

<p>STUDENT¹, by and through his Grandparent (“Parent”)</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case # 2009-1349</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Dates of Hearing: December 1-10, 2009</p> <p>Date of Complaint: October 1, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Donna Wulkan, Esq. 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Linda Smalls, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> Coles B. Ruff, Esq.</p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* ("IDEIA"), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened December 1, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, and concluded with the submission of the DCPS' closing brief on December 7, 2009, and Petitioner's closing brief on December 10, 2009. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on October 1, 2009. A pre-hearing conference was conducted on November 3, 2009, and a pre-hearing order was issued on November 6, 2009. The pre-hearing order outlined the issues to be adjudicated at the hearing. However, all issues were resolved by stipulation at the hearing save the issue of relief regarding the placement location for the student.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-27 and DCPS Exhibits 1-15) which were admitted into the record.

ISSUE(S):²

Is the placement proposed by the parent appropriate based on DCPS' acknowledged denial of a free and appropriate public education to the student by its failing to meet its "child find" obligations under IDEA: to timely identify, locate, and evaluate the student, determine his eligibility, develop an appropriate IEP, and offer an appropriate placement by his third birthday?

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

FINDINGS OF FACT ³:

1. The student is a [REDACTED] old who currently attends School A, a child development center located in the District of Columbia.⁴ The student resides in the District of Columbia with his parent. (DCPS Exhibit 4)
2. On October 1, 2009, Petitioner (the student's parent) filed a Due Process Complaint Notice ("*Complaint*") alleging the District of Columbia Public Schools ("DCPS") failed to provide a free and appropriate public education ("FAPE") to the student by failing to "child find"- identify, locate, and evaluate this student in all suspected areas of his disability, develop an appropriate IEP, if warranted, for this student for the 2009-2010 school year, and provide an appropriate placement, if warranted, for this student for the 2009-2010 school year. (Petitioner's Exhibit 1)
3. Following the filing of the complaint DCPS performed an educational evaluation on October 20, 2009, an occupational therapy evaluation on October 20, 2009, a speech and language evaluation on October 21, 2009, a physical therapy evaluation on October 22, 2009, and a psychological report on November 2, 2009. (DCPS Exhibits 10, 11, 12, 13 & 14)
4. A Multidisciplinary Team ("MDT") meeting was convened on November 20, 2009. The team reviewed the evaluations and the student was determined eligible to receive special education and related services as a student with a Developmental Delay ("DD"). DCPS developed a draft Individualized Education Plan ("IEP") indicating the student should receive 10 hours per week of specialized instruction and 45 minutes per week of speech and language services in an out of general education setting. The team scheduled a second MDT meeting to be held November 24, 2009, to finalize the IEP and placement of the student. (DCPS Exhibit 8 & 9)
5. The second MDT meeting did not occur and the matter proceeded to hearing on December 1, 2009. At the due process hearing DCPS and Petitioner agreed to the following stipulations:
 - DCPS failed to locate, identify and evaluate the student by his third birthday.
 - The student is eligible for special education and requires full-time specialized instruction and related services.
 - DCPS will convene an MDT meeting to finalize the IEP for the 2009-2010 school year within 30 calendar days of issuance of the Hearing Officer Determination.

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party's Exhibit.

⁴ There was sufficient indication the student's current special education needs are not being met at the child development center he is attending.

- DCPS will fund 1 hour per week of speech and language therapy for 12 months or the equivalent to be provided by an independent provider of the parent's choice at a rate not to exceed \$85.00 per hour as compensatory education.
- DCPS will fund an independent therapeutic summer camp for the summer of 2010 to focus on speech and pre-academic skills at a rate not to exceed \$2500.00 for the entire camp and to be completed by August 30, 2010, as compensatory education.

7. The student has been interviewed by and accepted at [REDACTED] [REDACTED] as a private full time special education placement that can provide the student with full time special education and related services. The student will attend [REDACTED] lower school for students ages 3 to 7. Tuition for all students in the lower school is funded by the District of Columbia. The classroom identified for the student has a special education teacher who has been teaching special education for at least five years and has submitted her certification credentials to the District of Columbia and is awaiting final certification. [REDACTED] (testimony)

8. The student should be in a full time special education school placement with intensive services. The student demonstrates a need for significant speech language services and further assessment to more accurately determine his cognitive and communication abilities. His school placement should be one where such assessments can be conducted. (Dr. [REDACTED] testimony, Petitioner's Exhibits 17 & 27)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a 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.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁵ In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

⁵ 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 with FAPE.

Is the placement proposed by the parent appropriate based on DCPS' acknowledged denial of a free and appropriate public education to the student by its failing to meet its "child find" obligations under IDEA: to timely identify, locate, and evaluate the student, determine his eligibility, develop an appropriate IEP, and offer an appropriate placement by his third birthday? Conclusion: The student should be placed on an interim basis at the placement proposed by the parent.

It is required that each public agency: (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. 34 C.F.R. §300.114(a)(2)(i).

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that 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. 34 C.F.R. §300.116(b).

The DC Code lists an order of the priority for special-education placement: (1) DCPS schools or District of Columbia Public Charter Schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia. D.C. Code § 38-2561.02(c) (2007).

DCPS acknowledged it had denied the student a FAPE and the parties agreed to all relief sought by Petitioner except the placement. The student special education requirements are not being met in the child development center where he currently attends. Although DCPS stated that it had identified two public placements that are available that can meet the student's needs, those locations were not disclosed prior to the hearing and there was no evidence presented regarding any public placements. DCPS agreed to convene a MDT/IEP meeting within thirty days of this Order; however, there was not specific placement presented that could immediately address the student's special education needs except the placement proposed by Petitioner.

Although DCPS asserted NCC is not the Least Restrictive Environment ("LRE") and is not an appropriate placement for the student, the Hearing Officer concluded there was sufficient evidence based on Ms. [REDACTED] and Dr. [REDACTED] testimony that the student's needs could be met at NCC. The parties stipulated the student was in need of a full time special education placement, which NCC clearly is.⁶ In light of the fact that DCPS has agreed to fund an independent speech language evaluation and the stated need to further assess the student's cognitive and communication abilities and revise his IEP, the Hearing Officer concludes that the student's ultimate placement should be reassessed at the MDT/IEP meeting DCPS has agreed to conduct within thirty days of this Order. At that time the MDT may consider appropriate placements and well as any that DCPS might propose in compliance with D.C. Code § 38-2561.02(c) (2007)

⁶ Although the teacher identified at NCC has yet to be certified the evidence demonstrates that the teacher has submitted the required certification materials to the District of Columbia is awaiting action to approve the certification. The Hearing Officer concluded that this coupled with the fact that all the students in the NCC lower school are funded by DCPS was sufficient as to its appropriateness and reasonableness of cost.

ORDER:

1. DCPS shall convene a MDT meeting to finalize the student's individualized educational program ("IEP") within thirty (30) calendar days of the issuance of this Order.
2. DCPS shall place and fund the student on an interim basis at the National Children's Center and provide transportation services until such time as the MDT/IEP meeting is convened. At the MDT meeting and based on the IEP developed the MDT shall determine and appropriate placement for the student for the remainder of the 2009-10 school year.
3. DCPS shall fund an independent comprehensive speech and language evaluation.
4. DCPS shall fund one (1) session per week of speech and language therapy for twelve months or its equivalent⁷ to be provided by an independent provider of the parent's choice at a rate not to exceed \$85.00 per hour as compensatory education.
5. DCPS shall fund an independent therapeutic summer camp for the summer of 2010 that focuses on speech and pre-academic skills for a rate not to exceed \$2,500.00 for the entire summer camp program, to be completed by August 30, 2010, as compensatory education.
6. The MDT meeting shall be scheduled through counsel for the student and parent.
7. DCPS is given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

⁷ The parties agreed that this was the maximum number of sessions DCPS would fund; however, and parent was free to use the sessions at a more frequent rate, e.g. two sessions per week for 6 months, if the parent and/or provider deemed it appropriate.

APPEAL PROCESS:

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. § 415(i)(2).

A handwritten signature in cursive script, appearing to read "Coles B. Ruff".

Coles B. Ruff, Esq.

Hearing Officer

Date: December 15, 2009