

DC Office of the State Superintendent of Education
Office of Review & Compliance
Student Hearing Office
1150 5th Street, SE
Washington, D.C. 20003
CONFIDENTIAL

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<p>[Parents], on behalf of [Student],</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools,</p> <p>Respondent.</p>	<p>Case:</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>December 24, 2009</p> <p><u>Representatives:</u></p> <p>Roberta Gambale, Petitioner</p> <p>Daniel McCall, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:30 a.m. on December 10, 2009, and continued at 9:30 a.m. on December 11, 2009. The record closed on December 16, 2009, upon filing of post-hearing briefs. The due date for the Hearing Officer's Determination (HOD) is December 26, 2009, pursuant to Standard Operating Procedure § 1003. This HOD is issued on December 24, 2009.

The hearing in this matter was 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.

Present at the due process hearing were:

Petitioner's Counsel, Roberta Gambale, Esq.

Respondent's Counsel, Daniel McCall, Esq.

Petitioners

Marie Sanao, Respondent's Representative

Seven witnesses testified at the hearing:

Student's Mother, Petitioner (P1);

Student's Father, Petitioner (P2);

Teacher

Deborah Watkis, Speech/Language Pathologist, DCPS, (D.W.);

Berna Viado, Physical Therapist, DCPS, (B.V.); and

Special Education Coordinator, DCSP,

The complaint in this matter was filed on October 20, 2009. A response to the complaint was filed by the Respondent on October 30, 2009. A prehearing conference was held on October 30, 2009, and a prehearing order was issued on that date. The resolution period was waived on November 17, 2009.

47 documents were disclosed and filed by the Petitioner on December 2, 2009. All of the disclosed documents were admitted as exhibits into the record (P 1 – P32 and P 34 – P 46) but for two (P 33 and P 47). Petitioner's exhibits are as follows:

- P 1 - Due Process Complaint Notice, October 14, 2009
- P 2 - [Petitioners'] Trial Brief, December 2, 2009
- P 3 - Second Prehearing Order, November 12, 2009
- P 4 - Due Process Hearing Notice (undated)
- P 5 - Response to DCPS's Motion to Dismiss, November 12, 2009
- P 6 - Email from Gambale to Mortenson and McCall, sent Thursday, November 19, 2009 8:43 AM
- P 7 - Letter from Persett to Gambale, November 17, 2009
- P 8 - Letter from Bautista to Zimmitti, November 19, 2009

- P 9 - Letter from Bautista to Conaboy, November 19, 2009
- P 10 - Letter from Gambale to Request for Independent Evaluation, October 5, 2009
- P 11 - Letter from Gambale to Second Notice of Unilateral Placement, October 5, 2009
- P 12 - Physical Therapy Evaluation Report, December 12, 2008
- P 13 - Comprehensive Developmental Evaluation, January 10, 2009, Occupational Therapy Evaluation Report, December 22, 2008
- P 14 - Individualized Education Program (IEP), April 17, 2009
- P 15 - IEP, January 13, 2009
- P 16 - Eligibility Meeting Report, January 13, 2009
- P 17 - Individual Service Plan for Parentally Place[d] Private-Religious School Students, October 9, 2009
- P 18 - Email chain ending from to P1, December 15, 2008, 1:53:41 PM, Email chain ending from to P1, December 15, 2009, 10:20:44 AM
- P 19 - Email chain ending from to sent Wednesday, February 25, 2009, 12:39 PM
- P 20 - Email chain ending from to sent Monday, March 9, 2009, 10:41 AM, Email chain ending from to sent Wednesday, March 18, 2009, 10:15 AM
- P 21 - Email chain ending from to P1, sent Tuesday, April 7, 2009, 4:48:13 PM
- P 22 - Email chain ending from to P1 and P2, sent Monday, April 13, 2009, 9:36:18 PM
- P 23 - Email chain ending from to P1 and Sanao, sent Thursday, April 16, 2009, 1:01:09 PM
- P 24 - Email from P1 to P1, Monday, April 20, 2009 1:26:02 PM, Email chain ending from Rhee to P1, sent Monday, April 20, 2009, 2:17:25 PM, Email chain ending from to Rhee and P1, sent Monday, April 20, 2009, 2:20:11 PM
- P 25 - Email from to P1, Monday, April 20, 2009, 6:10:35 PM
- P 26 - Email from to P1, Tuesday, April 21, 2009, 1:41:02 PM
- P 27 - Email chain ending from to P1, Tuesday, April 21, 2009, 12:06:51 PM
- P 28 - Email chain ending from to P1, Thursday, April 23, 2009, 12:01:22 PM
- P 29 - Email chain ending from to P1, Monday, April 27, 2009, 5:37:40 PM
- P 30 - Email from to P1, Wednesday, May 13, 2009, 7:17:29 PM
- P 31 - Email from Fenty to P1, Wednesday, June 10, 2009, 11:06:33 AM
- P 32 - Email chain ending from Rhee to P1, sent Tuesday, June 30, 2009, 7:38:34 AM
- P 34 - Email chain ending from to P1, sent Thursday, July 2, 2009, 10:44:15 AM, Email chain ending from P2 to P1, sent Tuesday, July 2, 2009, 10:23:57 AM

- P 35 - Email from P1 to Monday, September 21, 2009, 1:52:32 PM
- P 36 - Email chain ending from to P1 and sent Tuesday, September 22, 2009, 2:36:41 PM, Email chain ending from to P1 and sent Tuesday, September 22, 2009, 5:31:51 PM
- P 37 - Email chain ending from P1 to sent Wednesday, September 23, 2009, 2:02:56 PM
- P 38 - Email from P1 to Wednesday, September 23, 2009, 4:47:25 PM, Email chain ending from P1 to Brown, sent Wednesday, September 23, 2009, 3:03:49 PM
- P 39 - Email from "John"/customer service to P1, Monday, September 21, 2009, 5:16:32 PM
- P 40 - Handwritten notes (various dates and undated)
- P 41 - [Student], November 9, 2009
- P 42 - Service Tracker, July 16, 2009 (See R 1)
- P 43 - Service Tracker, May 12, 2009, Service Tracker, June 4, 2009, Service Tracker, July 23, 2009 (See R 2)
- P 44 - Related Service Provider Weekly Building and Intervention Schedule, School Year 2008-2009
- P 45 - IEP Report Card, July 10, IEP Report Card Progress Note, Student Report of Progress, June 4, 2009 (See R 3)
- P 46 - Due Process Complaint Disposition, November 17, 2009

The documents not entered in to the record were:

- P 33 - Email from Brown to P1, Thursday, July 2, 2009, 1:31:31 PM
- P 47 - National Child Research Center, Brochure, printed December 2, 2009

Three documents were disclosed and filed by the Respondent on December 4, 2009.

No objection was raised to the admission of any of the disclosed documents and they were admitted into the record. (R 1 – R 3). Respondent's exhibits are as follows:

- R 1 - Service Tracker, July 16, 2009 (See P 42)
- R 2 - Service Tracker, June 4, 2009, Service Tracker, July 23, 2009 (See P 43)
- R 3 - Student Report of Progress, June 4, 2009 (See P 45)

II. ISSUES¹

- 1) Whether the Respondent failed to provide special education and related services to the Student in conformity with the Student's IEP since January 2009?
- 2) Whether the Respondent failed to permit the Student's Parents to inspect and review the Student's education records within 45 days of requests to do so?
- 3) Whether the Respondent failed to offer or provide an appropriate educational placement for the Student during the 2008-09 and 2009-10 school years?

III. FINDINGS OF FACT

1. The Student is a year old child with a disability who was determined eligible for special education and related services in January 2009.² The Student was determined eligible under the category of development delay.³ When the Student was evaluated in November 2008 he had significant cognitive delays.⁴ He also exhibited some communication concerns that are addressed by a speech and language therapist.⁵ The Student also has a seizure disorder that is currently treated with medication and does not impede his access to school.⁶

¹ Two issues originally identified were either resolved or otherwise withdrawn at the start of the hearing, leaving the three identified here remaining.

² Testimony (T) of P1.

³ P 15, P 16.

⁴ P 13, P 16.

⁵ P 14, P 15, P 16.

⁶ T of P1, P 13, P 16.

2. On January 13, 2009, an initial IEP was developed and it was signed by P2.⁷ The IEP included annual goals in the areas of math, communication/speech and language, and health/physical.⁸ Supplemental supports and accommodations were listed as: assignments broken into segments; extra time for completion of tasks; a posted daily schedule, and special transportation services.⁹ The special education and related services included: specialized instruction, outside general education for 10 hours per week; physical therapy, outside general education for 30 minutes per week; and speech-language pathology, outside general education for one hour per week.¹⁰ The special education and related services were anticipated to begin on January 13, 2009, but did not begin until after the Student began attending
3. The IEP developed on January 13, 2009, includes a check box to indicate the parents agree with the IEP, have had an opportunity to be involved with its development, and that they received a copy of it and a copy of their procedural safeguards and parent rights.¹¹ The box is not marked and the Petitioners do not recall receiving a copy or reading about their rights.¹² They did consent to the IEP¹³

⁷ P 15, T of P1.

⁸ P 15.

⁹ P 15.

¹⁰ P 15.

¹¹ P 15, T of

¹² P 15.

¹³ P 15, T of P1, T of P2.

and did participate in its development, although it felt rushed to them and they did not fully appreciate what the IEP was or meant for their child, other than that it was a starting point to get services for their child.¹⁴

4. The Student's neighborhood school is ¹⁵ The Petitioners had requested, but were not provided, a list of schools that could deliver services to Student.¹⁶ The Petitioners were advised that there was no program in place at that could serve the Student (not withstanding the Student had an individualized education program) and that he could be served at

The Student began attending in February, 2009.¹⁸

5. The Student received no physical therapy services at until April, 2009.¹⁹ Some of the missed services were made up with double the time provided in late April and early May, 2009.²⁰

6. The Student was not provided specialized instruction outside of the general education setting.²¹ stated the reason for this was due to the fact that

¹⁴ T of P1, T of P2.

¹⁵ T of P1.

¹⁶ T of P1, T of P2.

¹⁷ T of P1, T of P2.

¹⁸ T of P1, T of

¹⁹ T of P1, T of T of P 43/R 2.

²⁰ P 20, P 28, P 43/R 2.

²¹ T of

did not provide pull-out services as they were an “inclusion program” and P1 agreed to this.²²

7. Speech and language services were provided during the regular school year, but were not provided during the extended school year as required.²³
8. Transportation services were not timely and were not provided on a consistent basis.²⁴ As a result the Student was often late to school or had to be brought to school by one of his parents.²⁵
9. The Petitioners made many complaints to school and city staff about the schools the Student attended and the provision of educational services that were not specifically special education related, such as playground complaints, cafeteria complaints, and staffing and organization at the schools, all of which impacted the appropriateness of the education the Student received.²⁶
10. The Petitioners made a request for “copies of the medicaid forms the special ed teachers filled out each time they met with [Student,]” in an email to the DCPS special education coordinator of his extended school year services on July 22, 2009.²⁷ The Respondent did not provide copies of the requested documents until

²² T of

²³ T of P 14, P 42/R 1.

²⁴ T of P1, T of P2.

²⁵ T of P1, T of P2.

²⁶ T of P1, T of P2, P 24, P 26, P 31, P 32.

²⁷ P 38, T of P1. (The Petitioners claimed there were multiple verbal requests, but there was no evidence of the dates these requests were made.)

the resolution meeting held November 17, 2009, as a result of the due process hearing complaint.²⁸

11. The Petitioners informed the Respondent, via email on September 21, 2009, that they had enrolled the Student at _____ because they “were unhappy with the services he received” from the Respondent.²⁹ They did not request Respondent to pay for _____ (until the due process complaint), only that they wanted to set up the speech and language services, physical therapy services, and academic services that were in the IEP to be provided.³⁰ The Petitioners had decided to enroll the Student at _____ where his siblings attend in the late spring or early summer of 2009.³¹

12. The Student is progressing well at _____³² has a class ratio of three teachers to each class of 16 or 17 students.³³ Children with disabilities are served at _____ and related services are embedded into the classrooms, so there are no pull-out services.³⁴ There are speech and language services and occupational therapy services, but there is no physical therapist on staff.³⁵ The Student is able

²⁸ T of P1, T of

²⁹ P 35.

³⁰ P 35, P 1.

³¹ T of P1, T of P2.

³² T of P1, T of P2, T of _____ T of

³³ T of _____ T of _____ T of P1.

³⁴ T of _____ T of _____ T of P1.

³⁵ T of

to identify colors, climb stairs independently, is articulating and asking questions, is describing settings and characters, is more social and is making play choices, has confidence, is keeping up with his brother physically, is focused and not “dazed” and is keeping on track with where the class is, and can retain and repeat information.³⁶

13. The cost of _____ is _____ per year.³⁷

IV. CONCLUSIONS OF LAW

1. Federal regulations at 34 C.F.R. § 300.17 define a free appropriate public education (FAPE) 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.

2. The Student was denied a FAPE when the Respondent failed to provide special education and related services in conformity with his IEP. The IEP required 10 hours of specialized instruction per week outside of the general education setting. The specialized instruction provided was in the general education setting, contrary to the IEP. Physical therapy services were not begun until over three months following the anticipated start date of the services, and over two months following

³⁶ T of P2, T of _____ T of _____

³⁷ T of P2.

the Student's start at Some of the missed physical therapy services were made up, but even if all were made up, the services were not delivered in conformity with the IEP. Finally, the IEP required special transportation, which was not consistently provided and the Student often arrived late to school. Thus, this related service was also not provided in conformity with the IEP.

3. Federal regulations at 34 C.F.R. § 300.501(a), *Opportunity to examine records*, requires:

The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.613 through 300.621, an opportunity to inspect and review all education records with respect to —

- (1) The identification, evaluation, and educational placement of the child; and
- (2) The provision of FAPE to the child.

A request to inspect records must be complied with:

without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

34 C.F.R. § 300.613(a).

4. The Student's Parents requested certain educational records concerning the provision of FAPE to the Student via email on July 22, 2009. That is the earliest confirmed date of a request for such records, as there was no evidence of the precise time for any earlier requests. This request was not complied with without unnecessary delay and not before September 5, 2009, 45 days following the request. The request was not even complied with prior to the resolution session held on November 17, 2009, 119 days later. Only at the resolution session were the requested records provided. This flagrant disregard of the Parent's rights

³⁸ No evidence was provided explaining why the Student did not begin attending and the possible implementation of the IEP, until nearly a month following the anticipated start date for services on January 13, 2009.

significantly impeded their opportunity to participate in the decision-making process regarding the provision of FAPE to the Student because this information was requested in order to inform themselves, and make judgments about, whether services were provided in conformity with the IEP.

5. Federal regulations at 34 C.F.R. § 300.116 require:

(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[.]

6. The Student's placement at _____ was not appropriate for the following reasons: his IEP called for 10 hours of specialized instruction outside of the general education setting and the specialized instruction was inside the general education setting (so the placement was not based on his IEP); he was not educated in the school he would have attended if nondisabled (Shepherd), and no consideration was given to the potential harmful effect on him, or on the quality of services that he needed, including the failure to have timely and adequate transportation to the school and the failure to have staff available to provide related services on a timely basis. Because the requirements under 34 C.F.R. § 300.116 were not met, FAPE was denied. (*See*, 34 C.F.R. § 300.17(b)).

7. Federal regulations at 34 C.F.R. § 300.148, require:

(c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency 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.

(d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied —

(1) If —

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement —

(1) Must not be reduced or denied for failure to provide the notice if —

(i) The school prevented the parents from providing the notice;

(ii) The parents had not received notice, pursuant to §300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if —

(i) The parents are not literate or cannot write in English; or

(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.

8. The Supreme Court has determined that “to read the § 1401(a)(18) [the definition of FAPE, as indicated in paragraph 1, above] requirements as applying to parental placements would effectively eliminate the right of unilateral withdrawal recognized in Burlington.” Florence County School Dist. Four v. Carter By and Through Carter, 510 U.S. 7, 13 (1993).
9. The Student was denied a FAPE, as addressed in paragraphs 2 and 6 above. The Student’s enrollment at _____ is appropriate even though it cannot provide physical therapy services. The school is addressing all of his academic needs and he is progressing. The Petitioners seek to have the Respondent to provide the

physical therapy service. Upon close examination of the evidence, it does not appear the Student is suffering as a result of not receiving physical therapy at this time. The physical therapy evaluation completed by Respondent in November, 2008, stated that the Student would “benefit from school-based physical therapy to improve his travel on level and uneven surfaces in a timely and efficient manner.” This was based on his results of the Locomotion subtest, in which he scored below average. He had problems walking stairs in an alternating pattern (which is no longer a problem), ran slowly, and had problems jumping. The three areas to improve, according to the report, were: keeping pace with his peers in most school situations; walking up stairs using alternating pattern without support; and walking down stairs using alternating pattern. By the end of his extended school year services, he still needed to demonstrate walking down stairs using an alternating pattern. Given the totality of circumstances, this one functional skill does not necessitate the provision of physical therapy services at this time. Given the overall setting, organization, and satisfaction Petitioners have expressed about , consistent with the holding in Carter and 34 C.F.R. § 300.148(c), the Petitioners’ placement is otherwise appropriate.

10. The Petitioners did not inform the Respondent of their intent to place the Student in a private school prior to the removal of the Student from the public school. When they did inform the Respondent, after the fact, they did not request the placement be at public expense, but rather only that special education and related services be provided. Not until the complaint was filed did the Petitioners express intent to have the private placement paid for by Respondent. Given the

sophistication of the Petitioners in their advocacy for their child, it does not seem reasonable that notice of their intent to seek public funding for their private placement was not timely given. However, the evidence does not show that they were provided notice of the requirement to provide the Respondent with such notice, and so they may have simply been unaware of this requirement or may not have considered it a possibility. Since reimbursement “[m]ust not be reduced or denied for failure to provide the notice if” the Respondent failed to provide notice of this requirement, reimbursement will not be reduced or denied. 34 C.F.R. § 300.148(e)(1)(ii).

V. DECISION

1. The Petitioner prevails on Issue 1 because the Respondent failed to provide special education and related services to the Student in conformity with the Student’s IEP.
2. The Petitioner prevails on Issue 2 because the Respondent failed to permit the Student’s Parents to inspect and review the Student’s education records within 45 days of the request to do so.
3. The Petitioner prevails on Issue 3 because the Respondent failed to offer or provide an appropriate educational placement for the Student.

VI. ORDER

1. The Petitioners shall be reimbursed, upon showing Respondent proof of tuition payments to up to per year, for the 2009-2010 and 2010-2011 school years. Reimbursement must be provided within 14 calendar days of proof.

2. Because this is a reimbursement matter, the Respondent is not required to (but may chose to) maintain an IEP for the Student. The Respondent shall propose to re-evaluate the Student, including through review of existing records, prior to the end of the 2010-2011 school year, and convene the IEP team to review the data and develop an IEP for the 2011-2012 school year, and make a placement determination. Any disagreement about the proposed reevaluation, IEP, or placement at that time may be subject to appropriate dispute resolution. Nothing in this HOD is intended to require the Respondent to continue to reimburse the Petitioner for the cost of the program beyond the 2010-2011 school year. The parties may agree to change the Student's placement prior to the conclusion of the 2010-2011 school year and they may agree to keep his placement at beyond the 2010-2011 school year. In either case, the Respondent shall review and revise the IEP and shall be responsible for the provision of special education and related services.

IT IS SO ORDERED.

Dated this 24th day of December, 2009.



Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).