing, math, and reading.

The record indicates that the Student has made some progress in certain areas of reading. Still, the extent of this progress is questionable. The Student is only on a second grade level in reading according to his teacher. He was on the second grade level in reading in 2012 according to the Woodcock-Johnson III Tests of Achievement. The teacher also indicated that the Student has made minimal progress in reading comprehension, obviously a main component of reading. The teacher indicated that he needs to work on significantly smaller passages in reading, suggesting that a different kind of class is needed for him.

In regard to math, the Student has also fared poorly. The student was on the first grade level in math back in 2012 according to the Woodcock-Johnson III Tests of Achievement. According to his teacher, he is still on the first grade level in math. The Student has made no progress in applied problems. Petitioner contends credibly that he cannot do his homework. He has gotten straight “1” grades in math throughout the 2012-2013 and 2013-2014 year.

In regard to writing, the pattern is similar. The Student was on the second grade level back in 2012 according to the Woodcock-Johnson III Tests of Achievement. His teacher now indicates that he is on the first to the second grade level in terms of writing, and that he needs “direct,” instruction in spelling and “explicit” instruction in writing. While there has been some limited progress in certain areas, overall the progress is not satisfactory.

According to his report cards, the Student has done poorly in the last two years. The Student is deemed to be below basic in most areas, and a majority of skills were marked as B for beginning. The Student frequently needed prompts in following directions, completing work on time, using time wisely, returning completed homework, participating in class discussion, and making an effort.

Teacher A has indicated that the Student needs specialized instruction in a small group setting. The Student’s general education teacher said that she does not “get anything from him” in her class. Moreover, there is documentation in the record establishing that the Student would benefit from reading instruction, writing instruction and math instruction presented at his grade level.

Nevertheless, the February, 2014 IEP team did not provide for an increase of specialized instruction, a small group setting, or a setting with a special education teacher in the room at all times. In fact, the team reduced the Student’s special education hours from 10 to 8, meaning

that the Student would spend most of the week in a general education class with no special education teacher, no paraprofessional, and with students who were functioning well above him academically. Respondent presents no evidence to establish that differentiation by a general education teacher could bridge such a gap between students. I will point out that there are no accommodations in the IEP that call for small group instruction for this Student. Under the circumstances, I agree with Petitioner and Witness D that this IEP was not reasonably calculated.

As a remedy, Petitioner asserts that appropriate relief in this matter is to order placement at School B.

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

The statute directs the court to “grant such relief as [it] determines is appropriate.” The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be “appropriate.” Absent other reference, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that “(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school.” Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief “must be tailored” to meet a student’s “unique needs.” Id. At 11-12 (citing to Florence County

School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider “all relevant factors” including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

Though School B appears to be a well-run school that contains appropriate small group instruction for the Student, this Student’s needs are not so specialized that a non-public school is necessary. The Student requires a small, self-contained contained setting in all academic areas with other students who are at his level. The record suggests that DCPS has proposed something similar for the Student. To this IHO, a suitable public school should be available as well in the District of Columbia Public School system. I will accordingly order the Student’s IEP to be revised to require a small special education classroom in all academic areas with no more than 10 students in the classroom. The classroom shall contain other students who are functioning at or near the Student’s academic levels in reading, writing and math.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent is adjudged to have denied the Student a FAPE by its IEP of February, 2014;
2. The IEP is hereby revised to require that for all academic subjects, the Student shall be placed in a classroom led by a special education teacher with no more than 10 students in the classroom;
3. Other students in the classroom shall be functioning at or near the Student’s academic functioning level.

Dated: June 1, 2014

Michael Lazan
Impartial 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).

Date: June 1, 2014

Michael Lazan
Impartial Hearing Officer