

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

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HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)

DOB)

Petitioner,)

V.)

**The District of Columbia
Public Schools,
Respondent**)

DATE OF HEARING
September 2, 2009

DATE OF COMPLAINT
July 24, 2009

ATTENDING SCHOOL:

**COUNSEL FOR PARENT/STUDENT: Fatmata Barrie
10125 Colesville Road
245
Silver Spring, Maryland 20901**

**COUNSEL FOR DCPS: Nia Fripp
Linda Smalls
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232**

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SSSE
STUDENT HEARING OFFICE

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

September 12, 2009

Representatives:

Petitioner – Fatmata Barrie
DCPS – Linda Smalls
Nia Fripp

Hearing Officer:

Jane Dolkart

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

A pre-hearing conference was held on August 17, 2009, and a pre-hearing order was issued on August 19, 2009

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by

1. Failing to develop an appropriate IEP in that the March 11, 2009 IEP lacks any specific goals?
2. Failing to develop an appropriate IEP in that the June 15, 2009 IEP reduced the student's specialized instruction and placement from full time out of general education to 5 hours of specialized instruction in an otherwise general education setting?
3. Failing to develop an appropriate June 15, 2009 IEP because Petitioner was not given an opportunity to discuss or be involved in the decision to reduce the student's special education hours and program and because no special education teacher (SET) was present at the meeting?
4. Failing to implement the March 11, 2009 IEP because the student was placed in an inclusion general education placement?
5. Failing to provide the student with S/L and counseling services during the 2008-2009 school year?
6. Failing to provide an appropriate placement in that the student requires a full time therapeutic placement with small classes?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated August 26, 2009 containing a list of witnesses with attachments P 1-10. The disclosure was admitted in its entirety. Petitioner called as witnesses the student, Dr. David Missar who evaluated the student, and Admission director at of DC.

DCPS submitted a five day disclosure letter dated August 26, 2009 containing a list of witnesses with attachments DCPS 1-3. The disclosure was admitted in its entirety. DCPS did not call any witnesses.

continued to need emotional/social/behavioral support. No baselines were contained in the IEP.

No age appropriate transition assessments had been completed and no specific post school goals were listed.

The IEP called for 26 hours of specialized instruction and 1 hour of behavioral support services per week in an outside general education setting.

(P 4)

6. A S/L evaluation was conducted on March 9, 2009 and was reviewed at the March IEP meeting. The student performed poorly on all tests and sub-tests. It was recommended that the student be discharged from therapy because her language skills appear commensurate with her cognitive abilities. (P 7)

The IEP team refused to provide S/L services in the student's March IEP and refused to discuss compensatory education for missed S/L services. This refusal was in direct conflict with the order in the February 13, 2009 HOD which ordered that the student receive compensatory S/L services and that she begin receiving S/L services within 10 days of the issuance of the HOD. Further, the HOD contained a specific finding that DCPS admitted in the hearing that the student was in need of S/L services. (P 5, February 2009 HOD)

7. The student began the 2008-2009sy in a general education program. In October 2008, the student was identified as MD (MR/ED) and was transferred to the MR cluster at . Most of the students in the MR cluster are moderately MR and function at a lower level than this student. The student testified at the February 2009 hearing that the classes were too easy. She reiterated this testimony at the September 2009 hearing. The February 13, 2008 HOD ordered that the student be placed with other mildly mentally retarded students, and not with students at a lower level of functioning. This was never effectuated. (February 13, 2009 HOD, Testimony of student, P 5)

8. Both the student and the parents would like the student to attempt to obtain a high school diploma. (Testimony of student, P 3, 5, 6, Testimony of student)

9. A student attending classes in the MR cluster at cannot earn a high school diploma. None of the courses in the cluster provide Carnegie Units. In order to receive Carnegie Units at it is necessary to take general education classes in an inclusion setting.

As a result of the fact that the student desired to work towards obtaining Carnegie Units, the student was taken out of the MR cluster in approximately March 2009, and placed in general education inclusion classes. This was in direct contradiction to the March 11, 2009 IEP which called for 26 hours of specialized instruction in an out of general

education setting and the February 2009 HOD. (P 4, 5, Testimony of student, February 2009 HOD).

10. cannot provide the student with a placement that includes a small class setting with other mildly MR students and with an opportunity to receive Carnegie Units if she is able.

11. On April 6, 2009, a comprehensive psychological evaluation report was completed for the student. The evaluation was conducted by C. David Missar, a PhD clinical psychologist in practice since 1993. Dr. Missar conducted the evaluation at the request of a social worker with Child and Family Services (CFS), District of Columbia Superior Court. Dr. Missar specializes in child and adolescent psychology and has done significant amounts of work for CFS over the years. Dr. Missar has conducted hundreds of psychological evaluations of students, has attended hundreds of IEP meetings at which he has reviewed evaluations or appeared as a student's therapist, and has attended several hundred special education due process hearings. Dr. Missar reviewed the student's 2006 comprehensive psychological evaluation and was aware of the students' diagnosis when he conducted his evaluation.

Dr. Missar was a credible witness. He is extremely experienced and knowledgeable in his field and was not retained by either of the parties to this proceeding. Dr. Missar prepared a lengthy, thoughtful and thorough report that contained extensive background information on the student.

Cognitively, the student continues to fall in the range of Mild Mental Retardation with a full scale IQ in the deficient range. Academically, the student shows significant limitations in all major areas. Her reading skills fall at around the 3rd grade level, her math skills are around the 5th grade level, and her writing skills are at the 3rd-4th grade level. The student's academic achievement is even below what would be expected from her cognitive abilities.

Emotionally, the student showed signs of depression, PTSD, and anxiety. The student is emotionally fragile, has a limited ability to cope with stress, and limited personality development.

The student was diagnosed with Mild MR, PTSD, Adjustment Disorder, and LD.

Dr. Missar recommended that the student be placed in a full-time, therapeutic day school with a focus on students with Mild MR. The setting should have a small class size with a teacher and at least 1 aide, individualized instruction and a structured setting. The student would benefit from therapeutic support given her emotional difficulties. The student requires intensive work on reading and writing skills, involvement in a vocational program, and assistance with adaptive living skills, social skills training and vocational placement. Dr. Missar believes that a small class size is a necessity for the student to function in a school setting and that she cannot learn in a general education setting. (P 6, Testimony of Dr. Missar)

12. The student did not receive in school counseling during the 2008-2009sy. (Testimony of student)

13. On June 15, 2009, an IEP meeting was convened to review Dr. Missar's evaluation and update the student's IEP. The MDT notes indicate that the student will continue on the diploma track with an anticipated graduation date of June 2010. This bears little if any relationship to reality. The IEP proposes to provide 5 hours per week of specialized instruction in an out of general education setting and 1 hour per week of behavioral support services. No other special education services are provided. The parent did not sign the IEP.(P 2, 3)

14. The February 13, 2009 IEP ordered DCPS to fund an independent vocational assessment. As of the time of the hearing, 7 months after the HOD order, Petitioner's attorney did not have a completed vocational assessment. This is an unconscionable delay that impacts negatively on the student's education.

15. The student has been accepted at _____ of DC. admission director at _____ testified concerning the school's MR program. The school has an MR program that focuses on functional and life skills aimed at obtaining a job. There is 1:1 instruction in reading and math in the morning. In the afternoon life skills such as taking the metro, paying bills, etc. is taught. The school provides transition services. There are two MR classrooms, each with 5-6 students, one teacher, and one aide. The classes are divided in terms of higher and lower functioning students and the student would be placed in the class with higher functioning students. The school provides counseling with students receiving individual counseling 1/week with a social worker and group counseling one time a week. The teachers are certified in special education and there is a full time speech pathologist on staff. The school provides vocational training in a Partnership with Marriott and with volunteer services. A student can take classes that provide Carnegie Units and could lead towards a high school diploma. _____ is an appropriate placement for the student. (Testimony of Ms. Stith-Twine)

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees "all children with disabilities" "a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines 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 State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEA's guarantee of FAPE "is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a "basic floor of opportunity" for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include "a statement of the child's present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child...." 20 U.S.C. ¶ 1414(d)(1)(A).

Pursuant to IDEA § 1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

A. Failure to develop an appropriate March 11, 2009 IEP

The IEP developed for this student on March 11, 2009 is a travesty. First, it completely and utterly ignores the February 13, 2009 HOD. The fact that DCPS so blithely ignores an order of the tribunal established by federal law to adjudicate disputes under the IDEA is extremely troublesome. The IEP fails to include the ordered S/L services and fails to place the student in the ordered educational setting. More astonishingly, it lists 26 hours of specialized instruction in an out of general education setting at the same time that the school indicates in the MDT meeting notes that the student has been taken out of the MR cluster and is attending general education classes. Even on its own terms, the IEP is entirely inadequate.

A complete IEP "must" include "measurable goals, including benchmarks or short-term objectives" for all areas that the child requires special education services. *Diatta v. Dist. of Columbia*, 319 F. Supp. 2d 57, 63 (D.D.C. 2004). All of the necessary components of

an IEP need to be written in the student's IEP. *Burilovich v. Bd. of Educ. of Lincoln Consol. Schs.* 208 F.3d 560, 568 (6th Cir. 2000). An IEP that fails to contain goals and objectives, and related services in areas identified by the IEP team as areas of need fails to meet the requirements of IDEA, and results in a denial of FAPE. *Alfonso v. District of Columbia*, 422 F. Supp. 2d, 1 (D.D.C. 2006).

Each qualified child's IEP must be a written document containing (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. *Rowley*, 458 U.S. at 182 (citing 20 U.S.C. § 1414(d)). "Failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that the school board failed to provide [the student] with a [free appropriate public education]." *Id.*

The student's March 11, 2009 IEP is completely lacking in annual goals, has no objective criteria or evaluation procedures and lacks a transition plan. It suggests that the March IEP meeting was called to go through the motions of meeting the requirements of the February HOD without any thought or care for this student's education. The IEP is both a procedural and a substantive denial of FAPE.

B. Failure to develop an appropriate IEP on June 15, 2009

DCPS has conceded that the June 15, 2009 IEP is inappropriate. It is yet another example of the completely irresponsible manner in which this student's education has been treated by the beginning of the 2008-2009sy. The evidence is overwhelming that this student requires a full time out of general education placement both in order to learn and to receive the emotional support she requires. The June 15, 2009 IEP is a substantive denial of FAPE.

C. Failure to provide parental participation in the development of the June 15, 2009 IEP and the reduction of the student's special education hours

The fact that the parents disagreed with the DCPS placement does not, by itself, show that they did not participate meaningfully. *Paoella v. District of Columbia*, 2006 WL 3697318 (2006)(unpublished opinion). Petitioner has failed to provide evidence proving a lack of parental participation in the development of the IEP.

D. Failure to Implement the March 11, 2009 IEP

The MDT notes for the March 11, 2009 prove on their face that the IEP was not implemented. The notes make clear that the student was attending general education classes in an inclusion setting, and also indicate that the student's achievement level is

above those of the other students in the MR cluster. As a result of the failure to implement the IEP the student received no educational benefit during the time she attended general education classes. DCPS denied the student FAPE.

E. Failure to provide the student with S/L and counseling services

The record is clear that DCPS made a decision not to provide the student with S/L services contrary to the February 13, 2009 HOD.

The student testified that she did not receive counseling services. DCPS did not provide any evidence suggesting that the student did receive the counseling services listed on her March IEP.

The student has suffered educational harm by being denied months of counseling and S/L services. DCPS has denied the student FAPE

F. Failure to provide the student with an appropriate placement

DCPS has conceded that the student's present placement is inappropriate and has not provided any evidence concerning an alternative placement for the student. DCPS has denied the student FAPE.

The Supreme Court has spoken on the level of education that the states are required to provide to disabled children. "[T]he education must be sufficient to confer some educational benefit upon the handicapped child." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 458 U.S. 176, 200-01 (1982). While a free and appropriate education (FAPE) does not require the best possible education, it clearly requires more than a program calculated to enable the child to derive *de minimis* educational benefit. *Doe ex rel. Doe v. Smith*, 879 F.2d 1340 (6th Cir. 1989). The IEP must confer a meaningful educational benefit gauged to the child's potential. *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000).

Once a school district's proposed placement is found to be a denial of FAPE, the parent is entitled to funding and placement at a parentally provided placement. A private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits." *Florence County Sch. Dist. Four v. Carter*, 950 F.2d 156 (4th Cir. 1991 *aff'd*, 510 U.S. 7 (1993 (quoting *Rowley*, 458 U.S. at 207; *See also Burlington Sch. Comm. V. Dep't of Educ.*, 471 U.S. 359 (1985)). The parent need only show that a private placement is beneficial, not that it is the least restrictive placement or the best placement possible.

The evidence proves that _____ of DC is a proper placement for the student. It can provide a therapeutic, small class, special education setting for the student. The student would be placed with other mildly mentally retarded students and would receive intensive basic academic instruction aimed towards self-sufficiency and job

attainment. She would get on the job vocational training, life skills training, counseling, and, if warranted, S/L therapy.

VII. SUMMARY OF RULING

DCPS has denied the student FAPE by failing to develop appropriate IEPs on March 11, 2009 and June 15, 2009.

DCPS has denied the student FAPE by failing to implement the student's March 11, 2009 IEP

DCPS has denied the student FAPE by failing to provide the student with S/L and counseling services for the 2008-2009sy.

DCPS has denied the student FAPE by failing to provide an appropriate placement.

VIII. ORDER

It is hereby **ORDERED** that

1. The student shall be placed at _____ of DC at DCPS expense, including transportation. The placement shall be effectuated no later than 1 week from the issuance of this HOD.
2. Within 30 days of placement at _____, an IEP meeting shall be convened to revise the student's IEP. The IEP shall be a full time out of general education IEP and shall include counseling and S/L services.
3. Petitioner's attorney shall provide _____ and the DCPS Office of Special Education with a completed vocational assessment no later than 15 days from the issuance of this HOD.
4. 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, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: September 12, 2009