

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

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

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STUDENT HEARING OFFICE
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PETITIONER, on behalf of
[STUDENT],¹

Date Issued: January 29, 2011

Petitioner,

Hearing Officer: Peter B. Vaden

v

Case No:

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: January 26, 2011

Respondent.

Student Hearing Office, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PETITIONER (the "Petitioner"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, the Petitioner alleges that District of Columbia Public Schools ("DCPS") violated the IDEA by placing the Student, who had previously been instructed in a full-time therapeutic setting, in a

¹ Personal identification information is provided in Appendix A.

general education classroom at NEIGHBORHOOD ELEMENTARY SCHOOL ("NES"). Petitioner seeks an order to require DCPS to develop an appropriate IEP for Student and to fund his placement at PRIVATE SCHOOL

The Student, an AGE adolescent, is a resident of the District of Columbia and is eligible for special education services under the primary disability, Emotional Disturbance ("ED"). The Petitioner's Due Process Complaint, filed on November 26, 2010, named DCPS as respondent. The undersigned Hearing Officer was appointed on November 30, 2010. The parties met for a resolution session on December 15, 2010. No agreement was reached and the parties decided that the case should proceed to a due process hearing. A prehearing telephone conference was held with the Hearing Officer and counsel on December 16, 2010 to set the hearing date, and to discuss issues to be determined and other matters.

On January 25, 2011, the day before the hearing, Petitioner filed a motion for a continuance. The basis for the continuance request was that counsel for Petitioner had been led to believe that she would have no problem setting an in-school observation of the Student. When counsel attempted to make an observation on January 18, 2011, eight days before the scheduled hearing date, the school principal did not allow the observation. The Hearing Officer denied the continuance motion, which was opposed by DCPS, because the Standard Operating Procedures for Due Process Hearings bar the granting of a continuance requested later than the due date for the five-day disclosures, except for a showing of good cause. The Hearing Officer found that Petitioner had not shown good cause.

The due process hearing was held before the undersigned Impartial Hearing Officer on January 26, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner

appeared in person and was represented by counsel. Respondent DCPS was represented by counsel. The Petitioner testified and called as witnesses EDUCATIONAL ADVOCATE, PRIVATE SCHOOL ADMISSIONS DIRECTOR, and NES READING TEACHER. DCPS called as witnesses SPED COORDINATOR and SPECIAL EDUCATION MONITOR. Petitioner Exhibits P-1 through P-43 and DCPS Exhibits R-1 through R-10 were admitted into evidence without objection.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

1. Whether the August 24, 2010 IEP denies Student FAPE by changing his placement from full time specialized instruction outside the General Education Setting to 15 hours per week of specialized instruction, of which 7.5 hours would be provided outside the General Education Setting.
2. Is DCPS required to pay for an independent Assistive Technology evaluation for student?

Petitioner seeks an order for DCPS to fund Student's placement at Private School and to require DCPS to pay for an Assistive Technology evaluation.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia. (Exhibit P-1)

2. When Student was three years old, he was found eligible for special education services under the disability, Developmental Delay. He was placed in a full-time pre-school program outside the general education setting. (Exhibit P-12)

3. After preschool, Student was placed by DCPS at THERAPEUTIC SCHOOL 1, a full time therapeutic program which later closed. (Testimony of Petitioner) After Therapeutic School 1 closed, DCPS placed Student at THERAPEUTIC SCHOOL 2, another full time therapeutic program, which closed after the 2009-2010 school year. (Testimony of Petitioner)

4. By the time he attended Therapeutic School 2, Student's disability classification had been changed to Emotionally Disturbed ("ED"). (Exhibit P-8)

5. At Therapeutic School 2, Student was provided a part time dedicated aide, ("MR. J") Mr. J continued to be assigned to Student at NES.

6. Student did well in the full time therapeutic programs at Therapeutic School 1 and Therapeutic School 2. (Testimony of Mother).

7. Student's eligibility for special education services under the primary disability, Emotional Disturbance, was confirmed by the Therapeutic School 2 MDT team on April 21, 2001 following a reevaluation. (Exhibit P-5, Exhibit P-2)

8. When Therapeutic School 2 closed at the end of the 2009-2010 school year, Student was assigned to NES. (Testimony of Mother)

9. The NES IEP team met on July 22, 2010. The team agreed that Student continued to need full time specialized instruction services outside of the General Education setting. (Testimony of Mother, Exhibit P-2).

10. NES is a SAMS (Statewide Application Model) school. In the SAMS school model, all children in the school are to have access to a plethora of services and support.

Depending on his or her needs, any student in the school would receive whatever services the school provides, but in a fully integrated setting. (Testimony of SPED Coordinator).

11. At NMS, there are 15 to 19 students in Student's inclusion classrooms. As a SAMS school, NES is not set up to provide full time special education services outside of the general education setting. (Testimony of SPED Coordinator)

12. NES reconvened Student's IEP team on August 24, 2010. Student's Special Education Services were reduced to 15 hours per week from the 24.4 hours per week specified in the July 22, 2010 IEP. Services outside the General Education setting were reduced from 24.4 hours per week to 7.5 hours per week. (Exhibit P-1, Exhibit P-2) Petitioner did not support the reduction in services. (Testimony of Petitioner, Testimony of SPED Coordinator)

13. DCPS conducted no new evaluations of Student, after the July 2010 IEP, to support this change in services. (Stipulated)

14. As of the August 2010 IEP meeting, Student performed at first to second grade level in reading and math. He was unable to write a complete sentence and could only write a few words independently.

15. Since starting the SAMS program at NES, Student has been doing no school work. He does not bring home homework assignments. (Testimony of Mother)

16. Student is struggling academically at NES. (Testimony of Mother, Testimony of NES Reading Teacher)

17. Student's behavior at NES makes it difficult for him to make academic progress. (Testimony of NES Reading Teacher).

18. Student has made a lot of social progress at NES. (Testimony of NES Reading Teacher)

19. According to Student's emotional behaviors and acting out have worsened at NES and he is regressing in the environment. (Testimony of Petitioner, Testimony of Educational Advocate) told Petitioner that her son is losing everything he gained at Therapeutic School 2. His behavior is regressing and he is fighting and cursing the aide. (Testimony of Petitioner)

20. At Therapeutic School 2, the staff initiated a Behavior Intervention Plan ("BIP") for Student that rewarded on-task behaviors with "green" points and penalized negative behavior with "red" points. (Testimony of Petitioner) NES developed a similar plan for Student on August 22, 2010 (Exhibit R-2). The staff at NES have not effected the BIP. (Testimony of Petitioner)

21. At an MDT team meeting in November 2010, NES Reading Teacher and other teachers voiced the opinion that NES was not an appropriate placement for Student. (Testimony of NES Reading Teacher, Petitioner)

22. Private School is a therapeutic school that provides services only to children with ED disabilities. The school has small class size, from 6 to 8 students with one teacher and one aide in every classroom. All teachers are certified in Special Education. (Testimony of Private School Admissions Director) Private School would be able to meet the special education needs of Student arising from his ED disability. (Testimony of Private School Admissions Director, Education Advocate)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

DISCUSSION

Under the U.S. Supreme Court's decision in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Hearing Officer must address two questions that are aimed at DCPS's paralleling responsibilities to comply with the procedural and substantive requirements of the IDEA: First, has the State complied with the procedures set forth in the Act? And second, 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, 102 S.Ct. 3034. Accordingly, my inquiry must be (1) whether the August 24, 2010 IEP developed for Student was procedurally deficient, and (2) whether the IEP was reasonably calculated for Student to receive sufficient educational benefits to meet the requirements of a FAPE. *N.S. v. Dist. of Columbia*, 709 F. Supp. 2d 57, 60, 54 IDELR 188 (D.D.C. 2010). The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

1. WAS THE AUGUST 24, 2010 IEP REASONABLY CALCULATED TO PROVIDE FAPE TO STUDENT?

Petitioner contends that DCPS's August 24, 2010 IEP denies FAPE to the Student because it reduces his special education services from a full time level, 24.4 hours per week, to only 15 hours, half of which are in the General Education setting. Before reaching that issue, I address an apparent major procedural deficiency in the development of the August 24th IEP. Under the IDEA, whenever a school division proposes to change the educational placement of a child or the provision of FAPE, the school division must give prior written notice to the parent. The notice must include, *inter alia*,

- (1) A description of the action proposed by the agency;
- (2) An explanation of why the agency proposes to take the action; and
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed action.

See 34 C.F.R. § 300.503. In this case, SPED Coordinator testified that the purpose of the July 22, 2010 IEP meeting was to familiarize the Petitioner with the SAM model and to assure that no more and no less services would be provided to Student. She testified that the purpose of the August 24, 2010 IEP meeting was for Petitioner to become acquainted with all service providers. This prompts the question: Where was the Prior Written Notice which would have alerted Petitioner to NES's plan, conceived between the July and August IEP meetings, to cut Student's special education services from full time to less than eight hours (outside general education) per week? Petitioner did not raise this prior written notice issue in her complaint for due process but DCPS's failure to fully apprise the Parent of its plan to totally revamp the Student's IEP is a matter of serious concern. *See, e.g., JN v. District of Columbia*, 677 F. Supp.2d 314, 320 (D.D.C., 2010) (Procedural violations that seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in a denial of a FAPE.)

The evidence clearly establishes that the provision of only 15 hours of special education services in the August 24, 2010 IEP, half in the general education classroom, was not reasonably calculated for Student to receive sufficient educational benefits to meet the requirements of a FAPE. Only the month before, at the July 22, 2010 IEP meeting, the IEP team agreed that Student required removal from general education, full time, for Specialized Instruction and Related Services. The IEP team stated, "[Student's] behavior requires he be placed in a setting with a smaller classroom size and the supports of a dedicated aide." (Exhibit P-2) This was

consistent with all of Student's IEP's since 2003. There was no change in Student's annual goals or any new evaluations that would have supported the reduction in services or change to the General Education setting specified in the August 24, 2010 IEP. From all appearances, the sudden change in Student's IEP services was made to accommodate NES's SAMS program rather than to enable the Student to receive educational benefit. An IEP must be tailored to the unique needs of the child – not to an academic model espoused by the school. *See, e.g., Suggs v. District of Columbia*, 679 F. Supp.2d 43, 48 (D.D.C. 2010). I find that DCPS's August 24, 2010 IEP was not reasonably calculated for Student to receive a FAPE. Petitioner prevails on this issue.

2. IS PLACEMENT AT PRIVATE SCHOOL APPROPRIATE FOR STUDENT?

The evidence establishes that Student's current placement at NES is not appropriate and does not meet his needs. Before ordering placement at Private School, additional facts must be established. Under District of Columbia law, special education placements shall be made in the following order or priority:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.

D.C. Code Ann. § 38-2561.02(c). NES follows an integration/assimilation model for all of its students, and apparently cannot offer a full-time therapeutic setting, as specified in all of Student's IEPs developed prior to August 2010. In this case, DCPS has not identified any other DCPS schools or public charter schools that could meet Student's educational needs. Private School is a District of Columbia Facility. Courts have identified a set of further considerations "relevant" to determining whether a particular placement is appropriate for a particular student,

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. *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005).

In his last Psychological Evaluation, completed in 2007, Student's overall intellectual ability was reported to reveal functioning in the very low range. His cognitive abilities were in the average range in Auditory processing. His word knowledge and comprehension were mildly delayed. His overall Thinking Ability standard score was within the low range. His performance was moderately delayed on inductive logic tasks. His mathematics ability was mildly delayed. His overall reading ability was considered to be severely delayed. He showed impulsivity and poor coping skills. When his coping defenses were not effective there was a potential for him to behave in a less controlled manner and possibly act out. (Exhibit P-21) Although this psychological evaluation is three years old, the evidence in this case confirms the validity of the psychologist's testing and observation. Notably, this AGE Student, exhibits serious behavior control problems. He performs at first to second grade level in reading and math. As of August 2010, he was unable to write a complete sentence and could only write a few words independently. The evidence establishes a severe disability.

All of Student's IEP's, until the most recent August 2010 IEP, reported that Student's ED behavior required that he be placed in a setting with a smaller classroom size and the supports of a dedicated aide. The evidence establishes that Private School, which follows the DCPS curriculum and primarily serves ED students from the District, can meet all of Student's specialized education needs. There was no evidence that Private School's cost, close to

per year including Extended School Year (“ESY”), is higher than the costs of similar private placements.

Under the IDEA’s Least Restrictive Environment requirement, “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled” and “[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2). The IDEA requires that DCPS ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum of alternative placements must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 CFR § 300.115. The evidence in this case establishes that Student could not be instructed in regular classes. DCPS has not offered full-time special classes for this Student since the closing of Therapeutic School 2. Under the circumstances, Private School offers the Least Restrictive Environment for Student. Accordingly, under the *Branham* factors, I find that Private School is an appropriate placement for Student. Petitioner prevails on this issue.

4. REQUEST FOR INDEPENDENT EVALUATIONS

In her due process complaint, Petitioner sought an order for DCPS to pay for independent educational evaluations of Student. Prior to the hearing the Parties agreed on evaluations, except DCPS refused to pay for an Assistive Technology evaluation. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to certain conditions. 34 CFR § 300.502(b). There was

no evidence in this case that Petitioner disagreed with any evaluation obtained by DCPS. DCPS prevails on this issue.

5. REQUEST FOR COMPENSATORY EDUCATION

At the hearing, Petitioner withdrew her request for compensatory education.

ORDER

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

Within 10 school days of this Order, DCPS shall fund Student's placement at Private School for the remainder of the 2010-2011 school year and shall provide Student's transportation to and from Private School. Within 10 school days of this order, DCPS shall convene Student's IEP Team at NES to revise his IEP in accordance with this decision, including to provide full time specialized instruction outside General Education. A representative of Private School shall attend the IEP meeting. All other relief requested by the Petitioner in her Complaint for Due Process is denied.

Date: January 29, 2011



Peter B. Vaden, 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 U.S.C. §1415(I).