

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

Student Hearing Office  
810 First Street, NE, Second Floor  
Washington, DC 20002

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STUDENT HEARING OFFICE  
2011 JAN -6 PM 9:15

Through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: January 5, 2011

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Dates: December 17, 2010

Room: 2004

**HEARING OFFICER DETERMINATION**

**BACKGROUND**

Student is an \_\_\_\_\_ year-old male, who is not currently attending school. His current IEP lists Emotional Disturbance (“ED”) as his primary disability and requires him to receive 10 hours per week of specialized instruction in a general education setting, 5 hours per week of specialized instruction outside of general education, and 240 minutes per month of behavioral support services.

On November 5, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to conduct a complete and comprehensive evaluation of Student, failed to conduct a vocational assessment of Student in order to develop an appropriate transition plan, failed to provide an IEP reasonably calculated to provide Student a FAPE, failed to provide Student an appropriate placement/location of services, and failed to provide Student with an appropriate IEP to include a behavior intervention plan (“BIP”).

On November 15, 2010, DCPS filed its Response to the Complaint, primarily asserting therein that Student’s IEP was appropriate to meet his needs; that Student’s multiple medications prevented accurate assessments, and as a result, further assessments were unwarranted; that there is no requirement for a formal vocational evaluation, and even if there were, Student was unavailable to receive such an evaluation; and that overall, Student was not denied a FAPE.

On December 3, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner withdrew its claims of an alleged failure to conduct a complete and comprehensive evaluation and an alleged failure to provide an appropriate IEP to include a BIP, based on DCPS's award of independent evaluations on November 23, 2010. After discussing the remaining three claims, Petitioner's requested relief, and hearing-related procedural matters, the hearing officer brought the hearing to a close. The hearing officer issued the Prehearing Order on December 8, 2010.

By disclosure letters dated December 10, 2010, Petitioner disclosed twenty-five documents (Petitioner's Exhibits 1 – 25), and DCPS disclosed DCPS-1 through DCPS-7.

The hearing officer convened the due process hearing on December 17, 2010.<sup>1</sup> The parties' disclosed documents were admitted into the record without objection. After DCPS counsel advised the hearing officer and opposing counsel that DCPS had issued an IEE letter authorizing an independent vocational assessment for Student and provided Petitioner's counsel with a copy of the letter, Petitioner withdrew its claim based on the failure to provide a vocational assessment. Thereafter, DCPS objected to proceeding with the hearing on the ground that Parent lacked standing because Student's birthday was the same day as the hearing, which meant that the right to prosecute the action had transferred to Student. The hearing officer heard argument from both parties before rejecting DCPS's challenge to Parent's standing, noting that Parent had standing when the action was filed and that DCPS failed to give the notice required under 34 C.F.R. § 300.520(a) as a condition precedent to the transfer of rights to Student. Finally, all preliminary matters having been addressed, the hearing officer received opening statements, witness testimony, and closing statements from both parties before concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### ISSUES

The issues to be determined are as follows:

1. Did DCPS fail to provide an IEP reasonably calculated to provide Student a FAPE?
2. Did DCPS fail to provide Student an appropriate placement/location of services?

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<sup>1</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

## 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:

1. Student began attending his current DCPS school in October 2009, after transferring from another DCPS high school. At the previous high school, Student would walk the halls and not go to his classes, and sit in the cafeteria and just stare. Parent asked for help for Student at the previous high school, but she did not receive any help. Student failed grade at the previous high school during SY 2009/10, and he is repeating the grade during the current school year.<sup>2</sup>
2. Once Student began attending his current DCPS high school, he became aggressive with Parent and his younger siblings. He would also punch holes and throw shoes into doors and walls. This is when Parent began to understand that Student was becoming mentally ill. The day after Student hit a teacher in the head with a globe on March 9, 2010, Parent took Student to see a psychiatrist and Student was admitted to \_\_\_\_\_ where he stayed for 5 weeks. Student was discharged on April 15, 2010.<sup>3</sup>
3. While Student was in \_\_\_\_\_ Parent called the attendance counselor at Student's current DCPS school to advise the counselor that Student had been hospitalized. Upon receiving Student's discharge paper from \_\_\_\_\_ Parent provided the school with a copy of the discharge paper.<sup>4</sup>
4. Approximately one week after Student's discharge from \_\_\_\_\_ he relapsed and was readmitted to \_\_\_\_\_ where he stayed for an additional 4 weeks.<sup>5</sup>
5. On June 21, 2010, a doctor issued a Report concerning Student's April 27 through May 21, 2010 hospitalization. The Report indicates that at the time of Student's initial assessment, he presented as disheveled, his behavior was bizarre and agitated, he had sparse speech and language, his mood was irritable, affect blunted, and thought process blocking. Although Student appeared preoccupied and distracted and was observed having auditory hallucinations, he was oriented to person, place and time. Student's admitting diagnosis on Axis I was Psychotic Disorder, not otherwise specified, and history of cannabis abuse.

The Report further notes that Student was compliant with treatment, which included various medications, and that he had reached baseline level of functioning. Student's Axis I discharge diagnosis was Schizophrenia, Paranoid Type, and his discharge medications were FazaClo by mouth in the morning and at night, and Haldol

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<sup>2</sup> Testimony of Parent.

<sup>3</sup> Testimony of Parent; *see* Petitioner's Exhibit 15.

<sup>4</sup> Testimony of Parent; *see* Petitioner's Exhibit 15.

<sup>5</sup> Testimony of Parent.

Decanoate every four weeks by injection. Student was to return home and follow up with a specified physician for medication management and individual therapy.<sup>6</sup>

6. After Student was released from            he would walk around his current high school in a mummy-like state because of his medications and he would sometimes have a hard time finding his classes. When Parent initially asked the school staff for testing for Student because his mental status had changed, the staff refused and said that their goal was to get students out of special education, not put them in.<sup>7</sup>
7. On September 7, 2010, Student received an Educational Evaluation, which consisted of the WJ III Tests of Achievement. Based on Student's performance on the assessment, the evaluator determined that Student's proficiency ranged from very limited to limited. Specifically, Student received the following grade equivalencies ("GEs"): Broad Reading – 5.1 GE; Broad Math – 3.5 GE; Broad Written Language – 5.0 GE; Math Calculation Skills – 4.5 GE; Written Expression – 3.7 GE; Academic Skills – 6.2 GE; Academic Fluency – 4.7 GE; and Academic Applications – 2.8 GE.<sup>8</sup>
8. On September 14, 2010, Student's treating child psychiatrist from the DC Department of Mental Health wrote a letter to Student's DCPS high school. The letter noted Student's diagnosis of Schizoaffective Disorder, Bipolar Type, noted that Student had been hospitalized for the disorder twice and treated with high potency psychotropic medication, which may cause mild sedation and blunted affect that may interfere with Student's academic functioning. The psychiatrist also suggested that Student "may need a more supportive educational setting which would be more conducive to learning given his mental illness."<sup>9</sup>
9. On September 23, 2010, a Revised Confidential Psychological Evaluation Report was issued for Student. The evaluation consisted of an array of tests, including cognitive, achievement, visual-motor integration, functional, and behavior assessments, as well as a classroom observation, behavioral observations, and a records review. The Background section of the Report indicates that Student was assessed due to his lack of performance in math, English, and science classes, and his social/emotional functioning and strange gestures within the school environment.

However, the evaluator indicated that she did not believe that Student's scores on the cognitive testing were a true representation of his ability, especially given the unknown effects of Student's various medications. The scores at issue were Verbal IQ of 73 (Borderline); Performance IQ of 59 (Exceptionally Low); and Full Scale IQ of 64 (Exceptionally Low).

The evaluator was of the opinion that Student's results on the academic testing were accurate and a valid reflection of his functioning. Student scored within the Low Range in Broad Reading and Broad Written Language, and within the Very Low Range in Written Expression, Math Calculation Skills, and Broad Math. Student also performed

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<sup>6</sup> Petitioner's Exhibit 8.

<sup>7</sup> Testimony of Parent.

<sup>8</sup> DCPS-3; Petitioner's Exhibit 9.

<sup>9</sup> Petitioner's Exhibit 13.



Also on June 18, 2010, Student was observed in Reading sitting in class staring, mumbling his responses and not completing any academic assignments.<sup>14</sup>

14. Student's current and initial IEP is dated October 21, 2010. It identifies Student's primary disability as ED and contains goals in the areas of Mathematics, Reading, Written Expression, and Emotional, Social and Behavioral Development. The IEP requires Student to receive 10 hours per week of specialized instruction in the general education setting, 5 hours per week of specialized instruction outside general education, and 240 minutes per month of behavioral support services.

Although Parent was not represented by counsel at the time, Parent stated at the IEP meeting that she disagreed with the IEP because Student suffered from bouts of paranoia, which meant that he could not be in the general population. Thereafter, Parent secured legal counsel.<sup>15</sup>

15. At the resolution session for this case, Parent was accompanied by an educational advocate from Petitioner's counsel's office. The parties discussed Student's academic and emotional challenges at the meeting, although some of the DCPS team members were not aware of Student's psychiatric hospitalizations and the severity of his illness. DCPS offered Student's current DCPS high school as his location of services, but Parent and the advocate disagreed that the current high school is appropriate. DCPS did not explain why it believes the current high school is appropriate. Instead, the DCPS representative said that DCPS had not seen Student enough during the school year and needed additional evaluations before a different location of services could be offered.<sup>16</sup>

16. On November 28, 2010, Student was accepted for admission for SY 2010/11 by a private, full-time special education school located outside of the District of Columbia. The acceptance letter indicates that Student will be placed in a small student-teacher ratio classroom and services will be provided to Student based on his incoming IEP until an initial 30-day review meeting is held.

The school offers a private therapeutic special education program for students from ages 5 to 21. The school treats the following disabilities: ED, learning disability ("LD"), speech and language impairment ("SLI"), other health impaired, traumatic brain injury, multiple disabilities, and intellectually deficient ("ID"). The school presently serves 108 students, 100 of whom are from the District of Columbia. The school has an upper team for high school, as well as lower and middle teams for elementary school and middle school that are located on a separate side of the school building.

Student participated in an intake interview at the school, and he also spent 1 day visiting the school by participating in class. Student was very quiet and behaved well during his visit. However, during his intake interview and his 1-day visit, Student repeatedly asked whether he would be safe and whether someone might hit him. Student was also worried about moving from class to class during his visit.

The school is aware of Student's psychological issues and medications. There are currently two other students at the school with schizophrenia. If Student attends the

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<sup>14</sup> Petitioner's Exhibit 11.

<sup>15</sup> DCPS-4; Petitioner's Exhibit 16; Testimony of Parent.

<sup>16</sup> Testimony of Educational Advocate.

school, he will be placed in a self-contained classroom near the vocational department. The class is part of the upper school, but it is located away from the other upper school classes. There are 5 other students in the class – two males and three females, with disabilities ranging from LD to SLI to high-functioning ID and multiple disabilities. The classroom teacher is certified for special education, regular education and to serve as a principal. There is also an assistant in the class.

The school is of the opinion that Student requires full-time specialized support; therefore, if Student attends the school, the school will conduct a 30-day review with DCPS to change Student's current IEP to a full-time IEP. Student is eligible to begin attending the school immediately, but he will require transportation services to do so.

The school offers a behavior management plan, 7 full-time behavior counselors, group counseling and social skills training, individual counseling, a psychiatrist who comes to the school, a diploma track and a certificate track, and a vocational program that is available to both diploma and certificate track students. The school has been certified to operate by OSSE. Tuition at the school is \_\_\_\_\_ per day, with 183 school days per year and additional charges for individual related services. OSSE has approved these rates for the current school year.<sup>17</sup>

### 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. Appropriateness of IEP

"The 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program.'" Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* Hence, if the child is being educated in the regular classrooms of the public education system, the IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.*

Petitioner argues that Student's IEP, which provides for only 5 hours of pullout services and 10 hours of inclusion services per week, is inappropriate in light of Student's severe mental illness, extremely low level of academic functioning, and behavior issues. On the other hand, DCPS maintains that the IEP is appropriate based upon the information it had at the time.

A review of the evidence in this case demonstrates that Student's current IEP is dated October 21, 2010, but Student has not attended school since September 30, 2010. Hence, Student has not yet begun receiving special education and related services pursuant to his IEP. Nevertheless, the evidence also reveals the following: Student's current level of academic functioning is primarily in the 3<sup>rd</sup> to 5<sup>th</sup> grade range although Student is presently in the \_\_\_\_\_ grade; Student's most recent

<sup>17</sup> Petitioner's Exhibit 6; testimony of Assistant Educational Director of private school.

Axis I diagnosis is Schizophrenia, Paranoid Type; Student is currently taking high potency psychotropic medication that may interfere with his academic performance; Student has had difficulty applying himself in school and interacting with his peers; and Student has been observed staring without focusing in class, speaking in an incoherent manner, and not completing any assignments. Moreover, all of this evidence was available to, and presumably considered by, DCPS when it developed Student's current IEP, which provides Student with only 5 hours per week of specialized instruction outside general education and 10 hours per week of specialized instruction in general education, in addition to 240 minutes per month of behavioral support services.

Based on the evidence outlined herein, the hearing officer concludes that Student's IEP does not appear to be tailored to his unique needs or reasonably calculated to enable him to achieve passing marks and advance from grade to grade because it contains insufficient specialized instruction in light of his extremely low level of academic functioning and his difficulty behaving appropriately in school. As a result, Petitioner has met its burden of demonstrating that Petitioner's IEP is inappropriate.

## **2. Placement/Location of Services**

Under IDEIA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. See 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. An LEA satisfies its obligation to provide a child with a disability with a free appropriate public education ("FAPE") by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction, and the personalized instruction provided should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982).

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)).

"Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment." *N.G. v. District of Columbia*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

In this case, Petitioner argues that Student's current placement is inappropriate, while DCPS maintains that Student's current DCPS high school is appropriate based on the current IEP.

The evidence in this case demonstrates that Student is currently not attending school and has not attended school since September 30, 2010, when he was hit by 1 student and was almost beat up by approximately 20 male students, with the result that Student is afraid to return to his current DCPS high school. Moreover, when Student did attend school prior to September 30<sup>th</sup>, he walked around in a mummy-like state because of his medications, would sometimes have a hard time finding his classes, would stare at staff without focusing on the instruction or assignments, would sometimes speak in an incoherent manner, and was not completing any academic assignments. In light of Student's pre-September 30<sup>th</sup> difficulties at his current DCPS high school, Student's treating child psychiatrist advised DCPS by letter that Student might require a more supportive educational setting that would be more conducive to learning given his mental illness. However, despite this recommendation and Student's ongoing problems in, and lack of attendance at, his current school, DCPS has not offered any alternative location(s) of service for Student and has steadfastly maintained that Student's current DCPS high school is an appropriate placement. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS has failed to provide Student with an appropriate placement/location of services.

A further review of the evidence reveals that Student has been accepted for admission at a private, therapeutic, full-time special education school located outside of the District of Columbia. This school is offering student a low student-teacher ratio in a self-contained classroom with 5 other students and 1 teacher and 1 assistant, a behavior management plan with full-time behavior counselors, individual and group counselors, and social skills training. Moreover, the school is aware of Student's psychological issues and medications, and the school currently services two other students with schizophrenia. As the school believes Student requires a full-time IEP, the school would conduct a 30-day review with DCPS to change Student's IEP to an IEP that offers him full-time specialized support. Based on this evidence, the hearing officer concludes that private school is appropriate for Student and is reasonably calculated to enable him to receive educational benefits.

### **3. Relief to be Awarded**

Where a public school has defaulted on its obligations under IDEA, a private school placement is proper if it is reasonably calculated to enable the child to receive educational benefits. *See N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008).

As this hearing officer has already concluded above that DCPS defaulted on its obligations under IDEA by failing to provide Student with an appropriate IEP and an appropriate placement/location of services, and that Petitioner's proposed private school placement for Student is reasonably calculated to enable Student to receive educational benefits, this hearing officer will award Student a placement at the proposed private school for the remainder of SY 2010/11. Moreover, as the private school intends to convene a 30-day review to revise Student's current IEP, the hearing officer will order DCPS to participate in said meeting to ensure an appropriate IEP is developed for Student.

**ORDER**

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

1. Student is awarded a placement for the remainder of SY 2010/11 at the full-time private special education school that has recently accepted him for admission. This placement shall be at DCPS's expense, and DCPS shall also provide Student with transportation to and from the private school.
2. DCPS shall participate in the 30-day review the private school intends to convene to change Student's IEP to an IEP that offers him full-time specialized support, with the goal of ensuring that an appropriate IEP is developed for Student. In the event DCPS fails to participate in the 30-day review, DCPS shall be bound by the IEP developed by the private school in its absence.

**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: 1/5/2011

/s/ Kimm Massey  
Kimm Massey, Esq.  
Hearing Officer