

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

STUDENT,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: January 4, 2012

Hearing Officer: Peter B. Vaden

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DSSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by STUDENT², under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, Student, an adult, alleges that her May 26, 2010 Individualized Education Program ("IEP") was not adequate and was not

¹ Personal identification information is provided in Appendix A.

² All rights under the Individuals with Disabilities Education Act transferred to Student when she reached the age of 18, the age of majority in the District of Columbia. *See* 34 CFR § 300.520.

fully implemented, that DCPS failed to conduct required evaluations and failed to fund an independent psychological evaluation requested by Student.

Student, an AGE young woman, is a resident of the District of Columbia. Student's Due Process Complaint, filed on October 24, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on October 25, 2011. The parties met for a resolution session on November 4, 2011, but did not come to an agreement. The 45-day time line for issuance of this HOD began on November 24, 2011. On November 22, 2011, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on December 13, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Student appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

Student testified and called as witnesses, AUNT, EDUCATIONAL ADVOCATE, and GRANDMOTHER. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-20 were admitted into evidence without objection, with the exceptions of Exhibits P-2, P-4, P-14 and P-18. Exhibit P-2 was admitted to establish notice but not for the truth of the matters contained therein. Exhibits P-4 and P-18 were admitted over DCPS' objection. DCPS' objection to Exhibit P-14 was sustained. DCPS' Exhibits R-1 through R-5 were admitted into evidence without objection. Upon request of Petitioner, the parties were granted leave to file post-hearing memoranda by December 16, 2011. Both parties filed post hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT³

- Whether DCPS failed to evaluate Student in all areas of suspected disabilities, by not conducting a Functional Behavior Analysis (FBA) by August 2009;
- Whether DCPS failed to timely complete triennial reevaluations of Student in 2010;
- Whether DCPS failed to provide funding for an IEE psychological evaluation after Student allegedly expressed disagreement with May 2011 evaluation conducted by DCPS;
- Whether DCPS failed to provide a vocational evaluation of Student that was allegedly promised by DCPS in April 2011;
- Whether DCPS' May 26, 2010 IEP was not appropriate for Student because the IEP lacked provision for direct counseling services and because the IEP post-secondary education and training plan lacks adequate baselines or measurable goals; and
- Whether DCPS failed to implement the May 26, 2010 IEP by not providing 7 hours weekly of specialized instruction outside of general education.

For relief, Student requests that DCPS be ordered to fund an Independent Educational Evaluation ("IEE") psychological evaluation and an IEE vocational evaluation for her. In addition, Student requests an award of compensatory education.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

³ See Prehearing Order, November 20, 2011.

1. Student is an AGE resident of the District of Columbia. Testimony of Student.
Testimony of Aunt.

2. Student graduated from CITY HIGH SCHOOL (“CHS”) with a regular high school diploma on June 17, 2011. Testimony of Student, Exhibit R-1.

3. Student was identified in 2007, or before, as a child with a disability requiring special education services under the Primary Disability classification, Emotional Disturbance. Exhibit P-8.

4. Student attended school in Maryland, under a Prince George County IEP, for her Ninth Grade and part of her Tenth Grade year. In January 2009, Student moved to the District of Columbia and enrolled in CHS. Testimony of Student.

5. Student testified that she had been diagnosed with Bipolar Disorder when she lived in Maryland. Testimony of Student. The evidence does not establish that this diagnosis was made known to DCPS before Student’s graduation from CHS. Id.

6. Student’s last special education evaluation date in Maryland was May 11, 2007. Exhibit P-8. Student was reevaluated for special education eligibility by DCPS in April 2010. At that time, she was administered the Woodcock Johnson III achievement test. Exhibit P-12. On May 25, 2010, Student’s Multidisciplinary “MDT” team determined that she remained eligible for special education and related services under the Primary Disability, Emotional Disturbance. Exhibit P-11.

7. Student’s IEP team at CHS convened on May 26, 2010 and revised her IEP. The May 26, 2010 IEP provided that Student would receive 14 hours per week of Specialized Instruction in the general education setting, 7 hours per week of Specialized Instruction outside of general education, and 60 minutes per month of Behavioral Support Services. Exhibit P-6.

8. The May 26, 2010 IEP contained a Post-Secondary Transition Plan, which identified as goals, researching colleges of interest, completing college entrance essays, completing employment resumes, applications and cover letters and community service. No baseline data was provided for these goals. Exhibit P-7.

9. Student was in GRADE at CHS for the 2010-2011 school year. For the school year, her grades were two F's, 4 D's, 2 C+s, and 1 A. Exhibit R-1.⁴

10. Student's testimony was vague and unclear on what Specialized Instruction services she did, or did not, receive in the general education setting. I am unable to make a factual finding on whether these services were provided. I find from Student's unrefuted testimony that during the 2010-2011 school year, Student did not receive any Specialized Instruction services outside of the general education setting. Testimony of Student.

11. Student received services from the CHS SOCIAL WORKER whenever needed. She went to see the social worker "maybe three times per week." Testimony of Student.

12. On April 29, 2011, Student executed a consent for Functional Behavioral Assessment ("FBS"), Behavior Intervention Plan ("BIP"), Vocational and Psycho-educational assessments. Exhibit P-1.⁵ DCPS never conducted the Vocational assessment. Testimony of Student.

13. DCPS conducted a psychological re-evaluation of Student in May 2011. Student was referred for an updated cognitive assessment, at her attorney's request, to ensure that

⁴ Petitioner suggests in argument that it was improper of DCPS to have graduated the Student with failing marks. However, there was no evidence that Student received her high school diploma "involuntarily." In any event, whether DCPS' awarding Student a regular high school diploma was improper or a denial of FAPE is not an issue in this hearing. See Prehearing Order, November 20, 2011.

⁵ Although Petitioner's counsel alluded in argument to a settlement agreement, in which DCPS agreed to conduct the evaluation, the alleged agreement was not introduced into evidence.

Student's current in-school behavior was not affected by a lack of understanding. The Wechsler Abbreviated Scale for Intelligence ("WASI") was administered to Student as a means to determine her current cognitive ability. Student's scores were Verbal IQ - 99, Performance IQ - 87 and Full Scale IQ -92, all in the low average to average range of intellectual functioning. The evaluator, SCHOOL PSYCHOLOGIST, concluded that the results of this evaluation and a previous evaluation indicated that Student understands and can participate effectively in her surroundings, especially since her verbal intelligence appeared to be a relative strength. Exhibit P-9.

14. DCPS administered an FBA of Student in May 2011, following an aggression incident at CHS in April 2011. The evaluator concluded that the April 2011 incident appeared to be a "one time incident." Apparently because Student was scheduled to graduate the following month, the evaluator provided no guidance for improving Student's behavior in the classroom. Exhibit P-10.

15. A Work Interest Inventory assessment was conducted on June 6, 2011, Exhibit P-10, p. 3, but the results were not shared with Student. Testimony of Student.

16. On August 19, 2011, Petitioner's Counsel requested DCPS to authorize an IEE psychological evaluation, because DCPS' May 2011 psychological reevaluation allegedly did not include an educational or clinical component. Exhibit P-3. DCPS did not fund the requested IEE.

17. DCPS did not provide Student with assistance toward her Post-Secondary Transition Plan. Student's brother worked with her on researching colleges and Student now knows how to write a resume and complete an application. At CHS, Student prepared on-line resumes as part of her senior portfolio requirement. Testimony of Student.

18. As of the hearing date, Student was unemployed and had been looking for a job. Testimony of Student, Testimony of Aunt. She applied for and was admitted to a medical assistant program at a D.C. vocational school. She could not attend in fall 2011, because of financial issues. She expects to enroll for the spring 2012 term. Testimony of Aunt, Testimony of Student.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

DISCUSSION

In this case, Student, requests an order for DCPS to fund IEE psychological and vocational evaluations. In addition, Student requests an award of compensatory education as compensation for DCPS' alleged denial of FAPE during her 2010-2011 school year. DCPS contends that, having graduated from CHS with a regular high school diploma, Student is not entitled to any relief.

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

1. DID DCPS DENY STUDENT A FAPE BY NOT CONDUCTING A FUNCTIONAL BEHAVIOR ASSESSMENT (FBA) BY AUGUST 2009?

DID DCPS FAIL TO TIMELY COMPLETE 2010 TRIENNIAL REEVALUATION OF STUDENT?

For her first two issues, Student contends that DCPS denied her a FAPE by not conducting an FBA in 2009 and not conducting triennial reevaluations in 2010. Student has failed to meet her burden of proof on these claims. With regard to the alleged requirement for an FBA, under 34 CFR § 300.324(a)(2)(i), the use of positive behavioral interventions and supports must be considered in the case of a child whose behavior impedes his or her learning or that of others. FBAs and Behavior Intervention Plans (“BIPs”) must be used proactively, if the IEP Team determines that they would be appropriate for the child. Student did not offer evidence at the due process hearing of in-school behavior in 2009, which impeded her learning or that of others, or which would have required the IEP team to consider requesting an FBA.

With respect to the triennial reevaluation, the IDEA requires that DCPS ensure that a reevaluation of each child with a disability occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. *See* 34 CFR § 300.303(a)(2). Student was evaluated in Maryland in May 2007. She was reevaluated by DCPS in April 2010. Student’s IEP team determined in May 2010 that she continued to be eligible for special education and related services. The evidence does not establish a failure by DCPS to comply with the IDEA triennial reevaluation requirement. DCPS prevails on these issues.

2. DID DCPS VIOLATE THE IDEA BY NOT FUNDING AN IEE PSYCHOLOGICAL EVALUATION, AFTER STUDENT DISAGREED WITH MAY 2011 DCPS EVALUATION?

On May 26, 2011, SCHOOL PSYCHOLOGIST conducted a psychological reevaluation of Student. The referral for the evaluation was made by DCPS on request of Petitioner’s Counsel. School Psychologist issued her psychological evaluation report on June 13, 2011.

Student graduated from CHS with a high school diploma on June 17, 2011. On August 19, 2011, Petitioner's Counsel requested an independent psychological evaluation for the stated reason that the June 13, 2011 psychological evaluation did not include an educational or clinical component. DCPS did not comply with this request. Generally, an adult student has the right to an independent educational evaluation at public expense, if the student disagrees with an evaluation obtained by the public agency. *See* 34 CFR § 300.502(b). However, a public agency's obligation to make FAPE available does not apply to children who have graduated from high school with a regular high school diploma. 34 CFR § 300.102(a)(3)(i). *See* Office of Special Education and Rehabilitative Services (OSERS), *Questions and Answers On Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, Question F-4 (Rev. Sept. 2011). I find, therefore, that DCPS was not required to respond to the request for an independent evaluation, which was made in this case over two months after Student graduated from high school. Furthermore, the purpose of an evaluation or reevaluation under the IDEA is (i) to determine whether the child is a child with a disability and (ii) to determine the content of the child's IEP. *See* 34 CFR § 300.304(b). Since, after Student graduated with a high school diploma, DCPS no longer had an obligation to provide either FAPE or an IEP to her, she could not have suffered educational harm from DCPS' failure to comply with the IEE request. *See, e.g., Taylor v. District of Columbia*, Civil Action No. 09-175 (EGS) (D.D.C. March 16, 2011) (DCPS' failure to timely respond to a request for an independent evaluation is a procedural violation of IDEA and may constitute a denial of FAPE if the Student suffered an "educational harm.") DCPS prevails on this issue.

3. WAS DCPS' MAY 26, 2010 IEP NOT APPROPRIATE FOR STUDENT BECAUSE THE IEP LACKED PROVISION FOR DIRECT COUNSELING SERVICES AND BECAUSE THE POST-SECONDARY EDUCATION AND

TRAINING PLAN LACKS ADEQUATE BASELINES OR MEASURABLE GOALS?

Student contends that her last DCPS IEP, developed on May 26, 2010, was inadequate because it lacked provision for direct counseling and because the Post-Secondary Transition Plan section lacked adequate baselines or measurable goals. The well-established standard for determining the adequacy of an IEP is whether the individualized educational program developed through the IDEA's procedures was reasonably calculated to enable the child to receive educational benefits. *See Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 3051 (1982). *See, also, e.g., Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C. 2004) (Whether or not the IEP was reasonably calculated to provide some educational benefit.) Generally, an IEP is reviewed prospectively – not in hindsight. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008) (The measure and adequacy of an IEP can only be determined as of the time it is offered to the student.)

The May 26, 2010 IEP reported that Student needed help with managing her feelings/moods appropriately in order to enable her to access grade level successfully and to increase her self esteem. To address this need, the IEP provided 60 minutes per month of Behavioral Support Services. In practice, Student met with the CHS Social Worker several times a week when needed. Student offered no evidence at the hearing that, at the time the IEP was developed, this level of services was insufficient or that direct counseling was required to enable her to receive educational benefits.

With regard to the Post-Secondary Transition Plan, the IDEA requires, beginning not later than the first IEP to be in effect when the child turns 16, that the IEP include measurable post-secondary goals in the areas of training, education, and employment, and, where

appropriate, independent living skills. 34 CFR § 300.320(b). It is up to each child's IEP Team to determine the transition services that are needed to meet the unique transition needs of the child. See U.S. Dept. of Education, 34 CFR Parts 300 and 301, *Analysis of Comments and Changes*, 71 F.R. 46668 (August 14, 2006). Student's May 25, 2010 transition plan does contain measurable goals, including researching college and universities of interest, writing college entrance essays and completing her resume, employment applications and cover letters. The transition plan does not include baseline data, which is not a requirement of the IDEA. See 20 U.S.C. § 1414(d)(1)(A). I find therefore that Petitioner has not established that DCPS' May 26, 2010 IEP was not reasonably calculated to enable her to receive educational benefits. DCPS prevails on this issue.

4. DID DCPS DENY STUDENT A FAPE BY NOT PROVIDING A VOCATIONAL EVALUATION AS WAS ALLEGEDLY PROMISED IN APRIL 2011?

Student contends that in April 29, 2011, DCPS agreed to conduct an FBA, psycho-educational and vocational evaluations of Student. The FBA was conducted in May-June 2011. The psychological evaluation report was completed on June 13, 2011. However, Student testified that she was never contacted regarding the vocational evaluation. It appears that a "Work Interest Inventory" assessment was conducted on June 6, 2011, but the results were not shared with Student. DCPS does not contend that the vocational evaluation was completed, but argues that Student suffered no harm as a result.

Under the IDEA, hearing officers generally do not have authority to enforce agreements between parents and education agencies. See, e.g., *H.C. ex rel. L.C. v. Colton-Pierrepoint Central School District*, No. 08-4221-CV, 52 IDELR 278, 109 LRP 44855 (2d Cir. July 20, 2009) (summary order) (IHO had no authority to enforce settlement agreement – essentially a

contract between the parties.) Absent a denial of FAPE to Student, I have no authority to enforce the alleged promise by DCPS to conduct a vocational assessment. To meet the requirements of a FAPE, a state must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Rowley, supra*, 458 U.S. at 203. The Petitioner has not shown that DCPS' alleged failure to conduct the promised vocational evaluation, resulted in denial of FAPE to her. Student graduated from high school on June 26, 2011. If DCPS had honored its alleged April 29, 2011 promise to conduct the vocational assessment, it is not evident how the results would have permitted Student to better benefit educationally in her last few days of high school. I find therefore that DCPS' failure to conduct the vocational assessment did not result in loss of FAPE to Student. DCPS prevails on his issue.

5. DID DCPS FAIL TO PROVIDE STUDENT THE IEP-REQUIRED HOURS OF SPECIALIZED INSTRUCTION OUTSIDE OF GENERAL EDUCATION?

The May 26, 2010 IEP provided that Student would receive 7 hours per week of Specialized Instruction outside the General Education setting. The evidence, Student's unrefuted testimony, established that during the 2010-2011 school year, Student did not receive any Specialized Instruction services outside of the general education setting. I find therefore that DCPS denied Student a FAPE by failing to implement the May 26, 2010 IEP.⁶ Student has graduated from CHS with a regular high school diploma and DCPS' obligation to make FAPE available does not apply to children who have graduated from high school with a regular high school diploma. *See* 34 CFR § 300.102(a)(3)(i). Federal courts have consistently held, however,

⁶ Petitioner also testified that DCPS did not provide her with instruction toward meeting her Post-Secondary Transition Plans goals to research colleges and universities, write college entrance essays, and complete job applications and resumes. The May 26, 2010 IEP provided that these services would be provided in workshops taught by the special education teacher. I do not reach this failure to implement claim because the claim was not set out as an issue in the Prehearing Order. *See Prehearing Order*, November 29, 2011.

that compensatory education may continue beyond a child's eligibility cut-offs to make up for the denial of FAPE during the statutory period. *See Anthony v. District of Columbia*, 463 F.Supp.2d 37, 45 n.6 (D.D.C. 2006) and decisions cited therein. Petitioner prevails on this issue.

6. COMPENSATORY EDUCATION REMEDY

In this decision, I have found that DCPS has denied Student a FAPE by not implementing the May 26, 2010 IEP requirement to provide 7 hours per week of Specialized Instruction, outside of the General Education setting ("Pull-out Services"). In her complaint for due process, Petitioner requested an award of compensatory education as a remedy for denial of FAPE. The IDEA gives courts "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See, e.g., Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522-23 (D.C.Cir. 2005). The award must "provide the educational benefits that likely would have accrued from special education services" that the school district "should have supplied in the first place." *Id.* at 524. A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. District of Columbia*, 680 F.Supp.2d 201, 206 (D.D.C. 2010), quoting *Anthony, supra*, 463 F.Supp.2d at 44; *Reid, supra*, 401 F.3d at 527.

In my Prehearing Order in this case, I alerted the parties that a compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry, and that to establish a basis for such a compensatory education award, counsel must be prepared at the hearing to document with exhibits and/or testimony "the correct amount or form of compensatory education necessary to create educational benefit" to enable the Hearing Officer to

project the progress Student might have made, but for the alleged denial of FAPE, and further quantitatively defining an appropriate compensatory education award. Unfortunately, Petitioner did not heed this guidance. Petitioner did not offer evidence of what educational benefits likely would have accrued from the 7 hours per week of Pull-out Services specified in Student's IEP or what services Student needs to elevate her to the position she would have occupied but for DCPS failure to provide those services. In the absence of such evidence, I am unable to make findings upon which to craft a compensatory education award.⁷

SUMMARY

In summary, I have found that DCPS has denied Student a FAPE for the 2011-2012 school year by not providing the 7 hours per week of Pull-out Services written in the May 26, 2010 IEP. Petitioner has not met her burden of proof to establish that DCPS has otherwise violated the IDEA or denied her a FAPE. Under case law in this jurisdiction, Student would be entitled to compensatory education as a remedy for denial of FAPE. However, Petitioner has not

⁷ During closing argument on December 13, 2011, I alerted the parties that there did not appear to be sufficient evidence to craft an award of compensatory education. Petitioner did not request a continuance to supplement the record. *Cf., e.g., Gill v. District of Columbia*, 751 F.Supp.2d 104, 114 (D.D.C. 2010) (concluding it was appropriate to hear additional evidence concerning the appropriate compensatory education due to plaintiff.) In written closing argument, Petitioner's Counsel requested that "compensatory education be held in abeyance." Pet.'s Closing Argument, December 16, 2011. However, under the D.C. Municipal Regulations, I am constrained to issue my Hearing Officer Determination ("HOD") no later than January 7, 2012. *See* D.C. Regs. tit. 5-E, § 3030.11. An HOD is a final decision and claims may not be held "in abeyance." *See* 34 CFR § 300.514(a). My denial of Petitioner's compensatory education request will be without prejudice. *Cf. A.G. v. District of Columbia*, Civil Action No. 09-01143 (ABJ) (D.D.C. July 1, 2011) ("In light of the 'case-specific flexibility' inherent in fashioning an equitable remedy, *Reid*, 401 F.3d at 524, the Court will grant plaintiffs' motion to submit the additional evidence regarding costs they incurred for wrap-around services."); *Walker v. District of Columbia*, Civil Action No. 10-506 (JEB) (D.D.C. May 20, 2011) ("Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial.") I encourage, but do not order, the parties to implement a plan to compensate Student for DCPS' failure to provide Pull-out Services by a voluntary agreement.

provided evidence upon which to craft a compensatory education remedy.

ORDER

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

1. Having found that DCPS denied Petitioner a FAPE by not providing the 7 hours per week of Pull-out Services specified in the May 26, 2010 IEP, but that Petitioner has failed to provide evidence upon which to craft an equitable award, Petitioner's request for an award of compensatory education is denied without prejudice; and

2. All other relief requested by Petitioner herein is denied.

Date: January 4, 2011

s/ Peter B. Vaden
Peter B. Vaden, 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 U.S.C. §1415(I).