

DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

1150 5th Street, SE
Washington, DC 20003
Tel: 202-698-3819
Fax: 202-698-3825

Confidential

OSSE
STUDENT HEARING OFFICE
2009 MAY 11 AM 7:57

<p>STUDENT¹, by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date: May 9, 2009</p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
--	--

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On March 27, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §1415 (c)(2)(B) (i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to comprehensively reevaluate the Student every three years; failing to provide an appropriate Individualized Education Program ("IEP") and educational placement. The Petitioner requests that the Respondent perform the necessary psychological evaluation, place and fund the Student to attend an appropriate program agreed to and identified by the parent. Additionally, the Petitioner requests that the Respondent provide the Student with a compensatory education award for the period the Student has been without appropriate services.

The DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed on April 17, 2009. The Respondent asserted the Student does not require a full time educational school setting and the current school can provide the appropriate services through her 2008-2009 IEP. The Respondent further asserted that the multidisciplinary team ("MDT") met on January 7, 2009, with the parent and the Student present, the educational evaluation was reviewed and the Student scored low/average in all areas. The Respondent alleged that it attempted to obtain parental consent to evaluate and it has been difficult to coordinate. The Respondent contends that the Student's truancy with 237 unexcused absences in the 2008-2009 school year has been an inhibiting factor in accessing her education. The Respondent further alleges it has not denied the Student a FAPE.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on April 21, 2009. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The parties stipulated that the Student is a resident of the District of Columbia entitled to receive special education services. The parties also stipulated that the Student's triennial evaluations expired March 2009.

The Respondent reasserted its position, that the Student does not require a full time educational school setting and has not been denied a FAPE. The Petitioner expressed her interest in having the Student placed at a private school; however, the school has not been identified yet. The Petitioner will also weigh the claim for compensatory education and decide prior to the Hearing whether to withdraw the request for compensatory education.

An Order required the Petitioner to demonstrate why the Student requires more hours on her IEP, why a full time placement is appropriate, how the private placement chosen by the Petitioner is appropriate and why the Respondent's proposed placement is not. The Respondent was to demonstrate that the current placement is appropriate and that it has not failed to provide the Student a FAPE. The Petitioner was required to present evidence for purposes of establishing whether compensatory education is warranted, and if so, what type and amount of compensatory education is most appropriate.

A hearing was held on May 5, 2009 at 3:00 PM. The Petitioner presented a disclosure letter dated April 23, 2009 to which five documents were attached, labeled P-1 through 5 and which listed three witnesses. Three witnesses testified –the Mother, the Student and the Senior Director of the Private School. The Respondent presented a disclosure letter dated April 29, 2009 identifying seven witnesses and to which five documents were attached, labeled DCPS 1 through 5. One witness testified – the

Special Education Coordinator. The documents were admitted without objections except Petitioner's document

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

1. Has the Respondent failed to comprehensively to timely reevaluate the Student?
2. Did the Respondent fail to provide an appropriate Individualized Education Program ("IEP") and educational placement?
3. Was the Student denied a FAPE?

III. FINDINGS OF FACT

1. The Petitioner and the Student are residents of the District of Columbia.
2. The Student is a student with disabilities under the Individuals with Disabilities Education Improvement Act ("IDEIA"). The Student's most recent IEP is dated January 22, 2009 and provides 6.5 hours of specialized instruction outside the general education setting, 13 hours of specialized instruction in the general education setting, and 30 minutes of behavioral support services weekly. The Student's disability classification is specific learning disabled.²
3. The Student most current psychological was conducted March 15, 2006, a comprehensive reevaluation is due.³
4. The Student is in the _____ grade for the third time. She believes she is not being taught; she stopped attending some of her classes because she could not learn. She is not good in reading and she receives two English classes, one is a Learning Lab. She has F in her English Lab and doesn't understand why because she has done her work in that class. The Student does not go to some of her classes because she does not understand the subject. She gets Algebra I, work packets and leaves the class because the other students are ninth graders, and since she should be in the _____ grade and she is embarrassed. English Lab is a pull out class with 10 students and she goes into that class whenever she is in school. The special education teacher also helps her with other classes.⁴
5. According to the mother, the Student needs a smaller classroom setting than current class. The Student does her work and she continues to get F. The classroom is too busy for a student with a learning disability to stay focused. The Petitioner observed students from other classes come into the classroom and create distractions. The Student requires someone to tell her to stay in class. The mother thinks the

² DCPS 5 - January 22, 2009, IEP.

³ P2 - March 15, 2009, Psychological evaluation and Testimony of the Special Education Coordinator.

⁴ Testimony of the student and DCPS 3.

Student requires individualized teaching; at a school where staff is constantly aware of where the Student is and provides supervision. The Petitioner believes the proper placement is the school her other daughter attends. The mother spoke to the SEC at and to other school personnel to get a smaller class or a class with two teachers in the room for the Student. The SEC told her that the Student is already in a small class. The mother believes the Respondent is not responsive to the Student's needs and instead has told her to take responsibility and require that the Student goes into classes. The mother did not attend the January IEP and requested it be rescheduled. The Petitioner did not receive notification of a new meeting or that evaluations were to be conducted. The Student goes to school and doesn't go into some classes. The Petitioner is aware of the truancy problem but "she cannot sit in the classroom with the Student every day". The Petitioner did not agree with the 2008 IEP, the Student's absences were also a problem, it was discussed, but there was no change. The Petitioner will only consider a private placement offer from the Respondent and according to her it should be

6. The Student rarely goes to classes' attempts to conduct the Student's evaluations have been done but because of the Student's sporadic attendance, the evaluations have not been completed. According to the SEC strategies and informal counseling was put in place to address the Student's needs. The Student has a part time IEP when she's present at school she receives services. Counseling to address the attendance problem was not included in the IEP because it is improper to provide related services for non attending students. The Petitioner was not sent a notice of intent to evaluate the Student because the testing was an informal. The Student is not performing a grade level because she is not attending school. The Student will likely not be promoted this year and will not matriculate from the grade. The Student has support and modifications in her program provided and could progress if she went to classes. The Student has 237 unexcused absences from classes. The Student was referred to the Truancy Coordinator. There are recommendations of get outside counseling to also address the attendance problem.⁶ The SEC asserted the parent was invited to the January 2009 IEP meeting, however there is no additional corroborating record of efforts made with the Truancy Office or invitations to meet prior to January 22, 2009 IEP meeting.

7. in Prince George's County serves multiple disabled students primarily emotionally disturbed students. The Student was accepted because she needs her IEP to be implemented at a therapeutic small setting, and with a social worker in the classroom. There are two possible classrooms identified for the Student one is a class with seven students and the other is a class with eight students, one teacher, one teacher assistant and both are certified in Maryland. The Student would be in a therapeutic setting, provided with coping skills and a class rotation program to help keep the Student focused. The decision to admit the Student was made by an administrator and teacher who reviewed the Student's IEP which provides 7.5 hours of specialized instruction, and an educational assessment. The school only serves students with a full time program of 29 hours of specialized instruction. The Student's IEP must be changed to fit the program. The cost of the program is unknown.⁷

⁵ Testimony of the mother and DCPS 4.

⁶ Testimony of the Special Education Coordinator and DCPS 3 April 6, 2000, Attendance Summary.

⁷ Testimony of the special education coordinator.

IV. CONCLUSIONS OF LAW

FAPE Determination

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

The IDEA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the 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 special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living. *See id.* § 1400(d)(1)(A). The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as “special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP).”

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that 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 FAPE.

The Respondent did not meet its legal obligation under the IDEIA. Here is why.

Triennial evaluations

According to the IDEIA 20 USC 1414(2)(a)(b) DCPS, as the local education agency, is responsible for ensuring that every evaluation, of each child with a disability, shall occur “at least once every three years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.”

Furthermore, under 20 U.S.C. 1414(b)(1)(3), 1412 (a)(6)(B) the local educational agency shall ensure that a re-evaluation is done upon the request of the parent and/or the recommendations of teachers or service providers and/or not less than once every three years. Accordingly, D.C. Municipal Regulations place the obligation to conduct re-evaluations of the student upon the LEA. (30 DCMR Sec 3005.7)

The Respondent was aware that the Student was due for a comprehensive psychological evaluation in March 2009. A re-evaluation is required to be conducted if conditions warrant, if the child’s parent or teacher requests, but at least once every three years.⁸ More than three years have passed since the Student was last evaluated. It is now May 2009, the Respondent has not conducted the evaluation and has not complied with the requirements of the IDEIA.

⁸ See: 34CFR 300.303
HOD

Individualized Education Program

In accordance with 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb), Individualized Education Programs or IEP “means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
- bb. Meet each of the child’s other educational needs that results from the child’s disability.”

This is the third time in the grade and nothing addresses how to move her next grade level. There are no strategies in place to address the Student’s self esteem and attendance problems in her IEP. The Respondent’s logic that a Student who is not attending all her classes should not receive additional related services, is oblivious to the fact the IEP is to be crafted to address the specific needs of the student, not to reduce the services for a program. The Respondent knew that the Student has a problem with class attendance, it failed to address in the Student’s program alternative measures for completion of evaluations that would then allow the IEP/MDT a fuller awareness of the Student strengths and weaknesses.

Parent participation

The Petitioner’s non-attendance to the 2009 IEP meeting is noted in the IEP but there is no explanation. The IDEIA requires that the Respondent make efforts to ensure that a parent of a child with a disability is present at each IEP Team meeting or is afforded the opportunity to participate, including-

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place.

The information provided to parents must indicate the purpose, time, and location of the meeting and who will be in attendance.

The IDEIA demands that, the public agency use other methods to ensure parent participation, including individual or conference telephone calls, consistent with regulations at 34 C.F.R § 300.328. A meeting may be conducted without a parent in attendance, in that scenario the Respondent must keep a record of its attempts to arrange a mutually agreed on time and place, detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parent and any responses received; and detailed records of visits made to the parent’s home or place of employment and the results of those visits.⁹ The only evidence of attempts made was a statement from the SEC and an unexplained on the IEP that the parent did not participate in the IEP meeting. The Respondent failed to document its efforts to achieve the participation of the parent. The Petitioner proved she have an opportunity to participate in drafting the Student’s IEP.

The Student’s IEP requires information from a current comprehensive evaluation, it must be updated, revised and must include specific strategies to address attendance, self esteem, and to assist the Student to move to the next grade level. The Student January 2009 is not appropriate.

⁹ 20 U.S.C. 1414(d)(1)(B)(i)
HOD

Placement

34 C.F.R. § 300.116 of the IDEA regulations require when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. It also states that the determination of the educational placement of a child with a disability must be based on a child's IEP. 20 U.S.C. 1412(a)(5).

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."

The last IEP/MDT meeting on behalf of the Student was conducted in January 2009, without the input of the Petitioner. The evidence showed that the Student makes choices on the classes she attends and those she does not. It appears that she does receive specialized instruction in the English Lab and that the special education teacher provides assistance in other subjects. There are 237 unexcused absences; it is not clear whether it is the Student's lack of attendance or the failure of the current program that has impacted the Student's academic progress. It is improper for the Hearing Officer with so many unanswered questions to make a full time placement determination.

Furthermore, the Petitioner choice of placement for the Student is a private full time special education program in the state of Maryland. Doubts were raised by the testimony of the Director that the placement at [redacted] is appropriate, the admission was made based on an IEP that was not current and only provides for 7.5 hours. The Student would be placed in the most restrictive environment and in a school which primary focus of services is not directed to learning disabled students, which is the Student's current disability classification. This is contrary to the IDEA 20 U.S.C. 1412(a)(5) and its regulation at Sections 300.114 through 300.118, consistent with the preference for educating children with disabilities in regular classes with appropriate aids and supports. The placement should be as close as possible to the child's home and made in conformity with the least restrictive environment provisions.

With the information and the evidence in the current Complaint the Hearing Officer cannot determine that [redacted] is an appropriate placement for the Student. An MDT must meet to discuss the updated evaluation, include the Petitioner and the Student in the conversation on the IEP 2009 and placement for the 2009-2010 school year. The Student's participation in the development of her IEP is extremely important given her apparent dissatisfaction with the school she has available.

Under the IDEA the parent is a statutorily required participant in a group discussion about placement. The parent, however, is only a member of the MDT/IEPT and not the final arbiter of the placement decision. No such power is granted the parent under the IDEA. Recent case law makes that point clear.

"Although the IDEA guarantees a Free Appropriate Public Education, it does not, however, provide that this education will be designed according to the parent's desires. The primary responsibility for formulating the education to be accorded a [child with a disability] and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parent or guardian of the child. Thus proof alone that loving parents can draft a better program than a state offers does not, alone, entitle them to prevail under the Act." Shaw v. The District of Columbia, 238 F. Supp. 2d 127, 139 (D.D.C. 2002).

The Petitioner did not prove that [redacted] is the appropriate placement for the Student. There is a psychological evaluation pending and the IEP must be updated. The Student continues to demonstrate an

absenteeism problem. The elements required to make the placement decision based on the unique needs of this Student are still uncertain for a determination of a full time private *placement to be awarded*

While the Student's IEP is inappropriate, the evidence on the Student's placement was inconclusive, because it is not clear if the lack of an appropriate placement for 2008-2009 is a result of the Student's absences or a lack of strategies from both the Respondent and the Petitioner to address the needs of the Student. The evidence is clear that the private placement chosen by the parent is not appropriate.

V. SUMMARY OF DECISION

The Petitioner proved the Respondent has not conducted a psychological evaluation on the Student in three years. The Petitioner proved that the Student's January 2009 IEP is not appropriate. The Petitioner failed to prove that the 2008-2009 educational placement is not appropriate.

An MDT meeting must convene and include the parent and the Student in the conversation and drafting of the 2009 IEP and the educational placement for the 2009-2010 school year. The IEP/MDT must discuss the updated evaluation, whether the amount of hours for specialized instruction for this Student should be increased, strategies to address the Student's self esteem, and attendance problems.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, the Respondent will fund by May 30, 2009, an independent comprehensive psychological evaluation. The Petitioner must make efforts to have the evaluation completed by July 30, 2009 and will document efforts to secure the evaluations are timely.¹⁰

IT IS FURTHER ORDERED, the Petitioner shall within 10 school days of the receipt of the psychological evaluation provide copies of the reports and propose three dates to the SEC at _____ to schedule an MDT/IEP meeting, for the purpose:

- a. To review and discuss the Student assessment report and;
- b. Prepare with the Petitioner and the Student's input an IEP;
- c. Make a placement determination for the 2009-2010 school year

IT IS FURTHER ORDERED, the Respondent shall issue a PNOP at the MDT/IEP if possible, or within five school days thereafter, if placement is recommended at one of the Respondent's school. If the placement recommended is a private school, the Respondent shall issue the PNOP within 10 school days of the meeting.

IT IS FURTHER ORDERED, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of

¹⁰ Petitioner's counsel shall keep a log of telephone calls and electronic correspondence to attempt to effect compliance within the timelines set out herein.

Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. The Respondent shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

IT IS FURTHER ORDERED, that in the event the Respondent fails to comply with the terms of this Order, Petitioner's counsel will contact the appropriate the Respondent's Placement Specialist to attempt to bring the case into compliance prior to filing a hearing request alleging the Respondent's failure to comply.¹¹

This order resolves all issues raised in the Petitioner's March 27, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

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

/s/WI Restorres
Wanda Iris Resto - Hearing Officer

Date: May , 2009

¹¹ If DCPS fails to contact Petitioner's counsel to coordinate scheduling the MDT meeting by a date that would make compliance with this Order feasible, Petitioner's counsel shall initiate telephone calls and electronic correspondence to attempt to effect compliance within the timelines set out herein.