DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

[STUDENT],[1]
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 8/16/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 8/8/11 Room: 2009

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

On June 29, 2011 counsel for petitioner filed a due process complaint alleging that DCPS denied a Free Appropriate Public Education (FAPE) to the student by not developing an appropriate IEP that contains sufficient hours of specialized instruction outside of general education and by not providing an appropriate placement. (P-1) On July 14, 2011 DCPS filed a response asserting that the student's IEP is calculated to provide educational benefit and that School is able to implement the student's IEP. (R-1) On July 20, 2011 a pre-hearing conference was held by telephone with counsel for petitioner Miguel Hull and counsel for respondent DCPS Victoria Healy. A pre-hearing Order was issued on July 21, 2011. The Order stated there was a resolution meeting on July 14, 2011 with no agreement and that counsel for petitioner

[1] Personal identification information is provided in Appendix A.

agreed to let the full thirty day resolution period run. The HOD is due September 12, 2011. The Order further stated that the issues to be determined at the due process hearing are: 1. Did DCPS deny a FAPE to the student by failing to develop an appropriate IEP that contained sufficient hours of specialized instruction outside of general education to meet the student's needs? 2. Did DCPS deny a FAPE to the student by failing to provide an appropriate placement at by not providing a small structured setting outside of general education? The relief requested is placement at a non-public special education day program at Academy in Alexandria, Virginia.

The due process hearing convened at 9:30 a.m. on August 8, 2011 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Miguel Hull represented the petitioner and Victoria Healy represented the respondent DCPS at the hearing. The hearing was closed. At the outset of the hearing, the hearing officer noted that petitioner's documents were out of correct numerical order and counsel for petitioner was required by this hearing officer to have them in correct order by the end of that business day and provide the corrected disclosures to the hearing officer and counsel for respondent. Counsel for petitioner complied with this requirement. Counsel for respondent DCPS objected to petitioner's documents of a previous educational advocate's notes of February 24, 2010 and November 8, 2010 and that advocate's observation of September 21, 2010 because she was not listed as a witness to be cross examined on those documents. The objection was sustained. Counsel for respondent also objected to evaluations done in 2006 as being too old. The objection was overruled since those evaluations provided background on the student's

past educational history, academic problems and needs. Counsel for respondent also objected to the physician's discharge statement from the

The objection was overruled because the document had been disclosed to DCPS in a previous case with this student and the document provides information on the student's needs and recent behavioral issues. Counsel for DCPS also objected to introducing the student's final report card received by the parent. The objection was overruled because it was a DCPS document that DCPS was aware of and the respondent's disclosed report card did not include grades for each advisory and was an incomplete document. Petitioner's documents P-1-P-24 in the corrected order were admitted into evidence. Counsel for petitioner withdrew the previous educational advocate's notes and observation in the corrected order of his disclosures. Respondent's documents R-1-R-8 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses: the student's mother, the student's educational advocate, Juan Fernandez, the student's case worker, who all testified in person and Assistant Education Director of . who testified by telephone. Counsel for respondent did not call any witnesses and rested on her documents.

JURISDICTION

The hearing was convened on August 8, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

Counsel for petitioner filed a due process complaint alleging that DCPS failed to provide an appropriate IEP because it did not provide sufficient hours of specialized instruction outside of general education to meet the student's needs caused by his emotional disturbance disability. The student's current IEP and prior two IEPs call for seven hours of specialized instruction in mathematics outside of general education. The student received poor grades for the 2010-2011 School Year. The student is on medication for ADHD, but when he does not take his medication he has behavioral problems at school. The student had several unexcused absences last school year, left classes and the school without permission and was sent home on several occasions. Counsel for petitioner also alleges that the student's placement was inappropriate because he needs a full-time day program for students with emotional disturbance. Counsel for respondent denied these allegations. Counsel for respondent argues that the student's truancy and failure to attend class makes him unavailable for the educational opportunities offered by DCPS.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did DCPS deny a FAPE to the student by failing to develop an appropriate IEP that contained sufficient hours of specialized instruction outside of general education to meet the student's needs?

2. Did DCPS deny a FAPE to the student by failing to provide an appropriate placement at at School for the 2010-2011 School Year and not proposing an appropriate placement for the 2011-2012 School Year by offering School as the student's placement instead of providing a small structured setting outside of general education? The relief requested is placement at a non-public special education day program at in Alexandria, Virginia.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue one-the failure to provide an appropriate IEP- are as follows:

I.

1. The student is a -year-old male who has been found eligible for special education and related services as a student with the disability classification of Emotional Disturbance. (P-2, R-8)

2. The student attended last school year at School. (Testimony of Mother, P-2, R-8)

3. On May 4, 2011 an Individualized Education Program was developed for the student that calls for seven (7) hours per week of specialized instruction in mathematics outside of general education and 240 minutes a month or one hour a week of behavioral support services in general education. (P-2)

4. The student's previous IEP of July 28, 2010 also called for 7 hours a week of specialized instruction in mathematics outside of general education and one hour a week of behavioral support services in general education. (P-4)

5. The student's previous IEP of February 24, 2010 also called for 7 hours a week of specialized instruction in mathematics outside of general education and one hour per week of behavioral support services in general education. (P-5)

6. Dr. Natasha Nelson conducted an independent comprehensive psychological evaluation on the student that was dated March 25, 2011. (R-6, P-8) Using the WISC-IV test for cognitive ability, Dr. Nelson found the student's overall cognitive abilities were at a Full Scale IQ score of 70. His verbal and nonverbal abilities were in the Borderline range of functioning (VCI=71; PRI=75). On the WIAT-III test for achievement, the student's scores on Oral Language were in the Low range with a standard score of 69 that was in the second percentile. (R-6 at p.21) His Basic Reading and Math Fluency skills were in the Average range with a standard score of 98 in Basic Reading and 96 in Math Fluency that placed him in the 45 percentile and 39 percentile respectively. (R-6 at p.21, P-8 at p.21) He performed in the Below Average range in Written Expression and Mathematics with a standard score of 77 in Written Expression and 79 in Mathematics that placed him in the 6 percentile and 8 percentile respectively. (R-6 at p. 21) (P-8 at p.21) In the clinical summary, the evaluator found that the student's emotional disturbance disability results in his being defiant and acting out. His use of cannabis "further exacerbates his mood dysregulation and triggers irritability, anger, and acting out behaviors." (R-6 at p.17-18, P-8 at p. 17-18)The student's diagnosis under Axis I was Mood Disorder Not Otherwise Specified, Cannabis Abuse, Conduct Disorder and Attention-Deficit/Hyperactivity Disorder. The evaluator

recommended that the student "should continue to be provided with services under the classification of Emotionally Disturbed. His poor academic functioning is a product of his emotional symptomatology. The magnitude of [student's] emotionality (outbursts, inability to submit to the demands of those in authority, and inattention in the classroom setting), requires a more restrictive setting for children with an Emotional Disturbance. It is recommended that he be placed in a full-time school for children with an Emotional Disturbance." (R-6 at p. 18, P-8 at p.18)

7. The student's Report Card for the 2010-2011 School Year showed he received final grades of Ds in English, Reading Workshop, World History, Algebra I-B and Environmental Science. (R-3) The student's grades for each advisory were as follows: In reading workshop, the special education resource class, he received a D the first advisory, F for second advisory, F for third advisory and D for fourth advisory. (P-24) In Environmental Science he received an F the first advisory and D the second advisory, a D in the third advisory and a B in the fourth advisory. (P-24) In World History he received an F the first advisory and D for second advisory. In Algebra IA he received an F the first advisory and an F second advisory but the special education teacher changed it to a C. (P-13)In English I, a special education resource class, he received an F in the third advisory and a D in the fourth advisory. (P-24) In Algebra IB he received an F in the third advisory and a D the third advisory. The teachers' comments on the report card are that the student has poor behavior and excessive absences. (P-24) The special education teacher indicated in the MDT Meeting Notes of May 4, 2011 that the student is getting Fs because he has not been in class. (R-7) The student did not make educational progress the last school year.

8. The student was absent 41 days and present 140 days in the last school year. (R-3)

9. The student has demonstrated aggressive and defiant behaviors at school including in April 2011, stealing a teacher's electronic device for which he was walking out of class, wandering the hallways, and leaving the building without permission or being sent home. (Testimony of and Mother) The parent received weekly calls from the school about the student's behavior. (Testimony of Mother)The independent psychological evaluation states: "School records indicate [student] has a history of truancy. Consequently, he is failing school. He also has a history of significant negative behaviors such as being disruptive, disrespecting and threatening school authority, on the school premises, and not completing assignments and homework. He has consequently been multiple times." (R-6 at p.16, P-8 at p.16) The student is aware of the school policy to wear a school uniform or be sent home and does not wear his uniform so he can be sent home. (Testimony of

10. The student was hospitalized for his behavior issues at The in February 2011 for ten days (P-10) and in April for ten days. (Testimony of Mother)

11. The student is on medication for ADHD. He does not have behavioral issues when he is on medication. (Testimony of and Mother, R-6 at p.15, P-8 at p. 15)

12. The student has a Behavior Intervention Plan (BIP) that was last developed on January 8, 2010. (R-5)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue two-the failure to provide an appropriate placement- are as follows:

II.

1. The student attended last school year at (Testimony of Mother, P-2, R-8)

2. Academy at School implemented the student's current IEP. (R-7)

3. The student received poor grades at last school year. (R-7)

4. The student will be going to his neighborhood high school School in the 2011-1012 School Year. (R-1) School is a large high school that has recently been renovated. (Testimony of There was no testimony presented on the program at School for this student or on the renovated school interior setting.

5. On May 4, 2011 an MDT meeting convened at at School including the special education coordinator, the special education teacher and the student's regular education teachers. The parent participated by telephone. (R-8) The May 4, 2011 MDT meeting Notes state: "We will attempt to place [student] in a DCPS school for students with emotional problems." (R-8 at p.3)

6. The student has been accepted at Academy in Alexandria, Virginia. Academy is a full-time day special education program for students with disabilities ages five to twenty-one including students with Emotional Disturbance, Learning Disabilities, Other Health Impaired and Intellectually Deficient. The majority of students have the disability classification of Emotional Disturbance. The classes are small with the largest class having a ratio of 10 students to 2 adults and some classes with 3 students to one teacher ratio. All upper school teachers are certified in content areas and special education teachers supervise the content based teachers. The program has been certified by OSSE and the State of Virginia. Related service providers are on staff including a clinical psychologist, art therapist, social workers, speech pathologists and an occupational therapist. There is a clinic aide to provide prescribed medication. There are 70 students in the Upper School program with 60 of them from the District of Columbia. The cost of the program is two hundred and fifty-nine dollars a day (Testimony of This hearing officer finds that program can provide educational benefit to the student.

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2003) This hearing officer found the testimony of the student's case worker, to be credible on the student's behavior. This hearing officer observed that his answers to questions were straightforward and knowledgeable about the student supported by his visiting Academy on a regular basis to discuss the student's behavioral issues,

and his weekly interactions with the student and the school personnel. This hearing officer also observed the mother's testimony and found her answers to be honest and straightforward. If she did not know something such as the program at School, she said she did not know. This hearing officer found her testimony credible on the student's behavior.

DISCUSSION/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 on issue one that the IEP is inappropriate for not having sufficient hours of specialized instruction are as follows:

In determining if an IEP meets the substantive requirements of the IDEA, The United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) held that courts must determine "is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07. In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989), The Third Circuit held that appropriateness under *Rowley* as applied to a student with severe disabilities means more than trivial educational benefit. The Court held in *Polk* that "...using *Rowley*'s own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit." *Polk* at p.184 Other Circuits have endorsed the *Polk* court's interpretation of educational

benefit in *Doe v. Smith*, 441 IDELR 544 (6th Cir. 1989); *Fort Zumwalt School District v. Clynes,* 26 IDELR 172 (8th Cir. 1991); *Roland M. v. Concord School Comm'n,* 16 IDELR 1129 (1st Cir. 1991) and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4th Cir. 1985) In *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41,44 (3d Cir. 1999) and *T.R. v. Kingwood Township Board of Education*, 32 IDELR 30 (3d Cir. 2000) the Third Circuit held that an IEP must provide "meaningful benefit." *See also A.I. Iapalucci v. D.C.*, 402 F. Supp. 2d 152 (D.D.C. 2005) ("...the appropriate focus of the court's review should be on whether DCPS is providing A.I. with an IEP that is reasonably calculated to provide meaningful educational benefit." *Id.* at p.167)

In this case, the student has an IEP providing for seven hours a week of specialized instruction outside of general education in mathematics and one hour a week of counseling services. (See Findings of Fact #3) The student's previous two IEPs also had the same level of services. (See Findings of Fact I. #4 & #5) The student's report card for the last school year shows he is receiving poor grades of mainly Fs and Ds. (See Findings of Fact I. #7) The independent comprehensive psychological evaluation of March 25, 2011 found based on test scores the student is scoring in the Below Average range in mathematics, written expression and the Low Range in oral language. (See Findings of Fact I. #6) The student's teachers in their comments on the report card indicate that the student is receiving poor grades because of poor behavior and excessive absences. The special education teacher indicated in the MDT Meeting Notes one May 4, 2011 that the student is receiving Fs because he does not go to class.(See Findings of Fact I.#7) The student has been absent 41 days in the last school year and often leaves class without permission and wanders the hallways. (See Findings of Fact I. # 8 & #9)

The student has not made educational progress as indicated in his poor grades and test scores cited above.

The student has been classified with the disability of Emotional Disturbance. The independent psychological evaluation reported: "School records indicate [student] has a history of truancy. Consequently, he is failing school. He also has a history of significant negative behaviors such as being disruptive, disrespecting and school authority, on the school premises, and not completing assignments and homework. He has consequently been nultiple times." (See Findings of Fact I. #9) The student has a BIP, but it over a year and half old and has not been updated. (See Findings of Fact I. #12) The student's disability is adversely impacting his academic performance. When the student is not on medication, he acts out with defiant behavior, leaves class and wanders the hallways or does not attend school.

Counsel for respondent argues that it is the student's truancy that is causing him to have poor grades and making him unavailable for the educational opportunities offered by DCPS. The student's disability classification of Emotional Disturbance by DCPS, however, must be considered. In *Independent School District No. 284, Wayzata Area Schools, Wayzata,Minnesota v. A.C.,* 258 F. 3d 769 (8th Cir. 2001) the Court of Appeals pointed out: "We do not believe, however, that the analysis can be limited to a stark distinction between unwillingness and inability to behave appropriately. There is a gray area between normal, voluntary conduct and involuntary physiological response, and that area is where Congress has chosen to locate behavioral problems such as A.C.'s. The IDEA clearly includes 'emotional disturbance[s]' as disabilities. *20 U.S.C.*

Section 1401 (3)(A)…" As in the above cited A.C. case, the evidence in the record in this case supports the conclusion that the student's truancy and classroom disruption belong in the emotional disturbance category. (See Findings of Fact I. #6, #7, #9 and #10) The student's outdated BIP indicates that the school is not addressing the student's behavioral issues which are adversely impacting his educational performance. Counsel for petitioner has met his burden of proof that DCPS has denied a FAPE to the student in not providing an appropriate IEP to address his disability. This hearing officer concludes the student's current IEP is not "reasonably calculated to provide meaningful educational benefit". *A.I. Iapalucci v. D.C at 167*

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 on issue two-whether DCPS denied a FAPE in not providing an appropriate placement at Academy at for the 2010-2011 School Year and not proposing an appropriate placement at School for the 2011-2012 School Year are as follows:

Following the development of an IEP, the public school system is required to provide an appropriate educational placement that meets the needs set forth in the IEP. *See Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004) (citing *Petties v. District of Columbia*,238 F. Supp. 2d 114, 116 (D.D.C. 2002) and *34 CFR 300.116.*

For the 2011-2012 School Year, DCPS is proposing as the student's placement the student's neighborhood high school, School. Counsel for petitioner has only presented testimony that is a large building. (See

Findings of Fact II. #3) Counsel for petitioner has presented no evidence on the program at School for this student or on the renovated school interior setting. Counsel for petitioner has presented no evidence that School would be unable to implement the student's IEP even if it is revised to include more hours of specialized instruction and behavioral support services outside of general education.

Last school year Academy did implement the student's IEP. Counsel for petitioner offered no evidence that Academy could not implement an IEP that called for more hours of specialized instruction and behavioral support services outside of general education.

Counsel for petitioner is seeking as relief placement of the student at Academy, a private special education day program in Virginia. As was pointed out in *T.T. v. District of Columbia*, 2007 U.S. Dist. LEXIS 52547 (D.D.C. 2007) DCPS is "not required to consider private-school placement when appropriate public-placement options are available. *See Jenkins v. Squillacote*, 290 U.S. App. D.C. 137, 935 F. 2d 303, 305 (D.C. Cir. 1991) ("[I]f there is an 'appropriate' public school program available...the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child."). Although the IDEIA guarantees a FAPE, it "does not necessarily guarantee the child [with a disability] the best available education." *Holland v. District of Columbia*, 315 U.S. App.. D.C. 158, 71 F. 3d 417, 419 (D.C. Cir. 1995). Nor does the IDEIA ensure that the FAPE will consist of the precise plan that the parent desires. *See Shaw*, 238 F. Supp. 2d at 139. These established legal propositions are reflected in the District of Columbia Code, which imposes a strict order of 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 Section 38-2501 (2000)(current version at D.C. Code Section 38-2561.02 (c) (2007))*."

Counsel for petitioner has failed to meet his burden of proof that DCPS has denied a FAPE to the student in not providing an appropriate placement. Counsel for petitioner has presented no evidence in the record on the inappropriateness of the program at School for this student other than that it is a large school. Placement at Academy, a facility outside of the District of Columbia, would be against the above cited legal propositions and the strict order of priority for special education placement in the above cited District of Columbia Code. The MDT Meeting Notes of May 4, 2011 states that the MDT "... will attempt to place [student] in a DCPS school for students with emotional problems." (See Findings of Fact II. #5) The *IDEA* Regulation states: "A group of persons, including the parents, and other persons knowledgeable about the child, the meaning of evaluation data, and the placement options" shall make placement decisions. *34 C.F.R. Section 300.116(a)(1)* The MDT team members were knowledgeable of the student's disability and needs and recommended a placement in a DCPS school for students with emotional problems. Finding another DCPS school for students with emotional problems for this student before placing him at a school outside of the District of Columbia would be in compliance with the strict order of priority for special education placement in the above cited D.C. Code.

ORDER

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

DCPS shall convene an MDT/IEP meeting by August 26, 2011 at a mutually agreeable time with the parent to review and revise the student's IEP to increase the number of hours of specialized instruction outside of general education to address the student's deficits in mathematics, written expression and oral language. The revised IEP shall include an updated Behavior Intervention Plan with specific interventions to address his acting out in class and leaving class without permission. The MDT shall work in coordination with the parent in ensuring that the student is on his medication for ADHD during school hours and an appropriate monitoring plan is implemented. The MDT shall also discuss and determine an appropriate placement for the student that can implement the revised IEP including placement at a program for students with emotional problems in compliance with the order of priority for special education placement in the above cited D.C. Code.

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: 8/16/11 Seymour DuBow /s/
Hearing Officer