

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

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

[Parent/Guardian], on behalf of,
[Student],¹

Petitioner,

v

District of Columbia Public Schools (DPCS),

Respondent.

Date Issued: February 1, 2011

Hearing Officer: Jim Mortenson

Case No:

2011 FEB -1 AM 10:15
OSSE
STUDENT HEARINGS OFFICE

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on November 26, 2010. A response to the complaint was filed on December 6, 2010. The Petitioner is represented by Domiento Hill, Esq., and the Respondent is represented by Cherie Cooley, Esq. A prehearing conference was held with counsel on December 8, 2010, and a prehearing order was issued on that date. A resolution meeting was held on December 20, 2010, and the parties agreed that no settlement could be reached and that the hearing timelines would start. The hearing was convened on January 20, 2011, in room 2004 at 810 First Street, NE, Washington, D.C. Only the second issue identified at prehearing was considered as the parties indicated they had resolved the first issue. The hearing concluded with closing arguments, via telephone, on January 25, 2011. The due date

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

for the hearing officer's determination (HOD) is February 3, 2010. This HOD is issued on February 1, 2011.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

III. ISSUE, RELIEF SOUGHT, AND DETERMINATION

The issue to be determined by the IHO is:

- 1) Whether the Respondent failed to provide Petitioner written notice of its refusal to place the Student at _____ School and whether _____ School is the appropriate placement for the Student?

The substantive requested relief is: Placement at _____ School for the remainder of the 2010-2011 school year, including transportation.

Based on the findings of fact and conclusions herein, this Independent Hearing Officer (IHO) has determined that the Respondent failed to provide the Petitioner written notice of its refusal to place the Student at _____ School and that _____ School is an appropriate placement for the Student.

IV. EVIDENCE

Four witnesses testified at the hearing. Three witnesses testified for the Petitioner and one testified for the Respondent. The witnesses are as follows:

For Petitioner:

- 1) Educational Advocate, Kevin Carter (K.C.)
- 2) Admissions Director,
- 3) Director,

For Respondent:

- 1) Special Education Coordinator,

21 documents were disclosed by the Petitioner. Of those, 11 were admitted into evidence as exhibits. The Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 7	December 20, 2010	Due Process Complaint Disposition
P 9	November 19, 2010	Request for Access to Student's Education Records
	November 19, 2010	Request for Reevaluations for Student. . . .
P 10	November 24, 2010	Individualized Education Program [IEP] (See R 4)
P 11	November 24, 2010	IEP Meeting Notes (See R 4)
P 12	December 20, 2010	Prior to Action Notice
P 13	November 16, 2010	Confirmation of Meeting Notice
P 14	November 26, 2010	Letter to Nyankori from Hill (See R 5)
P 15	December 3, 2010	Letter to Hill from Persett (See R 5)
P 16	December 20, 2010	Independent Educational Evaluation (IEE) Authorization
P 17	Undated	Student Work Samples
P 21	Undated	Curricula Vitae for Kevin Carter

Five documents were disclosed by the Respondent. Of those, two were admitted into evidence as exhibits. The Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 4	November 24, 2010	IEP (See P 10) and meeting notes (See P 11)
R 5	November 26, 2010	Letter to Nyankori from Hill (See P 14)
	December 3, 2010	Letter to Hill from Persett (See P 15)

V. 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 a year old learner with a disability.² He attended a District of Columbia Public School (DCPS) prior to the 2010-2011 school year.³ The Student's mother unilaterally enrolled him at School for the 2010-2011 school year.⁴ The mother's reason for enrolling the Student at is unknown. As of November, 2010, she is seeking specialized instruction and related services for the Student from the Respondent.⁵
2. The Student's educational performance is very low. He is at the kindergarten level in reading and the third grade level in math.⁶ He also shuts down in the classroom when called on or when he is overwhelmed by the work.⁷
3. Within days of enrolling at the staff at determined the Student required more services than his then current IEP required.⁸ The IEP required 10 hours of special education services.⁹ The staff at observed the Student's academic and functional performance and administered at least one test to assess the Student's academic performance following his enrollment.¹⁰

² P 10/R 4.

³ Testimony (T) of K.C.

⁴ T of K.C., T of R 4, P 11.

⁵ T of K.C., T of P 14/R 5.

⁶ P 10, P 11.

⁷ P 11.

⁸ T of

⁹ T of (Inexplicably, neither party offered a copy of this version of the Student's IEP into evidence.)

¹⁰ T of

4. An IEP team meeting was held on November 24, 2010, at [redacted] The meeting included a DCPS staff member who ran the meeting, as well as [redacted] staff, the Petitioner, and the Educational Advocate.¹² The Student's IEP was revised at the IEP team meeting.¹³ The DCPS staff member indicated to the other team members that he lacked authority to place the Student in a non-public placement, but did not stop the formulation of the IEP.¹⁴ The DCPS staff member is referred to as the local education agency representative to [redacted]
5. The IEP created at the November 24, 2010, IEP team meeting included, in relevant part: Annual academic goals in the areas of reading, spelling, language arts, and mathematics; an annual functional goal in the area of communication; 25 hours per week of specialized instruction; 30 minutes per week of speech services; extended school year services (11 months of instruction and services); academic assessment on the DC-CAS with accommodations; and placement at [redacted] where the Student would continue to have small classroom sizes.¹⁶ The Student has academic instruction as well as vocational instruction at [redacted] and can receive his diploma there with the level of services his IEP currently requires.¹⁷
6. [redacted] is a non-public vocational school for secondary school students with disabilities.¹⁸ Direct specialized instruction is provided to students in a small structured setting.¹⁹ Courses are team taught with a content teacher and a special education teacher.²⁰ Students with mental

¹¹ of K.C., of [redacted], P 11, R 4.

¹² of [redacted] P 11, R 4.

¹³ P 10, P 11, R 4.

¹⁴ T of [redacted] T of K.C., P 11, R 4.

¹⁵ of [redacted]

¹⁶ P 10, R 4.

¹⁷ of [redacted]

¹⁸ of [redacted] of [redacted]

¹⁹ of [redacted]

²⁰ of [redacted]

retardation, emotional disturbances, and learning disabilities are enrolled at the school.²¹

District of Columbia content standards are used, in part, in the curriculum at

7. Even though the IEP created at the November 24, 2010, IEP team meeting stated the reason for the Student's placement at [redacted] and not at a DCPS school (rejected because the "Student is unable to function in such a large setting") the Respondent sent another notice on December 20, 2010, stating the Student's placement was being changed from [redacted] to

[redacted] School.²³ The notice did not include an explanation for the proposal, a description of the data used as a basis for the proposal, a description of the other options the IEP team considered, or a description of other factors that were relevant to the Respondent's proposal.²⁴ The notice was also inaccurate as the IEP team had determined the Student would be placed at

8. [redacted] is a public secondary school operated by the Respondent.²⁶ The Student may be provided 25.5 hours per week of special education and related services in a segregated classroom for students with disabilities at [redacted] but will not be able to obtain a diploma there.²⁷ Special education is provided to students in only one of its three vocational classes, Shoe Repair.²⁸

²¹ T of

²² T of

²³ R 4, P 10, P 12.

²⁴ P 12.

²⁵ P 10, P 11, P 12, R 4, T of K.C., T of [redacted] (There was a resolution meeting on December 20, 2010 (See P 7), but a resolution meeting is not the same as an IEP team meeting and there was no evidence presented indicating the resolution meeting was a subsequent IEP team meeting to the November 24, 2010, IEP team meeting.)

²⁶ T of [redacted] P 15.

²⁷ T of

²⁸ T of

VI. 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:

1. District of Columbia law provides:

If the parents of a child with a disability, who previously received special education and related services under the authority of the LEA, enroll the child in a private placement without the consent of or a referral by the LEA, a court or hearing officer may require the SEA to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the LEA had not made FAPE available to the child in a timely manner prior to that enrollment, and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

DCMR 5-3018.3. *See also*, 34 C.F.R. § 300.148(a).

2. The Student's parent (Petitioner) unilaterally enrolled him at _____ at the start of the 2010-2011 school year without notice to the Respondent. She is not seeking, through this complaint, any reimbursement for the cost of the Student's placement at _____ however, and so the issue in this case is not examined under 34 C.F.R. § 300.148 or DCMR 5-3018.3.

3. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. The Supreme Court has described the purpose of the IDEA quite clearly:

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Board of Educ. v. Rowley, 458 U.S. 176, 203-204 (1982). It is within this legal context the case at hand must be examined.

4. Under federal law students with disabilities who are parentally-placed in private schools do not have an individual right to special education and related services. 34 C.F.R. § 300.137(a). This exception does not exist in the District of Columbia. *See* DCMR 5-3002.

5. 34 C.F.R. § 300.503, Prior notice by the public agency; content of notice, provides:

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency —

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Content of notice. The notice required under paragraph (a) of this section must include —

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the agency's proposal or refusal.

6. 34 C.F.R. § 300.114(a)(2), least restrictive environment requirements, provides:

Each public agency must ensure that —

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special 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.

7. 34 C.F.R. § 300.116, Placements, provides:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that —

(a) The placement decision —

(1) 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; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

(b) The child's placement —

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

8. The Student's performance gap, working at the kindergarten to third grade level in core academic areas, is prima facie evidence the Student has not been provided a FAPE prior to his enrollment at [redacted]. However, the Petitioner is not requesting reimbursement for any cost of sending the Student to [redacted]. Rather, the Petitioner is looking for prospective placement, as the Respondent has not proposed any placement, in her opinion, appropriate to meet the Student's needs. The IHO is in agreement with the Petitioner that no placement has been proposed that is appropriate to meet the Student's needs. Most strikingly, if the Student were placed at [redacted] he would not be able to obtain a diploma. This is due not to his disability, because the IEP team has determined that the Student will be assessed academically on the standard assessment (DC-CAS), but rather the Respondent's education structure. Only a student's IEP team can make a decision that a student will pursue a program leading to an IEP Certificate of Completion as opposed to a diploma. DCMR E-2203.06. No such determination has been made in this case. As such, the proposed placement at [redacted] is not consistent with the Student's IEP which requires 25.5 hours of special education and related services (which is not in dispute – and should not be, given the Student's performance gap).
9. By November 2010, the Respondent became aware of the Student's enrollment at [redacted] and an IEP team meeting was convened to review and revise the Student's IEP. The Petitioner was not rejecting the Respondent's services, and requested that the Respondent resume responsibility for the special education and related services for the Student. The Respondent permitted an IEP to be created that it subsequently did not wish to implement. This subsequent decision making, outside of the IEP team, was itself illegal. *See*: 34 C.F.R. §§

300.321, 300.327, Letter to Veazey, 37 IDELR 10 (OSEP 2001), and Doe v. Todd County Sch. Dist., 625 F.3d 459, ___, 55 IDELR 185, ___ (8th Cir. 2010). Then, the Respondent failed to provide written notice of its refusal to place the Student at ___ that met the requirements of 34 C.F.R. § 300.503. The notice the Respondent sent lacked an explanation for the proposal, a description of the data used as a basis for the proposal, a description of the other options the IEP team considered, or a description of other factors that were relevant to the Respondent's proposal.

10. Because the Petitioner's due process rights were violated, and the Respondent's proposed placement was not appropriate, the Student was denied a FAPE.
11. Placement at ___ is an appropriate remedy, even though it is a more restrictive setting, because the Respondent cannot provide the Student sufficient special education and related services in its proposed placement that will be in conformity with the Student's IEP or permit the Student to be involved in and progress in the general education curriculum so that he can obtain a diploma. ___ has the small structured educational setting conducive to the Student's special needs, the staff to provide specialized instruction and related services, and will permit the Student to be involved in and progress in the general education curriculum in order to work toward obtaining a diploma.

VII. ORDER

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

1. The Petitioner prevails and the Student is hereby placed at School at public expense for at least the remainder of the 2010-2011 school year, effective February 7, 2011. Transportation is required to be provided for the Student between home and the school at public expense as part of this placement.

IT IS SO ORDERED.

Date: February 1, 2011



Independent 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).