

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

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

STUDENT,¹
through the Parent,

RECEIVED

Petitioner,

JUL 29 2010

Date Issued: July 29, 2010

Hearing Officer: Wanda I. Resto Torres

v

Case No:

DCPS,

Hearing Date: July 19, 2010 Room: 4a

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND

When the Complaint was filed the student was a _____-year-old boy enrolled at a public school, in the _____ grade. The student is eligible for special education and related services, under the disability category of specific learning disability (SLD) because of a language based deficit.

The student's individualized education program (IEP) is dated May 27, 2010 and provides 6.5 hours of specialized instruction outside the general education, 20 hours of specialized instruction in general education, and 1 hour per week minutes of speech language pathology. ² On May 29, 2010, the parties met and agreed to compensatory education services be awarded to the student and that an auditory processing evaluation would be conducted on the student. The parties did not reach an agreement regarding the hours of instruction to be provided to the student. During that meeting the parent, independent tutor and educational advocate all objected to the DCPS as the location of service for this student, alleging failures of that location to provide the student with a suitable program or services over the past two years. ³

On June 4, 2010, a due process complaint (Complaint) was filed against the District of Columbia Public Schools (Respondent), pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA). The Petitioner claimed the DCPS failed to develop and implement an appropriate IEP, and failed to provide an appropriate educational placement for the Student for the 2010-2011 school year. The

¹ Personal identification information is provided in Appendix A.

² P#8, May 27, 2010, IEP.

³ P#7, May 27, 2010, DCPS MDT meeting notes, and testimony of the Education Advocate.

Petitioner alleged the Respondent has denied the Student a Free Appropriate Public Education (FAPE).⁴ As relief she requested, *inter alia*, an order that DCPS amend the student's IEP to provide full-time specialized instruction outside the general education setting in a private school with transportation and funded by the Respondent. The undersigned was appointed as the hearing officer on June 8, 2010.

On June 25, 2010, a telephonic pre-hearing conference was held in the above matter. During that conference call, the Petitioner reiterated claims that the student requires a full time individualized education program out of the general education setting as a result of the student's significant academic deficits. The Respondent alleged that the student's IEP when drafted was reasonably calculated to provide educational benefit. The Respondent further alleged that the student's current DCPS placement is appropriate and can implement the IEP. The Respondent claimed that the Student was not denied a FAPE, and object to the relief requested. Both Counsels provided a synopsis of their witnesses' testimony. The parties stipulated the Student attends a DCPS and is receiving special education services. The parties also stipulated that on May 29, 2010, a meeting was held and compensatory education award was offered for the student.

On July 19, 2010, a closed hearing was held; participating in the conference call were: Petitioner's counsel, Roberta Gambale; and Respondent's counsel, Laura George. The parties stipulated the IEP drafted May 27, 2010 cannot be implemented at the student's current DCPS. The parties also stipulated the Respondent has not identified another placement. The Petitioner presented documents labeled P-1 through 34 and eight witnesses testified; Petitioner, Education Advocate, Speech Pathologist, Psychologist, Occupational Therapist, Program Director, and the Newlen & Associates, Tutor. The Respondent presented documents labeled DCPS 1 through 4; one witness testified; the Special Education Coordinator. The documents were admitted without objections. The hearing was conducted in accordance with the rights established under the IDEIA and the implementing federal and local regulations, and the SOP.⁵ No written closing arguments or briefs were submitted.

ISSUES

The issues to be determined are as follows:

1. Has the Respondent failed to provide an appropriate individualized education program by not providing sufficient specialized instruction hours outside the general education?
2. Did the Respondent provide the student an appropriate educational placement for the 2010-2011 school year?
3. Was the student denied a FAPE?

FINDINGS OF FACT

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

⁴ 20 U.S.C. §1415(c)(2)(B)(i)(I)

⁵ IDEIA and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; 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").

1. The Petitioner erroneously stated in the due process complaint that the current placement had been determined inappropriate. The September 2008, Hearing Officer Determination (HOD) determined: "the Respondent during school year 2008-2009 issued a notice of placement to a middle school although the student was entering high school. As a result of that failure the HOD determined that the DCPS failed to provide an appropriate placement for the 2008-2009."⁶
2. The facts as asserted by Petitioner in paragraph 6 of the Complaint are misleading. The October 22, 2008 due process complaint which resulted in a December 12, 2008 HOD; it clearly states "The Petitioner *did not* demonstrate that the Student suffered an educational harm or was affected by any procedural violations the DCPS may have committed... The Petitioner *did not* demonstrate that the Student was impeded from receiving a free appropriate education."⁷
Emphasis supplied.
3. A psychological evaluation recommended that the student disability category be changed to reflect a language based learning disability.⁸ Based on the Kaufman Test of Educational Achievement administered as part of the student's psychological testing, the student is functioning on a 4th grade level in mathematics and a 2nd grade level in reading.⁹
4. The student's grades in March 2010 were in Biology- D, Algebra-C, Geometry- F, and in English II B¹⁰ The student's grades do not reflect the student's capacity he is not able to get basic work done he is performing at 3rd and 4th grade when his level should be the grade.¹¹
5. On May 29, 2010, the parties met the parent, independent tutor and educational advocate all objected to the DCPS as the location of service for this student, alleging failures of that location to provide the student with a suitable program or services over the past two years and insufficient specialized instruction.¹²
6. At the hearing the student with some difficulty testified; he cannot keep up with the class work; he is distracted by the large number of students in the classroom and in the hallways. He requires a lot of assistance from the teacher. The student wants help to get his grades up and go to college.¹³
7. The student is overwhelmed with the general education work because it is too advanced for him to comprehend. The student's IEP goals do not reflect his capacity. When the Petitioner sits with the

⁶ DCPS #1 September 16, 2008, HOD.

⁷ Hearing Officer Exhibit #1, December 3, 2008, HOD, and The American Bar Association Rules of Professional Conduct, Rule 3.3 Candor Toward the Tribunal-" (a) A lawyer shall not **knowingly**:(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Ms. Gambale is admonished that any future misrepresentation will force the Hearing Officer to report the attorney to the Bar Counsel.

⁸ P#20, December 15, 2009, Comprehensive Psychological Report.

⁹ Supra, page 6.

¹⁰ P#24, March 26, 2010, Student Progress Report.

¹¹ Testimony of the Petitioner.

¹² P#7, May 27, 2010, DCPS MDT meeting notes, and testimony of the Education Advocate.

¹³ Testimony of the student.

student to do work or daily activities, he does not understand basic reading, science, and math. He is receiving one/one tutoring in reading and has improved with the individualized attention.¹⁴

8. A recent Clinical Evaluation of Language Fundamentals (CELF-4) assessed the student's overall language abilities to be in the range of moderate to severe deficits.¹⁵ The student can read, comprehend and discuss facts however he needs to master subject matter vocabulary. The student has an academic vocabulary deficit making it difficult for him to express ideas and understand verbal instructions. New information must be presented to the student in segments with a multisensory approach. The student requires individualized assistance in each class to respond.¹⁶
9. The student requires transition services including discussion focused on goal setting in the areas of employment, college, daily living, and to be able to comprehend instruction from an employer.¹⁷
10. The student suffers from introversion which hinders his academic development since he does not like to participate in group activities. The student maintains very little eye contact and answers in brief phrases. The student has a global cognitive deficit's as evidence by the WASI Full Scale IQ of 76 (5th percentile rank) placing him in the borderline range. Based on the student's cognitive, academic, adaptive profile the student has a learning disability.¹⁸
11. The student will struggle in a general education setting because his academic and cognitive functioning is below that of his peers. As a learning disabled student he will not be at the same level of his chronological peers but he should progress, which currently he is not doing in math, and reading.¹⁹
12. The student is receiving one/one tutoring in Math and English focusing on his IEP goals twice a week for approximately one hour. The student reading level and decoding skills are in the second grade level. In the general education classes he is required to write essays and decipher mathematical problems beyond his level of comprehension. The 6.5 specialized instruction hours outside the general education in his current IEP are not sufficient. The student is between 5 and 7 years behind his peers, and needs more specialized instruction to catch-up. In the general education and the student will retract and not progress. The student must be placed in a group where the other students are at the same core abilities and level of the student.²⁰
13. The student's current school program has a maximum of only 19 hours of services outside the general education. During the school year 2010-2011 the school has a specific learning disabled cluster where co-teaching is provided for Math, English, Science and Social Studies. The only

¹⁴ Testimony of the Petitioner.

¹⁵ P#22, May 21, 2009, Speech/Language Evaluation.

¹⁶ Testimony of the Speech/Language Pathologist.

¹⁷ Testimony of the Occupational Therapist.

¹⁸ Comprehensive Psychological Report.

¹⁹ Testimony of the private School Psychologist.

²⁰ Testimony of Tutor.

contact with general education students will happen in Art, Music and lunch sessions. The program was available during the 2009-2010 school year.²¹

14. The admission team at the proposed private school reviewed the student's evaluations, and determined that the student has an academic vocabulary deficit and requires a specialized instruction in a small setting. The private school has a 5:1 student/teacher ratio at the school. There is a Guidance Counselor who will develop a transition plan with the student with a focus on work and college plans. The transition plan includes extended time to respond to SAT exam, a special education teacher assists the student and takes them on tours of colleges. The student's IEP requires an inclusion setting, all student at the private school have disabilities. The school has a partnership with a Public Charter School; and that allows students to interact with general education students. The cost for tuition is approximately

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:

FAPE Determination

The Respondent is required *inter alia* to 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.²²

The applicable regulations 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)."²³

Burden of Proof

The burden of proof is 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.²⁴

In assessing whether a FAPE has been provided, a court must determine whether (1) the school complied with the IDEIA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the Student to receive educational benefits.²⁵ The Respondent did not meet its legal obligation under the IDEIA, and below is why.

²¹ Testimony of the DCPS, Special Education Coordinator.

²² 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) .

²³ 34 C.F.R. § 300.17

²⁴ 5 D.C.M.R. § 3030.3.

²⁵ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982); and *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 16 (D.D.C. 2008).

Appropriateness of the Individualized Education Program

The Petitioner alleged that the student requires a full time individualized education program out of the general education setting as a result of the student's significant academic deficits; that have not been and will not be addressed by his current IEP.

The IDEIA defines the IEP as 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."²⁶

The IDEIA requires that the local education agency, make certain that the student's IEP be in effect at the beginning of each school year, contain a statement of the student's present level of academic achievement and functional performance. It must contain a statement of the student's measurable annual goals, a description of how the Student's progress toward meeting the annual goals will be measured, and any statement of the special education needs and related services and supplementary aids for a student to advance properly toward attaining the annual goals.²⁷

The student has disorders in the basic psychological processes involved in using language that has manifested itself in his inability to think, speak, read, write, spell, and do mathematical calculations at grade level. Yet his IEP does not describe his academic achievement and functional performance based on the student's functioning within a 3-5 grade level; nor does it account for all the individualized attention the student has required, according to the testimony from both Petitioner and the Tutor.

Furthermore, a reading of the IEP demonstrates the transition services plan does not include specific individualized strategies for the Student who is now years of age to assist him in the acquisition of daily living or from school to post school activities. The student's annual IEP goal in post secondary education and training indicates "the student will refine his goals for by developing a list of two vocational programs and two community colleges researching the requirements related to his interest and skills with 90% accuracy".

Current law provides that an appropriate transition services must be a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation.

²⁶ 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa),

²⁷ 20 U.S.C 1412 (a)(1), 1412 (a)(12)(A)(i), 1414(d)(3), (4)(B) and (7) and 1414(e)

- a. is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and
- b. includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and when appropriate, acquisition of daily living skills and functional vocational evaluation.²⁸

The evidence is that the student is performing at between 3-5 grade levels and should be at he has difficulty communicating his thoughts and has a learning disability. The uncontested evidence was that the student requires more specialized instruction hours outside the general education; than what is offered by the current IEP. Furthermore, by the Respondent's own admission it is willing to provide the student with a full-time IEP.²⁹ It is obvious that this student's unique needs were not considered when drafting his IEP. I find that the student's IEP is inappropriate; this student requires a full-time specialized instruction program to address his SLD.

Educational Placement

The parties stipulated at commencement of the hearing that the IEP as written in May 2010 cannot be implemented at the DCPS proposed school and no other placement was offered.

In an accordance with the IDEIA and its regulations when 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. It also states that the determination of the educational placement of a child with a disability must be based on a child's IEP.³⁰

During the hearing the Respondent offered evidence that at the DCPS the student was attending there was a "specific learning disable cluster" which provides services to students with special education needs. Although, the student was attending the school and it was aware that the student required programming to address his learning disabilities that program was not offered to the student. The first time the Petitioner heard of the program was during the hearing. The U.S. District Court for the District of Columbia recently indicated "Because the purpose of the due process hearing is to contest the adequacy of the IEP and the placement, the Hearing Officer should not consider evidence about services not prescribed by the IEP or discussed at the IEP meeting. *See generally A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007)"³¹ The Respondent supplied evidence of the services that the DCPS could have provided but were never offered to the student.

There was no evidence to explain a delay in determining the placement and location for the Student's special education services. There is nothing in the record contradicting the Petitioner's claims

²⁸ 20 U.S.C. § 1401 (34); 34 C.F.R. § 300.43, and D.C. Mun. Regs. Tit. 5 § 3001

²⁹ As stated by Respondent's Counsels during the hearing.

³⁰ 20 U.S.C. 1412(a)(5), 34 C.F.R. § 300.116.

³¹ *Stein et al., v. District of Columbia, et al.*, 54 IDELR 188 110 LRP 26678 May 4, 2010

that the Student's IEP cannot be implemented by the Respondent and the Student has to date no educational placement. The Respondent has failed to provide the Student with an educational placement according to its IDEA obligations.

Once a Petitioner establishes that the proposed public school placement was inappropriate, or as in this case non-existent, the second inquiry is whether or not the private school placement is appropriate.

In determining the appropriate placement for a child, preference is given to the least restrictive environment and the appropriate schools nearest the child's home.³² Further, mainstreaming of children eligible for special education services under the IDEA is "not only a laudable goal but is also a requirement of the Act." *Roark v. District of Columbia*, 460 F. Supp.2d 32, 43 (D.D.C. 2006) (quoting *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 786, 878 (4th Cir. 1989)); *Rowley*, 458 U.S. at 201 ("The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible."). If no public school can accommodate the Student's needs, the government is required to place the Student in an appropriate private school and pay the tuition.³³

The Parent has sought and the Student has been accepted in a private special education program. The Respondent has accepted the Student for placement. The Student can receive services in accordance with a full time placement with a low student/teacher ratio, with language based focus and a vocational training program adapted to the student's needs.

Under IDEA, an "appropriate" placement is that which enables a child to obtain "some benefit" from the public education he is receiving; not necessarily maximization of his potential. In addition to requiring that the child's placement be appropriate in the sense of providing some benefit, IDEA mandates that to the fullest extent possible, disabled children be educated with nondisabled children in the least restrictive environment.³⁴

The IDEA equates a FAPE, to an appropriate education with an educational benefit. The evidence was that the student requires additional specialized and vocational training than what has been provided or offered by the Respondent. For the reasons set forth above, because the Student needs requires additional services designed to meet his language deficits, academic, developmental, and functional needs. I find the Student needs a small setting in a full time special education program with individualized attention that is not being provided by the Respondent.

The evidence was that the least restrictive environment for the Student for the school year 2010-2011 requires a full-time program with appropriate related services of speech and language.

Where the public agency has failed to identify a suitable and appropriate placement that can address and/or provide for this student's unique needs the funding of a private placement would be an appropriate remedy. See: *Burlington v. Dept of Educ.* 472 U.S. 359, 105 S Ct. 1996. *Florence County School District v. Carter* 510 U.S. 7, 114 S. Ct. 361; *Roca v. District of Columbia* 43 IDELR 58, (March 14, 2005).

³² 20 U.S.C. § 1412(a)(5)

³³ 20 U.S.C. § 1412(a)(10)(B)(i); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

³⁴ 20 U.S.C. 1412(a)(5); *Rowley*, 458 U.S. at 198-200, 202, 102 S. Ct. at 3047; *Sherri A.D.*, 975 F.2d at 206.

“A student who is eligible for admission to DCPS ...and for whom no adequate special educational program is provided by DCPS shall be considered for placement in a private school.”³⁵ DCPS is responsible for the provision of a FAPE when it has failed; it must assume the cost for its failures.

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

ORDER

1. **ORDERED**, DCPS will invite the Petitioner and the student to a MDT/IEP team meeting; to be convened by August 26, 2010. The MDT will adjust all the student’s goals and objectives to reflect his current level of performance which is in the 3-5th grade range. The IEP will be modified to include specialized instruction services in all academic areas in a full time outside of the general education setting. The IEP must include a transition plan developed with the student’s input, **it is further**;
2. **ORDERED**, the DCPS will by August 26, 2010 issue a Prior Notice of Placement to the
The DCPS will fund the private placement of the student at _____ with transportation and related services **it is further**;
3. **ORDERED**, upon the Student attending _____ for 30 consecutive days, a MDT will be convened and DCPS shall be invited to the meeting. At that meeting, the student’s progress will be discussed, and the IEP will be revised if necessary, and written explanation must be included, **it is further**;
4. **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 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.

This order resolves all matters presented in the Petitioner’s June 4, 2010, due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: July 29, 2010



Wanda I. Resto Torres
Hearing Officer

³⁵ *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11 (1993), and DCMR § 3013.6.