

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

Student Hearing Office  
1150 5<sup>th</sup> Street, S.E.  
Washington, DC 20003

**RECEIVED**  
**JUL 15 2010**

---

[Parent], on behalf of,  
[Student],<sup>1</sup>

Petitioner,

v

District of Columbia Public Schools (DPCS),  
on behalf of,

Respondent.

Date Issued: July 15, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: July 6, 2010 Room: 4a

---

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:20 a.m. on July 6, 2010, in hearing room 4a, and concluded on that date. The due date for the Hearing Officer's Determination (HOD) is July 16, 2010, pursuant to the continuance order issued June 3, 2010. This HOD is issued on July 15, 2010.

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. The hearing was closed to the public.

Present at the due process hearing were:

Miguel Hull, Esq., Petitioner's Counsel

Laura George, Esq., Respondent's Counsel

---

<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner, Student's Parent (via telephone)

Juan Fernandez, Petitioner's Advocate

Three witnesses testified at the hearing for the Petitioner:

Petitioner (P), Student's Parent

Juan Fernandez (J.F.), Petitioner's Advocate

Administrative Head for

The Respondent did not present any witnesses.

A previous complaint was filed in 2009 and was dismissed as the result of a settlement on December 9, 2009. (Case                      The complaint in this matter was filed on April 1, 2010.

A response to the complaint was filed on April 7, 2010. A prehearing conference was held on April 20, 2010, and a prehearing order was issued on that date. The order was amended, to clarify one of the issues, on April 22, 2010. A resolution meeting was held on April 22, 2010, and did not result in any agreements. The hearing was scheduled for June 3, 2010, and the Petitioner moved for a continuance on June 1, 2010. The continuance was granted and the hearing was rescheduled on the next date both parties and the IHO had available, July 6, 2010.

The Petitioner is seeking a revised individual education program (IEP) to include full-time<sup>2</sup> special education and related services and a placement at                      a segregated non-public school for students with disabilities.

18 documents were offered by the Petitioner and were not objected to. (P 3 – P 20) The Petitioner's exhibits are:

P 3	-	October 28, 2009	-	Prehearing Order
P 4	-	January 15, 2010	-	IEP
P 5	-	January 15, 2010	-	IEP meeting notes

---

<sup>2</sup> "Full-time IEP" is a term of art used in the District of Columbia to refer to an IEP requiring special education and related services to be provided completely outside of the general education classroom.

P 6	-	September 24, 2009	-	IEP
P 7	-	September 24, 2009	-	Advocate's notes
P 8	-	October 1, 2008	-	IEP
P 9	-	September 24, 2009	-	IEP meeting notes
P 10	-	May 13, 2009	-	Confidential Psycho-Educational and Clinical Evaluation
P 11	-	April 18, 2009	-	Confidential Functional Behavior Assessment
P 12	-	April 17, 2009	-	Confidential Vocational Evaluation
P 13	-	June 19, 2009	-	Letter from Malachi to Parent Guardian
P 14	-	January 14, 2010	-	Speech and Language Re-Evaluation
P 15	-	September 24, 2009	-	IEP meeting notes (continued)
P 16	-	December 9, 2009	-	Dismissal Order (#2009-1412)
P 17	-	May 28, 2008	-	Initial Speech and Language
P 18	-	June 19, 2009	-	2008-2009 Final Report Card
		September 24, 2009	-	Schedule List View
P 19	-	September 24, 2009	-	Classroom Observation
P 20	-	January 14, 2010	-	Letter from Barnes to [Parent], Compensatory Educational Plan

5 documents were offered by the Respondent. (R 1 – R 5) R 3 was objected to by the Petitioner and was not re-offered. R 1, R 2, R 4, and R 5 were not objected to and were admitted into the record. Respondent's exhibits are:

R 1	-	January 14, 2010	-	Letter from Barnes to [Parent], Compensatory Educational Plan
R 2	-	January 15, 2010	-	IEP
R 4	-	January 14, 2010	-	Speech and Language Re-Evaluation
R 5	-	October 26, 2009	-	[untitled] behavior intervention plan

Both parties made counter-motions for directed findings near the conclusion of the hearing. Both motions were denied so that the IHO could take the matter under advisement and carefully review all of the evidence and the law.



externally monitored or provided with positive reinforcements.”<sup>8</sup> The Student’s behavioral functioning is “within normal limits. . . . [but the Student] struggles with controlling aggressive impulses and a deep-seated need to protect himself.”<sup>9</sup>

3. The IEP revised in September, 2009, included 15 hours of special education per week outside of the general education classroom.<sup>10</sup> A complaint was filed and settlement agreement reached on December 9, 2009.<sup>11</sup> The agreement, memorialized by this IHO in a dismissal order, required, in part:<sup>12</sup>

- 2) The Respondent will convene an IEP team meeting, no later than January 20, 2010, to, among other things:
  - a. Discuss and make a determination on whether the Student requires an increase in the level of specialized instruction;
  - b. Add social/emotional goal(s) and counseling services; and
  - c. Discuss and make a determination on whether the location of the Student’s services should be changed.

4. The Student was incarcerated for approximately two months prior to January 2010.<sup>13</sup> He had been adjudicated for drug use and has been clean since his release.<sup>14</sup> When he returned to school at both his behavior at school and academic performance were much better.<sup>15</sup> The Student was suspended at least six times during the course of the 2009-2010 school year, for five days each time, usually for wearing the

---

<sup>8</sup> P 11.

<sup>9</sup> P 10.

<sup>10</sup> Stipulated Fact.

<sup>11</sup> P 16.

<sup>12</sup> P 16.

<sup>13</sup> Testimony (T) of P. There is some indication from the testimony of P that the Student was incarcerated for a time after January 2010. Specifically, when she mentioned that the Student did not participate in agreed-upon tutoring which was part of the December settlement and a plan was created in January. *See*: P 16 and P 20. However, the Respondent’s obligation to the Student and his education program was not suspended while the Student was incarcerated. 34 C.F.R. §§ 300.301, 300.302.

<sup>14</sup> T of P. (No evidence was presented to counter this testimony.)

<sup>15</sup> T of P, P 5.

wrong uniform to school, and he was marked absent when he was tardy to class.<sup>16</sup> The Student was living in a group home, for a time, including during January, 2010.<sup>17</sup>

5. In January, 2010, the IEP team met and agreed to 20 hours of special education per week outside of the general education classroom, four hours per week of special education in the general education classroom, and one hour of counseling.<sup>18</sup> The Special Education Coordinator (SEC) for the school advised the team, upon discussing the Petitioner's request for a "full-time" IEP, that the school could not provide that level of services.<sup>19</sup> The IEP did not state how the Student's specific learning disability led to disruptive behaviors in the classroom, as reported in the April and May, 2009, assessment reports, and how that affected the Student's involvement in and progress in the general education curriculum.<sup>20</sup>
6. The Student received all failing grades in his end-of-the-year report card and must repeat the grade for the third time.<sup>21</sup>
7. The Student has been accepted to attend in Lanham, Maryland.<sup>22</sup> is a full-time special education school for students with various disabilities, including SLD.<sup>23</sup> The School uses both Maryland and District of Columbia curriculum, and D.C. students earn Carnegie units toward a diploma.<sup>24</sup> There are nine to

---

<sup>16</sup> T of P. (No evidence was presented to counter this testimony.)

<sup>17</sup> T of P, T of J.F.

<sup>18</sup> Stipulated Fact. (No prior written notice was provided that explains why the Respondent proposed the level of service it did nor why it refused the level of service the Petitioner sought.)

<sup>19</sup> T of J.F. (No evidence was presented to counter this testimony.) Also, "full-time IEP" is a term of art used in the District of Columbia to refer to an IEP requiring special education and related services to be provided completely outside of the general education classroom.

<sup>20</sup> P 4/R 2, R 5, P 10, P 11.

<sup>21</sup> T of P, P 13.

<sup>22</sup> T of C.A.

<sup>23</sup> T of C.A.

<sup>24</sup> T of C.A.

ten students in each class with a teacher and an assistance teacher.<sup>25</sup> The admissions team at reviewed the Student's education records and asked the Petitioner and the Student to come for an interview and a tour of the school.<sup>26</sup> The Student was accepted based on the data in his evaluations, his IEP, and the interviews with him and the Petitioner.<sup>27</sup>

8. When a student arrives at with an IEP that is not "full-time," the staff will review the IEP with data on the student's performance after 30 days and make any necessary revisions.<sup>28</sup>

#### IV. 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. 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

---

<sup>25</sup> T of C.A.

<sup>26</sup> T of C.A.

<sup>27</sup> T of C.A.

<sup>28</sup> T of C.A.

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 we must examine the case at hand.

2. 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.

3. An individualized education program (IEP) must be reviewed “periodically, but not less than annually, to determine whether the annual goals for the child are being achieved[.]”

34 C.F.R. § 300.324(b)(i). Upon review, the IEP must be revised, as appropriate, to address:

- (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child’s anticipated needs; or
- (E) Other matters.

34 C.F.R. § 300.324(b)(ii).

4. An IEP must include:

- (1) A statement of the child’s present levels of academic achievement and functional performance, including —
  - (i) How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children);

5. In January, 2010, the Student’s IEP was reviewed and revised, following a prior complaint and settlement. The Student had been in trouble with the law, was in a group home, and had been incarcerated for about two months prior to that time. He performed

better after returning to school, but did not achieve passing marks by the end of the school year, despite the supplementary aids and services provided.<sup>29</sup> The Respondent refused to increase the level of special education and related services sought by the Petitioner, the IEP was not revised after January to address the Student's lack of progress in the general curriculum with more or different supplementary aids and services, and the Student must now repeat the \_\_\_\_\_ grade for the third time. Because the IEP was not reasonably calculated to permit the Student to achieve passing marks to advance from grade to grade, the Respondent failed to appropriately revise the IEP to address the lack of progress, the Student was denied a FAPE.

6. The Student's specific learning disability has led to some social emotional functioning problems. Despite this and the agreement to add a social emotional goal and services to the IEP in December 2009, the statement of present level of academic achievement and functional performance does not state how the Student's specific learning disability affects his involvement and progress in the general education curriculum by generating negative behaviors in the classroom. This failure to develop an IEP that meets the requirements of 34 C.F.R. § 300.320 denied the Student a FAPE.

7. The Student has been accepted to attend \_\_\_\_\_ in Lanham, Maryland. \_\_\_\_\_ is a full-time special education school designed to assist children similar to the Student. It is reasonably expected the Student's needs can be met at \_\_\_\_\_. Because the Petitioner is seeking the more restrictive setting of \_\_\_\_\_ and because the Student has

---

<sup>29</sup> Respondent argued, but did not present any evidence, that the Student's poor performance was for anything other than not attending class. Only the fact that the Student was incarcerated or suspended shows he was absent from class, but this does not entirely explain his poor performance nor address the services in the Student's IEP.

been denied a FAPE, the Student will be permitted to attend \_\_\_\_\_, at public expense, pursuant to the Order below.<sup>30</sup>

### **V. ORDER**

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

1. The Petitioner prevails because the Respondent has denied the Student a FAPE as concluded above.
2. \_\_\_\_\_ is an appropriate remedy because it can provide full-time special education and related services for the Student.
  - a. After 20 days of school at \_\_\_\_\_ but before 31 days of school at \_\_\_\_\_ the IEP team, including staff from \_\_\_\_\_ will review and revise the Student's IEP to include full-time special education services and make other such revisions the Petitioner, with the assistance of \_\_\_\_\_ staff, believe are necessary to permit the Student to close his achievement gap in the curriculum so that the Student can, within two years, be on track to graduate from secondary school at some point before he turns 22 years of age. The IEP must also address, as part of the statement of academic achievement and functional performance, how the Student's disability influences his behavior, based on the most recent FBA and psycho-educational and clinical assessment, to impact his involvement and progress in the general education curriculum.

---

<sup>30</sup> Respondent argued that if the IHO found the IEP not appropriate, it must be given the opportunity to examine a continuum of services. No legal support was provided with this argument. The IHO rejects this line of argument because the Respondent had the obligation to monitor the Student's progress on both the IEP goals and in the general education curriculum, and review and revise the IEP to address any lack of advancement, including increasing the level of special education services up to a "full-time" IEP. The Respondent did not do this and will not now be given the opportunity to do what it should have done in the first place.

- b. If the Respondent does not agree with the IEP developed by the Petitioner with the assistance of \_\_\_\_\_ staff, it may challenge the IEP in a due process hearing, pursuant to 34 C.F.R. § 300.507.
- c. The Student's placement will be at \_\_\_\_\_ or similar school, at public expense, at least until he is involved in and progressing in the same general education curriculum as his same-aged peers, as measured by his performance on the DC-CAS and curriculum based assessments. The Student may begin attending \_\_\_\_\_ as soon as possible, and is advised to begin right away if the \_\_\_\_\_ staff agree he can begin during the summer. Transportation must be provided by or paid for by the Respondent.

**IT IS SO ORDERED.**

Date: July 15, 2010

  
\_\_\_\_\_  
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).